Practitioners Demanding Clear Outlines of Circular 230's Scope

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The IRS and Treasury are being asked by professional associations and tax attorneys to back up public statements that the Circular 230 opinion guidelines do not apply to published tax articles and similar writings.

The Association of the Bar of the City of New York, the Investment Institute, and lawyers at prestigious New York firms have sent letters to the IRS and Treasury in the past months requesting confirmation that the IRS will not apply the new covered opinion rules to practice articles, conference handouts, or other educational material despite clear public statements by government officials, including Cono Namorato, director of the IRS Office of Professional Responsibility (OPR), that the materials are not covered by the Circular 230 guidelines. (For prior coverage, see *Doc 2005-10168* or *2005 TNT 90-3* and *Doc 2005-13145* or *2005 TNT 116-4*.)

Some observers are not comfortable accepting the government's word, concerned that the guidelines could be interpreted on their face to include practitioner articles and other writing not produced with a client in mind.

Comments and Concerns

"A literal application of the definition of marketed opinion would encompass articles and outlines written for publication in periodicals and for distribution at seminars," the New York City bar association said in supplemental comments on the final rules submitted on June 9. E-mail exchanges on discussion groups and blogs and material describing noncontroversial tax issues in brochures would also be covered, according to the association. (For the comment letter, see *Doc 2005-13469* or *2005 TNT 119-20*.)

> ***'The language of section 10.35 does not limit covered opinions to written tax advice provided by a practitioner to his or her client,' Lawson noted.***

A similar concern was raised in a May 2 comment letter on the final rules submitted by the American College of Tax Counsel (see *Doc 2005-12426* or *2005 TNT 111-18*) and in a June 20 letter to Eric Solomon, Treasury deputy assistant secretary (regulatory affairs) and acting deputy assistant secretary for tax policy, and IRS Chief Counsel Donald Korb from Keith Lawson of the Investment Company Institute (see *Doc 2005-14039* or *2005 TNT 124-39*).

"The language of section 10.35 does not limit covered opinions to written tax advice provided by a practitioner to his or her client," Lawson noted. Lawson's specific concern was that many communications within the mutual funds industry, including trade association notices to members regarding tax legislation or IRS guidance, could be considered reliance opinions or even marketed opinions — but, he noted, the same concern arises with law review articles.

Others have reasoned that published articles are not covered because they are not tax advice. Articles, training outlines and presentations, and books "are clearly intended to be educational, not to transmit advice," according to an August 4 letter from Leslie B. Samuels of Cleary Gottlieb Steen & Hamilton LLP and Diana L. Wollman of Sullivan & Cromwell LLP addressed to Namorato and Stephen

MALOY TO REPLACE DENOVIO IN IRS CHIEF COUNSEL'S OFFICE

Heather C. Maloy has been named acting deputy chief counsel (technical), replacing the outgoing Nicholas J. DeNovio, the IRS announced last week.

DeNovio is headed to the Washington office of the law firm of Latham & Watkins to be a partner in the tax department.

Maloy most recently served as associate chief counsel for Passthroughs and Special Industries since August 2002. Before that she held a variety of positions in different parts of the IRS, including a stint on the commissioner's staff. She will now be responsible for maintaining the IRS's published guidance program.

"Heather's extensive executive experience and her substantial knowledge of Counsel's technical functions make her an excellent choice to act in this position," IRS Chief Counsel Donald L. Korb said. "She is a valuable asset to the Office of Chief Counsel."

Maloy received an LL.M. degree in taxation from the University of Florida School of Law in 1993, a law degree from Cornell Law School in 1990, and an undergraduate degree from Emory University in 1983.

DeNovio ascended the IRS ranks quickly after he was brought to the agency in 2003 to be senior counsel on tax shelter initiatives to then-Chief Counsel B. John Williams Jr. DeNovio had held the deputy post since February 2004 and was probably best known for overseeing the IRS guidance issued as a result of last year's corporate tax bill. ■

— Allen Kenney

Whitlock, the deputy director of the OPR (see *Doc 2005-17248* or *2005 TNT 156-73*).

The letter from Samuels and Wollman, which also takes the position that operative transactional documents and term sheets are not covered opinions, purports to confirm a prior agreement reached with the IRS over the interpretation of the opinion rules' application to those documents.

Legends in Practice

Because of the lack of specific exclusions from the rules, the Circular 230 "no penalty reliance" legend is becoming increasingly common on client bulletins distributed by law firms, accounting firms, and even investment banks.

Even if the bulletin itself does not contain a legend, if it is distributed by e-mail, the firm's automatic Circular 230 disclaimer legend, which typically extends to attachments, probably will already have been added, several practitioners have noted. Some attorneys have also reported seeing the legend on continuing education handouts, but they say it is not common practice.

There is some paranoia, and "some will go overboard" with legends, but most will strike a middle ground, said David Kempler of Silverstein and Mullens.

One place the legend has not been showing up is in tax practice publications. Editors at several tax publications report that, for the most part, no one has requested the legend be included on articles submitted for publication.

Lesli Laffie, editor of the American Institute of Certified Public Accountants' monthly publication *The Tax Adviser*, said no one had asked about it.

Even lawyers from major law firms have not asked for the legend to appear with their articles, according to Claudia Hill of Tax Mam Inc., a California-based tax services group, who edits the *Journal of Tax Practice and Procedure* published by CCH.

However, editors at *Tax Notes* said one author had asked about including the legend, but the editors and the author determined the notice was not necessary.

"My guess is you won't see it much on articles," said Robert Wood of Robert W. Wood, P.C., in San Francisco. Material consciously intended to be distributed to clients is a different case, according to Wood.

Wood said he sees the Circular 230 legend issue as part of a larger question of when a client relationship has been established. Even before Circular 230, it was not uncommon to see adviser notices on publications and Web sites notifying the reader that no client-lawyer relationship had been established and advising them to consult a tax professional, Wood said.

IRS Response

During an August 16 conference call held by the American Bar Association Joint Committee on Employee Benefits, Treasury officials were questioned repeatedly about when Circular 230 covers tax articles and other writing not directed at a specific client.

"The general answer is no," a tax practice article will not be advice because there is no practitioner-client relationship, said Michael Desmond, Treasury's deputy tax legislative counsel for legislative affairs, who was speaking on his own behalf.

Both Desmond and W. Thomas Reeder, Treasury acting benefits tax counsel (business and international taxation), also speaking on his own behalf, drew a sharp distinction between abstract statements about tax law and advice given to a client applying tax law to the client's particular circumstances. "Abstract statements about tax law are not tax advice," said Desmond.

Likewise, "simply reciting the statute and regs and applying them to an abstract set of facts" would not be tax advice, Reeder said when asked by Chuck Plenge of Haynes and Boone LLP in Dallas whether some employee benefit plan documents could be considered advice.

"As a general rule, people know when they are giving tax advice and when they are not," said Desmond.

> ***Both Desmond and Reeder drew a sharp distinction between abstract statements about tax law and advice given to a client applying tax law to the client's particular circumstances.***

The responses given by the Treasury officials during the call were well-received by the panel; however, neither Desmond nor Reeder said whether planned written guidance on Circular 230 would address that specific issue.

Treasury is "looking at ways the 10.35 rules can be better focused" in conjunction with other Circular 230 projects, said Desmond. The time frame for the guidance is "months rather than years," he added. "We are thinking in very broad channels," he said, rather than about issues that affect only a few practice areas. Areas to be addressed by the guidance include marketed opinion standards and monetary penalties, according to Desmond. ■