DCCurrents

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Tax Practitioners Face Increasing Regulation

Congress and the IRS have been focusing on regulating tax and financial services. Although the problems that are being addressed were not caused by CPAs, practitioners may be swept up in the solution. Tax practitioners need to keep a weather eye on developments, and this column provides a brief summary of the major regulatory initiatives.

IRS Proposals on Return Preparer Ethics

On June 4, 2009, IRS commissioner Douglas Shulman told the House Ways and Means Oversight Subcommittee that by year end he intends to recommend measures to ensure that tax preparers adhere to high ethical standards. Shulman said he wants to be sure that "all preparers are ethical, provide good service and are qualified" (IR-2009-57 (6/4/09)). The AICPA believes that the primary focus of the recommendations will be on unregulated commercial return preparers because of the high error rates on earned income credit returns and numerous consumer complaints about refund anticipation loans.

At a July 30 IRS forum on return preparers, Michael Dolan, the chair of the AICPA's IRS Practice and Procedures Committee, supported higher ethical standards but encouraged the IRS to avoid adding regulatory burdens to CPAs who are already regulated by state board of accountancy rules, the AICPA Code of Professional Conduct and Statements on Standards for Tax Services, Circular 230, and Internal Revenue Code penalties. It is not known whether the commissioner will propose registration of preparers, but he has said that he is open to all ideas. The AICPA believes that CPAs should not be subject to new regulatory measures such as an exam, CPE requirements, or licensing or registration processes or fees. It also hopes that any proposed measures will not result in a "certification" that could mislead the public by giving professional trappings to commercial preparers.

Unauthorized Disclosure Penalty Under Sec. 7216

Sec. 7216 prohibits the disclosure or use of tax return information, and regulations that went into effect at the beginning of 2009 require a client's explicit, written consent for any exceptions (T.D. 9375). Disclosure would occur if a tax return preparer provided return information (broadly defined) to a third party. Use of tax return information generally involves the use of the return information by the preparer in offering nontax services to the taxpayer. Sec. 7216 provides criminal penalties for knowing or reckless violations, with fines for each violation of up to $1,000 or imprisonment of up to one year, or both. Sec. 6713 provides a civil penalty of $250 for less egregious conduct in disclosing or using tax return information.

The AICPA is concerned that Sec. 7216 could make it more difficult for tax practitioners to provide client services. For example, if a client e-mails the practitioner and asks him or her to send a schedule or other return information to a bank, the regulations are unclear as to whether this is sufficient consent for the disclosure. The AICPA has developed a series of frequently asked questions and proposed responses and has met with the IRS national taxpayer advocate, chief counsel, and commissioner and Treasury's Office of Tax Policy to seek clarifications.

Sec. 6694 Return Preparer Penalty Developments

The Emergency Economic Stabilization Act of 2008, P.L. 110-343, revised the Sec. 6694 standard for positions taken in tax returns, and this resulted in revisions to proposed regulations. AICPA representatives met with Treasury and IRS officials to discuss the proposed regulations and the need for additional guidance, and on December 15, 2008, the final regulations were released, largely following the June 2008 proposed regulations (T.D. 9436). On the same date, the IRS issued Notice 2009-5 to provide interim guidance for complying with the 2008 legislative changes. The Tax Division thanked the IRS for its prompt guidance but asked it to give high priority to providing a clear, objective test for determining what constitutes a tax shelter.

FTC Red Flag Rule Could Apply to CPAs

Recent FTC interpretations of a 2003 statute could require CPAs to have procedures in place to help curtail identity theft. In 2003, Congress enacted legislation (the Fair and Accurate Credit Transactions Act, P.L. 108-159) to require creditors to help identify suspicious situations, and recent FTC interpretations of the "red flag" requirement would apply this rule to CPAs who extend credit to clients, such as by using retainer fees or deferred billing. The FTC interpretation specifically mentions a doctor or a lawyer who "defers payments, even in the normal course of a traditional billing process." This could require the CPA to have an internal program, subject to inspection and review, to detect, prevent, and mitigate identity theft. Information on the red flag rule can be found at www.ftc.gov.

The AICPA has been seeking an exemption for CPAs, and the FTC has extended the effective date to November 1, 2009. This is all too reminiscent of another unnecessary regulation on CPAs—the privacy disclosure notification requirement of the Gramm-Leach-Bliley Act, P.L. 106-102, that the AICPA successfully fought years ago.

Proposed Consumer Financial Protection Agency

H.R. 3126, introduced in July and currently referred to the House Committee on Financial Services, would set up a Consumer Financial Protection Agency that could regulate independent professional services as well as products related to consumer credit and finance. Routine CPA services could be subject to a strict regulatory and oversight regime because the bill defines "financial activity" broadly. The proposed legislation would result in redundant regulation of CPAs and certified public accounting firms that are already subject to appropriate oversight by the IRS, Treasury, state boards of accountancy, and the AICPA's professional and ethical standards. The AICPA hopes that the legislation can be modified to exclude routine CPA services because the increasing costs of regulation would likely be passed on to clients without any corresponding benefits, thus working against the bill's objective of helping consumers.

Looking Ahead

As the IRS and Congress seek to raise standards for commercial return preparers and unprofessional financial service providers, they generally know that CPAs are not the problem, but it is sometimes difficult to exclude them from the solution. The AICPA will continue to seek ways to help CPAs provide quality services with a minimum of unnecessary regulation.

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EditorNotes

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