

Department
of the
Treasury

Internal
Revenue
Service

Office of
Chief Counsel

Notice

CC-2007-003

January 17, 2007

Subject: Non-Taxpayer Specific Legal Advice **Cancel Date:** Upon incorporation into CCDM

Purpose

This notice sets out revisions to the legal advice procedures implementing the recommendations of Notice CC-2006-013 (May 5, 2006).

Background

In May 2006 the Case Specific Advice Task Force made a number of recommendations designed to improve the manner in which attorneys in the Office of Chief Counsel provide legal advice to Service personnel. The Chief Counsel adopted those recommendations and directed that revisions be made to the legal advice procedures to implement them. The revisions implementing the recommendations regarding generic legal advice are set out below as they will appear in the CCDM.

The revisions add additional procedures governing the issuance of generic legal advice by an Associate Chief Counsel. Legal advice of this type, which has been referred to historically as non-taxpayer specific legal advice, is legal advice intended to be applied broadly to an entire industry or a class of taxpayers. These procedures are designed to ensure that non-taxpayer specific legal advice is tailored to meet the needs of Service executives administering industry wide programs or programs that present issues that apply broadly across classes of taxpayers, as well as ensuring that the legal advice is viewed as authoritative. Accordingly, legal advice provided under these procedures may be issued either upon the request of a Division Commissioner, IRS program manager, or Division Counsel executive, or on an Associate Chief Counsel's own initiative. It must be addressed to a Division Commissioner, Division Counsel, or a program manager in the Service who has nationwide responsibility for the issue,

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regardless of how the request originates, and it must be signed by an executive in the Associate office.

These procedures do not preclude the issuance of non-taxpayer specific legal advice by branches within the Associate offices. Legal advice may continue to be issued, as appropriate, under the procedures set out in CCDM 33.1.2.2.3 General Procedures for Legal Advice from Associate Chief Counsel and 33.1.2.2.4 Legal Advice to Program Managers. Nor does issuance of legal advice under these procedures preclude the Associate's office from issuing Technical Advice Memoranda or any other form of legal advice on the same issue.

As legal advice intended for public release, it must be based on an amalgamated set of facts that is representative of the facts applicable within the affected industry or of the class of taxpayers, but must not reference any specific taxpayer and must not contain any material that will be redacted as privileged information. When it is determined there is a need to address strategy, the development of specific cases, or litigation hazards, a separate memorandum may be sent to the program manager or the appropriate Counsel office.

When a program manager requests this type of legal advice, the Associate Chief Counsel, the Service program manager, and a Division Counsel executive for the program manager's Operating Division will agree on a mutually acceptable timeframe for completion. The facts and circumstances surrounding the request will determine the appropriate timeframe, and may include consideration, as appropriate, of the requester's priorities, the priority of the advice relative to other work in the office, and the complexity of the issues presented. The Associate office should confirm the agreement in writing, either by email or written memorandum, identifying the issue or issues to be addressed and the expected date of completion.

Similar to other forms of legal advice, non-taxpayer specific legal advice issued under these procedures may not be used as precedent. A subsequent change or modification to any conclusion or analysis, therefore, does not require withdrawal or revocation of the initial advice memorandum. Instead, the Associate Chief Counsel executive should issue a new memorandum setting out the correct or modified conclusion or analysis. To the extent coordination of the advice is required, the procedures in CCDM 31.1.4.1 Guidelines for Coordination should be used.

Administrative Issues

Cases seeking non-Taxpayer specific legal advice under these procedures should be opened in Techmis with a category of PRENO, FILENO, or POSTNO, as appropriate, and the due date should be modified to reflect the agreed upon timeframe. To facilitate identifying these kinds of cases, the aspect code AM should be entered upon opening the case.

The memorandum should be prepared using the macro found on CCMacros, which will facilitate processing of the memorandum for release to the public. Upon issuance of a memorandum, the checksheet found at Exhibit 33.1.2-4 should be used to process the memorandum for publication. Once released, legal advice memoranda issued by Associate Chief Counsel can be found at <http://www.irs.gov/foia/article/0,,id=162993,00.html>.

Revised Subsections of CCDM 33.1.2

The following revisions to the CCDM incorporate the recommendations of the Task Force as adopted by the Chief Counsel that pertain to non-taxpayer specific legal advice. Section 33.1.2.2.3.5 below sets out the specific procedures applicable to that type of advice.

33.1.2.2.3.2

(1-17-2007)

Technical Advice vs. Legal Advice in Nondocketed Cases

(1) The choice between whether to request Technical Advice or some other form of legal advice depends on whether the advice is intended to establish the position of the Service in a specific case and whether it is advisable to have the taxpayer participate in the advice request process. If the above types of conditions apply, technical advice must be requested and will result in the issuance of a Technical Advice Memorandum. Questions about whether Technical Advice is appropriate are further addressed in CCDM 33.2, Technical Advice. Generally, all other forms of advice constitute legal advice. Legal advice may be issued to the Field, to a program manager, or to a Division or Division Counsel. It may be issued in either docketed or nondocketed cases and may cover legal issues, tactics, and strategy related to a case, a generic issue, or program. Legal advice may also respond to the type of coordination needed with the Associate offices in pursuing the issue, the advisability of identifying test cases with particular fact patterns, or the strategies that might be considered to resolve the issue without litigation.

(2) Legal advice does not preclude a request for technical advice in the same case. Depending on the circumstances, the requests for different types of advice may be made at different stages of case development or at the same time with respect to different types of issues. For example, some form of legal advice might be needed at a preliminary stage in order to decide what lines of factual development should be pursued, and technical advice might then be requested at a later stage to determine final Service position based on the facts that have been developed. In some cases, technical advice might be requested in order to establish Service position based on the facts that have been developed with respect to certain legal issues while some other form of legal advice might at the same time be provided to assist with tactical or strategic case-development issues.

(3) Technical advice may not be used to provide legal advice intended to be generally applicable to an industry or a discrete class of taxpayers. See CCDM 33.1.2.2.3.5.

(4) Chief Counsel Advice is a term used to describe a certain subset of legal advice that is required to be released to the public under section 6110. Not all legal advice is subject to this public disclosure requirement. For a more complete discussion of what constitutes Chief Counsel Advice, see CCDM 33.1.3.1.1 Definition of Chief Counsel Advice.

33.1.2.2.3.3

(1-17-2007)

Format of Legal Advice

(1) Legal advice may contain the following elements when appropriate to the content of the legal advice being rendered:

a. Written legal advice should contain a caption/information identifying the case. The caption and identifying references will include the CASE number, office symbols of the office drafting the advice, the appropriate UILs, the name of the case, the title of the person to whom the advice is directed, and the title of the person signing the advice. The subject line should reflect the primary issue in the case, even if the memorandum provides case specific advice, and should not categorize the advice by a name, such as Chief Counsel Advice or Generic Legal Advice.

Note: If the names of the person assigned to case, the person to whom the advice is sent, and the person signing the advice are included in the memorandum, they may not be redacted when the advice is processed for release. See CCDM 33.1.3.2 Redacting Legal Advice Prior to Public Release.

b. The opening paragraph of should state: "This document should not be used or cited as precedent." The opening paragraph of the advice may then briefly set forth the nature of the case (for example, submission of a proposed revenue ruling for concurrence or comment). That the office has previously rendered legal advice on the case may be mentioned.

c. The opening paragraph of a memorandum that provides advice of the type described in CCDM 33.1.2.2.3.5 should state the general issue that the memorandum addresses.

d. Taxpayer-specific advice should include a legend for identifying the references to taxpayer information in the advice.

e. Issue headings should be used as appropriate. If there is more than one issue, each issue is stated in a separate paragraph, and each paragraph is numbered. State the issues in clear, precise language. Whenever appropriate, state any additional issues

that have been identified but were not specifically raised in the incoming request for advice.

f. A Conclusion heading should be used if an issue heading is appropriate. There should be a specific statement of the conclusion reached with respect to each issue. This conclusion must be written to leave no doubt as to its meaning and to make it clear it is based solely on the facts presented.

g. A Statement of Facts heading should normally be used. It should contain those facts necessary to understand the analysis of the issues. The facts should be set out concisely, but without sacrificing clarity. Generic facts may be used if they do not sacrifice clarity.

h. A Law and Analysis heading should normally be used. The analysis portion of the advice sets forth clearly and concisely the pertinent law, regulations, published rulings of the Service, and case law or other precedent and the rationale to bridge between the issue, facts, law, and conclusion.

i. A Case Development, Hazards, and Other Considerations heading should be used when the document will be processed for release as Chief Counsel Advice or if it is advice provided under CCDM 33.1.2.2.3.5. This part of the advice might include a discussion of audit techniques, case development, legal precedent or other factual or tactical considerations that may pose litigation hazards. Depending on the circumstances, all or part of the information in this section may be exempt from disclosure. For further information on redacting this material, see CCDM 33.1.3.2.2 Permissive Deletions of Privileged Material.

j. The law and analysis section (or the case development section, if any) may be followed by a summary in a complex case. The summary may be used to restate the facts and the law, to reiterate the conclusions reached on each issue, and to set forth recommended action.

(2) The CC macros should be used to ensure the format of the memorandum is correct. Headings normally introduce the statement of the issue or issues, the conclusion or conclusions, the statement of facts, the analysis, and the summary. Headings need not be used if the advice is four pages or fewer. The format is shown in Exhibit 33.1.2-2. The format for memoranda signed by Associate Chief Counsel executive prepared to provide non-taxpayer specific legal advice is shown in Exhibit 33.1.2-3.

(3) The citation forms in the current edition of *The Bluebook: A Uniform System of Citation* should be used in legal memoranda.

(4) In preparing memoranda providing legal advice, attorneys and managers should consider the character of the advice being given. A memorandum that consists entirely of case development and strategic advice that would be subject to the attorney client or

law enforcement privilege, or that is given with respect to a docketed case or in anticipation of litigation, will have little, if any, material that will be subject to public disclosure under section 6110. Such memoranda may be prepared without legends and other tools that facilitate redaction. A memorandum that contains a background discussion of the law or a description of the facts will likely have significant portions disclosed. In such cases, the memorandum should be prepared using the redaction tools.

(5) When legal advice has been coordinated with other Associate offices or branches within an Associate office, the response received from those offices must not be attached to the memorandum that is provided to Field Counsel or other IRS field employee. Rather, the office responsible for preparing written legal advice should integrate the analysis, as appropriate, into the memorandum.

33.1.2.2.3.5

(1-17-2007)

Additional Procedures for Certain Non-Taxpayer Specific Legal Advice, Including Generic Legal Advice

(1) When an issue arises in a number of cases that affects an industry segment or there is a need to address a legal issue as it relates to an amalgamated set of facts, it may be desirable to have an Associate Chief Counsel executive whose office is responsible for the issue sign a generic legal advice. This type of advice is in contrast to issuing non-taxpayer specific legal advice at the branch level. Generic legal advice might be appropriate, for example, where a common set of material facts applies to a significant number of taxpayers, and advice with respect to facts representative of those common material facts will assist the Service in resolving the cases more efficiently than advice applicable only to a specific taxpayer.

(2) Legal advice of this type may originate from a request for advice by the Service or a field office of Counsel, or at the initiative of an Associate Chief Counsel executive. To ensure that non-taxpayer specific legal advice is designed to meet the needs of IRS program managers, a request for legal advice of general applicability made under these procedures must in general be submitted by a program manager with national responsibility for the issue or by a Division Counsel executive. In either case, legal advice of this type may be issued upon a determination by an Associate Chief Counsel executive that it is appropriate to render such advice in this form to promote efficiency, to promote consistent treatment of similarly situated taxpayers, or to otherwise promote sound tax administration. If the legal advice is at the initiative of an Associate Chief Counsel executive, that executive will coordinate with Division Counsel upon initiation of the project, so that Division Counsel may seek the views of the appropriate Service executives.

(3) For requests by program managers or a Division Counsel executive, the Associate

Chief Counsel must conduct a presubmission conference. The presubmission conference should include, as appropriate, the Division Counsel executive and the program manager. A presubmission conference will help to confirm the form of legal advice that is appropriate under the circumstances. It will also assist in defining the issues on which advice is needed, in developing the amalgamated facts upon which to base the legal advice, and in discussing possible timeframes within which advice will be provided once the request is submitted.

(4) After submission of a request for this type of legal advice, the Associate Chief Counsel executive, the Division Counsel executive, and the requesting program manager, where appropriate, should agree upon a mutually acceptable timeframe for completion. The facts and circumstances surrounding the request will determine the appropriate timeframe, and may include consideration, as appropriate, of the requester's priorities, the priority of the advice relative to other work in the office, and the complexity or sensitivity of the issues presented. The Associate Chief Counsel office will confirm the agreement in writing, either by email or memorandum, identifying the issue or issues to be addressed and the agreed upon date of completion.

(5) The Associate Chief Counsel executive should notify the Division Counsel executive and, where applicable, the program manager of any developments in processing the request for advice that might delay the response beyond the agreed upon date. The program manager or Division Counsel executive that submitted the request may ask for a conference with the Deputy Chief Counsel (Operations) if the response is delayed beyond the agreed upon date. The Associate Chief Counsel and the appropriate Division Counsel must brief the Deputy Chief Counsel (Operations) if the response is not issued within 180 days of submission.

(6) The Associate office must in general coordinate the proposed response with the appropriate Division Counsel office prior to issuing the response. Doing so will allow the identification of any points requiring further development or discussion of any possible areas of disagreement prior to issuance. Any disagreements should be resolved using the procedures contained in CCDM 31.1.4.6 Reconciliation of Disputes.

(7) A memorandum issued under this subsection must be addressed to the national program manager or Division Counsel executive who submitted the request. The Division Counsel should receive a copy of all memoranda issued to program managers under this subsection. The advice should be based on a representative set of amalgamated facts generally applicable to the industry segment or taxpayer class that gave rise to the request. Care should be taken to ensure that facts and figures derived from specific cases within the industry or taxpayer class are modified so that they do not reference a specific taxpayer.

(8) Advice of this type is intended to be released to the public in its entirety. It should not contain any privileged material that will be redacted. When it is determined there is a need to address strategic advice, the development of a specific case, or litigation

POSTN-123456-06
Appendix

Exhibit 33.1.2-3 Format for Generic Legal Advice Memorandum

**Office of Chief Counsel
Internal Revenue Service
memorandum**

CC:PA
POSTN-123456-06

UILC: 01.00.00-00

date: October 25, 2006

to: Industry Director , HMT
(Large & Mid-Sized Business)

from: Associate Chief Counsel
(Procedure & Administration)

subject: [Description of Issue]

This memorandum addresses [description of issue]. This memorandum should not be used or cited as precedent.

ISSUES

CONCLUSIONS

LAW AND ANALYSIS

Please call me at (202) 622-3400 if you have any further questions.

cc: Division Counsel
Field Counsel

Exhibit 33.1.2-4 Checksheet for Processing Generic Legal Advice

Checksheet for Processing Generic Legal Advice

Case Control Name: _____

Case Control Number: _____ WLI # _____

Associate Office: _____ Date of issuance (signed): _____

_____ 1. Does the memorandum reflect the uniform issue list number(s)?

_____ 2. Has the electronic version of the memorandum been submitted to CC:PA:LPD:DLS through Counsel's content management system (Documentum)? (If the original memorandum was date-stamped, the date that the document was signed should be inserted directly below the letterhead on the electronic version.) To submit a document, click the "Submit" button on the lower right-hand side of the e-word toolbar to submit a document through Documentum. **A copy of the electronically generated receipt acknowledging the submission of the memorandum through Documentum must be placed in the office's official case file.**

_____ 3. Forward a paper copy of the document and a paper copy of the completed checksheet to CC:PA:LPD:DLS (Rm. 5201) the day the document is submitted for processing. Place a copy of this checksheet in the office's official case file.

Initiator: _____ Date: _____

Reviewer: _____ Date: _____

Note: Initiators and Reviewers are responsible for ensuring that these procedures have been followed and that the documents have been sent to CC:PA:LPD:DLS.