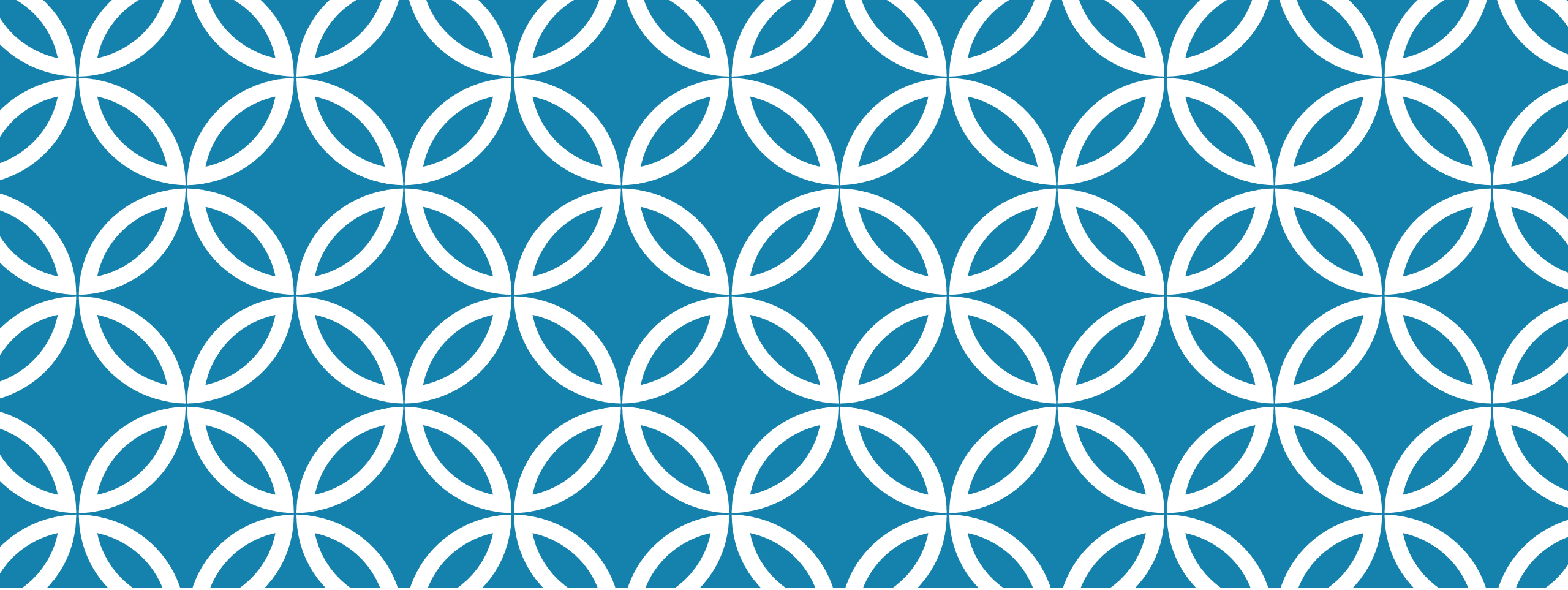

TREASURY CIRCULAR 230

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LEARNING OBJECTIVES

- Know the expectations for tax practitioners in serving clients, including the duty of confidentiality, competency and proper administration of the tax law.
- Understand the practitioner's obligations to disclose certain client information when representing them against the IRS.
- Understand the provisions of Treasury Circular 230, the IRC and common law as it pertains to tax practitioners.
- Know the IRS requirements before an individual may file returns on behalf of others as a preparer.

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SOURCES OF TAX PRACTICE STANDARDS

- Treasury Circular 230
- Internal Revenue Code
- AICPA Statement on Standards for Tax Services
- AICPA Code of Professional Conduct
- Common Law

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PRACTICE STANDARDS UNDER TREASURY CIRCULAR 230

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TREASURY CIRCULAR 230

"Circ. 230"

Regulates individuals practicing before the IRS.

Issued by the Treasury Department.

Applies to all CPAs, attorneys, enrolled agents and anyone representing taxpayers before IRS.

Gives the government the ability to impose penalties.

Covers written advice to clients.

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KNOWLEDGE CHECK!

The tax practice standards in Treasury Circular 230 do not apply to which of the following individuals:

a. An individual who prepares tax returns for compensation.

b. A CPA assisting a client who is being audited by the IRS.

c. Enrolled Agents

d. An accountant responsible for preparing financial statements in accordance with GAAP.

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31 U.S.C. §330. PRACTICE BEFORE THE DEPARTMENT

The Treasury Secretary may suspend or disbar from practice before the Department, or censure, a representative who —

is incompetent;

is disreputable;

violates regulations prescribed under this section; or

with intent to defraud, willfully and knowingly misleads or threatens the person being represented or a prospective person to be represented.

NOTE: The Loving case, discussed later, discussed whether Sec. 330 gave the IRS the authority to regulate who could be a tax preparer.

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KEY CIRCULAR 230 PROVISIONS

Information to be Furnished (10.20)

Knowledge of client's omission (10.21)

Diligence as to Accuracy (10.22)

Prompt disposition of pending matters (10.23)

Fees (10.27)

Return of client's records (10.28)

Conflicting interests (10.29)

Solicitation (10.30)

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KEY CIRCULAR 230 PROVISIONS (CONT'D)

Negotiation of taxpayer checks (10.31)

Best practices for tax advisors (10.33)

Due Diligence Standards –Returns/Docs (10.34)

Negotiation of Taxpayer Checks –(10.31)

Competence (10.35)

Due Diligence for Written Advice (10.37)

Giving False or Misleading Info (10.51(a)(4))

Willfully Assisting, Counseling or Encouraging a Client to Evade Taxes or Payment Thereof (10.51(a)(7))

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CIRC. 230 § 10.21 KNOWLEDGE OF CLIENT'S OMISSION

"A practitioner who . . knows that the client has not complied with the revenue laws of the United States or has made an error in or omission from any return, document, affidavit, or other paper . . . must advise the client promptly of the fact of such noncompliance, error, or omission. "

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KNOWLEDGE CHECK!

Alexander, a tax practitioner, becomes aware that his biggest and most important client, hedge fund Greenrock, Inc., has been systematically under reporting material amounts of taxable income. Which of the following is the correct course of action according to Treasury Circular 230?

a. Call the IRS directly and tell them about the underreporting.

b. Inform the client that they need to disclose the income to the IRS.

c. Withdraw from the engagement if the client refuses to disclose.

d. Both b. and c.

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ACTS DISCREDITABLE

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TREAS. CIRC. §10.51(A)(4) DISREPUTABLE CONDUCT

- Cannot give false/misleading information to the Treasury or any agent.
- Cannot willfully assist, counsel, or suggest to a client/prospective client an illegal plan to evade Federal taxes
- Cannot violate any Federal tax law

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TREAS. CIRC. §10.51(A)(13) ORAL OR WRITTEN OPINIONS

- Behavior is considered Disreputable/Incompetent Conduct if practitioner produces or engages in:
  - False opinions
  - Intentional or recklessly misleading opinions;
  - Pattern of Incompetent Opinions.
  - Counseling conduct known to be illegal/fraudulent;
  - Concealing matters required by law to be revealed.
  - Reckless conduct, which is highly unreasonable omission/misrepresentation from standards of ordinary care
  - Gross Incompetence, which is gross indifference, grossly inadequate preparation, consistent failure to perform obligations to client

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KNOWLEDGE CHECK!

Amanda, EA, is helping a married couple, Homer and Wanda, prepare their tax return. Amanda accidentally uncovers the fact that Homer is under-reporting some of their income and diverting the funds to pay for a bass boat. Amanda does nothing to correct the situation since she doesn't want to be fired by Homer. She prepares the return with the incorrect income numbers and sends it to the taxpayers for signing and filing. Which of the following statements is false?

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KNOWLEDGE CHECK! (CONT'D)

a. Amanda has committed an acts discreditable under Treasury Circular 230 since she knowingly allowed Wanda to sign a return in which there was a material error.

b. Amanda has violated Treas. Circ. 230 §10.51(a)(4) Disreputable Conduct provisions since she assisted a client in evading Federal taxes.

c. Amanda has done nothing wrong since all she is doing to making the client happy.

d. Amanda may be subject to probation, suspension or disbarment.

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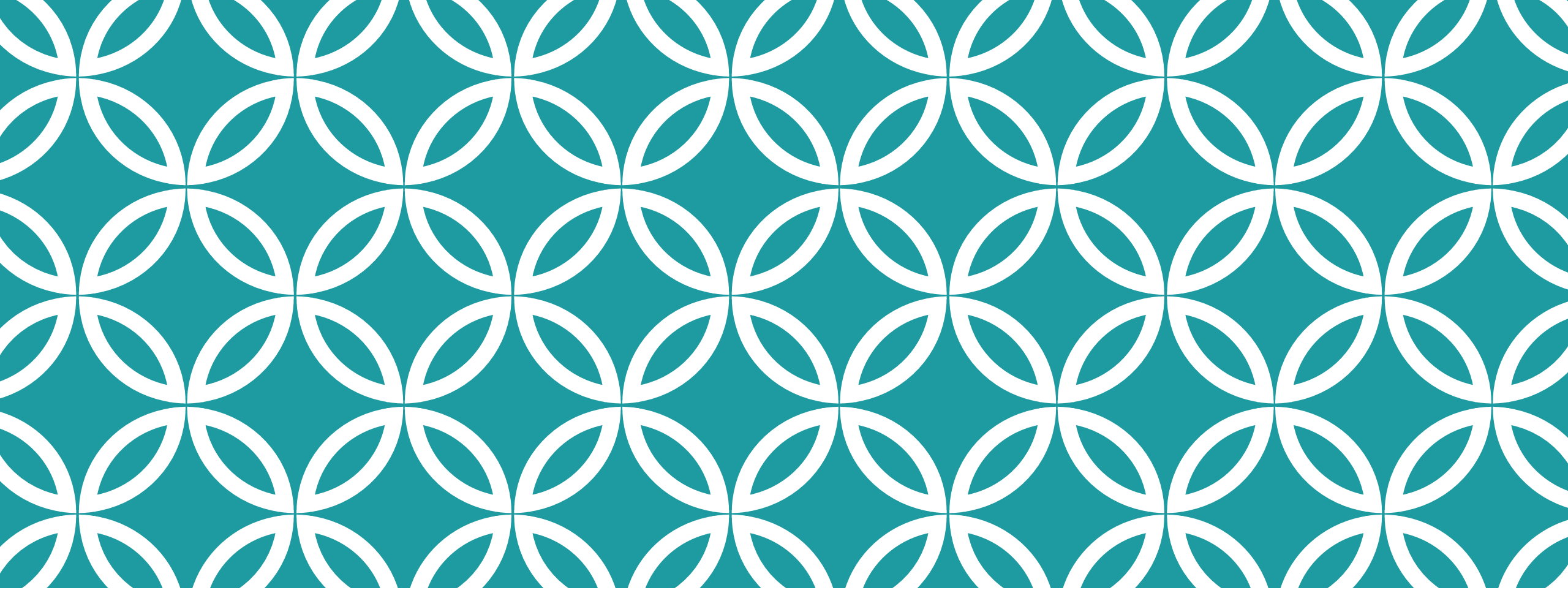

DUE CARE

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TREAS. CIRC. §10.35 COMPETENCE

A practitioner must possess the necessary competence to engage in practice before the Internal Revenue Service. Competent practice requires the appropriate level of knowledge, skill, thoroughness, and preparation necessary for the matter for which the practitioner is engaged.

- Be competent
- Become competent
- Hire/consult competence

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TREAS. CIRC. § 10.20 INFORMATION TO BE FURNISHED

- Must promptly submit records or information to the IRS unless the information is privileged.
- Practitioners must make a reasonable inquiry of the client regarding the identity of persons who may have possession and control of requested information. This person must be identified to the IRS.
- Cannot interfere with the IRS while they are in the process of obtaining information.

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TREAS. CIRC. §10.22 DILIGENCE AS TO ACCURACY

Practitioner must exercise Due Diligence in:

Preparing, approving and/or filing tax returns, documents, affidavits etc. relating to IRS matters.

Determining correctness of oral/written representations made to the client or to Treasury personnel.

Can rely on other's work product only if it is reasonable to do so.

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TREAS. CIRC. § 10.23 PROMPT DISPOSITION OF PENDING MATTERS

"A practitioner may not unreasonably delay the prompt disposition of any matter before the Internal Revenue Service."

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§ 10.33 BEST PRACTICES FOR TAX ADVISORS.

Should always use best practices, including:

- Communicating clearly with the client regarding the terms of the engagement.
- 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.
- Advising the client regarding the import of the conclusions reached
- Acting fairly and with integrity in practice before the Internal Revenue Service.

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TREAS. CIRC. §10.34(A) STANDARDS FOR TAX RETURNS

May not sign a tax return or advise a position on a tax return, willfully, recklessly, or through gross incompetence if:

Lacks reasonable basis

Unreasonable position (sec. 6694(a)(2))

Willful attempt to understate liability (6694(b)(2)(A))

Reckless, intentional disregard of rules and regulations (6694(b)(2)(B))

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STANDARDS FOR DOCUMENTS AND OTHER PAPERS – §10.34(B)

- May not advise taking positions that are frivolous.
- To delay or impede tax administration.
- That demonstrates an intentional disregard of rules or regulations.

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PENALTIES AND CLIENT RELIANCE §10.34(C),(D)

Must advise client of potential penalties and their avoidance through disclosure (10.34(c))

Can rely on client information in good faith, without verification but cannot ignore implications of other information furnished

Cannot ignore actual knowledge

Must make reasonable inquiries for incorrect, inconsistent or incomplete information

No Willful Blindness

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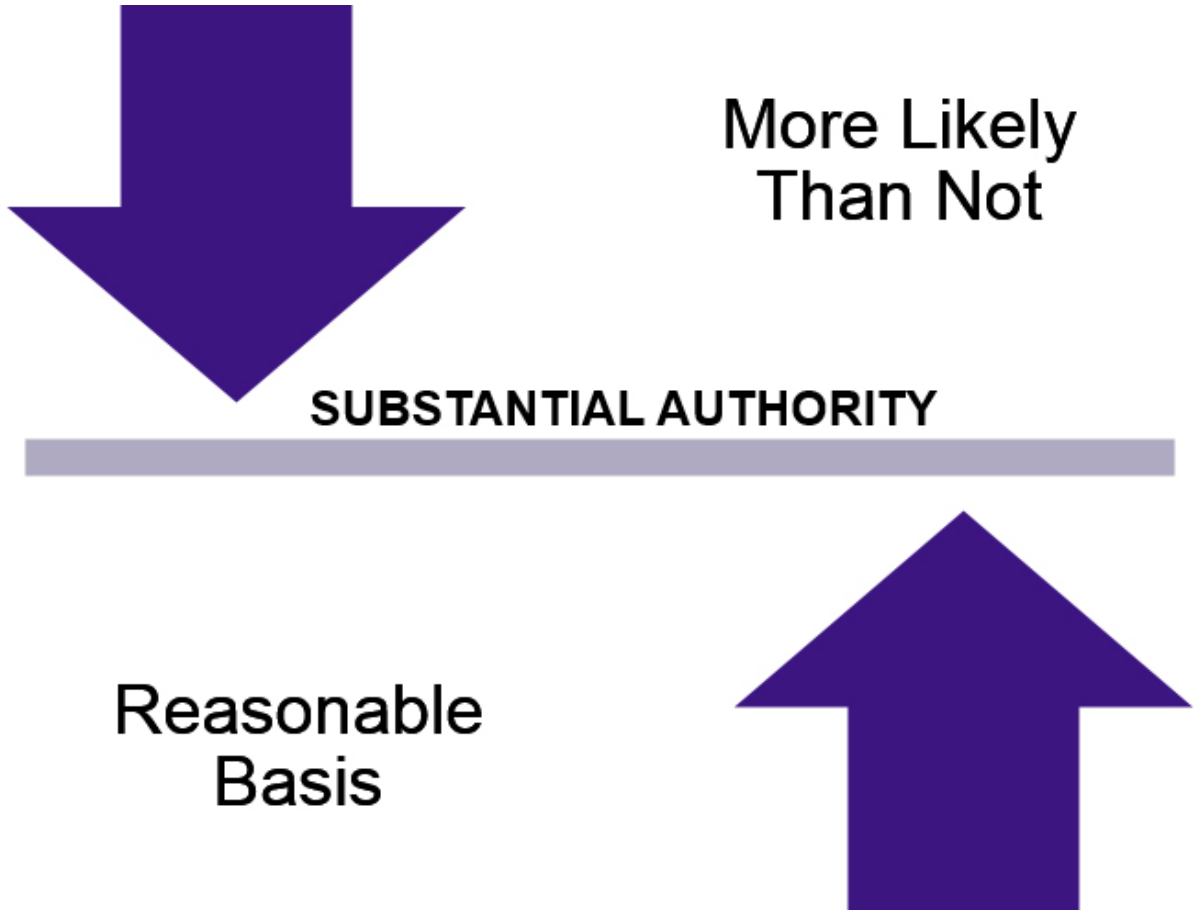
SUBSTANTIAL AUTHORITY



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LEVELS OF TAX AUTHORITY

- Will = 100% certainty the position will prevail if challenged.
- Should = At least 80% certainty but less than 100%.
- More Likely than Not – Greater than 50% but less than 80%.
- Substantial Authority – Around 40% but less than MLTN.
- Realistic Possibility of Success – 1 in 3 change of prevailing.
- Reasonable Basis – Significantly higher than not frivolous and lower than RPS.
- Not Frivolous – Not patently improper; some merit to position.
- Frivolous – Patently improper.

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KNOWLEDGE CHECK!

Raj's client, Sally, has told him that she nets $40K a year in self-employment income. Raj knows that Sally does not have any other source of income, substantial savings, or inheritance, yet Sally owns a mansion in a tony neighborhood, drives an expensive imported roadster, and shops in high-end stores. Does Raj have a duty to make further inquiry?

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KNOWLEDGE CHECK! (CONT'D)

a. No, because he can accept anything a client tells him without further inquiry.

b. Yes, because Raj has a duty to make further inquiry since there is a possible inconsistency between the $40K in income and what the client really earned.

c. No, because Sally's lifestyle is none of his business.

d. Both a. and c.

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TREAS. CIRC. §10.37 DUE DILIGENCE FOR WRITTEN ADVICE

Reasonable factual and legal assumptions

Reasonably consider all relevant facts

Reasonable efforts to identify and ascertain the relevant facts

No unreasonable reliance on representations, statements, findings, or agreements. No audit lottery positions or advice

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CASE STUDY:

RONI DEUTCH, "THE TAX LADY"

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KNOWLEDGE CHECK!

Marcus prepares the tax return for superstar Justin Timberwood. He sells information to a national tabloid regarding Justin's charitable contributions. Which of the following is true?

a. Marcus has not done anything wrong since he only revealed part of the client's tax return, not the whole document.

b. Marcus has violated tax practitioner standards since he did not maintain client confidentiality.

c. Marcus' actions are acceptable since anybody in his position would have done the same thing.

d. None of the above.

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OTHER ISSUES

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TREAS. CIRC. § 10.27 FEES

Cannot charge an unconscionable fee in connection with any matter before the Internal Revenue Service.

Generally, cannot charge a contingent fee for services in dealing with the Internal Revenue Service, except:

1. Examination of an original tax return; or
2. Preparation of an amended return or claim for refund or credit if within 120 days of written notice of examination of the original tax return.
3. Preparation of a claim for credit or refund due to assessed statutory interest or penalties.
4. Services rendered in connection with any judicial proceeding arising under the Internal Revenue Code.

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TREAS. CIRC. § 10.28 RETURN OF CLIENT'S RECORDS

- Practitioner must, upon request, promptly return all client
- Can retain copies of the records returned to a client.
- Fee dispute generally does not relieve the practitioner of his or her responsibility

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TREAS. CIRC. § 10.29 CONFLICTING INTERESTS.

Cannot represent a taxpayer if there is a conflict of interest. Examples:

- One client's interests will be directly adverse to another client's
- Representation of a clients will be materially limited by the practitioner's responsibilities to another client, a former client or a third person, or by a personal interest of the practitioner.

Can still represent a client if:

- The practitioner will still be able to provide competent and diligent representation
- The representation is not prohibited by law; and
- Each affected client gives informed consent in writing.

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TREAS. CIRC. § 10.30 SOLICITATION

Cannot advertise using false, fraudulent, or coercive statement or claim; or a misleading or deceptive statement or claim.

Cannot utilize the term “certified” or imply an employer/employee relationship with the Internal Revenue Service.

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TREAS. CIRC. §10.31 NEGOTIATION OF TAXPAYER CHECKS

May not endorse, negotiate, direct to an account any US Treasury check in another's name

- No cashing
- No endorsing
- No depositing to a controlled account
- No split electronic transfers
- Client concurrence is irrelevant
- IRC 6695(f) penalty

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CASE STUDY: STEVEN MARTINEZ

- Worked as an IRS agent until leaving and starting his own shop.
- Starting in 1994, Steven would send clients the "true" return for them to approve, but then file a return for much less AGI.
- Clients would have made tax payments to a "trust" account which was actually Martinez's own account.
- Clients finally found out about it in 2009 as he was facing trial.
- In 2012, Martinez offers the gardener $100,000 to kill the three witnesses.

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REGISTERED TAX RETURN PREPARERS ("RTRP")

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HISTORY OF RTRP

- Prior to 2010, anyone could call themselves a tax preparer.
- IRS instituted the RTRP initiative, which required preparers to:
  - Register with the IRS;
  - Obtain a PTIN;
  - Pass a competency test; and
  - Complete 15 hours of continuing education credits annually.
  - Adhere to Treasury Circular 230.
- RTRPs were allowed to prepare and sign federal tax and were granted limited authority to represent taxpayers before the Internal Revenue Service.

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HISTORY OF RTRP (CONT'D)

- CPAs, Attorneys, EAs and Volunteers were exempt from testing and CE.
- In January, 2013, the RTRP program was suspended due to the court rulings on Loving v. IRS.
- Those covered by the RTRP program no longer have to register with the IRS, take the competency test or attend CE.
- Loving does not affect the requirements for CPAs, attorneys, or EAs.

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LOVING V. IRS, 743 F.3D 1013 (D.C. CIR. 2014)

- In 2011, the IRS interpreted Sec. 330 to permit regulation of tax preparers. Instituted the RTRP program to address concerns about the competency of some tax preparers.
- Plaintiffs sued, claiming new RTRP regulations would cause them to lose business because of increased costs or force them to close their businesses.
- Plaintiffs:
  - Sabina Loving from South Side of Chicago, serving low income clients.
  - Elmer Kilian
  - Giovanni Gambino - a financial planner

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LOVING V. IRS (CONT'D)

- The D.C. Court of Appeals upheld the District Court ruling, which held that Sec. 330 does not extend to give the IRS power to regulate the tax preparation industry.
- They may however, continue to regulate who can practice in front of the IRS (e.g. representing taxpayers during an adversarial proceeding such as an audit, Appeals, or for other procedure or matters before the IRS).

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AFTER LOVING

- IRS established the Directory of Federal Tax Return Preparers.
- Gives the general public information on a tax return credentials or qualifications.
- The directory contains only those with a PTIN or have obtained an Annual Filing Season Program Record of Completion ("AFSP").
- Can receive an AFSP certificate by:
  - 18 CE hours, which includes a 6 hour federal tax law refresher course with an exam.
  - Renewing PTIN.
  - Adhering to Treas. Circ. 230.

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QUALIFYING CONTINUING EDUCATION

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REQUIRED ANNUAL CONTINUING EDUCATION

- Attorneys – Usually around 15 hours per year
- CPAs – Average of 40 hours per year
- EAs – 72 hours every 3 years, minimum of 16 per year.
- AFSP Certificate Holders – 18 hours annually
- Tax preparers not included in any of the above categories – None unless required by alternative certification.

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OTHER ETHICAL ISSUES

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TAX PREPARER PENALTIES (1 OF 4)

"Preparer" - Prepares for compensation or hires people who do

Signing vs. non-signing preparers

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TAX PREPARER PENALTIES (2 OF 4)

§6695 Penalties – $60 per occurrence unless specified.

- Furnish copy of return.
- Sign a return.
- Failure to furnish correct ID #.
- Maintain copy or list.
- Failure to furnish correct information return.
- Negotiation of check – $600.
- Child Tax Credit, Earned Income Credit, Hope and Lifetime Learning Credits – $600.

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TAX PREPARER PENALTIES (3 OF 4)

§6694 Penalties

1) No substantial authority + no disclosure - greater of $1,000 or 50% income derived - 33% < substantial authority < 50%.
2) Willful attempt to understate or reckless/intentional disregard - greater of $5,000 or 50% income derived.
3) Aiding & Abetting = $10,000 penalty.

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TAX PREPARER PENALTIES (4 OF 4)

§ 7206 Criminal Fraud – Willfully aiding or assisting in the preparation of any tax document that is fraudulent or false in any material matter.

- $100K + 3 years.

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KNOWLEDGE CHECK!

Ralph, a cost segregation specialist, was asked to prepare depreciation schedule for Estaban's tax return. Sue Lin prepared the rest of the return and incorporated the depreciation deduction from Ralph's schedule, which significantly reduced the Estaban's tax liability. Which of the following is true?

a. Ralph is not considered a tax preparer because he did not sign the return.
b. Ralph is considered a non-signing tax preparer and therefore could be subject to tax preparer penalties under the IRC.
c. Sue Lin is the only person considered a tax preparer.
d. Ralph is not considered a tax preparer since Estaban is ultimately responsible for any tax liability due.

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CRIMINAL FRAUD

Conducted by IRS Criminal Investigation Division ("CID").

Criminal fraud requires proof beyond a reasonable doubt.

Civil fraud needs only proof by preponderance of the evidence.

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ADVISOR PENALTIES

- Failure to furnish information on reportable transactions:
  - $50K – individuals.
  - $250K – others.
- Failure to maintain investor list.
- Tax shelter fraud – lesser of:
  - 100% Gross Income derived.
  - $1,000.

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KNOWLEDGE CHECK!

Austin, CPA, has been assessed by the IRS a Section 6694 understatement penalty because of allegedly faulty work in advising a client the taxability of a transaction. What is the best way of defeating this penalty?

a. Ask the IRS for a do-over so Austin can re-prepare the return correctly this time.

b. Austin has no liability since it is ultimately the taxpayer's responsibility to file a correct return.

c. Demonstrate that Austin had at least substantial authority based on an analysis of the IRC, Treasury Regulations, Case Law and Treasury publications.

d. None of the above.

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COMMON LAW STANDARDS

Accountants owe their clients a common-law duty to exercise reasonable care.

Whether "Reasonable Care" has been exercised is usually based on if tax practitioner standards have been met.

If not, then practitioner may be sued under a state's tort law or potentially under contract claims.

Tortious act can be categorized as either negligence-based or intentional.

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NEGLIGENCE-BASED TORTS

Common Law Negligence Claims based on accountant's failure to exercise reasonable care towards a client.

Negligent Misrepresentation – used when a non-client is injured.

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KNOWLEDGE CHECK!

Which of the following is NOT a way of defending a tax preparer from a negligence lawsuit?

a. Demonstrate that the tax practitioner acted reasonably by meeting tax practice standards.

b. Show that the tax practitioner's actions, even if wrong, did not cause the client's losses.

c. Bring evidence that the taxpayer's controller gave the tax preparer bad information and there was no way the preparer would have known this fact.

d. Ignore the lawsuit and hope it will go away.

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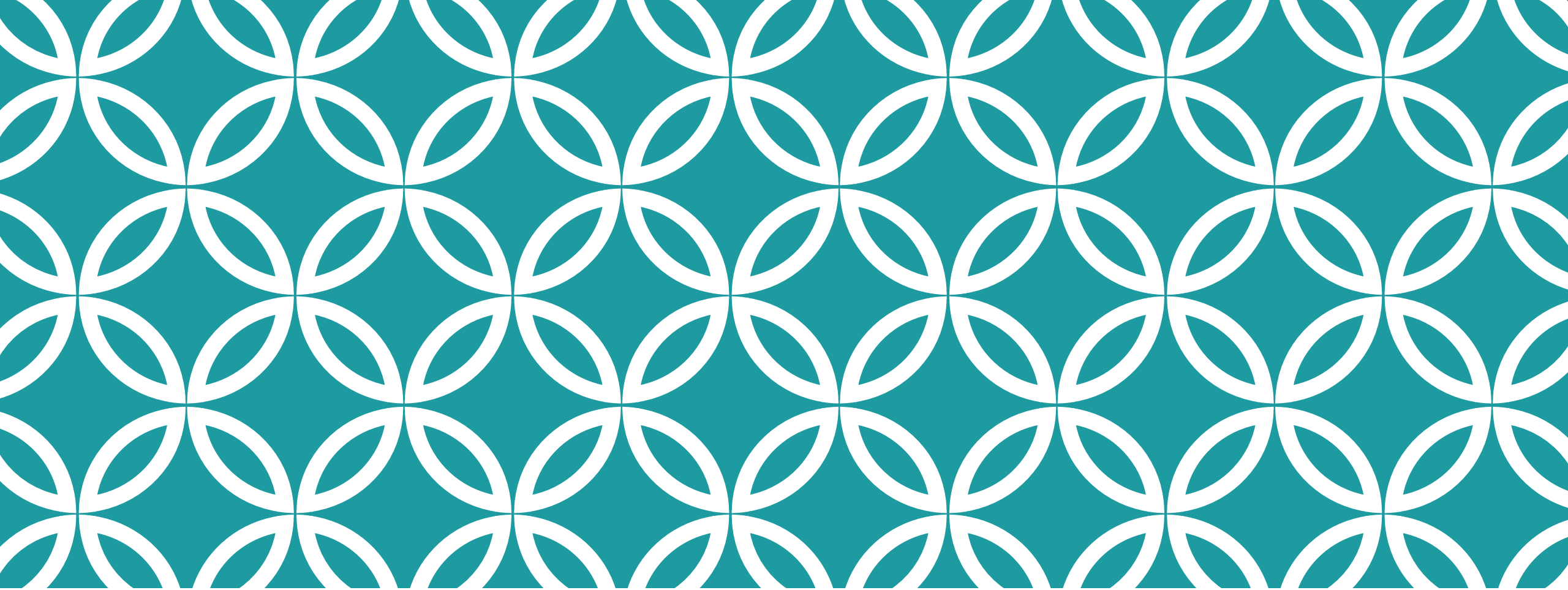

QUESTIONS?

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