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May 5, 2009

VIA REGULAR MAIL and
FSTScomments@aicpa.org
Edward S. Karl
Director, AICPA Tax Division
File FSTS Comments
1455 Pennsylvania Avenue NW
Washington, DC 20004-1081

Dear Sirs:

This letter is sent as a comment on the Exposure Draft of Proposed Statements on Standards for Tax Services issued November 26, 2008.

The undersigned is a member of the American Institute of Certified Public Accountants (the "Institute"), as well as of the Texas Society of Certified Public Accountants. However, this comment is not and should not be viewed as other than my personal comments and views and not those of any organization to which I belong. This commentator applauds the Institute for undertaking this needed revision of the Statements of Standards for Tax Services. However, set forth below are some suggestions for amending language in the Proposed Statements and for expanding the Statements.

I. Conflicts of Interest

I respectfully suggest that the Statements are significantly deficient by the omission of a Statement on Standards for conflicts of interest in tax practice. The Internal Revenue Service has acted, over the last number of years, to amend Circular 230 Section 10.29, dealing with conflicts of interest in tax practice as applicable to "tax practitioners". The term "tax practitioner" includes members of the Institute. IRS and Treasury officials have been clear in their discussions of the several amendments that they intend by the language in the current version of the Circular 230 to incorporate the conflict of interest standards in the ABA Model Rules of Professional Conduct. These ABA Model Rules were intended to be, and, I understand have been, adopted as the applicable standards (with modest variations) by most, if not all, of the various state bars. These Model Rules vary in great respect from the conflict of interest rules applicable to CPAs. Attached ("Exhibit "A") is a speech prepared for a May 1, 2009 CPE function of the Dallas Society of CPAs that covers the specific topic of conflicts of interest as applicable to CPAs, discusses several applicable Institute publications, and distinguishes those rules applicable to members from the rules applicable to attorneys. The point is that CPAs in

public practice frequently do not have a practical understanding of how the Circular 230 rules apply to their practices; CPAs need guidance in this regard in the form of a Statement on Standards from their professional organization, the Institute. I therefore urge the applicable committee(s) to add such a Statement expeditiously.

Set forth below are my specific comments and suggestions with respect to each Proposed Statement:

II. Statement No. 1

- a. Add to Paragraph 4 a new last sentence: "To the extent that standards imposed by the applicable taxing authority exceed or contravene tax standards set forth in Paragraph 5, those standards of the applicable taxing authority apply to the member."

(I think that this concept is included elsewhere in the Statement, but it needs stated more clearly and earlier in the Statement.)

- b. Footnote 1 should be amended to read in its entirety as follows: "A member should refer to the current version of the Internal Revenue Code Section 6694, *Understatement of the taxpayer's liability by tax preparer* (or its successor), and applicable regulations under such section, as well as Circular 230 to determine the reporting standard applicable to preparers of federal tax returns, since members are "tax practitioners" as defined in Circular 230.
- c. Paragraph 9, last sentence of the Statement should be modified so that the sentence reads as follows: "A member is to comply with the standards, if any, of the applicable taxing authority; only if the applicable taxing authority has no standards or if its standards are lower than the standards set forth in Paragraph 5 will the standards set forth in Paragraph 5 apply."
- d. The first sentence in Paragraph 12 should be amended to read in its entirety as follows: "In reaching a conclusion concerning whether a given standard in Paragraphs 4 or 5 has been satisfied, a member may consider a well-reasoned construction of the applicable statute, the positions and the basis for such positions in well-reasoned articles or treatises, or pronouncements issued by the applicable taxing authority, regardless of whether such sources will be treated as *authority* under Internal Revenue Code Section 6662, *Imposition of accuracy-related penalty on underpayments*, and the regulations thereunder.
- e. Paragraph 15 should be amended to add a new sentence at the end as follows: "The member must consider whether a failure to disclose an item or transaction in a manner required by the applicable taxing authority precludes his or her involvement with preparation of a return."

- f. Add to the end of the last sentence of Paragraph 16 the following addition:
“including any required disclosure.”

III. Statement No. 2

- a. Paragraph 4(a) should be amended to read as follows: “The information is not readily available to the taxpayer and the answer is not significant in terms of taxable income or loss, or the tax liability shown on the return. (The standard of whether an item is significant is different from the concept of materiality.)”
- b. Paragraph 5 should be amended to read as follows: “A member may not omit an answer to a question because it might prove disadvantageous to a taxpayer and still be involved with the preparation of the return.”

(Failure to answer a question for the reason indicated implies an incomplete return or a return that would result in penalties.)

- c. Add to the end of the sentence of Paragraph 6 the following: “and, if the return would be deemed incomplete or result in penalties, the member may not continue to be involved with the preparation of a return if the taxpayer determines to omit an answer to such a question.”

IV. Statement No. 3

- a. Paragraph 2, second sentence, should be amended to read as follows: “However, a member may not ignore the implications of information furnished and should make reasonable inquiries if the information furnished appears to be incorrect, incomplete, or inconsistent either on its face or on the basis of other facts known to the member.”
- b. Paragraph 3 should be amended to read as follows: “If the tax law or regulations impose a condition with respect to deductibility or other tax treatment of an item, such as taxpayer maintenance of books and records or substantiating documentation to support the reported deduction or tax treatment, a member must make appropriate inquiries to determine to the member’s satisfaction whether such condition has been met and must consider facts known to the member that are in contraindication of the accuracy of the taxpayer’s representations.
- c. Paragraph 6, first sentence, should be amended to read as follows: “The preparer’s declaration does not require a member to examine or verify supporting data; a member may rely on information furnished by the taxpayer unless it appears to be or, based upon information otherwise available to the member the member knows or should know that it is, incorrect, incomplete, or inconsistent.”

V. Statement No. 6

- a. Paragraph 4 should be amended to add a new last sentence after the end of Paragraph 4 as proposed: “If the potential consequences of the error include possible assertion of a criminal act of the taxpayer, the member should consider recommending to the taxpayer to immediately seek legal counsel and should consider whether withdraw from the performance of further tax (or other) services for the taxpayer and whether to continue a professional or employment relationship with the taxpayer.”
- b. Paragraph 6 should be amended to read as follows: “If a member is representing a taxpayer in an administrative proceeding with respect to a return that contains an error of which the member is aware, the member should request the taxpayer’s agreement to disclose the error to the taxing authority, unless the potential consequences of the error include the possible assertion of a criminal act of the taxpayer. Lacking such agreement (or if the potential consequences of the error include possible assertion of a criminal act of the taxpayer) the member should consider whether to withdraw from representing the taxpayer in the administrative proceeding and whether to continue a professional or employment relationship with the taxpayer.”
- c. The second sentence of Paragraph 12 should be amended to read as follows: “If the subsequent year’s tax return cannot be prepared without perpetuating the error, the member must withdraw from the return preparation if the prior year error is correctible and the taxpayer does not agree to correct the prior year error(s), and if such error(s) are not correctible, should consider whether withdrawal is appropriate.”

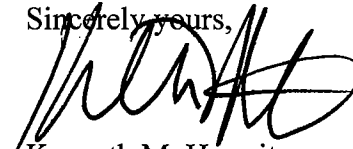
VI. Statement No. 7

- a. The second sentence of Paragraph 2 should be amended to read as follows: “When communicating tax advice to a taxpayer in writing, a member must comply with the relevant taxing authority’s standards, if any, applicable to written tax advice.”
- b. Paragraph 10 (a) should be amended to read as follows: “the advice reflects professional judgment based upon facts available to the member and law existing as of the date the advice is rendered...”

Edward S. Karl
May 5, 2009
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I appreciate your consideration of the above comments. If I can be of further assistance, please let me know.

Sincerely yours,



Kenneth M. Horwitz

KMH/pl

Enclosure

4302602

**CONFLICTS OF INTEREST: A COMPLICATED
GROWING RISK FOR CPAs
Dallas CPA Society CPE Day Dallas, Texas
May 1, 2009**

Presented by: Kenneth M. Horwitz, C.P.A., Esq., LL.M.

Mr. Horwitz is of Counsel
at the Dallas Office of the Law
Firm of Glast, Phillips & Murray, P.C.
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AV rated by Martindale Hubbell

LENGTH OF PRACTICE

40 Years

PRIMARY AREA OF PRACTICE

GENERAL BUSINESS, TAXATION AND ESTATE PLANNING

Ken Horwitz has forty years experience in a broad general tax and transaction practice that has included a sophisticated practice in business acquisitions, corporate and partnership taxation and estate planning, frequently involving transactions with significant international aspects. That practice extends to negotiations as well as tax controversy before the IRS. In addition, because of his qualification as a certified public accountant and experience as a tax partner in a "Big Eight" accounting firm, his practice also includes significant experience in accounting (both tax and audit) malpractice litigation and representation before the State Board of Public Accountancy. His practice has encompassed a variety of industries such as manufacturing, real estate, high technology, oil and gas and retail sales, among others. In addition, because of qualification as a certified public accountant, this practice also includes significant experience in accounting (both tax and audit) malpractice litigation. He was also group chief/tax law specialist for the Internal Revenue Service in Washington, D.C. His tenure with the Internal Revenue Service included practice in taxation and structuring of various methods of investment: domestic, as well as under the laws of a variety of foreign nations. Recent transactions in which Mr. Horwitz acted as principal responsible attorney include:

- Reorganization of privately held corporate and proprietorship businesses into holding company/partnership structure to achieve owner's estate planning, federal and state income tax and asset protection goals.
- Representation of European/Middle-Eastern client group in international tax examination, and related corporate reorganization, international estate planning and immigration planning.
- U.S. and international tax planning for major Mexican corporate group in connection with its U.S. manufacturing and sales operations, and related negotiation and documentation of loans and acquisitions.
- Obtaining a Texas franchise tax ruling for a major software developer.

- Representation in connection with IRS examination (including appeals) and collection activities, financial and legal planning, state sales tax controversy and creditor collection efforts in business workouts, including negotiations with tax authorities (federal and state), vendors, Small Business Administration, customers and suppliers.
- Tax Team Leader in U.S. client's acquisition of U.S. publicly-held U.S. corporation. Both parties owned worldwide subsidiaries with international tax issues a major factor in acquisition planning.
- Representation in connection with corporate and partnership reorganizations including both domestic as well as foreign entities.
- Assist clients in negotiations and documentation of sales and purchases of closely held businesses.
- Representation involving tax structuring of real estate transactions and partnerships.
- Estate planning for client in context of divorce planning and negotiations with spouse's counsel to achieve family goals of (1) splitting the estate in the divorce context; and (2) shifting major portions of large estate to children and future generations without gift or estate tax.
- Charitable contribution planning involving substantial real estate valuation issues and including restructuring of partnerships, preparing and filing probate court action for modification of irrevocable trusts, and obtaining a private letter ruling from the IRS National Office on generation skipping tax issues.
- Representation of Certified Public Accountants before the Texas State Board of Public Accountancy, the Securities Exchange Commission and the courts.

PROFESSIONAL HONORS AND ACTIVITIES

Offices held: International Tax Association of Dallas: Immediate Past Chair; Dallas Bar Association: International Law Section: Past Chair; Dallas CPA Society: (Past Vice President, Past Chairman of Tax Committee, Past Chair IRS Liaison Committee); Texas Society of Certified Public Accountants (member: Board of Directors; Past member Board of Governors, CPE Foundation; Past Chair Litigation Services Conference Committee); Texas Association of Certified Public Accountants (Past Vice President).

Lecturer: Frequent speaker on accounting (and tax) ethical/malpractice issues as well as tax-related international and business subjects.

Member: State Bar of Texas; United States Tax Court Bar; State Bar of Georgia; Dallas Bar Association; American Bar Association; American Institute of Certified Public Accountants; Texas Society of Certified Public Accountants; Dallas CPA Society; Texas Association of Certified Public Accountants; America Association of Attorney-CPAs.

Author: "Recent Developments Favor Use of Foreign Trade Zones," 63 *Journal of Taxation* 172; "Partnerships Can Survive the Bankruptcy of a General Partner," 46 *Taxation for Accountants* 330; "Worker Status Test Unchanged by the Supreme Court,"

48 *Taxation for Accountants* 354; "Independent Contractor vs. Employee Classification Has a Major Tax Impact", *Tax Ideas*, ¶1358; "New Law Liberalizes Worker Classification Rules," 57 *Taxation for Accountants* 324; "New Law Liberalizes Worker Classification Rules," 25 *Taxation for Lawyers* 196; "The CPA- Client Privilege: Boon or Bane?" 25 No. 4 *Today's CPA* 18; The New CPA - "Client Confidentiality Privilege: Opportunity or Risk?", *RIA Tax Planning & Practice Guide* (6/18/99); "A New Development in Tax Free Exchanges of Real Estate," 27 No. 8 *Today's CPA* 8; "Comments on Circular 230 Changes", 2005 TNT 106-21; "Revised Circular 230: New Dangers for CPAs", 33 No. 2 *Today's CPA* 20; New Tax Preparer Penalty Standards: An IRS Overlay To What Congress Has Done, www.tscpa.org and *TSCPA Public Practice E-News January/February 2008* (January 3, 2008); Co-Author -"Tax Planning for Real Estate Leases for Both Lessor and Lessee, *Tax Ideas*, ¶1235; Co-Author - "Supreme Relief: The Texas High Court Announces New Statute of Limitations Rules for Accountants," 25 No.1 *Today's CPA* 32.

EDUCATION

George Washington University National Law Center
LL.M., Taxation, 1972
Emory University School of Law
Juris Doctor, 1968
Georgia Institute of Technology
Bachelor of Science, 1965

**CONFLICTS OF INTEREST: A COMPLICATED
AND GROWING RISK FOR CPAs
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II. AICPA STANDARDS

The performance of services by a CPA are subject to several ethical standards including (i) integrity, and (ii) objectivity, and (iii) conflict of interest. It is clear that rules that control whether a potential or actual conflict of interest exists under accounting ethical standards applicable to CPAs except many situations that for an attorney (and for a CPA under IRS standards) would create a conflict of interest. See Exhibit A, attached: Conflict of Interest Decision Tree, AICPA Special Report 08-1, *Independence and Integrity and Objectivity in Performing Forensic and Valuation Services*, Appendix A.

AICPA Professional Standards, ET Section 54 (Exhibit B, attached), provides that integrity is a fundamental element of character that is the benchmark against which the member must ultimately test all decisions. Integrity requires a member to be, among other things, honest and candid within the constraints of client confidentiality. Integrity can accommodate the inadvertent error and honest difference of opinion; it cannot accommodate deceit or subordination of principle. Importantly, ET Section 54.03 requires the CPA to test his actions against the following questions: “Am I doing what a person with integrity would do? Have I retained my integrity?” Integrity requires a member to observe the principles of objectivity, as well as other applicable principles.

The requirement for acting with objectivity and integrity is pervasive in the context of a CPA’s practice requirements under the various ethical standards. (See AICPA Professional Standards, ET Section 55, at Exhibit C, attached.) See also, the AICPA Statement on Standards for Consulting Services No. 1, at Section 7, that provides additional general standards for all Consulting Services:

“Client Interest. Serve the client interest by seeking to accomplish objectives established by the understanding with the client while maintaining integrity and objectivity . . .

“Communication with Client. Inform the client of (a) conflicts of interest that may occur pursuant to interpretations of Rule 102 of the Code of Professional Conduct,^{2, 3} (b) significant reservations concerning the scope of benefits of engagement, and (c) significant engagement findings or events.”

