National Association of Tax Professionals

Comments on Proposed Regulations Governing Practice Before the Internal Revenue Service [REG-138367-06], Otherwise Known as Circular 230

November 8, 2012

Background

The National Association of Tax Professionals (NATP) is a nonprofit professional association that is committed to the accurate administration and application of tax laws and regulations by providing education, research and information to all tax professionals. For over 30 years, NATP has existed to serve professionals who work in all areas of tax practice.

NATP is a unique association among others in the industry. It is the only organization that represents all tax professionals whether CPAs, attorneys, EAs, accountants, financial planners, franchisees or other participants in the industry. NATP has over 26,000 members and 38 Chapters. These members own or work in firms that prepare more than 11 million tax returns annually on behalf of individuals and other entities. NATP serves these members by providing over 200 education offerings in more than 95 cities throughout the United States, a service unmatched by any other national tax association.

Purpose

NATP hereby provides comments regarding the proposed regulations under Circular 230 as released by the Department of the Treasury on September 12, 2012.

Executive Summary

- NATP is grateful that the IRS does listen to practitioners when we express dissatisfaction with overly cumbersome rules that are difficult to apply. Many practitioners have stated

that the rules unduly interfere with their client relationships and are not an ethical standard that everyone, including clients, can comprehend easily. These proposed regulations make strides in accommodating these concerns. We, along with the taxpaying public, also appreciate the elimination of provisions that resulted in the unrestrained use of disclaimers on nearly every practitioner communication regardless of whether the communication contains tax advice.

- We applaud the streamlined nature of these provisions and the clarity they offer.

- Our main concern has to do with Section 10.3 of Circular 230 resulting in restraint of trade for affected tax preparers. Section 10.3(f)(3) prevents them from giving pre-transaction advice to their clients. It results in putting taxpayers in harm's way for non-compliance (largely due to ignorance) and it forces affected preparers out of business because they cannot compete. We brought this to the attention of the Treasury and the IRS in previous comments regarding the last revision of Circular 230. We were assured that a correction would appear in this revision.

Simplification of Rules

Circular 230 has always been a growing body of rules governing the practice of professionals before the Internal Revenue Service. As tax law has become more complex and taxpayers have become more sophisticated with the expansion of technology and communication, rules have had to adapt to keep up with the continued and rapid movement of business and investment issues and practices.

The modification of Section 10.35 to address covered opinions and tax advice in 2005 was an unprecedented exercise in complexity, however. We are very pleased to see the practical approach taken by Treasury and the IRS in proposing to remove this onerous section and instead place emphasis on compliance with Circular 230 in general. These proposed regulations streamline the existing rules for written tax advice by removing current §10.35 and applying one standard for all written tax advice under proposed §10.37. That's eminently more understand-able by everyone, including clients. Proposed §10.37 provides that the practitioner must base all written advice on reasonable factual and legal assumptions, exercise reasonable reliance and consider all relevant facts that the practitioner knows or should know. The proposed removal of §10.35 will eliminate the requirement that practitioners fully describe the relevant facts (including the factual and legal assumptions relied upon) and the application of the law to the facts in the written advice itself.

The unrestrained use of disclaimers on nearly every practitioner communication regardless of whether the communication contains tax advice has been an irritant to virtually everyone that has seen them. Practitioners have stated that this practice discourages compliance with the ethical requirements because some practitioners have concluded that, if they include a disclaimer, they are free to disregard the standards in current §10.35 regarding written tax advice. The disclaimers also lead to confusion for clients because clients often do not understand why the disclaimer is present and its consequences. In addition, practitioners have complained that the disclaimer's widespread overuse causes clients to ignore the disclaimers altogether, and may render their use

in some circumstances irrelevant. The proposed revisions to Circular 230 render these disclaimers unnecessary, and we look forward to their demise.

Clarity

Other provisions, §§10.31, 10.36, and 10.82, are herein updated to reflect the current practice environment. In addition, a general competence standard is being proposed in new §10.35. NATP is gratified to see that, even though Registered Tax Return Preparers are not being tested on the preparation of business, gift, trust and estate tax returns, Circular 230 makes it very plain that they are expected to be competent, having the knowledge, skill, thoroughness and preparation necessary for the matter for which they are engaged. The proposed regulations also clarify that the Office of Professional Responsibility has exclusive responsibility for matters related to practitioner discipline, including disciplinary proceedings and sanctions.

Proposed §10.31 provides that a practitioner may not endorse or otherwise negotiate any check (including directing or accepting payment by any means, electronic or otherwise, into an account owned or controlled by the practitioner or any firm or other entity with whom the practitioner is associated) issued to a client by the government in respect of a Federal tax liability. The IRS has assured NATP that a taxpayer's refund check can be deposited into his or her own account first with a corresponding debit into the preparer's account without running afoul of these stricter guidelines. Under those circumstances, we fully support this provision. The proposed regulations also expand §10.31 to apply to all individuals who practice before the IRS, not just those practitioners who are tax return preparers. We support that as well.

The proposed regulations extend the expedited disciplinary procedures of Section 10.82 to disciplinary proceedings against practitioners who have willfully failed to comply with their federal tax filing obligations. These proposed regulations only permit the use of expedited procedures in the limited circumstances when a noncompliant practitioner demonstrates a pattern of willful disreputable conduct by (1) failing to make an annual federal tax return during four of five tax years immediately before the institution of an expedited suspension proceeding; or (2) failing to make a return required more frequently than annually during five of seven tax periods immediately before the institution of an expedited suspension proceeding.

And finally, the IRS and Treasury propose revising current §10.1 to clarify that the Office of Professional Responsibility has exclusive responsibility for matters related to practitioner discipline, including disciplinary proceedings and sanctions. This was formalized by the recent issuance of a notice delegating to the Commissioner of the IRS the authority to decide appeals to the Secretary of the Treasury, or his delegate, filed under Circular 230, with respect to enrollment decisions. This authority may be re-delegated in writing to Director, Office of Professional Responsibility, currently Karen Hawkins. Since there has been confusion over the roles of the Office of Professional Responsibility and the Return Preparers' Office, we appreciate this clarification.

"Advice"

What was noticeably absent from these proposed regulations was any clarification on the

authority for registered tax return preparers to give advice. Specifically, §10.3(f)(3) of the current version of Circular 230 states, "A registered tax return preparer's authorization to practice under this part also does not include the authority to provide tax advice to a client or another person except as necessary to prepare a tax return, claim for refund, or other document intended to be submitted to the Internal Revenue Service."

We previously commented on this provision in its proposed and its final form, stating that this "surprise" provision unfairly restrains affected tax preparers' trade by preventing them from giving pre-transaction advice to their clients. We were shocked that such an egregious proposal was contained in the final regulations, and we're very disappointed that a correction is not present in this update. The preamble to the current regulations state that this provision was inserted to denote that the federally authorized tax practitioner privilege under §7525 does not apply to communications between a taxpayer and a registered tax return preparer because advice provided by a registered tax return preparer is intended to be reflected on a tax return and is not intended to be confidential or privileged. The need to make that clarification has its place, but the language used in this section threatens the very existence of these small business tax preparers.

This provision essentially states that a registered tax return preparer doesn't have the authority to provide tax advice to a client or other person except as necessary to prepare a tax return. That appears to mean they can't give "pre-transaction" counsel or do tax planning with clients or prospective clients or respond to a client's request for help in being compliant. That obviously has a detrimental impact on the practice of many tax preparers. It is common practice for tax return preparers to meet with clients at times other than during tax season. Additionally, taxpayers may seek advice from a return preparer as a "second opinion" or when they are looking to engage a preparer. Clearly this provision is not only unprecedented and without warrant, it is administratively counterproductive. This provision impedes the tax preparer's ability to effectively counsel taxpayers on the proper applicability of tax law as it pertains to their specific tax responsibilities. Such an unrealistic and unfair restriction puts taxpayers in harm's way because they will potentially become non-compliant through ignorance of the law. It will also force affected preparers out of business because they cannot compete with those who "are permitted" to give such advice.

NATP asked that clarification be issued in the form of a notice that explains just what this means to registered tax return preparers, at a minimum, and that the provision in Circular 230 be subsequently clarified or removed. We were assured that the term "advice" was limited to legal advice and the IRS included that clarification in the following FAQ on its website:

7. How much tax advice can registered tax return preparers give to clients? (posted 2/27/12)

> *Section 10.3(f)(3) of Circular 230 provides that a registered tax return preparer's authorization to practice "does not include the authority to provide tax advice to a client or another person except as necessary to prepare a tax return, claim for refund, or other document intended to be submitted to the Internal Revenue Service." The IRS received comments after the final regulations were published suggesting that this language is ambiguous. To clarify, the IRS interprets this provision to permit registered tax return preparers to provide advice to a client that is reasonably necessary to prepare a tax return, claim for refund, or other document intended to be submitted to the Internal Revenue Service for a current or future tax period, regardless of*

whether the client has engaged the registered tax return preparer to prepare the tax return, claim for refund or other document for the tax period.

We appreciated the gesture, but we expressed concern for this treatment which we reiterate here. Where, in the hierarchy of Authority, do Frequently Asked Questions (FAQs) on the irs.gov website fall in terms of reliance? We expect it to be very near the bottom as some answers to FAQs have disappeared entirely from the website. Others have been "relocated" when the IRS introduced its new website. There is no reasonable way to search the IRS website for a particular FAQ.

In some instances, the FAQs become obsolete. Here's an example: the IRS issued 21,000 letters last November to select tax preparers who file a large number of returns containing either a Schedule A, C or E. Two thousand of these preparers received a letter informing them that they were picked for an office visit to occur between December, 2011 and April, 2012. The IRS issued FAQs regarding these visits. Now that the visits are over, there is no need for the information contained in the answers to the FAQs.

We were told that the clarification of what was meant by "advice" in Section 10.3(f)(3) would be included in a future revision of Circular 230, just not this revision. We, again, express our disappointment that this matter was not resolved with this proposed revision to Circular 230. It's a matter of vital importance to hundreds of thousands of tax return preparers working with millions of taxpayers! We urge the Treasury to remove the specific restraint of trade provision in Section 10.3(f)(3) of Circular 230. The provision is confusing in its language and can easily be misunderstood by the many professionals that are new to regulation under Circular 230. On its face, regulators should be interested that taxpayers get the advice they need from their trusted tax advisor so that they are informed and compliant in their business transactions. There should be no confusion or misunderstanding of the need for this kind of advice or the ability of all practitioners to provide it. To preclude registered tax return preparers from advising their clients at any point is counterproductive to tax administration and the very principles that underlie the Return Preparer Review Report (Pub 4832) and its' recommendations. At equity, preparers should not be put in a position of confusion as to whether to refer their clients to competitors for advice in the course of planning, emergencies or any other instance in which taxpayers need help with compliance.

NATP appreciates the opportunity to comment on these regulations. We trust that the remarks made herein will be helpful and used in the further revision and clarification of how Circular 230 and the regulations thereunder will be equitably administered.