

Tax Notes Today

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HAWKINS RESERVING MONETARY PENALTIES FOR FIRMS

By Wesley Elmore

Although the **IRS** Office of Professional Responsibility has the authority to penalize practitioners or their firms through monetary sanctions, OPR Director Karen Hawkins said February 17 that she is reserving that penalty for firms only.

"I'm saving it for the firms, because I don't want practitioners to ever, ever get the impression that they can buy their way out of a disciplinary matter by throwing some money at me," said Hawkins, who spoke at a Standards of Tax Practice session of the American Bar Association Section of Taxation meeting in San Diego. "I want to use the monetary sanction where it has the most impact."

Under Circular 230 section 10.50(c), OPR has the authority to impose a monetary penalty on practitioners or firms that engage in inappropriate conduct of up to 100 percent of the gross income derived, or expected to be derived, from the conduct. Hawkins said she plans to remain in her office for only one more year, so even though it is her position that the monetary penalty should be imposed only on firms, her successor could disagree.

Hawkins also pointed out that the monetary penalty could be imposed in addition to other practitioner penalties that OPR has at its disposal, including censure, suspension, and disbarment. But she also noted that the office can't automatically impose discipline on a practitioner if the practitioner doesn't agree to it. When disagreements occur, OPR must take the case before an administrative law judge, and the ALJ's decision can be appealed to the Treasury appellate authority.

To avoid using excessive resources on such cases, OPR works hard to negotiate disciplinary penalties with practitioners, Hawkins said. "Part of what I'm trying to do is essentially save my resources for the really egregious stuff and help the rest of these people just get something accomplished, get enough discipline so that everybody recognizes that it wasn't the right thing to do, and then we can all move on," she said.

Hawkins said that the success OPR has had when taking its cases before an ALJ or the appellate authority is a "validation" of the stance the office takes on its cases.

Reinstatement Contingencies

Hawkins said that when she began as director of OPR, ALJs often handed down indefinite suspensions for practitioner misconduct. She said that under her tenure, she has pushed for determinate sentences instead, frequently with a contingency on a practitioner's reinstatement. For example, OPR could call for a 24-month suspension for a practitioner for noncompliance, with reinstatement contingent on the practitioner petitioning OPR and demonstrating that he is compliant and has not otherwise violated Circular 230, she said.

More recently, OPR has been using its authority under Circular 230 section 10.79(d), which gives the OPR director discretion to base a practitioner's reinstatement on other contingencies -- for example, requiring practitioners to take continuing education courses in ethics, Hawkins said. "It forces them to go out and get the kind of education that I think they've apparently missed or they wouldn't have been disciplined," she said.

Hawkins added that she's received few objections from disciplined practitioners about those continuing education requirements.

OPR University

Hawkins isn't reserving education requirements for disciplined practitioners. OPR is creating its own "OPR university" to provide its staff with a training program on issues such as Circular 230 and the Administrative Procedure Act, she said.

Also, OPR is working to educate field agents on the willfulness standard that the office must meet when meting out discipline, Hawkins said, adding that that is necessary because some **IRS** employees have made referrals to OPR based on their "gut reaction" that a practitioner is a "bad actor" without any evidence to back it up.

"You can't just go in and say to the ALJ, 'Yeah, this guy's a bad actor.' You've got to have a bunch of stuff behind it that reaches the conclusion of bad actor," Hawkins said. "The field struggles with that, just because it's not something that they've really been trained up for."

Willfulness Standard

Regarding the willfulness standard for Circular 230 violations, Hawkins said that since she became OPR director, she has changed her position on how that standard should be defined. She said that while she originally disagreed with former appellate authority David F.P. O'Connor's adoption of the criminal standard of willfulness and believed that a civil standard was more appropriate, she has since become "very comfortable" with the standard that current appellate authority Bernard Weberman has adopted, describing it as a hybrid of the criminal and civil standards.

"The longer I've been inside the agency doing this, the bigger believer I've become in the fact that there need to be appropriate checks and balances on the authority and the power of an agency," Hawkins said. She added that especially now that 300,000 to 400,000 new people have become subject to Circular 230 since the **IRS** implemented its return preparer registration initiative, "I think the agency needs to have some hurdles that are a little higher to step over in order to justify" taking someone's livelihood away.

OPR Reorganization

Hawkins said OPR has recently reorganized and has shifted most of its previous administrative responsibilities over enrollees -- such as those regarding testing, continued education, enrollment, and renewal -- to the **IRS** Return Preparer Office. That leaves OPR free to focus on the bulk of Circular 230 enforcement.

OPR's new structure divides the staff into two teams of lawyers, paralegals, and support staff that resemble the organization of private law firms, an approach that Hawkins said she hopes will allow disciplinary cases to be handled more efficiently. The addition of new staff in the coming month might create a third team, she said.

In 2011 OPR considered 726 cases for potential discipline under Circular 230, Hawkins said, which resulted in seven disbarments, 280 reprimands, and 161 suspensions, most of which were processed under the expedited suspension rules. OPR had no disciplinary hearings before an ALJ in 2011, she said.

While compliance cases have traditionally taken up most of OPR's enforcement resources, focus on those cases has shifted toward alternative ways of dealing with practitioner noncompliance, Hawkins said, and she noted the success of OPR's various soft touches.

Hawkins said that due diligence inquiries are the second most reviewed type of disciplinary action. The field is exercising discretion in not sending inappropriate cases to OPR, and the referred egregious cases evidence preparers compromising their standards in an effort to keep client goodwill, she said. She added that it is legitimate for OPR to ask firms under Circular 230 section 10.36 to show documentation of their due diligence processes.

Hawkins reported that in 2011 the **IRS** issued 830,000 preparer tax identification numbers, while PTIN renewals dropped to 638,000. Of the PTIN group, 42,000 were enrolled agents, 204,000 were CPAs, 28,000 were attorneys, 51,000 registered as supervised employees, and 37,000 registered as preparers of non-1040 returns.

Circular 230's Expanding Reach

At a separate Fiduciary Income Tax session February 18, Hawkins said that the latest Circular 230 revisions have received too little attention because practitioners have focused on their application to registered return preparers. (For T.D. 9527, see Doc 2011-11674 or 2011 TNT 105-10.)

Circular 230 section 10.8(c) says that any individual -- not any practitioner -- who is paid to prepare all or a substantial part of a document reflecting a taxpayer's liabilities that will be submitted to the **IRS** is subject to all the behavioral conduct rules and sanctions and penalties that can be imposed under Circular 230. That language could expand Circular 230's reach to individuals who otherwise might not have thought they were covered by it, such as people providing advice and preparing forms in the pension planning and benefits area, Hawkins said.

"I think 10.8(c)'s reach is far enough and broad enough to now reach those people," Hawkins said. "If you've got any friends in that industry, you might want to call their attention to subparts B and C of Circular 230."

Another notable provision is section 10.36(b), which requires the individual in a firm who is primarily responsible for the firm's return preparation practice to ensure that the rest of the staff complies with Circular 230 and that there are procedures in place to ensure compliance. Violations can result in personal liability for the responsible person, Hawkins said. "This is a brand new provision, and people are not hearing what it means and are not appreciating who it applies to," she added.

Hawkins said section 10.2 of Circular 230 is broad in its definition of practice. It covers everything that could come before the **IRS**, including foreign bank account reporting, new healthcare provisions, first-time home buyer credits, and "cash for clunkers," she said.

"That throws you into Circular 230 conduct if you are acting in some capacity as an adviser or practitioner for that purpose," Hawkins said. "10.2 says it's preparing, it's filing, it's advising, it's communicating, it's everything. So it's a very, very broad definition of practice."

PTIN Requirements

Hawkins said the competency exam for registered tax return preparers is now available and that individuals who are obligated to take the test must do so before receiving a PTIN. There are questions on the PTIN application that determine whether a particular individual must take the test, she said.

Matthew Cooper, branch 1 senior technical reviewer, **IRS** Office of Associate Chief Counsel (Procedure and Administration), noted that on February 15 the **IRS** published a notice of proposed rulemaking that expands the list of individuals who may seek PTINs. The notice says anyone in the new categories who

receives a PTIN will be subject to a federal tax compliance check and a suitability check. (For REG-124791-11, see Doc 2012-3007 or 2012 TNT 31-13.)

Coming Guidance

Cooper said there is a Circular 230 project on the **IRS's** current guidance plan and that it could make significant changes to the return preparer aspects and other, broad parts of Circular 230.