CIRCULAR 230
& OTHER STANDARDS

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Standards

AICPA Statements of Standards for Tax Services
Circular 230
New York’s Registered Return Preparer Program
Civil Penalty Standards
Criminal Penalty Standards
Recommending a Return Position

IRC 6694, 31 CFR 10.34(1), SSTS No. 1, 20
NICER 2600-4.3(h)

Position must not be “unreasonable”:

- (1) The position was not supported by substantial authority;

- (2) There was not a reasonable belief that the position would more likely than not be sustained on its merits; and

- (3) The position was not adequately disclosed.
“Substantial Authority”

- “substantial authority” has the same meaning as in the accuracy-related penalty regulations.

- In addition, there is substantial authority for a position if the taxpayer is the subject of a “written determination” (a ruling, determination, or letter).

- There must be substantial authority for a position on the date the return or claim for refund is deemed prepared.

“Reasonable Belief”

- More likely than not be sustained on its merits’ if the tax return preparer analyzes the pertinent facts and authorities and, in reliance upon that analysis, reasonably concludes in good faith that the position has a greater than 50% likelihood of being sustained on its merits.

- This is a “facts and circumstances” test that looks to the preparer’s diligence, experience, and the complexity of the issues and the facts.
Good Tax Planning or Unreasonable Position?  Example

Section 183

- Activity not for profit if it does not show a profit in at least 3 of five consecutive years.
- If not, retroactive denial of losses.
Adequate Disclosure

- Provide the taxpayer with a return that included the disclosure; OR
- Advise the taxpayer of the penalty standards applicable to the taxpayer under § 6662, and contemporaneously document the advice.
Reasonable Cause and Good Faith

Penalties/Circ. 230 sanctions will not be imposed if, considering all of the facts and circumstances, the understatement was due to reasonable cause and the preparer acted in good faith.
Reasonable Cause – Factors

1. The nature of the error.
2. The frequency of the error.
3. The materiality of the error.
4. The preparer’s normal office practice
5. The preparer’s reliance on the work of another preparer
6. The preparer’s good faith and reasonable reliance on generally accepted administrative or industry practice.
Recommending Challenged Tax Position
– SSTS No 5

- A determination in an administrative proceeding or court decision does not restrict a member from recommending a different tax position in a later year’s return unless the taxpayer is bound to a specified treatment in such year, such as where the taxpayer has signed a formal closing agreement.

- May continue with prior position where the determination was caused by a lack of documentation but there is adequate supporting data for the later year, the position satisfied SSTS No. 1, but the taxpayer chose to settle for other reasons, or more favorable authority has developed since the determination.
Reliance on Information from Taxpayer

- Preparer can in good faith rely on information furnished by the taxpayer or third parties.
- But may not ignore the implications of information furnished to the preparer or actually known by the preparer.
- Preparer must make reasonable inquiries if the furnished information appears incorrect or incomplete.
(i) In preparing and reviewing any returns, affidavits, or other documents submitted to the Service, (ii) in determining the correctness of any oral or written representations made by the practitioner to the Service, and (iii) in determining the correctness of any oral or written representations made by the practitioner to the client in connection with any matter before the Service.

Due diligence is presumed where a practitioner relies on the work product of another person, and the practitioner exercised reasonable care in engaging, supervising, training and evaluating such person.
Knowledge of a Client’s Omission – 10.21, SSTS No's, 20 NICER 2600-4.3(a)

- A practitioner who knows that the client has not complied with the revenue laws of the United States or has made an error in or omission from any return, document, affidavit, or other paper must advise the client promptly of the fact of such noncompliance, error, or omission; and
- the consequences as provided under the Code and regulations of such noncompliance, error, or omission
- And, SSTS No. 6, recommend corrective action.
A practitioner must, on a proper and lawful request by a duly authorized officer or employee of the IRS/NYS, promptly submit records or information in any matter before the IRS/NYS unless the practitioner believes in good faith and on reasonable grounds that the records or information are privileged.
Information to be Furnished

Where the requested records or information are not in the possession of, or subject to the control of, the practitioner or the practitioner’s client, the practitioner must

- promptly notify the requesting officer and the practitioner must provide any information that the practitioner has regarding the identity of any person who the practitioner believes may have possession or control of the requested records or information; and

- make reasonable inquiry of his or her client regarding the identity of any person who may have possession or control of the requested records or information;

- But the practitioner is not required to make inquiry of any other person or independently verify any information provided by the practitioner’s client regarding the identity of such persons.
Privileges?

- Attorney-Client
- Accountant-Client – IRC 7525 (but not with respect to NY audit)
- Work Product
- Fifth Amendment
A practitioner may not interfere, or attempt to interfere, with any proper and lawful effort by the Internal Revenue Service, its officers or employees, to obtain any record or information unless the practitioner believes in good faith and on reasonable grounds that the record or information is privileged.
A practitioner shall not represent a client before the IRS/NYS if the representation involves a conflict of interest.

A conflict of interest exists if —

(1) The representation of one client will be directly adverse to another client; or

(2) There is a significant risk that the representation of one or more clients will be materially limited by the practitioner’s responsibilities to another client, a former client or a third person, or by a personal interest of the practitioner.
Notwithstanding the existence of a conflict of interest, the practitioner may represent a client if —

- The practitioner reasonably believes that the practitioner will be able to provide competent and diligent representation to each affected client;
- The representation is not prohibited by law; and
- Each affected client waives the conflict of interest and gives informed consent, confirmed in writing by each affected client, at the time the existence of the conflict of interest is known by the practitioner. The confirmation may be made within a reasonable period of time after the informed consent, but in no event later than 30 days.

Copies of the written consents must be retained by the practitioner for at least 36 months from the date of the conclusion of the representation of the affected clients, and the written consents must be provided to any officer or employee of the IRS/NYS on request.
A practitioner must possess the necessary competence to engage in practice before the IRS.

Competent practice requires the appropriate level of knowledge, skill, thoroughness, and preparation necessary for the matter for which the practitioner is engaged.

A practitioner may become competent for the matter for which the practitioner has been engaged through various methods, such as consulting with experts in the relevant area or studying the relevant law.
Individual who has principal authority and responsibility for overseeing a firm’s tax practice including advice concerning Federal tax matters and preparation of tax returns, claims for refund, or other documents for submission to the IRS, must take reasonable steps to ensure that the firm has adequate procedures in effect for all members, associates, and employees for purposes of complying with Circular 230.
Standards to Ensure Compliance with Circular 230 – 10.26 (6/12/14)

Individual with principal authority will be subject to discipline for failing to comply with the requirements of this section if—

(1) The individual through willfulness, recklessness, or gross incompetence does not take reasonable steps to ensure that the firm has adequate procedures to comply with Circular 230 and one or more individuals who are members of, associated with, or employed by, the firm are, or have, engaged in a pattern or practice, in connection with their practice with the firm, of failing to comply Circular 230; or

(2) The individual through willfulness, recklessness, or gross incompetence does not take reasonable steps to ensure that firm procedures in effect are properly followed, and one or more individuals who are members of, associated with, or employed by, the firm are, or have, engaged in a pattern or practice, in connection with their practice with the firm, of failing to comply Circular 230
New provision for written advice concerning one or more “Federal tax matter.”

“Federal tax matter” is defined as concerning the application or interpretation of a “revenue provision” of the Internal Revenue Code as defined in IRC § 6110(i)(B), any provision of law impacting a person’s obligations under the internal revenue laws and regulations, or any other law or regulation administered by the Internal Revenue Service.

Government submissions on matters of general policy, continuing education, presentations, and marketing and promotional presentations are excluded from the definition of Federal tax matters.
Standards for Written Advice

- The overall standard for written advice is a “reasonable practitioner standard, considering all facts and circumstances, including, but not limited to, the scope of the engagement and the type and specificity of the advice sought by the client.”

- If the written advice is an opinion that the practitioner knows or has reason to know will be used by a person other than the practitioner in “promoting, marketing, or recommending to one or more taxpayers a partnership or other entity, investment plan or arrangement a significant purpose of which is the avoidance or evasion of” federal tax, the “reasonable practitioner standard” will apply, but there will be consideration given to “the additional risk caused by the practitioner’s lack of knowledge of the taxpayer’s particular circumstances.”
Standards for Written Advice

The standards for written tax advice require that a practitioner:

- Base the written advice on reasonable factual and legal assumptions (including assumptions as to future events);
- Reasonably consider all relevant facts and circumstances that the practitioner knows or reasonably should know;
- Use reasonable efforts to identify and ascertain the facts relevant to written advice on each Federal tax matter;
- Not rely upon representations, statements, findings or agreements (including projections, financial forecasts, or appraisals) of the taxpayer or any other person if reliance on them would be unreasonable;
- Relate applicable law and authorities to facts; and
- Not, in evaluating a Federal tax matter, take into account the possibility that a tax return will not be audited or that a matter will not be raised on audit.
Standards for Written Advice

- A practitioner’s reliance on representations, statements, findings, or agreements is unreasonable “if the practitioner knows or reasonably should know that one or more of the representations or assumptions on which any representation is based are incorrect, incomplete, or inconsistent.”

The practitioner also may rely on the advice of others if the advice is reasonable and the reliance is in good faith under the facts and circumstances. Reliance on another person will not be considered reasonable if the practitioner knows or has reason to know that:

- the opinion of the other person should not be relied on;
- the other person is not competent or lacks the necessary qualifications to provide the advice; or
- the other person has a conflict of interest in violation of the rules described in this part.
Is this Criminal?

- 26 USC 7201: Tax Evasion
- 26 USC 7206(1) & (2): False Returns
- 26 USC 7212: Attempt to Interfere with Administration of Internal Revenue Laws
- 18 USC 371: Conspiracy
- 18 USC 1001: False Statement to a Federal Official
Criminal Intent in Tax

- Intentional
- Violation of
- Known
- Legal Duty