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One Elk Street, Albany, New York 12207 • 518/463-3200 • <http://www.nysba.org>

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January 29, 2008

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: Proposed Amendments to Circular 230 Relating to
Standards with Respect to Tax Returns

Dear Assistant Secretary Solomon and Acting Commissioner Stiff:

I am pleased to enclose the New York State Bar Association Tax Section's Report No. 1149, addressing proposed amendments to Circular 230 relating to standards with respect to tax returns, which were released by the Treasury on September 26, 2007 (the "Proposed Amendments"). The Proposal Amendments would seek to conform the standard of Section 10.34 of Circular 230 ("Section 10.34") to that of Section 6694 of the Internal Revenue Code of 1986 (the "Code") as it was recently amended.

Following a brief discussion of the history of tax return advice and preparation standards under Circular 230, the Report describes the current and proposed standards. Finally, part IV of the Report discusses our recommendations, comments and concerns regarding the change in standards.

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Because Circular 230 is a regulation, we believe that the Treasury has authority to set the standard for practitioner conduct where the Treasury believes it to be appropriate. Congress, however, has spoken in the case of tax return preparers in setting a standard for taking return positions in Code Section 6694, and we believe that standard should inform the standard of Section 10.34 as it relates to conduct covered by Code Section 6694. As discussed in our Letter No. 1146 relating to Section 6694, dated January 28, 2008, we have many concerns with the standard set in Code Section 6694, many of which apply equally in the context of a practitioner giving advice on a position to be taken on a tax return. Moreover, the penalties and sanctions for a violation of Circular 230 are potentially more severe than those that apply under Code Section 6694.

Balancing these considerations, we recommend that Section 10.34(a) be bifurcated, so that it contains (1) a base standard, which would apply to all practitioners covered by Section 10.34(a), consisting of the historic realistic-possibility-of-success standard of old Section 10.34(a), or in any event a standard not higher than the taxpayer penalty standard under Section 6662 of the Code, and (2) a further rule that, if a practitioner described in Section 10.34(a) is a tax return preparer who is subject to Code Section 6694 and commits repeated, or otherwise serious, violations of Code Section 6694, that conduct would also be considered a violation of Section 10.34(a). The foregoing rule (2) should include guidance coordinating the penalties and sanctions imposed by Code Section 6694 and Circular 230, so that they are applied equitably and there is no inappropriate duplication of statutory and administrative penalties for the same conduct.

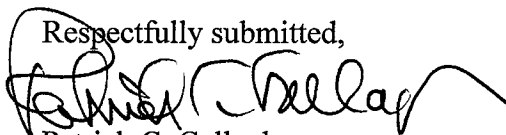
This Report makes the following additional recommendations:

- For practitioners who advise taxpayers to make adequate disclosure, provide a defense against sanctions arising from taxpayer nondisclosure. A practitioner, even one who prepares a return, cannot force a taxpayer to include a disclosure with the return where the taxpayer does not agree to do so. In addition, it is important for the taxpayer to understand the taxpayer penalty rules and the role that disclosure plays in those rules. Accordingly, we recommend, regardless of the Section 10.34(a) standard ultimately adopted, that a carve out from liability for non-disclosure be available under Circular 230 to practitioners who give advice to taxpayers, where the practitioner advises the taxpayer with respect to the taxpayer penalty rules of Code Sections 6662, 6662A and 6664, as applicable.
- Clarify the scope of activities that will potentially subject practitioners to sanction under Circular 230. For a number of reasons, legal advice regarding tax return positions is often rendered in limited scope engagements of various types. It may not be possible in such an engagement for a practitioner to form a “reasonable belief,” as defined in Circular 230, regarding whether a particular return position meets the Circular 230 standard. If the Proposed Amendments are intended to apply to such advice, they should be clarified so that, in the context of a limited scope engagement, customary practitioner conduct that is consistent with professional norms and is not negligent would not be construed as a violation of the provision.

- Clarify the “reasonable belief” standard. A practitioner is required to have a “reasonable belief” that a tax return position meets the Circular 230 standard. Although the reasonable belief standard is drafted as a subjective one — the belief of the particular practitioner — we believe that the existence of the belief is subjective but that the reasonableness of the belief is appropriately an objective question, and that the standard should be clarified that it will be applied as such.
- Expand the list of authorities that practitioners may consult in determining that a “reasonable belief” exists. In establishing a “reasonable belief” regarding a tax return position, we recommend that practitioners be able to consult and rely on a broader list of authorities than the limited list on which taxpayers may rely to establish substantial authority, including treatises and other commentary.

I appreciate your consideration of our recommendations and comments. Please let us know if you would like to discuss our report or the Final Regulations further or if we can assist you in any other way.

Respectfully submitted,



Patrick C. Gallagher
Chair

cc:

The Honorable Donald L. Korb
Chief Counsel
Internal Revenue Service

Karen Gilbreath Sowell
Deputy Assistant Secretary for Tax Policy
Department of the Treasury

Michael J. Desmond
Tax Legislative Counsel
Department of the Treasury

Deborah A. Butler
Associate Chief Counsel (Procedure & Administration)
Internal Revenue Service

Michael R. Chesman
Director, Office of Professional Responsibility
Internal Revenue Service

Matthew S. Cooper
Office of Associate Chief Counsel (Procedure and Administration)
Internal Revenue Service

Anita C. Soucy, Attorney-Advisor
Office of Tax Legislative Counsel
Department of Treasury