August 7, 2019

Hon. Charles P. Rettig
Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Re: Comments on proposed elimination of attorney positions from the Internal Revenue Service Office of Professional Responsibility

Dear Commissioner Rettig:

Enclosed please find comments in response to news that the Internal Revenue Service may be phasing out attorney positions in the Office of Professional Responsibility. These comments are submitted on behalf of the Section of Taxation and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the American Bar Association.

The Section of Taxation would be pleased to discuss these comments with you or your staff.

Sincerely,

Eric Solomon
Chair, Section of Taxation

Enclosure

cc: Hon. David Kautter, Assistant Secretary (Tax Policy), Department of the Treasury
Hon. Michael Desmond, Chief Counsel, Internal Revenue Service
Kirsten Wielobob, Deputy Commissioner for Services and Enforcement, Internal Revenue Service
Sunita Lough, Commissioner, Tax Exempt & Government Entities Division, Internal Revenue Service
Kathryn Zuba, Associate Chief Counsel (Procedure and Administration), Internal Revenue Service
Elizabeth Kastenberg, Acting Director Office of Professional Responsibility, Internal Revenue Service
AMERICAN BAR ASSOCIATION
SECTION OF TAXATION

Comments on proposed elimination of attorney positions from the Internal Revenue Service Office of Professional Responsibility

These comments ("Comments") are submitted on behalf of the American Bar Association Section of Taxation (the "Section") and have not been approved by the House of Delegates or Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the American Bar Association.

Principal drafting responsibility for preparing these Comments was exercised by Guinevere Moore on behalf of the Standards of Tax Practice Committees of the Section of Taxation. Substantive contributions were made by Matthew Cooper, Walter Pagano, S. Starling Marshall, Michelle F. Schwerin, Lawrence A. Sannicandro, Shamik Trivedi, and Aaron Esman. The Comments were reviewed by Diana L. Erbsen, Council Director and Karen L. Hawkins, former Chair of the Section.

Although members of the Section may have clients who might be affected by the federal tax principles addressed by these Comments, no member who has been engaged by a client (or is a member of a firm or other organization that has been engaged by a client) to make a government submission with respect to, or otherwise to influence the development or outcome of one or more specific issues addressed by, these Comments, or has participated in the preparation of the portion (or portions) of these Comments addressing those issues. Additionally, while the Section’s diverse membership includes government officials, no such official was involved in any part of the drafting, review, or approval of these Comments.

Contact: Guinevere Moore
(312) 549-9993
Guinevere.moore@jmtaxlitigation.com

Date: August 7, 2019
INTRODUCTION

On April 1, 2019, Tax Notes reported in Tax Notes Today that the Internal Revenue Service (the “Service”) will be phasing out all attorney positions in the Office of Professional Responsibility (“OPR”) and replacing them with non-attorneys. According to the article, the Service “believes OPR no longer needs to hire attorneys to interpret and apply the Circular 230 rules governing practice before the IRS.” The Section strongly urges the Service to reconsider this proposed restructuring and to keep attorneys in OPR.

EXECUTIVE SUMMARY

The Section believes that OPR’s independence is vital to carrying out its mission. OPR requires independent attorneys who can provide conflict-free services in setting and enforcing ethical and disciplinary standards for practice before the Service. In addition, the Section believes attorneys are uniquely trained and qualified to carry out this essential role. We recommend that the Service reconsider eliminating attorney positions from OPR, and instead ensure that attorneys remain in OPR and continue to be involved in carrying out OPR’s important mission.

BACKGROUND

The Department of Treasury (“Treasury”) has statutory authority to issue regulations governing practice before the Service under Section 330 of Title 31 of the United States Code. Regulations promulgated under Section 330 governing practice before the Service are published in the Code of Federal Regulations and in pamphlet form as Treasury Department Circular No. 230 (“Circular 230”). Pursuant to Circular 230, the Commissioner is directed to establish, and has established, an Office of Professional Responsibility to administer and enforce the rules governing practice before the Service. OPR has “exclusive responsibility for discipline, including disciplinary proceedings and sanctions” related to all practitioner conduct in practice before the Service. Practitioners before the Service include attorneys, certified public accountants, enrolled agents, enrolled actuaries, enrolled retirement plan agents, and others with limited practice rights.

---

2 Id.
3 31 C.F.R. §10.1.
4 31 C.F.R. §10.1(1).
5 See generally 31 C.F.R. §§10.3, 10.4. Circular 230 was last revised on June 12, 2014, and includes a reference to “Registered Return Preparers”. In Loving v. IRS, 742 F.3d 1013 (D.C. Cir. 2014), the U.S. Court of Appeals for the District of Columbia Circuit held that return preparation by itself does not constitute practice before the Service subject to regulation by Circular 230 or OPR’s exclusive jurisdiction for discipline. While it is clear that Circular 230 should be revised in light of Loving, what those revisions should be is outside the scope of these Comments.
OPR is divided into three segments: (1) Office of the Director, (2) Legal Analysis Branch, and (3) Operations and Management Branch. OPR’s current management team consists of an Acting Director, Special Counsel to the Director, and three members of the Legal Analysis Branch team, including the Acting Chief, a Section Manager, and an Acting Section Manager.

OPR receives referrals about practitioners from Service field personnel (including the Criminal Investigation Division), from the Treasury Inspector General for Tax Administration and other governmental agencies, the public, the Service Return Preparer Office, tax practitioners who are aware of misconduct, and other sources, including state bars. Well over half of the referrals OPR receives are from Service field personnel who are themselves charged with administering and enforcing the Internal Revenue Laws. Many referrals are disposed of without reprimand or discipline of any kind. For example, in calendar year 2018, there were 2,630 referrals made to OPR. Of those referrals, 2,444 were closed without any disciplinary action, 107 reprimands were issued, 57 suspensions were determined, two disbarments were required, and no censures were made. As the foregoing statistics confirm, despite receiving the majority of its referrals from Service personnel, OPR receives many referrals in which no “proceeding” ever is initiated, and the referral is disposed of without any sanction being raised by OPR.

If OPR receives a referral describing misconduct that requires further review, OPR will contact the practitioner, providing notice of an investigation and an opportunity to respond. If, upon completion of an investigation, OPR determines that discipline is appropriate, the practitioner may make an offer to resolve the matter without a hearing and OPR may attempt to negotiate an agreed-upon sanction with the practitioner. If OPR and the practitioner do not agree on a sanction, then a proceeding for sanctions may be instituted with the filing of an administrative complaint. OPR’s entire investigatory and negotiation function is confidential and not disclosed to the public. Formal disciplinary proceedings are filed with, and held before,

---

7 Id.
10 Id.
12 Id. It is unknown what activity OPR took for 20 other cases received as referrals in this calendar year but not reflected in the dispositions. These numbers also do not include 106 cases that were referred by state disciplinary boards and bars, and the results of those referrals are not indicated.
14 31 C.F.R. § 10.61(b)(1).
15 31 C.F.R. §§ 10.50, 10.60.
an Administrative Law Judge (“ALJ”), who is expected to render a findings of fact and conclusions of law decision within 180 days of the conclusion of any hearing.\textsuperscript{16} An opportunity for briefing by the parties after hearing and before the ALJ decision is required.\textsuperscript{17} Both practitioners and OPR may appeal decisions of the ALJ.\textsuperscript{18}

**RECOMMENDATION**

According to its website, OPR’s mission is to “interpret and apply the standards of practice for tax professionals in a fair and equitable manner.”\textsuperscript{19} The importance of OPR’s mission cannot be overstated. Our system of taxation relies almost entirely on voluntary self-reporting. Practitioners play a vital role in assisting taxpayers to voluntarily self-report tax liabilities, and OPR, in turn, should act as the guidepost for ethical standards applicable to tax practitioners. OPR should be independent of outside influence and OPR’s enforcement should be robust, visible, and ethically sound.

OPR “is central to the IRS’s goal of maintaining high standards of ethical conduct for all practitioners and [OPR] must operate independently from IRS functions enforcing Title 26 requirements.”\textsuperscript{20} OPR’s independence from the IRS is essential to both our self-reporting system and OPR’s exclusive role in administering and enforcing Circular 230. If OPR were not independent, IRS agents could easily create conflicts of interest between taxpayers and their representative of choice by initiating a disciplinary action against practitioners who advocate zealously for their clients. Indeed, the Section has previously noted the problematic nature of having “disciplinary power being exercised by the same offices that address enforcement of Title 26.”\textsuperscript{21}

The Chief Counsel is charged with providing “the highest quality legal advice and representation for the Internal Revenue Service,” and is “the chief legal advisor to the Commissioner on all matters pertaining to the interpretation, administration and enforcement of the Internal Revenue Laws….”\textsuperscript{22} Attorneys who are employed by the IRS Office of Chief Counsel are duty-bound to assist the Commissioner in enforcing the Internal Revenue Laws. They cannot provide conflict-free advice to OPR when OPR’s function of administering Circular 230 and either carrying out (or declining to carry out) practitioner discipline will potentially put OPR at odds with the Service.

In addition to the problematic independence and conflict of interest issues that would certainly arise if OPR does not have internal, independent attorneys on staff, OPR investigations

\textsuperscript{16} 31 C.F.R. § 10.76(a)(1).
\textsuperscript{17} 31 C.F.R. §§ 10.70, 10.72, 10.76.
\textsuperscript{18} 31 C.F.R. § 10.77.
\textsuperscript{20} T.D. 9527, 2001-27 I.R.B. 1, at preamble (emphasis added).
\textsuperscript{21} Letter from Charles H. Egerton on behalf of the American Bar Association, Section of Taxation, to the Honorable Douglas Shulman, July 11, 2011.
require attorneys who are trained to perform complicated legal analysis. Accordingly, in order for OPR to fully administer and enforce Circular 230, as required by 31 C.F.R. § 10.1, the Section believes that the office should be staffed with qualified attorneys who have been trained both in the law and in the ethics of legal practice. Simply put, the work required of OPR staff is, at its core, legal work that attorneys are uniquely trained and qualified to perform.

Take, for example, two key components of a typical case in OPR that is not based on mere determination of whether a practitioner is in violation of his or her filing requirements: privilege and conflicts of interest. One or both of privilege and conflicts of interest issues can arise and require careful analysis in most OPR cases that do not turn on practitioner compliance. Both are legal issues that require attorney analysis.

The concept of privilege is central to our legal system. “Privilege” is the protection of certain communications and documents against compulsory disclosure, and protects the sanctity of certain relationships, including that of an attorney and her clients. Absent very specific circumstances, privileged information may not be disclosed even in response to discovery requests or formal inquiries by government agencies. Privilege may protect, among other things: confidential communications between a lawyer or tax representative and his client for the purpose of giving or receiving legal advice (attorney-client privilege); materials prepared in anticipation of litigation (work product privilege); communications between spouses (spousal privilege) and extensions of the attorney-client privilege to non-lawyers engaged to provide technical advice to a lawyer to enhance the lawyer’s ability to provide informed legal advice to his client (Kovel privilege). The attorney-client privilege concepts are made applicable to non-attorney tax practitioners by section 7525 of the Code23 so the analysis is similar.

Privilege primarily is a legal concept, based only in small part on statute and in large part on the Federal Rules of Civil Procedure and on case law that has developed over many decades. Each privilege doctrine has discreet elements that have been defined and refined by courts over the years. These principles still are being defined today. Therefore, questions of privilege can involve complex legal analysis, most of which is entirely unrelated to tax. That is why Revenue Officers and Agents themselves rely on Service attorneys to opine on these types of thorny issues in Service enforcement matters. Mistakes in this analysis can have devastating consequences, as disclosure of privileged information in one context may be deemed a waiver for all purposes.

Revenue officers and revenue agents are trained in tax. Circular 230, which contains the Regulations OPR is authorized to administer, is not a tax law. It has many key provisions comparable to the American Bar Association Model Rules of Professional Conduct (“Model Rules”).24 The Model Rules serve as models for the baseline standard of legal ethics and

23 References to a “section” or “I.R.C. §” are to a section of the Internal Revenue Code of 1986, as amended (the “Code”), and regulation references are to the Regulations promulgated thereunder (the “Regulations” or “Reg. §,” “Temporary Regulations” or “Temp. Reg. §,” and “Proposed Regulations” or “Prop. Reg. §”), unless otherwise indicated.

24 See, e.g., Kenneth M. Horwitz, Conflicts of Interest: IRS Rules Differ from AICPA Professional Standards, The Tax Advisor (Nov. 1, 2001), https://www.thetaxadviser.com/issues/2011/nov/tpr-nov11.html (providing an excellent background of the various revisions to Circular 230 over the years and how it has been edited to more closely reflect the ABA Model Rules with each revision).
professional responsibility for lawyers practicing law in every state in the United States. The Circular 230 provision on conflicts of interest contained in § 10.29 is “an intentional analogue to ABA Model Rule of Professional Responsibility 1.7.”\textsuperscript{25} In a presentation prepared and presented during the 2016 IRS Nationwide Tax Forum, OPR directed practitioners to look to the ABA rules for guidance on how best to avoid conflicts of interest. Notably, the American Institute of Certified Professional Accountants, or AICPA, also directs its members to seek advice from an attorney when conflicts of interest issues arise.\textsuperscript{26} In practice, accounting firms generally seek advice from general counsel on conflicts of interest issues.

Finally, the Section believes that eliminating attorney positions from OPR is inconsistent with the well-established principle that the ethical standards that apply to legal professionals should not be interpreted and enforced by nonlawyers without attorney involvement and oversight.\textsuperscript{27} Having non-attorneys alone evaluate the disciplinary action to be taken against attorneys is not merely an academic or a timing issue. Take, for example, an allegation that a practitioner violated section 10.20 of Circular 230 and failed to provide records or other information requested by the Service. If the practitioner raises a defense of attorney-client privilege as a reason why the documents were not turned over, then under the proposed elimination of attorneys at OPR, a non-lawyer would evaluate that defense and the legal question it raises.

If OPR determines a practitioner should be disciplined and the practitioner is unwilling to propose an appropriate sanction or agree to any counterproposal by OPR, OPR’s recourse is to file a complaint against the practitioner with an ALJ. An administrative hearing will then follow. The Section believes this administrative hearing is not an adequate substitute for having an experienced attorney making the highly nuanced judgment calls that are legal in nature and necessary to evaluate ethical conduct by attorneys or other tax practitioners. The Section believes that the absence of attorneys at OPR may lead to an increased number of hearings before ALJs, which will have significant impact on practitioners. The former Director of OPR, Karen Hawkins\textsuperscript{28}, put it this way:

The Director [of OPR] has enormous power to affect the livelihood and career of a practitioner. There are safeguards, of course, but the prehearing disciplinary process conducted by OPR, vests all authority in the Director and, potentially by


\textsuperscript{28} Ms. Hawkins also served as the Chair of the Section.
delegation, OPR staff. Far more cases are settled than litigated. The moral sensibilities of the Director and OPR staff control many of the outcomes.29

Practitioners under investigation by OPR should not have to wait until a formal proceeding is initiated to raise nuanced defenses to allegations of ethical misconduct, nor should they have to wait to have those defenses analyzed by a person with the specialized training necessary to understand the defenses. While non-attorneys can receive basic training in the ethical standards applicable to attorneys, this training is not an adequate substitute for a formal legal education which requires a course on professional responsibility, passing a professional responsibility examination, and taking ongoing continuing legal education courses with an emphasis on ethics.

The Section strongly believes that without independent attorneys who are trained in ethics and evaluating legal concepts such as privilege and conflicts of interest within its leadership and its ranks, OPR’s ability to administer and enforce Circular 230, and its independence, will be undermined. Adverse impacts on OPR do not take place in a vacuum, but instead may have a ripple effect on our self-reporting system of taxation. We urge the Service to adjust course and ensure independent attorneys remain with an independent OPR and carry out OPR’s important mission.