

“TAX TALK TODAY”®

OPR: A BALANCED APPROACH

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Brought to you by the IRS and produced by L&M Production Design Group, based in Alexandria, VA, “Tax Talk Today”® is a free, live, monthly interactive Webcast aimed at educating tax professionals on the most contemporary and complex tax issues. Now in its seventh year with over 500,000 viewings, the award-winning series airs monthly at www.TaxTalkToday.tv and programs are archived on the site for one year after each episode. For additional information or to inquire about sponsorship opportunities, please contact Paul Lamonia at (703) 642-6505 or Lamonia@LMpdg.com or visit www.TaxTalkToday.tv.

BECKI J. DOBYNS: This is “Tax Talk Today,” the tax show for the tax pro. Today’s program is “OPR: A Balanced Approach.” Hello, I’m Becki Dobyms, sitting in for Phyllis Grimes. Welcome to “Tax Talk Today,” a series of programs brought to you by the Internal Revenue Service. The “Tax Talk Today” series provides you, the tax professional, with the opportunity to interact directly with representatives of the IRS and practicing professionals on current tax issues. Today’s program is the first of two new shows added to the “Tax Talk Today” schedule. Viewing the “Tax Talk Today” series is an easy way to learn continuing education credits. For today’s program, you will earn one CPE credit for ethics. You can purchase CE credits through the “Tax Talk Today” store.

You will need the course number which is given at the end of the program. So don’t forget to jot it down. Also, we want your questions throughout today’s program. So please, e-mail your questions to: questions@taxtalktoday.tv. Any questions not answered on the program today will be posted to the “Tax Talk Today” Web site under resources.

Now, if you’ve not already done so, visit the resource section of our Web site. We’ve posted an outline for today’s program as well as additional valuable information. Now, let’s get on to today’s program: “OPR: A Balanced Approach.”

On today’s program, we will discuss the Office of Professional Responsibility. OPR’s mission is to set, communicate and enforce standards of competence, integrity and conduct among Circular 230 professionals. Watch our panel of experts discuss OPR’s oversight of professionals practicing before the IRS and the approaches this important office is taking to carry out its mission.

Now let’s join our first panel on OPR. Today’s moderator is Les Witmer. Les brings to “Tax Talk Today” 23 years of experience with the IRS and is currently a communications consultant in Atlanta. Joining Les is: Karen Hawkins, director, Office of Professional Responsibility, Internal Revenue Service; and Michael Salyards, senior counsel, Internal Revenue Service.

The complete bios for guests are on the “Tax Talk Today” Web site. Les?

LES WITMER: Thanks, Becki. The Office of Professional Responsibility was established in January of 2003. Previously on “Tax Talk Today” we talked about the changing role of OPR and we’d like to revisit that. Take a look at what OPR does, what tax professionals – who you regulate and what can happen to them applying the standards. Karen, I guess the best place to start is maybe to give a little bit of an overview on, briefly, what is the role of OPR?

KAREN HAWKINS: Well, it often comes to a surprise to practitioners when they look for us that they don’t find anything in the internal revenue code that talks about OPR or Circular 230. That’s because the legislation creating OPR and its impending legislation was enacted

under Title 31 of the U.S. Code. So Circular 230 is what we commonly call the body of regulation that have been promulgated under Title 31.

Circular 230 and OPR are responsible for overseeing the ethical conduct of tax professionals in a variety of contexts in the practice before the Internal Revenue Service. And it does only apply to tax professionals who actually practice before the Internal Revenue Service.

MR. WITMER: Okay, we want to get to those and maybe explore a little bit more about how you do that. But last month there was an important announcement that was made by your commissioner that talks about a pending review of the tax preparer or the tax preparer community. And to make sure everybody understands what that is and maybe before we talk about it, let me read from that announcement:

“IRS Commissioner Doug Shulman announced 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.

“Some of the potential recommendations could focus on a new model for regulation of tax-return preparers, service and outreach for return preparers, education and training of return preparers and enforcement related to return preparer misconduct. The commissioner will submit these recommendations to the Treasury secretary and the president by the end of the year.”

So I know this was just announced but could you elaborate on that, give us a little bit more of the details or what you expect to happen?

MS. HAWKINS: Well, I can give you some details about the process more than what we expect to happen at the moment. The commissioner really meant what he said: This is an open project. We have no preconceived notions, everything is on the table that anybody wants to put on the table. We have pulled together a team inside – the two co-leaders of the commissioner’s review are myself and Mark Ernst, who is the commissioner’s deputy for operations.

We have a team under us that are doing all kinds of things that we think are necessary: research, investigation in a variety of areas associated with previous tests and studies that were done on preparers. I have started as of last week attending the tax forums that the Internal Revenue Service does around the country. We’re holding small, informal discussion groups that forums are the best place for us to access the so called un-enrolled preparer so that we can have an opportunity to talk to the very constituents who may be subject to some sort of regulation and hear what they have to say about it.

And I guess one of the newer announcements is that on the 30th of July, in the Reagan auditorium, which is right across from the IRS building here in Washington, there will be a public forum comprised of two panels. The first panel will have panelists from various consumer-oriented organizations – AARP, the Vita Group; low-income taxpayer clinics will be represented, a couple of other consumer based constituencies. Mark Ernst will chair that panel and they will discuss the consumer issues associated with regulation.

The second panel will be of the more organized based preparers – the ABA tax section, the AICPA, the NAEA, NANSAs and NATPs so we have both Circular 230-covered practitioners as well as organized groups who are now currently representing some of the un-enrolled preparers.

And we will explore the obvious for them: What does it mean for preparers to be regulated and what do they see of the issues and what recommendations do they have? The commission is very, very interested in gathering data from all of these interested constituencies.

MR. WITMER: Will there be other public forums to come?

MS. HAWKINS: Yeah, we're talking about at least six right now. We may do them in blocks of two, just like we're doing this, two panels each. We're also talking about taking at least one of them outside of the Washington area so that we can reach some other geographies in addition to the geography that I will reach by doing the tax forums around the country.

MR. WITMER: How will people know where they are or more information about them?

MS. HAWKINS: There will eventually be a Web site on IRS.gov that will give all of the information. I am told as of this morning that it isn't quite there yet, but I would expect to see it by the end of the week just because we do have these things to announce that are happening.

And I guess the one other important detail – for the Internal Revenue Service, this is a marching drill. The commissioner has committed to bringing a broad range of recommendations in final form to the secretary of the Treasury and the president by the end of the year, so those of you who know about planning know that those of us leading the group have to know what we're talking about probably by the end of October.

MR. WITMER: Okay. And we'll certainly keep you apprised on "Tax Talk Today" with our news and also our resource page of any of those upcoming things.

Let's get back to OPR then. You talked about – and I think most people know who's covered and who you deal with and who you regulate. Who don't you cover? Who are those?

MS. HAWKINS: Yeah, it's always a surprise to everybody. I've even talked to former commissioners who didn't realize this. Circular 230 essentially says that anybody can prepare a tax return. So tax-return preparers and tax-return preparation as an activity is not a Circular 230-governed activity.

So anyone who is a mere tax-return preparer without otherwise touching the Internal Revenue Service in some way by practicing before it is not covered by Circular 230.

MR. WITMER: All right, well, I want to – our next panel will be joined by some practitioners and we'll go into a discussion. But I think what we'd like to do is maybe set the

stage for that. Can you give us a little bit of background about how you're organized and then maybe get into a little bit about how OPR functions?

MS. HAWKINS: Right. This is probably a good place to reference the resource materials because we have a PowerPoint that actually has our organizational chart there if people really want to look at it closely. But I essentially have two enforcement-branch divisions and a case development and licensure division.

The case development and licensure division is where almost all of the intake comes from, where all of the referrals come through and they do a first cut to make a determination as to whether we have jurisdiction or not. As you've just heard me say, we don't regulate anywhere near as many people as folks think and so I'd say close to 40, 50 percent of what we get in is not technically covered under our jurisdiction.

So we have paralegals in the CD&L branch that screen those out and then try to screen them to other appropriate places in the service. If they make it through CD&L, they go through a reviewer in my enforcement branch, one, who takes a second cut, just in case, and then it gets referred to one of the 10 attorneys that I have there for a follow-up investigation, ultimately a determination as to whether there is some kind of conduct that warrants disciplinary action, at which point in time we'd make contact with the practitioner.

My enforcement branch, two, is smaller. It has just two lawyers and a paralegal in it. And they are responsible for addressing conduct associated with actuaries. And they actually have a dual report because they report to me, but they also report to the joint board, actuarial board, which is comprised of several other governmental agencies besides the Internal Revenue Service.

MR. WITMER: Okay. Michael, what's the relationship, then, between counsel, legal counsel, and OPR?

MICHAEL SALYARDS: Well, one thing that practitioners don't realize is that the Office of Professional Responsibility does not actually do the prosecution of any complaints charging a violation of Circular 220 (ph). As an extra level of due process, that's handled by the Office of Chief Counsel and General Legal Services, of which I'm a part of.

And so OPR is one of our clients. We handle all of the nontax litigation in the IRS and OPR proceedings are a nontax proceeding. It's an ethical matter.

So what happens is, when they're done with their investigations, they determine whether or not a practitioner has violated any provisions of Circular 230 and it's then referred to one of six field offices within general legal services. It goes to whatever geographic area the practitioners are located in. They don't have to travel to Washington, D.C., to handle these matters.

And what we do in general legal services is we take the recommendation of OPR, the recommendation both as to what should be charged and what the sanctions should be, and we

immediately, and we immediately contact that practitioner to let them know that it's in a litigation phase now.

And if you look at Circular 230 starting at Section 10.62, that's the point where general legal services takes over the case. It's the institution of proceedings. We'll let the practitioner know we have it, give them one final opportunity to communicate with us and give us their side of the story. If it's not resolved at that point, we then draft and issue a complaint. We get an administrative law judge involved and, at that point, it's full-blown litigation.

MS. HAWKINS: Can I add something to that – because what Mike says is essentially correct, but since my arrival, which is all of three months ago, I've had numbers of conversations with the GLS director. And he and I have agreed that we would be far better off if we meet more regularly on complex cases before we refer them so that we develop them better.

And so we're actually going to start piloting some cases where we know that either it's a high-profile issue, it's a firm issue, big-dollar case where we want to make sure that GLS gets the absolute best file they can get for a hearing. And we're going to start bringing them in early. And they're ready for that. So I think we'll have a good collaborative process going pretty soon.

MR. WITMER: One thing I guess we should make clear: You report directly to the commissioner of the Internal Revenue Service?

MS. HAWKINS: Yes. I actually have a dual report. I do report directly to the commissioner. I have to report also to his deputy for services and enforcement since that's where all of the rest of the operating divisions are that I would be working with.

MR. WITMER: Let's talk a little bit about these operation divisions and your relationship with them. Is this where a good many of the referrals come from inside?

MS. HAWKINS: Yeah, I would say most of the referrals, particularly the ones that Mike's group would ever see, are coming from inside. The examination division is a big source for us, as is the collection division. We do get matters referred to us from TIGA (sp) and from CI when they have cases that they decide they don't have enough to go on, to pursue in their arenas, they'll end up sending them to us.

The other source that we have that people may not think about until recently is the Justice Department. As they have been more and more successful at bringing injunctive actions, they will – we've done a couple of things with them. If they actually do a deal on an injunction, we will get them to get a term in the injunction that prohibits tax-return preparation which is the one thing we can't regulate.

If for some reason they see a case that they don't think is worthy of pursuing for injunction, it gets sent back to us, if it's a practitioner, and we'll pursue it that way.

MR. WITMER: How about disgruntled taxpayers? I would imagine you get some from outside as well?

MR. HAWKINS: We get some, but it's surprisingly few that we can actually deal with. We actually get many, many that are very frustrating for us because they are related to practitioners that are actually preparers that we do not – we don't have jurisdiction over.

The ones that we do get from taxpayers are often in the realm of they didn't get their paperwork back, their return didn't get filed on time; it was really the preparer's fault; they're disgruntled about something they would or wouldn't do. More often than not, we find that if one of our lawyers calls the taxpayer and talks to them, they have either gotten over their anger by that point in time or they really can't create enough of a fact pattern for us to justify upsetting the preparer's life for.

MR. WITMER: Michael, what about the cases that come to litigation? What are the majority of the issues or what are some of the issues that you deal with?

MR. SALYARDS: Historically, they have fallen into three basic categories. The bulk of our cases over the years have been tax compliance. The practitioner is simply delinquent or late in filing or paying their personal tax returns, the returns of their business entity.

We take particularly seriously the employment taxes because that's a fiduciary role they owe their employees. So those historically have been the bulk of what ends up in litigation, is personal tax compliance. And, over the years, what we've seen it shift towards is more towards the conduct. We have, I think, a large number of cases that deal with contemptuous conduct; simply they are engaging in abusive conduct towards the IRS personnel that they're dealing with.

We get a lot of cases involving damage to the system, the integrity of the representation system in which they're willfully, intentionally delaying the process, refusing to cooperate with information requests from the IRS, refusing to meet timely with the agents.

And the growing number of cases that we're getting, they're still small in number but they're probably the more complex cases that have to do with due diligence, the duties that they owe to their clients.

MR. WITMER: Okay, one other area before we go on to our next panel that we probably should comment on is one of the changes was the monetary penalties or monetary sanctions that could come about. Where are we with that?

MS. HAWKINS: Well, so far, I'm just scaring a lot of people with my speeches, but I am intending to put some action behind that. The monetary sanction penalty has been in Circular 230, applicable for matters that arose after October of 2004. And it has yet to be used. The consciousness within OPR as well as outside needs to be raised a lot more about the availability of that penalty.

The thing that attracted me to it, even as a private practitioner, was that it is the only sanction that OPR has that it can apply to firms and to organizations. And I think that's an area that needs to be looked at very carefully. I think that there are any number of opportunities that

have been missed. Even in the three months that I've been there, I've seen some things come through where I think, gee, why aren't we looking at the firm?

So we're going to start looking at the firm. And we have the ability to apply those sanctions to the firm. We also have the ability to sanction monetarily an individual practitioner if we think it's appropriate.

MR. WITMER: Okay.

Good, thanks for this interesting overview and I'm sure we're going to discuss some of these with our practitioners in the next panel. But, before we do that, let's hear from Becki for the Headline News.

(Music.)

MS. DOBYNS: Here are the top stories from the IRS. Practitioner video and audio presentations: Have you visited the IRS' practitioner video and audio presentations page on IRS.gov? This page provides a wealth of information to inform tax professionals on subjects such as proper worker classification, correspondence examination, cancelled debt, much more. Visit our resource page and click on the link under Headline News for more information.

Tax tips: The Internal Revenue Service is publishing summertime tax tips to provide useful and concise advice on topics that affect taxpayers. Many taxpayers don't think about their taxes until the start of filing season in January. You know that can be a big mistake. Steps such as checking withholding, getting the proper receipts from charities, organizing records or setting a personal tax strategy are most effective if they're done well before year's end.

So this summer, the IRS is publishing three tax tips per week. Topics range from how to get parents credit for sending their kids to day camp to protecting yourself from identity theft. You can receive IRS tax tips via e-mail as soon as they are published by signing up with the IRS e-news subscription page. See today's resource page for the link to the tax tips page.

New offer and compromise booklet and form: The Internal Revenue Service has released the new Form 656-B, offer and compromise booklet; and the revised Form 656, offering compromise. The new Form 656-B contains all of the forms and instructions necessary to file an offer and compromise. The revised Form 656 has been slimmed down and now only includes the four-page offer and compromise application. All of the worksheets, checklists and instructions previously found in Form 656 can now be found in Form 656-B.

The availability of the two forms allows taxpayers and practitioners to easily access the offer and compromise application without printing or sorting through the offer booklet. And we've included a link on today's resource page to headliner volume 270, dated July 8th, with this information.

Now let's continue our conversation on OPR. Joining our panelists are: Chris Rizek, member of the law firm Caplin & Drysdale, based in Washington, D.C.; and Lonnie Gary, an enrolled agent and director at RSM McGladrey, from Union City, California. Les?

MR. WITMER: Thanks, Becki. Welcome to both of you. Lonnie and Chris, you heard during the first segment, an overview of OPR and some of the issues that Michael and Karen discussed. I guess a place to start would be, what's the reaction? What are some of the issues, from what you heard or what you know, that's on the mind of fellow practitioners? Lonnie?

LONNIE GARY: Well, certainly I think monetary penalties are on the minds of practitioners that I speak with. Karen has indicated that she wanted to use monetary penalties in case of firm misconduct. But practitioners want to know how will OPR use monetary penalties with regard to individuals?

MS. HAWKINS: Well, we can – so anything that we can, I can't say that we might not one day. But I do view it more as more attractive to use with firms. One of the admonitions of the regulations now is that monetary sanctions should not be used in lieu of other kinds of discipline.

So at the moment, our approach would be to look at an individual practitioner and see whether one of the other recommends censured suspension or disbarment kinds of discipline would be more appropriate. And certainly, we won't entertain a practitioner attempting to buy their way out of that kind of discipline by the payment of a monetary sanction.

So I think for the time being, unless we have a particularly egregious case where the fees were outlandish or some other conduct just warrants – we can't get at the behavior enough with a non-monetary sanction, we wouldn't put aside the opportunity to use the monetary sanction. But I have my eye on firms at the moment.

MR. GARY: I understand. But since they can be used against individuals, my thought is, how does the monetary penalty fit in with the other hierarchy of penalties that OPR has available to us? The other sanctions?

MS. HAWKINS: I'm not quite sure what you mean by "fit." I could see, for instance – and these are all hypotheticals because at the moment we have nothing before us – I could see someone warranting disbarment where they performed some sort of service where they charged what we also considered to be an unconscionable fee. In fact, that may even be a part of the disbarment allegation, where we might decide that a monetary sanction is appropriate so they discourage some of that unconscionable fee.

MR. WITMER: Chris, what about other areas that might be on the mind of practitioners?

CHRIS RIZEK: Well, the area that I get the most number of questions about that I think people really don't well understand about how OPR works is in the area of referrals. And we get a lot of different questions about the different sources of referrals. Perhaps we could talk about those.

The first one is – as I think was mentioned by Michael – that in the past, historically, one of the biggest sources of your kinds of cases was practitioner noncompliance on their own tax liabilities. And I wonder if you could talk a little bit about, first off, how those cases come in and are treated and examined, both non-payment and non-filing. And then what sort of things you have in mind for the future in that area.

MS. HAWKINS: Well, there are probably a couple of ways to dichotomize this. If we're talking about enrolled agents, we are starting to routinely check their compliance records when they seek to renew their licenses. So if there's any warning that I would give practitioners today, is that if you think that you want to be an enrolled agent or stay an enrolled agent, don't be so foolish as to fill out a renewal application knowing that you haven't filed your tax returns yet because it's highly likely – there aren't that many of you; there are about 46,000 and we're now re-upping them in three year cycles so we're only having to deal with a third of a time. I think it's just a really easy way to keep people honest, so that's happening. And that's not so much a referral as people are telling on themselves, in some respects.

The other sources, as you might imagine, are from our revenue agents and our revenue officers who encounter, maybe, people who are either being examined or representing people who are being examined who they're not happy with. And if they figure out that they're also a practitioner, they might try to send us a referral based on delay. Or they might send us a referral because they – as a revenue officer – they're trying to collect against a practitioner. So they know they owe taxes; they know they're not in compliance; and they'll send those into us as well to follow up on.

MR. SALYARDS: Well, what I could add is at least the cases that end up in general legal services litigation, they're not the type that are just zero tolerance – you've missed one year of filing you're late on a small amount of money, we're going to come after you for a suspension or disbarment.

OPR does a really good job of weeding out the trivial; the insignificant tax issues, even though they are violations of Circular 230. And what ends up going for the suspension or disbarment are those in which that tax compliance is manifesting itself through just a willful refusal to pay, a refusal to file on time – you see it in their overall conduct in interacting with revenue officers. And it's that conduct we're seeking the sanction.

MR. RIZEK: So as a general rule, a single act of noncompliance – assuming it's not particularly egregious – isn't going to result in sanction. Whereas persistent or repeated noncompliance might catch your attention.

MS. HAWKINS: Yeah, and maybe I could say a couple of other things. A single act of noncompliance isn't even going to get looked by us, frankly. But what we have done since I have been there, in addition to – thank you for the plug about the excellent job that we do – but what we have also done – or I've started to realize as I look at these compliance cases is that they take an enormous amount of our resources for what, for me, is a pretty simplistic no-brainer.

People are supposed to file tax returns. (Chuckles.) And particularly people who think they want to practice before the Internal Revenue Service. It's just incongruous to me.

So my goal is to get people compliant. And the reasons that practitioners fall out of compliance are no different than their general tax-paying public. Something's happened that gets in the way and then it just snowballs.

So we have now – since I've been there – instituted three approaches: the softest, the soft and then sort of a modified. And the soft letter essentially goes to someone who has managed to self-correct after they've been referred to us.

And so we essentially send them a letter that now says, congratulations; we're really happy to see that you self-corrected. Good for you. We're delighted to see it. Please don't let it happen again. But we wanted to let you know that if it does happen again, we are looking.

The second letter is a soft 60-day letter, which goes to practitioners who are out of compliance from earlier years or – have balances due but are currently compliant. So we know they're trying to get their act together. And we'll send them a 60-day letter that essentially says you've got 60 days. Get the returns in; get the payment in; make a deal to make the payment with the IRS that the IRS approves of and it will be a no harm, no foul – except this is a reprimand. So if we see your name come in again, it will be an aggravating circumstance for whatever additional discipline you might be up for the next time around.

The third approach that we're taking is addressed – I've seen us use it recently with lawyers. I don't think it's just lawyers; but it seems to lend itself at the moment for that better. We've done four settlement cases with the GOS-referred cases at the moment with this. And that's called the deferred discipline agreement. And that essentially says the practitioner agrees that a certain amount of suspension is appropriate for the conduct. But the practitioner agrees to get compliant and stay compliant for five years. If they stay compliant for that period of time, kind of everything just stays fine and there's no publicity; there's no sharing with state agencies; there's nothing.

If the practitioner defaults at any time during that five-year period, the discipline that they'd agreed to kicks in. It becomes public and we do it all through an expedited proceeding under the circular 230 provisions rather than having to again use a lot of resources unnecessarily to pursue something that's a no-brainer.

MR. GARY: This is good information, Karen, because as you know, recently published was the sanctions guideline for non-compliance. And included in that is a grid that indicates certain minimum sanctions for various acts of non-compliance. The OPR advisory committee, as you also know, is on record as opposed to that penalty grid because of the potential for the rigid application. So it's very good to hear that one item of non-compliance would not necessarily rise to a suspension or disbarment.

MS. HAWKINS: Right, and let me just say that the compliance guidelines are still out there. We did publish them to the web. They are intended to be part of our internal revenue

manual, which we hope very much to have up and available to everyone before the end of next month. But this soft letter, 60-day letter that I'm talking about is really going to be placed in front of that compliance guideline. So you have all the mitigating factors that are still listed for the first four pages of that IRM exhibit. But in front of those even, you have the soft letter issues.

So before you get to what – and Lonnie knows and others that I was a member of that advisory committee before I took this position and I certainly was one of the more vocal critics. So I'm sitting here now having to deal with something I was never particularly fond of. I think it has its place but I think there are many other safeguards that have to be put in place and dealt with before we get to the harshness of the way that that compliance grid looks.

MR. RIZEK: Karen, one of the other questions I get a lot – particularly in the wake of the tax shelter wars of this decade and the revision of the tax shelter penalties in 2004 is which sort of penalties assessed against a practitioner will result in disciplinary action versus that practitioner. And the question runs the gambit from a 6662 substantial authority or substantial understatement penalty on the taxpayer, on the practitioners' own tax liability through the specific tax shelter return penalties like 6694, the information penalty, 6700, 6707, 6708. Can you talk about which of those result in automatic referrals and sort of what that process is with those?

MS. HAWKINS: Sure. I have to put my glasses on for this because I'll give you an internal revenue manual site; it's irm4.11.55.4.2.2.1.

MR. WITMER: And we have placed that on the resource page. (Laughter.)

MS. HAWKINS: Yes, on your resource page. And if you look there, it will give you a list. The relevant pieces of the list are 6694-B, which I think is no surprise to anybody, 6695-F, 6701 and 6700 that you just mentioned; 7407, 7408. You will also see there a reference to 6694-A being a mandatory referral. That's a matter of time lag. Everybody knows that 6694-As are no longer automatic referrals to OPR. It's just a matter of the IRMs getting updated as quickly as everybody's positions and attitudes are.

I would say that in terms of how the referrals happen, I am starting in August. I will be visiting around the country as the IRS in each of the operating divisions gears up to train all of their new hires. I think you've probably heard there was a whole state of hiring that's going on. I or one of my staff members will be visiting many of those training operations and talking not just about OPR but about the sources of referrals, about what to look for, and we are going to be customizing those. If we're talking to revenue officers, we're going to talk about practitioner conduct that occurs strictly in the collection arena versus examination. We will talk about it strictly in the examination area.

I think it's probably one of the unique things I bring to the job is having been a practitioner in tax controversy for so long, I know how to behave badly. (Chuckles.) Not that I ever did, of course, but I know what bad behavior looks like. So I can share that with the people I'm going to be teaching.

In addition this year, for some reason – it’s a lucky year for me – all of the divisions are also holding major senior manager meetings and just kind of getting acquainted, reacquainted from being spread out all over the country. And I am going to be addressing a lot of those for the same purpose, talking about some of this.

MR. RIZEK: Well, the interesting thing about that list you just went through is 6694-A, the new accuracy penalty, is not on that list as an automatic. And also, 6707 and 6708, which will lead to the reporting and list maintenance for shelters is not on that list. That’s an interesting list. I suppose those could still, in egregious situations, result in referrals, just not automatic.

MS. HAWKINS: Well, right, I was going to say, these are technically mandatory referrals. So certainly revenue agents and revenue officers can feel free to refer anything that they think is egregious conduct to us. And if the behavior is sort of defined by a code section, that makes it a little bit easier for them to refer it to us, frankly. We would still take a careful look and make sure that their referral was appropriate. But we wouldn’t turn it down just because it wasn’t a mandatory statute.

MR. WITMER: Here’s a question that’s come in: “Does the OPR have any cases in the pipeline involving failures to comply with Section 10.35?” That would be the tax shelter opinion standards.

MS. HAWKINS: Yeah, there’s sort of a convoluted answer to this. If you recall, 10.35 didn’t really come into Circular 230 in time to catch some of the most egregious conduct that we saw in the tax shelter arena. It also is a section that has been questioned – I think very wisely – by a lot of private practitioners because it looked very much like OPR. And GOS would be expected to try a substantive tax case in order to get to the conduct.

So up until now, we have had cases that involve opinion writing that preceded 10.35 that we have pursued on a due diligence – in a due diligence allegation. And in fact, there is at least one reported opinion fairly recently involving a due diligence allegation. We have others in the pipeline, but again, they’re all due diligence. There’s not one that’s labeled as a 10.35.

MR. RIZEK: As you know, there are some of us who think that due diligence kind of swamps the opinion standards anyhow. And as a practical matter, what I think many of us have found is that the limited scope opinion exception to the 10.35 has sort of swallowed all those technical rules.

MS. HAWKINS: My practitioner view – I’m here for such a short time; I still have a half a hat on for practitioner – if you adhere to the due diligence criteria in Circular 230 and the best practices provision in Circular 230, you virtually don’t have to worry about OPR in the 10.35 arena.

MR. WITMER: Okay, here’s another question. This goes back to the monetary penalties. “What’s the relationship between monetary penalties and civil prepare penalties, i.e. Section 6694?”

MS. HAWKINS: Well, perhaps the questioner is worried about the fact that the 6694 penalty can be as much as 50 percent of the liability. And we can do 100 percent. So are we going to do 150 percent? It'd be a great way for us to deal with this budgetary crisis we're in, but I don't think that that's the approach we should take. It's going to take some coordination just as we have now with some of these cases where OPR has had to step back while the Justice Department pursues things criminally or we've stepped back while one of the operating divisions pursues a whistleblower tip.

We step back and wait to see what's the most appropriate thing to do. We certainly – and I'm quite sure that this is in the guidance to monetary sanctions right now – we would not double up. So the most you would see us doing, if the full 6694 penalty was imposed would be the other 50 percent, if that makes you feel any better.

MR. RIZEK: Yeah, well, one of the things that the 6694 guidance has been very helpful on is defining what gross income from the transaction is. And I would hope that something along those same lines would be used by OPR in applying those sanctions.

MS. HAWKINS: I'm one of those people who believes that having the same definition in multiple places by the same regulatory agency is a wise approach to things. And so, I certainly wouldn't want to be trying to buck that definition. Whether there are still some subtleties and nuances there that we get into arguments about, you know, maybe that's where case law makes those resolutions for us.

MR. GARY: While we're talking about referrals, Michael, you had mentioned that that caseload, as it is, has been shifting from noncompliance cases to more – I think you used – contemptuous conduct on the part of practitioners. What filters are in place to ensure that a practitioner actively engaged in advocacy for his client isn't singled out for a referral just based on not being able to get along with a revenue officer or revenue agent.

MR. SALYARDS: Well, a lot of that is going to depend upon the competency of Ms. Hawkins' staff. And they do filter that out. And one thing you've got to realize is a referral, in and of itself, is more or less invisible to the practitioner. They don't know what's going on. So that if there's just a frivolous referral made by a disgruntled client, disgruntled taxpayer, and there's really no Circular 230 violation, that's not going to get to general legal services. What ends up in litigation, truly a complaint charging a violation, is where there's apparent misconduct; it's clear based on the documentation – particularly a paper trail – that particular language was used in the communications with the IRS; there is a documented pattern of delay; a documented pattern of refusal to cooperate with the service. And in those cases, it's clear. It's filtered down to a small number. And when I say it's increasingly that type of cases, we don't get a lot of contentious conduct cases. We primarily get, in terms of numbers, tax compliance and due diligence.

MR. WITMER: Let me follow up to that with a question that we've gotten from one of our viewers: What safeguards are in place to keep revenue officers or agents from using the

threat of referrals to OPR as a weapon against practitioners that are disagreeing with the officer and against their position?

MS. HAWKINS: I would love to hear that that doesn't happen, but having been a practitioner for 30 years and had it used against me, I know that it does. It is inappropriate conduct. All of the manager-group level on up, know that it is inappropriate conduct.

I have been the recipient of actually written suggestions that I would be referred to OPR. And my personal reaction to that was to write back, and, in that instance, correct that individual's reading of Circular 230, which is always the nicest way to approach it.

But I would certainly say, for a practitioner who runs into that, they should not hesitate to pick up the phone and call the revenue officer's supervisor and immediately report that conduct. It's intimidating; it has a chilling effect on representation; it is not the way that the service needs to conduct itself because we have plenty of skills and skilled people to do the appropriate approaches to these things.

MR. SALYARDS: Yeah, as OPR itself, you don't have a hotline or anything that somebody could call in on.

MS. HAWKINS: Right. We do not. Although I have to say, having seen some of the questions that have come up, it is an intriguing thought to me to be able to provide that kind of a service. As you know, we have people who call in during tax season and get advice on their tax returns. And there's always a question about can they rely on it, how good was it, how bad was it and, you know, how many "corrects" or "bads."

So I think there are a lot of issues there. So right now, we are not able to accept those kinds of direct questions. Once in a while, if someone does communicate with us and it sounds like something that would be appropriate for procedure administration council and chief council's office to answer, we'll refer them over there. But we don't routinely respond to those questions.

MR. SALYARDS: There's another – if I file a 2848 power of attorney, will OPR check my tax records?

MS. HAWKINS: I would like to assure everybody out there. Not only will we not check your tax records – because we don't know that you have filed a 2848 unless something else comes to us. We aren't the purveyors of the 2848 system. That's another place in the Internal Revenue Service. So if we want information about 2848s, we have to go there. We do not routinely check for that.

And I have recently had conversations with my counterparts in examination and collection. And we have all pretty much agreed that it is inappropriate for revenue agents and revenue officers to be making those checks. And I have made it clear to my staff and to the other operation divisions that if we get a referral where it is obvious that the only way that the referring

person could have known about the noncompliance was by taking a 2848 and checking the compliance, we will reject it as a referral and we will not work it.

MR. RIZEK: Your answer earlier about ethics hotlines reminds me that a long of states – you know, state bar associations, for example – do have something like that. And that led me to this other question, which is, to what extent do you interact with those state bar association or state accounting licensing agencies both in getting referrals from them or in referring disciplinary – after you’ve taken action – back to them?

MS. HAWKINS: Yeah, this is kind of a listen-up for the practitioners, I think. We have informal and somewhat more formal agreements with virtually every state so that they are providing us with information about the people they’re disciplining. They have no way, of course, of determining whether someone is a practitioner under 230 or not. So our paralegals in our CDNL unit I told you about are routinely checking that.

The only real option we have there is to go in and see if someone has ever filed a 2848 for the sole purpose of determining whether they have practiced before the Internal Revenue Service. And if, at that point, we identify them, we will essentially use our expedited proceedings to take disciplinary action.

In the reverse, until recently, as you well know, we did not publish our discipline. We are now publishing our discipline. And so our approach has been to take the public information and send it to the licensing boards, whether it be for attorneys or CPAs, in each state. And just carve out that state’s information and send it to them. And then they proceed however they want.

MR. SALYARDS: I can say that probably one of the biggest mistakes practitioners make is when they get contacted by OPR to investigate a referral that’s been made to them, they don’t respond. They don’t take it seriously. And then the case is referred to general legal services, and we make that initial contact and they don’t respond.

And I don’t know if they realize the consequences that can come from these proceedings, particularly if there’s no response at all. This system moves very quickly on getting the default judgment. And next thing you know, it’s not just a suspension, it’s a disbarment.

And if they thought, you know, OPR’s not a big deal, Circular 230 is not a big deal, what Ms. Hawkins just referred to in terms of the publicity to the state bars, but publicity to potential clients who can research any of this on IRS.gov, it’s serious. And it needs to be taken seriously.

MR. WITMER: A related point, Michael, is that another mistake practitioners make is not just not responding, but not hiring counsel to assist them early on in the process. A lot of times, by the time, for example, I get a call; it’s already in your office. And a lot of the opportunities to resolve things early have already past by. So they need not only to respond, they need to get a counsel involved early.

MR. GARY: Karen, I just wanted to follow up a little bit. As you know, you have to have jurisdiction in order to take authority over this practitioner. You talked a little bit about the 2848 process. Is that the only way that you have of determining if you have jurisdiction – if someone has practiced before the service? Or are there other methods that you can use?

MS. HAWKINS: Well, it's the most obvious, particularly because it's a real quick check for us. It's not a perfect system, by any means. The division that manages the 2848s is working with some old technology and their processes for updating is not as desirable as it might be.

The other problem with the 2848 is that not everybody has to put a 2848 into the system in order to practice before the IRS. People who do 706s are granted power of attorney authority right on that 706 form. So that never gets into the computers in any way, shape or form.

People who do criminal investigation don't have to submit 2848s, and yet they're technically practicing before the Internal Revenue Service. Our more recent group of people are the practitioners who are representing whistleblowers; who are doing their whistleblowing and they don't need a power, but as soon as they want their reward, they do need a power. (Chuckles.)

So right now, we are exploring other ways. And of course, in the written opinion area, there's no 2848 required at all. So the 2848 isn't the sole source, but it's one of our more reliable. And certainly, it's the fastest use of our resources; to make a quick determination as to whether we should even be spending time on a particular matter or not.

MR. WITMER: Here's a question, now, let me shoot to the practitioners. Could you better define "practice before the IRS?" Practice before the IRS. What is it that entails "practice before the IRS?"

MR. RIZEK: Well, the guidance used to say that there's – for example, in the old appeals, the 601 regs, there's a discussion of what practice before the IRS is. And it says, discussing things with revenue agents, making presentations to appeals, interfacing with the IRS. The big question, which I think the tax shelter opinions standards have really focused on is the extent to which simply interacting with a tax payer and not appearing before the IRS – if you never have entered a 2848, and never had, and don't care if you ever do appear before the IRS – I don't think OPR has ever taken the position yet that that will rise to the level of practice before the IRS. Am I correct on that?

MS. HAWKINS: Well, for the most part. There was some of that argument being made with some of the practitioners early on that we went after on due diligence, with respect to opinion writing, when we didn't have 10.35. And the argument was, well, I've never put a 2848 into the system so how could I be practicing?

There is a recent case called Sykes, which was decided, I think, a month-and-a-half ago. It was actually decided before I got here; I had the pleasure of deciding whether to appeal it or not. But one of the issues in that was, was his opinion-writing practiced for purposes of the ALJ even having jurisdiction to hear the case. And relatively short shrift was made of that argument;

that the ALJ found that, in that instance, Mr. Sykes had deliberately written the opinion knowing that it was going to be used by the practitioner as part of their presentation to the Internal Revenue Service to defend their filing position. And as far as that ALJ was concerned, anyway, that was practiced before the IRS. And that was the end of that issue.

So with this practitioner review, will the mere preparation of a tax return become “practice” before the Internal Revenue Service because, arguably, the tax law is so complicated that nobody is just a scribe on a line-by-line, put the 1099 number here and the W-2 number here. But we’re making decisions and we’re taking positions for the tax payer on a lot of the numbers we put on. I have no idea whether that will come out that way during the review process, but it’s going to get looked at.

MR. SALYARDS: The other place it comes up – I won’t belabor the point – but the other place it comes up is in connection with privilege. Return preparation historically not being a privileged activity – a federally authorized tax practice under 7525 being privileged activity; an activity in which communications are privileged.

MR. WITMER: Let me get a couple more in here. Do you contact the state bar or board and let them know when a practitioner was merely referred to OPR?

MS. HAWKINS: Absolutely not.

MR. WITMER: Good. And in talking about state bar and the practitioner organizations, I guess we’ve been looking at a lot from the OPR side. What about from the practitioner’s standpoint; the organizations? What role do they have in ethical conduct and proper practice?

MR. GARY: Well, from a professional organization standpoint I think they have a responsibility for fostering all of the codes of conduct under Circular 230. I look at my own professional organization and in our code of conduct we subscribe to Circular 230 and hold our members to that standard. As an employee of a large accounting firm, you look to the policies and procedures to make sure that all of the standards of due diligence are being adhered to, and so I think we have an extreme responsibility for making sure the practitioner community adheres to Circular 230.

MR. RIZEK: I think most larger, quality law and accounting firms have internal procedures set up for compliance. They usually have some training, they usually have some people designated as focal points for these questions. I know my firm certainly does – and I think the problem areas come up with practitioners who don’t have that sort of resource base to help them. I think we were discussing earlier that the bulk of your caseload is actually sole practitioners who don’t have somebody to put a check on them or if their organizations it’s really the kind of abusive, OIC mills and refund mills and things like that.

But I think the quality organizations – everyone I’ve talked to – we’ve all put procedures in place to guarantee compliance.

MR. WITMER: Okay. We have a couple minutes left, and Karen, we always get this question and it always comes up when we're talking about this and that is the un-enrolled or unaffiliated tax preparer – there's no licensing or registration. I think the national taxpayer advocate brought this up in a report before Congress as a real problem.

With this tax preparer review, what's going to happen? Will it get some legs – I guess we've heard it before. Is there a chance that something might happen in this area?

MS. HAWKINS: Well, in the commissioner's press release he points out that the combination of the complexity, growing complexity of the tax laws and the increased numbers of taxpayers who choose to use some sort of paid preparation, which is well over 80 percent now. We can't ignore this elephant in the room for too much longer.

There already was a mandate from Congress that we start requiring preparers to all use the same sort of numbering system as their preparer identification number on a tax return. So even before I arrived at OPR that regulatory process was in place and was moving through. I don't know exactly what its timing is, but there will be probably some tax-preparer identification number that will be assigned.

Whether that comes with other kinds of licensures, certification, continuing education requirements is exactly what the commissioner's review process is all about but certainly you mention the taxpayer advocate. She has had this in her annual report since 2002 – not just one of them.

It's a real mission for her and I think that her voice is being heard more loudly and more clearly at this point in time than ever before.

MR. WITMER: What about software developers?

MS. HAWKINS: They're in the mix. They're a very important aspect to the tax preparation.

MR. WITMER: It doesn't come under OPR?

MS. HAWKINS: No, an OPR has no control over them right now. And whether we would after the fact, after this review process, I have no idea. But they're certainly being looked at and considered are the lending banks who do these refund loans.

MR. WITMER: Very good. Good information – always a topic that gets a lot of questions, and if we haven't gotten to your question by the panel here, we will answer all the questions and place it on our resource page. Again, thanks for a very interesting discussion. Before we close out, let's go back to Becki.

(Music.)

MS. DOBYNS: And that brings us to the end of today's program. Mark your calendars for Tuesday, October 6th for the next and final "Tax Talk Today" program. The topic is the American Recovery and Reinvestment Act of 2009 or ARRA. Learn about the new provisions under this act and how they will affect filing taxes. Remember that you will be able to view today's and other "Tax Talk Today" programs by going to our archives on our site.

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We want your feedback so send you comments to: mail@taxtalktoday.tv. Remember there is one remaining live program in October, and program archives will be available through December. So tell your colleagues to watch "Tax Talk Today." I'm Becki Dobyms and we'll see you in October. Thanks for watching.

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(Music.)

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