

1. Tax Notes Today
Hawkins Discusses OPR Sanction Guidelines
By Jeremiah Coder

The process for seeking particular sanctions in Circular 230 disciplinary proceedings may seem opaque from the outside, IRS Office of Professional Responsibility Director Karen Hawkins acknowledged on December 2, joking that "I may be all that stands between you and irrationality."

"There are no specific guidelines," Hawkins said at the American Bar Association Section of Taxation's National Institute on Criminal Tax Fraud in Las Vegas, but she said the growing number of administrative law judge decisions has "created a fair body of law" that outlines the range of sanctions for misconduct. OPR consciously distinguishes between personal noncompliance and conduct violations, she said. "I have a tendency to look to state bar disciplinary decisions that are made with respect to lawyers for a lot of my guidance" on how specific factors play into the particular sanction sought, she said.

Practitioner remorse and demonstration of rehabilitation go a long way toward imposition of a lesser sanction, Hawkins said. "It's an evolving process for us at the moment."

Disciplined practitioners who seek to challenge a sanction in federal district court face an uphill battle, because the proceeding is governed by the Administrative Procedures Act rather than traditional federal judicial rules, Hawkins said. "The agency's decision will stand unless the complainant can show the agency was arbitrary, capricious, abused its discretion, or otherwise did something contrary to law. That is a very tough burden for a practitioner to carry," she said.

Hawkins said her office plans to beef up enforcement of Circular 230 section 10.36(b), which requires firms preparing refund claims and other tax documents to ensure that adequate Circular 230 compliance procedures are in place. Asked whether law firms that occasionally submit refund claims on behalf of clients to prepare for litigation will also be expected to have strong management processes in place, she responded, "I do contemplate that, to put it quite bluntly."

Firms are taking a risk by thinking they might slide under the radar, Hawkins suggested. OPR has already requested firms to investigate compliance with section 10.36(a) opinion writing standards, Hawkins said. "We will be proactively . . . making those requests," especially of major tax return preparation firms, she said.

Hawkins reiterated her position that OPR is interested in situations in which a taxpayer goes to Appeals after assertion of an accuracy-related penalty, with Appeals sustaining the government's adjustment but abating the penalty solely on the basis of the taxpayer's reliance on the professional adviser.

"I want [Appeals] to think long and hard about whether that previous adviser who advised the position which has incurred the penalty should be looked at by OPR," she said.

While the IRS faces a difficult budget situation in the near term, Hawkins said IRS Commissioner Douglas Shulman is committed to making certain that the Service's return preparer oversight initiative is properly funded. "The good news for OPR is that if there is

money to be spent for new things, the commissioner's commitment and priority is to spend them on the return preparer project and [OPR]," she said.

"This is a commissioner who gets it," Hawkins said, adding that Shulman "understands and appreciates the need for the integrity arm of the Service to be independent" and to make decisions apart from Title 26 penalties.