



**Ethical Standards for
Employee Benefits
Practitioners**

What to Ask and Say to Clients
and What to Tell the IRS



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Retirement Plans



Benefit Practitioner

Plan Participant, Employee

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- Types of Retirement Plans
- Required Minimum Distributions
- Retirement Plan FAQs
- Published Guidance
- Forms & Publications
- Correcting Plan Errors
- Newsletters
- More Topics

Tax Information for Retirement Plans Community



Help with Choosing a Retirement Plan

Web guide to help you compare plans

File a Retirement Plan Return

Forms 5500, 5500-SF, 5330, 5558 and 8955-SSA

Form 2848 - More Changes

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Retirement Plans Phone Forums

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Find, Fix and avoid common mistakes in plans

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Introduction of Presenters

- **Karen L. Hawkins**, Director, Office of Professional Responsibility
- **Mary Beth Braitman**, Partner, ICE Miller LLP
- **Gabriel Minc**, Senior Tax Law Specialist, IRS Employee Plans



Applicable Standards of Practice Before the IRS

- What is Circular 230?



Finding the Rules

- Information on OPR, Circular 230 and Discipline - visit:
<http://www.irs.gov/Tax-Professionals/Circular-230-Tax-Professionals>



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



Hypothetical A

- CFO claims Hospital X, which is organized as a section 501(c)(3) tax-exempt entity, is a governmental employer.
- CFO proposes to Practitioner Y the establishment of a pension plan (Plan Z) that only covers senior executive employees and provides for 10-year cliff vesting.



Ethical Issue A.1 – Communicating the Client Relationship

- Must communicate clearly regarding the terms of the engagement. (§ 10.33(a)(1)- an aspirational standard)
 - What is the importance of an engagement or disengagement letter?



Ethical Issue A.2 – Establishing the Facts

- Tax advisor must “establish the facts.”
(§ 10.33(a)(2)- an aspirational standard)
 - What practical steps might Practitioner Y take to establish the facts with CFO of Hospital X?



Ethical Issue A.3 – Diligence as to Accuracy

- Must exercise due diligence in determining the correctness of oral or written representations made by the practitioner to the IRS and to the client. (§ 10.22(a)(2) and (3))
 - How does Practitioner Y demonstrate adequate due diligence with respect to Hospital X?



Ethical Issue A.4 – Relying on Information Furnished by Client

- May rely in good faith, without verification, upon information furnished by the client.
(§ 10.34(d))
 - May Practitioner Y rely on CFO's representation that Hospital X is a governmental employer?



Ethical Issue A.5 – Procedures to Ensure Best Practices

- Firm must take reasonable steps to ensure the firm's procedures are consistent with best practices. (§ 10.33(b)- an aspirational standard)
 - As a practical matter, what kind of reasonable steps should a firm's management take to ensure that the firm's procedures are consistent with the best practices described in Circular 230?



Hypothetical B

- Practitioner Y in Hypothetical A is a promoter of “Qualified Executive Governmental Pension Plans.”
- Practitioner Y directly solicits Hospital X and, based on an analysis of the tax savings to the senior executives of Hospital X, Practitioner Y proposes a flat fee of \$50,000 for the plan document, a legal opinion letter, and to submit the plan to the IRS for a favorable determination letter.
- If the IRS does not issue a favorable determination letter, Practitioner Y must refund Hospital X \$40,000.
- Hospital X must enter into a confidentiality agreement with Practitioner Y.



Ethical Issue B.1 – Talking About Fees

- A practitioner must generally not charge an unconscionable fee or, subject to certain exceptions, a contingent fee. (§ 10.27)
 - Is the fee arrangement in Hypothetical B permissible under Circular 230?



Ethical Issue B.2 – Soliciting Potential Clients

- May not in any way use any form of public communication or private solicitation containing a false, fraudulent, or coercive claim; or a misleading or deceptive statement or claim. (§ 10.30)
 - Might Practitioner Y's solicitation of Hospital X under the facts of Hypothetical B be inappropriate under Circular 230?



Ethical Issue B.3 – Navigating Preparer Penalties

- Standards of Conduct to Avoid Code § 6694 Penalties
 - Disclosed – Reasonable basis standard
 - Undisclosed – Substantial authority standard
 - Tax shelters – More likely than not standard



Ethical Issue B.4- Giving Advice About the Transaction

- Is there any circumstance under which Practitioner Y could violate the standards of conduct under Circular 230, as well as under section 6694 of the Code, for taking an unreasonable position with respect to a Hospital X pension plan?



Hypothetical C

- CFO of Hospital X in Hypothetical A has been informed that the IRS is in the process of developing regulations regarding what constitutes a “governmental plan.”
- CFO’s understanding is that until such regulations are issued a “good faith” standard applies.
- CFO asks Practitioner Y to prepare a written tax opinion concluding that the plan is a governmental plan within the meaning of Code section 414(d) in order to avoid any potential IRS penalties.



Ethical Issue C.1 – Talking About the Import of Conclusions Reached

- Should advise the client regarding the import of the conclusions reached, including, for example, whether a taxpayer may avoid accuracy-related penalties. (§ 10.33(a)(3)-an aspirational standard)
 - What if the client wishes to take a much more aggressive tax position than the practitioner recommends?



Ethical Issue C.2 – Standards for Written Advice

- Can Practitioner Y violate the standards of practice under Circular 230 by writing a tax opinion with a poor legal analysis and/or inaccurate statement of the facts?



Hypothetical D

- Practitioner Y submits an application for a favorable determination letter with respect to Plan Z.
- The IRS makes requests for additional information, but after 2 years no determination letter has been issued.
- Hospital X demands Practitioner Y's files regarding Plan Z.



Ethical Issue D.1 – Responding to IRS Information Requests

- What are Practitioner Y's obligations with respect to the IRS' information requests in Hypothetical D?



Ethical Issue D.2 – Identifying Privileged Records and Information

- How might Practitioner Y identify any of Hospital X's records or information that might be privileged?



Ethical Issue D.3 – Resolving Conflicts with Clients

- If Hospital X fails or refuses to pay Practitioner Y's fees, and demands that Practitioner Y transfer custody of all of Practitioner Y's files regarding Hospital X to Hospital X, must Practitioner Y comply with Hospital X's request?



Hypothetical E – Sanctions Under Circular 230

- Hospital X wishes to file a complaint with the IRS Office of Professional Responsibility (OPR) regarding Practitioner Y.



Ethical Issue E.1 – Conduct Subject to Sanction Under Circular 230

- Is there any conduct in any of Hypotheticals A through D that Practitioner Y could be sanctioned for under Circular 230?
- If so, what are the sanctions available under Circular 230?



Relevant Statutory and Regulatory Law



Information Requests – § 10.20 of Circular 230

- Must promptly submit records or information unless the practitioner believes in good faith and on reasonable grounds that the records or information are privileged.



Information Requests – § 10.20 of Circular 230 (Continued)

- If practitioner & client do not have requested information, must -
 - Promptly notify the IRS and provide any information about the identity of any person who may have the requested records or information.
 - Make reasonable inquiry regarding the identity of any person who may have the requested records or information.
- Practitioner is not required to make inquiry of any other person or independently verify any information provided by the practitioner's client regarding the identity of such persons.



Practitioner Duty Re: Errors & 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.



Fees – § 10.27 of Circular 230

- May not charge an unconscionable or contingent fee.
- “Contingent fee” -
 - Is based, in whole or in part, on whether or not a position taken avoids challenge by the IRS or is sustained either by the IRS or in litigation;
 - includes any fee arrangement in which the practitioner will reimburse the client for all or a part of the client’s fee if a position taken on a tax return or other filing is challenged by the IRS or is not sustained.



Return of Client's Records – § 10.28 of Circular 230

- At the request of a client, must promptly return all records of the client necessary for the client to comply with his or her Federal tax obligations.
- The existence of a dispute over fees generally does not relieve the practitioner of his or her responsibility.
- If applicable state law allows or permits the retention of a client's records by a practitioner in a dispute over fees for services rendered, the practitioner need only return those records that must be attached to the taxpayer's return.



Return of Client's Records – § 10.28 of Circular 230 (Continued)

- The term “records of the client” doesn’t include:
 - any return,
 - claim for refund,
 - schedule,
 - affidavit,
 - Appraisal,
 - or any other document if the practitioner is withholding the document pending the client’s performance of its contractual obligation to pay fees with respect to the document.



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 (Continued)

- 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 (Continued)

- 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.



Solicitation – § 10.30 of Circular 230

- May not in any way use or participate in the use of any form of public communication or private solicitation containing a false, fraudulent, or coercive statement or claim; or a misleading or deceptive statement or claim.



Terms of the Engagement - § 10.33(a)(1) of Circular 230 – Aspirational Standard

- Communicate clearly about the terms of the engagement.
- Determine the expected purpose for and use of the advice and have a clear understanding about the form and scope of the advice or assistance to be rendered.



Establishing the Facts - § 10.33(a)(2) of Circular 230 - Aspirational Standard

- Determine which facts are relevant,
- evaluate the reasonableness of any assumptions or representations,
- relate the applicable law (including potentially applicable judicial doctrines) to the relevant facts, and
- arrive at a conclusion supported by the law and the facts.



Advice Regarding Conclusions - § 10.33(a)(3) of Circular 230- Aspirational

- Should advise about the import of the conclusions reached, including, for example, whether a taxpayer may avoid accuracy-related penalties under the Code if a taxpayer acts in reliance on the advice.



Firm's Procedures – § 10.33(b) of Circular 230- Aspirational Standard

- Tax advisors with responsibility for overseeing a firm's practice of providing advice concerning Federal tax issues or of preparing or assisting in the preparation of submissions to the IRS should take reasonable steps to ensure that the firm's procedures for all members, associates, and employees are consistent with the best practices in section 10.33(a) of Circular 230.



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



Relying on Client Information – § 10.34(d) of Circular 230

- May rely in good faith without verification upon information furnished by the client.
- May not ignore the implications of information furnished to, or actually known by the practitioner.
- Must make reasonable inquiries if the information as furnished appears to be incorrect, inconsistent with an important fact or another factual assumption, or incomplete.



Procedures to Ensure Compliance - § 10.36 of Circular 230

- Practitioner with who has principal authority and responsibility for overseeing a firm's tax practice must take reasonable steps to ensure that the firm has adequate procedures in effect for purposes of complying with the requirements of Circular 230.



Procedures to Ensure Compliance - § 10.36 of Circular 230 (Continued)

- Person with principal authority is subject to sanctions if:
 - Through willfulness, recklessness, or gross incompetence doesn't take reasonable steps to ensure the firm has adequate procedures; or
 - Knows or should know that one or more individuals at the firm are, or have been, engaged in a pattern or practice that doesn't comply and, through willfulness, recklessness, or gross incompetence, fails to take prompt action to correct the noncompliance.



Written Advice – Prop. § 10.37(a)(2) of Circular 230

- Must –
 - Base on reasonable factual or legal assumptions;
 - Reasonably consider all relevant facts;
 - Use reasonable efforts to identify and ascertain the relevant facts;
 - Not rely on representations, statements, findings, or agreements if reliance would be unreasonable;
 - Not take into account the possibility that a tax return will not be audited, or that an issue will not be raised on audit.



Written Advice – Prop. § 10.37(a)(3) of Circular 230

- Reliance on representations, statements, findings, or agreements is unreasonable if the practitioner knows or should know that one or more representations or assumptions on which any representation is based are incorrect or incomplete.



Written Advice – Prop. § 10.37(b) of Circular 230

- Practitioner may rely on the advice of others if the advice was reasonable and the reliance is in good faith. Not reasonable if know or should know—
 - Opinion should not be relied on;
 - Other practitioner is not competent or lacks the necessary qualifications; or
 - Other practitioner has a conflict of interest.



Written Advice – Prop. § 10.37(c)(1) of Circular 230

- In evaluating a practitioner's written advice, must apply a reasonableness standard, considering all the facts and circumstances, including, but not limited to, the scope of the engagement and the type and specificity of the advice sought by the client.



Written Advice – Prop. § 10.37(c)(2) of Circular 230

- If the written advice will be used or referred to in promoting, marketing, or recommending a partnership or other entity, investment plan, or arrangement a significant purpose of which is the avoidance or evasion of tax, a heightened standard of review applies.



Sanctions – § 10.50 of Circular 230

- Censure;
- Suspension; or
- Disbarment.
- Additionally, OPR may impose a monetary penalty not to exceed the gross income derived or to be derived from the conduct giving rise to the penalty.



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.



Violations Subject to Sanctions – Prop. § 10.52 of Circular 230

- A practitioner may be sanctioned under § 10.50 if –
 - Willfully violates any of the regulations (other than § 10.33); or
 - Recklessly or through gross incompetence (within the meaning of § 10.51(a)(13)) violates § § 10.34, 10.36, or 10.37.



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



Privilege – IRC § 7525

- Same common law protections of confidentiality which apply to a communication between a taxpayer and an attorney shall also apply to a communication between a taxpayer and any federally authorized tax practitioner to the extent the communication would be considered a privileged communication if it were between a taxpayer and an attorney.
- However, the privilege may only be asserted in any non-criminal tax matter before the IRS; and in any noncriminal tax proceeding in federal court brought by or against the United States.



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.