



New York State Bar Association

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November 16, 2007

The Honorable Eric Solomon
Assistant Secretary (Tax Policy)
Department of the Treasury
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220

The Honorable Linda E. Stiff
Acting Commissioner
Internal Revenue Service
Room 3000 IR
1111 Constitution Avenue, N.W.
Washington, D.C. 20224

Re: Comments Regarding the New Monetary Penalty
Under Circular 230

Dear Assistant Secretary Solomon and Acting Commissioner Stiff:

I am pleased to enclose New York State Bar Association Tax Section Report No. 1136 (the "Report"). The Report comments on IRS Notice 2007-39, 2007-20 IRB 1243 (April 22, 2007) (the "Notice") in which the Service provided guidance regarding the new monetary penalty under Circular 230.

The Report responds to the Notice's request for comments regarding factors to be considered when determining whether a monetary penalty is appropriate, factors the government should consider in declining to impose a monetary penalty on an employer, firm or other entity, and mitigating circumstances to consider in determining the amount of monetary penalty.

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Regarding when the monetary should be imposed, the Report recommends that the monetary penalty be treated no differently than other available sanctions under Circular 230 and that the same standards of willfulness, recklessness and gross incompetence be applied to monetary penalties. The Report suggests that the basic rules governing imposition of the monetary penalty be expressly stated section 10.52 of Circular 230. Suggested revisions to section 10.52 are included as an exhibit to the Report.

The Report discusses the relationship of the monetary penalty to the other available sanctions under Circular 230 and recommends that section 10.52 indicate that the monetary penalty can be imposed as a sole sanction or in combination with the other sanctions of censure, suspension or disbarment. The Report suggests that section 10.52 identify factors to be considered in determining an appropriate sanction and proposes a list of such factors. The proposed list is derived, in large part, from 18 U.S.C. section 3553(a) which sets forth factors to be considered for determining an appropriate criminal sentence. The Report also notes that our Executive Committee is split as to whether the name of a practitioner on whom monetary penalties have been imposed should always be disclosed to the public.

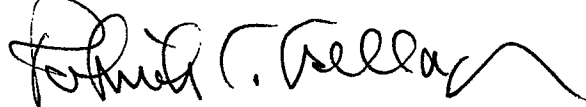
Regarding the question of when a monetary penalty should be imposed on an employer, firm or other entity, the Report recommends that there be a safe harbor from sanctions for any firm that can show it has taken reasonable steps to ensure adequate procedures for purposes of complying with Circular 230. Further, a firm that can show it uses "best practices for tax advisors" as indicated in section 10.33(b) of Circular 230 generally should generally be relieved of any monetary sanction.

The Report addresses how the amount of the monetary penalty should be determined and recommends that the penalty amount limited by the gross income derived (or to be derived) from the prohibited conduct and any services directly attributable to the prohibited conduct. In determining whether services are "directly attributable" to prohibited conduct, we suggest a "but for" test of causation, so that income from other services would be included in computing the penalty only if the other services would not have been provided "but for" the prohibited conduct. This would reasonably link the amount of the penalty to the prohibited conduct.

Finally, the Report recommends that all mitigating factors be considered in determining whether to impose a monetary penalty and in determining the amount of the penalty, and that the burden of proving mitigating factors be placed on the practitioner. This would help ensure that any appropriate mitigating factors are brought to the attention of the government before sanctions are imposed.

We appreciate your consideration of our comments. Please let us know if you would like to discuss these matters further or if we can assist you in any other way.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Patrick C. Gallagher", with a long, sweeping flourish extending to the right.

Patrick C. Gallagher
Chair

cc:

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