

**IRS Circular 230 Regulations
for Written Tax Advice**
by
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The Internal Revenue Service ("*IRS*") has adopted tax practice regulations (Circular 230) for attorneys, accountants and IRS-enrolled agents ("*tax practitioner(s)*") applicable to the issuance of certain *written tax advice*. The regulations, which became effective June 21, 2005, set forth not only "aspirational best practices" applicable to all tax practitioners, but also provide mandatory requirements for tax practitioners who provide so-called "Covered Opinions." These rules are enforced by important sanctions relating to practice before the IRS. The regulations do not alter or supplant other ethical standards applicable to tax practitioners.

A *Covered Opinion* is written advice (including electronic communications) by a tax practitioner concerning one or more federal tax issues arising from: (1) an "IRS-listed" transaction, (2) any partnership or other entity, any investment plan or arrangement, or any other plan or arrangement, the *principal purpose* of which is the avoidance or evasion of any tax imposed by the Internal Revenue Code ("*IRC*") , or (3) any partnership or other entity, any investment plan or arrangement, or any other plan or arrangement, a *significant purpose* of which is the avoidance or evasion of tax imposed by the IRC if the written advice is (A) a *reliance opinion*, (B) a *marketed opinion*, (C) is subject to *conditions of confidentiality*, or (D) is subject to *contractual protection*.

It is anticipated that the IRS will consider that written documents are not "advice" for purposes of these tax practice regulations unless a tax practitioner-client relationship exists between the writer and the recipient *and* the written documents at issue apply the law to a client-specific fact pattern. These rules are not intended to apply to routine types of documents that generally are not considered tax advice under circumstances where no further analysis is necessary.

Reliance Opinion

A *reliance opinion* is written advice that concludes at a confidence level of at least more likely than not (meaning, more than 50%) that one or more significant federal tax issues would be resolved in the taxpayer's favor. However, written advice is *not* treated as a reliance opinion if the tax practitioner *prominently* discloses in the written advice that it was *not* intended or written by the tax practitioner to be used, and that it cannot be used by the taxpayer, for the purpose of avoiding federal tax penalties that may be imposed on the taxpayer. A statement is "prominently" disclosed if it is set forth in a separate section at the beginning of the written advice in bolded typeface that is larger than any other typeface used in the written advice.

Marketed Opinion

Written advice is a *marketed opinion* if the tax practitioner knows or has reason to know that the written advice will be used or referred to by a person other than the tax practitioner (or a person who is a member of, associated with, or employed by the tax practitioner's firm) in promoting, marketing or recommending a partnership or other entity, investment plan or arrangement to one or more taxpayers. Written advice generally is not treated as a marketed opinion if the tax practitioner prominently discloses in the written advice that (1) it is not intended or written by the tax practitioner to be used, and that it cannot be used by the taxpayer, for the purpose of avoiding penalties that may be imposed on the taxpayer, (2) it is written to support the promotion or marketing of the transactions or matters addressed in the written advice, and (3) the taxpayer should seek advice based on the taxpayer's particular circumstances from an independent tax advisor.

Conditions of Confidentiality

Written advice is subject to *conditions of confidentiality* if the tax practitioner imposes upon one or more recipients of the written advice a limitation on disclosure of the tax treatment or tax structure of the transaction and the limitation on disclosure protects confidentiality of that tax practitioner's tax strategies, regardless of whether the limitation on disclosure is legally binding.

A claim that a transaction is proprietary or exclusive is not a limitation on disclosure if the tax practitioner confirms to all recipients of the written advice that there is no limitation on disclosure of the tax treatment or tax structure of the transaction that is the subject of the written advice.

Contractual Protection

Written advice is subject to *contractual protection* if the recipient has the right to a full or partial refund of the tax practitioner's fees (or the fees of a person who is a member of, associated with, or employed by the tax practitioner's firm) if all or part of the intended tax consequences from the matters addressed in the written advice are not sustained, or if the fees paid to the tax practitioner (or the fees paid to a person who is a member of, associated with, or employed by the tax practitioner's firm) are contingent on the recipient's realization of tax benefits from the transaction. All of the facts and circumstances relating to the matters addressed in the written advice are considered in determining whether the tax practitioner's fees are refundable or contingent, including the right to reimbursements of amounts that the parties to a transaction have not designated as fees or any agreement to provide services without reasonable compensation.

Covered Opinion Requirements

Covered Opinions about partnerships or other entities, investment plans or other arrangements with a *significant purpose* to avoid tax must (1) identify and consider all relevant facts, (2) relate the law to the relevant facts, (3) avoid

unreasonable factual assumptions or representations, and (4) consider all significant tax issues. Covered Opinions are usually far more comprehensive than general written tax advice so they are more costly to prepare. Covered Opinions which fail to meet this standard violate these tax practice regulations.

Disclaimer

As an alternative to issuing a Covered Opinion, tax practitioners may include a "*disclaimer*" in general written tax advice consistent with the regulatory requirements noted above relative to reliance opinions and marketed opinions. If the disclaimer is stated prominently in the written advice, then compliance with the Covered Opinion standards in preparing the written tax advice is unnecessary. Of course, written tax advice must always carefully and thoroughly discern and relate all of the facts and circumstances of a matter to applicable federal laws, regulations and applicable judicial opinions of the federal courts.

Clark & Trevithick includes appropriate legends in its *e-mails*, *written correspondence* and other *written communications* of tax advice. The legends state that the recipient of the written communication may not use it to avoid tax penalties, or to promote, market or recommend to someone else the matter addressed in the written communication. Our legend for e-mail communications reads:

Circular 230 Disclaimer: *To comply with IRS requirements, please be advised that, unless otherwise stated by the sender, any tax advice contained in this e-mail message and its attachments is not intended or written to be used, and cannot be used, by the recipient to avoid any federal tax penalty that may be imposed on the recipient, or to promote, market or recommend to another any referenced entity, investment plan or arrangement.*

Like *Clark & Trevithick*, law firms and tax accounting firms around the country have adopted policies to insure compliance with these tax practice regulations, so such disclaimers and legends appear commonly in written correspondence. Rest assured, though, that our use of such disclaimers and legends does not mean that our tax advice is unsupported, but rather that the standards of a Covered Opinion are not achieved in any particular instance unless made expressly so by the writer.

If you would like more information about the IRS Circular 230 Regulations for written tax advice, please contact me, **Dean I. Friedman**, at 800 Wilshire Blvd., 12th Floor, Los Angeles, California 90017, by telephone at (213) 629-5700, extension 368, or by e-mail at dfriedman@clarktrev.com.