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Treasury Finally Amends Circular 230 – The Crazy Disclaimers Are A Thing Of The Past

By Larry Brant on 6.24.14 | Posted in Circular 230, Larry's Tax Law

As of June 12, 2014, with the exception of what are commonly known as “Marketed Opinions,” tax advisors and their firms no longer need separate standards governing Written Advice. Section 10.35 of Circular 230 (“C230”) has been eliminated. Consequently, the crazy, overused C230 disclaimers can go in the trash bin. No more emails to mom, dad, children or other family members, and/or friends with a federal tax disclaimer. I bet that will be somewhat of a relief to these email recipients. No longer will they find themselves looking for tax advice as a result of the prominent disclaimer in a message that has absolutely nothing to do with taxes.

Representatives of the IRS and the Office of Professional Responsibility (“OPR”) have vocalized glee about the elimination of C230 disclaimers. Karen Hawkins, Director of the OPR, told participants at a tax conference in New York last week: “I’m here to tell you that jurat, that disclaimer off your emails. It’s no longer necessary.” IRS Chief Counsel, William Wilkins, echoed the same sentiments last week when he said: “The Circular 230 legend is not merely dead, it’s really most sincerely dead.”

Treasury estimates this amendment to C230 and the removal of the corresponding compliance burden on tax advisors “should save tax practitioners [and/or their clients] a minimum of $5,333,200.”

All Written Advice is now governed by Section 10.37 of C230. This provision does not contain specific disclosure rules. Consequently, unless Treasury further amends Section 10.37, the C230 disclaimers are no longer required on Written Advice.

Going forward, among other things specifically set forth in Section 10.37 of C230, tax advisors must:

- Base the 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 the taxpayer or any other person if reliance on them would be unreasonable;
- Relate applicable law and authorities to facts; and
- Not, in evaluating a federal tax matter, take into account the possibility that a tax return will not be audited or that a matter will not be raised on audit.

C230 still provides that any tax advisor with principal authority and responsibility for overseeing the firm's tax practice must take reasonable steps to ensure that it has adequate procedures in place to ensure C230 compliance. Failure to take "reasonable" steps to ensure that the procedures are followed subjects the tax advisor and his or her firm to discipline.

As a result of the June 12, 2014 amendments to C230, tax advisors (with the exception of Marketed Opinions):

- Are no longer required to use disclaimers; and
- Are no longer required to describe in Written Advice all of the relevant facts, including assumptions and representations, the application of law to the facts, and any conclusions.

It is hard to dispute that specifically including in Written Advice all relevant facts, assumptions and representations, application of the law to the facts, and any legal conclusions, is a good and sound practice. Nevertheless, Section 10.37 of C230 now only requires that tax advisors consider the:

- Scope of the engagement;
- The type and specificity of the advice sought; and
- Appropriate facts and circumstances.

Based upon these factors, tax advisors are now required to determine the extent to which the relevant facts, application of the law to those facts, and the conclusions should be included in the Written Advice. This amendment to C230, in a lengthy and verbose manner, tells tax advisors that they are not subject to specific and rigid information inclusion requirements in all Written Advice any longer. Rather, they are required to look at all of the relevant facts and circumstances, giving due consideration to what they reasonably know or should know, to determine what should be included in Written Advice. No rigid, one-size-fits-all, requirement exists any longer. According to Karen Hawkins, the government amended this component of

C230, purposely making it a broad principles-based rule. It gives both the government and tax advisors lots of flexibility, allowing them to use common sense and sound practice standards when rendering Written Advice.

It should be noted, written presentations provided to an audience solely for educational purposes are not considered Written Advice for purposes of C230. Be aware—if a presentation is made with any level of intent to market or promote transactions, more onerous requirements are required. The IRS has not lost sight of history – it is keeping its eye on Marketed Opinions and will continue to closely scrutinize them.

Tax advisors and their firms need to have a good understanding of C230, as amended, and implement policies to ensure compliance therewith. In light of the possibility of censorship, suspension or disbarment from practice before the IRS, the stakes are high.

The Service's new arsenal is strong. The 2014 amendments to C230 redirect the tax world back toward normalcy. Nevertheless, given the sanctions for noncompliance, C230 is still something tax advisors and their firms need to take seriously and strive to comply therewith.

The takeaways are threefold:

1. No longer may tax advisors place disclaimers on Written Advice that say things like "the IRS requires that we tell you……" or "we are required under Circular 230 to tell you" that you may not rely upon this advice to avoid federal tax penalties. Those types of statements are no longer accurate and should be removed from Written Advice. No longer does the IRS or C230 require such a statement.
2. A good understanding of C230 is required by all tax advisors. Firms should have a C230 Committee that adopts good practice standards and policies, and educates, monitors, and ensures C230 compliance by, members of the firm.
3. Marketed Opinions are still being closely scrutinized by the IRS. Compliance with Section 10.37 of C230 is required.

For C230 compliance issues, or to learn more about C230, feel free to contact me.

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