DANIEL B. EVANS

ATTORNEY AT LAW
P.O. BOX 27370
PHILADELPHIA, PA 19118

(215) 233-0988

STREET ADDRESS: 7963 EASTERN AVENUE
WYNDMOOR, PA 19038
EMAIL (INTERNET): dan@evans-legal.com
WORLD WIDE WEB: http://evans-legal.com/dan
TELECOPIER (FAX): (215) 893-5388

October 16, 2006

Glenn P. Kirkland
Internal Revenue Service, Room 6516
1111 Constitution Avenue, N.W.
Washington, DC 20224

Re: Circular 230 (REG-111835-99)
Paperwork Reduction Act Comments

Dear Mr. Kirkland:

I am submitting these comments on Circular 230, Regulations Governing Practice Before the Internal Revenue Service (31 C.F.R. § 10.0 et seq.), in response to the request for public comments published at 71 F.R. 58476 (10/3/2006). Although the request for comments specifically refers to §§ 10.6, 10.29, and 10.30 of Circular 230, I would like to address the paperwork burden imposed by § 10.35, relating to “covered opinions.”

I am submitting these comments as an individual lawyer who practices before the Internal Revenue Service. I am also a fellow of the American College of Trust and Estates Counsel and am currently serving as the chair of the Real Property, Probate and Trust Law Section of the Pennsylvania Bar Association, but I am not authorized to speak on behalf of either of those organizations. However, the opinions expressed below are based in part on opinions and experiences that I have heard expressed by other members of those organizations.

Background: “Covered Opinions”

31 C.F.R. 10.35 imposes certain disclosure requirements for “covered opinions,” which are defined as written advice by practitioners concerning one or more federal tax issues relating to certain kinds of transactions, entities, plans, or arrangements. (The definition of “covered opinion” will be discussed in more detail below.) The regulations also require that, in order to avoid the disclosures required for covered opinions, practitioners must make other disclosures described in § 10.35(b)(4)(ii) and 10.35(b)(5)(ii).

Although these disclosures are made to third parties and not to the Internal Revenue Service or the Department of the Treasury, or any other government agency, they are nevertheless a "collection of information" as defined by 5 C.F.R. § 1320.3(c).

Burden of Required Disclosures

The required disclosures impose a significant burden on tax practitioners because the definition of covered opinion could apply to *any* advice on *any* tax issue, with the result that many tax practitioners are either (a) refusing to provide ***any*** written advice to any client on any tax issues or (b) including required disclosures in ***all*** written communications, including all e-mails, in order to avoid any possibility of any inadvertent violation of the disclosure requirements.

Although the purpose of these regulations was to impose stricter standards on lawyers and accountants giving opinions on tax shelters and other questionable tax arrangements, the definition of "covered opinion" in § 10.35(a)(1) applies by its terms to ***all*** written advice (including emails) on ***any*** plan or arrangement the principal purpose of which is to avoid any tax. Although employees within the Department of the Treasury have made statements suggesting that the regulations were not intended to apply to routine tax planning with respect to deductions, exemptions, and transactions clearly allowed by Congress and IRS regulations and rulings, the "covered opinion" definition is not so limited and applies to all written communications involving any tax planning, no matter how routine.

If tax avoidance is only "a significant purpose," and not "the principal purpose," there are disclosures that can be made to take written advice out of the definition of "reliance opinion," and many tax practitioners routinely include those disclosures in ***all*** written communications, including all e-mails, in order to avoid any possibility of any inadvertent violation of the disclosure requirements that would otherwise apply to a "reliance opinion." However, there is no such exception for written advice if the principal purpose of the arrangement is the avoidance of tax, which means that every written communication on those arrangements must comply with the detailed disclosures required by § 10.53(c).

The definition of "principal purpose" excludes arrangements the purpose of which is the "claiming of tax benefits in a matter consistent with the statute and Congressional purpose," but there are many estate and gift planning arrangements which are principally for the purpose of avoiding estate and gift tax and for which there is no clear expression of Congressional purpose. For example:

- Section 2010 of the Internal Revenue Code allows a "unified credit" against estate tax that presently exempts $2 million from federal estate tax. However, if a married person leaves his or her entire estate to his or her surviving spouse, the exemption is lost or wasted because the combined estates of the couple will be taxed at the death of the survivor and the survivor's estate will be entitled to

only one credit. For married couples that exceed the exemption amount, a routine estate plan is to create a trust for the benefit of the surviving spouse at the first death so that the exemption of the first to die can be used to fund the trust without payment of estate tax, the survivor can have the income and benefit of the trust during his or her lifetime, and the trust can be distributed free of any federal estate tax upon the death of the survivor. Often, the trust would not have been created but for the desire to avoid estate tax, so the principal purpose is to avoid the tax. Although the credit and resulting exemption are tax benefits granted by statute and the IRS has for decades allowed the use the exemption through these kinds of trusts, the undersigned is unaware of any legislative history or other expression of Congressional purpose to allow the avoidance of estate tax by this kind of trust arrangement, so tax practitioners are burdened with either (a) not providing any written tax advice on this kind of trust arrangement, or (b) spending the time and effort to comply with the disclosures required by § 10.35(c), or (c) risking disciplinary action by continuing to provide written advice that does not comply with § 10.35.

- Another routine estate planning arrangement is to transfer life insurance policies to, or purchase life insurance policies through, an irrevocable trust in which the insured is not a trustee or beneficiary. Section 1041 of the Internal Revenue Code requires that life insurance proceeds be included in the federal gross estate of insured, and so subject to federal estate tax upon the death of the insured, if the insured had any “incident of ownership” in the policy, but it is generally agreed that the insured can establish a trust to own a life insurance policy and keep the proceeds out of the insured’s taxable estate as long as the insured does not have any interest or power over the trust that would be an “incident of ownership” in the policy. Once again, the exclusion of life insurance proceeds from estate tax may be a “tax benefit” intended by Congress, but the undersigned is unaware of any legislative history or other expression of Congressional purpose to allow the avoidance of estate tax by this kind of trust arrangement, so tax practitioners are under the same burdens described above for “unified credit” trusts.

- Another routine estate planning arrangement is to use the federal gift tax annual exclusions to make gifts to a trust, and to qualify the gifts as excluded “present interests” (and not “future interests”) by the use of limited powers of withdrawal (usually called “crummey powers” after Crummey v. Commissioner, 397 F.2d 82 (9th Cir. 1968).) Once again, the annual gift tax exclusion may be a “tax benefit” intended by Congress, but the undersigned is unaware of any legislative history or other expression of Congressional purpose to allow the avoidance of gift and estate tax by this kind of trust arrangement, so tax practitioners are under the same burdens described above for “unified credit” trusts.

There are many other examples of plans and arrangements which have as their principal purpose the avoidance of federal estate and gift tax, and which are generally

approved and usually not challenged by the Internal Revenue Service, but for which evidence of "Congressional purpose" may be lacking.

Limiting Required Disclosures to "Significant" Tax Issues

Much of the burden on tax practitioners caused by the rules for covered opinions is unnecessary because a simple change to the regulations would eliminate most routine written advice from the scope of the rules.

The burden on tax practitioners would be substantially reduced, and the purposes of the "covered opinion" regulations would still be served, merely by amending the definition of "covered opinion" in § 10.25(b)(2) by changing the phrase "federal tax issue" to "significant federal tax issue."

The regulations already define "significant federal tax issue" as a federal tax issue for which the IRS has "a reasonable basis for a successful challenge" and that definition partially limits the application of § 10.35. For example, the definition of "reliance opinion" (which is one of several different kinds of opinions that are "covered opinions" if tax avoidance is "a significant purpose") states that written advice is a "reliance opinion" only if the opinion reaches a favorable conclusion on at least one "significant federal tax issues." However, there is no such limitation for written advice on an arrangement if "the principal purpose" is tax avoidance, which means that practitioners cannot give written advice on routine, generally accepted tax planning without complying with the disclosures required by § 10.53(c) even when there are no significant tax issues.

I believe that the "significant federal tax issue" standard is a standard that tax practitioners can understand and apply without too much difficulty in most cases, that the application of that standard to all written advice would substantially reduce the number of "covered opinions" subject to the disclosure requirements of § 10.53(c), and that the application of that standard to all written advice would substantially reduce the disclosure burdens on tax practitioners without affecting the primary purposes of the covered opinion regulations.

Because the regulations as presently written impose a burden on practitioners that is unnecessary and unjustified, I would ask that the Office of Management and Budget ***not*** approve the continued collection of information imposed by 31 C.F.R. § 10.35.

Sincerely yours,

Daniel B. Evans