Office of Chief Counsel
Internal Revenue Service
memorandum

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to: Director, Office of Professional Responsibility
Attn: Earl Prater

from: Richard Goldstein
Special Counsel to the Associate Chief Counsel
(Procedure and Administration)

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subject: "I" CAF Indicator

This memorandum is in response to your request for our views on several matters relating to adding an "I" (for ineligible) indicator on the Centralized Authorization File (CAF).

Background

OPR has never notified taxpayers that individuals that the taxpayers designated as their representatives have been suspended or disbarred from practice before the IRS. Last year, SB/SE's return preparer coordinators, on OPR's advice, began checking Forms 2848, Power of Attorney and Declaration of Representative, to confirm that the designated representatives were eligible to practice before the IRS. This exercise revealed that a significant number of designated individuals either did not have a current state license as an attorney or CPA or were not active enrolled agents. In those cases, the return preparer coordinator notified the taxpayer listed on the Form 2848 that was checked, but other taxpayers designating the same individual as a representative were not notified that the individual was ineligible to practice before the IRS.

OPR, return preparer coordinators, and CAF units do not have the ability to manually notify each taxpayer designating a particular individual as their representative that the individual is ineligible to practice before the IRS. It is currently unclear whether the IRS is able to send automatic computer-generated notices to taxpayers designating an ineligible representative on Form 2848.

Issues:

The main questions raised by your office were regarding communications between the IRS, the ineligible representative, and the taxpayer regarding the individual's ineligibility to represent the client before the IRS.

IRS Communications with the Ineligible Representative

After the IRS determines that an individual is ineligible to practice before the IRS, the IRS should correspond with the individual to inform him of the determination. The correspondence should inform the individual of the basis for the determination, and should afford the individual an opportunity to establish that the determination is erroneous. The correspondence should also indicate that the IRS will be dealing with the taxpayer directly, or with an alternative representative if the taxpayer has designated one, unless and until the ineligible representative can establish that the determination of ineligibility was erroneous. Although Circular 230 does not require that an ineligible representative inform his clients that he is no longer eligible to practice before the IRS, the IRS can certainly suggest in the written correspondence that the ineligible representative notify his clients that he can no longer represent them before the IRS.

IRS Notice to Taxpayer

Only those individuals listed in Circular 230 sections 10.3, 10.5(d), and 10.7 are eligible to represent taxpayers in front of the IRS. Thus, if the IRS determines that a designated individual is ineligible to practice before the IRS, and the individual attempts to do so, the IRS cannot accept that representation. Rather, the IRS has to deal directly with the taxpayer or another individual whom the taxpayer has designated to represent her, who is authorized to practice before the IRS.

If the taxpayer has not designated an alternative representative, in the IRS's first contact with the taxpayer after the IRS has determined that the designated individual is not eligible to practice before the IRS, the IRS employee should explain to the taxpayer that the IRS is dealing with the taxpayer directly because the individual designated on the Form 2848, "Power of Attorney and Declaration of Representative" has not established to the IRS that he is eligible to represent taxpayers before the IRS. The correspondence also should inform the taxpayer of the taxpayer's right to designate another representative who is authorized to practice before the IRS.

Representative's Notice to Client

Although an individual who loses her eligibility to practice cannot represent a taxpayer before the IRS, there is no specific requirement in Circular 230 that the individual notify her clients that she is no longer eligible to practice before the IRS.[1] The ineligible individual should not, however, conduct herself in a manner that may improperly suggest to the taxpayer that the individual is still representing the taxpayer before the IRS. If the client is under the impression that the individual is still their representative, the individual should make it clear to the taxpayer that she can no longer represent the client regarding IRS matters. If the ineligible individual fails to inform a client that she can no longer represent the client before the IRS and, thereby, perpetuates the client's misconception that the individual is still representing the client, under Circular 230 section 10.81, the Director of OPR can consider that in determining whether to reinstate the individual as a practitioner at some later date.

If you have any questions, please contact Bridget Tombul at 622-7679.

[1] Although Circular 230 does not specifically require practitioners who become ineligible to practice to inform their clients of the change in their eligibility status, section 10.5(k)(4) of Circular 230 provides that individuals ineligible to practice before the IRS may not state or imply that they are eligible to practice before the IRS. In addition, practitioners who are attorneys and CPAs may have a duty under their State ethical rules to inform their clients that they can no longer represent them before the IRS. For example, ABA Model Rule 1.16(d) provides that a lawyer who must terminate representation (*i.e.* he receives notice that he is not eligible to practice before the Service) has a duty to protect his client's interests, including giving notice of the termination to the client. Further, Article V of the AICPA Code of Professional Conduct requires that members be diligent in discharging their responsibilities to a client. Although the AICPA Code is not as explicit as the ABA Model Rules, it certainly implies a duty to protect a client's interest, which would include the duty to notify the client of the CPA's ineligibility to practice so that the client can retain other representation.