

Client Alert

Latham & Watkins Tax Department

New IRS Rules Regarding Written Tax Advice

The Circular 230 Regulations are the rules that tax practitioners must comply with in order to practice before the IRS. The Treasury recently issued substantial amendments to these rules, and these amendments take effect June 21, 2005. The purpose of this client alert is to discuss these rules briefly and their impact on the types of written tax advice that we provide to our clients.

The revised rules set forth new requirements that must be followed when we provide many types of written advice to clients regarding federal tax issues. The scope of these rules is extremely broad and thus they potentially cover not only formal written tax opinions but also any other written communications that contain advice regarding federal tax issues. Moreover, although the rules were motivated by a desire to combat abusive tax shelters, they are not limited in that manner and, hence, they potentially cover many types of ordinary business transactions.

The basic approach of the new rules is to require that any written tax advice must generally either (a) be rendered in the form of a full, detailed opinion that reflects a heightened "due diligence" review of all relevant facts and discusses all relevant federal tax matters (a "covered opinion") or (b) contain certain language which makes clear that the written advice cannot be relied upon to avoid penalties that may be

imposed on the taxpayer under the Internal Revenue Code (a "legend"). To the extent that the written advice may be used or referred to in promoting, marketing or recommending a transaction to other taxpayers, the written advice may be treated as a "marketed opinion," in which case the legend must also state that the advice was written to support the promotion or marketing of such transactions and that taxpayers should seek advice from an independent tax advisor based on the taxpayer's particular circumstances. There are various types of written advice that are generally excluded from the foregoing rules (such as written tax advice that is contained in documents required to be filed with the SEC), and there are also various types of written advice for which a legend is inoperative and which must, therefore, follow the covered opinion requirements.

In the course of our practice, we are commonly asked by our clients to provide written tax advice which may be covered by the rules described above, but for which our clients do not desire us to engage in the detailed and exhaustive analysis that would be required by the covered opinion requirements, due to the considerable time and expense that would be involved. Therefore, in order both to comply with these rules and to meet the desires and expectations of our clients,

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we generally will be adding the appropriate legend to various forms of written communications that may contain tax advice (including emails, private offering memos, letters, memos and opinions), in lieu of having all such

written communications satisfy the covered opinion requirements. Of course, in those situations where a client wishes us to provide written tax advice that follows the covered opinion requirements, we will be happy to do so.

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