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## THE TAX GROUP

at Brownstein Hyatt Farber Schreck

### Circular 230 Practice Standards Apply To In-House Tax and Benefits Attorneys

For years, practitioners have requested a definitive pronouncement from the Treasury Department and Internal Revenue Service (“IRS”) on the question of whether and how the rules under Treasury Department Circular No. 230 (31 C.F.R. §10) (“Circular 230”),<sup>1</sup> which governs federal tax practice before the IRS, apply to in-house counsel.

Generally, Circular 230 sets forth rules governing standards of “practice” before the IRS. The term “practice” for purposes of Circular 230 broadly covers all matters connected with a presentation to the IRS (or any of its officers or employees), which relates to a taxpayer’s rights, privileges or liabilities under laws or regulations administered by the IRS.

Circular 230 also imposes certain ministerial requirements for a practitioner to qualify for practice before the IRS, including the requirements that a person who represents another party before the IRS must file a written declaration of authorization and obtain a preparer tax identification number (“PTIN”). Because neither of these requirements generally applies to in-house attorneys, some practitioners have assumed that Circular 230 applies only to a practitioner who in fact obtains a PTIN and files a power of attorney with the IRS on behalf of a third-party client.

#### **DIRECTOR OF THE OPR TO IN-HOUSE COUNSEL: YOU ARE SUBJECT TO CIRCULAR 230**

In recent speaking engagements, Karen Hawkins, Director of the IRS’s Office of Professional Responsibility (“OPR”), makes the IRS’s position absolutely clear: in-house attorneys ARE subject to the standards of practice set forth in Circular 230 and any practice by such attorneys before the IRS is within the OPR’s jurisdiction. Ms. Hawkins refutes the assumption that requirements in Circular 230 render it inapplicable to in-house attorneys and reiterates that “practice” broadly means representing a taxpayer before the IRS. In other words, it is Ms. Hawkins’ and, one may assume, the IRS’s position that an attorney who represents a business before the IRS in a federal tax matter – even in the attorney’s capacity as an employee (whether by contributing to the preparation of the business’ federal income tax return or otherwise) – is subject to Circular 230.

**Application to Benefits Counsel.** Since employee benefit plans are governed in part by the federal income tax laws and by laws that the IRS administers (e.g., ERISA), benefits counsel must also comply with Circular 230.<sup>2</sup>

**Consequences and Compliance.** Failure to adhere to Circular 230 can result in the imposition of monetary penalties, censure, suspension or disbarment, and other sanctions. Thus, it is critical for in-house counsel to understand what facets of his/her practice are covered by Circular 230 and the specific measures he/she must take in order to represent his/her employer in matters before the IRS.

<sup>1</sup> Circular 230 can be found at <http://www.irs.gov/pub/irs-pdf/pcir230.pdf>.

<sup>2</sup> IRS discussed application of Circular 230 to benefits lawyers in a July 2011 phone forum. A copy of the transcript can be found at [http://www.irs.gov/pub/irs-tege/ethics\\_phoneforum\\_transcript.pdf](http://www.irs.gov/pub/irs-tege/ethics_phoneforum_transcript.pdf) and the related handout can be found at [http://www.irs.gov/pub/irs-tege/ethics\\_phoneforum\\_presentation.pdf](http://www.irs.gov/pub/irs-tege/ethics_phoneforum_presentation.pdf).

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## AREAS OF IN-HOUSE PRACTICE SUBJECT TO CIRCULAR 230

Circular 230 sets out the standards of professional conduct for “practitioners” (including in-house attorneys) who practice before the IRS. Of all the standards of conduct covered under Circular 230, we expect the standards covering the following topics have most relevance to in-house counsel:

- Response to IRS requests for records or information.
- Return preparation and representations to the IRS, including rules on return positions, duties to advise the taxpayer regarding return positions, and the practitioner’s status as a return preparer.
- Conflicts of interest. A practitioner may not represent a client before the IRS if “the representation involves a conflict of interest;” note that conflicts may arise in situations other than as between two or more current clients. For relevant purposes, a conflict exists if there is “a significant risk that the representation of one or more clients will be materially limited by the practitioner’s responsibilities to ... a third person, or by a personal interest of the practitioner.”
- General prohibitions in practice before the IRS against unreasonable delay, assistance from disbarred or suspended attorneys, and serving as a notary.
- Best practices. Although the guidelines for best practices are aspirational, the IRS expects that tax advisors will “provide clients with the highest quality representation concerning Federal tax issues by adhering to best practices in providing advice and in preparing or assisting in the preparation of a submission to the [IRS].”
- Standards for written advice.
- Disciplinary proceedings, monetary penalties, and other sanctions before the OPR.

Although it is not clear whether or how the Circular 230 standards covering the following areas would apply to the typical in-house counsel, counsel nevertheless should be aware of these standards and determine how they should be applied to his or her own practice:

- Return of client records.
- Fees.
- Advertising and solicitation to current or prospective clients.
- Prohibition against endorsing or negotiating checks issued to a client.
- Covered opinions. Circular 230 imposes specific, stringent requirements on “covered opinions,” which in broad terms encompass written advice (including electronic communications) given on one or more federal tax issues arising from a tax shelter (or tax shelter-like) transaction. Circular 230 explicitly, but narrowly, excludes from the definition of “covered opinions” written advice that is “provided to an employer by a practitioner in that practitioner’s capacity as an employee of that employer solely for purposes of determining the tax liability of the employer.”
- Former government employees.

In-house counsel should become versed in those standards of conduct that apply to him or her. And, in all cases, in-house counsel must reconcile the foregoing standards with his or her professional duties as an attorney under general standards of professional conduct.

## STEPS LEADING TO IN-HOUSE COMPLIANCE WITH CIRCULAR 230

**Adopt Procedures.** Circular 230 requires that any practitioner who has or shares principal authority and responsibility for overseeing “a firm’s” practice of preparing tax returns, claims for refunds, or other documents for submission to the IRS (a “Responsible Practitioner”) “must take reasonable steps to ensure that the firm has adequate procedures in effect for all members, associates, and employees for

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purposes of complying with Circular 230.” Although the language of this provision applies explicitly to a “firm,” the prudent approach would be to assume that it applies equally to those attorneys in an in-house law department, no matter the size, that have tax and benefits responsibilities. These adequate procedures include:

- **Circular 230 Policy.** The general counsel, on the employer’s behalf, should adopt a Circular 230 policy, which should be comprehensive and cover matters such as return preparation, written communications regarding tax matters and best practices. The general counsel should be prepared to revise this policy as often as necessary to keep it up-to-date for developments in IRS guidance. In addition, the general counsel should circulate the policy to all attorneys (even those who do not practice in taxation), advise them that the employer has adopted a formal Circular 230 policy, and communicate the expectation that the policy will be followed.
- **Continuing Education.** The employer should adopt a continuing education requirement for all of its tax practitioners (whether or not they prepare tax returns) relating to obligations under Circular 230.

**PTINs.** Ms. Hawkins indicated that in-house attorneys preparing employer returns continue to be exempt from the PTIN requirements.

**BHFS Comment on Covered Opinions.** The exclusion from covered opinions for advice rendered by in-house counsel can be read narrowly, and the Responsible Practitioner would be well advised to ensure that the employer has procedures in place for rendering advice or preparing submissions to the IRS. Among the less onerous recommended measures is that the general counsel implement a legend for email and other written advice, which states clearly that the communication cannot be used to avoid tax penalties or to promote to any other party any tax matter or transaction.



For assistance in creating an appropriate Circular 230 Policy or for answers to any questions concerning the application of Circular 230 to your practice, please contact:

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