

Tax Notes Today

March 29, 2013

HAWKINS ELABORATES ON CONFLICTS OF INTEREST

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Tax practitioners should pay close attention to the potential presence of conflicts of interest but need not recuse themselves in every situation in which there's a conflict, IRS Office of Professional Responsibility Director Karen Hawkins said March 28.

The conflict of interest rules in Circular 230 section 10.29 are conceptually difficult for most non-lawyer practitioners, who generally are unfamiliar with conflict procedures, Hawkins said during an American Law Institute Continuing Legal Education webcast on Circular 230.

A two-step approach to complying with section 10.29 is to first define the potential conflict and then determine whether representation is still possible, Hawkins said, adding that the mere presence of a conflict doesn't mean that a practitioner must withdraw from client representation. Rather, once a conflict has been identified, the tax professional must have a conversation with the taxpayer about whether representation is possible, she said.

Generally, rules in Circular 230 that allow professionals to create a checklist are dangerous, Hawkins warned, saying that the jurat disclosure in the old section 10.35 covered opinion standards resulted only in pro forma action without necessarily changing practitioner behavior. "Opinions were meeting the checklist and yet accomplishing nothing," she said. Under the proposed Circular 230 regs (REG-138367-06 (Doc 2012-19202)), sections 10.35 and 10.37 have been revised to reflect a principles-based framework that is not a checklist and that relies more on discretion, she said.

The objective of proposed section 10.35 is to increase the competence of tax practitioners and should not be viewed as a "gotcha" for OPR, Hawkins said. The office does not envision using the competence provision as a stand-alone complaint, but rather will be coupling it with other due diligence factors, and any allegation of a Circular 230 violation on competence grounds would have "a bunch of material behind that," she said. (Prior coverage (Doc 2012-25294).)

OPR doesn't take any special steps to advise state bars or state boards of accountancy of any disciplinary actions taken under Circular 230, Hawkins said, noting that most licensing agencies are now paying attention to the list of sanctioned practitioners that is announced monthly in the Internal Revenue Bulletin. OPR tends to piggyback on state

bar disciplinary actions because those bars make determinations of an individual's fitness to practice based on characteristics similar to those relevant to OPR, she said.

Hawkins emphasized that OPR is an independent function from the IRS. "We happen to be administratively housed in IRS, but our enabling statute is in Title 31, not Title 26," she said. That statutory placement "sends a message that we are different and separate," she said, adding, "We take our independence very seriously."

OPR's primary goal is to protect the tax administrative system and the taxpaying public from dishonest preparers in an objective and consistent fashion, Hawkins said.

Preparer Regulation

Explaining the IRS's push over the past several years to regulate all tax return preparers, Hawkins said that it was a primary objective of former IRS Commissioner Douglas Shulman. "From my point of view, the job is not done," she said, noting that she stayed on at OPR beyond her original four-year commitment because she "believed in that goal and thought it was important to remain in place and make sure it continues."

It is important for the tax system to start regulating paid return preparers in an organized way, Hawkins said. The IRS is still laying the foundation and doing outreach on preparer oversight, she said, adding that the agency "hit a rather significant bump in the road with the *Loving* case." (Related coverage (Doc 2013-7439).)

Hawkins said Treasury's authority to regulate the appearance of individuals before it began in 1884 with the addition of section 330 to Title 31 and that the intention at the time was to regulate the integrity of claims presented before the agency involving compensation for the loss of horses. Under Title 31, Treasury is authorized to make determinations about the characteristics of persons desiring to practice, such as competence, character and integrity, she said. "That's all still in the statute today, which is the foundation on which we hang our hats" for enrolled agents and also the new designation of registered tax return preparer, she said.

OPR has extensive jurisdiction under Circular 230, Hawkins said, noting that section 10.2 defines practice broadly and covers all matters in which an individual is presenting a matter of taxpayers' rights. She emphasized that practice is more than just representation covering laws and regulations administered by the IRS, because practice is not limited to Title 26. The definition in section 10.2 has been in place for 20 years and has never been challenged, she said.

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