

TAX UPDATE

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The Trouble with Disclaimers--Circular 230 Revisited

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Disclaimer Explosion

In an old *Star Trek* TV episode, we were introduced to a species known as “Tribbles” that, while appearing to be completely harmless creatures, turned out to have an ability to reproduce that itself created problems from the sheer number of tribbles that would exist in a short period. We, as tax professionals, seem to have found our own “tribble” now, known as the Circular 230 disclaimer, something that seems helpful and actually does serve a useful purpose in the right situation, but which has now been so overused that we see them as often as you saw tribbles in that old episode.

This week we’ll talk about the potential risks involved with the overuse of the Circular 230 disclaimer, which many of us have now seen plastered on any email coming from many tax professionals. Rather than being the “safe” approach, it may very well be that the disclaimer itself will get the user into hot water—or cause the user to actually fail to comply with the Circular 230 covered opinion standards by lulling the user into a belief

they've "fixed that one".

The Issues

I posted a message on the California Society of CPAs *TaxTalk* site that outlined the possible issues after a discussion emerged about a participant's use of an email signature that stated it contained a "required" disclaimer under Circular 230. Below is the text of that message:

I know that a *LOT* of people are using the disclaimer and the "required" provision, while overstating the issue, is used by quite a few CPAs and attorneys as a shorthand reference to avoid long discourses with clients about the actual state of the law.

That said, it's important to note that *IF* you believe the rules are meant to be (or will be) read expansively (something I don't really believe and I suspect neither does Kip) then your disclaimer wouldn't work under §10.35(b)(5). That is, if the IRS is going to be picky enough to say that a routine email is a "covered opinion" (as opposed to an email that clearly is meant to give comfort on something close to a marketed program) then the disclaimer is defective.

A marketed opinion disclaimer requires you admit the opinion is being used to market a tax program, and then advise the individual to seek his/her own opinion, among other things. Obviously you would *NOT* say your email was meant to be used to market a tax shelter unless you *DID* mean for it to be used that way (at least unless you like being sued when someone fouls up after misusing your email <grin>), so it appears impossible from a practical standpoint to do a protective disclaimer in a signature for a marketed opinion.

As well, the disclaimer is essentially only valid for a reliance opinion--meaning it doesn't work for "principal purpose" transactions or listed transactions.

Considering deciding to add a disclaimer to each email means you are assuming the IRS is going to be unreasonable in applying the rules, to be consistent you would need to assume they will be similarly unreasonable in deciding on what is a "principal purpose" transaction--and if you had an opinion that dealt with a principal purpose transaction, you can't use the disclaimer.

As well, there's still the problem that by including a disclaimer on routine correspondence, you are removing protection from the client. The disclaimer doesn't say this applies only if this would be a covered opinion, but rather says you can't use this for penalty protection, period. So that would be true even if the penalty protection was being asserted for a position that did not require a "more likely than not" position.

Kip has had numerous discussions with senior management in the Office of

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Professional Responsibility and they have indicated they don't disagree with Kip's view that the profession has generally grossly overreacted to the standards.

Whew! I think I've now summarized that discourse <grin>.

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