

Form 8300 - Are You in Compliance?

Has your firm ever received a large cash payment or a series of cash payments, and you were not quite sure about possible Internal Revenue (IRS) reporting obligations? Generally the IRS requires an individual or a business to file a Form 8300, "Report of Cash Payments Over \$10,000 Received in a Trade or Business."

The Form 8300 is designed to identify possible money laundering or illicit activities because the IRS believes that those who pay in cash do not want a paper trail and may be involved in illegal activities. The information provided by Form 8300 provides valuable information to the Internal Revenue Service

(IRS) and the Financial Crimes Enforcement Network (FinCEN) in their efforts to combat money laundering.

Under IRC §6050I, the law requires any person engaged in a trade or business who receives more than \$10,000 in cash in any one transaction, or two or more related transactions, to report the transaction to the IRS within 15 days of receipt of the cash using Form 8300. The \$10,000 threshold is cumulative and if multiple payments are received within any 12 month period, Form 8300 must be filed within 15 days after the payments equal or exceed \$10,000. There is no general exception for attorneys regarding this reporting requirement.

In certain situations cashier's checks, bank drafts, traveler's checks and money orders are treated like cash for determining the Form 8300 requirement. Generally, since attorneys are not involved in the retail sale of consumer durables, collectibles or travel and entertainment, reporting of monetary instruments is not required. However, if the attorney is aware or should have known that the use of monetary instruments was meant to avoid the filing of the Form 8300, such monetary instruments become reportable.

The law requires that a properly filed Form 8300 contain the cash payer's name, address and tax identification number, as well as the amount of cash received and the date and nature of the transaction. Any business filing a required Form 8300 must also furnish a written statement to each person identified on Form 8300 by January 31 of the succeeding calendar year. A copy of the filed Form 8300 should not be enclosed. A copy of the written statement must be retained by the business for five years. The statement must show:

- The name, address, and telephone number of the person to contact for the business;
- The aggregate amount of reportable cash received during the calendar year; and;
- Disclose that this information was reported to the IRS.

The IRS proposes to assess civil penalties for failure to file Form 8300 or for filing an incomplete Form 8300 in a timely manner. Civil penalties range from \$50 to \$250,000 depending on the circumstances for noncompliance. When the failure is due to intentional disregard of the cash reporting requirements, the amount of the penalty the IRS may impose is the greater of \$25,000 or the amount of cash received in each transaction, not to exceed \$100,000. In addition to monetary penalties

there is also the potential for imprisonment.

In certain instances involving "special circumstances" the preparation and filing of Form 8300 may violate attorney-client privilege. "Special circumstances" may exist when disclosure of the Form 8300 information reveals a confidential communication, such as the motive or reason the client consulted the attorney, or provides a "last link" to such information. Although a client-identifying safeguard called the "Last link doctrine" was established, invocation of this doctrine as a defense to the disclosure required by section 6050I has been consistently unsuccessful.

Attorneys may attempt to rely on the attorney-client privilege to avoid disclosure of client-identifying information to the IRS. Between 1991 and 1995 several court decisions ruled in favor of the IRS' position that client-identifying information required on Form 8300 is not privileged: these cases include *United States v. Goldberger & Dubin, P.C.* 935 F.2d 501 and *United States v. Leventhal* 961 F.2d 936 amongst others.

Although several state bar associations have issued ethics opinions stating such disclosure without a client's permission, is a violation of the attorney-client privilege; the IRS contends that Form 8300 payment disclosures, regarding legal fees, does not represent a confidential communication between lawyer and client in the nature of legal advice. Therefore, the details of such a transaction are not protected by the attorney-client privilege. Attorneys may be forced into an untenable position of choosing between the possible violation of state bar association ethical principles and / or the risk of penalties for noncompliance with IRS reporting requirements.

New Jersey's Rules of Professional Conduct provide some guidance, under RPC 1.6(d)(4), indicating that client information, reportable on Form 8300, could be provided to the IRS without violating the attorney-client privilege. "A lawyer may reveal such information to the extent the lawyer reasonably believes necessary.....to comply with other laws."

As part the on-going effort to enforce Form 8300 compliance by attorneys; the IRS has taken the position that it will seek to assess the intentional disregard penalty against certain attorneys that either fail to file and \or file an incomplete form. The IRS has commenced performing audits at law firms to test compliance with the Form 8300 reporting requirements and has assessed penalties for noncompliance.■

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