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DEPARTMENT: News, Commentary, and Analysis; News Stories

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HEADLINE: #7 2014 TNT 120-7 NEW DUE DILIGENCE LANGUAGE IS MEANT TO STREAMLINE CIRCULAR 230. (Release Date: JUNE 20, 2014) (Doc 2014-15454)

ABSTRACT: The IRS Office of Professional Responsibility drafted the new Circular 230 due diligence standard for written opinions so that it would be consistent with the publication's other due diligence standards, OPR Director Karen Hawkins said June 20.

SUMMARY: Published by Tax Analysts(R)

The IRS Office of Professional Responsibility drafted the new Circular 230 due diligence standard for written opinions so that it would be consistent with the publication's other due diligence standards, OPR Director Karen Hawkins said June 20.

The language now in section 10.37 looks much like the language in section 10.22, Circular 230's general due diligence provision, Hawkins said at New York University's Tax Controversy Forum in New York. Section 10.22 says a practitioner may rely on the work product of another as long as the practitioner has used reasonable care in selecting, evaluating, and training that person. "You will see some of that same language in [section] 10.37," she said.

OPR is trying to create consistent language throughout all the due diligence provisions so practitioners are not trying to figure out different terms of art, Hawkins said.

The new section 10.37, contained in final regulations (T.D. 9668) released June 9, also is designed to give taxpayers leeway in interpretation, Hawkins explained. "This is a principles-based regulation; it is intended to be very broad," she said. "It is intended to leave a lot of leeway, both on your end and on our end with how we analyze this."

Hawkins noted that OPR revised section 10.31, regulating taxpayer check negotiation, to apply to all practitioners and electronic payments. Before the change, section 10.31 applied only to return preparers. "The provision is a little of a sleeper, but I urge you not to ignore it," she said. "I'm calling it a sleeper because some of the changes are so subtle that you wouldn't have noticed them without me pointing it out to you."

The section now applies to practitioners, not just return preparers, "but we are focused on anyone authorized to practice under Circular 230," Hawkins said.

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The IRS Office of Professional Responsibility drafted the new Circular 230 due diligence standard for written opinions so that it would be consistent with the publication's other due diligence standards, OPR Director Karen Hawkins said June 20.

The language now in section 10.37 looks much like the language in section 10.22, Circular 230's general due diligence provision, Hawkins said at New York University's Tax Controversy Forum in New York. Section 10.22 says a practitioner may rely on the work product of another as long as the practitioner has used reasonable care in selecting, evaluating, and training that person. "You will see some of that same language in [section] 10.37," she said. (Prior coverage (Doc 2014-14378).)

OPR is trying to create consistent language throughout all the due diligence provisions so practitioners are not trying to figure out different terms of art, Hawkins said.

The new section 10.37, contained in final regulations (T.D. 9668 (Doc 2014-14374)) released June 9, also is designed to give taxpayers leeway in interpretation, Hawkins explained. "This is a principles-based regulation; it is intended to be very broad," she said. "It is intended to leave a lot of leeway, both on your end and on our end with how we analyze this." (Prior coverage (Doc 2014-15109).)

The final regs replace the covered opinion rules with one standard for written advice. That standard says that a practitioner must:

[#186] base the written advice on reasonable factual and legal assumptions (including assumptions on future events);

[#186] reasonably consider all relevant facts and circumstances that the practitioner knows or reasonably should know;

[#186] use reasonable efforts to identify and ascertain the facts relevant to written advice on each federal tax matter;

[#186] not rely on representations, statements, findings, or agreements (including projections, financial forecasts, or appraisals) of the taxpayer or any other person if reliance on them would be unreasonable;

[#186] relate applicable law and authorities to facts; and

[#186] not, in evaluating a federal tax matter, consider the possibility that a tax return will not be audited or that a matter will not be raised on audit.

For direction on what the new section means, Hawkins recommends that practitioners look to the revision's preamble. "I think it's one of the best preambles that has been put out with respect to a revision to Circular 230," she

said, adding that the preamble will help practitioners understand what OPR intended and where it is heading, particularly on the section 10.37 issue.

Check Negotiation Changes

Hawkins noted that OPR revised section 10.31, regulating taxpayer check negotiation, to apply to all practitioners and electronic payments. Before the change, section 10.31 applied only to return preparers. "The provision is a little of a sleeper, but I urge you not to ignore it," she said. "I'm calling it a sleeper because some of the changes are so subtle that you wouldn't have noticed them without me pointing it out to you."

The section now applies to practitioners, not just return preparers, "but we are focused on anyone authorized to practice under Circular 230," Hawkins said.

Section 10.31 has been in Circular 230 for a long time and piggybacks on federal law in areas other than tax, Hawkins said. It is a federal crime to cash a check or negotiate a check that has been written to a citizen, taxpayer or otherwise, from the U.S. government, she explained.

Hawkins said that a practitioner can't direct or accept a payment into any account that is owned or controlled by the practitioner or any entity the practitioner is associated with.

"We have a lot of folks out there with check cashing services. They, in some instances, license themselves as banks, and they are going to have to think about how that impacts them," Hawkins said.

Firm Compliance Inquiries

OPR initiates inquiries of firms when it sees public information suggesting there have been transgressions involving Circular 230, Hawkins said.

OPR often learns about the potential violations through court cases and will send the firms inquiry letters asking them to clarify what procedures they have in place under section 10.36, Hawkins explained. OPR uses that inquiry to ensure that whatever they saw in the public record won't happen again, she said.

"We have done that with several major law firms and accounting firms in this country and we've gotten an incredibly positive response, although they do lawyer up," Hawkins said.