

A Message To Our Clients: IRS Circular 230 And Its Impact

Under the Internal Revenue Code, certain tax penalties are imposed on taxpayers for substantial understatements of income tax, tax underpayments attributable to negligence or disregard of rules or regulations, and certain other tax underpayments. The Internal Revenue Code does, however, specify circumstances under which taxpayers can avoid imposition of such penalties. One of these circumstances is the “reasonable cause” exception – if the taxpayer can show that there was reasonable cause for the underpayment and that taxpayer acted in good faith with respect to the underpayment, the underpayment penalty may not apply. In showing that this reasonable cause exception applies to relieve a taxpayer from liability, the taxpayer’s proof of reasonable reliance in good faith on the advice of a professional tax advisor may be sufficient.

The new Circular 230 regulations issued by the Treasury Department were effective on June 20, 2005 in response to some situations in which tax professionals issued tax advice or opinions to clients so that the clients would have penalty protection, even though the advice or opinions were based upon facts, assumptions, or representations that were not reasonable. These new regulations established very high standards that a tax advisor must meet if he or she wishes to provide a client with written tax advice that may be relied upon for tax penalty protection. Circular 230 prescribes standards of practice for lawyers and accountants before the Internal Revenue Service, including ethical and professional responsibilities.

As a result of the Circular 230 regulations, any written tax advice (including tax advice included in an email or other form of electronic written communication) that you receive on or after June 21 from any McNair Law Firm attorney will generally include the following prominent disclaimer:

CIRCULAR 230 DISCLOSURE

TO ENSURE COMPLIANCE WITH REQUIREMENTS IMPOSED BY THE IRS, WE INFORM YOU THAT ANY U.S. FEDERAL TAX ADVICE CONTAINED IN THIS COMMUNICATION (INCLUDING ANY ATTACHMENTS) IS NOT INTENDED OR WRITTEN TO BE USED, AND CANNOT BE USED, FOR THE PURPOSE OF (I) AVOIDING PENALTIES UNDER THE INTERNAL REVENUE CODE OR (II) PROMOTING, MARKETING OR RECOMMENDING TO ANOTHER PARTY ANY TRANSACTION OR MATTER ADDRESSED HEREIN. THIS ADVICE MAY NOT BE FORWARDED (OTHER THAN WITHIN THE TAXPAYER TO WHICH IT HAS BEEN SENT) WITHOUT OUR EXPRESS WRITTEN CONSENT. TO READ MORE ABOUT THIS DISCLOSURE, PLEASE SEE <http://www.mcnair.net/230.pdf>

This prominent disclaimer will not appear, however, if the written tax advice is in the form of, and meets the requirements of, a “covered opinion” (a technical term defined in the Circular 230 regulations). The purpose of this message is to provide you with an explanation of the reasons McNair Law Firm is now required to include this legend on certain tax advice.

Although generally issued to address written tax advice rendered in connection with certain tax-structured transactions, the Circular 230 regulations are broadly worded to potentially apply to any written materials (including marketing materials) that contain statements related to federal taxes. The Circular 230 regulations set forth a number of provisions that will significantly alter how tax practitioners

will be required to conduct their practices. In response to the Circular 230 regulations, practitioners will include certain disclosures (which may include but not be limited to the prominent disclaimer set forth above) in many written materials that contain federal tax-related information.

The Circular 230 regulations impose mandatory requirements that apply to “covered opinions,” which are generally any written advice relating to a federal tax issue, whether contained in formal opinions, emails, or certain offering documents. The Circular 230 regulations are broadly worded to apply to all practitioners—not just tax attorneys—who provide written advice relating to federal taxes.

In response to the Circular 230 regulations, law firms will be taking numerous steps to ensure compliance. In situations where a tax advisor provides written tax advice that is not subject to the requirements of a “covered opinion”, Circular 230 provides that its requirements will be satisfied if the written tax advice includes a legend or disclaimer such as that adopted by McNair Law Firm, which makes it clear that the written tax advice cannot be relied upon to avoid federal tax penalties.

Attorneys (and accountants) who fail to comply with the requirements of the Circular 230 regulations are subject to being suspended or barred from practice before the Internal Revenue Service, fined, or publicly censured.

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