

Preview and Analysis of Proposed Statements on Standards for Tax Services

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The AICPA's Tax Executive Committee (TEC), the standard-setting body authorized to promulgate standards of tax practice for AICPA members, released an exposure draft of proposed Statements on Standards for Tax Services (SSTS Nos. 1–7) on November 26, 2008. Comments on the exposure draft may be submitted until May 15, 2009.¹ The TEC anticipates that revised SSTS, based on the exposure draft with possible modifications for comments received, will become effective no earlier than January 1, 2010.

The preface to the proposed SSTS states that standards are the foundation of any profession. AICPA members are aided in fulfilling their ethical responsibilities through the existence of these enforceable tax practice standards against which a member's professional performance is measured. These standards apply to all members providing tax services regardless of the jurisdiction in which they practice. A member's compliance with the standards also reaffirms the public's awareness of the professionalism that is associated with CPAs and the AICPA.

The proposed SSTS have their historical origins in the AICPA's Statements on Responsibilities in Tax Practice (SRTPs), originally issued between 1964 and 1977. By the 1990s, the SRTPs, originally considered advisory in nature, had

become recognized and relied upon by the IRS, state boards of accountancy, and other professional organizations as the appropriate articulation of professional conduct by CPAs engaged in tax practice. In August 2000, the TEC issued the current SSTS, largely mirroring the content and language of the SRTPs, but changing them from best practices to enforceable standards.

Since the TEC issued the SSTS, members have asked for clarification on various matters contained therein. In addition, with changes in federal and state laws on tax practice matters, a need arose to revise the statements. Thus, a task force, appointed in 2003, began the revision process for the SSTS, culminating in the TEC's exposure of the proposed SSTS in November 2008.

¹ Comments can be addressed to: Edward S. Karl, Director, AICPA Tax Division, File: SSTS Comments, 1455 Pennsylvania Avenue NW, Washington, DC 20004-1081, or e-mailed to SSTScomments@aicpa.org.

Changing Standards

The exposure of the proposed SSTS is important due to dramatic changes in tax return preparer standards in the Internal Revenue Code and Circular 230² over the past few years. Circular 230 was revised to include proposed conforming language to keep it consistent with tax return preparation standards found in Sec. 6694 and related regulations. In addition, Congress has revised the Sec. 6694 tax return preparer reporting standards dramatically over the past two years. It is likely that in 2009, new language will be proposed for Circular 230, §10.34, to make it consistent with that of the revised Sec. 6694.

Prior to 2007, the Sec. 6694 preparer standard for an undisclosed tax return position was similar to the realistic possibility of success standard contained in the current and proposed SSTS. The standard essentially meant that the tax return position had to have a 33% or greater chance of being sustained if challenged on the merits. The Small Business and Work Opportunity Tax Act of 2007³ increased this standard to a reasonable belief that more likely than not (i.e., greater than a 50% chance of success) the position would be sustained on its merits if challenged.

This statutory change to Sec. 6694 set up a potential conflict of interest between the taxpayer and the preparer because the Sec. 6662 taxpayer standard for undisclosed tax return positions is the substantial authority standard, which is lower than the more likely than not (MLTN) standard applicable to the preparer. As defined under Sec. 6662 and explained in Regs. Sec. 1.6662-4, the substantial authority standard is generally considered to require approximately a 40% or greater chance of success. Notices 2007-54, 2008-11, and 2008-13 provided transitional relief from this potential conflict in standards.⁴

The potential conflict of interest was finally resolved with the passage of the Emergency Economic Stabilization Act⁵ in October 2008. In this act, Congress

lowered the preparer standard under Sec. 6694 for undisclosed, nontax-shelter positions from MLTN to substantial authority, equalizing the preparer and taxpayer standards for such positions. The Sec. 6694 preparer standards for tax shelters (as defined under Sec. 6662(d)(2)(C)(ii)) and reportable transactions (Sec. 6662A) were kept at the MLTN level.⁶

Notice 2009-5⁷ (issued on December 15, 2008) provides interim guidance on transitional rules related to the revisions to Sec. 6694, the definition of substantial authority for purposes of Sec. 6694, and interim compliance rules for tax shelter transactions.

It should be noted that the Sec. 6694 preparer standard for a disclosed tax return position is the reasonable basis standard, which is less rigorous than the substantial authority and the realistic possibility of success standards but more rigorous than the not frivolous standard that had been in effect prior to the May 2007 revisions to Sec. 6694. The current SSTS No. 1 standard for such positions is the not frivolous standard; that standard is raised to a reasonable basis in proposed SSTS No. 1.

Practitioners are encouraged to review all the documents mentioned above to ensure that they understand what the applicable standards are. Practitioners should also review case law under Sec. 6662 dealing with the relationships between legal authority and factual matters.

The recent changes to the standards for tax return positions make it important to have the professional guidance provided in proposed SSTS No. 1. The federal standards are now stricter than the default realistic possibility of success standard found in proposed SSTS No. 1. In addition, various state and local jurisdictions may have standards for nontax-shelter state tax return positions that involve the MLTN standard and are thus higher than both the federal and AICPA default positions for nondisclosed (nonabusive) tax return positions. This article presents a summary of the

EXECUTIVE SUMMARY

- The AICPA's Tax Executive Committee released an exposure draft of proposed Statements on Standards for Tax Services (SSTS Nos. 1–7) on November 26, 2008. The IRS, state boards of accountancy, and other professional organizations rely upon the SSTS as the appropriate articulation of professional conduct by CPAs engaged in tax practice.
- The revision of the existing SSTS, which were issued in 2000, reflects requests by AICPA members for clarification of various matters and changes in the tax return preparer standards in the Code and in the Circular 230 regulations governing individuals practicing before the IRS.
- While some of the individual standards in the proposed SSTS have undergone significant changes, some remain largely the same as the existing standard they replace. Current SSTS 6 and SSTS 7 are combined into a single standard in the proposed SSTS.

2 Treasury Circular 230, *Regulations Governing the Practice of Attorneys, Certified Public Accountants, Enrolled Agents, Enrolled Actuaries, and Appraisers Before the Internal Revenue Service*.

3 Small Business and Work Opportunity Tax Act of 2007, P.L. 110-28.

4 Notice 2007-54, 2007-27 I.R.B. 12; Notice 2008-11, 2008-3 I.R.B. 279; and

Notice 2008-13, 2008-3 I.R.B. 282.

5 Emergency Economic Stabilization Act of 2008, P.L. 110-343.

6 It should be noted that there are a number of taxpayer penalty provisions under Sec. 6662.

7 Notice 2009-5, 2009-3 I.R.B. 309.

proposed statements using the language found in the exposure draft.⁸ The discussion highlights changes to the current statements, provides commentary on significant areas, and makes suggestions to the practitioner community.

Proposed SSTS No. 1: Tax Return Positions

Proposed SSTS No. 1 “sets forth the applicable standards for members when recommending tax return positions and preparing or signing tax returns (including amended returns, claims for refunds, and information returns) filed with any taxing authority.” For purposes of proposed SSTS No. 1, a tax return position includes “(1) a position reflected on a tax return on which a member has specifically advised a taxpayer or (2) a position about which a member has knowledge of all material facts and, on the basis of those facts, has concluded whether the position is appropriate.” In addition, the proposed statement defines a taxpayer as “a client, a member’s employer, or any other third-party recipient of tax services.”

The proposed statement emphasizes that in addition to the AICPA, various taxing authorities (at the federal, state, or local level) may have specific reporting and disclosure standards related to recommending a tax return position or preparing or signing a tax return and that these standards can vary by type of tax and between taxing authorities. Proposed SSTS No. 1 also highlights that a member’s responsibility includes advising a taxpayer on relevant tax return disclosure responsibilities and potential penalties.

Proposed SSTS No. 1 requires a member to determine and comply with the applicable taxing authorities’ tax return reporting standards. If there are no written standards, a member should not recommend a tax return position or prepare or sign a tax return taking a position unless the member has a good-faith belief that the position has at least a realistic possibility of being sustained administratively (e.g., during an audit) or judicially on its

merits if challenged. A member may recommend a tax return position or prepare or sign a tax return taking a position if the member concludes that there is a reasonable basis for the position, provided that, in the case of recommending a position, the member advises the taxpayer to properly disclose the position and, in the case of preparing or signing a return, the position is appropriately disclosed.

Note: Proposed SSTS No. 1 reflects an increase in the standard for a disclosed position to the reasonable basis standard. Current SSTS No. 1’s standard for disclosed positions is the not frivolous standard.

In determining whether these standards are satisfied, a member may consider a well-reasoned construction of the applicable statutory law, well-reasoned treatises or articles, or pronouncements by the applicable taxing authority, regardless of whether these sources are considered authority under Sec. 6662 or its related regulations. A tax return position would not fail to meet these standards simply because the position was later abandoned for practical or procedural reasons during litigation or an administrative hearing.

Members’ and Taxpayers’ Responsibilities

The self-assessment tax system that exists in the United States can be effective only if taxpayers file tax returns that are true, correct, and complete. Tax returns are a taxpayer’s representation of facts, and the taxpayer has final responsibility for any positions taken on a return. Standards that apply to a taxpayer may differ from those that apply to a member. A member has dual responsibilities to both the taxpayer and the tax system. It is well established that a taxpayer has no obligation to pay more taxes than are legally owed.⁹ Thus, the member has both the right and the responsibility to be an advocate for the taxpayer when recommending a tax return position.

In addition, when relevant in recommending a tax position or preparing or

signing a tax return, the member should advise the taxpayer about potential penalty consequences of such a position and the opportunity to avoid such penalties through disclosure. A member should base his or her determination of whether a taxpayer has appropriately disclosed a tax return position on the facts and circumstances of the individual case and the disclosure requirements mandated by the taxing authority. Ultimately, it is the taxpayer’s responsibility to decide whether and how to disclose. Any member engaged to recommend a tax return position, but not to prepare or sign the return, who advises the taxpayer about appropriate disclosure of the position will be deemed to meet the disclosure requirements of proposed SSTS No. 1.

A member should not recommend a tax return position or prepare or sign a tax return reflecting a position that the member knows will serve merely as an arguing position advanced solely to obtain leverage in a negotiation with a taxing authority or will exploit the audit selection process of a taxing authority. A member who in good faith believes that more than one tax return position satisfies the applicable standards may discuss acceptable alternative positions with the taxpayer. The member’s discussion may take into account the likelihood that each position might or might not cause the taxpayer’s return to be examined and that the position would be challenged during the examination.

Finally, for purposes of proposed SSTS No. 1, preparation of a tax return includes providing advice about events that have occurred at the time of the advice, if the advice is directly relevant to determining the existence, character, or amount of a schedule, entry, or other part of a tax return.

Proposed SSTS No. 2: Answers to Questions on Returns

Proposed SSTS No. 2 “sets forth the applicable standards for members when signing the preparer’s declaration on a tax return if

⁸ In order to preserve accuracy and guard against the inadvertent misinterpretation in the explanation of the standards, the authors have periodically incorporated the exact wording and language used in the draft proposals.

⁹ See, e.g., *Helvering v. Gregory*, 69 F.2d 809 (2d Cir. 1934) (“Any one may so

arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one’s taxes”).

one or more questions on the return have not been answered.” For purposes of this statement, questions include requests for information on the return, in the instructions, or in the regulations, whether or not they are in the form of a question.

Proposed SSTS No. 2 states that, before signing as a preparer, a practitioner should make a reasonable effort to obtain information from the taxpayer that would be essential to provide appropriate answers to all questions on a tax return. The actions called for under this statement also might fall under the Circular 230, §10.22, requirement that a practitioner exercise due diligence in preparing returns.

The proposed SSTS No. 2 reflects minor modifications to the current SSTS No. 2’s explanation as to why a member needs to be satisfied that a reasonable effort has been made to obtain information in order to provide appropriate answers. It notes that, in addition to the facts that an omission may detract from the quality of the return and that the member must often sign a declaration that a return is true, correct, and complete, a request for information may necessitate a disclosure in order for the return to be complete.

Another change reflected in the proposed SSTS No. 2 involves added language on penalties. The current SSTS No. 2 indicates that a member should consider whether omitting an answer may result in the return’s being deemed incomplete. Proposed SSTS No. 2 also notes that a member should consider whether the omission of an answer to a question may result in penalties. This brings proposed SSTS No. 2 more in line with the procedural aspects of preparing returns as specified in proposed SSTS No. 3.

Proposed SSTS No. 3: Procedural Aspects of Preparing Returns

No substantive changes were made to the current SSTS No. 3 in the revision process. Proposed SSTS No. 3 “sets forth the applicable standards for members concerning the obligation to examine or ver-

ify certain supporting data or to consider information related to another taxpayer when preparing a taxpayer’s tax return.” Generally, a member may rely in good faith, without verification, on information provided by the taxpayer or by third parties. Nevertheless, a member must make reasonable inquiries if that information appears to be incorrect, incomplete, or inconsistent either on its face or on the basis of other facts known to the member.

Whenever feasible, in preparing the current tax return a member should refer to the taxpayer’s returns for one or more prior years and encourage the taxpayer to provide supporting data where appropriate. If tax law or regulations impose a condition on deductibility or other tax treatment of an item, the member should make appropriate inquiries to determine that the taxpayer has met the condition.

During the preparation of a tax return, a member should consider known information from another taxpayer’s tax return if that information is relevant and its consideration is necessary to properly prepare the current tax return. It is important to consider any limitations relating to confidentiality imposed by rules or law when using such information.

The language in proposed SSTS No. 3 is similar to that in Regs. Sec. 1.6694-1(e), which provides that a preparer may rely in good faith, without verification, on information provided by a taxpayer, another tax preparer, an adviser, or other party (including another preparer or adviser in the preparer’s own firm). The Sec. 6694 regulations go on to note that a preparer is not required to examine, audit, or review evidence to independently verify the furnished information; however, the preparer may not rely on information provided by the taxpayer concerning legal conclusions on federal tax issues. The responsibilities delineated in proposed SSTS No. 3 are similar to those required under §§10.22 and 10.34(b)–(d) of Circular 230. Although a member has certain due diligence responsibilities in preparing a return, the taxpayer has the

ultimate responsibility for the return’s contents.

Proposed SSTS No. 4: Use of Estimates

Current SSTS No. 4 continues as proposed SSTS No. 4 with only minor revisions. The statement “sets forth the applicable standards for members when using the taxpayer’s estimates in the preparation of a tax return.” Under this statement, the taxpayer has the ultimate responsibility to provide the estimated data even if a member advises on the use of estimates. For purposes of this statement, appraisals, valuations, or approximations based on professional judgment in applying accounting methods are not considered estimates.

Unless prohibited by statute or rule, a member may use the taxpayer’s estimates if it is not practical to obtain exact data and the member determines that the estimates are reasonable based on the facts and circumstances known to the member. However, the member should not present the estimates in a manner that implies greater accuracy than exists.

Treasury and the IRS recognize that sometimes the use of reasonable estimates may be appropriate in the preparation of tax returns,¹⁰ or there may be no practical alternatives to the use of reasonable estimates—for example, when the taxpayer’s records are destroyed accidentally or through computer failure or natural disaster. Note that as in other areas of reliance, the tax return preparer must meet the diligence standards in Regs. Sec. 1.6694-1(e) in order to rely properly on information and advice provided by taxpayers or other individuals.¹¹

Estimates must be reasonable and based on something more than speculation, as discussed in several court cases. For example, a tax credit was disallowed where there was a lack of contemporaneous evidence on material elements of a taxpayer’s claims for the credit and the evidence provided by the taxpayer regarding the estimates for credits was based

10 See, e.g., Regs. Sec. 1.448-2(d), dealing with the use of experience to estimate uncollectible amounts; Regs. Sec. 1.451-1(a), dealing with a situation in which an amount of income is accrued on the basis of a reasonable estimate and the exact amount is subsequently determined; and Regs. Sec.

1.451-5(c)(1)(ii), dealing with the use of an estimated cost of goods sold amount where a taxpayer is required to include advance payments for inventoriable items in income.

11 See T.D. 9436 and Notice 2009-5, 2009-3 I.R.B. 309.

primarily on after-the-fact speculations.¹² In another case,¹³ a research tax credit was disallowed when the court found that the taxpayer's research tax credit study was "fundamentally flawed," "unreliable," and "entitled to no weight," where the amount of a research tax credit was based largely on speculation and guesswork related to workers' activities from four to ten years earlier.

Estimates can be used properly in areas such as expenses. The longstanding *Cohan* rule¹⁴ allows taxpayers to estimate expenses for certain business deductions. However, there must be a valid reason for relying on the rule, such as impracticality or lost or destroyed records. Also note that the *Cohan* rule of estimation no longer applies to travel, use of a car, or entertainment expenses because the rule has been superseded by legislation.¹⁵

A recent Tax Court case¹⁶ underscores the importance of documentation in supporting the use of estimates. In that case, Tyson Foods attempted to apply the *Cohan* rule to depreciate approximately \$2 million in expenditures for which the company did not maintain complete and correct records. The court stated that although the *Cohan* doctrine permits the court to estimate allowable deductions when it is clear that a taxpayer has incurred deductible expenses, there must be sufficient evidence in the records to provide a basis for making an estimate. Tyson's status in the industry and its employment of in-house and outside accountants and tax preparers "who were well aware of the record keeping requirements" weighed against Tyson. The court concluded that Tyson failed to satisfy its burden of proving that it was entitled to the disputed deductions.

Proposed SSTS No. 5: Departure from a Position Previously Concluded

Proposed SSTS No. 5 "sets forth the applicable standards for members in recommending a tax return position that

departs from the position determined in an administrative proceeding or in a court decision with respect to the taxpayer's prior return." For purposes of this statement, an administrative proceeding includes a taxing authority examination or an appeals conference related to a return or a refund claim. A court decision refers to a decision by any court having jurisdiction over tax matters.

Proposed SSTS No. 5 is essentially unchanged from the current SSTS No. 5. A member may recommend a tax return position or prepare or sign a tax return that departs from the position determined in an administrative proceeding or court decision with respect to a prior return of the taxpayer if the requirements of SSTS No. 1 are satisfied and the taxpayer is not bound to a different specified treatment in the later year, such as because of a formal closing agreement.

Proposed SSTS No. 6: Knowledge of Error

Proposed SSTS No. 6 combines the current SSTS No. 6 (Knowledge of Error: Return Preparation) and current SSTS No. 7 (Knowledge of Error: Administrative Proceedings). Much of the language in the current SSTS Nos. 6 and 7 was duplicative; the combination of the two is logical and efficient.

The proposed SSTS No. 6 sets forth the applicable standards for a member who becomes aware of an error in a taxpayer's previously filed tax return, an error in a return that is the subject of an administrative proceeding, or a taxpayer's failure to file a required tax return. For purposes of this statement, the term "error" includes any position, omission, or method of accounting that, at the time the taxpayer files the return, fails to meet the standards set forth in SSTS No. 1. An error also includes a position on a prior year's return that no longer meets SSTS No. 1 standards due to the retroactive effect of legislation, judicial decisions, or administrative pronouncements.

Items that have an insignificant effect on the taxpayer's tax liability are not included in the definition of error. Whether an error has an insignificant effect is left to the professional judgment of the member based on all the facts and circumstances known to the member and the cumulative effect of the error. The term "administrative proceeding" does not include a criminal proceeding. The standards set forth in proposed SSTS No. 6 apply even if the member has not prepared or signed the return containing the error.

Included in proposed SSTS No. 6 is a provision from the current SSTS No. 7 stating that special considerations "may apply" when a member has been engaged by legal counsel to provide assistance in a matter relating to the counsel's client. In many of these situations, the attorney-client privilege extends to the member who is assisting legal counsel on the case. In other situations, the client's retention of an attorney in preparation for a legal proceeding will help protect the confidentiality of materials if the attorney retains the member to advise in the case.

While performing services for a taxpayer, if a member becomes aware of an error, the member should inform the taxpayer promptly, advise the taxpayer of the potential consequences of the error, and recommend the necessary corrective measures. Circular 230, §10.21, also requires that a practitioner advise a client of the consequences of noncompliance, error, or omissions; however, SSTS No. 6 goes beyond §10.21 by requiring that the member recommend corrective measures.¹⁷

The member may provide the advice and recommendations orally. Good practice dictates an oral notification to be the first step in providing preliminary or advance notice, but the member should document any oral notification. When the member becomes aware of an error, he or she is not allowed to inform the taxing authority without the taxpayer's permission, except when required by law.

12 *Boddie-Noell Enterprises, Inc.*, 36 Fed. Cl. 722 (1996).

13 *McFerrin*, No. H-05-3730 (S.D. Tex. 5/12/08).

14 *Cohan*, 39 F.2d 540 (2d Cir. 1930).

15 For a review of *Cohan* rule applicability see Schloemer, "Cohan Rule Still Secures Some Deductions Despite Statutory Limits," 81 *Prac. Tax Strategies*

91 (August 2008).

16 *Tyson Foods, Inc.*, T.C. Memo. 2007-188.

17 Wilson, "CPA Obligations for Addressing Errors and Omissions," 39 *The Tax Adviser* 206 (April 2008).

While performing services that do not involve tax return preparation or representation in an administrative proceeding, if a member becomes aware of an error, it is the member's responsibility to advise the taxpayer of the error's existence and to recommend that the taxpayer discuss the error with his or her tax return preparer (this recommendation may be given orally). If a member believes that a taxpayer could be charged with fraud or other criminal misconduct, the member should advise the taxpayer to consult with an attorney before taking any action. It is the taxpayer's responsibility to decide whether to correct any errors. Under the current Code, regulations, and case law, there is no obligation to file an amended return,¹⁸ and the member/adviser "has no duty *per se* to withdraw from representation if the client fails to file an amended return."¹⁹

Depending on the actions taken by a taxpayer based on the advice and recommendations provided, a member should consider whether to withdraw from an engagement or to continue a professional or employment relationship with the taxpayer. If the taxpayer does not correct an error, or if a member is asked to prepare the current year's return when the taxpayer has not taken action to correct an error in a prior return, the member should consider withdrawing. If a member decides to continue the relationship, he or she should take reasonable steps to make sure that the error is not repeated. The "should consider withdrawal" language provides guidance to the member for the necessity to address the error while retaining the flexibility of allowing the member to consider the particular facts and circumstances when determining whether withdrawal is necessary.

If a member represents a taxpayer in an administrative proceeding on a return that contains a known error, the member should request the taxpayer's agreement to disclose the error to the taxing authority. The member should be careful not to disclose without the taxpayer's permission, and the permission should be in writ-

A member should base the determination of whether a taxpayer has appropriately disclosed a tax return position on the facts and circumstances of the case and the disclosure requirements of the taxing authority.

ing. Lacking such agreement, the member should consider whether to withdraw. However, an unexplained withdrawal may send an alarm signal to the taxing authority. Therefore, the member should withdraw in a manner that minimizes such an effect. The exact manner will depend on the nature of the error and the specific circumstances of the relationship.

If the member obtains the taxpayer's consent, the disclosure should be made in a timely fashion. It should not be delayed to such a degree that the taxpayer or member will be considered to have failed to act in good faith or to, in effect, provide misleading information. In any event, the member should make the disclosure before the conclusion of the administrative proceeding.

A conflict may arise between the interests of the member and those of the taxpayer. For example, a conflict may be created due to:

- The potential for violating the member's confidential client relationship (AICPA Code of Professional Conduct, Rule 301, *Confidential Client Information* (AICPA, *Professional Standards*, vol. 2, ET §301.01));
- Tax law and regulations;
- Laws on privileged communications; or
- The potential adverse impact on a taxpayer resulting from a member's withdrawal.

In such cases, a member should consider consulting with legal counsel before deciding on recommendations to the taxpayer, in addition to deciding whether to

continue a professional or employment relationship with the taxpayer.

Proposed SSTS No. 7: Form and Content of Advice to Taxpayers

Proposed SSTS No. 7 (current SSTS No. 8) is directly related to proposed SSTS No. 1. This statement "sets forth the applicable standards for members concerning certain aspects of providing advice to a taxpayer and considers the circumstances in which a member has a responsibility to communicate with a taxpayer when subsequent developments affect advice previously provided." However, proposed SSTS No. 7, like current SSTS No. 8, does not cover a member's responsibilities when there is an expectation that parties other than the taxpayer are likely to rely on the advice provided.

Proposed SSTS No. 7 contains several additions and enhancements to the current SSTS No. 8. When providing tax advice, the member should use professional judgment to ensure that the advice reflects competence and appropriately serves the taxpayer's needs. When communicating tax advice to a taxpayer in writing, the member should adhere to relevant taxing authority standards applicable to the written advice. With oral advice, a member should use professional judgment about whether there is any need to document the advice. No standard format is required when a member communicates or documents oral advice.

Proposed SSTS No. 7 states that members providing tax advice to a taxpayer

18 Fogg and Johnson, "Amended Returns—Imposing a Duty to Correct Material Mistakes," 120 *Tax Notes* 979 (September 8, 2008).

19 Pollack, "What Obligations Do Taxpayers and Preparers Have to Correct Errors on Returns?" 72 *J. Tax'n* 90 (February 1990).

should assume that the advice will affect how the matters or transactions considered would be reported or disclosed on the taxpayer's return. Therefore, when giving tax advice, a member should consider the standards in proposed SSTS No. 1 when ascertaining tax return reporting and disclosure standards applicable to a related tax return position, as well as the potential penalty consequences of the return position. A member is under no obligation to communicate with a taxpayer when subsequent developments affect advice previously provided about significant matters, except when helping a taxpayer with the implementation of procedures or plans associated with the advice provided or when undertaking this obligation by specific agreement.

Conclusion

Tax advice is a valuable service that members provide to taxpayers. The matters covered in the written and/or oral advice may range from routine to complex. Since the range of tax advice is so extensive and tailored to a taxpayer's specific needs, it is not possible to establish a standard format or guidelines for communicating or documenting the provided tax advice that would cover all situations.

Oral advice may satisfy a taxpayer's needs in routine matters or well-defined areas. A member should use professional judgment about documenting oral advice. However, documenting the advice may prevent future liability issues and ensure that miscommunications do not occur due to a taxpayer's failure to understand even basic tax concepts and their applications. It would be beneficial, for example, to document via e-mail an oral conversation or to place a written copy of the oral advice and facts in a file (with a copy sent to the client). Where oral advice may be appropriate in routine matters, written communications are recommended in unusual, important, complicated, or substantial dollar value transactions. Members should be cognizant of applicable confidentiality privileges when providing tax advice.

Members should use professional judgment in deciding on the form of advice provided to a taxpayer. Factors to consider in such a determination include

the importance of the transactions and the amounts involved, the time available for developing and submitting the advice, the general or specific nature of the taxpayer's inquiry, the technical complexity involved, and the taxpayer's tax sophistication. Other factors include the need for the member to seek other professional advice and the existence of authorities and precedents. The proposed statement includes additional factors related to disclosure requirements and potential penalties. These include the type of transaction and whether it is subject to heightened disclosure or reporting requirements, potential penalty considerations of the tax return position, whether any potential penalties can be avoided through disclosure, and whether the member intends for the taxpayer to rely on the tax advice to avoid potential penalties.

Proposed SSTS No. 7, as well as current SSTS No. 8, stress the prudent step of ensuring that the taxpayer understands that the member is not expected to communicate subsequent developments that affect previously provided tax advice unless the member undertakes a specific contractual obligation with the taxpayer to do so. In addition, taxpayers should be informed that any tax planning or other advice may be affected by subsequent changes in statutory law, the issuance of new regulations, and judicial or administrative rulings in particular jurisdictions. Practitioners should be aware that the precautionary language about the exigencies regarding implementation of a plan or transaction may affect its viability.

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EditorNotes

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