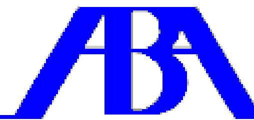

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May 11, 2005

Hon. Arnold I. Havens
General Counsel
Department of the Treasury
4312 MT
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Re: Comments on the Final Circular 230 Regulations

Dear Mr. Havens:

I am writing on behalf of the Section of Taxation of the American Bar Association concerning the final Circular 230 Regulations. The views expressed in this letter represent the position of the Section of Taxation and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the American Bar Association.[1]

On December 17, 2004, final regulations concerning Circular 230 were issued effective for written advice rendered after June 20, 2005. We commented extensively on these regulations in proposed form. While we appreciate the substantial drafting efforts reflected in the final regulations, we believe that further revisions are desirable and necessary. Practitioners have been reviewing the rules since they were issued in order to create procedures for complying with the rules' requirements. This review has demonstrated the need for further changes.

1. The "principal purpose" category in Section 10.35 of the regulations poses difficult compliance problems. Some transactions are structured to qualify for tax benefits explicitly provided by the Code or sanctioned by well-established precedent (*e.g.*, structuring a property exchange to qualify under Code section 1031, making a favorable tax election, or adopting a well-recognized estate planning structure). Compliance with the costly new requirements of Circular 230 in such cases seems far removed from Treasury's goals in promulgating the new rules. Moreover, the regulations provide no standards for distinguishing between "principal" purpose and "significant" purpose transactions, thus raising serious risks of both inconsistent application and inadvertent non-compliance. We believe that the "principal purpose" category should be eliminated or substantially narrowed to clarify that it does not apply to advice regarding tax benefits that are clearly contemplated by the statute or well-established precedents.

2. Compliance with the regulations' requirement that many categories of written advice, no matter how informal, must bear a legend (in a type-face larger than any other used in the document) stating that the advice may not be relied on for penalty-protection purposes will often be difficult (*e.g.*, in a large-type slide presentation) and inadvertent non-compliance will likely be a frequent occurrence. The better solution would be to eliminate the legend requirement for informal advice and, instead, to amend Circular 230 and regulations under Code sections 6662 and 6664 to provide that an opinion may

[1] Principal responsibility was exercised by Lawrence M. Hill and Kathleen C. Dale. Substantial contributions were made by Linda Galler, Gersham Goldstein, Mona Hymel, Ronold Platner, Charles A. Pulaski, Jr. and Steven C. Salch. The comments were reviewed by John Barrie, Chair of the Section's Committee on Government Submissions, and by Michael B. Lang and Sylvan Siegler, respectively Chair and Council Director of the Section's Committee on Standards of Tax Practice.

not be relied on for purposes of penalty protection unless the opinion states that such reliance is intended ("opt in"). If this proposal is not implemented (*i.e.*, if the requirement to legend informal advice is retained), we recommend that requirements that the legend be in the largest-type and appear before any other text be changed to provide that inclusion of the legend in bold-face type, all letters capitalized, on the first or second page of the document will suffice. We note in this regard that as a technical matter, it may not be possible to ensure in an email system that the font size of the legend exceeds that of the rest of the text.

3. We believe that the "marketed opinion" standard can be interpreted in an overly-inclusive manner. For example, we do not believe that it was the intent of the rules that publications containing general discussions of planning ideas (such as newsletters) or reorganization opinions set forth in public disclosures be within the definition. Thus, the scope of advice that must comply with the "marketed opinion" rules should be clarified. One approach is to limit their application to situations in which it is known that there is a plan to actively solicit investors for a transaction. We continue to urge that "self-marketed" opinions be covered by the marketed opinion rules.

4. Better specification of who within a firm will be considered to have "principal authority" over a firm's tax practice is needed in Section 10.36. In particular, the rule should be clarified to make clear that general managers of firms who are not tax practitioners are not covered.

5. Section 10.35 should be clarified to provide that opinions containing alternative arguments for the taxpayer's position do not violate the rule so long as those arguments are not dependent upon factually inconsistent premises. Moreover, where the situation is such that a fact is uncertain (*e.g.*, the value of property), analysis that considers the reasonably likely possibilities concerning that fact should not be treated as violating the rule because alternatives based on plausible factual determinations are addressed.

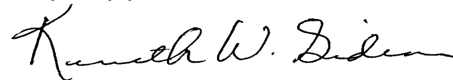
6. While the regulations appropriately provide that practitioners may not base their substantive conclusions on the likelihood of audit, the regulations should make clear that practitioners are not prohibited from advising their clients regarding the possibility that the transaction may be audited, what the likely course the IRS may take in an audit is, and what the prospects for settlement may be. In addition, the regulations should not apply to negative advice (*i.e.*, where the practitioner recommends that a taxpayer not engage in a transaction).

7. We further suggest that the regulations be clarified to provide that conduct that is intentional, but not intentionally violative of the rules, will not be treated as "willful." For example, if a firm sets a policy determining how it will apply the "principal purpose" standard in a reasonable way, those persons principally responsible for management of the firm's tax practice should not be considered to have acted "willfully" for purposes of Section 10.36 simply because they adopted a policy. Rather, the assessment should go to whether the policy adopted was reasonable. Similarly, in Section 10.52, a practitioner's deliberate determination that a transaction is not a "principal purpose" transaction should not be treated as "willful" simply because the practitioner intended to make a determination. Instead, the assessment should turn on the practitioner's good faith and reasonableness in making that assessment.

8. In view of the scope and significance of our requested changes as well as those requested by other commentators, we urge you to delay the effective date of the final regulations in order to provide practitioners with adequate time to develop procedures based upon the Government's final decisions.

We and our members are willing to meet with you to discuss or clarify these comments if that would be of assistance.

Very truly yours,



Kenneth W. Gideon
Chair, Section of Taxation

cc: Hon. Mark W. Everson, Commissioner, Internal Revenue Service
Eric Solomon, Acting Deputy Assistant Secretary – Tax Policy, Treasury Department
Hon. Donald L. Korb, Chief Counsel, Internal Revenue Service
Helen M. Hubbard, Tax Legislative Counsel, Treasury Department
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