Cleary, Gottlieb, Steen & Hamilton LLP **Sullivan & Cromwell LLP**

August 4, 2005

Mr. Cono R. Namorato,
Director,
Office of Professional Responsibility,
Internal Revenue Service,
Room 3000 IR,
1111 Constitution Avenue, N.W.,
Washington, D.C. 20224.

Mr. Stephen A. Whitlock,
Deputy Director,
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Washington, D.C. 20224.

Re: Proper Interpretation of Section 10.35 of Circular 230 As Applied to Transaction Agreements and Term Sheets and Articles and Other Educational Materials

Dear Messrs. Namorato and Whitlock:

We are pleased that you agree with our interpretation of Section 10.35 of Circular 230 as it applies to the types of agreements, term sheets and educational materials described below. As we indicated to you, we are sending you this letter so that our interpretation and your confirmation can be communicated to other affected practitioners. It is our hope that this letter provides certainty to our colleagues as to these types of documents and thereby eliminates some of the distracting questions about the scope of the new rules.

Specifically, we are confirming that the types of writings described below are not written advice that would be subject to the covered opinion rules of Section 10.35, and thus need not contain the "opt-out legends". We believe that our approach is rational and reasonable and reflects the objectives of the new covered opinion rules. We understand, however, that even when the Section 10.35 covered opinions rules do not apply, a tax practitioner's work product is still subject to the professional standards

generally enunciated in other sections of Circular 230 and applicable codes of professional conduct (such as those promulgated by the State bars and AICPA).

1. Transaction Agreements and Other "Operative" Agreements Between Parties to a Transaction

Transaction agreements and other "operative" agreements entered into between the parties to a transaction often contain statements relating to U.S. taxes. These types of statements include the following:

(a) "Whereas clauses" setting forth the parties' understanding of some tax matter (*e.g.*, "Whereas Target is currently taxed as a subchapter S corporation") or the parties' intentions for how the transaction will be treated for tax purposes (*e.g.*, "Whereas, the parties intend for the Merger to qualify as a reorganization within the meaning of Section 368 of the Code").

(b) Representations by a party as to some tax matter - for example, the party's tax status (*e.g.*, "Target is not a United States real property holding company") or the accuracy of its previously filed tax returns or the tax returns it will file prior to the closing date.

(c) Covenants as to how the parties will report something for tax purposes -- for example, how they will report the transaction itself or will report pre-closing or post-closing tax items of the Target (*e.g.*, "Purchaser will cause all pre-closing period returns of Target to be filed consistently with previously filed returns except to the extent any position would be unreasonable" or "Purchaser will not take any reporting position that would cause an increase in Target's pre-closing tax liabilities" or "Employee will make a Section 83(b) election".)

(d) Covenants that a party will take certain actions that will have certain tax results (*e.g.*, "Seller will cause the Target to distribute all of its current and accumulated earnings and profits to the Seller prior to the transfer of Target to the Purchaser" or "Purchaser will not permit the CFC Target to generate any subpart F income during the post-closing portion of the taxable year during which the sale of CFC Target occurs").

(e) Allocations of purchase price, which affect the character and source of seller's income and gain from the sale and the purchaser's future tax results from owning the acquired assets (*e.g.*, purchaser's depreciation deductions).

(f) Tax indemnity provisions that address how increases in taxes or increases in tax losses or credits will be economically shared between the parties and how disputes will be resolved.

(g) Provisions in a partnership agreement providing for the maintenance of capital accounts and the allocation of tax items which might refer to the partners' intent that the provisions comply with Section 704 of the Code.

(h) Other partnership agreement provisions that refer to taxes, such as provisions that require distributions of cash sufficient to fund the partners' tax liabilities with respect to partnership income, that prohibit any transfers of a partnership interest that would cause the partnership to be treated as a publicly-traded partnership, or that state that the partnership intends to operate so as not to generate any effectively connected income or any income that would be treated as "unrelated business taxable income" to a tax-exempt member.

(i) Organizational documents, such as articles of incorporation, by-laws and stockholders agreements, which may contain statements about the tax status of the entity or how it intends to operate.

We understand that some practitioners are uncertain as to whether, if they prepare the drafts of these agreements or provide proposed revisions to a draft, those drafts or proposed revisions could be seen as "tax advice" since these types of documents are based, at least in part, on a view as to how the U.S. tax rules apply to the specific facts.

We believe, however, that transaction agreements and other "operative agreements", and proposed revisions to such agreements provided by practitioners, are clearly not within the meaning of a covered opinion because these agreements and drafts do not constitute "tax advice". These are (and are intended to be) binding agreements between the parties to the transaction - - not advice from the practitioner.

We recognize that a practitioner who prepares or proposes revisions to such documents for a client is rendering tax services and does have professional obligations in connection with those services, including an obligation to exercise due diligence. This is particularly true when the document reflects the taxpayers' expectations regarding the tax consequences of the transaction.

2. Term Sheets for a Transaction

These are really just "early" versions of the operative agreements addressed in 1. above. As such, they often have statements of the same type as those

described above. Again, some practitioners have questioned whether preparing or transmitting such term sheets would implicate the covered opinion rules. We do not believe that these could possible be covered opinions for the same reasons that the agreements and drafts of agreements could not be. These simply are not tax advice and no taxpayer would mistakenly think that a term sheet is advice or that it could possibly rely on a term sheet to avoid penalties.

If such term sheets were considered to be transmitting tax advice because of such statements, they might well be considered "marketed opinions" for Section 10.35 purposes since the client they are prepared for is likely to use the term sheet in order to encourage the counterparty to engage in the transaction. This would create a bizarre situation in which the practitioner would need to add a legend to the term sheet advising the client to seek independent tax advice based on its particular circumstances. We think such an interpretation of Section 10.35 would be inappropriate and irrational and would be ignoring the purpose of the rules.

3. Articles, Training Outlines and Presentations and Books

We have seen it reported in the tax press that you and other IRS and Treasury Department officials have stated at public conferences that articles, training outlines and presentations and books are not covered opinions. Nevertheless, we understand that some practitioners are still concerned that these types of materials may be seen as containing "tax advice" because they explain how the law works and often include hypothetical fact patterns followed by an analysis of how the law applies to the hypothetical facts. They may even address the facts of a real case, such as a case that was the subject of a court decision, an IRS ruling or a news story.

We believe that it would be inappropriate to interpret the rules to cover such materials. These are clearly intended to be educational, not to transmit advice. While it is true that other practitioners and taxpayers may often refer to such materials in formulating a view as to the actual consequences to a specific taxpayer of a given transaction or situation, these materials are not themselves "advice".

* * *

We appreciate your having confirmed that you agree with our interpretation set forth above. We believe that our reading of Section 10.35 represents a rational and common sense approach and we hope that this letter is useful to other practitioners.

If you have any questions or would like to discuss this further, please contact either of us.

Sincerely,

/s/ Leslie B. Samuels

Leslie B. Samuels

/s/ Diana L. Wollman

Diana L. Wollman

cc: The Honorable Mark W. Everson
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