

# Tax Notes Today

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## **HAWKINS WARNS OF DISTINCTION BETWEEN FACT AND LEGAL CONCLUSION**

By Jaime Arora

The IRS Office of Professional Responsibility has seen several practitioners get in trouble because they are confused about what constitutes a factual representation when performing adequate due diligence, OPR Director Karen Hawkins said August 12.

The due diligence standard for written opinions in section 10.37 of Circular 230, as established in final regulations (T.D. 9668 (Doc 2014-14374)) issued in June, requires that a practitioner base written advice on reasonable factual and legal assumptions. (Prior coverage (Doc 2014-14378).)

Speaking on a webcast sponsored by the American Bar Association Section of Taxation, Hawkins said some clients provide legal conclusions to their representatives, but neither party realizes it. For example, a statement by a client regarding the amount of capital gain that the client needs to report during a year contains a legal conclusion about capital gains under the law, she said. The number is a fact, but practitioners cannot necessarily accept the client's characterization of what it represents, Hawkins said, adding, "That's where you need to do due diligence."

Regarding the prohibition in section 10.37 on taking into account the possibility that a tax return will not be audited or that a matter will not be raised on audit, Hawkins said there is a difference between discussing the chances of getting caught and considering how aggressive a position is. She said discussions on the chances of a settlement or resolution are acceptable, while those on the chances of "sneaking it into a return" are not.

Hawkins said OPR also encounters some confusion about the reasonable practitioner standard found throughout the final regs. The standard is not subjective, she said. Although practitioners may think they have acted reasonably in dealing with an issue, OPR will compare those actions to an objective standard and may not reach the same conclusion, she said.

## **Perpetuated Errors or Omissions**

According to section 10.21 of Circular 230, practitioners must advise their clients of noncompliance if they know of an error in or omission from any return, document, affidavit, or other paper that the clients submitted or executed under the revenue laws of the United States.

Although a practitioner's duty is complete upon advising the client of the consequences of failing to correct an error, the practitioner should consider whether the error or omission will be perpetuated in the future should the client fail to fix it, Hawkins said. If the error will be perpetuated in the following years and included in the practitioner's future work product, the practitioner might be complicit with the client and violate the disreputable conduct provisions in section 10.51, she said.

In response to discussion by the panelists about so-called de minimis errors, Hawkins said she is concerned about using the term because Circular 230 does not contain a de minimis rule.

## **Disclaimers**

Hawkins has said OPR will send letters asking practitioners to stop using Circular 230 disclaimers saying the disclaimer is required. (Prior coverage (Doc 2014-15109).)

During the webcast, Hawkins said lawyers have traditionally put disclaimers in their e-mails about protected information and that they may continue to do so, as appropriate. "You can put anything that you want on your e-mail as long as it doesn't blame me or the Internal Revenue Service or Circular 230 for the appearance of that disclaimer," Hawkins said.