

Internal Revenue Manual Section 36.3.1.4(2)(a)

Drafting an AOD

1. An AOD should:
 - Be written concisely
 - Include only relevant facts
 - Include only facts taken from the court opinion or the public record of the case
 - Be a summary of the issue or opinion and the Service's litigation posture on the issue
 - Not contain summaries of the law or a complete analysis of the legal issues and facts of the case
 - Generally be no more than two pages
2. The recommendation in every AOD will be summarized as acquiescence, acquiescence in result only, or nonacquiescence.



A. Acquiescence means that the Service accepts the holding of the court in a case and that the Service will follow it in disposing of cases with the same controlling facts. It does not indicate approval or disapproval of the reasons assigned by the court for its conclusions.

B. Acquiescence in result only means that the Service accepts the holding of the court in a case and that the Service will follow it in disposing of cases with the same controlling facts. It also indicates disagreement or concern with some or all of the reasons assigned by the court for its conclusions.

C. Nonacquiescence signifies that, although the decision was not appealed or was not reviewed by the Supreme Court, the Service does not agree with the holding of the court and will not follow it nationwide in disposing of other cases. With respect to opinions of an appellate court, the Service generally will follow the holding in cases appealable to that circuit due to the binding nature of the opinion on lower courts even when the office concludes that the opinion is erroneous. The AOD may include a statement that the holding will not be followed in future cases in the circuit if the case can be distinguished on the facts. Any decision to not follow circuit court precedence in that circuit is a strategic decision, which can only be made after consultation with the Department of Justice Tax Division.

3. Generally, the recommendation should be explained in the discussion portion of the AOD. An explanation should be included, for example, when the Service is seeking other cases with the same issues to establish a conflict among the circuits, or when the Service anticipates revoking or modifying a regulation or revenue ruling. When the Service is recommending nonacquiescence to a circuit court opinion, the discussion generally should include the following statement, articulating that Service

personnel are expected to follow the circuit precedent, unless the case can be distinguished:

"Although we disagree with the decision of the court, we recognize the precedential effect of the decision to cases appealable to the ___th Circuit, and therefore will follow it with respect to cases within that circuit, if the opinion cannot be meaningfully distinguished. We do not, however, acquiesce to the opinion and will continue to litigate our position in cases in other circuits."

4. In those very rare circumstances when the office determines that the issue will continue to be litigated in the deciding circuit or that the case does not establish controlling circuit precedent because its holding can be limited to its unique facts, the author should not include the statement set forth in paragraph (3). Instead, the AOD should provide clear directions to Service personnel for resolving cases appealable to that circuit. See, for example, United States v. Roxworthy, AOD 2007-4, IRB 2007-40 (Oct. 1, 2007) which provides, "The Service will continue to aggressively seek the enforcement of summonses, including those challenging unjustified assertions of work product in all appropriate cases, including those that would be appealable to the Sixth Circuit."