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**REAL ESTATE: LAND USE, DEVELOPMENT & FINANCE**

**TAX (INTERNATIONAL, FEDERAL AND STATE)**

**TELECOMMUNICATIONS & UTILITIES**

**TRUSTS, ESTATES & PERSONAL PLANNING**

**VENTURE CAPITAL & EMERGING COMPANIES**

**WHITE COLLAR CRIME**

## **Circular 230 Amendments Provide New Rules Applicable to Written Tax Advice**

By

Louis S. Nunes, III

Professionals who are admitted to practice before the Internal Revenue Service must comply with the requirements of certain federal regulations commonly referred to as "Circular 230." The Treasury Department issued amendments to Circular 230, effective June 21, 2005, to add new requirements that professionals must follow when rendering written federal tax advice. Although the main target of the new requirements is tax shelter opinions, the new requirements apply to all forms of written federal tax advice; not only detailed opinions, but also emails, letters, memoranda and other written communications that are not typically considered nor intended to be "tax opinions."

The new requirements generally require that all written tax advice must identify and consider all relevant facts, must relate the applicable law to the facts, must evaluate all significant federal tax issues, and reach a conclusion as to each significant federal tax issue. With respect to identifying all relevant facts, the new rules require that the practitioner may not base his conclusion on any unreasonable factual assumptions or on any unreasonable factual representations, statements or findings of the practitioner's client or any other person.

While these requirements are not "new" with respect to traditional tax opinions, these requirements now apply to all written communications containing written federal tax advice, including email, letters and memoranda. Prior to the new requirements, it was possible for a practitioner to render tax advice on a more limited basis that did not involve the time and expense of a traditional detailed tax opinion. Under the new rules, essentially all written communications containing federal tax advice, in whatever form, must now take the form of a detailed tax opinion.

The new rules allow a practitioner to "legend out" of the above requirements if the practitioner includes a "legend" in the written advice that expressly states that the written advice is not intended to be, and cannot be, relied upon for the purpose of avoiding penalties imposed by the Internal Revenue Code. In most cases, our clients do not expect our written advice to rise to the level of a traditional tax opinion that can be used for penalty protection purposes. Therefore, email messages, letters and memoranda authored by members of our firm's tax section will contain the following legend:

### **Circular 230 Disclaimer**

Pursuant to Treasury guidelines, any federal tax advice contained in this communication (or any attachment) does not constitute a formal opinion. Accordingly, any federal tax advice contained in this communication (or attachment) is not intended or written to be used, and cannot be used by any taxpayer, for the purpose of avoiding penalties that may be asserted by the Internal Revenue Service.

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This legend allows us to render written federal tax advice to our clients in the normal course of business without having to provide a detailed opinion on each specific federal tax question raised. The legend in no way diminishes the quality of the tax advice that we provide, it simply allows us to render written federal tax advice that satisfies the requirements of the new regulations without incurring the costs involved in rendering a detailed opinion.

There will be situations in which our clients request that we issue a detailed tax opinion on certain federal tax issues, which we will be happy to provide. However, we will not undertake to provide such a detailed tax opinion unless our client instructs us in writing to render such an opinion after discussing the issue with us.

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*Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:*

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