

# New Circular 230 Regulations Impose Strict Standards for Tax Practitioners

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## I. Introduction

On December 17, 2004, the U.S. Department of the Treasury published final regulations amending the tax shelter provisions of Circular 230, which imposes duties on practitioners representing taxpayers before the Internal Revenue Service. These revisions provide (1) “aspirational” practice standards for tax advisers, (2) mandatory requirements for “covered opinions,” and (3) new practice standards for all other written tax advice.<sup>1</sup>

These regulations are the most recent development in a continuing effort to deter abusive tax shelter opinions. As far back as 1980, the Treasury Department characterized abusive tax shelters as one of the most serious compliance problems confronting the IRS.<sup>2</sup> As the Treasury Department explained, the use of tax shelter schemes “undermines the public’s confidence in the fairness of the tax system and may affect the level of voluntary compliance.”<sup>3</sup>

Professional organizations representing tax advisers generally support the concept of developing guidelines and standards applicable to formal tax shelter opinions. These groups, however, have expressed concern that such standards be limited to formal tax opinions and not carry over and apply to routine tax advice and less formal written communications. Despite these concerns, the new Circular 230 standards go well beyond formal tax opinions and tax shelter related tax advice. For this reason, all tax practitioners must be aware of the new standards and sanctions.

This article discusses the background relating to the Treasury Department’s regulation of tax shelter opinions, the final regulations, the practitioners affected by the new regulations, possible sanctions for violating the rules, and the application of the new rules in current practice.

## II. Background

The Treasury Department first proposed rules governing the standards of practice for tax shelter opinions in 1980.<sup>4</sup> At that time, the definition of a tax shelter opinion was limited to written advice used in the promotion of tax shelters.<sup>5</sup>

In 1982, the American Bar Association’s Standing Committee on Ethics and Professional Responsibility (ABA Ethics Committee) responded to the proposed rules by adopting specific tax shelter opinion guidelines in Formal Opinion 346. The guidelines, based on the Model Code of Profes-

sional Responsibility, require a practitioner who renders a tax opinion to exercise responsibility with respect to the accuracy of the relevant facts; apply the law to the facts; consider all material federal tax issues; where possible, provide an opinion on the merits of the issues; evaluate the material tax benefits; and assure that the opinion is correctly described in the offering materials.<sup>6</sup>

On December 15, 1982, the Treasury Department substantially modified the proposed rules to incorporate the ABA Ethics Committee’s recommendations.<sup>7</sup> The 1982 revisions clarified that the Treasury Department did not intend to regulate a practitioner’s relationship with individual clients.<sup>8</sup> Rather, the definition of tax shelter opinions in the 1982 proposed regulations was limited to advice intended for taxpayers other than the practitioner’s client and used in the promotion or marketing of a tax shelter. In 1984, the 1982 proposals were adopted with a few minor modifications.<sup>9</sup>

In January 2001, the Treasury Department issued proposed regulations modifying the standards of practice for tax shelter opinions.<sup>10</sup> This proposal significantly expanded the definition of tax shelter opinions governed by Circular 230. The proposed regulations retained the tax shelter advice provisions and added a new provision governing tax shelter opinions, defined by reference to section 6662 of the Internal Revenue Code.<sup>11</sup>

The Section of Taxation of the American Bar Association criticized this definition as too broad and proposed an alternative.<sup>12</sup> The ABA Tax Section offered a proposal that eliminated the reference to “tax shelter opinions” and proposed the substitution of a new defined term, “section 10.35 opinions.” A section 10.35 opinion is written advice concerning a transaction that falls within one of the six delineated categories.<sup>13</sup> So-called section 10.35 opinions would have been subject to the special standards and requirements found elsewhere in the regulations.<sup>14</sup>

Thereafter, the Treasury Department published new proposed regulations governing tax shelter matters on December 30, 2003.<sup>15</sup> The 2003 proposed regulations combined the 2001 proposed section 10.33, governing tax shelter opinions used to market tax shelters, with the 2001 proposed section 10.35, governing more-likely-than-not tax shelter opinions, into proposed section 10.35. In addition to this format change, the 2003 proposed regulations excluded “limited scope opinions” from the definition of tax shelter opinions thereby allowing a practitioner to provide an opinion that addresses some, but not all, of the

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relevant federal tax issues. The proposed regulations also modified the standards applicable to tax shelter opinions, and added a new section dealing with the best practices of tax advisers.

The final regulations released by the Treasury Department on December 17, 2004, are effective for advice issued 180 days after the adoption of the final regulations, i.e., June 20, 2005.<sup>16</sup> The new rules make substantial changes in the structure and scope of the practice standards, most significantly the final regulations do not exempt routine tax advice but attempt to strike a balance with a two-tier structure that permits practitioners to “opt-out” of the heightened covered opinion standards. Practitioners opting out of the stringent standards applicable to covered opinions are nevertheless subject to the standards applicable to other written advice.

### III. Overview of the New Circular 230 Regulations

The new regulations govern three aspects of tax advice. First, the regulations provide “best practices” for tax advisers. The preamble to the new regulations, as recommended by the ABA Tax Section, describes the best practices guidelines as “aspirational,” meaning that the regulations merely provide that the best practices constitute a standard that tax practitioners should seek to achieve as a goal. The preamble to the regulations makes clear that these provisions are aspirational and not practice standards that will give rise to sanctions for a practitioner’s conduct that falls short of the best practices standards.<sup>17</sup>

Second, the regulations set forth mandatory requirements for “covered opinions.” A covered opinion is written advice that concerns one or more federal tax issues arising from (1) a listed transaction, (2) a plan or arrangement, the principal purpose of which is the avoidance or evasion of any tax, or (3) any plan or arrangement, a significant purpose of which is avoidance or evasion of tax if the written advice is (a) a reliance opinion (*i.e.*, concludes with at least a more-likely-than-not standard), (b) a marketed opinion, (c) subject to conditions of confidentiality, or (d) subject to contractual protection.<sup>18</sup> A practitioner giving advice in a covered opinion must consider all relevant facts, relate applicable law to relevant facts, evaluate the significant federal tax issues, and provide an overall conclusion.<sup>19</sup>

Third, the regulations provide rules for practitioners giving written advice that is not a covered opinion (“other written advice”). The rules applicable to other written advice set forth a list of prohibitions, for example, written advice shall not be based on unreasonable factual or legal assumptions. These provisions are subjective and depend on the facts and circumstances surrounding the advice, including the scope of engagement.<sup>20</sup>

Practitioners whose conduct falls short of the mandatory tax practice standards set forth in the regulations (*i.e.*, those applicable to “covered opinions” and “other written advice”) are subject to sanctions, including sanctions that would bar a practitioner from practicing before the IRS.<sup>21</sup> At this time, the sanctions do not include monetary penalties, but monetary penalties against a practitioner who violates Circular 230 were authorized under the American

Jobs Creation Act of 2004.<sup>22</sup> The new Circular 230 regulations do not reflect the changes made by the American Jobs Creation Act.<sup>23</sup>

### IV. Detailed Description of New Rules

#### A. Best Practices

The best practices provision states that tax advisers “should provide clients with the highest quality representation.”<sup>24</sup> Best practices include (1) communicating clearly with the client regarding the terms of engagement; (2) establishing the facts, determining which facts are relevant, evaluating the reasonableness of assumptions or representations, relating applicable law to relevant facts, and arriving at a conclusion supported by the facts and law; (3) advising clients regarding the significance of the conclusion; and (4) acting fairly and with integrity in practice before the IRS.<sup>25</sup> These standards generally parallel the ABA Model Rules for Professional Conduct.<sup>26</sup>

A tax adviser should take steps to ensure these guidelines are followed by other practitioners that the adviser is responsible for overseeing. In addition, tax advisers with overseeing responsibilities are expected to take steps to ensure that the firm’s procedures are consistent with these standards.<sup>27</sup>

As previously stated, the best practices standard is described in the regulations as “aspirational.” The guidelines describe a standard that practitioners should attempt to reach when giving tax advice. A practitioner is not subject to sanctions for failure to achieve these aspirational goals.<sup>28</sup>

The best practices standards in the final regulations are essentially the same as the standards in the proposed regulations. The final regulations clarify in the preamble that these provisions are not mandatory standards of behavior.

#### B. Covered Opinions

One source of significant controversy relating to the new regulations is the definition of the term “covered opinion.” A covered opinion is written advice, including electronic communication, on one or more federal tax issues arising from: (1) a “listed” transaction, (2) a plan or arrangement, the principal purpose of which is the avoidance or evasion of federal tax, or (3) a plan or arrangement, a significant purpose of which is the avoidance or evasion of federal tax, if the written advice is (a) a reliance opinion, (b) a marketed opinion, (c) subject to conditions of confidentiality, or (d) subject to contractual protection.<sup>29</sup> The advice is limited to federal tax advice concerning the treatment of an item of income, gain, loss, deduction, or credit, the existence or absence of a taxable transfer of property, or the value of property.<sup>30</sup>

The definition of “covered opinion” specifically excludes written advice if the practitioner is reasonably expected to provide subsequent written advice that satisfies the covered opinion requirements.<sup>31</sup> Covered opinions also do not include written advice concerning the qualification of a qualified plan, state or local bond opinions, and documents required to be filed with the SEC.<sup>32</sup>

### 1. *Listed transaction*

A listed transaction is any transaction the IRS identifies in published guidelines under Treas. Reg. § 1.6011-4(b)(2).<sup>33</sup> A listed transaction also includes transactions that are “substantially similar” to an identified transaction.<sup>34</sup>

### 2. *Principal purpose is avoidance or evasion of federal tax*

The second category of covered opinions is written advice concerning a plan or arrangement in which the principal purpose is the avoidance or evasion of federal tax.<sup>35</sup> “Principal purpose” is not defined in the Circular 230 regulations.<sup>36</sup>

### 3. *Significant purpose is avoidance or evasion of federal tax*

The third category of covered opinions is written advice that relates to a transaction, plan or arrangement, a significant purpose of which is avoidance or evasion of federal tax. Such written advice must also fall within one of the following categories: (1) a reliance opinion, (2) a marketed opinion, (3) an opinion with conditions of confidentiality, or (4) an opinion with contractual protection.<sup>37</sup>

A **reliance opinion** is any advice with a conclusion of more likely than not (or stronger). A reliance opinion does not include an opinion that prominently discloses that the taxpayer cannot use the opinion for the purpose of avoiding penalties.<sup>38</sup>

Despite recommendations to the contrary from the tax bar and others representing tax practitioners, the reliance opinion category of covered opinions is not by its terms limited to formal opinions or written advice relative to tax shelters. If the IRS has a mere reasonable basis for taking a contrary position and the advice relates to an issue that has a significant tax effect on the transaction, *any* written advice expressing a more likely than not (or stronger) conclusion would be subject to the mandatory requirements. This is precisely the result that many tax practitioners had hoped to avoid.

A **marketed opinion** is written advice the practitioner knows or has reason to know will be used or referred to by a person other than the practitioner in promoting, marketing, or recommending a plan or investment.<sup>39</sup> A practitioner is only permitted to issue a marketed opinion if he or she concludes that the taxpayer will prevail on the merits at a confidence level of at least more likely than not with respect to each significant federal tax issue.<sup>40</sup> The opinion must disclose the relationship between the promoter and the practitioner, including the compensation arrangement.<sup>41</sup>

If the advice prominently discloses the following three items, the opinion is excluded from the definition of a marketed opinion:

- The advice was not intended or written for the purpose of avoiding penalties and cannot be used to avoid penalties.
- The advice was written to support the promotion or marketing of the transaction.

- The taxpayer should seek independent tax advice.<sup>42</sup>

A written opinion contains **conditions of confidentiality** (and thus constitutes a covered opinion) if (1) the practitioner imposes on one or more recipients of the written advice a limitation on disclosure of the tax treatment or tax structure of the transaction, and (2) the limitation on disclosure protects the confidentiality of that practitioner’s tax strategies.<sup>43</sup> This provision appears to be drafted to apply to written advice where the taxpayer is under an obligation to maintain secrecy about the tax analysis or conclusion in the opinion, which would seem not to apply to typical clauses found in routine tax opinions where the practitioner states that the opinion is for the use of the taxpayer client. This typical clause, unlike a condition of confidentiality, does not prohibit the client from explaining to third parties the tax treatment or tax structure of the transaction.

Written advice has **contractual protection** if the taxpayer has the right to a refund of fees if the “tax shelter” does not reduce the taxpayer’s taxes.<sup>44</sup> An opinion with contractual protection raises a suspicion that the advice relates to an abusive tax shelter. The ABA Tax Section recommended the inclusion of this category because it is a characteristic associated with potentially abusive advice.<sup>45</sup>

The final regulations changed the name and definition of opinions covered by these heightened standards. The proposed regulations covered “tax shelter opinions.” The final regulations replace “tax shelter opinions” with “covered opinions.”

The final regulations narrow slightly the scope of opinions governed by Circular 230 compared with the proposed regulations. The proposed regulations covered tax shelter opinions, defined as written advice relating to a tax shelter item or items.<sup>46</sup> A tax shelter included any partnership or other entity, any investment plan or arrangement, a significant purpose of which is the avoidance or evasion of any tax imposed by the Internal Revenue Code.<sup>47</sup>

One of the categories of covered opinions in the final regulations, a reliance opinion, essentially retains the tax shelter definition from the proposed regulations. The one major change is that a reliance opinion concludes with a more-likely-than-not (or stronger) confidence level, whereas the proposed regulations did not require this threshold. Therefore, the final regulations exclude tax shelter opinions, as defined in the proposed regulations, that do not reach the confidence level of more likely than not.

### C. **More Stringent Requirements for “Covered Opinions”**

Circular 230 mandates that practitioners fulfill certain requirements when giving covered opinions. In general, the practitioner must consider all relevant facts, relate the law to the facts, evaluate the significant federal tax issues, and provide a conclusion.<sup>48</sup>

In considering the relevant facts, the practitioner must make reasonable efforts to identify and ascertain the facts. A practitioner is prohibited from basing the opinion on unreasonable factual assumptions or representations.<sup>49</sup> An assumption or representation is unreasonable if the practitioner knows or should know that it is incorrect or

incomplete. The opinion must contain a section identifying all relevant facts, all factual assumptions, and all representations, statements, or findings of the taxpayer relied upon by the practitioner.<sup>50</sup>

The practitioner must identify and consider all significant federal tax issues in the opinion. The opinion must relate the applicable law to the relevant facts. The practitioner cannot assume a favorable conclusion or fail to consider a significant federal tax issue unless it is a limited scope opinion or the practitioner is relying on the opinion of others, as permitted in the final regulations. The opinion must not contain any internally inconsistent legal analysis or conclusions.<sup>51</sup>

The practitioner must provide conclusions as to the likelihood that the taxpayer will prevail on the merits with respect to each significant federal tax issue. The opinion must also provide an overall conclusion as to the confidence level of the transaction or matter. The opinion must explain and describe the reasons for all conclusions.<sup>52</sup>

The practitioner must not take into account any of the following in evaluating the taxpayer's chances of success on the merits: the possibility that a tax return will not be audited, that an issue will not be raised on audit, or that an issue will be resolved through settlement if raised.<sup>53</sup>

A covered opinion that fails to conclude at a confidence level of at least more likely than not with respect to a significant federal tax issue must prominently disclose that the opinion does not reach this confidence level and the taxpayer may not use the opinion to avoid penalties.<sup>54</sup>

The final regulations permit limited scope opinions (*i.e.*, opinions of address less than all the federal tax issues) if the practitioner and client agree to a limited scope opinion and certain disclosures are provided in the opinion. The opinion must prominently disclose that it is a limited scope opinion, other tax issues may affect the conclusion, and the taxpayer may not use the opinion for the purpose of avoiding penalties with respect to significant federal tax issues outside the scope of the opinion.<sup>55</sup>

A practitioner must be knowledgeable in all the aspects of the federal tax law relevant to the opinion being rendered. This is a tricky requirement because the regulations offer no guidance on how a practitioner determines that he or she is "knowledgeable." If the practitioner is not knowledgeable of a relevant aspect of tax law, the practitioner may rely on the opinion of another practitioner. The regulations permit this reliance if the practitioner has no reason to believe that the other practitioner's advice should not be relied upon for the opinion and the opinion relied upon is disclosed in the written advice.<sup>56</sup>

These rules are only used to determine the ethical standards a tax practitioner must follow. The Circular 230 standards are not relevant in determining whether the taxpayer relied on the opinion in good faith or whether an opinion is persuasive. There must be an independent evaluation of the facts and circumstances to determine whether the taxpayer acted in good faith and a separate evaluation of the content of an opinion to gauge its persuasiveness.<sup>57</sup>

The required elements of a covered opinion are the same in the final regulations as in the proposed regulations. In general the elements are a factual statement, application of the law to facts, evaluation and conclusion of all significant federal tax issues, and an overall conclusion on the likeli-

hood that the federal tax treatment is proper.<sup>58</sup>

### D. Procedures to Ensure Compliance

A practitioner who has responsibility for overseeing other practitioners providing tax advice is responsible for taking reasonable steps to ensure that the firm has adequate procedures for purposes of ensuring the compliance with the covered opinion requirements by June 20, 2005. The overseeing practitioner is subject to sanctions if the practitioner through willfulness, recklessness, or gross incompetence (1) does not take reasonable steps to ensure that the firm has adequate procedures or (2) fails to promptly correct the noncompliance of an individual the practitioner knows or should know has engaged or is engaging in practice that does not comply with the covered opinion requirements. A practitioner is only responsible for correcting the noncompliance of individuals who are members of, associated with, or employed by the firm of the practitioner.<sup>59</sup> There is no guidance on the necessary requirements of an "adequate procedure."

### E. Less Stringent Requirements for "Other Written Advice"

Under the final regulations, the other written advice provision applies to any written advice that is not a covered opinion whether or not it is a tax shelter type issue. A practitioner is not permitted to base such written advice on unreasonable factual or legal assumptions, unreasonably rely upon representations, statements, findings, or agreements of the taxpayer or any other person, or consider less than all the relevant facts that the practitioner knows or should know. A practitioner is also prohibited from taking into account the chances the return will be audited or the transaction is discovered on audit.<sup>60</sup>

The standard for other written advice is subjective. It varies depending on the facts and circumstances of the situation, including the scope of engagement. For example, a practitioner is held to a greater standard if the practitioner knows or has reason to know the opinion will be used in a manner similar to a marketed opinion. The IRS's Office of Professional Responsibility is given significant latitude in determining whether advice meets this test because the test depends on the specific facts and circumstances of the situation.<sup>61</sup>

The entire section governing other written advice is new. The proposed regulations did not provide guidelines or standards for written advice other than tax shelter opinions. Because the definition of tax shelter opinions in the proposed regulations was broad, there was apparently no need to provide standards for other written advice. The inclusion of this section in the final regulations is evidence of the Treasury Department's desire to, in its words, strike a balance between imposing stringent requirements on written tax advice (*i.e.*, covered opinions) where the potential for abuse is highest and imposing less stringent standards for more routine tax advice where the potential for abuse is less evident.<sup>62</sup>

### F. Advisory Committee

The regulations provide for the formation of an ad-

visory committee to review and make recommendations to the Director of the Office of Professional Responsibility regarding professional standards or best practices for tax advisers.<sup>63</sup> The final regulations adopted the advisory committee provision in the proposed regulations with one substantial modification, as recommended by the ABA Tax Section: The advisory committee is not authorized to make recommendations about actual practitioner cases or to have access to information pertaining to actual cases.<sup>64</sup>

### V. Practitioners and Sanctions

#### A. Practitioners

The requirements for covered opinions and other written advice apply to “practitioners” — attorneys, accountants, and individuals who practice before the IRS.<sup>65</sup> Circular 230 defines “practice before the IRS” as encompassing “all matters connected with a presentation to the Internal Revenue Service,” including preparing and filing returns and documents, corresponding and communicating with the IRS, and representing a client at conferences, hearings, and meetings.<sup>66</sup>

An “attorney” for these purposes is defined as an attorney who is not currently under suspension or disbarment and is permitted to practice before the IRS by filing a written declaration that he or she is currently qualified as an attorney and is authorized to represent the party or parties on whose behalf he or she acts.<sup>67</sup> Commentators have suggested that an attorney is not permitted to practice before the IRS and thus not governed by Circular 230 unless the practitioner files a power of attorney. The ABA Tax Section’s proposed definition of practitioner attempts to eliminate this argument by including in the definition of practitioner the phrase “regardless of whether the individual has in fact filed a declaration or enrolled pursuant to this part.”<sup>68</sup> The final regulations do not adopt this suggested change.

#### B. Failure to Comply with Circular

The Secretary of the Treasury is authorized to censure, suspend, or disbar any practitioner from practice before the IRS if the practitioner fails to comply with the Circular 230 regulations.<sup>69</sup> The regulations provide that a practitioner may be sanctioned, by censure (public reprimand), suspension, or disbarment, for willful violation of the regulations (other than section 10.33); or recklessly or through gross incompetence violating, among others, the covered opinion provisions and other written advice requirements.<sup>70</sup>

Disbarment from practice before the IRS is not equivalent to disbarment or suspension from a state bar because the IRS is only authorized to prevent a practitioner from practicing before the IRS.<sup>71</sup> This disbarment or suspension, however, becomes a black mark on the practitioner because other practitioners are prohibited from directly or indirectly accepting assistance from these individuals.<sup>72</sup> These provisions effectively eliminate a practitioner’s abil-

ity to be employed as a tax professional by a law firm or by a corporation.

It is unclear how the IRS intends to enforce these rules governing written advice between a practitioner and a client if the practitioner never appears before the IRS or submits documents to the IRS. The potential repercussions are so severe, however, that it is unlikely that practitioners will take these rules lightly.

### VI. Comments

#### A. Revisions and Clarifications

The final regulations contain several revisions and clarifications that improve the new Circular 230 standards. These changes were made in response to comments received from tax practitioners. First, the final regulations clarify that the best practice standards are “aspirational.” The proposed regulations provided that tax advisers “should” provide clients with the highest quality representation by adhering to best practices in providing advice.<sup>73</sup> The ABA Tax Section recommended the clarification of the best practices regulation to prevent possible “misuse, by mischaracterizing what is intended as an aspirational guideline as a minimum standard of conduct.”<sup>74</sup> As recommended, the preamble to the regulations state that the best practices guidelines are “aspirational” and a practitioner is not subject to sanctions for failure to meet these standards in providing tax advice.<sup>75</sup>

Second, the final regulations revise the proposed regulations as they relate to the function of the advisory committee. The Director of the Office of Professional Responsibility has the authority to form advisory committees under the final and proposed regulations. An advisory committee under the proposed regulations was permitted to review and make recommendations regarding professional standards or best practices for tax advisers, including “whether a practitioner may have violated sections 10.35 or 10.36.”<sup>76</sup> The ABA Tax Section urged the elimination of this authority to recommend the discipline of an individual practitioner because there is a “potential for conflicts of interest, abuse and error” when some practitioners are singling out other practitioners for discipline by the IRS. The ABA Tax Section also noted that the advisory committee is not in a position to appropriately conduct examinations or investigations sufficient to warrant recommendations for individual discipline.<sup>77</sup> In response to these comments, the Treasury Department revised this provision by replacing “whether a practitioner may have violated sections 10.35 or 10.36” with “hypothetical conduct.” Therefore, under the final regulations, an advisory committee may not review a particular practitioner’s conduct.

Third, the regulations clarify that written advice includes advice communicated by e-mail. While this clarification is clearly proper, it underscores the importance of being aware of the breadth of communications to which the new rules apply. Since, the new rules do not exempt routine and informal advice, as a technical matter any written advice,

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including e-mail, concerning one or more federal tax issues is covered by either of the two new practice standards. The reminder that e-mails are included is important since many tax practitioners, like everyone else, frequently treat e-mail communications as informal and almost conversational communications.

### B. Routine Tax Advice

Perhaps one of the most important and controversial decisions embedded in the final regulations is the way the regulations respond to the tax practitioners' comments with respect to the treatment of routine tax advice. Practitioners sought to have the regulations narrowed to make clear that they apply only to formal written opinions. This approach, by definition, would have made the regulations inapplicable to most routine and informal tax advice.

After the Treasury Department published the proposed regulations, commentators noted that the more-likely-than-not tax shelter opinions could apply to informal advice, thereby detrimentally affecting taxpayers seeking informal tax advice. In arguing that routine advice should be excluded from these regulatory standards, the ABA Tax Section described routine and informal advice as the type of advice given to guide the taxpayer and not the type of advice provided for the purpose of avoiding penalties.<sup>78</sup> The New York State Bar Association (NYSBA) suggested an "opt-in" election to make clear that an opinion is for penalty avoidance purposes and thus covered by the regulations. The NYSBA mentioned that a "significant minority" of its members preferred an "opt-out" election whereby advice is for penalty avoidance purposes unless provided otherwise in the communication.<sup>79</sup>

The Treasury Department responded to these comments, but not in the manner generally hoped for by commentators. The final regulations take a more comprehensive approach that exempts little if any written tax advice. Basically, the regulations adopt a two-tier system (standards for covered opinions and standards "other" written advice) with two limited "opt-out" provisions for reliance opinions.<sup>80</sup> Under one option, a practitioner can opt-out by stating that the opinion was not written and cannot be used for penalty avoidance purposes.<sup>81</sup> The second "opt-out" permits a practitioner to provide a limited scope opinion if (1) the practitioner and taxpayer agree that the scope of the opinion and the taxpayer's use of the opinion for penalty avoidance purposes are limited, and (2) the opinion discloses that the opinion is limited to the federal tax issues addressed in the opinion, additional issues may exist that could affect the tax treatment, and with respect to any significant federal tax issue outside the opinion, the opinion was not written and cannot be used for the purpose of avoiding penalties.<sup>82</sup>

Literally read, the two-tier system includes any written tax advice. The "other written advice" category could include, for example, the most general statement about a

practitioner's understanding of a Code section irrespective of an actual transaction or advice on whether a Code section applies to a particular transaction. If such a broad application of the rules relating to "other written advice" was not intended, one approach would be to provide guidance by defining the term "advice" to refer only to written advice that offers the practitioner's conclusion with respect to the application of the law to specific facts. Absent some clarification of the scope of this rule, practitioners will be forced to review for Circular 230 compliance the most benign written tax advice to their clients.

### C. Opting Out from the Covered Opinion Standards

If an e-mail expresses a favorable conclusion concerning a significant tax issue that has a significant effect, that e-mail could be a reliance opinion, subject to the heightened standard applicable to covered opinions. Practitioners may want to consider adding, in appropriate situations, a standard disclaimer to e-mail and informal advice to "opt-out" of the reliance category of covered opinions and clients should not be surprised to see this disclaimer on written advice. This disclaimer will not exclude the practitioner altogether from Circular 230

but will reduce the standard from the stringent covered opinion requirements to the other written advice guidelines. To "opt-out" a practitioner must write, in a separate section at the top of the advice in bolded typeface that is larger than other typeface used, "this opinion was not intended or written by the practitioner to be used, and it cannot be used by the taxpayer, for the purpose of avoiding penalties that may be imposed on the taxpayer."<sup>83</sup> A practitioner should be cautious when writing advice under this disclaimer. The new regulations prohibit a practitioner from providing advice that is contrary to or inconsistent with the required disclosure.<sup>84</sup>

Opting out with such a disclaimer may be unacceptable to the client (or the practitioner). Clients seeking written advice do so in part so that they may rely upon it. In such cases, the practitioner may want to invoke the limited scope opinion option. The limited scope opinion allows a practitioner to issue an opinion that addresses less than all of the significant federal tax issues.<sup>85</sup> To invoke this option, the practitioner and client must agree that the scope of the opinion is limited and that the client's reliance on the opinion for penalty purposes is limited to the federal tax issues addressed in the opinion.<sup>86</sup> The practitioner must also place a prominently disclosed disclaimer in the opinion, stating that the opinion is a limited scope opinion that may not address all issues that could affect the federal tax treatment of the transaction, and the taxpayer may not use the opinion for penalty avoidance purposes with respect to significant federal tax issues outside the scope of the opinion.<sup>87</sup>

Perhaps one of the most important and controversial decisions embedded in the final regulations is the way the regulations respond to the tax practitioners' comments with respect to the treatment of routine tax advice.

### D. A Suggestion for Narrowing the Scope of Other Written Advice

In their current form, the final regulations impose less stringent standards on other written advice, i.e., written advice that is not a covered opinion as defined in the regulations. The requirements for other written advice apply in the case of any written advice (other than a covered opinion) concerning “one or more Federal tax issues.” Elsewhere in the regulations a distinction is made between “Federal tax issues” and a federal tax issue that is “significant.”<sup>88</sup> A federal tax issue is deemed “significant” if the IRS has a reasonable basis for taking a contrary position and the effect of the issue on the transaction is significant.<sup>89</sup>

One way to narrow the reach of the other written opinion rules would be to make them applicable only to other written advice concerning one or more significant federal tax issues as defined in the new regulations. This would eliminate altogether from the practice standards written advice where either the IRS does not have a reasonable basis for a contrary position or the issue lacks a significant tax impact on the transaction. Such a cut back in the reach of the new practice standards would seem entirely justified.

### E. Employee Tax Practitioners (Tax Directors, Tax Counsel, *et al.*)

One question that the new regulations do not address is the question posed by some commentators: Whether the new practice standards apply to tax professionals who are employees of a taxpayer corporation, *e.g.*, a corporation’s tax director, tax counsel, and other tax professionals.

Starting with the new regulations, it is correct to observe that by their terms the new rules apply to tax “practitioners.” For example, as the new rules relate to covered opinions, the regulations state that a “practitioner” providing a covered opinion “shall comply” with the new standards of practice. Under the new regulations, a practitioner “includes any individual described in Section 10.2(e)” of the existing Circular 230 regulations. Section 10.2(e) defines a “practitioner” as an individual described in paragraphs (a) through (d) of section 10.3, which lists attorneys, certified public accountants, enrolled agents, and enrolled actuaries. The paragraphs describing attorneys and certified public accountants do so with reference to individuals who have filed a power of attorney with the IRS declaring that such individual is authorized to act on behalf of a taxpayer.

Generally, employees of a taxpayer corporation (the tax director, tax counsel, *et al.*) do not file a power of attorney with the IRS declaring that they act on behalf of their employer. For this reason, following the provisions of the new and existing regulations, which seem to connect the definition of a practitioner with the filing of a power of attorney, the conclusion may well follow that such employee tax professionals are not practitioners (and hence not subject to the new standards of practice).<sup>90</sup>

The above analysis does not consider the possible application of section 10.7(c) of the existing Circular 230 regulations which permits an individual who is not a practitioner to engage in “limited practice” before the IRS. One category of permitted limited practice authorizes a full-time

employee of a corporation to represent his or her employer before the IRS. Presumably, this rule applies to employees who are tax professionals, including the tax director, tax counsel, *et al.*<sup>91</sup> Such authorized limited practice, however, is subject to limitations and restrictions, including a provision permitting the Director of Professional Responsibility to impose sanctions, including the withdrawal of the limited practice authorization, against an employee, if such employee engages in conduct that would be subject to sanctions if engaged in by a practitioner.<sup>92</sup>

The imposition of parallel practice standards for employees who are granted limited practice rights before the IRS probably did not give rise to issues under the prior tax shelter opinion standards since those rules were crafted to regulate marketing-type tax shelter opinions — opinions that employee advisers rarely, if ever, rendered. Since the new rules impose wide-ranging requirements on all sorts of written tax advice including routine written tax advice not involving tax shelter issues, it is essential that guidance be provided as soon as practicable to clarify that the new standards for written tax advice were not intended to apply generally to employee tax advisers, if that is the case. Given the importance of this question, however, if the guidance would seek to extend the new rules to non-practitioner employees of a taxpayer, a compelling case can be made for not doing so without developing the reasons for and against such application through a notice of proposed rulemaking.

Since the new rules impose wide-ranging requirements on all sorts of written tax advice including routine written tax advice not involving tax shelter issues, it is essential that guidance be provided as soon as practicable to clarify that the new standards for written tax advice were not intended to apply generally to employee tax advisers (i.e., in-house tax professionals), if that is the case.<sup>93</sup>

## VI. Conclusion

With these final regulations, the Treasury Department significantly expanded its regulation of practitioner conduct to include all written federal tax advice, either under the “covered opinion” standard or the “other written advice” guidelines. Practitioners should consider using one of the two “opt-out” provisions, when appropriate, to reduce the standard from the stringent “covered opinion standards to the facts and circumstances test found in the “other written advice” provisions. Clients should not be surprised to see these “opt-out” provisions in large boldface type at the top of written advice after June 20, 2005. Because of the significant effect of these regulations on routine written tax advice, the Office of Professional Responsibility should issue additional guidance on these provisions and the Treasury Department should consider limiting the “other written advice” category to tax advice concerning one or more significant federal tax issues.



<sup>1</sup> Regulations Governing Practice Before the Internal Revenue Service, 69 Fed. Reg. 75,839 (Dec. 20, 2004) (to be codified at 31 C.F.R. §§ 10.33, 10.35, 10.36, 10.37, 10.38, and 10.52).

<sup>2</sup> Tax Shelters; Practice before the Internal Revenue Service, 45 Fed. Reg. 58,594, 58,595 (Sept. 4, 1980) (preamble).

<sup>3</sup> *Id.*

<sup>4</sup> Tax Shelters; Practice before the Internal Revenue Service, 45 Fed. Reg. 58,594 (proposed Sept. 4, 1980) (to be codified at 31 C.F.R. pt. 10).

<sup>5</sup> *Id.* at 58,598.

<sup>6</sup> American Bar Association, *Formal Opinion 346 (Revised)*, 68 A.B.A. J. 471 (1982).

<sup>7</sup> Tax Shelters; Practice before the Internal Revenue Service, 47 Fed. Reg. 56,144 (proposed Dec. 15, 1982) (to be codified at 31 C.F.R. pt. 10).

<sup>8</sup> *Id.* at 56,146.

<sup>9</sup> Notice 84-4, 1984-1 C.B. 331.

<sup>10</sup> Regulations Governing Practice Before the Internal Revenue Service, 66 Fed. Reg. 3,276 (proposed Jan. 12, 2001) (to be codified at 31 C.F.R. pt. 10). Before issuing the proposed regulations, the Treasury Department issued an advanced notice of proposed rulemaking on amendments to regulations that would take into account legal developments, professional integrity and fairness to practitioners, taxpayer service, and sound tax administration. Proposed Rulemaking, 64 Fed. Reg. 31,994 (June 15, 1999). An advanced notice was also published on May 5, 2000, requesting comments on amendments to the regulations relating to standards of practice governing tax shelters and other general matters. Proposed Rulemaking, 65 Fed. Reg. 30,375 (May 5, 2000).

<sup>11</sup> Section 6662 imposes accuracy related penalties on taxpayers who substantially understate their income tax. This section provides special rules in cases involving tax shelters, defined as a partnership or other entity, any investment plan or arrangement, or any other plan or arrangement, the significant purpose of such partnership, entity, plan, or arrangement is the avoidance or evasion of federal income tax. I.R.C. § 6662(d)(2)(C).

<sup>12</sup> The American Bar Association Tax Section, *ABA Tax Section Suggests Shelter Revisions to Circular 230 Proposed Regs*, 2002 TNT 87-21 (Apr. 24, 2002). See also The American Bar Association Section of Taxation, *The American Bar Association Section of Taxation has suggested changes to the proposed Circular 230 regs.*, 2001 TNT 86-47 (Apr. 23, 2001), and The American Bar Association Tax Section, *ABA Tax Section Offers Definition of 'Tax Shelter' for Circular 230 Regs*, 2001 TNT 158-15 (Aug. 13, 2001).

<sup>13</sup> As listed in the summary section of the ABA Tax Section's 2002 comments, the six categories are: (1) the transaction is a "listed transaction," (2) the principal purpose of the transaction is the avoidance or evasion of federal income tax, (3) the practitioner has reason to believe or actual knowledge that the taxpayer has participated in the transaction under conditions of confidentiality, (4) the practitioner has reason to believe or actual knowledge that the taxpayer has obtained contractual protection against the possibility that the intended tax benefits will not be sustained, (5) the practitioner receives a fee with respect to a transaction that satisfies certain requirements, or (6) the practitioner has reason to believe or actual knowledge that the opinion will be used by a party other than the practitioner or the practitioner's firm to market or promote the transaction to taxpayers. The American Bar Association Tax Section, *ABA Tax Section Suggests Shelter Revisions to Circular 230 Proposed Regs*, 2002 TNT 87-21 (Apr. 24, 2002).

<sup>14</sup> *Id.*

<sup>15</sup> Regulations Governing Practice Before the Internal Revenue Service, 68 Fed. Reg. 75,186 (proposed Dec. 30, 2003) (to be codified at 31 C.F.R. pt. 10).

<sup>16</sup> 69 Fed. Reg. at 75,842 to 75,845 (Dec. 20, 2004) (to be codified at 31 C.F.R. §§ 10.33(c), 10.35(g), 10.36(b), 10.37(b), 10.38(b), and 10.52(b)). The ABA recommended a delayed effective date in its 2002 comment. The American Bar Association Tax Section, *ABA Tax Section Suggests Shelter Revisions to Circular 230 Proposed Regs*, 2002 TNT 87-21 (Apr. 24, 2002).

<sup>17</sup> 69 Fed. Reg. at 75,841 to 75,842 (Dec. 20, 2004) (preamble).

<sup>18</sup> *Id.* at 75,842 (to be codified at 31 C.F.R. § 10.35(b)(2)).

<sup>19</sup> *Id.* at 75,843 to 75,844 (to be codified at 31 C.F.R. § 10.35(c)).

<sup>20</sup> *Id.* at 75,844 to 75,845 (to be codified at 31 C.F.R. § 10.37).

<sup>21</sup> 31 C.F.R. §§ 10.50 and 10.52 (2004). The final regulations also place a duty on tax advisers who supervise practitioners. Tax advisers with overseeing responsibilities should take reasonable steps to ensure that a firm's procedures are consistent with the best practices standards and must take steps to ensure that a firm's procedures are consistent with the covered opinion requirements. 69 Fed. Reg. at 75,842 and 75,844 (Dec. 20, 2004) (to be codified at 31 C.F.R. §§ 10.33(b) and 10.36(a)).

<sup>22</sup> The American Jobs Creation Act of 2004, Pub. L. 108-357 § 822(a)(1), 118 Stat. 1418 (2004) (to be codified at 31 U.S.C. § 330(b)).

<sup>23</sup> 69 Fed. Reg. at 75,840 (Dec. 20, 2004).

<sup>24</sup> *Id.* at 75,841 to 75,842 (to be codified at 31 C.F.R. § 10.33(a)). The ABA Tax Section and the New York State Bar Association supported the enactment of provisions governing "aspirational" best practice standards. The American Bar Association Tax Section, *ABA Comments on Proposed Circular 230 Changes on Tax Shelters*, 2004 TNT 32-28 (Feb. 12, 2004); New York State Bar Association, *NYSBA Comments on Proposed Circular 230 Amendments*, 2004 TNT 58-46 (Mar. 24, 2004).

<sup>25</sup> 69 Fed. Reg. at 75,841 to 75,842 (Dec. 20, 2004) (to be codified at 31 C.F.R. § 10.33(a)).

<sup>26</sup> The American Bar Association Tax Section, *ABA Comments on Proposed Circular 230 Changes on Tax Shelters*, 2004 TNT 32-28 (Feb. 12, 2004).

<sup>27</sup> 69 Fed. Reg. at 75,842 (Dec. 20, 2004) (to be codified at 31 C.F.R. § 10.33(b)).

<sup>28</sup> *Id.* at 75,840 (preamble).

<sup>29</sup> *Id.* at 75,842 (to be codified at 31 C.F.R. § 10.35(b)(2)(i)).

<sup>30</sup> *Id.* at 75,842 (to be codified at 31 C.F.R. § 10.35(b)(3)).

<sup>31</sup> *Id.* at 75,842 (to be codified at 31 C.F.R. § 10.35(b)(2)(ii)(A)).

<sup>32</sup> *Id.* at 75,842 (to be codified at 31 C.F.R. § 10.35(b)(2)(ii)(B)).

<sup>33</sup> *Id.* at 75,842 (to be codified at 31 C.F.R. § 10.35(b)(2)(i)(A)).

<sup>34</sup> Treas. Reg. § 1.6011-4(b)(2).

<sup>35</sup> 69 Fed. Reg. at 75,842 (Dec. 20, 2004) (to be codified at 31 C.F.R. § 10.35(b)(2)(i)(B)).

<sup>36</sup> The regulations under section 6662 define "principal purpose" for purposes of defining tax shelters in the context of imposing accuracy related penalties. A transaction has a principal purpose of tax avoidance under section 6662 if the purpose of avoiding tax exceeds any other purpose. A transaction with the principal purpose of avoiding tax has "little or no motive for the realization of economic gain." Treas. Reg. § 1.6662-4(g)(2)(i)(C).

<sup>37</sup> 69 Fed. Reg. at 75,842 (Dec. 20, 2004) (to be codified at 31 C.F.R. § 10.35(b)(2)(i)(C)).

<sup>38</sup> *Id.* at 75,842 (to be codified at 31 C.F.R. § 10.35(b)(4)).

<sup>39</sup> *Id.* at 75,842 (to be codified at 31 C.F.R. § 10.35(b)(5)(i)).

<sup>40</sup> *Id.* at 75,843 (to be codified at 31 C.F.R. § 10.35(c)(3)(iv)).

<sup>41</sup> *Id.* at 75,844 (to be codified at 31 C.F.R. § 10.35(e)(1)).

<sup>42</sup> An opinion with these disclaimers is excluded from the marketed opinion category only if it is not described in § 10.35(b)(2)(i)(A) (concerning listed transactions) and § 10.35(b)(2)(i)(B) (concerning the principal purpose of avoidance or evasion). 69 Fed. Reg. at 75,842 (Dec. 20, 2004) (to be codified at 31 C.F.R. § 10.35(b)(5)(ii)).

<sup>43</sup> 69 Fed. Reg. at 75,842 (Dec. 20, 2004) (to be codified at 31 C.F.R. § 10.35(b)(6)).

<sup>44</sup> *Id.* at 75,842 to 75,843 (to be codified at 31 C.F.R. § 10.35(b)(7)).

## New Circular 230 Regulations Impose Strict Standards for Tax Practitioners

<sup>45</sup> The American Bar Association Tax Section, *ABA Tax Section Suggests Shelter Revisions to Circular 230 Proposed Regs*, 2002 TNT 87-21 (Apr. 24, 2002).

<sup>46</sup> 68 Fed. Reg. at 75,189 to 75,190 (proposed Dec. 30, 2003) (to be codified at 31 C.F.R. § 10.35(c)(4)).

<sup>47</sup> *Id.* at 75,189 (proposed Dec. 30, 2003) (to be codified at 31 C.F.R. § 10.35(c)(2)).

<sup>48</sup> 69 Fed. Reg. at 75,843 to 75,844 (Dec. 20, 2004) (to be codified at 31 C.F.R. § 10.35(c)).

<sup>49</sup> The regulations state that “it is unreasonable to assume that a transaction has a business purpose or that a transaction is potentially profitable apart from tax benefits.” 69 Fed. Reg. at 75,843 (Dec. 20, 2004) (to be codified at 31 C.F.R. § 10.35(c)(1)(ii)).

<sup>50</sup> 69 Fed. Reg. at 75,843 (Dec. 20, 2004) (to be codified at 31 C.F.R. § 10.35(c)(1)).

<sup>51</sup> *Id.* at 75,843 (to be codified at 31 C.F.R. § 10.35(c)(2)(iii)).

<sup>52</sup> *Id.* at 75,843 (to be codified at 31 C.F.R. § 10.35(c)(3)).

<sup>53</sup> *Id.* at 75,843 (to be codified at 31 C.F.R. § 10.35(c)(3)(iii)).

<sup>54</sup> *Id.* at 75,844 (to be codified at 31 C.F.R. § 10.35(e)(4)).

<sup>55</sup> *Id.* at 75,843 (to be codified at 31 C.F.R. § 10.35(c)(3)(v)).

<sup>56</sup> *Id.* at 75,844 (to be codified at 31 C.F.R. § 10.35(d)).

<sup>57</sup> *Id.* at 75,844 (to be codified at 31 C.F.R. § 10.35(f)).

<sup>58</sup> *Id.* at 75,843 to 75,844 (to be codified at 31 C.F.R. § 10.35(c)).

<sup>59</sup> *Id.* at 75,844 (to be codified at 31 C.F.R. § 10.36(a)).

<sup>60</sup> *Id.* at 75,844 to 75,845 (to be codified at 31 C.F.R. § 10.37(a)).

<sup>61</sup> *Id.* at 75,844 to 75,845 (to be codified at 31 C.F.R. § 10.37(a)).

<sup>62</sup> Sheryl Stratton, *Circular 230 Regs “Federalize” Tax Practice, Treasury Told*, 2005 TNT 10-2 (Jan. 14, 2005).

<sup>63</sup> Circular 230, 69 Fed. Reg. at 75,845 (Dec. 20, 2004) (to be codified at 31 C.F.R. § 10.38).

<sup>64</sup> *Id.* at 75,845 (to be codified at 31 C.F.R. § 10.38); The American Bar Association Tax Section, *ABA Comments on Proposed Circular 230 Changes on Tax Shelters*, 2004 TNT 32-28 (Feb. 12, 2004).

<sup>65</sup> 31 C.F.R. § 10.2(e) (2004); 69 Fed. Reg. at 75,842 (Dec. 20, 2004) (to be codified at 31 C.F.R. § 10.35(b)(1)).

<sup>66</sup> Circular 230, 31 C.F.R. § 10.2(d) (2004).

<sup>67</sup> *Id.* § 10.3(a) (2004). There are similar rules for CPAs and enrolled actuaries. *Id.* §§ 10.3(b) and (d) (2004). An enrolled agent is not required to file a power of attorney. *Id.* § 10.3(c) (2004).

<sup>68</sup> The American Bar Association Tax Section, *ABA Tax Section Suggests Shelter Revisions to Circular 230 Proposed Regs*, 2002 TNT 87-21 (Apr. 24, 2002).

<sup>69</sup> U.S.C. § 330(b)(2004). The new jobs act authorizes censure. The American Jobs Creation Act of 2004, Pub. L. 108-357 § 822(a)(1)(a), 118 Stat. 1418 (2004) (to be codified at 31 U.S.C. § 330(b)).

<sup>70</sup> 69 Fed. Reg. at 75,845 (Dec. 20, 2004) (to be codified at 31 C.F.R. § 10.52).

<sup>71</sup> The Treasury Department is authorized to impose standards of conduct for those who practice before it. 31 U.S.C. § 330 (2004).

<sup>72</sup> Circular 230, 31 C.F.R. § 10.24(a) (2004). The prohibited assistance is assistance relating to a matter or matters constituting practice before the IRS.

<sup>73</sup> Regulations Governing Practice Before the Internal Revenue Service, 68 Fed. Reg. at 75,188 to 75,189 (proposed Dec. 30, 2003) (to be codified at 31 C.F.R. § 10.33).

<sup>74</sup> The American Bar Association Tax Section, *ABA Comments on Proposed Circular 230 Changes on Tax Shelters*, 2004 TNT 32-28 (Feb. 12, 2004).

<sup>75</sup> 69 Fed. Reg. at 75,840 (Dec. 20, 2004) (preamble).

<sup>76</sup> 68 Fed. Reg. at 75,191 (proposed Dec. 30, 2003) (to be codified at 31 C.F.R. § 10.37).

<sup>77</sup> The American Bar Association Tax Section, *ABA Comments on Proposed Circular 230 Changes on Tax Shelters*, 2004 TNT 32-28 (Feb. 12, 2004).

<sup>78</sup> *Id.*

<sup>79</sup> The New York State Bar Association, *NYSBA Comments on Proposed Circular 230 Amendments*, 2004 TNT 58-46 (Mar. 24, 2004).

<sup>80</sup> Both “opt-out” disclaimers must be prominently disclosed, meaning that the item is set forth in a separate section at the beginning of the advice in a bolded typeface that is larger than any other typeface used in the written advice. 69 Fed. Reg. at 75,843 (Dec. 20, 2004) (to be codified at 31 C.F.R. § 10.35(b)(8)).

<sup>81</sup> *Id.* at 75,842 (Dec. 20, 2004) (to be codified at 31 C.F.R. § 10.35(b)(4)(ii)). This “opt-out” only applies to reliance opinions that are not described in § 10.35(b)(2)(i)(A) (concerning listed transactions) or § 10.35(b)(2)(i)(B) (concerning the principal purpose of avoidance or evasion).

<sup>82</sup> *Id.* at 75,843 to 75,844 (Dec. 20, 2004) (to be codified at 31 C.F.R. §§ 10.35(c)(3)(v) and (e)(3)). This “opt-out” only applies to reliance opinions that are not described in § 10.35(b)(2)(i)(A) (concerning listed transactions), § 10.35(b)(2)(i)(B) (concerning the principal purpose of avoidance or evasion), or § 10.35(b)(5) (a marketed opinion).

<sup>83</sup> This exact wording is not required. See 69 Fed. Reg. at 75,844 (Dec. 20, 2004) (to be codified at 31 C.F.R. § 10.35(b)(4)).

<sup>84</sup> *Id.* at 75,844 (Dec. 20, 2004) (to be codified at 31 C.F.R. § 10.35(e)(5)).

<sup>85</sup> 69 Fed. Reg. at 75,843 (Dec. 20, 2004) (to be codified at 31 C.F.R. § 10.35(c)(3)(v)). This “opt-out” only applies to reliance opinions that are not described in § 10.35(b)(2)(i)(A) (concerning listed transactions), § 10.35(b)(2)(i)(B) (concerning the principal purpose of avoidance or evasion), or § 10.35(b)(5) (a marketed opinion).

<sup>86</sup> 69 Fed. Reg. at 75,843 (Dec. 20, 2004) (to be codified at 31 C.F.R. § 10.35(c)(3)(v)).

<sup>87</sup> *Id.* at 75,844 (to be codified at 31 C.F.R. § 10.35(e)(3)).

<sup>88</sup> See 69 Fed. Reg. at 75,842 (Dec. 20, 2004) (to be codified at 31 C.F.R. § 10.35(b)(3)).

<sup>89</sup> *Id.*

<sup>90</sup> A separate, but related, question concerns whether an individual who *was* a tax practitioner who filed powers of attorneys in respect of prior client activities continues to be a tax practitioner under the regulations if such individual later becomes an employee of a taxpayer and no longer acts on behalf of the taxpayer corporation pursuant to a power of attorney.

<sup>91</sup> See Circular 230, 31 C.F.R. § 10.7(c)(1)(iv) (2004)

<sup>92</sup> *Id.* § 10.7(c)(2)(ii) (2004).

<sup>93</sup> After the completion of this article, IRS representatives informally commented that the new Circular 230 rules do apply to in-house tax advisers, but suggested that because of the type of work such advisers generally do, the application of the new rules perform may not have much practical effect. In fact, employee tax advisers frequently express favorable conclusions in written tax advice on matters having significant tax consequences. Accordingly, if these rules are applied to in-house tax professionals, such application potentially will have significant consequences.