

IRS Issues Alert Analyzing When Circular 230 Applies to In-House Tax Professionals



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The IRS Office of Professional Responsibility (“OPR”) has exclusive authority to administer and enforce Circular 230 (“Circ. 230”), the Regulations Governing Practice before the Internal Revenue Service. (31 C.F.R. Subtitle A, Part 10). On June 15, 2023, OPR issued [Alert 2023-04](#), noting that “significant questions exist” about whether in-house tax professionals are subject to the practice standards contained in Circ. 230, and if they are subject, to what extent. The Alert sought to clarify the answers to some of those questions.

When are In-House Tax Professionals Subject to Circ. 230?

Circ. 230 provides that given their professional credentials, in-house or outside attorneys, certified public accountants, and enrolled agents are authorized to practice before the IRS, so long as the professional files a Form 2848 Power of Attorney and Declaration of Representative signed by the taxpayer and the representative. The Alert notes that every attorney, certified public accountant and enrolled agent that practices before the IRS is subject to Circ. 230 regardless of whether they hold that role as an in-house or outside practitioner.

What about the situation where that internal attorney, certified public accountant or enrolled agent let their status lapse prior to the rendering of such services, or if they are persons not falling with the foregoing categories? So long as they are not under suspension or disbarment, the IRS has a “limited practice” rule under which bona fide officers and regular full-time employees of a corporation (which does include its parent, subsidiary, or other affiliated corporation), association or organized group may also practice before the IRS for that business, provided that they also file the required Form 2848, without any requirement that they be a current attorney, certified public accountant or enrolled agent.

When is Such Work “Practice Before the IRS”?

Circ. 230 applies to “practice before the IRS” and particularly defines that to encompass “all matters connected with a presentation to the Internal Revenue Service or any of its officers or employees relating to a taxpayer’s rights, privileges, or liabilities under laws or regulations administered by the IRS.” (Circ. 230 at Section 10.2(4)). The definition of “presentation” includes but is not limited to:

preparing documents; filing documents; corresponding and communicating with the Internal Revenue Service; rendering written advice with respect to any entity, transaction, plan or arrangement, or other

plan or arrangement having a potential for tax avoidance or evasion; and representing a client at conferences, hearings, and meetings.

The Alert specifically notes that this broad list does **not** include activities relating to the preparation and filing of tax returns, “unless the in-house practitioner prepares, approves, or submits the returns in connection with representing their employer in a matter before the IRS.” Note that except for “rendering written advice with respect to any entity, transaction, plan or arrangement, or other plan or arrangement having a potential for tax avoidance or evasion,” the foregoing list identifies prospective activities the professional will engage in with the IRS, not retrospective ones.

Who Must Be Listed on the Form 2848 Power of Attorney?

The Form 2848 identifies to the IRS the specific, full-time employee that the business authorizes to advocate, defend, negotiate, and dispute issues with the IRS on the businesses’ behalf. So, you need to list the person that will have such representational authority. You may list more than one. For example, you may list your internal certified public accountant and below that your outside legal counsel (and check the boxes associated with both so that they both receive IRS communications on the matter).

However, where that employee is merely a conduit of information to the IRS, say by simply providing information to the IRS or accepting information from it, the IRS does not consider that to be done in a representational capacity and thus is not treated as “practice” before the IRS requiring a Form 2848. In that conduit context, a Form 8821 Tax Information Authorization or the Communications Agreement section in Form 4764 will suffice to provide the required consent for that employee to exchange the relevant confidential information.

How Do You Address the “Split Role” Issue Where an Employee is at Times Subject to Circ. 230 and at other Times Not So Subject?

This is a tough question and boils down to a facts and circumstances analysis. The IRS has been careful to point out that “there is no authority or basis ... for concluding that an activity constituting ‘practice’ for an outside professional does not also constitute ‘practice’ for an in-house one.” This very directly aligns the roles and responsibilities, as well as the caselaw defining when such are subject to Circ. 230, between inside and outside professionals. The IRS explains it as follows:

while an in-house tax professional’s relationship with their employer — who is also the client/taxpayer — is different from the relationship that an outside professional has with the same client/taxpayer, except in the possible case of an officer appointed by the board of directors, the in-house professional never becomes the client/taxpayer itself. They — like an outside practitioner — **are always acting as an agent, or representative, of the taxpayer.**

Other than in the context of providing advice and guidance on plans or arrangements having a potential for tax avoidance or evasions, the clear line here begins with that filing of a Form 2848. Prior to that filing, the preparation and filing work is not subject to Circ. 230. From that filing, however, the IRS argues that such work (like the filing of an amended tax return during audit) falls within Circ. 230 and that it has a stronger oversight role over such professional activity. So, careful borders must be drawn between when an in-house professional is operating in a role (including making any presentation) subject to a Form 2848 Power of Attorney and thus Circ. 230, from other ancillary advice or guidance roles not within that Form 2848 or subject to Circ. 230.

This Alert establishes a bright line rule that outside of preparations for the purposes of tax avoidance or evasion guidance, the in-house professional is subject to Circ. 230 only from the time the Form 2848 is executed. On the other hand, the Alert cautions that there should be no legal distinction between the roles that subject an outside practitioner to Circ. 230 and those which subject an in-house counsel to Circ. 230. Given that, once the Form 2848 is executed, careful thought should be given to the roles the in-

house practitioner undertakes with regard to that tax issue, lest activity they don't anticipate being considered practice before the IRS falls subject to Circ. 230.