

## Internal Revenue Manual 36.3.1.4(2)(A) (08-11-2004)

### 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 will generally follow the holding of the circuit court in cases appealable to that circuit due to the binding nature of that opinion in lower courts, even when the office concludes that the opinion is erroneous.
3. Generally, the recommendation should be explained in the discussion portion of the AOD. Such an explanation should be included, for example, where the Service is seeking

other cases to establish a conflict among the circuits, or where the Service anticipates revoking or modifying a regulation or revenue ruling. In a nonacquiescence to a circuit court case, the discussion section should include a statement that the opinion will be followed in that circuit. The AOD should include the following language to clearly indicate 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. This language should not be used in those very rare circumstances when the office determines that the issue will continue to be litigated even in the deciding circuit or that the case does not establish controlling circuit precedent because its holding can be limited to its unique facts. Instead, the AOD should provide clear directions as to how to resolve cases appealable to that circuit.