

Tax Opinion Policies and Procedures

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Abstract

This Article summarizes and comments on a 2021 survey by the American College of Tax Counsel (ACTC) on the policies and procedures followed by law and accounting firms in drafting tax opinions. The Article provides background on the contexts in which tax opinions are issued and considerations that are relevant to the composition of such opinions; defines and distinguishes among the levels of assurance at which tax opinions are typically provided; and presents an overview of ethical rules and related considerations, including Circular 230 and the Code’s preparer penalty provisions, implicated in the process of drafting and issuing tax opinions. The Article concludes by making several suggestions to professional firms that are engaged in establishing or reviewing their own opinion processes and to ACTC on how to move forward with its effort to provide useful information and materials to tax professionals.

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I. Introduction

Many law and accounting firms have established procedures and policies for preparing, reviewing, and issuing tax opinions. In 2021, the Board of Regents of the American College of Tax Counsel (ACTC) constituted a Task Force on Tax Opinion Procedures to conduct a survey to gather a sense of where firms “are” in this regard. This Article summarizes and comments on the survey and its findings.¹

Before describing the survey results, this Article provides background on the contexts in which tax opinions are issued and considerations that are relevant to the composition of such opinions. In particular, the Article defines and distinguishes among the levels of assurance at which tax opinions are

¹ For a comprehensive and thoughtful study of tax opinions, see Robert P. Rothman, *Tax Opinion Practice*, 64 TAX LAW. 301 (2011).

typically provided and presents an overview of ethical rules and related considerations, including Circular 230 and the Code's preparer penalty provisions, implicated in the process of drafting and issuing tax opinions. The Article concludes by making several suggestions to professional firms that are engaged in establishing or reviewing their own opinion processes and to ACTC on how to move forward with its effort to provide useful information and materials to tax professionals.

II. Why Do Clients Ask for Tax Opinions?

Clients request written tax opinion letters for a variety of reasons and use these letters in a variety of contexts. The most common of these are described below.

1. *Some clients simply seek written comfort that their tax advisers have thought carefully through the relevant issues and have confidence in their advice.*² Particularly when a client is risk averse or wishes to minimize the risk that a tax return position will be successfully challenged, a thoughtful analysis by the client's tax professional provides reassurance.

Often, though not necessarily, a law firm that issues a tax opinion also has worked with the client in structuring the transaction. In these cases, the value of the representation is not merely in the words of the opinion letter, but also in the ongoing lawyer-client relationship in which the firm advised the client on how to accomplish its business or investment objectives. (The same firm also could, but need not, assist the client in implementing the transaction.) Alternatively, comfort could come from a fresh look at a transaction by a firm that did not participate in its planning or structuring.

The importance of providing comfort to a client in the form of a tax opinion is particularly important at the moment for at least two reasons. First, Congress has recently enacted broad scale changes to our nation's tax laws for which there is little or no guidance or authority. For example, the Tax Cuts and Jobs Act of 2017 created a new regime for taxing international transactions.³ In these circumstances, even the most pure-of-motive taxpayers may ask for some level of assurance regarding the likely position of the Service on business practices, transactions, or investments. The more frequent or broad-

² LINDA GALLER & MICHAEL B. LANG, REGULATION OF TAX PRACTICE 150–51 (2d ed. 2016).

³ Pub. L. No. 115-97, 131 Stat. 2054; *see, e.g.*, Linda Sugin, *The Future of the New International Tax Regime*, 24 FORDHAM J. CORP. & FIN. L. 219, 227 (2019) (quoting Roseanne Altschuler) ("The Act made major changes to the international tax system. It made enough changes to easily keep us busy for a generation and to keep many of us out of retirement."); Madeleine Burnette-McGrath et al., *A Quick and Easy Guide to the New FDII, GILTI, and 100 Percent Foreign DRD International Tax Provisions of the 2017 Tax Cuts and Jobs Act*, 38 VA. TAX REV. 181, 181 (2018) ("Since these changes affect many areas of corporate taxation practices that have remained constant for decades, many taxation scholars, students, and educators are now faced with the task of deciphering the Tax Cuts and Jobs Act's uncharted sections.").

sweeping the legislative changes, the more likely taxpayers are to request written analyses and appraisals of the likelihood of success should tax positions be challenged.

Second, as the Service's "no-rule" list (of areas in which it will not, or will not ordinarily, issue a ruling or determination letter) grows, clients seeking pretransaction comfort have little choice but to request tax opinions.⁴ In 2021, for example, there were 253 domestic areas in which the Service will not issue a ruling, compared with 69 in 2011, and 62 in 2001.⁵ There were 76 areas in which the Service will not ordinarily issue a ruling in 2021, compared with 66 in 2011, and 62 in 2001.⁶ There were 29 areas in which rulings will not be issued until the Service has conducted further study in 2021, compared with 19 in 2011, and 8 in 2001.⁷ Thus, the number of areas in which a taxpayer cannot, or likely cannot, obtain a ruling has grown from 132 to 349 over the last 20 years. And even in areas in which the Service is willing to rule, the ruling process can take six months to a year or more for difficult issues.⁸

2. *Clients seek tax opinions to defend against the imposition of tax penalties by the Service.* Opinion letters provided for this purpose are casually referred to as "penalty protection" opinions based on the notion that obtaining a tax opinion may prevent the imposition of penalties by satisfying the "reasonable cause and good faith" exception of section 6664.⁹

⁴ Jasper Cummings has suggested that the increase is the result of diminishing Service resources. Jasper L. Cummings, *Tax Opinion Practice Today*, 145 TAX NOTES (TA) 1049, 1049 (Dec. 1, 2014).

⁵ Rev. Proc. 2021-3, § 3, 2021-1 I.R.B. 140, 141-48; Rev. Proc. 2011-3, § 3, 2011-1 C.B. 111, 112-16; Rev. Proc. 2001-3, § 3, 2001-1 C.B. 111, 112-15. The numbers are not as stark in the international context, where there were 14 areas in which the Service will not issue a ruling in 2021, compared with 13 in 2011, and 10 in 2001. Rev. Proc. 2021-7, § 3, 2021-1 I.R.B. 290, 290-91; Rev. Proc. 2011-7, § 3, 2011-1 C.B. 233, 233; Rev. Proc. 2001-7, § 3, 2001-1 C.B. 236, 236-37. There were 39 areas in which the Service will not ordinarily issue a ruling in 2021 compared with 36 in both 2011 and 2001. Rev. Proc. 2021-7, § 4, 2021-1 I.R.B. at 291-93; Rev. Proc. 2011-7, § 4, 2011-1 C.B. at 234-35; Rev. Proc. 2001-7, § 4, 2001-1 C.B. at 237-38.

⁶ Rev. Proc. 2021-3, § 4, 2021-1 I.R.B. at 148-53; Rev. Proc. 2011-3, § 4, 2011-1 C.B. at 116-20; Rev. Proc. 2001-3, § 4, 2001-1 C.B. at 115-19.

⁷ Rev. Proc. 2021-3, § 5, 2021-1 I.R.B. at 153-55; Rev. Proc. 2011-3, § 5, 2011-1 C.B. at 120-21; Rev. Proc. 2001-3, § 5, 2001-1 C.B. at 119.

⁸ Yoav Shans, *Tax Insurance is Ready to Launch*, 171 TAX NOTES FED. (TA) 35, 37 (Apr. 5, 2021).

⁹ GALLER & LANG, *supra* note 2, at 151. References to a "section" are to a section of the Internal Revenue Code of 1986, as amended (Code), unless otherwise indicated.

Although cases certainly can be found in which the existence of a tax opinion enabled a taxpayer to avoid penalties,¹⁰ it is doubtful that penalty protection is very often the primary motivation in requesting (and paying for) a tax opinion. A taxpayer should want the underlying position itself to be upheld if challenged, with penalty avoidance being a secondary consideration. “If the opinion merely saves penalties, it has largely failed.”¹¹ Thus, a tax opinion is likely not *all* about penalty protection, just partially at best.

“Reasonable cause and good faith” is a defense to a number of penalties under the Code.¹² Tax opinions are most often thought of, however, as a defense to accuracy-related penalties imposed under section 6662.¹³ These penalties are not imposed “if it is shown that there was reasonable cause [for the portion of the underpayment involved] and [that] the taxpayer acted in good faith with respect to such portion.”¹⁴ Regulations provide most of the rules defining (and governing) the scope of the reasonable cause defense, directing that determinations be made on a “case-by case basis, taking into account all pertinent facts and circumstances,” the most important factor being “the extent of the taxpayer’s effort to assess the taxpayer’s proper tax liability.”¹⁵

Reliance on a professional tax adviser satisfies the reasonable cause and good faith standard if the reliance was reasonable and the taxpayer acted in good faith.¹⁶ (The regulation’s circular definition is not very helpful in this regard.) The professional advice (1) “must be based on all pertinent facts and circumstances and the law as it relates to those facts and circumstances,”¹⁷ (2) “must not be based on unreasonable factual or legal assumptions,” and (3) “must not unreasonably rely on the representations, statements, findings,

¹⁰ *E.g.*, *Southgate Master Fund, LLC v. United States*, 651 F. Supp. 2d 596, 668 (N.D. Tex. 2009), *aff’d*, 659 F.3d 466, 492–94 (5th Cir. 2011); *Klamath Strategic Investment Fund v. United States*, 472 F. Supp. 2d 885, 904–05 (E.D. Tex. 2007), *aff’d*, 568 F.3d 537, 548 (5th Cir. 2009).

¹¹ Robert W. Wood, *Tax Opinion or Private Letter Ruling? A 12-Point Comparison*, 149 TAX NOTES (TA) 835, 836–37 (Nov. 9, 2015); *see also* Robert W. Wood, *Debunking 10 Myths About Tax Opinions*, 148 TAX NOTES (TA) 789, 789–90 (Aug. 17, 2015); Robert W. Wood, *What Good is a Tax Opinion, Anyway?*, 128 TAX NOTES (TA) 1071, 1071 (Sept. 6, 2010).

¹² *E.g.*, I.R.C. §§ 6657 (bad check penalty), 6712 (penalty for failing to disclose treaty-based return positions), 6694(a) (preparer penalty for unreasonable positions).

¹³ I.R.C. § 6662.

¹⁴ I.R.C. § 6664(c)(1). There is no reasonable cause exception for the noneconomic substance transaction penalty under section 6662(b)(6). I.R.C. § 6664(c)(2). Somewhat different rules apply in determining reasonable cause for reportable transaction understatements and underpayments attributable to substantial or gross valuations overstatements. I.R.C. §§ 6664(c)(3), 6664(d). The same reasonable cause and good faith exception applies with respect to imposition of a fraud penalty under section 6663. I.R.C. § 6664(c)(1).

¹⁵ Reg. § 1.6664-4(b)(1).

¹⁶ *Id.*

¹⁷ Reg. § 1.6664-4(c)(1)(i).

or agreements of the taxpayer or any other person.”¹⁸ According to the Tax Court, the taxpayer must provide proof by a preponderance of the evidence that each of three requirements is satisfied:

1. the adviser must be a competent professional with sufficient expertise to justify reliance,
2. the taxpayer must have provided necessary and accurate information to the adviser, and
3. the taxpayer must have actually relied in good faith on the adviser’s judgment.¹⁹

This three-part test is only a minimum, however; courts often look at additional factors—for example, whether the adviser had a conflict of interest, whether the adviser was a promoter of a tax shelter, whether the tax opinion was sloppily written, etc.²⁰

Advice in this context refers to any communication from a tax professional setting forth that person or firm’s analysis or conclusion, which is provided to the taxpayer, and on which the taxpayer relies with respect to the imposition of an accuracy-related penalty.²¹ Tax opinions fall squarely within this definition of advice. As described below, they typically contain a detailed recital of all relevant facts; set forth all assumptions that are made, representations made by others on which the opinion relies, or both; and carefully lay out the legal analysis underlying the ultimate conclusion(s) (*i.e.*, opinions) stated in the letter.²² Thus, although there will be substantial hurdles along the way, if a taxpayer can show that she acted reasonably and in good faith in relying on a tax opinion, that opinion should insulate her from the imposition of accuracy-related penalties.²³

¹⁸ Reg. § 1.6664-4(c)(1)(ii).

¹⁹ *Neonatology Assocs., P.A. v. Commissioner*, 115 T.C. 43, 98 (2000), *aff’d*, 299 F.3d 221 (3d Cir. 2002). The Tax Court continues to apply the *Neonatology* three-part test in the context of tax opinions. *See, e.g.*, *Pankratz v. Commissioner*, 121 T.C.M. (CCH) 1178, 2021 T.C.M. (RIA) ¶ 2021-26 (taxpayer’s reliance on draft tax opinion was reasonable and in good faith).

²⁰ *See generally* MICHAEL SALTZMAN & LESLIE BOOK, *IRS PRACTICE AND PROCEDURE* ¶ 7B.03[3][a][ii] (rev. 2d ed. 2021).

²¹ Reg. § 1.6664-4(c)(2).

²² *See infra* Part III.

²³ Raising the reasonable cause and good faith defense could constitute a waiver of the attorney-client privilege, potentially requiring that a tax opinion and other communications be turned over to the government. *See AD Investment 2000 Fund LLC v. Commissioner*, 142 T.C. 248 (2014); *Eaton Corp. v. Commissioner*, Order, Docket No. 5576-12 (Apr. 6, 2015), available at https://my.kiplinger.com/members/links/ktl/150605/Eaton_Order.pdf [<https://perma.cc/JB4Q-TBNC>].

Tax opinions can play a role in avoiding the “substantial understatement” penalty²⁴ (which is one of the accuracy-related penalties) in another way. In simple terms, an item on a tax return is treated as having been properly reported, and therefore no substantial understatement penalty can be imposed, if there is or was substantial authority for the item.²⁵ (As an alternative, a substantial understatement penalty cannot be imposed with respect to an item on a tax return if (1) the relevant facts affecting the item’s tax treatment are adequately disclosed on the return or a statement attached to the return, and (2) there is a reasonable basis for the tax treatment.)²⁶ The Regulations define “substantial authority” in terms of weight: there is substantial authority if the weight of legal authorities supporting the taxpayer’s position is substantial in relation to the weight of the contrary authorities.²⁷ Guidance is provided as to how the analysis should be conducted, which authorities can be taken into account, and how a particular authority ranks relative to other authorities.²⁸ Nonprimary authorities, upon which most taxpayers (who are unschooled in the tax law) would likely rely without the involvement of a tax professional, do not count at all. In the absence of relevant authorities, a well-reasoned construction of the statute may constitute primary authority.²⁹

In most cases, showing that the substantial authority standard has been met is simply impossible without professional advice, which may come in the form of a tax opinion. Particularly when there is no authority and a well-reasoned construction of the statute is the only way to satisfy the regulatory standard, a tax opinion setting forth a tax professional’s analysis and reasoning is the best, and may be the only, means of avoiding a penalty.

3. *Some clients require tax opinions to satisfy a contractual condition.* For example, the closing of a corporate acquisition may be conditioned upon receipt of an opinion that the acquisition will qualify under section 368 as a tax-free reorganization.³⁰

²⁴ I.R.C. § 6662(b)(2).

²⁵ I.R.C. § 6662(d)(2)(B)(i).

²⁶ I.R.C. § 6662(d)(2)(B)(ii). Neither exception can apply to any item attributable to a tax shelter. I.R.C. § 6662(d)(2)(C). The regulations, however, provide that in the case of a noncorporate taxpayer, a tax shelter item is treated as having been properly reported if (1) there is substantial authority for the treatment and (2) the taxpayer reasonably believed at the time the return was filed that the treatment was more likely than not the proper treatment. Reg. § 1.6662-4(g)(1)(i)(A)–(B). This regulation has no apparent basis in the statute and probably is based on an earlier statutory provision. GALLER & LANG, *supra* note 2, at 53–54.

²⁷ Reg. § 1.6662-4(d)(3)(i).

²⁸ Reg. § 1.6662-4(d)(3)(ii)–(iii).

²⁹ Reg. § 1.6662-4(d)(3)(ii).

³⁰ Heather Field, *Tax Lawyers as Tax Insurance*, 60 WM. & MARY L. REV. 2111, 2124 (2019); Robert G. Woodward, *Tax Opinions*, 2010 ABA TAX-CLE 0923078 ¶ III.B (Sept. 2010), Westlaw, 2010 WL 4607769; Rothman, *supra* note 1, at 303. *See also* Canal Corp. v. Commissioner, 135 T.C. 199, 205–06 (2010) (prior to engaging in a transaction that was later determined

Requiring a tax opinion as a condition of closing serves at least two purposes. First, legal conclusions might rest on facts that are not known with certainty until a transaction closes. For example, satisfying the continuity of proprietary interest requirement in certain tax-free reorganizations may depend on the trading price of the acquiring corporation on the closing date. It may be impossible, then, to know whether a transaction will qualify under section 368 until the closing date.³¹ Second, requiring a tax opinion as a condition to closing enables a party to renegotiate terms until the last moment if a tax adviser realizes that a significant issue was missed during the lead-up to closing.³²

4. *Federal securities laws require that certain transactions involving the issuance of securities to the public include an opinion to support discussions of the tax consequences included in the offering materials.* SEC Regulation S-K requires that a tax opinion be submitted for filings:

1. on Form S-11 (REITs and certain other companies whose primary business is investing in real estate),
2. to which Securities Act Industry Guide 5 applies (*i.e.*, real estate limited partnerships),
3. for roll-up transactions, and
4. for other registered offerings when “the tax consequences are material to an investor and a representation as to tax consequences is set forth in the filing.”³³

to be a tax shelter, the corporate taxpayer’s board conditioned the transaction’s closing upon an accounting firm (*i.e.*, PwC) issuing a tax opinion at a should level of assurance).

³¹ Rothman, *supra* note 1, at 302–03.

³² *Id.* at 303.

³³ 17 C.F.R. § 229.601(b)(8); SEC Staff Legal Bulletin No. 19 at ¶ III (Oct. 4, 2011), <https://www.sec.gov/corpfin/staff-legal-bulletin-19-legality-and-tax-opinions-registered-offerings> [<https://perma.cc/6REV-8JT5>]. See generally N.Y. STATE BAR ASS’N, TAX SECTION, REP. NO. 1261, REPORT ON TAX OPINIONS IN REGISTERED OFFERINGS (2012), available at [https://nysba.org/NYSBA/Sections/Tax/Tax Section Reports/Tax Reports 2012/1261 Report.pdf](https://nysba.org/NYSBA/Sections/Tax/Tax%20Section%20Reports/Tax%20Reports%202012/1261%20Report.pdf) [<https://perma.cc/VS8P-SYXT>]. Jasper Cummings has characterized the SEC rules requiring an explanation of material tax consequences as “thin to nonexistent.” Jasper L. Cummings, Jr., *Tax Whipsaws and the SEC*, 162 TAX NOTES (TA) 1183, 1192 (Mar. 11, 2019).

So the bottom line is that an SEC reviewer has only “materiality” to stand on against a constant barrage of Wall Street efforts to say nothing when the law firms know the tax law and the SEC reviewer usually does not (or not to the same depth). As a result, we see the SEC reviewers feeling proud of themselves for making registrants change “certain

Legal counsel, an independent public accountant, or a certified accountant can render a tax opinion for this purpose.³⁴ A private letter ruling from the Service also can satisfy this requirement.³⁵ Tax consequences are considered material to an investor if “there is a substantial likelihood that a reasonable investor would consider the information to be important in deciding how to vote or make an investment decision or, put another way, to have significantly altered the total mix of available information.”³⁶

SEC guidance permits long-form or short-form tax opinions and delineates what a tax opinion must include.³⁷ Notably, the guidance is quite specific regarding the level (or levels) of assurance at which tax opinions may (or may not) be issued.³⁸

5. *Clients may request tax opinions to demonstrate that Financial Accounting Standards Board (FASB) reporting thresholds have been met.* Accounting Standards Codification Subtopic 740-10³⁹ largely incorporates the principles set forth in Interpretation No. 48, *Accounting for Uncertainty in Income Taxes* (commonly referred to as FIN 48).⁴⁰ This guidance applies U.S. generally accepted accounting principles (GAAP) to the financial state-

material tax consequences” to “material tax consequences” while missing more substantive failings.

Id. at 1192–93; *see also* Omri Marian, *Reconciling Tax Law and Securities Regulation*, 48 U. MICH. J. L. REFORM 1, 2–3 (2014). It should be noted, however, that Circular 230 standards governing written advice apply to tax opinions written specifically to satisfy the requirements of the SEC. *See* T.D. 9668, Regulations Governing Practice Before the Internal Revenue Service, 79 Fed. Reg. 33,685, 33,686 (June 12, 2014) (“The final regulations adopt the approach taken in the proposed regulations, eliminating the covered opinion rules in former § 10.35 and instead *subjecting all written tax advice to one standard* under final § 10.37 . . .”) (emphasis added).

³⁴ SEC Staff Legal Bulletin No. 19, *supra* note 33, at ¶ III.A.1.

³⁵ Despite the reference to a revenue ruling, the SEC Staff Legal Bulletin makes clear that only a private letter ruling would qualify: “[a]n IRS revenue ruling may be substituted for a tax opinion only if it is a specific letter ruling addressed to the registrant and covers all of the material tax consequences of the proposed transaction. Accordingly, a general revenue ruling that does not address the specific facts of the proposed transaction would not be sufficient.” SEC Staff Legal Bulletin No. 19, *supra* note 33, at ¶ III.A.1 n.37; *see also* Robert W. Wood & Donald P. Board, *Tax Opinions the SEC Way*, 149 TAX NOTES (TA) 1307, 1307–08 (Dec. 7, 2015).

³⁶ SEC Staff Legal Bulletin No. 19, *supra* note 33, at ¶ III.A.2. *See generally* Wood & Board, *supra* note 35, at 1308–10.

³⁷ SEC Staff Legal Bulletin No. 19, *supra* note 33, at ¶ III.B.

³⁸ *Id.* at ¶ III.C.4.

³⁹ *Income Taxes (Topic 740)*, in FIN. ACC’T STANDARDS BD., ACCOUNTING STANDARDS CODIFICATION (2009), available at <https://asc.fasb.org/topic&trid=2144680> [hereinafter FASB ASC 740-10].

⁴⁰ *Accounting for Uncertainty in Income Taxes*, Interpretation No. 48 (Fin. Accounting Standards Bd. 2006) [hereinafter FIN 48].

ments of domestic and foreign business entities, including not-for-profit entities with activities that are subject to income taxes.⁴¹ A covered entity is not permitted to recognize the financial statement effects of a tax position unless the entity concludes that, based on the technical merits, the position is more likely than not to be sustained upon examination by the relevant taxing authority.⁴²

Determining whether a tax position meets the more likely than not threshold requires consideration of the facts, circumstances, and information available at the reporting date.⁴³ A tax opinion is not required for this purpose. However, given the complexity of the particular issue or issues involved, the level of development (or nondevelopment) of the applicable tax law, the magnitude of possible exposure, and the entity's own expertise, a decision to seek an outside tax opinion may be prudent.⁴⁴

6. *By rendering tax opinions, transactional tax lawyers provide a version of insurance to their clients.* Professor Heather Field has argued that tax opinions provide an element of insurance to clients.⁴⁵ She asserts that, in providing a tax opinion, a law firm conditionally agrees to indemnify its client for part of the potential loss the client will incur if the government successfully challenges the tax treatment described in the opinion. Thus, to some degree, a tax opinion is like tax insurance purchased from a third party. While Professor Field does not argue that insurance is the primary or even a predominant function of tax opinions, she asserts that indemnification shifts a portion of the risk from the taxpayer (client) to the opinion writer, and therefore is an integral part of the economic relationship between the two.⁴⁶ One is therefore left to ponder the extent to which the insurance aspect of tax opinions plays a role in clients' decisions to seek tax opinions.⁴⁷

III. Structure of Tax Opinions

Tax practitioners give advice in many formats: traditionally in oral communications in person or on the telephone, in memoranda and letters, but of

⁴¹ FASB ASC 740-10-15-2.

⁴² FASB ASC 740-10-25-6. "More likely than not" means a likelihood of more than 50%. *Id.* An examination is deemed to include resolution of the appeals and litigation processes, if any. *Id.*

⁴³ *Id.*

⁴⁴ See, e.g., Marvin A. Kirsner & Taryn D. Goldstein, *New Financial Reporting Rules Will Require Disclosure of Uncertain Tax Positions*, 8 DERIVATIVES: FIN. PROD. REP. (Aug. 2007); Brian R. Walsh, *FIN 48: Accounting for Uncertain Income Tax Positions*, CONSTR. ACCT. & TAX'N 5, 8-9 (May/June 2007). FIN 48 itself states that, while independent tax opinions are not required, "a tax opinion can be external evidence supporting a management assertion." FIN 48, *supra* note 40, at ¶ B34.

⁴⁵ Field, *supra* note 30, at 2115.

⁴⁶ *Id.* at 2118-19.

⁴⁷ Professor Field characterizes her portrayal of tax opinions as descriptive, not normative, at least at this time. *Id.* at 2119.

late in voicemails, emails, and text messages. “At the pinnacle of legal advice is the formal [tax] opinion,”⁴⁸ generally understood to be “a formal, written communication from a qualified tax adviser (generally an attorney or CPA who specializes in tax practice) to the client, or to another party at the client’s request, that is printed on letterhead stationery and clearly states that it constitutes an ‘opinion.’”⁴⁹ Practitioners and firms use their own preferred formats and language in rendering opinions,⁵⁰ but all tax opinions look more or less the same and include the components discussed below.⁵¹

A. *Introductory Material*

Tax opinions typically begin with statements that set the stage. These include an explanation of the role of the issuing firm (*e.g.*, advisor in structuring the transaction that is the subject of the tax opinion, role limited to outside review, etc.), the purpose for which the tax opinion was requested, a list of relevant documents that were reviewed by the issuing firm and that are relevant to the opinion(s) being rendered, and disclaimers regarding the scope of the opinion letter or the issuing firm’s responsibilities.⁵² Common disclaimers include:

1. that an opinion is based on the facts, representations, and assumptions that are specifically identified in the letter;
2. that a tax opinion is based on the law as of a particular date and that the law could change, possibly retroactively;
3. that the Service or a court could take a contrary view of the issues that are opined upon; and
4. that an issuing firm has no obligation to notify the client of a change in the law.⁵³

⁴⁸ Rothman, *supra* note 1, at 301.

⁴⁹ Woodward, *supra* note 30, at ¶ I.A.3. Opinions typically express the view(s) of a practitioner’s firm rather than of a practitioner individually. *Id.* at ¶ I.B.3.

⁵⁰ For an illustration of the format of a typical tax opinion, see Woodward, *supra* note 30, at Exhibit A.

⁵¹ Many of the components discussed in the text are mandated by, or are generally consistent with, section 10.37 of Circular 230, which prescribes requirements for written advice. *See infra* discussion accompanying notes 138–140.

⁵² Rothman, *supra* note 1, at 361–63.

⁵³ *Id.* at 363. Sometimes, tax opinion letters caution that persons other than the addressee cannot rely on the opinions stated therein. Woodward, *supra* note 30, at ¶ IV.A.1.c.5.

B. *Facts, Representations, and Assumptions*

Conclusions or opinions stated in tax opinion letters are based on the application of legal principles to a particular set of facts.⁵⁴ Therefore, all facts that are necessary to each opinion stated in a letter are or should be carefully identified. Facts can be established based on representations, transactional documents, and assumptions.⁵⁵ As discussed below, representations and assumptions can be relied upon only if they are reasonable.⁵⁶

C. *Legal Analysis*

The longest part of a tax opinion letter is usually the section that discusses the applicable law and explains the issuing firm's reasoning underlying its conclusion(s).⁵⁷

D. *Opinions or Conclusions*

A tax opinion letter typically ends with the issuing firm's conclusion or conclusions, expressed as an opinion or opinions at a stated level of assurance. "The wording is almost formulaic: most firms use something like 'Based upon the foregoing, and subject to the assumptions set forth above, we are of the opinion that ____.'"⁵⁸ These are the words that are sought by the client in requesting a tax opinion letter in the first instance.

IV. Levels of Assurance

Tax opinions predict how a court would rule in deciding the issue or issues opined upon, assuming the deciding court agreed with the facts as recounted in the letter.⁵⁹ Stated differently, tax opinions predict the likelihood of a position being sustained on its merits if challenged by the Service. Opinions can be, and are, issued at varying levels of assurance.⁶⁰ Although there are no formal rules or definitive guidance, tax opinion letters typically give assurance at

⁵⁴ Rothman, *supra* note 1, at 366.

⁵⁵ *Id.*; see also Cummings, *supra* note 4, at 1050–53 (discussing certificates of fact provided to tax opinion writers).

⁵⁶ See Circ. 230 § 10.37(a)(2) (discussed *infra* at text accompanying note 140).

⁵⁷ Rothman, *supra* note 1, at 364. Certain tax opinions do not contain a discussion of law. These are opinions, for example, dealing with section 368 reorganizations or other areas in which the law is well-settled or novel issues of law are not involved. Woodward, *supra* note 30, at ¶ IV.A.3.a.

⁵⁸ Rothman, *supra* note 1, at 364.

⁵⁹ GALLER & LANG, *supra* note 2, at 151.

⁶⁰ For a tongue-in-cheek description of tax opinion standards, see Anonymous, *A Detailed Guide to Tax Opinion Standards*, 106 TAX NOTES (TA) 1469 (Mar. 21, 2005).

one of five levels, generally expressed in percentage terms (notwithstanding how difficult it is to quantify particular outcomes).⁶¹ These are:

Reasonable basis,

Substantial authority,

More likely than not,

Should, and

Will.⁶²

The level of assurance, or confidence level, expressed in a tax opinion with respect to a position usually is determined by the purpose of the tax opinion, though it need not be. For example, guidance issued by the SEC in connection with Regulation S-K is quite specific regarding the level or levels of assurance at which tax opinions may or may not be issued;⁶³ tax opinions issued in connection with corporation acquisitions, opining that the requirements of section 368 are met, typically are issued at a will level of assurance;⁶⁴ and so on. A tax opinion provided for penalty protection opines at a reasonable basis, substantial authority, or more likely than not level of assurance depending on the requirements of the underlying penalty.

⁶¹ Percentages, of course, refer to the bottom of the range. For example, a tax return position that satisfies the “will” standard also satisfies all of the other standards.

⁶² Some commentators include “not frivolous” in the list. *E.g.*, Robert W. Wood, *The Uneasy Topic of Tax Opinion Standards*, 165 TAX NOTES FED. (TA) 1823, 1823 (Dec. 16, 2019); Rothman, *supra* note 1, at 327. Presumably, firms would provide a formal tax opinion at such a low level of assurance only in rare circumstances. “Not frivolous,” therefore, is omitted from the list. *See* Rothman, *supra* note 1, at 324 (characterizing “not frivolous” as “[p]erhaps the lowest level at which there is some modicum of comfort as to a position (short of ‘a snowball’s chance in hell’)”). “Not frivolous” has been quantified as a five to ten percent likelihood of success in the context of section 6694 preparer penalties. STAFF OF THE JOINT COMM. ON TAX’N, 106TH CONG., STUDY OF PRESENT-LAW PENALTY AND INTEREST PROVISIONS AS REQUIRED BY SECTION 3801 OF THE INTERNAL REVENUE SERVICE RESTRUCTURING AND REFORM ACT OF 1998 (INCLUDING PROVISIONS RELATING TO CORPORATE TAX SHELTERS) 160 (July 22, 1999) (JCS-3-99) [hereinafter JOINT COMMITTEE PENALTY STUDY].

⁶³ SEC Staff Legal Bulletin No. 19, *supra* note 33, at ¶ III.C.4.

⁶⁴ Woodward, *supra* note 30, at ¶ IV.3.a.

A. *Reasonable Basis*

Reasonable basis has been variously quantified: by some, as low as 20%;⁶⁵ by others, as falling between 20 and 30%.⁶⁶ Like substantial authority and more likely than not, reasonable basis has its source in, and derives its relevance from, the Code and regulations governing penalties.⁶⁷ According to Regulation section 1.6662-3(b)(3):

The reasonable basis standard is not satisfied by a return position that is merely arguable or that is merely a colorable claim. If a return position is reasonably based on one or more of the authorities set forth in § 1.6662-4(d)(3)(iii) (taking into account the relevance and persuasiveness of the authorities, and subsequent developments), the return position will generally satisfy the reasonable basis standard even though it may not satisfy the substantial authority standard as defined in § 1.6662-4(d)(2).

A position having a reasonable basis avoids a negligence penalty.⁶⁸ A return position having a reasonable basis also avoids a penalty for substantial understatement of income tax if the relevant facts are adequately disclosed on a return or a statement attached to a return and the tax return position is not attributable to a tax shelter.⁶⁹ Thus, reasonable basis tax opinions provided to clients relate primarily to the avoidance of negligence and substantial understatement penalties.

A standard similar to the substantial understatement penalty applies to the preparer penalty under section 6694(a). Except in the case of tax shelters or reportable transactions, section 6694(a) penalties are not imposed if the relevant facts are disclosed on the taxpayer's return and the position has a reasonable basis.⁷⁰ Reasonable basis for this purpose has the same meaning as it does

⁶⁵ AICPA, INTERPRETATIONS OF STATEMENT ON STANDARDS FOR TAX SERVICES NO. 1, *TAX RETURN POSITIONS* 4 (updated Apr. 30, 2018), available at <https://www.aicpa.org/resources/download/interpretations-of-statement-on-standards-for-tax-services-no-1-tax-return> [https://perma.cc/CRZ3-FUNY] [hereinafter AICPA, STANDARDS FOR TAX SERVICES]; JOINT COMMITTEE PENALTY STUDY, *supra* note 62, at 160; Richard M. Lipton, *Practitioner Helps Define "Reasonable Basis" Standard*, 166 TAX NOTES FED. (TA) 283 (Jan. 13, 2020); Woodward, *supra* note 30, at ¶ V.A.2.b (apparently an outlier, quantifying reasonable basis as between 10 and 20%).

⁶⁶ Rothman, *supra* note 1, at 327.

⁶⁷ I.R.C. §§ 6662(d)(2)(B)(ii)(II), 6694(a)(2)(B); *see also* I.R.C. § 6700(b)(2) (providing that the Service may waive penalties for promoting an abusive tax shelter, imposed with respect to a gross valuation overstatement, if there was a reasonable basis for the valuation and the valuation was made in good faith).

⁶⁸ Reg. § 1.6662-3(b)(1).

⁶⁹ I.R.C. § 6662(d)(2)(B)(ii); Reg. § 1.6662-4(e)(1), -4(e)(2).

⁷⁰ I.R.C. § 6694(a)(2); Reg. § 1.6694-2(d). Regulations ease the adequate disclosure requirement where the taxpayer refuses to comply by requiring that a signing preparer advise the taxpayer to disclose and document such advice, and by imposing similar advice and documentation requirements on nonsigning preparers. Reg. § 1.6694-2(d)(3).

for the taxpayer penalties discussed above.⁷¹ Thus, tax opinions at a reasonable basis level of assurance may be written for other tax professionals who are concerned about their clients' tax return positions. As discussed below, section 10.34 of Circular 230 adopts a similar standard though it is doubtful that a formal tax opinion would be rendered for Circular 230 purposes.⁷²

B. *Substantial Authority*

According to the regulations, substantial authority is more stringent than reasonable basis and less stringent than more likely than not (the latter meaning a greater than 50% likelihood of success).⁷³ Oddly, most commentators nonetheless peg substantial authority at a 40% likelihood of success⁷⁴ (meaning that return positions with a less than 40% likelihood of success would not meet the substantial authority standard) despite the vast expanse between reasonable basis—20% at the low end—and more likely than not—51%.⁷⁵

Substantial authority is particularly difficult to quantify in percentage terms. Unlike reasonable basis and other accuracy standards applicable to tax penalties, the regulations defining substantial authority do not focus at all on the merits of a tax return position or the likelihood that a taxpayer would prevail were a particular position challenged by the Service. Rather, the regulations focus only on the strength, or relative strength, of authorities supporting a position.

There is substantial authority for the tax treatment of an item only if the weight of the authorities supporting the treatment is substantial in relation to the weight of authorities supporting contrary treatment. All authorities relevant to the tax treatment of an item, including the authorities contrary to the treatment, are taken into account in determining whether substantial

⁷¹ Reg. § 1.6694-2(d)(2).

⁷² Treasury Department regulations found in Title 31, Part 10, of the Code of Federal Regulations govern practice before the Service and are commonly referred to as Circular 230. Discipline under Circular 230 for providing substandard tax return advice is unlikely unless the practitioner has engaged in a pattern of conduct. See Circ. 230 § 10.34(a)(2).

⁷³ Reg. § 1.6662-4(d)(2). The more likely than not standard is discussed *infra* at notes 84–92 and accompanying text.

⁷⁴ Lipton, *supra* note 65, at 283 (agreeing with an AICPA slide deck presented in 2010); Wood, *supra* note 62, at 1823; AICPA, STANDARDS FOR TAX SERVICES, *supra* note 65, at 4; JOINT COMMITTEE PENALTY STUDY, *supra* note 62, at 160, 163; *but see* Rothman, *supra* note 1, at 327 (35–40%).

⁷⁵ Commentators may assume that substantial authority is higher than realistic possibility of success, which has been quantified as a greater than one-in-three, or 33%, likelihood of success. Such a conclusion, however, appears not to be supported by authority.

authority exists. The weight of authorities is determined in light of the pertinent facts and circumstances in the manner prescribed by [Regulation section 1.6662-4(d)(3)(ii)].⁷⁶

The regulations provide considerable guidance on how to conduct the weighing process, including a list of authorities that can be taken into account.⁷⁷ Because the substantial authority standard can be satisfied at less than 50% certainty, substantial authority for more than one position is possible.⁷⁸

Tax opinions at the substantial authority level of assurance are typically provided for purposes of penalty avoidance. For the taxpayer, if an item is not attributable to a tax shelter, no penalty for substantial understatement of income tax can be imposed if there is or was substantial authority for the treatment on the tax return.⁷⁹ A similar rule prevents the imposition of a preparer penalty under section 6694(a).⁸⁰ The analysis required to establish substantial authority generally requires professional expertise. Indeed, the regulations describe the standard as “an objective standard involving an analysis of law and application of the law to relevant facts,”⁸¹ a difficult, if not impossible, task for someone without tax training. Moreover, a lay person can hardly be expected to appreciate “[t]he weight accorded an authority[, which] depends on its relevance and persuasiveness, and the type of document providing the authority”⁸² or to create a “well-reasoned construction of the applicable statutory provision”⁸³ in the absence of certain types of authority.

C. *More Likely Than Not*

More likely than not is the only level of assurance that is defined in the regulations in terms of numeric probability: “the standard that is met when there is a greater than 50-percent likelihood of the position being upheld.”⁸⁴ Consequently, there is no disagreement that more likely than not means greater than 50%.⁸⁵

⁷⁶ Reg. § 1.6662-4(d)(2).

⁷⁷ Reg. § 1.6662-4(d)(3).

⁷⁸ Reg. § 1.6662-4(d)(3)(i).

⁷⁹ I.R.C. § 6662(d)(2)(B). Substantial authority also may be relevant in avoiding a reportable transaction understatement penalty under section 6662A. See I.R.C. § 6664(d).

⁸⁰ I.R.C. § 6694(a)(2)(A). Evaluation of authorities for this purpose closely parallels the methodology that applies with respect to the taxpayer penalty under section 6662, subject to some modifications in Notice 2009-5, 2009-1 C.B. 309.

⁸¹ Reg. § 1.6662-4(d)(2).

⁸² Reg. § 1.6662-4(d)(3)(ii).

⁸³ *Id.*

⁸⁴ Reg. § 1.6662-4(d)(2); see also Reg. § 1.6694-2(b)(1) (“position has a greater than 50 percent likelihood of being sustained on its merits”).

⁸⁵ GALLER & LANG, *supra* note 2, at 152; Lipton, *supra* note 65, at 283 (agreeing with an AICPA slide deck presented in 2010); Wood, *supra* note 62, at 1823; Rothman, *supra* note 1, at

More likely than not opinions are provided in several contexts. With respect to penalties, more likely than not opinions can play a role with respect to at least three separate penalties. First, satisfying the reasonable cause and good faith exception to a substantial understatement penalty attributable to a tax shelter item requires, *inter alia*, that a corporate taxpayer have reasonably believed, at the time its return was filed, that the tax treatment of the item at issue was more likely than not the proper treatment.⁸⁶ Good faith reliance on an unambiguous more likely than not opinion by a professional tax adviser can satisfy this belief requirement. Second, the penalty for an understatement with respect to a reportable transaction is subject to its own unique reasonable cause requirements, which include, *inter alia*, that the taxpayer have reasonably believed that the treatment of the relevant item was more likely than not the proper treatment.⁸⁷ In characterizing the types of tax opinions that cannot be relied upon to establish a taxpayer's reasonable belief,⁸⁸ the Code implies that tax opinions that are not excluded by certain regulatory requirements can be taken into account for this purpose. Third, a preparer penalty cannot be imposed with respect to a tax shelter or reportable transaction if it is reasonable to believe that the position at issue would more likely than not be sustained on its merits.⁸⁹ According to the regulations, determining whether it is reasonable to believe that a position would more likely than not be sustained on its merits can take into consideration advice furnished by another advisor.⁹⁰

More likely than not is the standard or threshold that must be used by CPAs preparing financial statements to assess all material positions taken in an enterprise's income tax return.⁹¹ While tax opinions are not a requirement for corporations to meet the applicable threshold, companies routinely engage outside tax counsel or advisers to prepare tax opinions on significant

327; AICPA, STANDARDS FOR TAX SERVICES, *supra* note 65, at 4; JOINT COMMITTEE PENALTY STUDY, *supra* note 62, at 160, 163.

⁸⁶ Reg. § 1.6664-4(f)(2)(i)(B). While facts and circumstances other than a corporation's legal justification can be taken into account in determining reasonable cause and good faith, a corporation's legal justification can be considered only if there is substantial authority for the position and the corporation satisfies a belief requirement. Reg. § 1.6664-4(f)(2)(i). A more likely than not tax opinion can satisfy the belief requirement.

⁸⁷ I.R.C. § 6664(d)(3)(C).

⁸⁸ I.R.C. § 6664(d)(4)(B).

⁸⁹ I.R.C. § 6694(a)(2)(C).

⁹⁰ Reg. § 1.6694-1(b)(1).

⁹¹ FASB ASC 740-10, *supra* note 39. For this purpose, the more likely than not threshold means a likelihood of more than 50%; "[a]n entity shall initially recognize the financial statement effects of a tax position when it is more likely than not, based on the technical merits, that the position will be sustained upon examination." FASB ASC 740-10-25-6.

positions to determine whether such positions meet the more likely than not standard.⁹²

D. *Should*

The should standard is not quantified or defined in either the Code or regulations because this standard plays no role in the Code's penalty provisions. Not surprisingly, then, commentators disagree on its meaning, pegging should as low as a 60% probability of success⁹³ and as high as 80%.⁹⁴ Regardless, should implies a relatively high degree of confidence in the item or matter opined upon, while also recognizing the existence of some risk that the opinion could be wrong.

Because should opinions are not written with any particular legal standard in mind, there is no specific list of circumstances in which opinions reflecting this standard are the norm. Certainly, clients seeking comfort or reassurance appreciate an opinion at the strongest level that counsel can or is willing to provide. If an opinion is written for purposes of satisfying a contractual condition, the contract specifies the level of opinion required; this could and often is, but need not be, the should standard. Moreover, because there is no situation in which an opinion at a will level is required, should opinions are more common than will opinions.⁹⁵

E. *Will*

The highest level of assurance is the will standard, which generally reflects a 95 to 100% likelihood of success. A will opinion is considered a "clean" or "unqualified" opinion of near certainty;⁹⁶ a "will" opinion is consistent with the conclusion that there is no material risk of being wrong.⁹⁷ Will opinions theoretically should be easy to give because there are no worrisome legal issues.⁹⁸

⁹² CHRISTOPHER H. HANNA ET AL., CORPORATE INCOME TAX ACCOUNTING ¶ 12.07 (2021).

⁹³ Wood, *supra* note 62, at 1823.

⁹⁴ Lipton, *supra* note 65, at 283 (agreeing with an AICPA slide deck presented in 2010); *but see* Rothman, *supra* note 1, at 327 (quantifying the "should" standard as falling within the 70 to 75% range); *see also* Jasper L. Cummings, *The Range of Legal Tax Opinions, with Emphasis on the 'Should' Opinion*, 98 TAX NOTES (TA) 1125, 1129–31 (Feb. 17, 2003) (describing the history of the should opinion). In light of the broad range, it is interesting to note Robert Rothman's observation that there is "a more or less common understanding among practitioners" as to what the term should (but also will) means in the context of tax opinions. Rothman, *supra* note 1, at 311.

⁹⁵ Rothman, *supra* note 1, at 313–15.

⁹⁶ GALLER & LANG, *supra* note 2, at 153.

⁹⁷ Rothman, *supra* note 1, at 312.

⁹⁸ *Id.*

Will opinions typically be issued in transactions for which the market expects such opinions. These include, for example, reorganization acquisitions of public companies and issuance of certain types of financial instruments.⁹⁹

F. *No Tax Opinions at Realistic Possibility of Success Level*

Commentators sometimes include “realistic possibility of success” in cataloging or listing levels of assurance.¹⁰⁰ As described below,¹⁰¹ lawyers generally satisfy their ethical obligations if advice meets or exceeds this standard. Because statutory and regulatory standards applicable to both lawyers (as tax advisers) and taxpayers no longer refer to this standard, however, lawyers are strongly advised to follow the higher standard applicable with respect to preparer penalties.

The realistic possibility of success standard continues to apply to CPAs, but only when the applicable taxing authority has no written standards or if those standards are lower than American Institute of CPAs (AICPA) standards.¹⁰² With respect to federal tax advice, the applicable taxing authority is the Service,¹⁰³ as to which higher standards apply. Thus, CPAs do not satisfy ethical obligations with respect to federal tax advice by advising at the realistic possibility level and may or may not satisfy ethical obligations with respect to state tax advice by advising at that level.

V. Ethical and Related Considerations

When drafting a tax opinion, tax professionals must be mindful of professional and other standards from at least three sources: (1) statutory penalties, (2) ethical principles, and (3) Circular 230. The first two prohibit written advice that does not meet a prescribed level of assurance; the third does not. Ethical guidance applicable to CPAs and lawyers (but only with respect to tax shelter opinions) and Circular 230 each prescribe procedural rules as well. While not a professional requirement, malpractice considerations are also often taken into account.

⁹⁹ *Id.*

¹⁰⁰ See, e.g., Rothman, *supra* note 1, at 321–22; David Weisbach & Brian Galle, *The Regulation of Tax Advice and Advisers*, 69 TAX PRAC. (TA) 196, 213 (Mar. 21, 2011).

¹⁰¹ See *infra* notes 115–120 and accompanying text.

¹⁰² *Statement on Standards for Tax Services No. 1*, Tax Return Positions in AICPA, STATEMENTS ON STANDARDS FOR TAX SERVICES 1–7 at 6 (¶¶ 4, 5) (updated Apr. 30, 2018), available at <https://www.aicpa.org/resources/download/statements-on-standards-for-tax-services-no-1-7> [<https://perma.cc/3LPB-JFB5>] [hereinafter AICPA SSTs No. 1]; *Interpretation No. 1-1, Reporting and Disclosure Standards in AICPA*, STANDARDS FOR TAX SERVICES, *supra* note 65, at 6 (¶ 2), 10 (¶¶ 26, 27); *Interpretation No. 1-2, Tax Planning in AICPA*, STANDARDS FOR TAX SERVICES, *supra* note 65, at 14 (¶ 4).

¹⁰³ *Interpretation No. 1-1, Reporting and Disclosure Standards in AICPA*, STANDARDS FOR TAX SERVICES, *supra* note 65, at 7 (¶ 3).

A. *Statutory Penalties*

Tax professionals may be subject to the preparer penalty provisions of the Code when they render tax opinions.¹⁰⁴ These penalties apply only if a professional is considered a “tax return preparer,”¹⁰⁵ but a tax return preparer, for this purpose, can be either a signing preparer or a nonsigning preparer.¹⁰⁶ Thus, an individual who only provides a tax opinion and does not see a taxpayer’s return or claim for refund nonetheless can be held liable if the issue(s) addressed in the tax opinion constitute a substantial portion of a return or refund claim.¹⁰⁷ However, an individual can be considered a tax return preparer only if the advice is “with respect to events that have occurred at the time the advice is rendered,”¹⁰⁸ making the timing of a tax opinion relevant, if not decisive, in subjecting its author to a penalty.¹⁰⁹

The basic preparer penalty provision, section 6694(a), contains three standards:

1. *More likely than not.* For positions with respect to a tax shelter or reportable transaction, a penalty may be imposed “unless it is reasonable to believe that the position would more likely than not be sustained on its merits.”¹¹⁰

¹⁰⁴ I.R.C. §§ 6694, 6695. While this discussion focuses on the basic preparer penalty in section 6694(a), readers should also be mindful of section 6694(b), under which a preparer penalty can be imposed with respect to a willful attempt to understate tax liability on a tax return or refund claim or a reckless or intentional disregard of rules and regulations.

¹⁰⁵ See I.R.C. § 7701(a)(36) (definition of “tax return preparer”).

¹⁰⁶ Reg. § 301.7701-15(b). A tax return preparer is a person who prepares for compensation, or who employs one or more persons to prepare for compensation, all or a substantial portion of a return or refund claim. Reg. § 301.7701-15(a). A signing tax return preparer is “the individual tax return preparer who has the primary responsibility for the overall substantive accuracy of the preparation” of a return. Reg. § 301.7701-15(b)(1). A tax return preparer who is not a signing tax return preparer but who prepares all or a substantial portion of a return or refund claim “with respect to events that have occurred at the time the advice is rendered” is a nonsigning tax return preparer and thus can be subject to the preparer penalty provisions with respect to the return or substantial portion thereof as to which the person provided oral or written advice to the taxpayer or to another tax return preparer. Reg. § 301.7701-15(b)(2)(i).

¹⁰⁷ The regulations define and elaborate on the concept of “substantial portion.” See Reg. § 301.7701-15(b)(3).

¹⁰⁸ Reg. § 301.7701-15(b)(2)(i).

¹⁰⁹ The rule is not black and white, however. See Reg. § 301.7701-15(b)(2). It is not clear why a tax professional who provides advice before a transaction occurs generally is not subject to preparer penalties with respect to such advice, while a perhaps far less knowledgeable preparer of a return who provides advice after the fact generally is.

¹¹⁰ I.R.C. § 6694(a)(2)(C).

2. *Substantial authority.* For all other advice, if a position is not specifically disclosed on the taxpayer's return, a penalty may be imposed unless there is or was substantial authority for the position.¹¹¹
3. *Reasonable basis.* If a position is not with respect to a tax shelter or a reportable transaction but also is not supported by substantial authority, a penalty may be imposed unless there is a reasonable basis for the position and it is adequately disclosed.¹¹²

The meaning of each standard has been discussed and should therefore be familiar.¹¹³ Under section 6694(a), a tax return preparer's failure to satisfy the relevant standard may result in the imposition of a preparer penalty if the individual knew or reasonably should have known that the advice fell short. As a consequence, from a practical standpoint, a tax opinion should comply with the relevant standard in order to avoid a penalty under section 6694.¹¹⁴

B. *Ethical Rules*

1. *Rules Applicable to Lawyers*

a. *ABA Formal Opinion 85-352.* According to ABA Formal Opinion 85-352,¹¹⁵ a lawyer is prohibited from advising tax return positions that fall short of a "realistic possibility of success" standard. This standard is generally thought to govern any tax advice given to a client to the extent that tax return positions are or will be involved (e.g., advice given in the course of structuring a transaction that ultimately will involve a tax return position or positions). Notably, Opinion 85-352 permits the rendering of advice that a lawyer believes will not prevail if challenged by the Service, so long as there is a "realistic possibility" of succeeding based on the lawyer's good faith assessment of the law.

[A] lawyer may advise reporting a position on a return even where the lawyer believes the position probably will not prevail, there is no 'substantial authority' in support of the position, and there will be no disclosure of the position in the return. However, the position to be asserted must be one which the lawyer in good faith believes is warranted in existing law or can be

¹¹¹ I.R.C. § 6694(a)(2)(A).

¹¹² I.R.C. § 6694(a)(2)(B).

¹¹³ See *supra* text accompanying notes 65–92. The more likely than not standard is specifically defined in the regulations under section 6694(a), as a position having a greater than 50% chance of being sustained on the merits. Reg. § 1.6694-2(b)(1).

¹¹⁴ There is a reasonable cause and good faith exception. I.R.C. § 6694(a)(3).

¹¹⁵ ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 85-352 (1985) [hereinafter Opinion 85-352].

supported by a good faith argument for an extension, modification or reversal of existing law. This requires that there is some realistic possibility of success if the matter is litigated. In addition, in his role as advisor, the lawyer should refer to potential penalties and other legal consequences should the client take the position advised.¹¹⁶

Given the subjective nature of the rule—the lawyer's own good faith beliefs being at issue—it is surprising that the realistic possibility of success standard has been quantified. The standard is universally understood as a one-in-three (or one-third) or greater likelihood of being sustained on the merits.¹¹⁷ The reasons for adopting this particular numerical standard have been eloquently explained by others.¹¹⁸ For present purposes, it is enough to note that at one time, all professional standards—lawyers', accountants', and Circular 230—and statutory penalties were uniform at this level,¹¹⁹ but since Opinion 85-352 was issued, all professional standards and statutory penalties, with the exception of those specifically applicable to lawyers as set forth in Opinion 85-352, have been elevated above the realistic possibility of success. Given the higher standards in the preparer penalty provisions of the Code and taxpayers' (*i.e.*, clients') accuracy standards, it would be unusual, and perhaps irresponsible, for a lawyer—without more—to render tax advice at a mere realistic possibility of success level.¹²⁰

b. *ABA Formal Opinion 346*. ABA Formal Opinion 346¹²¹ provides specific guidance of a procedural nature to lawyers drafting tax opinions in the context of tax shelter investments.¹²² Typically provided to promoters,

¹¹⁶ *Id.*

¹¹⁷ Reg. § 1.6694-2(b)(1) (as in effect prior to Dec. 15, 2008); Circular 230 § 10.34(d)(1) (as in effect prior to Apr. 4, 2008); AICPA, STANDARDS FOR TAX SERVICES, *supra* note 65, at 4; JOINT COMMITTEE PENALTY STUDY, *supra* note 62, at 160; Lipton, *supra* note 65, at 283; Rothman, *supra* note 1, at 321.

¹¹⁸ Dennis J. Ventry, Jr., *Lowering the Bar: ABA Formal Opinion 85-352*, 112 TAX NOTES (TA) 69 (July 3, 2006); Paul J. Sax et al., *Report of the Special Task Force on Formal Opinion 85-352*, 39 TAX LAW. 635 (1986).

¹¹⁹ Opinion 85-352, *supra* note 115; AICPA, Statements on Responsibilities in Tax Practice No. 1 & Interpretation 1-1, Realistic Possibility Standard (as in effect prior to Oct. 31, 2000); Reg. § 1.6694-2(b)(1) (as in effect prior to Dec. 15, 2008); Circular 230 § 10.34(d)(1) (as in effect prior to Apr. 4, 2008).

¹²⁰ For example, advice at a lower level would seem to be appropriate when a lawyer advises a taxpayer that a return position does not meet the substantial authority standard but has a reasonable basis, and the lawyer advises the taxpayer to disclose the relevant facts in the return. See I.R.C. §§ 6662(d)(2)(B), 6694(a)(2)(B). Thus, even if the lawyer believes that the position lacks a realistic possibility of success, advice at the lower level could be allowable from an ethics perspective.

¹²¹ ABA Comm. on Ethics & Prof's Responsibility, Formal Op. 346 (revised, Jan. 29, 1982) [hereinafter Opinion 346].

¹²² For purposes of Opinion 346, a tax shelter is an investment that has as a significant feature either or both of the following attributes: (1) deductions in excess of income from the investment

these tax opinions are meant to be relied upon by offerees in determining whether to invest. While the types of transactions envisioned by Opinion 346 are no longer popular, many of the principles stated in the Opinion are useful (as suggestions or best practices), but not required, with respect to any tax opinion. These include:

1. The lawyer should establish the terms of the relationship at the time she is engaged, including making clear that the lawyer requires full disclosure from the client of the structure and intended operations of the venture and complete access to all relevant information.
2. The lawyer should make inquiry as to the relevant facts and, consistent with guidelines established in ABA Formal Opinion 335,¹²³ be satisfied that the material facts are accurately and completely stated in the offering materials. If any alleged facts are incomplete, suspect, or inconsistent, the lawyer should make further inquiry.
3. A tax opinion should relate the law to the actual facts to the extent ascertainable. The assumption of facts that are not currently ascertainable is proper so long as such factual assumptions are clearly identified and are reasonable and complete.
4. A lawyer rendering a tax opinion should make reasonable inquiries to ascertain that a good faith effort has been made to comply with laws other than tax laws.
5. The lawyer should satisfy herself that she or another competent professional has considered all material tax issues. The tax opinion should address each material tax issue as to which a reasonable possibility of challenge by the Service exists.
6. If possible, the tax opinion should state the lawyer's opinion of the probable outcome on the merits of each material tax issue. If that is not possible, the tax opinion should so state and provide the reasons for this conclusion.
7. A tax opinion should provide an overall evaluation of the extent to which the tax benefits, in the aggregate, are likely to be realized.

in any year or (2) credits in excess of the tax attributable to the income from the investment in any year.

¹²³ ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 335 (1974). Opinion 335 provides guidance for opinions written in connection with transaction exemptions under the Securities Act of 1933 for offers and sales of unregistered securities.

8. The lawyer should assure that the offerees will not be misled by mischaracterizations, in offering materials or promotion efforts, of the extent of the tax opinion.

Transactions to which Opinion 346 applies are rare today.¹²⁴ Thus, Opinion 346 is relevant today only with respect to transactions that meet its definition of a tax shelter and as a general, though nonbinding, guide to what might be considered best practices in drafting tax opinions.

c. *Model Rules.* As lawyers, tax attorneys are subject to rules of professional conduct adopted in the states in which they are admitted or practice. All states' codes or rules are based on the ABA Model Rules of Professional Conduct. However, the ABA has amended its Model Rules from time to time, and states have adopted their own variations. Thus, lawyers are cautioned to consult the relevant states' rules rather than the Model Rules. With that caveat, the following Model Rules are particularly relevant in the context of tax opinions.

Rule 1.1—Competence.¹²⁵ Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary to the representation. Thus, a tax opinion should be given only by a lawyer who possesses the requisite knowledge and skill and who treats the engagement with the thoroughness called for by the tax opinion process. Moreover, other partners in a law firm, including (in particular) other lawyers with managerial authority, must make reasonable efforts to assure that those involved in the opinion process are competent to so engage.¹²⁶

Rule 2.3—Evaluation for Use by Third Persons.¹²⁷ A lawyer may render advice for use by someone other than the client (*e.g.*, a tax shelter opinion) if the lawyer reasonably believes that evaluating a matter for the benefit of a third party or parties is compatible with other aspects of the lawyer's relationship with the client. If the lawyer knows or reasonably should know that the evaluation is likely to affect her client's interests materially and adversely, however, she may not provide the evaluation unless the client gives informed consent. According to the Comments, when a question about a client's legal situation arises at the instance of the client's financial auditor, the lawyer's response may be made in accordance with procedures recognized by the legal

¹²⁴ Rothman, *supra* note 1, at 359.

¹²⁵ MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 2021).

¹²⁶ MODEL RULES OF PROF'L CONDUCT r. 5.1.

¹²⁷ MODEL RULES OF PROF'L CONDUCT r. 2.3.

profession, such as the so-called “treaty” entered into between the ABA and AICPA.¹²⁸

Rule 3.1—Meritorious Claims & Contentions.¹²⁹ This rule is the basis for the ethical standard stated in Opinion 85-352. A lawyer may not assert or refute an issue “unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.”

Rule 5.1—Responsibilities of a Partner or Supervisory Lawyer.¹³⁰ Lawyers are responsible for other lawyers’ violations of the rules of professional conduct if they order or, with knowledge of specific conduct, ratify the conduct involved. In a law firm, partners or others with managerial or supervisory authority over another lawyer are responsible for violations, as well, if they know about the conduct at a time when the consequences can be avoided or mitigated but fail to take reasonable action. While this rule is somewhat extreme in concept, it should be borne in mind by partners and others who review opinion letters or otherwise oversee the practice of an attorney who drafts a tax opinion.

2. Rules Applicable to CPAs

AICPA professional guidelines apply identical standards to tax return preparation and tax planning advice.¹³¹ For this purpose, tax planning refers to oral or written recommendations or expressions of opinion in prospective or completed transactions on either a return position or a specific tax plan developed by the accountant, taxpayer, or a third party.¹³² An AICPA member must comply, in the first instance, with the standards imposed by the relevant taxing authority.¹³³ In the case of a federal tax issue, the substantial authority standard (*i.e.*, the preparer penalty standard set forth in section 6694 and section 10.34(a) of Circular 230) governs. If the applicable taxing

¹²⁸ *Id.* at Comment [6]. The treaty is: ABA Comm. on Audit Inquiry Responses, *Statement of Policy Regarding Lawyers’ Responses to Auditors’ Requests for Information*, 31 BUS. LAW. 1709 (1975); see also ABA Audit Responses Committee, *Statement on Updates to Audit Response Letters*, 70 BUS. LAW. 489 (2015); Alan J. Wilson et al., *The ABA Statement on Audit Responses: A Framework that Has Stood the Test of Time*, 75 BUS. LAW. 2085 (2020).

¹²⁹ MODEL RULES OF PROF’L CONDUCT r. 3.1.

¹³⁰ MODEL RULES OF PROF’L CONDUCT r. 5.1.

¹³¹ *Interpretation No. 1-2, Tax Planning in AICPA, STANDARDS FOR TAX SERVICES*, *supra* note 65, at 14 (¶ 4) (cross-referencing to AICPA SSTS No. 1, *supra* note 102, and *Interpretation No. 1-1, Reporting and Disclosure Standards in AICPA, STANDARDS FOR TAX SERVICES*, *supra* note 65).

¹³² *Interpretation No. 1-2, Tax Planning in AICPA, STANDARDS FOR TAX SERVICES*, *supra* note 65, at 14 (¶ 5).

¹³³ AICPA, SSTS No. 1, *supra* note 102, at 6 (¶ 4).

authority has no written standards or written standards that are lower than the realistic possibility of success standard, the applicable standard is realistic possibility of success¹³⁴—not surprisingly defined as an “approximately a one-in-three (33 percent) likelihood that the position will be upheld on its merits if it is challenged.”¹³⁵

AICPA Interpretation No. 1-2 provides procedural guidelines for issuing opinions. Unlike Opinion 346, which applies (to lawyers) only in the context of tax shelter opinions, the AICPA rules apply (to CPAs) rendering any type of opinion that reflects the results of tax planning. Thus, a CPA should do all of the following:

1. establish the relevant background facts,
2. consider the reasonableness of assumptions and representations,
3. consider applicable regulations and standards regarding reliance on information and advice received from a third party,
4. apply the relevant authorities to the facts,
5. consider the business purpose and economic substance of the transaction if they are relevant to the tax consequences of the transaction (relying on a representation that there is a business purpose or economic substance being insufficient as a general matter),
6. consider whether the issue involves a listed transaction or reportable transaction,
7. consider other regulations and standards applicable to written tax advice promulgated by the applicable taxing authority, and
8. arrive at a conclusion supported by the authorities.¹³⁶

(Similar, though not identical, guidelines apply to CPAs in reviewing opinions that were given to a client by other tax professionals.)¹³⁷

¹³⁴ *Id.* at 6 (¶ 5). Under a prior AICPA standard, a CPA could not recommend that a tax return or tax planning position be taken unless the CPA had a good faith belief that the position had a realistic possibility of being sustained administratively or judicially on its merits if challenged. AICPA, Statements on Responsibilities in Tax Practice No. 1 & Interpretation 1-1, Realistic Possibility Standard (as in effect prior to Oct. 31, 2000), *supra* note 102.

¹³⁵ AICPA, STANDARDS FOR TAX SERVICES, *supra* note 65, at 4.

¹³⁶ *Interpretation No. 1-2, Tax Planning in AICPA*, STANDARDS FOR TAX SERVICES, *supra* note 65, at 14 (¶ 6).

¹³⁷ *Id.* at 15 (¶ 7).

These guidelines are strikingly similar to those in Opinion 346 and to the Circular 230 opinion standards that are described in the following Part, which were replaced in 2014. It is interesting, therefore, that AICPA standards are now substantially stricter than those required of lawyers and of all tax professionals by Circular 230.

C. Circular 230

Readers of a certain age will recall the Circular 230 standards for written advice, which were replaced in 2014.¹³⁸ Circular 230 no longer includes minimum standards for rendering tax opinions, although it does prescribe procedural rules that are similar to those in AICPA Interpretation 1-2.¹³⁹ The Circular 230 rules emphasize reasonableness. Thus, a practitioner who renders any type of written advice, including a tax opinion, must:

1. base the written advice on reasonable factual or legal assumptions, including assumptions as to future events,
2. reasonably consider all relevant facts and circumstances that the practitioner knows or reasonably should know,
3. use reasonable efforts to identify and ascertain the facts relevant to the written advice on each federal tax matter,
4. not rely on representations, statements, findings or agreements (including projections, financial forecasts, or appraisals) of the taxpayer or any other person if reliance on them would be unreasonable,
5. relate applicable law and authorities to facts, and

¹³⁸ T.D. 9165, Regulations Governing Practice Before the Internal Revenue Service, 69 Fed. Reg. 75,839 (Dec. 20, 2004), *revised by* T.D. 9668, 79 Fed. Reg. 33,685 (June 12, 2014).

¹³⁹ Circular 230 does prescribe minimum standards for tax returns and other submissions to the Service. Circ. 230 § 10.34. These standards loosely follow section 6694. Courts, however, have concluded that the Service lacks statutory authority to regulate tax preparation through Circular 230. *Loving v. I.R.S.*, 742 F.3d 1013 (D.C. Cir. 2014); *Ridgely v. Lew*, 55 F. Supp. 3d 89 (D.D.C. 2014); *see generally* GALLER & LANG, *supra* note 2, at 80–96. These cases arose from the Service's attempt to bring noncredentialed tax return preparers within the scope of the Circular 230 regulations. Whether these same provisions apply with respect to attorneys, CPAs, and enrolled agents, all of whom clearly are subject to Circular 230 when they are practicing before the Service, is an open question. Nonetheless, best practice is to comply with Circular 230 even when a rule arguably is outside the authority of the Service.

6. not take into account, in evaluating a federal tax issue, the possibility that a tax return will not be audited or that an issue will not be raised on audit.¹⁴⁰

Circular 230, therefore, permits written advice regardless of whether the practitioner concludes that a particular issue will be resolved in the taxpayer's favor and regardless of the practitioner's confidence level with respect to resolution of any particular issue.

Other provisions of Circular 230, which may be relevant in the context of written tax advice, include the following:

§ 10.22—Diligence as to accuracy. A practitioner must exercise due diligence, *inter alia*, in preparing or assisting in the preparation of any papers relating to Service matters and in determining the correctness of written representations made by the practitioner to clients in the context of Service matters. For this purpose, a practitioner is presumed to exercise due diligence in relying on the work product of another person if the practitioner "used reasonable care in engaging, supervising, training, and evaluating the person, taking proper account of the nature of the relationship between the practitioner and the person."¹⁴¹

§ 10.35—Competence. The competence standard in Circular 230 is almost identical to the standard in the Model Rules.¹⁴² Unlike the Model Rules, however, Circular 230 applies to all individuals subject to Circular 230, not just attorneys. Notably, the Preamble to the 2014 Circular 230 amendments states:

Although not binding on the IRS, Treasury and the IRS believe that the comments to Rule 1.1 of the Model Rules of Professional Conduct, State Bar opinions addressing the competence standard, and the American Institute of Certified Public Accountant's competency standard are generally informative on the standard of competency expected of practitioners under Circular 230.¹⁴³

Thus, practitioners should make themselves aware of, and comfortable with, the competence standards of the legal and accounting professions, to assure they have the requisite level of expertise to render a particular tax opinion.

¹⁴⁰ Circ. 230 § 10.37(a)(2).

¹⁴¹ Circ. 230 § 10.22(b).

¹⁴² MODEL RULES OF PROF'L CONDUCT r. 1.1.

¹⁴³ T.D. 9668, Regulations Governing Practice Before the Internal Revenue Service, 79 Fed. Reg. at 33,690.

§ 10.33—Best practices for tax advisors. By its terms, section 10.33 of Circular 230 is not binding. The best practices contained therein, however, purport to ensure “the highest quality representation concerning Federal tax issues”¹⁴⁴ and therefore should be taken into account in the process of drafting and reviewing tax opinions. These include the following:

1. “Communicating clearly with the client regarding the terms of engagement.”¹⁴⁵ Specifically relevant to tax opinions, a tax advisor should determine the client’s expected purpose for, and use of, the advice that will be rendered, and should have a clear understanding with the client regarding the form and scope of the written advice.
2. “Establishing the facts, determining which facts are relevant, evaluating the reasonableness of any assumptions or representations, relating the applicable law (including potentially applicable judicial doctrines) to the relevant facts, and arriving at a conclusion supported by the law and the facts.”¹⁴⁶
3. “Advising the client regarding the import of the conclusions reached.”¹⁴⁷ For example, a tax advisor should advise a client whether she would avoid accuracy-related penalties if she acts in reliance on the advice.

Notwithstanding the existence of mandatory provisions in Circular 230 pertaining to tax advice, the Service (through its Office of Professional Responsibility)¹⁴⁸ is unlikely to enforce any of them. In at least two cases, courts have limited the Service’s authority to regulate tax practitioners to situations in which they engage in “practice” before the Service, referring to “practice during an investigation, adversarial hearing, or other adjudicative proceeding.”¹⁴⁹ Unless a practitioner is “‘presenting’ a ‘case,’”¹⁵⁰ in “traditional adversarial proceedings,”¹⁵¹ the Service has no authority to regulate and therefore to enforce.

¹⁴⁴ Circ. 230 § 10.33(a).

¹⁴⁵ Circ. 230 § 10.33(a)(1).

¹⁴⁶ Circ. 230 § 10.33(a)(2).

¹⁴⁷ Circ. 230 § 10.33(a)(3). Only indirectly relevant in the context of tax opinions, section 10.33(a)(4) of Circular 230 contains an additional best practice: “[a]cting fairly and with integrity in practice before the Internal Revenue Service.”

¹⁴⁸ Circ. 230 § 10.1; I.R.S. Deleg. Order 25-16 (Rev. 1), I.R.M. 1.2.2.14.16 (Sept. 3, 2014).

¹⁴⁹ *Loving v. I.R.S.*, 742 F.3d 1013, 1018 (D.C. Cir. 2014).

¹⁵⁰ *Id.* at 1018.

¹⁵¹ *Id.* at 1019.

In *Loving v. I.R.S.*,¹⁵² several tax return preparers who previously had not been subject to Circular 230 (because they were not attorneys, CPAs, or enrolled agents) challenged the validity of the Circular 230 amendments adopted in 2011 under which they were required to qualify and enroll as registered tax return preparers under Circular 230 and under which their return preparation undertakings were subject to the substantive (and enforceable) requirements of Circular 230.¹⁵³ In a unanimous opinion, the Court of Appeals for the D.C. Circuit ruled that the Service's statutory authority to "regulate the practice of representatives before the Department of the Treasury"¹⁵⁴ did not encompass authority to regulate tax return preparers because, *inter alia*, return preparers are not "representatives"¹⁵⁵ and return preparation does not constitute "practice."¹⁵⁶ Tax return preparers, therefore, do not practice before the Service when they assist in the preparation of another person's tax return.

Soon after the *Loving* decision, a CPA who charged contingent fees for preparing and filing refund claims challenged (in the federal district court for the District of Columbia) the validity of section 10.27 of Circular 230, which prohibits contingent fee arrangements in these circumstances. The court, in *Ridgely v. Lew*,¹⁵⁷ ruled that, under *Loving*, the Service had no authority to regulate the preparation of ordinary refund claims preceding commencement of adversarial proceedings because these services do not constitute the practice of representatives before the Service.

As a consequence of the *Loving* and *Ridgely* decisions, any provision in Circular 230 regulating acts that do not relate directly to acting as an agent on behalf of a taxpayer in making a case before the Service is suspect in terms of the Service's authority to regulate, even if the actor is a person (attorney, CPA, or enrolled agent) who otherwise is or could be subject to regulation under Circular 230.¹⁵⁸ Thus, in preparing and privately providing a tax opinion to a client, a practitioner arguably need not comply with Circular 230.

¹⁵² 742 F.3d 1013.

¹⁵³ See Circ. 230 §§ 10.3(f)(1), 10.4 (permitting this category of tax professionals to practice before the Service); 10.3(f)(2) (defining practice, for this category of professionals only, to include "preparing and signing tax returns and claims for refund, and other documents for submission to the Internal Revenue Service."). Circular 230 has not been amended since *Loving* was decided. Efforts to amend the underlying statute, 31 U.S.C. § 330(a)(1), have been unsuccessful.

¹⁵⁴ *Loving*, 742 F.3d at 1018.

¹⁵⁵ *Id.* at 1017.

¹⁵⁶ *Id.* at 1018.

¹⁵⁷ 55 F. Supp. 3d 89 (D.D.C. 2014).

¹⁵⁸ See also *Sexton v. Hawkins*, 2017-1 U.S.T.C. ¶ 50,181, 119 A.F.T.R.2d 1187 (D. Nev. 2017) (disbarred attorney who prepared tax returns for individual clients was not subject to the authority of the Service's Office of Professional Responsibility or Circular 230 because tax return preparation is not practice before the Service under *Loving*).

Nonetheless, it is difficult and probably reckless to ignore standards that constitute best practices, at least conceptually, and that are largely consistent with ethical principles applicable to attorneys and CPAs.

VI. Survey, Results, and Analysis

A. *The Survey*

In 2021, the Board of Regents of ACTC constituted a Task Force on Tax Opinion Procedures, which circulated a questionnaire to its more than 500 members regarding their firms' tax opinion procedures.¹⁵⁹ The questions and a tabulation of responses are reproduced in the Appendix to this Article.

Compared to the number of surveys circulated, the response rate was low. Only 76 individuals responded, and not all respondents answered every question. Moreover, responses to the survey describe practices only among firms that are represented in ACTC and thus are not necessarily representative of practices followed by tax lawyers and firms generally. While the survey asked for the size of each respondent's firm, it did not ask whether a respondent practices in a law firm or accounting firm. As a consequence, the survey results do not lend themselves to a systematic review or global conclusions.¹⁶⁰ However, the survey provides an excellent starting point for firms that are developing policies and procedures and for those that are reviewing policies and procedures already in place by identifying possible best practices and providing a glimpse into the substance and structure of other firms' policies.

B. *Responses and Analysis*

The survey consisted of 12 substantive questions,¹⁶¹ most of which pertain to policies or procedures for reviewing tax opinions that have already been drafted. The survey touched only lightly upon (1) policies or rules for drafting tax opinion letters (*e.g.*, format, reliance on client representations or representations by third parties) and (2) maintenance or use (within the firm) of tax opinions that have already been issued (*e.g.*, as templates with respect to

¹⁵⁹ According to its website, membership in ACTC is limited to a maximum of 700 tax attorneys across the United States. *History and Purpose*, ACTC, <https://www.actconline.org/history-and-purpose/> [<https://perma.cc/RM7R-HKRF>]. There is no statement regarding the actual number of members; the author estimates that there are probably at least 500. Of course, there could be 700 members.

¹⁶⁰ For the same reason, the survey provides no basis for any conclusions regarding what most firms do or do not do, or what state of the art is with respect to tax opinion procedures. In this regard, it is noted that the survey does not distinguish between law and accounting firms, large and small firms, or large and small tax departments, or among practices in different locations.

¹⁶¹ There were also two questions at the end of the survey pertaining to the size of each respondent's firm and tax department. Because of the low response rate to the survey, insufficient data are available to correlate firm or department size to substantive policies or procedures in any meaningful way.

format, as a means to assure consistency of positions among tax opinions rendered by the same firm).

1. *Tax Opinion Review Policies and Procedures in General*

Almost all respondents' firms have a formal opinion review policy for the issuance of tax opinions. Firms that have such policies are evenly split, however, on whether those policies are in writing or are merely a matter of institutional lore or practice. Although one might expect that more formalized procedures would exist in large firms as opposed to small ones, there was no correlation among the responses between the size of respondents' firms and the existence of opinion review policies in writing.

One can only speculate why a firm would choose to, or choose not to, memorialize its review procedures in writing. A good reason to refrain from establishing a written policy is the risk, if a firm does not meticulously comply with its written procedures as to a particular tax opinion letter, that such failure could be held against the firm in malpractice litigation. On the other hand, maintaining and following a written policy could deter malpractice actions in the first instance or help in their defense. Written policies must be regularly reviewed and updated to account for changes in the law, professional standards, or the contexts in which clients seek tax opinions, taking time and attention away from billable matters. Unwritten policies can be easily modified or altered on an ongoing basis.

Among responding firms that have a tax opinion review policy (written or not), almost 70% apply their policies only to formal tax opinions and not to other written advice. With respect to the other 30%, the range of advice to which review policies apply is broad, from all written communications to only opinions that are provided in specific contexts (*e.g.*, securities offerings, in connection with large transactions).

One respondent recounted a firm review policy that is available whenever the author of tax advice considers review appropriate. On one hand, this approach appears judicious and eminently reasonable, making the process available to anyone who thinks review by colleagues would be wise. On the other hand, however, placing the decision to seek review solely in the hands of the author leaves open the possibility that written advice, which perhaps should be reviewed, will not be.

2. *Identity of Reviewers*

Thirty percent of respondents' firms have a tax opinion review committee while 70% do not. Descriptive responses suggest that some firms maintain a standing committee (*e.g.*, all equity partners, or a chair and four members, etc.), but most firms constitute a review committee each time a need arises. Only two respondents reported that nontax professionals are part of the tax opinion review committee. At one firm, a member of the ethics committee

participates. Another firm requires participation by an attorney or attorneys from another (*i.e.*, other than tax) department.¹⁶²

More than 73% of respondents' firms require at least two partners to approve a tax opinion. Most textual responses reflect a flat two-partner rule, but in some firms more than two partners can be called upon.

Seventy-eight percent of firms require that all reviewing and approving partners be tax partners.¹⁶³ Only 22% permit partners practicing in other areas to participate. This is not surprising given the often complicated tax principles at issue and the difficult technical analysis that is usually involved. Having a member of the ethics committee involved, however, as one respondent reported, is probably a good idea from both professional ethics and malpractice points of view.

Somewhat surprisingly, less than 20% of respondents' firms permit non-partners to participate in the review and approval of tax opinions. This may, and probably does, exclude professionals who have greater knowledge or expertise on a particular subject than partner reviewers and is particularly surprising given the increase in counsel positions at large law firms.¹⁶⁴ If the purpose of a review is to assure that the legal analysis is correct and the conclusions are sound, including the experts in the process would seem to be advisable regardless of equity status within a firm.

3. *Procedural Requirements for Approval*

Eighty-two percent of respondents' firms do not differentiate among types of opinions in terms of procedural requirements for approval. In these firms, the process is the same no matter the context in which a tax opinion is rendered or the purpose of the opinion. The remaining 18% of firms have different requirements based on the type of opinion. Most explanations provided by respondents in the latter group focused on the number of partners required for approval, certain types of opinions (*e.g.*, "sticky" issues, complex opinions, opinions in connection with securities offerings) requiring review and approval by more than the usual two partners.

Ninety-six percent of respondents reported that their firms have the same approval procedures for all levels of tax opinions. The remaining four percent reported having different approval requirements based on the level of opinion (*e.g.*, will, should, or more likely than not).

¹⁶² The response states that opinions are reviewed across departments.

¹⁶³ The survey did not distinguish between equity and nonequity partners.

¹⁶⁴ See, *e.g.*, Michael Allen, *Revamping the 'Counsel' Role*, ABOVE THE LAW (Nov. 27, 2015), <https://abovethelaw.com/2015/11/revamping-the-counsel-role/> [<https://perma.cc/9R3L-YYZK>] (describing the broadening of the counsel title to attorneys who are "more senior than associates but for whom the firm does not have room in the partnership"). This article reports, for example, that during the first ten months of 2015, 1,244 counsels lateraled within the Am Law 200, and that "[c]ounsel's share of the lateral market [was] up 50% for the same period" in 2008.

4. *Tax Opinion Drafting Policies and Procedures*

Forty-five percent of respondents reported that their firms have created one or more standard forms for opinions or portions of opinions that can be standardized. Fifty-five percent of respondents' firms do not maintain any standardized forms or templates. Only a few respondents provided examples of types of opinions for which standardization has worked well. Some, but very little, overlap existed among responses, except with respect to tax-free reorganizations (section 368), as to which five respondents reported that their firms maintain standardized forms. Other responses included opinions rendered in the following contexts: entity classification (*e.g.*, partnerships, REITs,¹⁶⁵ REMICs,¹⁶⁶ S corporations) (three respondents), financing (three), capital markets (two), commercial finance (two), small business stock (section 1202) (two), spinoffs (two), audit requests (one), penalty abatement (one), private placement memorandum opinions (one), public finance (section 103) (one), and SEC mergers and acquisitions (one). Several respondents reported that their firms maintained standard forms or templates for portions of tax opinions (*e.g.*, "standard caveats and disclaimers," "language regarding scope, reliance on other parties, etc.").

Only one question in the survey pertained to training or educating professionals with respect to the preparation of tax opinions. That question appears to contemplate instruction on professional ethics issues and regulatory requirements rather than how-to guides for conceptualizing and drafting an opinion letter. Indeed, many respondents who reported that their firms do provide training referred, in comments, specifically to Circular 230 training or to regularly scheduled continuing education programs. Thus, it appears that few firms formally train tax professionals in programs that are specific to tax opinions.

Sixty-six percent of respondents reported that their firms provide training while 34% reported that their firms do not. A handful of respondents who reported that their firms provide training described such training as a written policy; informal, general, or "on the job by partners"; or as mentoring "when issues come up"; suggesting that far less than 66% of respondents' firms actually hold training sessions on either tax opinions specifically or ethical issues in tax practice (including Circular 230) more generally.

Based on the survey and comments provided by respondents, it appears that firms are not formally teaching tax professionals how to prepare tax opinions. Matters such as fact gathering are both procedural and ethical and are not necessarily intuitive. For example: How does one assure that all of the pertinent facts have been ascertained? To what degree can or should statements or representations made by others be relied upon? Professionals must also appreciate the meaning of the various levels of assurance commonly used

¹⁶⁵ I.R.C. § 856 (real estate investment trusts).

¹⁶⁶ I.R.C. § 860D (real estate mortgage investment conduits).

in tax opinions and be familiar with the analysis or thought process that goes into determining at what level the firm is willing to opine. Professionals should also be conversant in the impact of opinions on their clients (*e.g.*, as penalty defense, privilege issues). Thus, it is quite surprising that for many tax professionals, tax opinion skills are picked up on the job.

5. *Retention Policies*

Only one question in the survey pertained to the maintenance of tax opinions after they are issued. Surprisingly, only 35% of respondents reported that their firms have a policy relating to the cataloging and retention of tax opinions. Sixty-five percent of respondents' firms do not. Thus, it appears that professionals in most firms have no formal means of accessing tax opinions previously rendered by their firms. This is remarkable, given the technological ease of creating and maintaining a searchable database.

No questions in the survey concerned the use of opinions by others in a firm after the fact. Coupled with the low percentage of firms that appear to index or maintain centralized files containing tax opinions, it appears that most tax professionals may be reinventing the proverbial wheel when opinions are requested on issues as to which the firm has already opined. Moreover, other than by making informal inquiries, professionals in such firms have no means of learning whether their firms have ever opined on the same or a similar issue and risk preparing opinions that contradict prior opinions rendered by the same firm.

Most respondents whose firms do have a policy relating to the cataloging and retention of tax opinions described their firms' retention policies as relatively informal. Thus, while these firms retain copies of prior opinions, they are not necessarily in one place (*e.g.*, "maintain all correspondence on our server indefinitely," "informal circulation of 'FYI' copies"). No respondent reported that opinions are indexed or cataloged in any meaningful way.

6. *What Respondents Asked For*

At the end of the survey, respondents were informed that ACTC would like to provide ideas for firms to consider as they adopt or update tax opinion review policies and were asked to provide ideas for what ACTC should include as part of this process.

Several respondents are interested in having a sense of other firms' policies and what constitutes best practices in this area. The survey results described in this Article address the former and may provide a further impetus to explore what should be best practices as a general matter. Perhaps relatedly, several respondents are interested in seeing sample templates or checklists utilized by other firms and understanding the benefits, if any, of the use of standardized language.

Several respondents suggest a need for regular training for professionals drafting opinions and for those serving on review committees. Indeed, the survey results reflect meager opinion training by respondents' firms.

Respondents who practice as solo practitioners or as the only tax partner in a firm seek ideas on how to obtain appropriate review of their tax opinions. Another respondent suggested that appropriate review may be difficult even in firms with multiple tax partners when the drafting partner is particularly specialized and other tax partners might not be as qualified.

Finally, one respondent sought guidance on how other firms decide whether (and when) they will (or will not) issue tax opinions. For example, do firms make these decisions based on the type of transaction, the purpose of an opinion, or the firm's relationship with the requesting client, etc.?

VII. Recommendations

The ACTC survey can serve as a point of departure for discussions within the profession and within firms regarding best practices for preparing and reviewing tax opinions. To that end, this Article makes several modest suggestions to firms for improving their opinion policies and procedures. The Article also proposes areas for further exploration should ACTC wish to conduct a more extensive or comprehensive survey or study.

A. Recommendations to Firms

1. *Firms should periodically review their tax opinion policies and practices.* The survey shows that most firms at which respondents practice have some sort of review policy for issuing tax opinions. The responses reflect a range of approaches. While firms should not change their own practices merely to conform to procedures adopted by others, many of the responses should cause firms to consider whether and how to improve their own rules. Taking stock from time to time is healthy. Moreover, ethical, statutory, and regulatory standards change over time, as do firms' practices and cultures, suggesting that opinion policies should be reviewed and revised on a regular basis.

Regarding the question of whether and why firms should have firm-wide guidelines for the issuance and review of tax opinions, Professor Susan Saab Fortney stated the following with respect to procedures for issuing legal opinions generally:

These procedures provide quality control and reduce the firm's liability exposure for opinion letters. By taking steps to avoid improvidently rendered opinions, law firms may be able to avoid state disciplinary and regulatory actions, as well as civil and criminal liability. For example, by implementing good faith internal procedures for rendering opinion letters, a firm may be able to defend against a finding of scienter under the federal securities laws. In addition to providing some assurance against claims, internal review procedures assist firms in developing uniform approaches to opinion matters,

educate attorneys on relevant developments, and provide a pool of experienced and knowledgeable attorneys with whom difficult or novel issues may be discussed. Internal peer review procedures for opinion letters may also insulate the attorney handling the transaction against pressure from clients to give broad opinions and may shield the attorney from unreasonable demands from attorneys on the other side of the transaction.¹⁶⁷

2. *Firms should decide whether tax opinion review policies should conform to review policies applicable to other types of opinions.* A survey conducted by the ABA Section of Business Law in 2010, which generated 252 responses, reported that almost all responding firms had opinion policies or procedures of some sort.¹⁶⁸ More than three-quarters of respondents, for example, had established “procedures for issuing opinion letters” and for distributing and making “available materials and resources prepared by others . . . regarding opinion letters and opinion practice.”¹⁶⁹ In contrast, responses to the ACTC survey on tax opinions paint quite a different picture. One wonders whether the same firms maintain separate procedures for different departments within the firm or types of opinions (tax vs. nontax). While there may be good reasons for any such differences, firms should consider whether differences are intentional and whether all professional practices should conform to the same policies.

3. *Firms should train tax professionals on best practices for conceptualizing, drafting, and reviewing a tax opinion letter.* The survey suggests that a majority of firms do not provide training specifically related to the issuance of tax opinions, including education relating to applicable ethical, statutory, and regulatory (e.g., Circular 230) standards. Even among firms for which respondents reported the existence of training, many firms educate only informally (e.g., “on the job,” mentoring) or include opinion practice standards within training applicable to tax practice generally.

Firms should provide formal training programs pertaining solely to the process of, and ethical considerations in, drafting tax opinions. Opinion writing is a skill. As an example, omission or misstatement of a crucial fact (even inadvertently) can diminish the value of an opinion to the client. Disclaimers

¹⁶⁷ Susan Saab Fortney, *Are Law Firm Partners Islands Unto Themselves? An Empirical Study of Law Firm Peer Review and Culture*, 10 GEO. J. LEGAL ETHICS 271, 285–86 (1997); but see Ted Schneyer, *The Case for Proactive Management-Based Regulation to Improve Professional Self-Regulation for U.S. Lawyers*, 42 HOFSTRA L. REV. 233, 254 (2013) (“[M]any law firm partners regard being monitored by their partners as an ‘affront.’”).

¹⁶⁸ Legal Ops. Comm. of the ABA Section of Bus. Law, *Report on the 2010 Survey of Law Firm Opinion Practices*, 68 BUS. LAW. 785, 787 (2013) [hereinafter 2010 Business Law Survey]; see also Comm. on Legal Ops., ABA Section of Bus. Law, *Law Office Opinion Practices*, 60 BUS. LAW. 327 (2004).

¹⁶⁹ 2010 Business Law Survey, *supra* note 168, at 798 (responses to question 4).

are often necessary for ethical or liability purposes. Every professional involved in the opinion process should be proficient in firm rules and policies as well as the applicable ethical, statutory, and regulatory standards, and should understand the expectations of the firm in terms of form and format. Moreover, training programs confirm that all participants are trained equally and ensure consistency among professionals and across offices.

4. *Firms should maintain and make available indexed or searchable databases or files of previously issued tax opinions.* The survey suggests that most firms do not have policies relating to the cataloging or retention of tax opinions.¹⁷⁰ Maintaining an indexed or searchable database or file would provide numerous benefits, including ensuring consistency among positions proffered by the firm. In large firms or tax departments, such files could be the only means by which a current tax opinion writer can learn who in the firm has dealt with a similar issue or issues.

5. *Firms should consider using standard language for parts of tax opinion letters.* The survey showed a split among firms on the use of standardized language. Just under one-half of respondents' firms use standard forms or language while just over one-half do not. If there is a disagreement among tax professionals on this point, firms nonetheless should consider whether and the extent to which standardized language could be beneficial. Standard language is preferable to modeling (or copying) language from a prior opinion because an earlier opinion might have been drafted to accommodate particular or peculiar facts, which might not be obvious to the current opinion drafter.¹⁷¹ Of course, neither the legal analysis reflected in a tax opinion nor the opinions themselves can ever be standardized because they relate to specific taxpayers and unique facts.

6. *Firms should decide what constitutes a tax opinion for purposes of their review policies.* The survey reflects a wide variety of practices with respect to the types of written advice that require review under a firm's opinion review policy. Articulating clearly the breadth of a policy both sets expectations and avoids the issuance of advice without review when the substance or format of advice should have merited review by others.

7. *Firms should consider whether to formally require tax opinion preparers to consult with another tax professional or professionals prior to delivering a tax opinion for review.* The survey did not ask whether firms require opinion preparers to consult with colleagues prior to drafting. One's partners, for example, could identify nonobvious issues or concerns and could assist in the legal analysis and process of determining the level of assurance at which an

¹⁷⁰ By contrast, 51% of respondents to the 2010 Business Law Survey reported that their firms maintain a file or archive of opinion letters issued by the firm. 2010 Business Law Survey, *supra* note 168, at 807 (responses to question 34). Nineteen percent reported that their firms maintain a file or archive of opinion letters issued by other firms. *Id.* (responses to question 35).

¹⁷¹ Comm. on Legal Ops., ABA Section of Bus. Law, *Law Office Opinion Practices*, *supra* note 168, at 329.

opinion will be issued. A colleague within one's own practice area also is more likely to see that a transaction raises special concerns or requires special procedures. When a firm's review committee consists of professionals from outside of the firm's tax practice, knowing that another tax professional or professionals have been consulted can provide comfort or confidence in the opinion rendered.

Relatedly, firms might discuss the point in time for initiating the opinion review process. Should review begin after an opinion letter is complete or should reviewers become involved at an earlier point? Does the answer to this question depend on the type of transaction or the difficulty or novelty of the issue(s) presented?

8. *Firms should consider and define the role of reviewers.* The survey suggests that most firms require review of tax opinions by at least two tax partners. Only a minority of firms require nontax professionals to participate in the process. When nontax professionals participate, what role do they play? Are they expected to familiarize themselves with complex tax principles or is there some other reason for their presence? Indeed, what is the role of tax professionals in the review process? Do they have the ability to stop the issuance of an opinion or require the inclusion of particular language, or is their role merely advisory?

9. *Firms should consider including nonpartners in the opinion review process.* Only 20% of respondents' firms permit nonpartners to participate in the opinion review and approval process. This is quite surprising in light of the growth of nonequity partnerships and counsel positions.¹⁷² Indeed, if a counsel attorney is an expert in an area in which no partner shares a similar level of expertise, it is illogical to exclude that individual from the process. Of course, counsel attorneys might be consulted during the drafting process or prior to review, but their views and opinions might not be taken into account at all if the drafting professional takes a different view. If a purpose of the review process is to ensure the accuracy of the issue(s) opined upon, it makes no sense to exclude experts.

B. *Recommendations for Further Study*

The ACTC survey provides useful information and a starting point for firms that are developing tax opinion policies and procedures and for those reviewing policies and procedures already in place. Should ACTC wish to conduct a broader survey, this Article suggests the following areas of inquiry.

1. *Add questions concerning fact-finding processes.* As previously discussed, professionals rendering tax opinions are (or may be) subject to statutory, regulatory, and ethical rules requiring a degree of diligence in identifying and ascertaining relevant facts and outlining the circumstances under which

¹⁷² See Allen, *supra* note 164.

a professional can (and by negative inference, cannot) rely on factual representations by others.¹⁷³ Thus, a future study should inquire specifically into the process or processes under which facts are gathered and the degree of reliance on clients' statements that is permitted by firms.

2. *Tease out differences, if any, between law firms and accounting firms.* The survey did not distinguish between law firms and accounting firms and therefore offers no insights into differing practices, if any, between the two. If there are differences, it may be the case that best practices are not the same across professional designations. It is also possible that common practices in one of the professions, which are not common in the other, could work well in either setting. It would be interesting to understand whether and how the practice of rendering tax opinions in accounting firms differs from that in law firms and what each type of firm could learn from the other.

3. *Tease out differences, if any, between small and large firms.* Some of the comments submitted by respondents practicing in small firms suggested that certain of their practices (e.g., including nontax partners as members of opinion review committees) are followed out of necessity. It would be helpful, therefore, to clarify best practices where there are few, if any, tax professionals in a firm other than the drafting professional, and best practices when there are many tax practitioners in a firm. Indeed, some policies, such as requiring the maintenance and cataloging of tax opinions, are much more important in large firms, where some or many tax professionals could easily be unaware of the transactions in which others are or have been engaged.

4. *Circulate surveys broadly and expend effort to obtain responses.* While an excellent first step, the ACTC survey was circulated only to members of ACTC. The response rate was low. As a consequence, whether the results reflect firm or tax practices more generally remains unclear. A future study should circulate surveys to a wider selection of firms and there should be follow-up efforts to obtain responses.

VIII. Conclusion

The survey results reflect that more than a few firms are actively engaging in the practices recommended in this Article. Most respondents' firms have an opinion review policy in some form. Most firms require review by a least two partners, who in most cases are tax partners. Comments submitted by respondents reflect interest in hearing about other firms' procedures in order to make better decisions about their own firms' policies. Many respondents are interested in training (or more training) programs.

The most troubling revelation is the lack of policies within firms for maintaining archives of tax opinions that firms have already issued. Maintaining an indexed or searchable database or file of such opinions is technologically easy and should become standard practice.

¹⁷³ See Cummings, *supra* note 4, at 1050–53.

The survey also reveals a range of approaches to opinion policies and procedures. This Article and the survey, together, should encourage further discussion within firms and across firms regarding best practices in the area.

Appendix

Survey Responses

1. *Does your firm have a formal opinion review policy for issuing tax opinions?*

Yes	70	92.1%
No	<u>6</u>	7.9%
	76	

If you answered "yes," is your firm's policy in writing?

Yes	34	48.6%
No	<u>36</u>	51.4%
	70	

Three of nine respondents indicated that their firms do not have a formal opinion review policy but went on to answer questions pertaining to their firms' review policies, suggesting that these three individuals interpreted this question as contemplating a formal, versus an informal (or perhaps unwritten), review policy. As a consequence, these respondents are reported here as yeses for purposes of the first part of question 1 and noes for purposes of the second part.

2. *Does the policy apply solely to formal tax opinions, or is it broader than that?*

Applies solely to formal tax opinions	47	68.1%
Broader than formal tax opinions	<u>22</u>	31.9%
	69 ¹⁷⁴	

If broader, to what written communications does the policy apply?

Examples of responses: any written tax advice, informal tax opinions, advice in large transactions/advice "having a potentially important effect," all legal opinions rendered by the firm

3. *Does your firm have a tax opinion review committee?*

Yes	23	30.3%
No	<u>53</u>	69.7%
	76	

¹⁷⁴ One respondent did not answer this question.

If so, how is the tax opinion review committee staffed?

Examples of responses: senior tax partners, senior attorneys, one firm committee that reviews all opinions (including tax opinions), partners with tax LL.M. degrees, tax partner not involved in the engagement, head of tax group/national tax group, managing shareholder and senior tax counsel, two other members with expertise, specified number (two, three, five partners)

4. *Alternatively, in lieu of a tax opinion review committee, does your firm require at least two partners to approve the opinion?*

Require approval by at least two partners	55	73.3%
Does not require approval by at least two partners	<u>20</u>	26.7%
	75	

5. *Can one or more of the partners reviewing and approving the tax opinion be nontax partners? (For example, for an opinion on a loan transaction, can the second partner review be done by a commercial finance attorney?)*

Yes	16	21.9%
No	<u>57</u>	78.1%
	73	

6. *Can one or more of the individuals reviewing and approving the tax opinion be nonpartners?*

Yes	14	19.7%
No	<u>57</u>	80.3%
	71	

7. *Does your firm's tax opinion review policy have different approval requirements based on the type of opinion being issued (e.g., penalty protections, invalidity of a regulation, closing opinions, etc.)?*

Yes	13	18.1%
No	<u>59</u>	81.9%
	72	

Examples of responses: greater review/higher standard of review for opinions with higher level of confidence, public transactions with SEC reporting, "sticky" issue, complex opinion

8. *Does your firm's tax opinion review policy have different approval requirements based on the level of opinion (e.g., will, should, more likely than not) being issued?*

Yes	3	4.1%
No	<u>71</u>	95.9%
	74	

9. *Does your firm provide training specifically related to the issuance of tax opinions, including education relating to applicable standards such as Circular 230, opinion subject to ABA Ethics Opinions 346 or 85-352, requirements for penalty protection under the Internal Revenue Code and regulations, and applicable SEC requirements (e.g., SEC Staff Legal Bulletin No. 19)?*

Yes	25	33.8%
No	<u>49</u>	66.2%
	74	

10. *Does your firm have a policy relating to the cataloging and retention of tax opinions?*

Yes	26	34.7%
No	<u>49</u>	65.3%
	75	

If so, please describe your policy.

Examples of responses: opinions stored in a data bank or accounting departments, both digital and hard copies kept, firm maintains a directory of opinion letters, all legal opinions in common binder, cataloged within document management system

11. *Has your firm created one or more standard form(s) of opinions (or at least those portions of opinions that can be "standardized")?*

Yes	34	45.3%
No	<u>41</u>	54.7%
	75	

If your firm has created standard forms of tax opinion, can you provide examples of the types of opinions where standardization has worked well?

Of the responses, there were no common themes. Examples included: tax-free reorganizations; penalty abatement and litigation; commercial and public finance; repetitive types of offerings (capital markets); entity classification; audit requests; general language such as burden of proof

12. *ACTC would like to provide ideas for firms to consider as they adopt or update their formal "Tax Opinion Review Policy." Please provide any ideas that you think we should include as part of this process.*

13. *What is the size of your firm?*

1-9	10	13.9%
10-49	8	11.1%
50-99	14	19.4%
100-499	11	15.3%
500 or more	<u>29</u>	40.3%
	72	

14. *What is the size of the tax department in your firm?*

1-9	27	36.0%
10-20	21	28.0%
21-50	16	21.3%
51-100	4	5.3%
More than 100	<u>7</u>	9.3%
	75	