

Ethics Phone Forum For Employee Plans Practitioners

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Introduction of Presenters

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Circular 230 Regulates Practice Before the IRS

- 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

“Practice”

- **All** matters connected with a presentation to the IRS relating to a taxpayer’s rights, privileges, or liabilities under laws or regulations **administered by** the IRS
- Preparing or filing documents, corresponding and communicating with the IRS, rendering written advice, and representing a client at conferences, hearings and meetings
- Legacy Cir 230 Practitioners: Practice = Tax Return Preparation



Who May Practice?

- ❑ Attorneys
- ❑ Certified Public Accountants (CPAs)
- ❑ Enrolled Agents
- ❑ Enrolled Actuaries
- ❑ Enrolled Retirement Plan Agents (ERPAs)
- ❑ Registered Tax Return Preparers

Other Individuals - § 10.8(c)

- Anyone who prepares (or assists with) all or a substantial portion of a **document** pertaining to a taxpayer's tax liability.
- Subject to Subparts B (Duties and Restrictions) and C (Sanctions), irrespective of license or PTIN status.

Procedures To Ensure Compliance - § 10.36

- Firms must have procedures in place to ensure compliance with the Circular 230 rules regarding –
 - Covered opinions; and
 - Tax returns and other documents.



DISCIPLINE OPTIONS

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

Who Is a Tax Return Preparer for PTIN Purposes?

- ❑ Prepares all or substantially all of a tax return or claim for refund for compensation (Treas. Reg. § 1.6109-2)
- ❑ Interpreted broadly
- ❑ Certain Forms excluded through IRS guidance

Who Is a Tax Return Preparer for IRC § 6694 Purposes?

- An individual primarily responsible for the position(s) on the return or claim for refund giving rise to an understatement (Treas. Reg. § 1.6694-1(b)(1)).
- Signing tax return preparer generally considered the person primarily responsible for all of the positions on the return or claim for refund.



PTINs Not Required

- Examples of Exempt Forms
 - Form 5500 series
 - Forms 5300 and 5307
 - Form 5310
 - Form 1099
 - Form SS-4
 - Form 2848
 - Form 8717



Case Study No. 1 – Part 1

- Suppose a plan sponsor wants to set up a defined benefit pension plan for the owner of a management company, and provide no benefits for rank and file employees in a related company.
- The plan sponsor intends to disregard the related entity.



Case Study No. 1 – Part 2

- The plan sponsor wants your participation in setting up the plan.



Case Study No. 1 – Part 3

- The plan sponsor asks for your advice regarding the administration of the plan in a manner that does not take the existence of the employees of the related company into account.



Case Study No. 1 – Part 4

- The plan sponsor also wants your assistance in asserting the plan is qualified under IRC § 401(a).



Case Study No. 2 – Part 1

- ❑ A plan sponsor comes to you after another advisor has set up a defined benefit pension plan for the owner of a management company.
- ❑ In setting up the plan, the prior advisor disregarded a related entity.
- ❑ The plan provides no benefits for rank and file employees of the related company.
- ❑ The plan has already requested, and received, a favorable determination letter.



Case Study No. 2 – Part 2

- The plan sponsor asks you to make relatively routine amendments to the plan to reflect changes in the applicable law.

Practitioner Duty Re: Errors and Omissions – § 10.21

- 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

Diligence as to Accuracy - § 10.22

- Must exercise Due Diligence in:
 - Preparing, approving and filing tax returns, documents, affidavits etc. 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(a)

- A conflict of interest exists if –
 - 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.

Waiver of a Conflict of Interest – § 10.29(b)

- Notwithstanding a conflict of interest, a practitioner may represent a client if –
 - The practitioner reasonably believes he or she will be able to provide competent and diligent representation to each affected client;
 - The representation is not prohibited by law; and
 - Each affected client waives the conflict of interest, confirmed in writing, at the time the existence of the conflict of interest is known by the practitioner.

Standards for Tax Returns –

§ 10.34(a)

- 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

Standards for Documents and Other Papers - § 10.34(b)

- May not advise taking positions that are frivolous.
- May not advise submissions:
 - to delay or impede tax administration;
 - that are frivolous; or
 - Containing or omitting information that demonstrates an intentional disregard of rules or regulations.

Advice Regarding Penalties and Client Reliance - § 10.34(c), (d)

- Must advise client of potential penalties and their avoidance through disclosure (10.34(c)).
- Reliance on client information in good faith, without verification, is OK, but...
 - Cannot ignore implications of other information furnished;
 - Cannot ignore actual knowledge; and
 - Must make reasonable inquiries for incorrect, inconsistent information (10.34(d)).
- No Willful Blindness.
- No “Don’t ask, don’t tell”.

Standards for Covered Opinions -

§ 10.35

- THE Checklist (10.35(c))
 - Know all the relevant Facts
 - Avoid unreasonable facts or assumptions
 - Know the law
 - Relate law to facts
 - Consider all significant federal tax issues
 - No audit lottery
 - Be competent or use others who are
 - Disclose conflicts or limitations on scope

Putting Advice In Writing – Standards of § 10.37

- ❑ No unreasonable factual or legal assumptions
- ❑ No unreasonable reliance on taxpayer or third party info
- ❑ Consider all relevant facts and Law
- ❑ No audit lottery
- ❑ Heightened standard for promoter material



Incompetent and Disreputable Conduct

– False Information - § 10.51(a)(4)

- Giving false or misleading information, or participating in any way in the giving of false or misleading information to the IRS.
- Applies to written and oral statements.



Incompetent and Disreputable Conduct – False Opinions - § 10.51(a)(13)

- ❑ Oral or Written
- ❑ Knowing, Reckless, Gross Incompetence
- ❑ Patterns of Incompetent Opinions
- ❑ Knowing misstatements of fact or law
- ❑ Positions unwarranted under existing Law
- ❑ Counseling illegal/fraudulent conduct

Are Communications With the Practitioner Privileged?

IRC §7525 Privilege Applicable to Tax Advice

- The same common law protections of confidentiality, which apply to a communication between a taxpayer and an attorney, also applies to a communication between a taxpayer and any federally authorized tax practitioner.
- But, only to the extent the communication would be considered a privileged communication if it were between a taxpayer and an attorney.



Scope of Tax Practitioner Privilege

- Applies only to non-criminal tax cases brought:
 - Before the IRS; or
 - In federal court by or against the United States.
- Does not apply to:
 - Business advice;
 - Accounting advice;
 - Tax return preparation advice;
 - Communications regarding tax shelters; or
 - Communications in furtherance of a crime or fraud.

The Fiduciary Exception To the Privilege

- Many courts have held that privilege does NOT protect communications between counsel and a party being advised in a fiduciary capacity from being disclosed to plan beneficiaries.
- A minority of courts require a showing of "good cause" where the fiduciary's interest in confidentiality is balanced against the beneficiary's need for the information.
- The majority of courts have held that if counsel advises a plan fiduciary about issues relating to plan administration, the privilege cannot be asserted against the plan beneficiaries.



Inadvertent Waiver of Privilege

- The attorney-client privilege is generally waived if purported confidential information is disclosed to non-client third parties by the client or by the attorney acting on behalf of the client.

Complaints or Inquiries?

- Office of Professional Responsibility
1111 Constitution Ave. N.W.
SE:OPR Rm. 7238
Washington, D.C. 20224
- For more info on OPR, Circular 230 and
Disciplined Practitioners visit:
<http://www.irs.gov/>
Select “Tax Professionals”
Then “Circular 230 Tax Pros”