

The Impact of Revisions to Circular 230 – should I drop my disclaimer?

In June 2014 the IRS issued final regulations that make significant changes to Circular 230. The final regulations recognize that the Covered Opinion Rules are no longer necessary, and have been replaced with new standards for issuing written tax advice. As a result, the “Circular 230 Disclaimer” will no longer be required on written correspondence. The general consensus is that removal of the disclaimer is a positive step for tax professionals.

However, it is important to understand that the standards to which a practitioner must adhere when providing written tax advice have only been amended and not eliminated. The Circular 230 Disclaimer was originally created for the specific reason of protecting practitioners from being held responsible for the provision of unintended tax advice. From a risk management standpoint, this protection is still a prudent approach and should not necessarily be abandoned completely.

In consultation with Attorney Ralph Picardi, NAPLIA believes it is in the best interest of practitioners to utilize a revised disclaimer on written correspondence as outlined below.

What is Circular 230?

Initially implemented in 2005, Circular 230 is a document containing the statute and regulations detailing a tax professional’s duties and obligations while practicing before the IRS. In other words, it is a set of rules, or a code of conduct, governing tax professionals.

What is a Circular 230 Disclaimer?

Section 10.35 of Circular 230 provided standards for covered opinions and other written advice. Tax professionals utilized a Circular 230 disclaimer at the conclusion of every written communication, including email, to remove the communication from the covered opinion rules in Section 10.35.

What is a Covered Opinion?

A Covered Opinion is written advice 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.

What amendments have been made?

In June of this year, the IRS issued final regulations which would remove the current Section 10.35.

Instead all written tax advice is now subject to one standard set forth in Section 10.37. Specifically, Section 10.37 states affirmatively the standards to which a practitioner must adhere when providing written advice on a Federal tax matter. Section 10.37 requires, among other things, that the practitioner base all written advice on reasonable factual and legal assumptions, exercise reasonable reliance, and consider all relevant facts that the practitioner knows or reasonably should know. A practitioner must also use reasonable efforts to identify and ascertain the facts relevant to written advice on a Federal tax matter.

What should you do?

It is our opinion that practitioners should continue to use a modified disclaimer in written correspondence. Although the excessive use of the previous Circular 230 disclaimer is no longer necessary, the continued use of a disclaimer can substantiate a “reasonable” standard in terms of affirming the provision of tax advice.

From a risk management standpoint such a disclaimer can be helpful with respect to written tax advice provided to clients. Historically, the existence of written disclaimers has helped in the defense of malpractice claims faced by CPAs.

Are IRS Circular 230 disclaimers still permitted?

There has been some misinterpretation that the IRS will no longer permit use of Circular 230 disclaimers. For clarification, the IRS Office of Professional Responsibility (OPR) has warned practitioners from including disclaimers that defer to the IRS, or Circular 230, as requiring the disclaimer (i.e. “The Internal Revenue Service says” or “I am required under Circular 230”).

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See our additional resources for accounting firms at, www.naplia.com/resources

Sample IRS Circular 230 Email Disclaimer¹

Sample Disclaimer Overview

The wording in this sample disclaimer is intended to continue to disclaim the provision of tax advice when appropriate. In addition, it provides for those circumstances where written tax advice is intended to be provided. In which case, the sender will expressly provide confirmation to this fact, and the disclaimer will not be in contradiction.

Sample Disclaimer Summary

- References IRS Circular 230 §10.37, but does not indicate the disclaimer is a requirement of Circular 230 and/or the IRS
- Is written in the positive format to allow for those circumstances where a practitioner does want to expressly provide tax advice

Sample Disclaimer Wording

Unless the above message (“this message”) expressly provides that the statements contained therein (“the statements”) are intended to constitute written tax advice within the meaning of IRS Circular 230 §10.37, the sender intends by this message to communicate general information for discussion purposes only, and you should not, therefore, interpret the statements to be written tax advice or rely on the statements for any purpose. The sender will conclude that you have understood and acknowledged this important cautionary notice unless you communicate to the sender any questions you may have in a direct electronic reply to this message.

¹ Sample Disclaimer provided by Ralph Picardi, Esq. partner at Lapping & Picardi, LLP

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