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Tax Regs in Plain English

IRS Restructuring and Reform Act of 1998

3411 - Accountant-Client Privilege

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Section 3411

A. Provision covered: RRA § 3411: "Confidentiality Privileges Relating to Taxpayer Communications." (IRC Provisions Affected: § 7525 (new))

B. Background: Prior law allowed the Service to learn the content of communications between taxpayers and federally authorized tax practitioners unless the communications were otherwise protected by the attorney-client privilege. In this statute, Congress intended to make the consulting relationship between taxpayers and federally authorized tax practitioners more like the relationship between taxpayers and their attorneys.

C. Changes: The bill creates a new, statutory, confidentiality privilege for communications between taxpayers and "any federally authorized tax practitioner" concerning "tax advice." "Federally authorized tax practitioners" are the persons described in Circular 230 as subject to regulation. "Tax advice" means any advice given "with respect to a matter which is within the scope of the individual's authority to practice." The new privilege may be asserted both in "any noncriminal tax matter before the Internal Revenue Service" and in "any noncriminal tax proceeding in Federal court with respect to such matter," and may be asserted "to the extent the communication would be considered a privileged communication if it were between a taxpayer and an attorney," except for written communications made "in connection with the promotion of the direct or indirect participation of such corporation in any tax shelter."

D. Impact: There is unlikely to be any immediate impact because the new statutory privilege may be asserted only as to communications made after the date of enactment. It is unlikely to affect examinations of tax periods prior to 1998. Nonetheless, the statute contains significant interpretative issues. Although the new communications privilege is partly defined by reference to the attorney-client privilege, it is clearly a different privilege, created solely by statute, and defined as much by the statutory language as by reference to the common law attorney-client privilege. Thus, there are likely to arise questions of statutory interpretation, such as what is meant by "tax advice," "communication," and other issues, such as under what circumstances will the taxpayer waive, or lose the ability to assert, the privilege. When these questions arise, they should be referred to counsel.

E. Necessary Actions:

1. Institutional Actions

Update or create training materials, IRM provisions, CCDM provisions, Regulations, Revenue Procedures, or taxpayer publications, as appropriate.

2. Things We Can Do

The statute grants a new privilege which does not arise automatically but must be asserted by the taxpayer. Employees may still seek the same information in the same manner as before the statute. The only difference is that taxpayers may now assert, in noncriminal proceedings, a confidentiality privilege for communications made after the date of enactment to federally authorized tax practitioners concerning tax advice sought or received.

F. Other Special Comments None.

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