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Kizzy is a Lead Analyst with Prudential Retirement, where she provides compliance, plan design and document services for qualified and nonqualified defined contribution plans and has 8 years of compliance, complex recordkeeping correction and consulting experience. She earned her Juris Doctor with high honors from Drake University in 2004 and BA in Management Information Systems from Loras College in 1998. She has received the following designations from the American Society of Pension Professionals and Actuaries (ASPPA); Certified Pension Consultant (CPC), Qualified Pension Administrator (QPA), Qualified 401(k) Administrator (QKA) and Tax-Exempt and Governmental Plan Consultant (TGPC).
Agenda

- Background
- Fact Patterns
  - Practical application of Circular 230 and NIPA Code of Ethics
  - Includes fact patterns presented by IRS
  - Circular 230 Disciplinary Procedures

Background

- Most Practitioners are covered by some form of code of conduct.
  - Circular 230
  - NIPA Code of Ethics
  - Attorney
  - CPA
  - Other professional code
• Even if Circular 230 does not apply, can provide “best practices” guidance.
• Overlapping provisions in the various codes of conduct. Examples of NIPA Code of Ethics and Circular 230:
  • I will practice only within the limits of my own competence and license, and I will recommend to my clients that they seek counsel of other professionals when appropriate.
  • I will hold in strict confidence information obtained from my clients, except as directed by the client or a court of law.

• Overlapping provisions (continued)
  • I will deliver, on direction from my client, all documents and information essential to the administration of a plan to a successor administrator.
  • I will avoid conflicts of interest, but if such conflicts arise, I will resolve them so that financial gain or other personal benefit will not interfere with my obligation to serve the interests of plan participants and their beneficiaries.
  • I will be truthful in all advertising and solicitation of business.
Background

- Overlapping provisions (continued)
  - I shall not engage in any activity or conduct which constitutes dishonest, deceitful, fraudulent or willfully illegal acts while conducting my practice as a pension administrator or representative.

Fact Patterns

- Fact Pattern #1
  - Attorneys from Law Firm A formed Law Firm B. Law Firm A had a Safe Harbor nonelective contribution with an additional discretionary cross-tested nonelective contribution. Law Firm B intended to maintain a new plan with the same plan design.
  - 4 years after the plan is established, you take over the administration of Law Firm B’s plan in the middle of 2012. You review the plan document and it is drafted to provide a Safe Harbor nonelective contribution with fixed 10% pro rata nonelective contribution. You recommend a cross-tested formula to assist in maximizing contributions, which is adopted for the 2013 plan year.
Fact Patterns

• Fact Pattern #1 (continued)
  • When reviewing the allocations for 2012 you identify that the attorneys are receiving different nonelective contributions.
  • Further discussions with the plan sponsor reveal that they have been operating as if they were cross-tested for the previous four years and not all of the HCE attorneys received the required contributions.
  • Discussion of Circular 230 and NIPA Code of Ethics implications.

Fact Patterns

• Fact Pattern #1 – additional information
  • Before the plan sponsor could take substantial steps towards correction or file under the Voluntary Correction Program (VCP) they received a notice of IRS audit for a plan year impacted by the error.
  • You represent the plan sponsor as Power of Attorney during the audit.
  • Additional discussion of Circular 230 and NIPA Code of Ethics implications.
Fact Patterns

- Fact Pattern #2 (IRS Phone Forum “Offering Tax Advice Relating to Employee Benefit Plans,” February, 2013)
  - Practitioner recommends including undocumented workers in plan’s census.
  - Intent is to never provide a benefit to such individuals.
  - Practitioner provides a written opinion regarding nondiscriminatory coverage testing under IRC § 410(b) based on such plan census.
- Discussion of Circular 230 and NIPA Code of Ethics implications.

  - Practitioner Y is approached by CFO of Hospital X, a 501(c)(3) entity.
  - The CFO further provides that Hospital X is a governmental entity and they would like Practitioner Y’s assistance in establishing a retirement plan that covers only senior executive employees and provides for a 10-year cliff vesting schedule.
- Discussion of Circular 230 and NIPA Code of Ethics implications.
Fact Patterns

  • Same facts as #3.
  • Practitioner Y prepares the plan document and submits it for determination regarding the form of the plan.
  • The IRS responds asking for additional information in order to complete the application.
  • Responding to the additional information request increases fees and determination is not forthcoming.
  • Two years pass since the application was first submitted and no ruling has been issued by the Service.

• Fact Pattern #4 (continued).
  • The CFO is losing patience and refuses to pay Practitioner Y’s most recent invoice.
  • In addition, the CFO asks for all files regarding Hospital X and the plan to be sent to Hospital X.
  • Discussion of Circular 230 and NIPA Code of Ethics implications.
Circular 230 Disciplinary Procedures

- Starts with a referral to Office of Professional Responsibility (OPR).
  - Any IRS employee who believes a practitioner has violated any provision of Circular 230 is required to make a written report to OPR (31 C.F.R. § 10.53(a)).
  - OPR will evaluate for jurisdiction, Circular 230 violations and willful, grossly incompetent or reckless conduct, as well as looking at practitioner’s personal tax compliance.

- OPR may look at alternate discipline options without revoking practice rights.
  - Soft letter (private)
  - Pre-allegation letter
  - Reprimand. Becomes part of record and could show pattern.

- Full investigation
  - Allegation letter
  - Due Process
  - Final Agency Decision (FAD)
    - Practitioner may file a complaint against OPR and address issues with FAD in Federal court
Circular 230 Disciplinary Procedures

• Discipline Options:
  • Private reprimand
  • Censure
  • Suspension
  • Disbarment
  • Monetary sanction (individual and firm level)

Notable Circular 230 Provisions

§ 10.28 Return of client’s records. (Continued)
• Does not include any return, claim for refund, schedule, affidavit, appraisal or any other document prepared by the practitioner if withholding pending the client’s payment of fees if contractually obligated.
§ 10.29 Conflicting interests.
- One client’s interest is directly adverse to another; or
- Significant risk of material limitation by responsibilities to:
  - Another client
  - A former client
  - A third person
  - By personal interest of the practitioner

§ 10.29 Conflicting interests. (Continued)
- May represent if:
  - Reasonably believe in ability to provide competent, diligent representation to each affected client;
  - Not legally prohibited; and
  - Each affected client waives conflict by giving informed consent in writing at the time the conflict is known.
- May consider consulting an objective third party.
§ 10.30 Solicitation.

- May not use any form of public communication or private solicitation that contains a false, fraudulent, or coercive statement or claim; or a misleading or deceptive statement or claim.
- ERPA or registered tax return preparers may not use the term “certified” or imply an employer/employee relationship with the IRS.
- Example of acceptable description:
  - “Enrolled to practice before the Internal Revenue Service.”

§ 10.34(b) Standards with respect to documents, affidavits and other papers.

- May not advise a client to take a position that is frivolous.
- May not advise a client to submit a document, affidavit or other paper to the IRS:
  - To delay or impede the administration of Federal tax laws.
  - That is frivolous.
  - That contains or omits information in a manner that demonstrates an intentional disregard of a rule or regulation.
Notable Circular 230 Provisions

§ 10.34(c) Advising clients on potential penalties.
• Must advise client of potential penalties and the opportunity to avoid by disclosure.

Notable Circular 230 Provisions

§ 10.34(d) Relying on information furnished by clients.
• Generally may rely in good faith without verification.
  • May not ignore actual knowledge.
  • May not ignore implication of other information furnished. May need to make reasonable inquiry.
  • No willful blindness.
  • Look at information versus making a characterization or legal conclusion.
§ 10.35 Competence.

- Competent practice requires the appropriate level of knowledge, skill, thoroughness, and preparation.
  - May become competent by consulting with experts or studying the relevant law.
  - Updated June 2014.

Contact Information

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