

Client Alert

June 16, 2014

IRS Issues Final Circular 230 Rules Simplifying Written Advice Requirements

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On June 9, 2014, the U.S. Treasury Department and Internal Revenue Service (“IRS”) issued final regulations replacing the “covered opinion” rules under Circular 230.¹ Effective June 12, 2014, the final rules now subject all written federal tax advice to one standard.

From a practical perspective, the most noticeable change tax practitioners (and their clients) will likely appreciate in the short run is the elimination of the need for the ubiquitous Circular 230 disclaimer from written communications, such as the disclaimers that are almost universally appended to e-mails from lawyers and accountants.

However, a more substantive and significant change will be the elimination of the need for determining whether written advice constitutes a “covered opinion” (as defined under the prior regulations) and whether the advice could instead be delivered in the form of a “limited scope” opinion. In addition, in either case, practitioners will also no longer be required to evaluate whether written advice satisfies all of the detailed requirements of the former Circular 230 rules, including the explicit statement of all facts relevant to the issues, identification of all assumed facts, and, if a limited scope opinion was not permissible, consideration of all significant federal tax issues that are relevant. As a result, practitioners and clients will have more flexibility to limit the scope of written advice to the particular issues of concern to the client.

ELIMINATION OF COVERED OPINION RULES

The final rules eliminate the former covered opinion rules and replace them with a single “reasonableness” standard applicable to all written tax advice. As revised, Circular 230 requires practitioners in delivering written advice to:

- base all written advice on reasonable factual and legal assumptions (including assumptions as to future events);
- reasonably consider all relevant facts and circumstances that the practitioner knows or reasonably should know;
- use reasonable efforts to identify and ascertain the facts relevant to written advice on each “federal tax matter”;
- not rely upon representations, statements, findings, or agreements (including projections, financial forecasts, or appraisals) of any person if such reliance would be unreasonable;
- relate applicable law and authorities to facts; and

¹ T.D. 9668, RIN 1454-BF96 (June 9, 2014).

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- not, in evaluating a federal tax matter, take into account the possibility that a tax return will not be audited or that an issue will not be raised on audit.

The final regulations also clarify that it is unreasonable for a practitioner to rely on representations if the practitioner knows or reasonably should know that one or more representations (or assumptions on which any representation is based) are incorrect, incomplete, or inconsistent.

The final regulations permit a practitioner, in providing written advice, to rely on advice of another person unless the practitioner knows or has reason to know that the opinion of the other person should not be relied on (including because such person either lacks the qualifications necessary to give the advice or has a conflict of interest that violates Circular 230 standards).

Finally, because the final regulations eliminate the disclosure requirements that were part of the covered opinion rules, practitioners will no longer need to include Circular 230 disclaimers to avoid the covered opinion rules. This will come as welcome news to practitioners and their clients alike because, as explained in the Preamble to the final regulations, Circular 230 “disclaimers are routinely inserted in any written transmission, including writings that do not contain any tax advice.” As a result, the final rules effectively eliminate the use of Circular 230 disclaimers in emails and other written communications so that tax advice can be delivered on discrete issues without risk of violation of the covered opinion rules.

HEIGHTENED STANDARD OF REVIEW FOR MARKETED OPINIONS

While the IRS will generally apply a “reasonable practitioner” standard that takes into account all facts and circumstances in reviewing practitioner compliance with the new written requirement rules, the IRS will give more weight to the additional risk caused by a practitioner’s lack of knowledge of the taxpayer’s particular circumstances in transactions in which the practitioner knows or has to reason to know the opinion will be used in promoting or marketing a potentially abusive tax shelter.

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