

Regulations Governing Practice Before the Internal Revenue Service

Announcement 2000-51

AGENCY: Office of the Secretary, Treasury.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: This document provides advance notice of proposed rulemaking to amend the regulations governing practice before the Internal Revenue Service (IRS), which appear in the Code of Federal Regulations and in pamphlet form as Treasury Department Circular No. 230, Regulations Governing the Practice of Attorneys, Certified Public Accountants, Enrolled Agents, Enrolled Actuaries, and Appraisers before the IRS. This document also invites individuals and organizations to submit comments on revising Circular No. 230 to address general standards of practice and standards of practice relating to tax shelters.

DATES: Submit comments on or before July 5, 2000.

ADDRESSES: Send submissions to: CC:DOM:CORP:R (REG-111835-99), room 5226, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 5 p.m. to: CC:DOM:CORP:R (REG-111835-99), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC. Submit comments and data via electronic mail (email) to http://www.irs.gov/tax_regs/regslst.html.

FOR FURTHER INFORMATION CONTACT: Concerning issues for comment, Richard Goldstein at (202) 622-7880; concerning submissions of comments and delivering comments, Guy Traynor, (202) 622-7180; (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

I. Background

Section 330 of title 31 of the United States Code authorizes the Secretary of the

Treasury to regulate the practice of representatives before the Department and, after notice and an opportunity for a proceeding, to suspend or disbar from practice before the Department those representatives who are incompetent, disreputable, or who violate regulations prescribed under section 330. Pursuant to section 330, the Secretary has published the regulations in Circular No. 230 (31 CFR part 10). These regulations authorize the Director of Practice to act upon applications for enrollment to practice before the IRS, to institute proceedings for suspension or disbarment from practice before the IRS, to make inquiries with respect to matters under the Director's jurisdiction, and to perform such other duties as are necessary to carry out these functions.

The regulations have been amended from time to time to address various specific issues in need of resolution. For example, on February 23, 1984, the regulations were amended to provide standards for providing opinions used in tax shelter offerings (Notice 84-4, 1984-1 C.B. 331 [49 F.R. 6719]). On October 17, 1985, the regulations were amended to conform to legislative changes requiring the disqualification of an appraiser who is assessed a penalty under section 6701 for aiding and abetting the understatement of a tax liability (Notice 85-18, 1985-2 C.B. 409 [50 F.R. 42014]). The regulations were most recently amended on June 20, 1994 (T.D. 8545, 1994-2 C.B. 415 [59 F.R. 31523]) to provide standards for tax return preparation, to limit the use of contingent fees in return or refund claim preparation, to provide expedited rules for suspension, and to clarify or amend certain other items.

On June 15, 1999, the Director of Practice published an advance notice of proposed rulemaking (64 F.R. 31994) requesting comments on amendments to the regulations that would take into account legal developments, professional integrity and fairness to practitioners, taxpayer service, and sound tax administration. The Treasury Department received several comments and is currently reviewing them. The 1999 advance notice of proposed rulemaking contemplated a notice of proposed rulemaking that would make general revisions to Circular No. 230.

II. Tax Shelters

Following the release of the advance notice of proposed rulemaking, the Treasury Department issued a report on the proliferation of corporate tax shelters. See "The Problem of Corporate Tax Shelters: Discussion, Analysis and Legislative Proposals," Department of the Treasury, July 1999. In February of this year, the Treasury Department and the IRS took steps to deter abusive shelters by publishing temporary regulations requiring disclosure of certain transactions by corporate taxpayers (T.D. 8877, 2000-11 I.R.B. 747 [65 F.R. 11205]), registration of confidential corporate tax shelters (T.D. 8876, 2000-11 I.R.B. 753 [65 F.R. 11215]), and maintenance of lists of investors in certain tax shelters (T.D. 8875, 2000-11 I.R.B. 761 [65 F.R. 11211]).

In addition, practitioners and organizations, such as the Section of Taxation of the ABA, have recommended that the Treasury Department revise Circular No. 230 to raise the standards for providing advice with respect to corporate tax shelters. The Treasury Department and the IRS agree that it is appropriate to review the standards that should be followed by practitioners who provide advice with respect to such transactions.

III. Request for Comments

The Treasury Department and the IRS invite comments relating to standards of practice governing tax shelters and other general matters. The Treasury Department and the IRS are particularly interested in receiving comments on the following matters.

A. *Opinion standards of Circular No. 230*

1. Whether the opinion standards in §10.33 (relating to tax opinions provided for the marketing of tax shelters) should be revised.

2. Whether Circular No. 230 should establish standards for tax opinions other than those provided for in §10.33 or §10.51 (relating to false opinions). Particularly, whether Circular No. 230 should establish standards for opinions intended to provide legal justification for the treat-

ment of an item for purposes of §1.6664-4(e) of the Regulations on Procedure and Administration (relating to the reasonable cause exception).

3. Whether an opinion provided for legal justification for purposes of §1.6664-4(e) of the regulations should specifically state that it is provided for this purpose.

4. For purposes of the foregoing:

a. Whether the factual due diligence standards set forth in §10.33(a)(1) should be applied to tax shelter opinions other than those provided for the marketing of tax shelters.

b. Whether the factual due diligence standards should be modified to further limit the circumstances under which a practitioner may rely on factual assertions of other persons and to require a practitioner to specify the measures taken to confirm the facts.

c. Under what circumstances, if any, Circular No. 230 should permit a practitioner to base an opinion upon hypothetical facts or factual assumptions and conclusions, including assumptions regarding the existence of a business purpose and the significance of such purpose relative to the intended tax benefits.

d. Whether Circular No. 230 should require that the opinion state that the transaction in question was analyzed under all applicable judicial doctrines (including the step transaction, business purpose, economic substance, substance over form, and sham transaction doctrines).

e. Whether Circular No. 230 should require that an opinion state unambiguously that there is a greater than 50 percent likelihood that the taxpayer will prevail with respect to each material tax issue and with respect to the material tax benefits in the aggregate.

B. *Contingent fees*

1. Whether §10.28 should prohibit a practitioner from charging a fee for an opinion or advice relating to a position taken or to be taken by a taxpayer in an original return where such fee is contingent upon whether the tax treatment of the transaction is sustained, and whether §10.28 should prohibit a practitioner from providing an indemnity to a taxpayer with respect to a position taken or to be taken in an original return.

2. Whether §10.28 should continue to permit a practitioner to charge a contingent fee for assisting a client in filing an amended return or claim for refund when the practitioner reasonably anticipates at the time the fee arrangement is entered into that the amended return or claim will receive substantive review from the Service.

C. *Conditions of confidentiality*

1. Whether there are circumstances in which Circular No. 230 should prohibit a practitioner from agreeing to conditions of confidentiality other than conditions of confidentiality imposed by reasons of privilege. If so, how should confidentiality be defined?

2. Whether Circular No. 230 should prohibit a practitioner from asking a client to agree to conditions of confidentiality.

D. *Sanctions*

1. Whether §10.24 should be modified to clarify what types of relationships with suspended persons are prohibited.

2. Whether there are circumstances in which a practitioner's failure to comply with the rules under Circular No. 230 should be attributed to the firm with which the practitioner is associated so that the practitioner and the firm (or all practitioners in the firm) may be subject to discipline under Circular No. 230.

3. Whether Circular No. 230 can or should provide a broader array of sanctions, such as censure, for violation of its provisions.

4. Whether the identities of those who are disciplined under Circular No. 230 should be exposed to greater publicity. If so, how should greater publicity be achieved?

E. *General Issues*

1. Whether §10.7(c)(1) should be modified to permit, under limited circumstances, an individual who is not authorized to practice before the IRS to represent a taxpayer without obtaining authorization for a special appearance from the Director of Practice under §10.7(d).

2. Whether and to what extent §10.21 should be modified regarding the actions a practitioner must take when he or she discovers that there is an error or omission on a return or other document.

3. Whether §10.22 should be modified to define what constitutes due diligence.

4. Whether §10.29 should be expanded to define conflicting interests and to delineate what constitutes informed consent permitting a practitioner to represent clients with conflicting interests.

5. How the provisions of §10.30(a)(2), regarding uninvited solicitations, should be modified in light of *Edenfield v. Fane*, 507 U.S. 761 (1993).

6. Whether the definition of communication in §10.30(c) should be expanded specifically to include certain forms of electronic communications and whether there are any special considerations that should be addressed regarding these forms of communication for purposes of §10.30.

7. Whether the §10.51 definition of disreputable conduct should be expanded to include conviction of any felony.

In addition to the foregoing issues, the Treasury Department and the IRS invite comments on any other changes that are necessary or appropriate to carry out the purposes of Circular No. 230.

Neal Wolin,
General Counsel.

(Filed by the Office of the Federal Register on May 5, 2000, 3:35 p.m., and published in the issue of the Federal Register for May 11, 2000, 65 F.R. 30375)