



Offering Tax Advice Relating to Employee Benefit Plans

**Ethical Standards for, and
Accountability of, Practitioners**

Introduction of Presenters



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Circular 230 and OPR



- What does the Office of Professional Responsibility (OPR) do?
- What is Circular 230?

Getting More Information About OPR and Circular 230



- For more info on OPR, Circular 230 and Disciplined Practitioners visit:

<http://www.irs.gov/>

Select “Tax Pros”

Then look under the “Responsibility and Oversight” heading.

Discipline Options Under Circular 230



- Reprimand (Private)
- Censure
- Suspension
- Disbarment
- Monetary Sanction (Individuals and Firms)

Interaction of OPR and Other Governmental Agencies



- IRS Examinations
- Criminal Investigation Division
- Treasury Inspector General for Tax Administration (TIGTA)
- Department of Justice
- Federal Trade Commission
- State Attorney General and Other State Offices

Overview of Circular 230



- 31 C.F.R. Part 10 (cir. 1886)
- Treasury Circular No. 230 (cir. 1921 Pamphlet) – Four subparts:
 - Subpart A: Authority to Practice
 - Subpart B: Duties and Restrictions Relating to Practice
 - Subpart C: Sanctions for Violations
 - Subpart D: Disciplinary Procedures



New Developments Under Circular 230 Relating To Written Opinions

Proposed Elimination of Regulations Applicable To Covered Opinions



Rules under § 10.35:

- Were unduly complex;
- Increased likelihood of oral versus written advice; and
- Led to Unrestrained use of disclaimers.

What Is Being Eliminated?



- Eliminates:
 - Requirement that practitioners fully describe the relevant facts (including the factual and legal assumptions relied upon); and
 - Application of the law to the facts in the written advice itself; and
 - Use of Circular 230 disclaimers in documents and transmissions, including emails.

What Does Proposed § 10.35 Provide?



- Clarifies that a practitioner must possess the necessary competence when engaged in practice before the IRS; and
- specifies that competent practice requires the knowledge, skill, thoroughness, and preparation necessary for the matter for which the practitioner is engaged.

Requirements for Written Advice Under Proposed § 10.37



- Practitioner must:
 - Base all written advice on reasonable factual and legal assumptions;
 - Exercise reasonable reliance; and
 - Consider all relevant facts the practitioner knows or should know.

Changes Under Proposed § 10.37



- Retains rule that a practitioner must not take into account the possibility that a tax return will not be audited or that an issue will not be raised on audit; and
- Eliminates rule that prohibits a practitioner from taking into account the possibility that an issue will be resolved through settlement.

Relying on Advice of Another Practitioner Under Proposed § 10.37(b)



- Only if the reliance is reasonable and in good faith considering the facts and circumstances.
- Not reasonable if know or should know the opinion should not be relied on, other practitioner is not competent or has a conflict of interest.

Procedures To Ensure Compliance Under Proposed § 10.36



- Requires a practitioner with principal authority for overseeing a firm's Federal tax practice to take reasonable steps to ensure the firm has adequate procedures in place for purposes of complying with Circular 230.



Written Opinions and Abusive Tax Avoidance Transactions

Abusive Tax Avoidance Transactions Under Proposed § 10.37(c)(2)



- Heightened standard of review applicable if practitioner knows or has reason to know advice will be used in promoting, marketing, or recommending an investment plan or arrangement a significant purpose of which is the avoidance or evasion of tax.

IRS Approaches To Stop Promoters of Abusive Schemes



- Injunction
- Assess civil penalties for promotion of the scheme
- Assess civil penalties for failure to register and/or maintain and provide a list of participants
- Criminal prosecution



Written Opinions and Sample Fact Patterns

Hypothetical No. 1



- Practitioner recommends including undocumented workers in plan's census.
- Intent is to never provide a benefit to such individuals.
- Practitioner provides written opinion regarding nondiscriminatory coverage testing under IRC § 410(b) based on such plan census.

Ethical Issue A



- Can a practitioner be held accountable for a written opinion that he or she knows is misleading or omits critical information?

Hypothetical No. 2



- Practitioner recommends an abusive insurance product of an offshore enterprise to U.S. clients, and provides related services.
- Practitioner prepares a tax opinion that validates the efficacy of the offshore insurance product.
- Practitioner has an economic relationship with the offshore enterprise.

Ethical Issue B



- Can a practitioner issue a written tax opinion recommending a transaction with respect to which he or she has a financial interest?

Ethical Issue C



- Can a practitioner be exposed to civil liabilities for issuing a written tax opinion that supports an abusive tax avoidance transaction?

Hypothetical No. 3



- Insolvent employer wants to “borrow” plan assets.
- Practitioner provides written opinions regarding plan’s acquisition of a newly created real estate operating company (REOC).
- Intent is to use the REOC as a vehicle to funnel assets from the plan to the employer.
- See U.S. v. Hook, 195 F.3d 299 (7th Cir. 1999).

Ethical Issue D



- Can a practitioner be held criminally liable for knowingly preparing a written opinion that supports criminal conduct with respect to a plan?



Relevant Statutory and Regulatory Law

Practitioner Duty Re: Errors and Omissions – § 10.21 of Circular 230



- Practitioner knowledge of noncompliance, error or omission in any submission
- Applies to returns and other documents
- Must promptly advise client:
 - Fact of noncompliance; and
 - Consequences of noncompliance, error or omission

Due Diligence as to Accuracy – § 10.22 of Circular 230



- Must exercise due diligence in:
 - Preparing, assisting in preparing, or approving documents relating to IRS matters.
 - Determining correctness of oral/written representations made to the client or to Treasury personnel.
- Reliance on another's work product? With reasonable care.

Conflicting Interests – § 10.29 of Circular 230



- Subject to certain exceptions, a practitioner shall not represent a client before the IRS if the representation involves a conflict of interest.

Conflict of Interest Defined – § 10.29 of Circular 230



- The representation of one client will be directly adverse to another client; or
- There is a significant risk that the representation of one or more clients will be materially limited by the practitioner's –
 - Responsibilities to another client, a former client or a third person; or
 - By a personal interest of the practitioner.

Conflict of Interest Exception – § 10.29 of Circular 230



- Reasonable belief in ability to provide competent and diligent representation to each affected client;
- Representation is not prohibited by law; and
- Each affected client waives the conflict of interest and gives informed consent, confirmed in writing.

Standards for Tax Returns –

§ 10.34(a) of Circular 230



- May not sign a tax return, or advise a position on a tax return, willfully, recklessly, or through gross incompetence if:
 - Lacks reasonable basis
 - Unreasonable position (6694(a)(2))
 - Willful attempt to understate liability (6694(b)(2)(A))
 - Reckless, intentional disregard of rules and regulations (6694(b)(2)(B))
- Patterns matter

Giving False or Misleading Information - § 10.51(a)(4) of Circular 230



- Incompetence and disreputable conduct for which a practitioner may be sanctioned includes knowingly:
 - Giving false or misleading information, or
 - Participating in any way in the giving of false or misleading information.
 - Applies to written and oral statements.

Encouraging Tax Evasion – § 10.51(a)(7) of Circular 230



- Incompetence and disreputable conduct includes:
 - Willfully assisting, counseling, encouraging a client or prospective client in violating, or suggesting to a client or prospective client to violate, any Federal tax law, or
 - Knowingly counseling or suggesting to a client or prospective client an illegal plan to evade Federal taxes or payment thereof.

Giving a False Opinion – § 10.51(a)(13) of Circular 230



- Incompetence and disreputable conduct includes giving a false opinion, knowingly, recklessly, or through gross incompetence, including an opinion which is intentionally or recklessly misleading, or engaging in a pattern of providing incompetent opinions.
- Oral or Written

False Opinion Defined – § 10.51(a)(13) of Circular 230



- Knowing misstatement of fact or law;
- Assertion of an unwarranted position;
- Counseling or assisting in conduct known to be illegal or fraudulent;
- Concealing matters required to be revealed;
- Consciously disregarding information indicating that material facts are false or misleading.

Understatement of Taxpayer's Liability by Tax Return Preparer – IRC § 6694



- Penalties for conduct giving rise to understatements
 - Undisclosed position for which there is no substantial authority
 - Disclosed position for which there is no reasonable basis
 - For tax shelters or reportable transactions, position if unreasonable to believe it would more likely than not be sustained on the merits

Civil Injunction Actions



- IRC § 7402 (Jurisdiction of district courts)
- IRC § 7407 (Action to enjoin tax return preparers)
- IRC § 7408 (Actions to enjoin specified conduct related to tax shelters and reportable transactions)

Civil Promoter Penalties



- IRC § 6700 (Promoting abusive tax shelters etc.)
- IRC § 6701 (Penalties for aiding and abetting understatement of tax liability)

Obligations of ‘Material Advisor’ of Reportable Transactions



- IRC § 6111 (Disclosure of reportable transaction)
- IR § 6112 (Material advisors of reportable transactions must keep lists of advisees, etc.)

Reportable Transaction Defined



- Listed transactions;
- Confidential transactions
- Transaction with contractual protection
- Loss transactions
- Transactions of interest
- See IRC § 6707A(c) and Treas. Reg. § 1.6011-4(b)

Civil Reportable Transaction Penalties



- IRC § 6707 (Failure to furnish information regarding reportable transactions) and § 6707A ((Penalty for failure to include reportable transaction information with return)
- IRC § 6708 (Failure to maintain lists of advisees with respect to reportable transaction)

Criminal Theft From an Employee Benefit Plan - 18 U.S.C. § 664



- Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use or to the use of another the assets of any employee benefit plan, or of any fund connected therewith.

Criminal False Statements and Concealment of Facts - 18 U.S.C. § 1027



With respect to information required under Title I of ERISA -

- Making any false statements or representation of fact, knowing it to be false, or
- Knowingly concealing, covering up or failing to disclose.