NEW YORK STATE BAR ASSOCIATION
TAX SECTION

REPORT ON PROPOSED AMENDMENTS TO CIRCULAR 230

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INTRODUCTION

On December 19, 2003, the Treasury Department issued proposed amendments to the regulations governing practice before the Internal Revenue Service (the "Service"), 31 CFR part 10, reprinted as Treasury Department Circular 230 (the "Proposed Amendments"). The Treasury Department has previously requested comments to Circular 230 and we responded by submitting reports in July 2000 and August 2001. This report provides comments to the most recent proposed changes to sections 10.33, 10.35, 10.36, 10.37 and 10.93 of Circular 230.

We understand the concerns that have prompted the Treasury Department and the Service to propose to amend Circular 230 and we know that a substantial amount of thought and consideration has gone into crafting the Proposed Amendments. We commend the Treasury on its efforts to address the many issues raised by the proliferation of tax shelters and tax shelter opinions and we recognize that the current Proposed Amendments incorporate many of the comments and concerns expressed by this bar association as well as many other groups and organizations. While we believe that the Proposed Amendments go a long way toward addressing many of the issues raised by the use of tax opinions to market and sell tax shelter transactions, there are some problems with the Proposed Amendments which we believe merit additional consideration prior to finalizing the Proposed Amendments.

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[1] This Report was prepared by a special Task Force of the New York State Bar Association Tax Section. Its principal drafters were Edward E. Gonzalez and Bryan C. Skarlatos, with helpful comments provided by Kimberly S. Blanchard, Peter C. Canellos, Michael S. Farber, David P. Hariton, Robert A. Jacobs, Barbara T. Kaplan, Jiyeon Lee, Charles Morgan, Yaron Z. Reich, Ellis L. Reemer, Stuart L. Rosow, Michael L. Schler, Lewis R. Steinberg, Linda Swartz and Diana L. Wollman.

COMMENTS

Section 10:33 - Best Practices for Tax Advisors

The references to how lawyers should write opinions are clearly correct statements of what lawyers generally should aim to accomplish when they provide advice and no one would argue with the idea that a lawyer should act fairly and with integrity when practicing before the Service. Nevertheless, approximately half of the members of the Tax Section Executive Committee believe that it is not appropriate for the Service to impose national uniform standards governing general conduct on lawyers and accountants. Instead, these members of the Tax Section Executive Committee feel that such regulation of lawyers and accountants is better left to local bar associations and accounting organizations that already provide general rules of conduct.[2] At the same time, the other half of the members of the Tax Section Executive Committee believe that it is appropriate for the Service to impose national standards of conduct on lawyers and accountants.

To the extent that the Service does impose the best practices enumerated in section 10.33 on tax practitioners, there is an issue of how those best practices should be enforced. Because many of the best practices are aspirational, they are articulated with the type of words typically used to describe worthwhile goals and objectives and, as a result, they are naturally vague and imprecise. For example, whether one is successful in communicating clearly regarding the terms of engagement or advising clients as to the import of conclusions will necessarily depend on how one analyzes the substantive law in light of the particular facts. Similarly, what does it really mean for someone to act "fairly" in practice before the Service?[3]

The standards set forth in section 10.33 are so vague and imprecise that it would not be appropriate, or even feasible, to subject practitioners to sanctions for violating those standards.[4] However, we believe that it would be appropriate to establish more specific standards of minimum conduct governing the relationship between tax practitio-

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[2] Of course, these members of the Tax Section Executive Committee recognize that practitioners who are not attorneys or accountants are not already subject to regulation and that national standards for general conduct may be appropriate for this group of practitioners.

[3] For example, ABA Formal Opinions 314 and 85-352 recognize that a tax attorney advising a client acts in the dual roles of advisor and advocate and that the Service often acts in the dual roles of an independent agency and an adversary. These varying roles and a practitioner's related ethical obligations complicate the determination of whether and when an attorney is acting fairly with respect to the Service

[4] It is not clear whether Treasury intended to subject violations of section 10.33 to sanctions. While we recognize that section 10.33 uses the word "should" install of "shall" when applying the standards, we also note that sections 10.50 and 10.52 impose sanctions for certain failures to comply with the provisions of Circular 230.

ners and clients and between tax practitioners and the Service. Further, if the standards were articulated with sufficient specificity, we believe that it would be appropriate to impose sanctions on practitioners who violate these standards, but only to the extent that such violations are repeated or willful.

Section 10.35 - Requirements for Certain Tax Shelter Opinions

A. General Comments:

As a starting point, we recognize that the requirements regarding tax shelter opinions were drafted to address prototypical transactions. The real estate syndications of the 1970's and 1980's come to mind. Thus, we assume that the Proposed Amendments are directed at impeding the successors of these types of tax shelters. We also understand the inherent difficulties in defining a tax shelter and we know that the drafters of the Proposed Amendments have struggled with the definition. As with the tax disclosure rules, there is an inherent conflict between casting the net too narrowly or too broadly.[5]

The definition of tax shelter used in the Proposed Amendments is inordinately broad. By defining a tax shelter as any plan or arrangement a significant purpose of which is the avoidance of tax, the term may be read to encompass virtually any transaction with a significant tax component, from tax free reorganizations, to debt issuances, to mass marketing of listed transactions, and everything in between. In short, any transaction involving tax planning appears to be covered, including legitimate tax planning. The definition of "tax opinion" is also extremely broad, covering all written communications whether or not such communications are intended to be opinions in the commonly-used definition of the term. Taken together, the terms "tax shelter" and "tax opinion" appear to include nearly every written communication between a tax advisor and a client concerning the tax aspects of almost every transaction for which a tax advisor would be hired to provide advice. Similarly, the term "marketed tax shelter opinion" potentially covers a very broad range of situations that do not really constitute the marketing of tax shelters.

We believe that the best way to address the legitimate concerns of the Treasury without unduly subjecting tax practitioners and their clients to excessive regulation is to exclude certain opinions (or communications not rising to the level of a traditional opinion) from the requirements of Circular 230. As a general proposition, such opinions or communications would not provide any protection from penalties. We recognize that the Proposed Amendments already contain an exception from some of the requirements in section 10.35 for limited scope opinions, but we believe that this limited exception does not go far enough to address and solve the issues that will arise in every-

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[5] Treasury Regulation section 1.6011-4.

day practice. Accordingly, our primary recommendation is that, for purposes of section 10.35, the term "tax shelter opinion" be defined to exclude opinions or other communications that are not intended to provide relief from penalties (as described below) as well as the tax portion of documents subject to SEC registration or excepted from SEC registration by a specific exemption. We also recommend that the term "marketed tax shelter opinion" be defined more narrowly.

The breadth of the Proposed Amendments, and the problems created thereby, can best be illustrated by a few examples of the types of situations that routinely arise in daily practice and that would be subject to the Proposed Amendments even though no "tax shelter" or "marketed tax shelter," in the traditional sense of those terms, is involved.

1. Review of a Term Sheet. Clients frequently send their tax advisors a term sheet for a potential investment. The client seeks to obtain a preliminary reaction since the proposed investment and its structure is only in the development stage. The practitioner prepares a short summary memorandum, or even a short e-mail, with preliminary observations. At the time the practitioner renders such preliminary advice, the practitioner may not know (i) whether the term sheet will result in an actual transaction; (ii) whether the client will ultimately seek a formal opinion; or (iii) whether the client will share the tax advisor's communication with others.

If no formal opinion is expected, the communication with the client would be subject to Circular 230. Moreover, if the practitioner knows that the e-mail may be shown to the client's joint venture partner, the e-mail would be a marketed tax shelter opinion. This is so even though the advisor's comments may not rise to the level of a traditional legal opinion. While the Proposed Amendments do allow an advisor to avoid some provisions in section 10.35 by agreeing to provide a "limited scope opinion", such opinions must still comply with certain portions of section 10.35 and, if the advisor knows that the client will show the tax advice to a third party, it becomes a "marketed tax shelter opinion" that is no longer eligible for the limited scope exception. We believe that advisors should be permitted to provide, and clients should be permitted to obtain, such preliminary advice without having to satisfy all of the requirements contained in the Proposed Amendments. Indeed, many clients do not want to read, much less pay for, a complete technical analysis of every proposed investment or transaction they consider.

2. Review of a Hypothetical Transaction. In the course of developing a financial product or discussing strategic alternatives, an investment banker may ask a tax advisor to provide a written memorandum addressing one or more aspects of a hypothetical transaction. The memorandum may be prepared for purposes of the investment bank's internal procedures, which may require internal approval before an idea may be

shown to the bank's clients, or it may be a memorandum prepared to address a particular issue that has arisen in the course of developing ideas.[6]

Such a memorandum would be subject to the Proposed Amendments even though it does not deal with the facts of any particular taxpayer. In such cases, it may be difficult or impossible to satisfy all the requirements of section 10.35. Yet, the advice rendered serves an important function in developing the issues and identifying the facts that must be considered if an actual transaction were undertaken.[7]

3. Review of a Potential Acquisition. A potential acquirer may request a tax advisor to prepare a memorandum addressing an acquisition structure that it contemplates presenting to a potential target. In many, but not all, of these cases, the advisor knows that the client may show the written materials to a third party for the purpose of getting the third party *and its counsel* comfortable with the tax aspects of the proposed transaction.

The purpose of the memorandum is not to supplant independent evaluation of the tax analysis. Nevertheless, the memorandum would be treated as a marketed tax shelter opinion under the Proposed Amendments because the practitioner has reason to know that the memorandum will be shown to third parties. This is so, even if the advisor expects that the third party will seek the advice of its own counsel and receive its own analyses or opinion. .

4. Negotiation and Structuring of a Transaction. Practitioners representing the parties to an acquisition (the acquiror and target) or a financing (the issuer and investment banker(s)) may exchange e-mails or faxes with an analysis of the opposite parties' tax situation in an effort to solve problems, resolve differing legal views, or to convince the other of why one approach is more favorable than another. Even though the e-mails or faxes are just part of the negotiations and structuring, they would appear to be tax shelter opinions under the Proposed Amendments and may be marketed tax shelter opinions.

5. SEC Registered Proxy Statement. A proxy statement is prepared regarding a proposed tax-free reorganization. Counsel to the two parties may either give an opinion that is described in the tax section of the proxy statement or provide an opinion regarding the tax-free status of the transaction to satisfy a closing condition. In either

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[6] Note that in the case of memoranda that are prepared for the internal use of a client, a tax practitioner cannot limit the circulation of its advice without potentially making the transaction a confidential transaction under Treasury Regulation section 1.6011-4(b)(3). This appears to be the case even if the client is not an investment banker or promoter.

[7] We think that it is in the Treasury's interest that investment bankers carefully review any products that they propose to market.

case, the tax disclosure will briefly describe the consequences of the transaction being treated as a reorganization.[8] Holders will be warned that the disclosure is general in nature and does not take into account the individual situation of holders, all of whom will be advised to consult their own advisors. Under the Proposed Amendments, such disclosures would have to be far longer, less readable and comprehendible, and possibly violate the SEC's "plain English" requirements.

6. SEC Registered Disclosure Statement. A company issues an instrument that it believes to be indebtedness for United States federal income tax purposes. Counsel may (i) deliver an opinion to the issuer that the instrument is debt for United States federal income tax purposes and prepare the disclosure in the prospectus regarding the tax consequences to the holder (the "Disclosure"); (ii) deliver no specific opinion but prepare the Disclosure; or (iii) prepare the Disclosure and deliver an opinion to the effect that the disclosure is a fair and accurate summary of the anticipated United States federal income tax consequences.

In our experience, the Disclosure itself would rarely, if ever, satisfy the Proposed Amendments requirements. Even though most tax advisors will have thoroughly examined the factors necessary to establish debt status, the details of the analysis would not be reflected in the Disclosure because the analysis is generally not considered relevant to a purchaser. The objective of most disclosure in public documents is to describe succinctly the anticipated material tax consequences to holders generally. The disclosure is generally written so that it can be understood by individuals who are not expert in the tax law; it is not addressed to tax professionals. Further, it is impossible to know the individual circumstances of countless holders. To write the type of detailed disclosure that the Proposed Amendments appear to require would create disclosure that is complicated and difficult to understand.

The few foregoing examples merely illustrate the many types of routine advice that practitioners provide on a daily basis that will fall within the definition of "tax shelter opinion" or "marketed tax shelter opinion." If the Proposed Amendments are adopted as written, many types of routine advice will become subject to some or all the requirements of section 10.35 even though it may be completely inappropriate, unnecessary, or impossible to require a tax advisor and a client to allocate the time and money needed to satisfy the standards of the Proposed Amendments.

We understand that some of these problems only arise if the Proposed Amendments are read literally and that the spirit behind the Proposed Amendments is not to affect routine advice. While we have no quarrel with the spirit of the Proposed Amendments, the enforcement mechanisms contained in Circular 230 require us to read

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[8] Note that customary opinions in these cases may only conclude that the transaction is a reorganization within the meaning of section 368(a) of the Internal Revenue Code and no more.

the rules from the enforcement perspective. In the event of a violation, the requirements of Circular 230 will be applied, with hindsight, by an Administrative Law Judge. It would be unreasonable to assume that the judge would adhere to anything other than the literal language of the regulations.

We recognize that a balance needs to be reached between the legitimate needs of the Treasury to address the tax shelter problem and the rights of taxpayers to conduct their relations with their tax advisors in the way that they believe satisfies their needs. We respectfully submit that the Proposed Amendments do not reach the proper balance. We believe that the Proposed Amendments constitute an unnecessary regulation of the relationship between tax practitioners and their clients and an unrealistic attempt to change the manner in which tax advisors practice on a daily basis. In most cases, clients simply do not seek the type of detailed opinions that the Proposed Amendments appear to require and, in our experience, providing such opinions would not even be possible in many situations. At the same time, we understand that the Treasury does have a legitimate interest in regulating the way in which opinions are written in those cases in which (i) a client intends to rely on the opinion for purposes of avoiding the application of penalties that are imposed under the Internal Revenue Code and (ii) the opinion is intended to be used in connection with a mass-marketed tax shelter. Our recommendations regarding how to implement these general guidelines are set forth below.

B. Specific Comments

1. Section 10.35(a)(1) Requirements for Certain Tax Shelter Opinions: Factual Matters

We suggest that the "Definitions" portion of section 10.35, which currently appears in section 10.35(c) of the Proposed Amendments, be inserted as a new section 10.35(a). By beginning section 10.35 with a definitions section, it will be clearer what types of conduct are subject to the regulations in section 10.35. Additional comments regarding specific definitions are set forth in our comments to section 10.35(c) below.

Regarding section 10.35(a)(1) of the Proposed Amendments, we would not change any of the requirements for factual matters to the extent that they apply to tax shelter opinions.[9] However, as demonstrated by the examples discussed above, practitioners frequently are requested by clients to provide a memorandum outlining the tax con-

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[9] NYSBA Tax Section Report #995 on Proposed Modifications to Circular 230 (the "Prior Report") simply suggested that tax shelter opinions should be required to identify all the relevant agreements and other documents reviewed by the practitioner. The list of documents could be in the text of the opinion or attached as an appendix. The idea was to encourage clients to provide all documents to the practitioner to make it less likely that a practitioner would miss or avoid a material fact or tax issue. Further, if a client fails to disclose a significant document, the failure would preclude a good faith reliance on the opinion.

sequences of hypothetical or potential transactions which sometimes have no specific taxpayer and/or different potential fact situations. In such cases, it is difficult or impossible for the practitioner to ascertain all relevant facts. Further, the requirements regarding assumptions and representations set forth in sections 10.35(a)(1)(ii) and (iii) are not workable in this context. Accordingly, we suggest that practitioners and clients who are dealing with hypothetical or potential transactions be permitted to agree to a limited scope opinion that does not satisfy all of the requirements regarding factual matters set forth in section 10.35(a)(1). This exception would also apply to marketed tax shelter opinions that address a hypothetical transaction, as long as the opinion is clear on its face that the facts addressed may not be those present in an actual transaction and that the legal conclusions may not apply to an actual transaction. Such marketed tax shelter opinions would be subject to the other applicable requirements of the section 10.35.

2. Section10.35(a)(2) - Requirements for Certain Tax Shelter Opinions: Relate Law to Facts

We agree that, with respect to tax shelter opinions, a practitioner should relate the applicable law to the relevant facts and, unless there is proper reliance on the opinion of another, the practitioner should not assume the favorable resolution of any material factual issue. Nevertheless, we do not agree that a tax shelter opinion should never contain internally inconsistent legal analyses or conclusions.

As we suggested in the Prior Report, Circular 230 should expressly permit an opinion to discuss alternative theories for one or more of its conclusions as long as the requirements of Circular 230 have been satisfied relying on one consistent theory. While a practitioner should not be permitted to rely on inconsistent legal analyses as to two different federal tax issues, the practitioner should be able to discuss one or more alternative theories provided that the opinion reaches a conclusion on all the tax shelter items by relying on one consistent theory. The idea is to allow opinions to state alternative, and possibly inconsistent, arguments to support the taxpayer's position.

The Prior Report also suggested that, if relevant facts are uncertain and more than one factual scenario is reasonably possible, an opinion should be allowed to reach different conclusions under alternative factual situations using inconsistent legal theories.

3. Section 10.35(a)(3) - Requirements for Certain Tax Shelter Opinions: Evaluation of Material Tax Issues

We agree with the requirements of section 10.35(a)(3) to the extent that they apply to tax shelter opinions. As discussed in more detail below, we believe that the exception for limited scope opinions set forth in section 10.35(a)(3)(ii) should be moved to the "Definitions" portion of the Proposed Amendments and should be incorporated into the definition of what constitutes a tax shelter opinion.

4. Section10.35(a)(4) - Requirements for Certain Tax Shelter Opinions: Overall Conclusion

We agree with the requirements of section 10.35(a)(3) to the extent that they apply to tax shelter opinions. We suggest that there be a cross reference to the disclosure required in section 10.35(d)(4) for opinions that do not reach a conclusion of at least more likely than not with respect to a material tax issue.

5. Section10.35(b) - Requirements for Certain Tax Shelter Opinions: Competence to Provide Opinion; Reliance on Others

We suggest that this provision be re-numbered as section 10.35(c) so that it follows the definitions set forth in section 10.35(a) and the general rules set forth in section 10.35(b).

As we stated in the Prior Report, we believe that the requirement that a practitioner be "not sufficiently knowledgeable on certain issues" before the practitioner may rely on the opinion of another should be deleted. There is no reason why a knowledgeable practitioner should not be permitted to rely on the opinion of another. The meaning and application of the phrase "not sufficiently knowledgeable on certain issues" is not clear and will be difficult to apply in practice. Further, there is no reason why a client who hires a knowledgeable practitioner should be required to incur the costs of a second opinion on a certain issue for no reason other than to comply with this section. A practitioner's ability to rely on the opinion of another should not be limited as long as all the other conditions of Circular 230 are met.

6. Section10.35(c) - Requirements for Certain Tax Shelter Opinions: Definitions

We suggest that this provision be re-numbered as section 10.35(a) so that it is clear at the beginning exactly what types of conduct are subject to the remaining requirements of section 10.35(b) and (c).

As discussed above the Treasury has chosen to use the definition of tax shelter that incorporates the "significant purpose" test, with the result that most transactions with a tax component are tax shelters and most written tax advice will constitute a tax shelter opinion. The Prior Report, as well as reports submitted by several other bar associations and interested parties, have noted that this broad definition raises many difficult issues. We have noted these problems above. We applaud the Treasury's decision to provide certain exceptions to the requirements of section 10.35 for certain types of opinions. For the reasons stated above, however, we do not believe that these exceptions go far enough.

We believe that the requirements of the Proposed Amendments should only apply to a fairly narrow group of opinions. As illustrated by the examples above,

attempting to apply opinion standards aimed at true tax shelters opinions to a wide variety of transactions and situations is inappropriate and in many cases not feasible. Our members have differing views regarding the best way to implement the proposal. A narrow majority of our members believes that the best approach is to provide for an "opt-in" election where only an opinion that makes clear that it is intended to provide penalty relief is subject to the Proposed Amendments. The advantage of this approach, as compared to the opt-out approach described below, is that practitioners do not have to label all their communications with a header to the effect the communication does not provide protection against penalties imposed under the Internal Revenue Code. In this way, the opinions that would be subject to the Proposed Amendments would likely be traditional, formal opinions. The disadvantage of this approach is that some taxpayers might assume that a particular communication did provide protection against penalties even in the absence of an explicit statement. Nevertheless, this should rarely occur in every day communications (such as e-mails, preliminary memoranda, analyses of hypothetical or genuine facts).

A significant minority of our members preferred an "opt-out" election under which any type of communication between a tax advisor and its client would not be subject to the Proposed Amendments if the tax practitioner makes clear that the advice provided in such communication may not be relied upon for protection against penalties. The advantage of this approach is that there is no ambiguity between the advisor and client as to what is intended to be achieved by the communication. On the other hand, it may be difficult to include such labels on all communication. Perhaps this burden could be ameliorated by a presumption, based on either the course of conduct between the practitioner and the client or the nature of the communication (e.g., a cursory e-mail) to indicate that no protection from penalties was intended.[10]

We strongly suggest that an exception to the definition of tax shelter opinion be provided for the tax disclosure incorporated in documents filed with the SEC and in offering materials for transactions that are exempt from registration with the SEC. An express exception from this exception may be provided for offerings covered by the existing tax shelter rules.

We also generally believe that marketed tax shelter opinions, in addition to opinions intended to provide relief from penalties, should be subject to the Proposed Amendments. Nevertheless, we believe that the term "marketed tax shelter opinion, as defined in the Proposed Amendments, is too broad. At a minimum, communications among the parties to an actual ongoing transaction (including communication to and from

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[10] Whether an "opt-in" or "opt-out" approach is used, the fact that communication does not provide penalty relief should have no relevance to the issue of whether a taxpayer acted reasonably. Such communications can be accorded the same weight as any analysis (such as an article) that a taxpayer may claim to have reviewed in determining its tax position.

the investment bankers) should be excluded from the term. In addition, communications provided to investment bankers that are intended for their internal use, and that are not expected to be provided to their clients, should not constitute marketed tax shelter opinions.

Consequently, we believe that the term "marketed tax shelter opinion" should only cover communications intended to be used in marketing a transaction and intended to be shown to multiple third parties. The term should also cover hypothetical opinions that are intended to be used to market a product or transaction to multiple third parties. As noted above in Section B.1, the requirements applicable to such opinions should be amended to reflect those cases in which the facts of an actual transaction cannot be addressed in the opinion. For example, "marketed tax shelter opinion" could be defined as:

> An opinion purporting to address the tax consequences of an actual or hypothetical transaction but one in which the tax consequences of a particular group of taxpayers, who are not the tax practitioner's clients, are described and the preparer of such opinion knows that such opinion will be used to induce multiple third parties to invest or participate in the transaction.[11]

The Proposed Amendments should also be amended to make clear, either by specific exceptions or by examples, that communications among the parties to a transaction or communications proposed for the internal use of an investment banker, are not marketed tax shelter opinions.

In addition, the Proposed Amendments provide that a "tax shelter opinion" includes "a financial forecast or projection prepared by or at the direction of a practitioner." The phrase "at the direction of a practitioner" raises the issue of whether it is intended that a practitioner who reviews and comments on a client's projections, but who renders no formal advice and who is not identified in any offering materials, must nevertheless generate an opinion meeting the standards of the Proposed Amendments. We would agree that, if the offering materials claim that a practitioner has reviewed the projection, then the practitioner should render an opinion. However, if the projections are presented without an opinion or any reference to the practitioner, the requirements of the Proposed Amendments should not apply. This is another instance in which informal advice that does not rise to the level of a conventional opinion should not be subjected to the requirements of the Proposed Amendments.

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[11] We suggest that "multiple" be defined. For example, it may be defined as five or more taxpayers – *See eg*; Treas. Reg. §301.6111-1 T Q/A 22 (defining one of the triggers for registering an investment as a tax shelter).

7. Section10.35(d) Requirements for Certain Tax Shelter Opinions: Required Disclosures

The requirement to disclose any "compensation arrangement between the practitioner (or the practitioner's firm) and any person (other than the client for whom the opinion was prepared)... " raises a question of what constitutes a "compensation arrangement."[12] For example, assume law firm A advises investment banker X on a product (writes a memorandum outlining tax consequences, etc.); represents X in the first instance in which the product is used and in which the issuer is represented by separate counsel that issues the tax opinion; and law firm A is paid on an hourly basis for work actually performed. Can law firm A then advise an unrelated issuer on the same product? What if the second issuer is an existing client of law firm A? If law firm B also provided advice to X by reviewing the analysis of law firm A, writing its own opinion (all as part of the effort of X to make sure that there was consensus with respect to the tax treatment of its product), does law firm B have a financial interest? Because of the confusion created by these and other situations, we believe that it is appropriate to draw a distinction between services provided for hourly rates and compensation arrangements based on how many transactions are successfully completed by the investment banker or promoter.[13]

8. Section 10.36(a) - Procedures To Ensure Compliance; Best Practices for Tax Advisors

We suggest that the regulations provide a safe harbor that, if satisfied, will ensure compliance with this section. For example, a safe harbor could involve (1) the adoption of a policy incorporating best practices; (2) the creation of procedures for punishing violations of best practices; and (3) communication of those policies and procedures to all members, associates and employees.

9. Section 10.36(b) Procedures to Ensure Compliance: Requirements for Certain Tax Shelter Opinions

In light of the sweeping coverage of the Proposed Amendments, and their ambiguity, at this stage, we think that the notion of holding one person responsible for the actions of another seems inappropriate. While we can appreciate that this can be a significant enforcement tool for the Treasury and the Service, the opportunities for misuse of this power are of concern.

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[12] Commissioner Everson's Penalty Policy Statement similarly refers to any "financial interest in the tax shelter promotion" or "financial arrangement with a tax shelter promoter." There are similar questions as to what constitutes a "financial interest" or "financial arrangement" for purposes of this Penalty Policy Statement.

[13] Such distinction has previously been made in the context of the registration requirements under IRC 6111.

Regardless of any changes that may be made to the scope of the Proposed Amendments, we would repeat the suggestion made with respect to section 10.36(a) that this section incorporate a safe harbor similar to the one suggested for section 10.36(a).

10. Section 10.36(c) Effective Date

The Proposed Amendments provide that section 10.36(a) is effective on the date that final regulations are published and that section 10.36(b) applies to tax shelter opinions rendered after the date that the final regulations are published. We suggest that the regulations allow ninety days after the final regulations are published to provide firms with sufficient time to adopt reasonable steps to insure compliance.