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Tax Practice: Proposed Revisions to IRS Circular 230 Set New Standards for 'Reasonable' Practices

By Florence Olsen

Under proposed "reasonableness" standards for Circular 230, employee benefit attorneys who provide written tax advice may not rely on information from benefit plan sponsors if the attorneys know or should know that the information is incorrect or incomplete, an **Internal Revenue Service** official said Feb. 13 during an agency-sponsored phone forum.

"You benefits folks really need to pay attention to this one," Karen L. Hawkins, director of the Office of Professional Responsibility at **IRS**, said during a presentation on professional accountability and standards of conduct for practitioners who offer tax advice about employee benefit plans. The discussion focused on standards for written tax advice under the tax code and **IRS** Circular 230.

"Your reliance on your taxpayer information is going to be unreasonable if you know or you should know that one or more of the representations or the assumptions on which a representation is based is either incorrect or incomplete or, I would add, inconsistent with other facts that you have," Hawkins said, referring to proposed revisions to Section 10.37 of the circular.

Proposed Regulation.

The proposed provisions, which appeared in REG-138367-06 (179 DTR GG-1, 9/17/12), would amend Circular 230 to apply a higher standard of review to practitioners who know or have reason to know that their tax advice will be used to recommend, market, or promote investment plans or other arrangements whose primary purpose is to avoid paying taxes.

"The word 'reasonable' is all over the place" in the proposed revisions to Section 10.37, Hawkins said. Practitioners would be expected to make reasonable factual and legal assumptions and to reasonably consider all the relevant facts associated with any matter for which written tax advice is sought, she said.

The proposed revisions would replace a “checklist” approach to standards with one based on principles of reasonableness, Hawkins said. For example, it would be unreasonable for a practitioner to assume that **IRS** would not audit a return or that it would not bring up an issue during an audit, she said. However, it would be reasonable for an attorney to “consider the possibility of resolution through settlement if challenged” by **IRS**, Hawkins said.

More Flexibility.

Current language in Section 10.37 prohibits practitioners from assuming that **IRS** and the taxpayer could reach a settlement on a tax dispute, “so we're creating a little more flexibility there,” Hawkins said.

In commenting on the proposed regulation in December 2012, the New York State Bar Association Tax Section asked **IRS** to provide more guidance on when and how the proposed reasonableness standard would apply (247 DTR G-3, 12/27/12).