

CIRCULAR 230 AND FORM 4764, LB&I EXAMINATION PLAN-GUIDANCE

OPR is publishing this guidance in response to field questions regarding the effect on Circular 230 and the Office of Professional Responsibility's ("OPR") jurisdiction over the corporate officers or employees identified in Section 1(b) of Form 4764, Communications Agreement, LB&I Examination Plan, for purposes of referrals for alleged Circular 230 misconduct. Circular 230 regulates representation activity by "practitioners," and others, meaning those who represent (advocate) or otherwise "practice" before the IRS.¹

The LB&I Communications Agreement allows a corporate taxpayer to designate one or more employees to 1) discuss tax matters, 2) provide and receive information, or 3) receive and discuss adjustments (or some combination of these three). The LB&I Communications Agreement operates as an authorization to receive tax information, similar to Form 8821, Tax Information Authorization. The LB&I Communications Agreement does **NOT** replace the Form 2848. When a corporate employee is merely providing or accepting information to, or from, the IRS, there is no representation activity or "practice" occurring and the Form 4764 will suffice. However, when the employee advocates, negotiates, disputes or does anything which goes beyond mere delivery of facts, general explanation, or acceptance of materials, the employee is engaged in representation activities ("practicing") before the agency and the Form 4764 is not sufficient. In the LB&I context, this typically involves advocating or defending certain positions related to the corporation's tax liability or adjustments proposed thereto.

If the corporation wants a specific employee (irrespective of title) to advocate, negotiate, or dispute issues with the IRS on behalf of the corporation, then a Form 2848, Power of Attorney, must be obtained from the corporation authorizing that representation. The Form 2848 must be signed by a duly **elected** officer or director of the corporation as identified in the corporate articles or by-laws (typically, the same officer who signs the corporation's tax returns and consents to extend the time for assessment of tax). "Vanity-titled" officers of a corporation are not legally authorized to execute the Form 2848 on behalf of the corporation. The IRS point of contact should request the Form 2848 from the appropriate corporate official when representation activities are about to, or have, begun. (See, LB&I Quarterly Newsletter, Issue 9-03, June 2011, pg 2).

¹ Circular 230, § 10.2(a)(4) defines "practice" as "ALL matters connected with a presentation to the Internal Revenue Service...relating to a taxpayer's rights, privileges, or liabilities under laws or regulations ADMINISTERED by the Internal Revenue Service." Practice includes preparing and/or filing documents; corresponding and communicating with the IRS; giving written tax advice; and, representing a taxpayer at a conference, hearing or meeting. A bona fide officer or regular full-time employee of a corporation and a general partner or regular full-time employee of a partnership may represent the entity before the IRS but are subject to all the regulations contained in Circular 230 when they do so. See Cir. 230, § 10.7(c)(1)(iii), (iv) and (c)(2)(iii).

IRS employees make referrals to OPR for alleged Circular 230 misconduct using Form 8484, Suspected Practitioner Misconduct Report for the Office of Professional Responsibility (rev. 12-2013). Form 8484 asks for evidence of the subject's practice before the IRS for Circular 230 jurisdiction to be established. A Form 2848 submitted to the IRS is one source of evidence of practice for purposes of establishing Circular 230's jurisdiction over the individual designated on the Form 2848. Other forms of evidence of practice can include a tax opinion written for the corporation to support taking a position in its tax return (31 USC 330(d)), or conduct that involves the preparation for compensation of all or a substantial portion of a document for submission to the IRS with respect to a corporate taxpayer's tax liabilities (31 CFR sec. 10.8(c); sec. 10.34(b)).

In any referral situation, a thorough and complete narrative must be provided that describes the individual's conduct and the alleged Circular 230 violation(s). This information assists OPR in beginning an investigation. Upon receipt of the 8484, OPR conducts an independent investigation of the facts and circumstances and determines whether, and to what extent, discipline may be necessary.