

## BNA Daily Tax Report

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### Tax Practice: New Principles Standard in **Circular 230** Applauded as Covered Opinion Rules Die

*By Diane Freda*

Final **Circular 230** rules on practice before the Internal Revenue Service got rid of the detailed requirements for providing written tax advice and replaced them with a principles-based standard that is much clearer, Kathleen Ferrell, a partner with Davis Polk & Wardwell LLP, told Bloomberg BNA.

The previous long-standing covered opinion rules “were very complex and didn't have the intended effect,” she said June 25.

“There were difficult interpretive issues and in order to obviate that, people were just putting a disclaimer on everything,” Ferrell said. “We did not get higher-quality tax advice out of those detailed rules; instead we just got a disclaimer on everything.”

The new rules ([T.D. 9668](#)) are practical, appropriate and exactly the ethical standards that attorneys seek to adhere to in their practice, she said ([111 DTR G-5, 6/10/14](#)).

They revolve around a reasonableness standard that relies on a facts and circumstances analysis, Caroline Ciruolo, a partner with Rosenberg Martin Greenberg LLP, told Bloomberg BNA June 25.

“Practitioners will no longer have a checklist of disclaimers that must be included in opinions. Instead, compliance with the regulations will be based on a totality of the facts and circumstances,” she said.

Under the previous rules, there were four standards for tax practice, Larry Campagna, a shareholder with Chamberlain, Hrdlicka, White, Williams & Aughtry, told Bloomberg BNA June 25. “The IRS expanded those into six rules, but in my view, the expanded rules are just more ways of saying ‘be reasonable.’”

In 2012 proposed rules (REG-138367-06), the IRS announced its plan to throw out the covered opinion tenet it had implemented in 2004. The proposed rules were finalized June 9.

Detailed Guidance Burdensome.

The covered opinion guidance had dictated in minute detail the form and content of a covered opinion, Ferrell said. There was a formula on how the written advice had to look, and what constituted a covered opinion was complex.

Ferrell said the definitions of reliance opinions and marketed opinions were so difficult to figure out that if there was any risk that written advice could fit into either of those definitions, practitioners had to comply with the detailed requirements of the covered opinion rules, or add some reliance opinion or marketed opinion disclosures set forth in **Circular 230**, and brand the transaction that way.

By contrast, the principles-based approach requires that practitioners base written advice on reasonable factual and legal assumptions, Ferrell said. They must consider all the facts and circumstances that they know or ought to know, and use reasonable efforts to identify and ascertain the relevant facts.

Practitioners aren't allowed to rely on representations, statements, findings or agreements of the taxpayer or any other person, if reliance on them would be unreasonable, Ferrell said. They also aren't allowed to take into account the "audit lottery"—the possibility that a return won't be audited or a matter won't be raised on audit.

The revisions to **Circular 230** broadened the rules, Charles Rettig, a managing partner with Hochman Salkin Rettig Toscher & Perez PC, said in a June 26 e-mail, but held a focus on the actual conduct by the practitioner.

New Section 10.35 requires the practitioner to possess the necessary competence to engage in practice before the IRS. That competent practice requires the appropriate level of knowledge, skill, thoroughness and preparation necessary for the matter for which the practitioner is engaged.

"It is unlikely a practitioner would be sanctioned under new Section 10.35 as a stand-alone violation," Rettig said. However, depending on the conduct involved, it could be an added burden for a practitioner to overcome if he or she is in violation of other provisions within **Circular 230**, he said.

#### Disclaimers Necessary?

While many practitioners will be removing the disclaimers entirely, Ciraolo said her firm will simply revise the disclaimer, taking out any reference to **Circular 230** or suggestion that it is required by the IRS, and add it to e-mails when appropriate.

Instead of the standard disclosure on every e-mail, practitioners should add such language when they believe it to be appropriate, she said, based on the facts and circumstances of the case, and the practitioner advice they are providing.

At a June 20 tax conference in New York, Karen Hawkins, director of the IRS's Office of Professional Responsibility, laid down the law about attributing the need for the disclaimers to the IRS or the OPR ([121 DTR G-2, 6/24/14](#))

The revisions are expected to save practitioners and their clients more than \$5 million, Ciraolo said.

## Uniform Standards.

The new standards are also significant because they apply the same competency standard to attorneys, certified public accountants, enrolled agents and any other practitioners who are appearing before the IRS, Campagna said.

“So the fact that the American Bar Association and the American Institute of CPAs have different definitions of competence doesn't matter,” he said. “Now there is one definition of competence for purposes of practice before the IRS.”

The rules also make it clearer that the person in charge of the firm's federal tax practice has to take reasonable steps to ensure that the firm has adequate **Circular 230** compliance procedures in place.

Campagna said that would likely come as a warning bell to a number of smaller firms that don't formalize their procedures very much. Larger accounting and legal firms are probably already doing it, he said.

Rettig said all firms should identify the person within the firm who has principal authority and responsibility for overseeing the firm's practice governed by **Circular 230**.

In the absence of such a designation, he said Section 10.36 allows the IRS to designate one or more individuals as having the responsibility. That person would then be subject to discipline for failing to comply with the provisions of **Circular 230**.

“Practitioners are fairly good at focusing and satisfying their responsibilities within the framework of a firm when they have reason to know it was their responsibility,” Rettig said. “However, in a busy practice, many prefer to assume someone else is covering the backside of the practice. Designate the person having such responsibilities and thank them for their efforts,” he said.