

Strafford

presents

Form 5500: Tackling Compliance Risks, Understanding Applicability of IRS Paid Preparer Rules Proactive Steps to Meet the Most Complex Requirements and Avoid IRS Penalties

A Live 110-Minute Teleconference/Webinar with Interactive Q&A

Today's panel features:

Jewell Lim Esposito, Shareholder, **Chamberlain Hrdlicka White Williams & Martin**, West Conshohocken, Pa.

Alex Brucker, Partner, **Brucker & Morra**, Los Angeles

Becky Miller, Director, National Professional Standards Group, **McGladrey & Pullen**, Bloomington, Minn.

Thursday, March 18, 2010

The conference begins at:

1 pm Eastern

12 pm Central

11 am Mountain

10 am Pacific

You can access the audio portion of the conference on the telephone or by using your computer's speakers.

Please refer to the dial in/ log in instructions emailed to registrations.

For CLE purposes, please let us know how many people are listening at your location by

- closing the notification box
- and typing in the chat box your company name and the number of attendees.
- Then click the blue icon beside the box to send.

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**Form 5500: Tackling Compliance
Risks, Understanding Applicability
of IRS Paid Preparer Rules
Webinar**

March 18, 2010

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Today's Program

Introduction To Key Concepts (<i>Becky Miller</i>)	Slides 3-17
Drill-Down On Implications For Information Return-Filers (<i>Alex Brucker</i>)	Slides 18-38
Filer Compliance Issues Encountered To Date (<i>Jewell Lim Esposito</i>)	Slides 39-50

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Introduction To Key Concepts

Becky Miller, RSM McGladrey

Preparer Penalties

- Apply regardless of whether return requires a signature
- May apply even if you only advised on a single item associated with a return
- May apply even if no return was filed

Separate from any taxpayer penalties!

Tax Return Preparer Penalty

- **IRC §6694: Understatement of Taxpayer's Liability by Tax Return Preparer**
- Background
 - Small Business and Work Opportunity Tax Act of 2007 (May 2007)
 - Notice 2007-54, transitional rules for 2007 (June 2007)
 - Notices 2008-12, 13 and 46 interim rules for 2008 (December 2007 and April 2008)
 - Proposed §6694 regulations (June 2008)
 - Sect. 506 of the Tax Extenders and Alternative Minimum Tax Relief Act of 2008, 110-343 (October 2008)
 - “Final” regulations and Notice 2009-5 (December 2008)
 - Rev. Proc. 2009-11 (December 2008)
 - Rev. Proc. 2010-15 provides rules for adequate disclosure (February 2010)

Amount Of Potential Penalty

- §6694(a) penalty for understatements due to unreasonable positions is the greater of \$1,000 or 50% of the income derived by the preparer.
- §6694(b) penalty for willful or reckless conduct is the greater of \$5,000 or 50% of the income derived by the preparer.

Who Is A Tax Return Preparer?

- A person who prepares for compensation (or who employs another who prepares for compensation) all or a substantial portion of a tax return
 - Substantial portion: Significant relative to the entire return
- Includes signing preparers and those who advise concerning tax reporting when all events have occurred
- Preparers of information returns and other schedules may be preparers of the recipient's return if substantial portion test is met.

What Is A Return?

- Returns reporting a tax liability
 - §6694 penalty and disclosure rules apply
 - *Examples:* Forms 990-T, 1040 series, 1041, 1120 series, 706, 709, 941, 943, 944
- Information returns and other documents
 - §6694 penalty and disclosure rules apply if item is a “substantial portion”
 - *Examples:* Forms 1042-S, 1065, 1120S, 5500, 8038
- Other information returns and documents
 - §6694 penalty does not apply unless willful evasion or reckless or intentional disregard of rules or regulations
 - *Examples:* Forms 1099, W-2, 990, estimated tax returns

Standards For Preparation

- Most tax return positions are only required to satisfy the “substantial authority” standard of conduct.
- Where available authority only meets “reasonable basis,” return may be filed without risk of penalty with appropriate disclosures.
- Tax shelter positions and reportable transactions require the “reasonable belief of a more likely than not” standard to avoid penalty.

What Are These Standards?

- Reasonable basis requires something like a 20% to 25% chance of success.
- Substantial authority is believed to be around 40%.
- More likely than not is more than 50%.

Percent Of What?

- If examined by a competent IRS agent, the surrounding legal authority would provide that level of assurance:
 - MUST consider contrary authority
- What is the available legal authority?
 - What is the source of the authority?
 - How old is the authority?
 - What has happened since it was issued?
 - How close are the authority's facts to the client's situation?
 - How well-reasoned is the authority?
 - What is the relative weight of contrary authority?
 - Treas. Reg. §1.6694-2(b)(2) and §1.6662-4(d)(3)(iii)

When Does MLTN Apply?

- Tax shelter or reportable transactions
- “Tax shelter” is defined as a partnership or other entity, investment plan or arrangement, or any other plan or arrangement having a “significant purpose” of avoiding or evading federal income tax.
 - Neither existing §6662 regulations nor the new interim guidance define “significant purpose.”
 - Old §6111 “confidential corporate tax shelter” regulations offer some insights.

When Does MLTN Apply? (Cont.)

- Tax shelter or reportable transactions (Cont.)
- Reportable transactions: Positions attributable to transactions described in §6662A(b)(2)
 - Listed transactions
 - See <http://www.irs.gov/retirement/article/0,,id=118821,00.html>
 - Other reportable transaction with a significant purpose of federal income tax avoidance or evasion

Where Might A Benefit Plan Practitioner Encounter These Issues?

- Employee stock ownership plans
 - S corporations
 - Qualifying employer security definition
 - Non-exempt transactions
 - Treatment of dividends
- Welfare benefit plans
- Timing of contribution deductions
- Late deposits of salary deferrals

Form 5500, Schedule H To Form 5330

Schedule H (Form 5500) 2007 Page 5

CHECK ONE ONLY

Net Income and Reconciliation (b) Total

2k Net income (loss) (subtract line 2j from line 2d) _____

l Transfers of assets _____

(1) To this plan _____

(2) From this plan _____

Part III Accountant's Opinion

3 Complete lines 3a through 3f if the opinion of an independent qualified public accountant is attached to this Form 5500. Complete line 3d if an opinion is not attached.

a The attached opinion of an independent qualified public accountant for this plan is (see instructions):

(1) Unqualified (2) Qualified (3) Disclaimer (4) Adverse

b Did the accountant perform a limited scope audit pursuant to 29 CFR 2520.103-6 and/or 103-12(d)? Yes No

c Enter the name and EIN of the accountant (or accounting firm):

Name _____

EIN _____

d The opinion of an independent qualified public accountant is not attached because:

(1) this form is filed for a COT, PSA or MTIA. (2) it will be attached to the next Form 5500 pursuant to 29 CFR 2520.104-50.

Part IV Transactions During Plan Year

4 COTs and PSAs do not complete Part IV. MTIAs, 103-12 IEs, and CIAs do not complete 4a, 4b, 4c, 4d, 4e, 4f, or 5. 103-12 IEs also do not complete 4f.

During the plan year:

a Did the employer fail to transmit to the plan any participant contributions within the time period described in 29 CFR 2510.3-102? (See instructions and DOL's Voluntary Fiduciary Correction Program.) _____

b Were any loans by the plan or fixed income obligations due the plan in default as of the close of the plan year or classified during the year as uncollectible? Disregard participant loans secured by the participant's account balance. (Attach Schedule G (Form 5500) Part II if "Yes" is checked.) _____

c Were any loans to which the plan was a party in default or classified during the year as uncollectible? (Attach Schedule G (Form 5500) Part II if "Yes" is checked.) _____

d Were there any nonexempt transactions with any party-in-interest? (Do not include transactions reported on line 4a. Attach Schedule G (Form 5500) Part III if "Yes" is checked on line 4d.) _____

e Was this plan covered by a fidelity bond? _____

1 7 0 7 0 0 0 5 0 K

Form 5330 **Return of Excise Taxes**
 Related to Employee Benefit Plans
 (Under sections 4965, 4971, 4972, 4973(a)(1), 4975, 4976, 4977, 4978, 4979, 4979A, 4980, and 4980F of the Internal Revenue Code)

OMB No. 1545-0075

Risk tax year beginning _____ and ending _____

A Name of filer (see instructions) _____

B Filer's identifying number (see instructions) _____

Number, street, and room or suite no. (if a P.O. box, see instructions) _____

C Plan sponsor's EIN _____

City or town, state, and ZIP code _____

F Plan year ending (MM/DD/YYYY) _____

G Name of plan _____

H Plan number _____

D Name and address of plan sponsor _____

I If this is an amended return, check here _____

Part I Taxes. You can only complete one Section of Part I for each Form 5330 filed (see instructions).

Section A—Taxes that are reported by the last day of the 7th month after the end of the tax year of the employer (or other person who must file the return)

1	Section 4972 tax on nondeductible contributions to qualified plans (from Schedule A, line 12)	101	1	
2	Section 4975(a)(2) tax on excess contributions to section 408(b)(7)(A) custodial accounts (from Schedule B, line 12)	102	2	
3a	Section 4975(a) tax on prohibited transactions (from Schedule C, line 3)	103	3a	
3b	Section 4975(b) tax on failure to correct prohibited transactions	103	3b	
4	Section 4976 tax on disqualified benefits for funded welfare plans	104	4	
5a	Section 4978 tax on ESOP dispositions	105	5a	
5b	The tax on line 5a is a result of the application of: <input type="checkbox"/> Sec. 664(g) <input type="checkbox"/> Sec. 1042	105	5b	
6	Section 4979A tax on certain prohibited allocations of qualified ESOP securities	106	6	
7	Total Section A taxes. Add lines 1 through 6. Enter here and on Part II, line 17	107	7	

Section B—Taxes that are reported by the last day of the 7th month after the end of the employer's tax year or 8 1/2 months after the last day of the plan year that ends within the filer's tax year

8a	Section 4971(a) tax on failure to meet minimum funding standards (from Schedule D, line 2)	108	8a	
8b	Section 4971(b) tax for failure to correct minimum funding standards	108	8b	
9a	Section 4971(f)(1) tax on failure to pay liquidity shortfall (from Schedule E, line 4)	109	9a	
9b	Section 4971(f)(2) tax for failure to correct liquidity shortfall	109	9b	
10a	Section 4971(g)(2) tax on failure to comply with a funding improvement or rehabilitation plan (see instructions)	110	10a	
10b	Section 4971(g)(3) tax on failure to meet requirements for plans in endangered or critical status (from Schedule F, line 1c)	110	10b	
10c	Section 4971(g)(4) tax on failure to adopt rehabilitation plan (from Schedule F, line 2d)	110	10c	
Section B1—Tax that is reported by the last day of the 7th month after the end of the calendar year in which the excess fringe benefits were paid to the employer's employees				
11	Section 4977 tax on excess fringe benefits (from Schedule G, line 4)	111	11	
12	Total Section B taxes. Add lines 8a through 11. Enter here and on Part II, line 17	112	12	

Section C—Tax that is reported by the last day of the 15th month after the end of the plan year

13	Section 4979 tax on excess contributions to certain plans (from Schedule H, line 2). Enter here and on Part II, line 17	113	13	
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For Printers A-C and Paperwork Reduction Act Notice, see Instructions. Cat. No. 11470M Form 5330 (Rev. 1-2004)

Interpretation Of “Late”

- Example 10 of Notice 2008-13

“Accountant J encounters an issue regarding various small asset expenditures. Accountant J researches the issue and concludes that there is a reasonable basis for a particular treatment of the issue. Accountant J cannot, however, reach a reasonable belief whether the position would more likely than not be sustained on the merits **because it was impossible to make a precise quantification regarding whether the position would more likely than not be sustained on the merits.** The position is not disclosed on the tax return. Accountant J signs the tax return as the tax return preparer. The IRS later disagrees with this position taken on the tax return. Accountant J is not subject to a penalty under section 6694.”

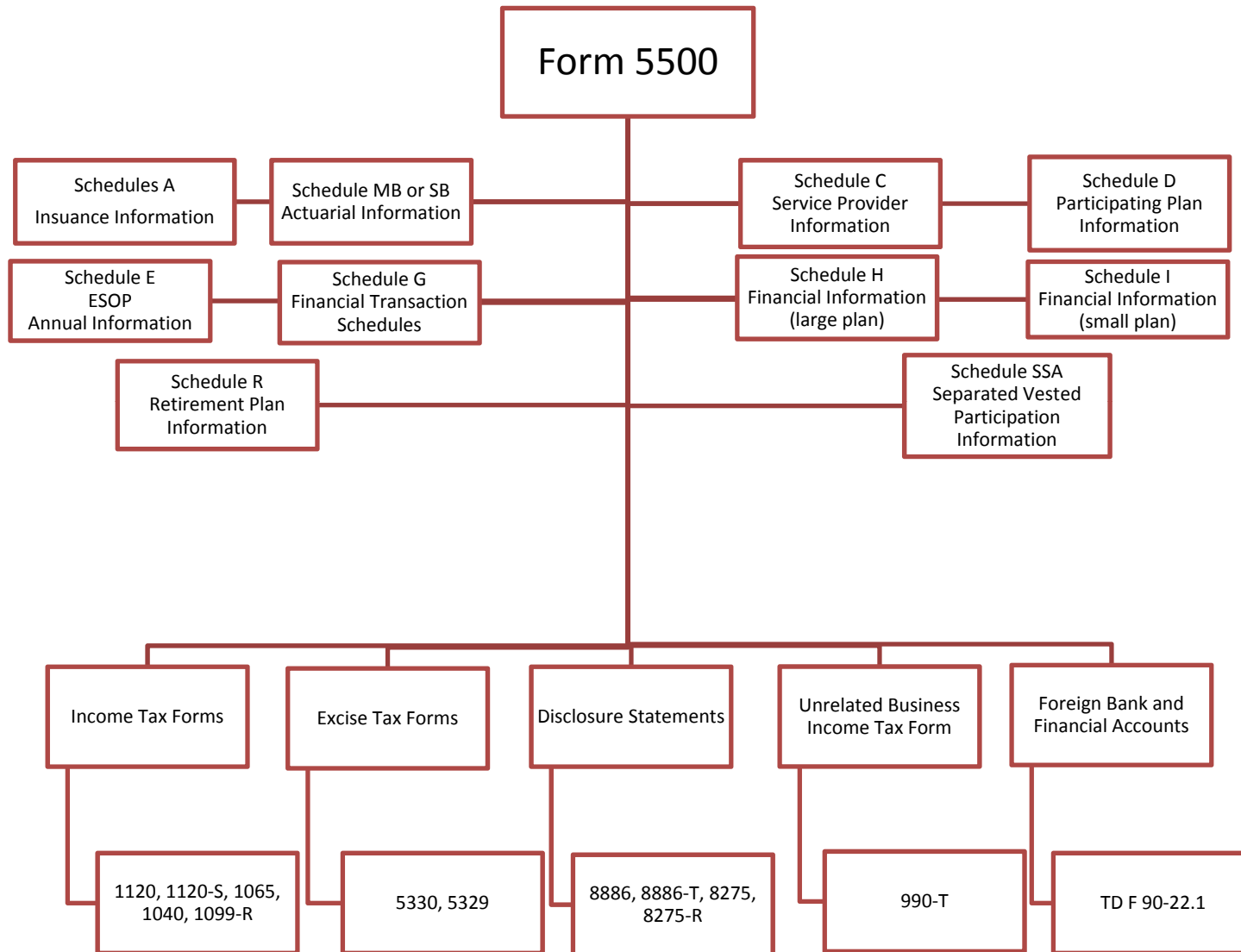
How Do We Disclose?

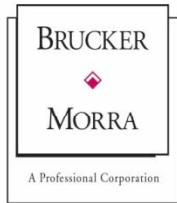
- Form 8275: General disclosure form
- Form 8275-R: Disclosure of positions taken in conflict with published regulations
 - This applies to TAX regulations.
 - The timeliness of deposit rule is a DOL regulation.
 - The consequence, however, is an excise tax under the Code.
- Disclose using Form 8275 if client is taking a position that you believe is beyond the scope of the non-exempt transaction requirements.

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**Drill-Down On
Implications For
Information-Return
Filers**

Alex Brucker, Brucker & Morra





CAVEAT!

The 2007 amendments to the Tax Preparer Penalty rules made a number of important changes to Code §6694, including: (1) expanding the definition of tax return preparer, (2) applying the penalty provisions to nearly all tax returns, including gift and estate tax returns, (3) raising the standards of conduct that tax return preparers must meet to avoid penalties, and (4) increasing preparer penalties.

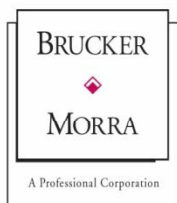
The most significant change was the requirement that a tax return preparer reach a **"more likely than not"** conclusion (that is with a greater than 50% likelihood) in order to avoid penalties on an undisclosed tax position.

Due to extensive discussions by tax preparation professionals and their organizations, the Emergency Economic Stabilization Act of 2008 removed the "more likely than not" standard and replaced it with a lower **"substantial authority"** standard. Tax return preparers are now subject to the same "substantial authority" standard as taxpayers for undisclosed tax positions.

"Substantial authority" exists if the weight of authorities supporting the taxpayer's treatment is substantial in relation to the weight of those that take a contrary position. As stated above, the "substantial authority" standard is less stringent than the "more likely than not" standard, but more stringent than the "reasonable basis" standard which applies to tax positions that are adequately disclosed. (For tax shelters and reportable transactions, the penalty provisions retain the "more likely than not" standard.)

Accordingly, replace "more likely than not" with "substantial authority" where mentioned in the accompanying outline and case studies.

Alex Brucker

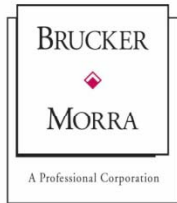


Tax Return Preparer Responsibility

Example 1.

Joe Sixpack who is a senior administrator for Maverick TPA, provides advice to I See Russia, Inc. (ISRI) concerning the proper treatment of plan investment in art, with respect to which all events have occurred on ISRI's Form 5500. In preparation for providing that advice, Joe Sixpack seeks advice regarding the proper treatment of the art item from Actuary A, who is within the same firm, but Joe is the person with most responsibility over the preparation of the return. Actuary A provides advice on the treatment of the art item upon which Joe relies. A's advice is reflected on ISRI's plan return, but no disclosure was made in accordance with §1.6694-2(c)(3).

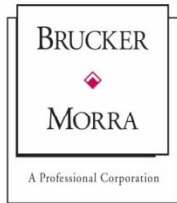
The advice constitutes preparation of a substantial portion of the return within the meaning of §301.7701-15(b)(3), and the IRS later challenges the position taken on the tax return, giving rise to an understatement of income and excise liability. For purposes of the regulations under section 6694, Joe is initially considered the tax return preparer with respect to ISRI's return, and the IRS advises Joe that he may be subject to the penalty under section 6694. It may be concluded that Actuary A had primary responsibility for the position taken on the return that gave rise to the understatement, because A had overall supervisory responsibility for the position giving rise to an understatement.



Tax Return Preparer Responsibility (Cont.)

Example 2.

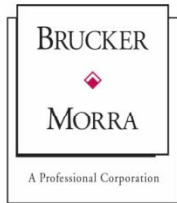
Same as Example 1, except that Actuary A is the non-signing tax return preparer within the firm with overall supervisory responsibility for the position giving rise to an understatement. Accordingly, A is the tax return preparer who is primarily responsible for giving rise to an understatement and is subject to penalty under section 6694.



Tax Return Preparer Responsibility (Cont.)

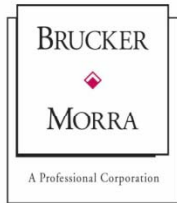
Example 3.

Same as Example 1, except Jake the Snake, an attorney who works for a different firm than Joe's, also provides advice on the same position upon which Joe relies. It may be concluded that Jake is also primarily responsible for the position on the return.



Verification Of Information

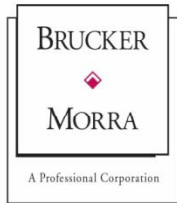
The standard is that there must be a reasonable belief that the position would more likely than not be sustained on its merits.



Verification Of Information (Cont.)

Example 1.

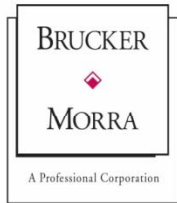
During an interview conducted by Joe Sixpack, client Yes We Can, Inc. (YECI) stated that it made a charitable contribution of real estate to its plan for the 2007 year having a value of \$150,000, when in fact it had not obtained an appraisal or proper changed title. Joe did not inquire about the existence of a qualified appraisal or the change of title. Non-cash contributions to a plan are suspect. Joe prepared the 5500 Form and disclosed the real estate investment only without investigating any issues relating to the transaction, which resulted in an understatement of liability for tax. Joe had primary responsibility for the preparation of the form and is subject to a penalty under section 6694.



Verification Of Information (Cont.)

Example 2.

While preparing the 2007 Form 5500 for Bailout, Inc., Joe realizes that Bailout stated in its financial statements that there were “other investments” of \$250,000 but did not provide an explanation or any detail about these investments. When Joe inquired about any other investments, Bailout furnished him with a K-1 from an appropriate limited partnership owned by the plan. Joe did not know that the plan owned additional limited partnerships that made up the balance of the other investments, and Bailout did not reveal this information to Joe. Notwithstanding his general inquiry about same, Joe is not subject to a penalty under section 6694.

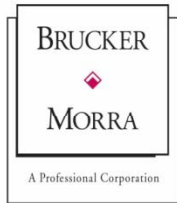


Verification Of Information (Cont.)

Example 3.

In preparing a tax return, Al Pocket Protector, a tax CPA took advice from an actuary concerning the limit on deductibility under section 404(a)(1)(A) of a contribution by an employer to a qualified pension trust. On the basis of this advice, Al completed and signed the corporate income tax return. It is later determined that there is an understatement of liability for tax that resulted from the incorrect advice provided by the actuary. Al had no reason to believe that the advice was incorrect or incomplete, and the advice **appeared reasonable on its face**. Al was also not aware at the time the return was prepared of any reason why the actuary did not know all of the relevant facts or that the advice was no longer reliable due to developments in the law since the time the advice was given. A is not subject to a penalty under section 6694.

The **actuary, however**, may be subject to penalty under section 6694 if the advice given by the actuary constitutes a substantial portion of the tax return within the meaning of §301.7701-15(b)(3) of this chapter.



Authorities

The authorities considered in determining whether a position satisfies the more likely than not standard are those authorities provided in §1.6662-4(d)(3)(iii) (or any successor provision).

Reg §1.6662-4 Substantial Understatement Of Income Tax

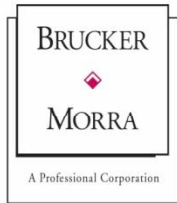
(d) Substantial authority.

(3) Determination of whether substantial authority is present.

(iii) Types of authority. Except in cases described in paragraph (d)(3)(iv) of this section concerning written determinations, only the following are authority for purposes of determining whether there is substantial authority for the tax treatment of an item: applicable provisions of the Internal Revenue Code and other statutory provisions; proposed, temporary and final regulations construing such statutes; revenue rulings and revenue procedures; tax treaties and regulations thereunder, and Treasury Department and other official explanations of such treaties; court cases; congressional intent as reflected in committee reports, joint explanatory statements of managers included in conference committee reports, and floor statements made prior to enactment by one of a bill's managers; General Explanations of tax legislation prepared by the Joint Committee on Taxation (the Blue Book); private letter rulings and technical advice memoranda issued after October 31, 1976; actions on decisions and general counsel memoranda issued after March 12, 1981 (as well as general counsel memoranda published in pre-1955 volumes of the Cumulative Bulletin); Internal Revenue Service information or press releases; and notices, announcements and other administrative pronouncements published by the Service in the Internal Revenue Bulletin. Conclusions reached in treatises, legal periodicals, legal opinions or opinions rendered by tax professionals are not authority. The authorities underlying

Reg §1.6662-4(d)(3)(iii), Cont.

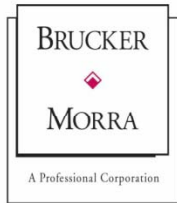
such expressions of opinion where applicable to the facts of a particular case, however, may give rise to substantial authority for the tax treatment of an item. Notwithstanding the preceding list of authorities, an authority does not continue to be an authority to the extent it is overruled or modified, implicitly or explicitly, by a body with the power to overrule or modify the earlier authority. In the case of court decisions, for example, a district court opinion on an issue is not an authority if overruled or reversed by the United States Court of Appeals for such district. However, a Tax Court opinion is not considered to be overruled or modified by a court of appeals to which a taxpayer does not have a right of appeal, unless the Tax Court adopts the holding of the court of appeals. Similarly, a private letter ruling is not authority if revoked or if inconsistent with a subsequent proposed regulation, revenue ruling or other administrative pronouncement published in the Internal Revenue Bulletin.



Authorities

Example 1.

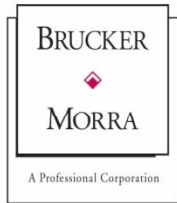
A new statute is silent as to whether the taxpayer may take advantage of certain pension tax benefits. The Treasury Department and the IRS have not issued any interpretative guidance for the newly enacted provision. A well-reasoned construction of the statutory text supports the position that a taxpayer may claim the tax benefits. Country First, a TPA, may avoid the section 6694(a) penalty by taking the position that it reasonably believed that the taxpayer's position would more likely than not be sustained on its merits.



Authorities (Cont.)

Example 2:

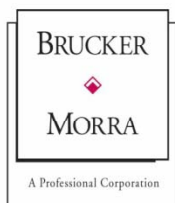
After the passage of legislation containing a new statutory provision, a taxpayer engaged in a transaction that is adversely affected by the new provision. Prior law supported a position favorable to the taxpayer. Country First believes that the new statute is inequitable as applied to the taxpayer's situation. The statutory language, however, is unambiguous as applied to the transaction to deny the result claimed by the taxpayer previously. In considering the new statutory provision as applied to the taxpayer's position, Country First may not avoid the section 6694(a) penalty by taking the position that the tax return preparer reasonably believed that the position would more likely than not be sustained on its merits.



Authorities (Cont.)

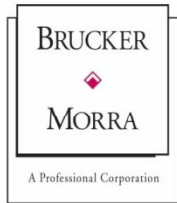
Example 3:

In the course of researching whether an interpretation of a phrase in the Internal Revenue Code (Code) is a position that more likely than not will be sustained on its merits, Maverick TPA discovers that the only relevant authorities include decisions of five U.S. courts of appeal. Three U.S. courts of appeal have construed the language as being taxpayer favorable. Two other U.S. courts of appeal, however, have construed the identical language as being favorable to the government's position. The U.S. Court of Appeals in the jurisdiction where the taxpayer is located has not addressed this issue. P reasonably believes that the taxpayer's facts more closely parallel the facts involved in the three U.S. courts of appeals' decisions that were taxpayer-favorable. Under the analysis prescribed by §1.6662-4(d)(3)(ii), P may avoid the section 6694(a) penalty by taking the position that the tax return preparer reasonably believed that a well-reasoned position consistent with the taxpayer favorable interpretation would more likely than not be sustained on its merits.



Non-Signing Tax Return Preparer

In general, a non-signing tax return preparer is any tax return preparer who is not a signing tax return preparer but who prepares all or a substantial portion of a return with respect to events that have occurred at the time the advice is rendered. In determining whether an individual is a non-signing tax return preparer, time spent on advice that is given after events have occurred that represents less than 5% of the aggregate time incurred by such individual with respect to the position(s) giving rise to the understatement shall not be taken into account. **Examples** of non-signing tax return preparers are tax return preparers who provide advice (written or oral) to a taxpayer (or to another tax return preparer), when that advice constitutes a substantial portion of the return within the meaning of paragraph(b)(3) of this section.

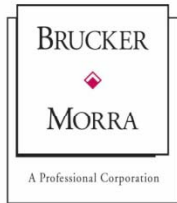


Non-Signing Tax Return Preparer (Cont.)

Example 1:

John Ambulance Chaser, an attorney in a law firm, provides legal advice to TPA regarding a certain item on the Form 5500. The advice provided by John is directly relevant to the determination of an entry on the taxpayer's return and this advice constitutes a substantial portion of the return. John, however, does not prepare any other portion of the taxpayer's return and is not the signing tax return preparer of this return. John is considered a tax return preparer.

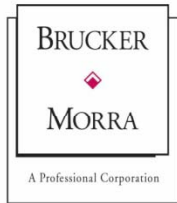
NOTE: Same if John were a CPA or actuary.



Non-Signing Tax Return Preparer (Cont.)

Example 2:

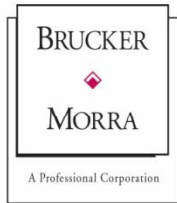
John provides legal advice to a client regarding its pension plan and an investment transaction. Based upon this advice, the client enters into the transaction. Once the transaction is completed, the client does not receive any additional advice from John with respect to the transaction. John did not provide advice with respect to events that have occurred and is not considered a tax return preparer.



Non-Signing Tax Return Preparer (Cont.)

Example 3:

The facts are the same as in Example 2, except that John provides supplemental advice to the client on a phone call after the transaction is completed. The time incurred on this supplemental advice by John represented less than 5% of the aggregate amount of time spent by B providing tax advice on the position. B is not considered a tax return preparer.



Substantial Position

Only a person who prepares all or a substantial portion of a return shall be considered to be a tax return preparer of the return or claim for refund. A person who renders tax advice on a position that is directly relevant to the determination of the existence, characterization, or amount of an entry on a return will be regarded as having prepared that entry. Whether a schedule, entry or other portion of a return is a substantial portion is determined based upon whether the person knows or reasonably should know that the tax attributable to the schedule, entry or other portion of a return **is a substantial portion of the tax required to be shown on the return.**

Strafford

Filer Compliance Issues Encountered to Date

Jewell Lim Esposito, Chamberlain Hrdlicka



Delinquent Deferral Question

- Form 5500 questions regarding delinquent late deposits of employee deferrals:
 - “Did the employer fail to transmit to the plan any participant contributions within the time period described in 29 CFR 2510.3-102? See instructions and DOL’s Voluntary Fiduciary Program.”
- How to determine if employer is late?



Delinquent Deferral Question (Cont.)

- How to answer:
 - Yes?
 - No?
 - Lie?



Form 5500 Instructions: Penalty Provisions

- Penalties
 - Up to \$10,000,
 - Five years imprisonment, or both
- For “false statement or representation of fact”
... See Sect. 1027, Title 18, U.S. Code, as amended by Sect. 111 of ERISA.



Delinquent Deferral Question

- How to answer:
 - Yes?
 - No?
 - Lie?



DOL's Voluntary Fiduciary Correction Program

- VFCP
- What it says
- Compliance
- File or not file?

Contribution Activity – FY End 6/30

Payroll End Date	Contributions Withheld	Payroll Date Paid	Amount Deposited	Date of Check or Wire	Date Cleared Bank	Bus Days / Bus Days Into Next Month
January 15	70,650	1/24/04	70,650	2/19/04	2/21/04	18 / 13
January 31	75,480	2/10/04	75,480	3/19/04	3/21/04	27 / 13
February 15	64,104	2/25/04	64,104	3/27/04	4/1/04	22 / 19
February 28	63,419	3/10/04	63,419	3/28/04	4/1/04	14 / 0
March 15	63,960	3/25/04	23,960	4/17/04	4/22/04	16 / 13
March 31	70,535	4/10/04	70,535	4/25/04	4/30/04	11 / 0
April 15	68,635	4/25/04	28,635	5/20/04	5/29/04	17 / 14
April 30	67,927	5/9/04	27,927	6/6/04	6/10/04	18 / 3
May 15	67,633	5/23/04	67,633	6/19/04	6/23/04	19 / 14
May 31	65,465	6/10/04	65,465	6/15/04	6/17/04	3 / 0
June 15	62,950	6/25/04	62,950	6/30/04	7/02/04	5 / 0
June 30	66,422	7/10/04	66,422	8/26/04	8/28/04	33 / 18

Contribution Activity – FY End 6/30 (Cont.)

Payroll End Date	Contributions Withheld	Payroll Date Paid	Amount Deposited	Date of Check or Wire	Date Cleared Bank	Bus Days / Bus Days Into Next Month
January 15	70,650	1/24/04	70,650	2/19/04	2/21/04	18 / 13
January 31	75,480	2/10/04	75,480	3/19/04	3/21/04	27 / 13
February 15	64,104	2/25/04	64,104	3/27/04	4/1/04	22 / 19
February 28	63,419	3/10/04	63,419	3/28/04	4/1/04	14 / 0
March 15	63,960	3/25/04	23,960	4/17/04	4/22/04	16 / 13
March 31	70,535	4/10/04	70,535	4/25/04	4/30/04	11 / 0
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April 30	67,927	5/9/04	27,927	6/6/04	6/10/04	18 / 3
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June 15	62,950	6/25/04	62,950	6/30/04	7/02/04	5 / 0
June 30	66,422	7/10/04	66,422	8/26/04	8/28/04	33 / 18

Voluntary Fiduciary Correction Program

- Online calculator at:
<http://askebsa.dol.gov/VFCPCalculator/WebCalculator.aspx>
- Example of lost earnings using VFCP calculator

VFCP Calculator - Lost Earnings

Principal: 10000
Loss Date: 04/13/2001
Recovery Date: 05/15/2001
Final Payment Date: 01/30/2004

Principal	Loss Date	Recovery Date	Final Payment Date	Amount Due	Delete
\$10,000.00	3/16/2001	4/13/2001	1/30/2004	\$77.33	Delete
\$10,000.00	3/30/2001	4/13/2001	1/30/2004	\$36.50	Delete
\$10,000.00	4/13/2001	5/15/2001	1/30/2004	\$82.27	Delete

Total: \$196.10



VFCP Timely Transfer Of Deferrals

- Most common error
 - HR tends to rely on TPA or IA
- What Department of Labor regulation says
 - General rule
 - Employer ***must*** deposit elective deferrals as of the earliest date on which such contributions (elective deferrals withheld from payroll) can reasonably be segregated from employer assets, or
 - The 15th business day of the month following the month containing the participant contribution date



What We've Found

- At what point does employer separate amounts for FICA/FUTA/SUTA?

Failure To Include Audited Financials



- Typical scenario
- DOL computer-generated notices
- Penalties for not filing a complete return