December 5, 2005

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Commissioner
Internal Revenue Service
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Washington, DC 20224

Donald L. Korb
Chief Counsel
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Re: Final Circular 230 Regulations Governing Written Tax Advice

Gentlemen:

I am writing on behalf of the Section of Taxation of the American Bar Association to express our concern about the adverse impact that the final Circular 230 regulations governing written tax advice are having on the delivery of tax advice to clients and the role of tax advice in the administration of our tax system. The views expressed in this letter represent the position of the Section of Taxation. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the American Bar Association.

We have previously filed extensive comments on the regulations in their various proposed and final forms. We have consistently supported the main purpose of the regulations, which is to address the shelter opinion abuses that emerged in the latter part of the 1990’s. Throughout these comments, however, we have also emphasized the need to assure that the impact of the regulations did not unduly burden the ability of tax practitioners to provide -- and taxpayers to receive -- written tax advice.

We believe that in many important respects, the regulations are producing undesirable consequences at a level that is disproportionate to the associated benefits to the tax system. For that reason, and as explained below, we urge that immediate attention be given to revising the regulations.

The undesirable consequences caused by the regulations include the following:

- Practitioners must evaluate all written tax advice against the technical rules created by the regulations, particularly section 10.35, regardless of context, content or relationship to tax shelters, and then decide on the appropriate process to follow in order to comply with the requirements of the regulations. In the vast majority of situations in which our members...
provide written tax advice to their clients, this adds to the time and expense of furnishing the advice without furthering the objectives of the regulations in a meaningful way. The increased time and expense act as barriers to taxpayers seeking tax advice, including affordable, routine tax advice.

- The use of legending to avoid noncompliance with Circular 230 has become a nearly universal part of tax practice. The legend often is inconsistent with the intended use of the advice separate and apart from the purpose of the legend with respect to taxpayer penalties. As a result, much written tax advice is presented in a manner that does not accurately represent the significance of the advice, creating confusion and discord between practitioners and their clients. In addition, the widespread use of legends diminishes the intended “consumer warning” effect.

- Because the technical rules of the regulations do not apply to oral advice, they encourage oral advice in place of written advice. This is not a desirable outcome for taxpayers, practitioners or the government.

- Many practitioners are concerned that IRS personnel will assert violations of the Circular 230 written tax advice regulations by applying a literal interpretation of their content, even though the practitioner has complied with the core ethical principles that underlie the regulations. In view of the severe sanctions available to the government, practitioners will be inclined to follow a literal interpretation of the regulations.

We believe that any benefit these rules produce with respect to regulating written tax shelter communications is more than offset by the new and substantial barriers that have been created to the provision of written tax advice. The regulations discourage the provision of timely and cost-effective written tax advice, and threaten to reduce rather than enhance compliance with the tax laws. As a consequence, we recommend that you consider one or both of the following approaches to address these concerns:

- Revise the Circular 230 regulations to align them more closely with their objectives. Our prior comments contain a number of suggestions along these lines. We have regularly urged that section 10.35 be limited to formal opinions. Application to pre-transactional planning memoranda and email conversations is far afield from any problem the regulations sought to remedy. We have submitted the idea of an “opt-in” system for penalty protection rather than the de-facto “opt-out” system in place today by reason of the practice of legending written advice. Broad classes of transactions could be exempted from section 10.35, such as by exempting transactions in which tax avoidance is clearly not the principal purpose, or by defining “significant purpose of avoidance or evasion” to make clear that it has no application to using tax benefits intended by Congress. Nor does Circular 230 have any place in application to published articles and memoranda written to clients generally.

- Request proposals for interpretations of the Circular 230 regulations as applied to specific fact situations (i.e., “frequently asked questions” or “FAQs”). Binding guidance issued in response to specific questions posed by practitioners would tend to reduce uncertainty and avoid unnecessary conflicts with the government. Some have suggested consideration of a process modeled on the Securities and Exchange Commission’s no-action letter program.

It is possible that other approaches could be devised to improve the administrability and effectiveness of Circular 230 as applied to written tax advice. We would welcome the opportunity to discuss alternative methods of addressing the underlying problems. In any event, we believe that immediate action is needed to reduce the burdens that have been placed on the provision of written tax advice and to curtail the adverse reaction that has been developing to the IRS and the administration of the tax laws by reason of these burdens.
Thank you for your consideration. We and our members are willing to meet with you to discuss this letter if that would be of assistance.

Sincerely,

Dennis B. Drapkin
Chair, Section of Taxation

cc: Michael J. Desmond, Tax Legislative Counsel, Department of the Treasury
    Stephen A. Whitlock, Deputy Director, Office of Professional Responsibility, Internal Revenue Service