Senator Grassley
Follow-Up Questions for the Record

Cono Namorato,
Nominee, Assistant Attorney General for the Tax Division
August 14, 2015

1. In your 2008 letter to the IRS you advocated that the IRS investigate the Alliance Defense Fund's ("ADF") Pulpit Initiative. This initiative encouraged churches who maintained 501(c)(3) non-profit status, to "preach from the pulpit a sermon that would address the candidates for government office in light of the truth of the Scripture," the goal of which was "to generate test cases [to] carry to the U.S. Supreme Court" in order to challenge the constitutionality of the political activity ban as applied to churches.[1] In order to determine whether any churches violated the ban on "politicking" the Internal Revenue Service would have to monitor the content of sermons. Do you believe this is an appropriate role for the Service? Please explain in detail.

   Answer: The IRS is charged with administering a complex and wide ranging federal income tax law that requires a strategic deployment of resources. The allocation of IRS resources is a matter determined by the Department of Treasury and the IRS. In my view, monitoring the content of sermons would not be a wise use of those resources.

2. In your responses to my Questions for the Record, in Question 4 you noted that the "Tax Division's only role would be to litigate disciplinary action in Federal District Court after a practitioner exhausts all of his or her administrative remedies." You then observed this scenario is extremely rare. However, if the Service were to more vigorously pursue action against attorneys under Circular 230—a policy you have expressly supported in the past[2]—wouldn't you expect the number of disciplinary actions the Tax Division litigates to increase?

   Answer: In my experience as both the former Director of the IRS Office of Professional Responsibility (OPR) and as an attorney representing practitioners before OPR, I have found that it is rare for a practitioner to litigate the disciplinary action taken by OPR in federal district court. To provide more context, in the past several years, I am aware of only two cases filed by practitioners in federal court and litigated by the Tax Division.

[1] *See* Alliance Defending Freedom, *Speak Up: Pulpit Freedom Sunday Frequently Asked Questions* 1-2, http://www.adfmedia.org/files/ChurchFAQ_ PulpitFreedom.pdf (last visited Oct. 17, 2014).

[2] Cono Namorato, *Update of the IRS's Office of Professional Responsibility: The Importance of Firm Responsibility*, 57 Tax Executive 43 (2005); Cono Namorato, *U. Va. Tax Institute—Various Topics: Circular 230, Preparer Standards, Voluntary Disclosure and Criminal Investigations*, (2008)(prepared text)(on file with the Committee); Cono Namorato, *UCLA Tax Institute—Current Enforcement Priorities of the IRS*, (2006)(prepared text)(on file with the Committee).

On the other hand, the IRS routinely publishes lengthy lists of practitioners who have been sanctioned by OPR for misconduct. If I am confirmed as Assistant Attorney General for the Tax Division, I would make the defense of disciplinary actions taken by OPR a priority regardless of the number of actions brought by practitioners.

3. Given the developments in *Loving*[3] and *Ridgely*[4], in your view, what constitutes practice under Circular 230? Please provide specific examples about the scope of behavior you believe Circular 230 appropriately governs.

Answer: As noted in my responses to Questions 5 and 7 submitted on July 31, 2015, in light of the decisions in *Loving* and *Ridgely*, the scope of Circular 230 is uncertain at this time. Examples of practice still governed by Circular 230 after *Loving* and *Ridgely*, include, in my view, the representation of: a taxpayer during the examination or appeals process; a taxpayer who is the subject of a criminal investigation; and a taxpayer in a collection or offer-in-compromise proceeding.

4. In your response to Question 6, you explained that your justification for writing to the IRS concerning the "Pulpit Initiative" was that you believed the actions of the ADF violated federal law and Circular 230. You also indicated this is the only letter you have written to the IRS on this issue. Aside from your time working for the Service, have you ever heard of or witnessed other practices that you believe violate the Code or Circular 230? If so, why did you decline to author a letter to the IRS with respect to those matters?

Answer: Yes. Over the course of my career, clients have disclosed prior misconduct to me in the context of their seeking legal advice. The information provided and legal advice given occurred in confidence and, therefore, as an attorney subject to the Rules of Professional Conduct, the attorney-client privilege and the duty of confidentiality would prohibit me from disclosing such information. As a result, I authored no letters to the IRS with respect to those matters.

5. In light of the case law developments on Circular 230, do you still maintain that the conduct of the ADF attorneys violates Circular 230, as you originally alleged in your 2008 letter?

Answer: As noted in my response to Question 3, in light of the decisions in *Loving* and *Ridgely*, the scope of Circular 230 is uncertain at this point. I am not in a position to speculate further as to how Circular 230 might apply to these facts. If confirmed as

[3] *Loving v. IRS*, 742 F.3d 1013 (D.C. Cir. 2014).
[4] *Ridgely v. Kew*, 55 F. Supp.3d 89 (D.D.C. 2014).

Assistant Attorney General, I commit to approaching all matters fairly, with utmost respect for controlling law on any issue.

6. Implicit in your response to Question 8 is the notion that ADF attorneys do not have a First Amendment right to encourage religious 501(c)(3) organizations to challenge unconstitutional statutes or regulations. How do you reconcile this position with the Supreme Court opinion in *Legal Services Corp. v. Velazquez*[5]? In particular, please address the majority's underlying concern in *Velazquez*, that limiting the action of attorneys would "foreclose advice or legal assistance to question the validity of statutes under the Constitution of the United States."

   Answer: I firmly believe in an individual's right to retain counsel to challenge laws that he or she believes to be unconstitutional. My concern with regard to the ADF attorneys was the active solicitation of clients for the purpose of assisting them in committing a violation of law. For this reason, I believe that the facts of *Velazquez*, which involved LSC attorneys representing clients in an ongoing proceeding, are distinguishable from the ADF situation.

7. In Question 7b, I asked whether the IRS should pursue sanctions or disbarment against attorneys affiliated with ADF. You responded that "all practitioners, regardless of their affiliation, who practice before the IRS should comport with the rules of practice promulgated by the Treasury Department." Please clarify your response to this question. In particular, do you believe that the scope of Circular 230 properly includes the conduct of ADF attorneys? Specifically, do you currently believe that the attorneys mentioned in your 2008 letter concerning the "Pulpit Initiative" are practitioners for purposes of Circular 230?

   Answer: As noted above, in light of the decisions in *Loving* and *Ridgely*, the scope of Circular 230 is uncertain at this point. I am not in a position to speculate further as to how Circular 230 might apply to these facts. If confirmed as Assistant Attorney General, I commit to approaching all matters fairly, with utmost respect for controlling law on any issue.

8. The answer you provided to Question 9 was non-responsive. Please explain, in detail, why the CAPA protections would not be rendered illusory under your proposed application of Circular 230 for those who were seeking to establish a test case as part of a broader litigation strategy designed to collaterally attack the "politicking ban," as applied to religiously affiliated 501(c)(3)'s on First Amendment grounds?

[5] *Legal Services. Corp. v. Velazquez*, 531 U.S. 533 (2001).

Answer: In my view, the protections of CAPA provide important safeguards to ensure a fair examination of the facts and circumstances of a matter involving the tax status of a religious organization. The concern raised in the September 8, 2008, letter involved reports of ADF attorneys counseling clients to violate the law, not the rights of a religious organization to all of the safeguards contained in CAPA.

9. In your responses to my written questions, you seemed to imply that you would treat cases involving religiously affiliated tax-exempt organizations in the same manner you would treat 501(c)(3) organizations with no religious affiliation. Traditionally, however, cases that involve the revocation of a religious affiliated organization's 501(c)(3) status are afforded additional procedural safeguards, such as CAPA. Cases that involve religious organizations raise core First Amendment concerns as they implicate both freedom of speech and freedom of religion rights. With this in mind, would you in fact evaluate any cases referred to you by the IRS implicating religiously affiliated 501(c)(3) organizations the same way you would any other 501(c)(3)? Please explain.

Answer: In my experience as both a prosecutor and a defense attorney, all cases should be evaluated based on the facts and the evidence. This evaluation should include a consideration of the unique characteristics of the entity involved, including, a religious organization. If I am confirmed as Assistant Attorney General, I will ensure that Tax Division attorneys are sensitive to issues involving religious organizations and act at all times in full accordance with the law.

10. As you know, the requirements contained in Circular 230 were designed to address substantial policy and budgetary issues resulting from practitioners involved in the development, marketing, and encouragement of abusive tax shelters and, in particular, abusive foreign tax shelters.[6] Why do you not recognize a meaningful distinction between attorneys engaged in the aforementioned practices and the conduct of the ADF attorneys who were seeking to establish a test case, as part of a broader litigation strategy designed to collaterally attack the "politicking ban," as applied to religiously affiliated 501(c)(3)'s on First Amendment grounds?

Answer: The written advice provisions of Circular 230 were amended during my tenure as the IRS OPR Director to address the increase in poorly reasoned tax opinions designed to support abusive tax shelters. These provisions were added to the existing Circular 230, which also addresses tax compliance by tax practitioners, conflicts of interest and a variety of other ethical issues. In my experience, misconduct can involve a range of behavior, from a practitioner's failing to meet his or her federal tax

[6] *See*, Dep't of the Treasury, Advance Notice of Proposed Rulemaking, 65 Fed. Reg. 30,375 (May 11, 2000).

obligations, to counseling clients to violate the law. As Director of IRS OPR, I imposed the entire range of discipline permitted by Circular 230, from reprimand to disbarment from practice before the IRS. Each decision was based on the specific facts and circumstances of each particular case, and the discipline imposed was calibrated to the offense. While it is certainly true that meaningful distinctions can and should be made between different types of conduct, it does not necessarily follow that conduct that may not be the most egregious should not be subject to appropriate inquiry by OPR.