R.I.P. Circular 230 Disclosures, *or* How the IRS Saved the Planet and Returned 30 Minutes of Your Day

How many times per day do you see something like this?

Required Circular 230 Tax Advice Disclosures:
1. Nothing contained in this column and any attachments is intended to be used, may be used, or may be relied upon by any taxpayer for the purpose of avoiding penalties that may be imposed on the taxpayer under the Internal Revenue Code of 1986, as amended.

2. Any written statement contained in this column and any attachments relating to any Federal tax transaction or matter may not be used by any person to support the promotion or marketing of or to recommend any Federal tax transaction(s) or matter(s).

Thankfully, Circular 230 disclosures are now dead.

The Internal Revenue Service isn't famous for giving presents, but in June it gave a wonderful gift to everyone who writes or reads letters or emails from lawyers, CPAs, financial service professionals and so many others: it eliminated the need for language like the example above, which for years has clogged computer servers, killed countless trees, and stolen minutes from your day and mine through unnecessary appending and scrolling. Thankfully, Circular 230 disclosures are now dead.

Circular 230 Governs Practice Before the IRS

The IRS issues and maintains rules, known as Circular 230, providing minimum standards of conduct for practice before the IRS (preparing tax returns, representing taxpayers in disputes, etc.). Those who do not meet Circular 230's standards are subject to disciplinary action, including suspension or disbarment from practicing before the IRS. Among the goals of Circular 230 is to improve and safeguard the quality of tax counsel and advice provided to taxpayers.

'Covered Opinions' and Circular 230 Disclosures

In an effort to serve that purpose, in 2004 the IRS revised Circular 230.[1] New language in Section 10.35 created rules and standards for written tax advice called "covered opinions," which included advice on a transaction that had tax avoidance as a significant purpose and which advice concluded one or more significant federal tax issues were more likely than not to be resolved in the taxpayer's favor. Any written tax advice that did not meet the covered opinion requirements had to "prominently display" a disclosure that the taxpayer could not rely on the advice to avoid potential tax penalties.

While well intended, the new rules were a failure. First, the requirements for writing a covered opinion were so onerous that few clients were willing to pay a lawyer to meet them. Instead of leading to better tax advice, it led practitioners, who continued to provide the best advice they could give, to slap the disclosure language on the 99.9 percent of written tax advice that did not meet the covered opinion requirements.

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Clients thought tax professionals were disclaiming their own advice, until the clients were taught to ignore the language altogether. Second, while the language applied only to federal tax advice, it has been grossly overused, being added without thought to emails forwarding jokes or making lunch plans and to letters that never mention or imply a single tax issue, reinforcing the perception that the language was meaningless.

New Final Regulations Reverse Course

Recognizing the failure, the IRS in June issued final regulations[2] applying to written tax advice rendered on or after June 12, 2014. The Preamble to the regulations notes that the covered opinion rules "increased the burden on practitioners and clients, without necessarily increasing the quality of the tax advice that the client received[,] … were burdensome and provided minimal benefit to taxpayers[,] … [and] contributed to overuse, as well as misleading use, of disclaimers on most practitioner communications even when those communications did not constitute tax advice."

The regulations modify Circular 230 in five key ways.

First, the covered opinion rules are eliminated from Section 10.35. Section 10.35 now simply says "[c]ompetent practice" requires "the knowledge, skill, thoroughness, and preparation necessary for the matter." Instead of a wide chasm between covered opinions on which taxpayers could rely and all other "unreliable" advice with required disclosures, all written tax advice now is subject to the same standard, contained in Section 10.37. Practitioners must base all written advice on reasonable factual and legal assumptions, exercise reasonable reliance on the representations of others, use reasonable efforts to identify and ascertain the facts relevant to the written advice, and consider all relevant facts that the practitioner knows or reasonably should know.[3] The determination of whether a practitioner has complied with the requirements of Section 10.37 will be based on all facts and circumstances.

Second, the regulations define what constitutes written advice on a federal tax matter, subject to the rules. Among the items excluded are continuing education presentations provided solely to enhance practitioners' knowledge of federal tax matters, provided the presentation does not market or promote particular transactions. Including the presenter's contact information, by itself, does not constitute marketing or promoting a transaction.

> *The rules now require only those disclosures, disclaimers and warnings that are necessary for the specific written advice.*

Third, while the 2004 revisions prohibited practitioners, when issuing written tax advice, from taking into account the possibility that an issue will be resolved through settlement, practitioners now may consider possible settlement factors. The preamble to the revised rules recognizes that "the existence or nonexistence of legitimate hazards that may make settlement more or less likely may be a material issue for which the practitioner has an obligation to inform the client." Practitioners still may not consider audit risk when issuing written tax advice.

Fourth, Section 10.36 expands the duty of those within a law firm who have "principal authority and responsibility" for overseeing the firm's federal tax practice to take "reasonable steps" to ensure that the firm has adequate procedures for complying with Circular 230 requirements. Managing or supervisory tax lawyers can be disciplined by the IRS (suspension or disbarment from practice before the IRS) for failing to implement firm policies and procedures in support of Circular 230 requirements.

Fifth, and of broadest application to the U.S. economy and Americans' quality of life, no covered opinions means no mindless appending of meaningless disclosure language to every email, letter, website post, fax, telegram and smoke signal emanating from law firms and other tax advisors.[4] The rules now require only those disclosures, disclaimers and warnings that are necessary for the specific written advice. If your knowledge of the facts is limited, describe the limitations. If you relied on information from the taxpayer or someone else, say so. If additional research might change the conclusions, warn the client. In short, do what wise law practice requires to protect the client and yourself.

Starting today, never, ever send another written communication with the pointless disclosure found at the beginning of this article. Eliminate it from your email signature. Delete it from form letters. If someone sends it to you, take the time to enlighten them. It is time for computer servers to rejoice, for trees to celebrate, and for you and me to think of all the things we'll do with the time we used to spend scrolling through Circular 230 language. Now, if we could just stop warning that forwarded jokes and business lunch plans might contain "privileged and confidential information."

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Notes

1. See Dan W. Holbrook, "Revenge of the IRS: Circular 230 Changes Law Practice," *Tenn.B.J.*, August 2005, page 28.

2. Treasury Decision 9668, available at http://www.irs.gov/pub/irs-utl/TD_9668_6-9-14_Cir%20230_6-9-14_Final_Reg.pdf.

3. Under IRC Section 6694, a "tax return preparer" [defined more broadly in IRC Section 7701(a)(36) than you might expect, to include not only the signer of a return but also those who advise on the tax treatment of a transaction reported on a return] is subject to a penalty for any understatement of liability based on an "unreasonable position," if the preparer knew (or reasonably should have known) of the position. An "unreasonable position" is a disclosed position for which there is not a "reasonable basis," an undisclosed position for which there is not "substantial authority" (greater than "reasonable basis" but less than "more likely than not"), or a position with respect to a "tax shelter" or "reportable transaction" that is not "more likely than not [to] be sustained on its merits." However, no penalty is imposed if there is reasonable cause for the understatement and the tax return preparer acted in good faith.

4. In fact, the IRS now threatens to sanction law firms that not only persist in using the old language but also state that it is required by the IRS.

Ask the TBA Membership Maven

Merry Christmahanakwanzika!

I just adore modern-day holidays! In fact, modern changes of all types make me so very happy, happy, happy!

The TBA has some modern change possibilities for members if you're interested … you're intrigued, I can tell!

Here's the scoop…

The TBA Membership Committee (love them!) has noticed more and more members interested in **International** Law, **Communication** Law, **Local Government** Practice, **Animal** Law and issues of particular concern to **LGBT attorneys** and individuals.

Here's the big Q …

Are any of these areas of interest to **YOU**?! If the TBA offered a new section in one of these areas … would you actually **JOIN THE NEW SECTION?** Go ahead and raise your hand by shooting an email to kstosik@tnbar.org and let Kelly know which section(s) tickle your fancy!

Enjoy the season and mmwah to you and yours … and FYI modern Santa really wants you to leave her a coconut water and gluten-free macaroon! XO

POTENTIAL NEW SECTIONS
International Law
Animal Law
Communication Law
Local Government Practice
LGBT Section

Interested!?

Send an email to Membership Director Kelly Stosik at kstosik@tnbar.org if you are interested in joining one or more of these sections. For more detailed description of each section, please visit http://www.tba.org/node/71418.

To ask the TBA Membership Maven a question please email maven@tnbar.org or her alter-ego, Kelly Stosik, the Tennessee Bar Association's membership director.