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Tax Practice: Circular 230 Revisions Prohibit Playing ‘Audit Lottery’ With Clients, IRS Official Says

By Alison Bennett

Revised rules for tax practice under Circular 230 make it absolutely clear that tax practitioners can't play the “audit lottery”in representing their clients, IRS Office of Professional Responsibility Director Karen Hawkins said.

“You don't get to take into account whether the client is going to get caught,” Hawkins said Aug. 19 at the 2014 IRS Nationwide Tax Forum. “That's violating every ethical principle I can think of. You shouldn't engage with the client on that issue.”

Hawkins went through the revisions to Circular 230, which governs all practice before the IRS, in detail. The changes were announced in June (111 DTR G-5, 6/10/14).

She said the provision calling for due diligence is the most important provision in the entire circular, stressing that the task of practitioners is to “know what the law is, know what the facts are, and whether they fit.” Practitioners have a responsibility to tell their clients if they have “round facts and a square law,” Hawkins said.

Rules for Written Advice.

The OPR director said due diligence requires that a standard of “reasonableness”applies to all forms of written advice to clients, including e-mails.

Another feature she explained in detail is the circular's focus on conflicts of interest. The revised rules of practice define a conflict as a case in which one client's interest is directly adverse to another, and where there is a significant risk that representation of one client will result in “materially limiting” the representation of another, Hawkins said.

She said practitioners can still continue to represent their clients if they believe they can still provide competent, diligent representation to each affected client, aren't legally prohibited from doing so, and obtain waivers in writing based on informed consent from their clients at the time of the conflict.

Hawkins stressed that practitioners are required to hold onto these informed consent waivers for 36 months after the engagement ends and be able to provide them to OPR on request.

However, she said, if someone from the IRS exam function wants to review the waivers, they should ask OPR if that is the right thing to do.

Hawkins highlighted the Circular 230 requirements for due diligence for tax returns, the ability of practitioners to rely on representations from their clients, and competence, among others. She noted that under a section of the circular dealing with procedures to ensure compliance, a practitioner that is in charge of a firm's Circular 230 compliance can be held responsible if there are violations by other practitioners in the firm.

Disreputable Conduct.

The OPR director also discussed provisions banning disreputable conduct involving false or misleading information. There can be “no participating in any way” in providing such information to Treasury Department employees, she stressed.

As one example, “I can't believe how many people are fibbing on their applications for PTINs”—tax preparer identification numbers—Hawkins said.

Practitioners must be on the lookout for false information in power of attorneys, federal tax returns, financial statements, applications for PTINs or to become enrolled agents, affidavits, declarations, and other kinds of other documents, she said.

“If somebody is going to lose their license, don't let it be you,”she told the conference. “No single client is worth it.”