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Circular 230 Update**Dennis B. Drapkin**

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Circular 230 Update

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1. Introduction

- A. There have been major legal developments affecting Circular 230 during the past 18 months.
 - i. Circ. 230 was revised in important respects by final regulations issued in June 2014. In general, these changes make Circ. 230 more flexible and user friendly.
 - ii. Several surprising cases have invalidated parts of Circ. 230. Not only are the specific holdings important, but the rationale for the decisions threatens the validity of many other provisions of Circ. 230.
- B. The implications of these developments for practitioners are significant. For example:
 - i. There is no longer any reason under Circ. 230 for disclaimers on written tax advice.
 - ii. On the other hand, the recent cases may undermine the legal authority for the IRS to regulate written tax advice at all.

2. Background: A brief history of Circ. 230¹

- A. Publication of Circ. 230 is authorized by 31 U.S.C. § 330 (not by title 26). The predecessor to 31 U.S.C. § 330(a) was enacted in 1884 in the aftermath of the Civil War as part of a War Department appropriation for “horses and other property lost in military service.” It authorized Treasury to

prescribe rules and regulations governing the recognition of agents, attorneys, or other persons representing claimants before this Department, . . .

This provision was intended to permit the Treasury Department to regulate the activities of those representing persons who had claims against the Treasury, *e.g.*, for back pay, property damage, or money owed.

¹ See, *e.g.*, Camp, “‘Loving’ Return Preparer Regulation,” Tax Notes, July 29, 2013, p. 457.

- B. In 1982, the relevant statutory language was revised to authorize Treasury to regulate the practice of representatives of persons before the Department of the Treasury

The accompanying explanatory language stated that the revision was only stylistic and was not intended to affect the substance of the statute. This language is now codified as 31 U.S.C. § 330(a)(1).

- C. There was relatively little need for administrative guidance under the statute until the individual income tax was re-enacted in 1913, which expanded the role of tax administration. The initial version of Circ. 230 was published in 1921 to provide some review of and control over those who engaged in federal tax practice.
- D. Over time, as the scope of Circ. 230 has been expanded, it has covered more than just the representational aspects of tax practice. Gradually, Circ. 230 has been extended to cover such important non-representational activities as providing written advice and assisting in the preparation of tax returns. It is this expansion of the scope of Circ. 230 that forms the basis for the cases discussed in Section 4 of this outline.
- E. Circ. 230 is now administered by the Office of Professional Responsibility (OPR), a part of the IRS.

3. Regulatory developments: June 2014 final regulations²

A. Background

- i. On Sept. 17, 2012, the IRS published proposed regulations that would extensively revise Circ. 230. 77 Fed. Reg. 57055. Final regulations were published on June 12, 2014. T.D. 9668; 79 Fed. Reg. 33685.
- ii. The June 2014 final regulations:
- Eliminated the “covered opinion” rules.
 - Substituted a general “competence” rule.
 - Clarified “due diligence” requirements for written tax advice.
- iii. Other changes:

² See, e.g., Rizek, “Recent Changes in Circular 230: Where Are We Now?” Tax Mngt. Real Estate J. 30 TMREJ 299, 9/3/2014; and Lewis and McCormally, “Circular 230: The Legend Falls,” BNA Daily Tax Report, 8/6/2014.

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