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March 31, 2004

Mr. Gregory F. Jenner
Acting Assistant Secretary (Tax Policy)
Department of the Treasury
Room 3120 MT
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220

The Honorable Mark W. Everson
Commissioner
Internal Revenue Service
Room 3000 1R
1111 Constitution Avenue, N.W.
Washington, D.C. 20224

Re: Notice of Proposed Rulemaking
Circular 230: Tax Shelter Opinions

Gentlemen:

We are writing to provide comments on the proposed amendments to the regulations governing practice before the Internal Revenue Service, 31 CFR part 10, reprinted as Circular 230, with respect to tax shelter opinions. We are aware that the Treasury has worked long and hard, and has considered the comments of numerous organizations, in developing the proposed amendments to Circular 230. We applaud the Treasury's efforts to address this difficult issue.

Proposed Section 10.35 defines a tax shelter opinion as "written advice by a practitioner concerning the Federal tax aspects of any Federal tax issue relating to a tax shelter item or items." A "tax shelter item" is defined, with respect to a tax shelter, as "an item of income, gain, loss, deduction or credit, the existence or absence of a taxable transfer of property, or the value of property." A "tax shelter" includes "any partnership or other entity, any investment plan or arrangement, or any other plan or arrangement, a significant purpose of which is the avoidance or evasion of any tax imposed by the Internal Revenue Code."

For tax shelter opinions generally, section 10.35 sets forth several requirements that must be complied with with respect to factual matters, application of law to facts, evaluation of material tax issues and overall conclusions. The opinion must identify and consider all relevant facts. The practitioner must not base the opinion on any unreasonable factual assumptions. The practitioner must relate the applicable law (including potentially applicable judicial doctrines) to the relevant facts and the practitioner must provide his or her conclusion as to the likelihood that the taxpayer will prevail on the merits with respect to each material federal tax issue. Finally, the practitioner must provide an overall conclusion as to the likelihood that the federal tax treatment of the tax shelter item or items is the proper treatment and the reasons for that conclusion.

The proposed rules apply to marketed tax shelter opinions and to more likely than not tax shelter opinions that are not marketed. If the opinion is not a marketed tax shelter opinion, the opinion may consider less than all material federal tax issues if the taxpayer and the practitioner agree to limit the scope of the opinion to one or more federal tax issues and the

practitioner discloses in the beginning of the opinion that the opinion is so limited, that additional issues may exist that could affect the federal tax treatment of the tax shelter addressed in the opinion, and that, with respect to any federal tax issues outside the scope of the opinion, the opinion may not be relied upon for the purpose of avoiding penalties under section 6662(d).

As a result of the broad definition of the term tax shelter in the proposed rules, the proposed rules would apply to written tax advice by a practitioner whether or not the advice takes a form traditionally viewed as a formal tax opinion. This means that the proposed rules would apply to letters, memoranda and e-mails written by a practitioner addressing a wide range of matters not connected with transactions traditionally viewed as tax shelters. These matters might include, for example:

- The tax consequences of the choice of entity for a proposed activity, with consideration of a C corporation, S corporation and limited liability company.
- Whether a proposed trust will qualify as a qualified terminable interest trust.
- The tax consequences of a proposed like-kind exchange of business properties.
- The tax consequences of use of a proposed insurance trust.
- The tax consequences of a proposed acquisition of a business, whether as a stock deal or an asset deal.
- The tax consequences of structuring a proposed acquisition of a business as a taxable transaction or as a tax-free reorganization.
- The tax consequences of a proposed disposition of United States real property by a foreign person.
- The tax consequences of a proposed acquisition of business real estate.

It is our view that the proposed Circular 230 rules are unduly broad in that they would apply to any written advice regarding the above types of transactions and many others of a similar nature. We are concerned that if the proposed rules are applied to such transactions, there is a high likelihood that the rules will not be complied with by practitioners. The likelihood of non-compliance is the result of the disproportionality between the cost in terms of time required to generate an opinion that complies with the proposed rules, as compared to the amount of tax at issue in the transaction. Many clients simply do not want to pay for the type of advice required by the proposed rules and practitioners will be put in a position of turning away substantial amounts of work or violating the rules. We are concerned that if practitioners do not comply with the rules with respect to routine tax advice, there is less likelihood that practitioners will comply with the rules in the area where, in our view, they are most needed: marketed tax shelter opinions.

The greatest concern in terms of tax compliance is in the area of marketed tax shelters. These shelters often have no purpose other than the reduction of federal income taxes. It is our recommendation that the proposed Circular 230 rules be revised to limit their scope to marketed tax shelter opinions. This would provide a bright line for application of the rules. Practitioners are aware of the distinction between routine written tax advice and a tax opinion that is to be used to market a tax shelter to investors. In this connection, however, we would suggest some changes to the definition of a marketed tax shelter opinion as currently set forth in the proposed rules.

The proposed rules provide that a marketed tax shelter opinion is a tax shelter opinion, including a more likely than not tax shelter opinion, that a practitioner knows or has

reason to know will be used or referred to by a person other than the practitioner in promoting, marketing or recommending the tax shelter to one or more taxpayers. We believe this definition should be expanded to include certain tax shelter opinions that are marketed to investors by the practitioner who has written the opinion. A method by which such an approach might be implemented is that if the fees received by the practitioner as a result of self-marketing the tax shelter (or a substantially similar tax shelter) to investors exceed a given amount in a particular year, the proposed rules would apply. In a case where the tax shelter is marketed by a third party, there would be no such minimum threshold with respect to fees. A self-marketed tax shelter would not include routine tax advice to existing clients, but would include a tax shelter devised by a practitioner who then approaches the taxpayer in an effort to market the tax shelter which the practitioner has devised.

Thus, if our suggestion is adopted, the proposed rules would apply to all marketed tax shelter opinions when the tax shelter opinion is used by a person other than the practitioner in promoting or marketing the tax shelter. When the tax shelter opinion is used by the practitioner himself in marketing the shelter, the rules would apply when fees received by the practitioner with respect to all such tax shelters (or substantially similar tax shelters) equal or exceed, say, $25,000 in a tax year.[1]

It is our view that the exception under the proposed rules for limited scope opinions is not likely to be useful in practice. This is because limited scope opinions would require such

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[1] The proposed rules contain an exclusion from the definition of tax shelter opinion for advice concerning the qualification of a qualified plan. We suggest that advice concerning tax analyses that are part of materials registered with the Securities and Exchange Commission also be excluded from the definition of a tax shelter opinion. It is not practical or necessary to require a document registered with the SEC to comply with all the rules in section 10.35.

extensive disclosure with respect to what the opinion is not that the client would be likely to find such an opinion unsatisfactory. That is to say, it simply would not work for a practitioner to give a memorandum or a letter to a client with respect to a proposed transaction, with the letter or memorandum making extensive reference to tax issues that have not been addressed. Further, even the limited scope opinions must adhere to several requirements. We believe that a better practical solution is to limit the application of the proposed tax shelter opinion rules to all tax shelters that are marketed by third parties and to tax shelters that are marketed by the practitioner where the fees derived from the tax shelter or a substantially similar tax shelter exceed a given amount in a tax year.

Thank you for your consideration.

Very truly yours,

Bryan C. Skarlatos /kf

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