Reinhart

IRS Issues Much Anticipated Final Regulations on Circular 230

IRS Circular 230 contains the ethical rules that govern practice before the IRS. Over the past decade, these rules have been revised a number of times. The purpose behind most of these revisions has been to encourage practitioners to engage in quality and appropriate tax practice.

One of the most talked about changes to Circular 230 was the creation of the Covered Opinion Rules. These rules contained very burdensome requirements for written tax advice. Since they first went into effect in 2005, practitioners have chafed under their requirements. Often tax practitioners would attempt to "opt out" of the Covered Opinion Rules by placing a legend or disclaimer at the bottom of most emails or other written tax advice.

On June 9, 2014 the IRS issued final regulations that make significant changes to Circular 230. The regulations had been greatly anticipated since being issued in proposed form on September 17, 2012.

The final regulations recognize that the Covered Opinion Rules are no longer necessary, and in many cases do more harm than good. The Covered Opinion Rules have been replaced with new standards for issuing written tax advice; the result is a very welcome change for practitioners. For example, it will no longer be necessary to have a Circular 230 legend at the bottom of virtually every email sent by an accountant or lawyer. However, as discussed below, issuing a tax opinion may become more complex in the future.

Requirements for Written Tax Advice—Revised Section 10.37

Even though the Covered Opinion Rules will no longer apply to written tax advice, a practitioner's advice still cannot be based upon unreasonable assumptions about the facts or the law, or unreasonably rely on representations, statements, findings or agreements. A practitioner must make reasonable efforts to ascertain and consider all relevant facts. The practitioner, when evaluating a tax matter, may not take into account the likelihood of an audit or settlement. The practitioner must consider all relevant legal authorities and relate the law to the facts. When the IRS evaluates a practitioner's advice, the IRS will apply a

POSTED:

Jun 9, 2014

RELATED PRACTICES:

Tax

https://www.reinhartlaw.com/practices/tax

RELATED PEOPLE:

Michael G. Goller

https://www.reinhartlaw.com/people/michael-goller

All materials copyright © 2025 Reinhart Boerner Van Deuren S.C. All rights reserved.

"reasonableness" standard.

Further, there is a heightened standard of care when the practitioner knows or should know that the written advice will be used to promote, market or recommend a course of action that has a significant purpose of avoiding or evading tax. Specifically, when evaluating a practitioner's advice, the IRS will apply a reasonableness standard which considers all facts and circumstances and places an emphasis on the additional risk associated with a practitioner's lack of knowledge of a taxpayer's particular circumstances.

Finally, a practitioner may rely on the advice of another person if, in light of the facts and circumstances, such reliance is reasonable and made in good faith. Reliance is specifically not reasonable when the practitioner knows or reasonably should know that (1) the opinion of the other person should not be relied upon; (2) the other person is not competent or lacks the necessary qualifications to provide the advice; or (3) the other person has a conflict of interest in violation of Circular 230 (e.g., a conflict that has not been appropriately waived).

Thus, while the Covered Opinion Rules created a very objective standard (i.e., follow a rigorous format and address certain well-defined matters and the advice will be deemed adequate), the new regulations replace this standard with a more subjective standard (i.e., written tax advice must be "reasonable"). Certainly, relief from the burdensome Covered Opinion Rules is a welcome change; however, the subjective question of "what is reasonable tax advice" may be a disputed issue in the future.

Competence—Revised Section 10.35

The Covered Opinion Rules were contained in Circular 230 Section 10.35. These rules have been deleted and the final regulations created a new Section 10.35. This section addresses a practitioner's competence. Specifically, a practitioner must possess the necessary competence to engage in practice before the IRS. Competent practice requires the appropriate level of knowledge, skill, thoroughness and the preparation necessary for the matter at issue. A practitioner may become competent by consulting with experts or studying the relevant law.

The new competency rule is similar to American Institute of CPAs (AICPA) Code of Professional Conduct, Section 50, Article V, Due Care, which provides:

> . . . Members should be diligent in discharging responsibilities to

All materials copyright © 2025 Reinhart Boerner Van Deuren S.C. All rights reserved.

clients, employers and the public. Diligence imposes the responsibility to render services promptly and carefully, to be thorough, and to observe applicable technical and ethical standards . . .

Procedures to Ensure Compliance—Revised Section 10.36

Practitioners in a position of authority must do more than ensure their own compliance with Circular 230. Supervising practitioners must ensure that all individuals they supervise comply with Circular 230 as it pertains to the preparation of returns, claims for refund or other documents submitted to the IRS. Further, practitioners with principal authority for overseeing a firm's practice of providing tax advice must take reasonable steps to ensure that the firm complies with Circular 230.

A practitioner responsible for implementation of Circular 230 compliance procedures will be subject to disciplinary action if:

1. The practitioner through willfulness, recklessness or gross incompetence does not take reasonable steps to ensure the firm has in effect and follows adequate procedures so as to comply with Circular 230, and one or more individuals who are members of, associated with or employed by the firm engage in a pattern or practice in connection with their practice with the firm, of failing to comply with Circular 230; or
2. The practitioner knows or should know that one or more individuals who are members of, associated with or employed by the firm engage in a pattern or practice, in connection with their practice with firm, that does not comply with Circular 230, and the practitioner, through willfulness, recklessness or gross incompetence fails to take prompt action to correct the noncompliance.

Revised Sections 10.35 and 10.36 mean that managers have a duty to ensure that their subordinates have the requisite knowledge and skill, and that they appropriately use that knowledge and skill. Copyright 2014 Reinhart Boerner Van Deuren s.c. All rights reserved. This communication may be considered advertising in some jurisdictions. This Headlines in Tax Law E-Alert provides general information and should not be construed as legal advice or a legal opinion. Readers should seek legal counsel concerning specific factual situations

All materials copyright © 2025 Reinhart Boerner Van Deuren S.C. All rights reserved.

confronting them. 1000 North Water Street Suite 1700 Milwaukee, WI 53202 414-298-8336 Michael G. Goller mgoller@reinhartlaw.com

Violations That Are Subject to Expedited Suspension Proceedings—Revised Section 10.82

Under Circular 230 Section 10.82, the IRS may expedite a practitioner's suspension to practice before the IRS for "willful disreputable conduct." Under the final regulations, this phrase now includes the failure to comply with one's own personal tax filing obligations.

Specifically, the regulations provide that "willful disreputable conduct" occurs when the practitioner:

1. Fails to file an annual return for four out of the five preceding years; or
2. Fails to file a return required more frequently than annually (e.g., Form 941) for five of the seven preceding periods.

The regulations do not require that the noncompliance be "willful"; rather, "willful, disreputable conduct" is established by an act of noncompliance (i.e., under the express terms of the rule even an excusable failure to file could result in a sanction for "willful disrespectable conduct"). Also note that the new rule pertains to filing tax returns, not payment of tax. Thus, it is critical that all tax practitioners file their tax returns on time.

Conclusion

The final regulations are effective June 12, 2014. Most of the changes to Circular 230 are welcome news to tax practitioners; however, the changes should not be seen as "lowering the bar" for quality tax practice. Indeed, due to the subjective nature of the new rules it will be important that tax practitioners who issue written tax advice make sure that, in light of their specific facts and circumstances, they are able to demonstrate that their advice is reasonable.

These materials provide general information which does not constitute legal or tax advice and should not be relied upon as such. Particular facts or future developments in the law may affect the topic(s) addressed within these materials. Always consult with a lawyer about your particular circumstances before acting on any information presented in these materials because it may not be applicable to you or your situation. Providing these materials to you does not create an attorney/client relationship. You should not provide confidential information to us until Reinhart agrees to represent you.

All materials copyright © 2025 Reinhart Boerner Van Deuren S.C. All rights reserved.