

NEW IRS CIRCULAR 230 REGULATIONS FOR WRITTEN TAX ADVICE

In the last few years, the United States Treasury Department has published final regulations affecting the practice of attorneys and other tax advisors before the Internal Revenue Service (“IRS”). These regulations are published as part of Circular 230 and thus are colloquially called the “Circular 230 Regulations.” The Circular 230 Regulations specify a set of best practices for engagements in which a tax practitioner issues written advice on Federal Tax Issues and impose mandatory requirements on that written advice in many circumstances. The regulations were effective June 21, 2005, and are part of a series of steps taken by the IRS to address the excesses of the tax shelter industry in the last decade.

Tax advisors who willfully, recklessly, or through gross incompetence violate the Circular 230 Regulations are subject to censure, suspension, or disbarment from practice before the IRS. In addition to these sanctions, Section 822 of the American Jobs Creation Act of 2004 authorizes the imposition of monetary penalties on tax practitioners and their firms for violations of Circular 230, up to the amount of gross income received from the conduct in question.

Because the attorneys at Gibbons who provide tax advice are required to comply with the Circular 230 Regulations, the manner in which they provide written tax advice to our clients is affected by the regulations.

I. Requirements for “Covered Opinions”

A key function of the regulations is to impose the following procedural and substantive requirements on tax advisors when they issue what is called a “Covered Opinion.” Briefly, practitioners who provide a covered opinion must:

- Use reasonable efforts to identify, ascertain, and consider all relevant facts;
- Base the opinion only on reasonable factual assumptions;
- Rely only on reasonable “factual representations, statements or findings of the taxpayer or any other person;”
- Relate the applicable law to the relevant facts;
- Consider all significant Federal tax issues (unless the opinion is expressly limited in scope);
- Provide a “conclusion as to the likelihood that the taxpayer will prevail on the merits with respect to each significant Federal tax issue considered in the opinion;” and
- Provide an “overall conclusion as to the likelihood that the Federal tax treatment of the transaction . . . is the proper treatment and the reasons for that conclusion.”

Tax advisors providing Covered Opinions cannot rely on factual assumptions or representations they know or should know are incorrect or incomplete. A Covered Opinion must prominently disclose compensation arrangements between the practitioner and tax shelter promoters, as well as the existence of any related referral agreements, if any of these exist. Additional disclosures are required for marketed opinions, limited scope opinions, and opinions that fail to reach a more-likely-than-not conclusion.



As one can see, if written tax advice is issued by Gibbons in the form of a Covered Opinion, depending on the facts of the particular situation, the need to comply with all of these requirements may make that form of advice that much more time-intensive and costly to provide.

II. What is a Covered Opinion?

Although the Circular 230 Regulations provide guidance on the issue, a universal concern of tax advisors is whether written advice in a letter, memo, e-mail, draft document, or private offering memorandum could be construed as a Covered Opinion, and therefore subject to the above potentially costly requirements.

Under the Circular 230 Regulations, a Covered Opinion is written advice (including an e-mail) that concerns one or more federal tax issues arising from: (1) a listed or similar transaction; (2) a plan or arrangement whose “principal” purpose is tax avoidance or evasion; or (3) a plan or arrangement that has a “significant” tax avoidance purpose, but only if such advice is a “reliance opinion,” a “marketed opinion,” or an opinion subject to conditions of confidentiality or contractual protection. Covered Opinions do not include preliminary tax advice, advice concerning the qualification of a qualified plan, a state or local bond opinion (to be addressed in separate regulations that are not yet finalized), or opinions included in documents required to be filed with the Securities and Exchange Commission.

Importantly, the Circular 230 Regulations provide that written advice with a “significant purpose” of tax avoidance is a Covered Opinion if, among other requirements, the advice concludes, at a confidence level of more likely than not, that one or more significant Federal Tax Issues would be resolved in the taxpayer’s favor. Presumably the client is relying on this advice to avoid imposition of a tax penalty, hence this is called a “Reliance Opinion.”

Because the definition of a Reliance Opinion is so broad, much of the written Federal tax advice provided by attorneys at Gibbons may need to comply with the Circular 230 Regulations, subject to a critical exception available when a disclaimer is incorporated in the advice.

III. How Do the Disclaimers Work?

Critically, the Covered Opinion provisions do not apply to a Reliance Opinion if the written advice disclaims reliance on the part of the client, which is effected if the issuer prominently discloses “in the written advice that it was not intended or written by the 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.”

In addition, with respect to a “marketed opinion”, which would appear to include a tax discussion in a private offering memorandum, an additional form of disclaimer is called for, stating that the tax advice was written to support the promotion or marketing of the transaction described therein, and urging taxpayer recipients of the offering memorandum to seek tax advice based on their particular circumstances from an independent tax advisor.



IV. Conclusion - Gibbons Current Policy

Until additional guidance is issued by the IRS, many tax practitioners, including those at Gibbons, have concluded that they have little choice but to include a standardized disclaimer in tax advice correspondence issued by tax, corporate and other attorneys and legal professionals, to characterize the advice, if reasonably possible, as not a Covered Opinion, so as to avoid triggering all of the potentially costly procedural and substantive requirements that would otherwise be imposed.

The inclusion of these disclaimers on e-mails, letters and other correspondence is intended to allow our tax advisors to comply with the Circular 230 Regulations without having to provide a detailed Reliance Opinion that complies with all of the requirements of a Covered Opinion, unless a client requests us to issue an opinion in that format. Since June 21, 2005, therefore, it has been our policy that unless a client instructs us in writing that a Reliance Opinion meeting the requirements of a Covered Opinion is desired, all written Federal tax advice in the form of a Reliance Opinion will include the appropriate disclaimer provision, generally in the form shown below.

If you are a client of Gibbons P.C., and you see a form of this tax disclaimer in a letter, memo, e-mail or other piece of correspondence issued to you, and you have questions or concerns with respect to the implications of that disclaimer, please feel free to reach out to either your contact here at the firm, or to one of the members of our Circular 230 Committee, Peter J. Ulrich, Steven H. Sholk or Rita M. Danylchuk, at 973-596-4500, to discuss the matter.

IRS Circular 230 Disclaimer: To ensure compliance with IRS Circular 230, any U.S. federal tax advice provided in this communication is not intended or written to be used, and it cannot be used by the recipient or any other taxpayer (i) for the purpose of avoiding tax penalties that may be imposed on the recipient or any other taxpayer, or (ii) in promoting, marketing or recommending to another party a partnership or other entity, investment plan, arrangement or other transaction addressed herein. For more information on this disclaimer, please see the Gibbons website.