Practice

By Kathryn Keneally and Charles P. Rettig

Meet the New Director of the Office of Professional Responsibility: An Interview with Karen L. Hawkins

Karen L. Hawkins became the Director of the Office of Professional Responsibility (OPR) on April 13, 2009. She brings to OPR nearly 30 years of experience as an attorney representing taxpayers. Ms. Hawkins made a lasting contribution to the tax community by founding the San Francisco Pro Se/Pro Bono Tax Court project, one of the first programs in the country to provide *pro bono* legal assistance at Tax Court calendar calls for *pro se* taxpayers, which has served as a model for similar programs in other cities. She has been recognized by her peers with the ABA Section of Taxation Pro Bono Award, the California Tax Bar V. Judson Kline Award, the Golden Gate University Judith McKelvey Distinguished Alumna Award and the ABA Tax Section Civil and Criminal Penalties Committee Jules Ritholz Award. She also served as a private practitioner on the OPR Advisory Subcommittee of the Information Reporting Program Advisory Committee (IRPAC), which provides a forum for discussion of tax administration issues between IRS officials and representatives of the public. She was slated to be the chair of the ABA Section of Taxation when she accepted the Commissioner's invitation to serve as the Director of OPR.

Director Hawkins takes the helm of OPR at a significant time in its history. The mission of OPR is to set, communicate and enforce standards of competence, integrity and conduct among professionals who practice before the IRS. The last several years have brought a series of significant changes to Circular 230, which sets out ethical conduct regulations governing tax professionals who practice before the IRS. We have also seen an increase in the resources and tools available to OPR in furthering its mission. We thank Director Hawkins for sharing her perspective on the tasks before OPR today.

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Let's start with a brief overview of how OPR is structured.

There is a case development and licensure division, and two enforcement branch divisions. Virtually all referrals and intake starts at the case development and licensure division. We have a staff of paralegals who make a first cut determination as to whether OPR has jurisdiction. We eliminate somewhere around 40 to 50 percent of all matters at that stage as falling outside our jurisdiction. Next, a reviewer from an enforcement branch takes a second look and makes a second cut of matters outside OPR's jurisdiction. At that point, the matter is assigned to one of the ten attorneys in the enforcement branch to determine whether there is conduct that may warrant disciplinary action. Only after that determination is made will the practitioner be contacted. As a result, a large number of matters are closed without the practitioner even knowing that a referral was made.

The second enforcement branch is smaller, with two lawyers and one paralegal. Their responsibility concerns the conduct of actuaries, and in addition to reporting to me, they report to the Joint Board for the Enrollment of Actuaries.

We work with practitioners to reach an agreement as to the resolution and sanction to be imposed. In the absence of an agreement, matters are referred to the General Legal Services Division of IRS Office of Chief Counsel for prosecution before an administrative law judge.

What is the extent of the coordination between OPR and the Office of Chief Counsel?

Since my arrival at OPR, I have had several discussions with the director of General Legal Services to discuss coordination. We have agreed that we should meet regularly to discuss complex cases, which would include high profile or big dollar cases, as well as matters that are focusing on a firm. Our goal is to use a collaborative process to ensure that we have done all that is needed in developing the cases.

To whom do you report?

I report directly to the Commissioner. I also report to the Deputy Commissioner for Service and Enforcement, who oversees all the operating divisions that work with OPR.

Who is and who is not subject to OPR's jurisdiction?

OPR has jurisdiction over Circular 230 practitioners, which include attorneys and certified public accountants who are practicing before the IRS, all enrolled agents and enrolled retirement plan agents, enrolled actuaries and appraisers who present appraisal reports to the IRS. Tax professionals who represent taxpayers at IRS examinations, in collection proceedings, or at Appeals, will fall within OPR's jurisdiction, as will practitioners who file Forms 706, and those who are involved in representations during investigations by the Criminal Investigation Division.

Tax opinion writers also are considered to be practicing before the IRS, and will fall within OPR's jurisdiction. Although this last category has been the subject of some controversy, recently an administrative law judge issued an opinion that gave short shrift to the contention that a tax opinion that was prepared with the intention of supporting a return position before the IRS was not practice before the IRS. More recently, we have had to address the issue of practitioners who represent whistleblowers falling within the jurisdiction of OPR.

It often comes as a surprise to people, however, that because the preparation of tax returns is not limited to those professionals governed by Circular 230, the preparation of tax returns without more will not bring someone within the jurisdiction of OPR.

Recently there has been considerable attention on issues concerning tax return preparers in light of the Commissioner's announcement that he will propose a comprehensive set of recommendations directed to matters concerning return preparers. What is OPR's role in these efforts?

In his press release, Commissioner Schulman stated that by the end of 2009, he will propose "a comprehensive set of recommendations to help the Internal Revenue Service better leverage the tax-return preparer community with the twin goals of increasing taxpayer compliance and insuring uniform and high ethical standards of conduct for tax preparers." We have put together a team, jointly headed by me and Mark Ernst, the Deputy Commissioner for Operations. We have no preconceived notions, and at this point are looking to put all options on the table. We are in the process of holding a series of forums and undertaking other investigations and necessary research. We are gathering information from all interested

constituencies. As the Commissioner has stated, the potential regulations could focus on a new model for regulation of return preparers, service and outreach for return prepares, education and training of return preparers and enforcement related to return preparer misconduct. All I can say now is that we are working diligently on these issues, so that the Commissioner can make his recommendations to the Secretary of the Treasury and the President by the end of this year.

Will the review of issues relating to return preparers include tax preparation software?

Yes. Return preparation software is important. Software providers do not currently fall under OPR's jurisdiction, but their role will be part of the mix as we review issues relating to return preparation.

Will the issue of registration or licensing for return preparers be addressed in this process or otherwise?

This has been a topic of increased focus for some time, as the National Taxpayer Advocate has also noted in her annual reports for several years. Congress has mandated that return preparers be required to use an identification number on tax returns. Other issues, such as licensing, certification, continuing education—all that is open for review.

How do referrals come to OPR?

The largest source of referrals by far are from the IRS Examination Division and from the Collection Division. Some matters come from the Tax Inspector General for Tax Administration, or TIGTA as it is known, and from the Criminal Investigation Division. We have also been seeing referrals from the Department of Justice, especially in conjunction with injunction proceedings. While we may get complaints directly from taxpayers, we find that these very often fall outside our jurisdiction, or we learn after a telephone follow up that there is little factual support for the complaint. We also receive information from state disciplinary bodies. Once sanctions are imposed by another disciplinary body, OPR can often use the expedited procedures under Circular 230 to address the matter.

I want to note that I will be involved, as will other members of my staff, in training new IRS employees. We will be discussing the operation of OPR and the source of referrals. We will focus on identifying practice specific improper conduct by practitioners. The IRS operating divisions are also coincidentally planning major senior management meetings this year, and I will address the issue of referrals at these meetings as well.

OPR is often called upon to address situations in which tax professionals are not in compliance with their own obligations to file tax returns and to pay taxes. How are you handling these matters?

First, let me say that, as a general rule, a single act of noncompliance will not merit review by OPR. For more extensive cases, our goal is to get people to be compliant. From my experience representing taxpayers, I know that the reasons that practitioners fall out of compliance is not very different from the reasons that other taxpayers fall out of the system. Something happens in their lives, they miss a filing or fall short in payment, and once they have fallen short once, they struggle to come back into compliance, and the problem builds on itself. Our goal is to get them back into the system.

In connection with these individual income tax compliance issues, I have instituted three approaches. The first approach is for those practitioners who self-corrected after the referral was made to OPR. For those cases, we send a letter that states, basically, we are pleased to see the self-correction, please don't let it happen again, but if it happens again, we will give attention to it. The second group is practitioners who fell out of compliance in earlier years but have come back into compliance, or those who have balances due but are otherwise in current compliance. We send those practitioners a letter stating that they have 60 days to file delinquent returns and to pay the taxes, or to have an arrangement to pay to which the IRS has agreed. If they meet these terms, OPR will close the matter with a reprimand. Finally, as a third group, in some cases, we have entered into a deferred discipline agreement. In these agreements, the practitioner agrees that a certain period of suspension is appropriate. We also agree to something that functions as a form of a probation period, during which the practitioner must demonstrate continuing compliance. If the practitioner remains compliant within the stated period, then the matter is dismissed, with no imposition of a formal sanction, no publicity and no reporting to state agencies. If the practitioner fails to stay in compliance, then

OPR can proceed using the expedited proceeding provisions of Circular 230 to impose the sanction set out in the deferred discipline agreement.

How does this three-level approach that you are describing work with the grid that was part of the recently published sanctions guidelines for noncompliance?

It is no secret that I was a vocal critic of the proposal for a compliance grid when I was in private practice. I understand that it has its place. The three alternative approaches that I have discussed—a soft letter, a 60-day letter to come into compliance coupled with a reprimand, or a deferred discipline agreement—all come in front of the compliance grid. I also note that there is an extensive discussion of mitigating factors set out in the compliance guidance before you get to the grid, which offer safeguards against the grid itself.

How do matters concerning noncompliance by a tax professional come to OPR's attention?

We are now checking Enrolled Agent compliance records when they apply to renew their licenses. This seems like a very easy way to keep people honest. Apart from that, we receive referrals from those cases before examination or collection that involve tax practitioners.

How does the IRS safeguard against a revenue agent or officer using the threat of an OPR referral against a practitioner who is engaged in appropriate adversarial conduct?

This is a concern that I know to be real, because I faced it as a practitioner. In one case, I received a written communication, stating that the agent intended to make a referral. I responded, also in writing with a copy to his manager, with an explanation of how that particular agent had misread Circular 230. As a general practice, I suggest that practitioners faced with such a threat should immediately report that conduct to the agent's manager, and memorialize the exchange, and any follow-up communications, in writing. It is inappropriate conduct to threaten a representative with a referral to OPR in the midst of a tax controversy matter. However, I would also like to say that I think an immediate knee-jerk referral to TIGTA, without first trying to get some satisfaction from the agent's manager, demonstrates thinner skin than I think a controversy practitioner should have.

There was some discussion at one point that when a practitioner filed a Form 2848 power of attorney, a review would be made to determine whether he or she was in tax compliance. What is the status of this?

OPR will not check the tax records or filing status of any practitioner as a result of the filing of a Form 2848. When a Form 2848 is filed, it goes to a different part of the IRS, and we do not automatically see all Forms 2848 that are filed. We may access the system to determine whether someone as to whom a referral is made is in fact practicing before the IRS, but we will not review compliance as the result of the filing of a Form 2848.

Can a revenue agent or revenue officer look to the compliance history of a tax professional representing a taxpayer to make a referral?

We would view this as inappropriate conduct by the IRS employee. I have given instructions to my staff, and I have told the other operating divisions, that if we receive a referral, and it appears that the only way that the person making the referral could have known of the practitioner's noncompliance is from checking for compliance after a Form 2848 was filed, we will reject that referral outright. I am not suggesting that noncompliance by practitioners is acceptable. But in my opinion, the chilling effect such an approach would have on taxpayer representation, outweighs the compliance concerns.

The Internal Revenue Code contains a number of penalty provisions. Which of these will result in an automatic referral to OPR?

Those can be found in the Internal Revenue Manual (IRM) at 4.11.55.4.2.2.1, and they include the penalty for willful or reckless conduct under Code Sec. 6694(b), the penalty for wrongfully negotiating a refund check under Code Sec. 6695(f), the penalty for abusive tax shelter promotion under Code Sec. 6700, and for aiding and abetting an understatement of tax under Code Sec. 6701, as well as the injunction provisions for return preparers under Code Sec. 7407 and tax shelter promoters under

Code Sec. 7408. The IRM also includes Code Sec. 6694(a), but that is out of date and will be removed with the next update of the IRM.

These are the mandatory referrals. Revenue agents and officers can make referrals in other circumstances.

Within the last few years, OPR has obtained the ability to impose monetary sanctions, but has yet to do so. What might we see concerning monetary sanctions in the future?

Monetary sanctions are applicable to matters that arose after October 2004. We are working to raise awareness both within OPR and outside about the availability of that penalty. Notably, a monetary sanction is the only penalty that can be applied to firms and organizations. I view this as an area in which there have been a number of missed opportunities. We will be looking at firms and organizations to determine when this sanction may be appropriate.

Under what circumstances might an individual practitioner be exposed to monetary sanctions?

While the monetary sanctions are available in matters involving individual practitioners, the regulations also admonish that they should not be used in lieu of other sanctions. At this time, we will look first to whether another sanction—reprimand, censure, suspension or disbarment is appropriate and sufficient. I can envision a situation in which there is an egregious set of facts—for example, a case warranting disbarment that also involved an unconscionable fee—in which we might look to monetary sanctions as an additional penalty. But right now, as I have said in recent speeches, we are focusing on firm conduct.

How will the monetary penalties be coordinated with the penalties under Code Sec. 6694?

Under Code Sec. 6694, a penalty of up to 50 percent of the income derived from the transaction may be assessed, and under Circular 230, OPR can impose a penalty of up to 100 percent. I do not believe that the right approach is to interpret this as exposing a practitioner to a potential penalty of 150 percent, but I can envision using the monetary penalties to achieve a total penalty of one hundred percent in an appropriate case. I am also a firm believer that the same definitions should apply across the board, so I do not believe that we should apply a definition of the "amount" subject to penalty that differs from the Code Sec. 6694 guidance.

To what extent does OPR interact with state disciplinary bodies?

OPR receives information from state disciplinary bodies, and then we make a determination as to whether the professional practices before the IRS and whether the state discipline warrants reciprocal Circular 230 sanctions. We also provide information regarding our public sanctions to state disciplinary bodies on a regular basis.

Do you have any words of advice for practitioners who find themselves the subject of an OPR proceeding?

Pay attention when you are contacted by OPR. Very often, matters can be resolved at an early stage. Conversely, if a matter is not addressed by the practitioner early on, the consequences may become more severe. Ignoring OPR may only exacerbate a problem. Even if a practitioner believes that practice before the IRS may not be important to him or her, disciplinary action taken by OPR may reverberate with other disciplinary agencies with greater importance to your livelihood.