

N(35)(12)43-1

February 19, 1999

Subject: Revised AOD Language **Cancellation Date:** August 18, 1999

The purpose of this notice is to provide standard language to be used in most nonacquiescing Actions on Decision regarding appellate cases. It has long been the general approach of the Chief Counsel's Office to follow the adverse court of appeals opinion in cases appealable to that court even when we conclude that the opinion is erroneous. This approach provides respect for that court's opinion, maximizes certainty and encourages resolution of cases in that circuit without undue and costly litigation.

In the past, Actions on Decision have sometimes neglected to address this issue or have used language which could be confusing as to litigation in the deciding circuit. The standard language is intended to clearly indicate that Service personnel are expected to follow the circuit precedent, unless the case can be distinguished. The language set forth below should appear at the end of the "Discussion" section of all nonacquiescing AODs issued in appellate cases:

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.

This language should not be used, of course, in those very rare circumstances when the Office determines that the issue will continue to be litigated even in the deciding circuit. In those circumstances, the AOD should provide clear directions as to how to resolve cases appealable to that circuit. CCDM (35)(12)43 will be modified in accordance with this directive.

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Questions about this Notice should be directed to George Bowden at 202-622-7820.

/s/ Daniel J. Wiles

for JUDITH C. DUNN
Associate Chief Counsel
(Domestic)