OVERVIEW OF OPR, CIRCULAR 230, AND RELATED PROCEDURES

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CHAPTER 6
Section 6

Overview of OPR, Circular 230 and Related Procedures

- **Organization**—We work for the Deputy Commissioner, Services and Enforcement. This reflects the Commissioner’s view that practitioner professional responsibility is key to effective tax administration.

- **Jurisdiction** – The title of our regulations is “Regulations Governing the Practice of Attorneys, Certified Public Accountants, Enrolled Agents, Enrolled Actuaries and Appraisers” however not all CPAs or attorneys with those titles fall within our jurisdiction. In order to fall within our jurisdiction one of those professionals would have to “practice” before the IRS. This is defined broadly in § 10.2 (d) as “all matters connected with a presentation to the Internal Revenue Service or any of its officers or employees relating to a taxpayer’s rights, privilege, or liabilities under law or regulations administered by the IRS.” Thus, in addition to the run of the mill representation before the service that we all think of, such as representing a taxpayer during an audit, it would also include, for example, requesting a private letter ruling. The recent Jobs Creation Act also confirmed that our jurisdiction extends to written opinions and their writers. What this means in practical terms, is that a practitioner may have prepared a written opinion for a client on a tax position for his return, but never filed a POA and sat in on a conference with a revenue agent or officer, and we would still have
jurisdiction over that practitioner. We have a proposed regulation change that would clarify this.

• Regulations governing practice appear in Treasury Circular 230. A key part of our job is to inquire into referrals about possible violations, and to take appropriate action when we find a violation has occurred. The process gives substantial protection to practitioners suspected of misconduct, including a right to a conference with us, discussions, a formal hearing before an independent ALJ, an appeal to a Treasury official, and judicial review.

• Sanctions for violations range from a private reprimand to disbarment. The American Jobs Creation Act added a civil monetary penalty option, up to the gross income derived from the misconduct. This penalty may be in addition to or in lieu of another sanction under Circular 230. If the employer, firm or other entity knew or should have known of the conduct giving rise to the sanction, we may impose a similar penalty—also up to the gross income derived—on the firm. This penalty is independent of any action taken under the Internal Revenue Code.

• OPR views the monetary sanction as one of the most important developments in the rules for practice before the IRS in recent memory. It strikes directly at the analysis of risk and reward that was reported in Senate hearings on tax shelter marketing. The sanction exposure is now the full amount of the fees, plus any action that may be taken under the Internal Revenue Code.
• What this means for practitioners who practice in a firm is that they need to take a fresh look at internal control and risk management procedures. The exposure to liability under Circular 230 for activity that the firm knew or should have known about is not conceptually different from the firm’s exposure to malpractice liability. We will be looking for internal control and risk management processes that are appropriate to the nature of the practice—including things such as training and supervision of staff, opinion and peer review processes.

• We in OPR are not the only ones who are concerned about professional responsibility issues. We have heard from practitioner groups, individual practitioners, academics and Congress that they agree with Commissioner Everson’s frequently expressed view—that tax professionals should be pillars of support for our system of tax administration, not the architects of its circumvention. We have been encouraged to take aggressive action against unethical and unscrupulous tax professionals—as the most effective way to promote public confidence in the vast majority of tax professionals who are committed to doing the right thing

**Enforcement priorities**

• Our system of tax administration relies on self assessment and compliance by taxpayers. We look at the role tax professionals play in this system on several
levels. First, as a taxpayer, we expect practitioners to timely file returns and pay their Federal tax obligations. Practitioner individual and business tax compliance is always going to be a part of our inventory, but we are going to address it more efficiently through education and self correction, and through a more systematic approach. The second aspect of the tax professionals’ role is in advocating their clients’ interests, helping their clients meet their tax obligations and helping them navigate through the tax code and IRS procedures.

- Finally, we look at the tax professionals’ obligation to the system of tax administration. Zealous representation has limits, some of which are found in the Internal Revenue Code, and others in Circular 230. We tell practitioners that when a client asks them to violate one of these limits, they need to think about whether they can continue to have a relationship with that client—do they need to “fire the client?”

- We are making significant efforts to address practitioner roles in abusive transactions. Recent amendments to Circular 230 clarify our expectations and raise the bar for written tax advice. However, we have found that some of the most troublesome behaviors by practitioners can be addressed through long-standing provisions of 230. Related to this is our decision to move our cases in parallel with other enforcement activities, where we can do so without compromise of either the other enforcement activity or the practitioner’s rights. This is a case by case assessment, coordinated with IRS Criminal Investigation
and Justice where appropriate and necessary. We make the call on the Circular 230 issue.

**Opinion Standards**

- While there has been a lot of discussion of what is wrong with the written advice standards, the reality is that the substantive expectations have not changed. Conceptually, the written advice standards should be read in conjunction with long-standing due diligence requirements. Due diligence obligations going back to the 1920s version of Circular 230 have been sufficient to define the professional obligations of tax practitioners in this area.

- The detailed form and content rules in the covered opinion standards were intended to cover advice on transactions with a higher risk of abuse. We have heard the criticisms that the “significant purpose” and “marketed opinion” definitions sweep in unintended and uncontroversial advice. We are working to address those concerns.

- Independent and competent advice has an important place in tax administration. Under appropriate circumstances, it has the effect of creating a presumption of reasonable belief in the validity of the taxpayer's position, thus providing penalty protection.
• In a nutshell if we see an opinion which appears to be based upon unreasonable factual or legal assumptions or which unreasonably relies upon representations, or if the opinion does not appear to consider all relevant facts, it will warrant a second look by us to determine if it complies with our rules.

Key Provisions of Circular 230

Information to be furnished 10.20

• On a proper and lawful request by a duly authorized officer or employee of the IRS, a practitioner must promptly submit records or information in any matter before the IRS unless the practitioner believes in good faith and on reasonable grounds that the records or information are privileged.

There are two areas of concern—information requested by an authorized IRS employee, and information requested by OPR.

• Insisting that a summons be issued is not grounds for action under Cir. 230

• If the practitioner does not have possession or control of the information, he she must promptly notify the requesting IRS person that he/she does not have the information and provide any information he/she has regarding the identity of any person he/she believes may have possession or control.
• You must make reasonable inquiry of the client (but not others) regarding the identity of the person with possession or control

When this rule was proposed in 2001, concerns were expressed about the obligation it places on practitioners to make an inquiry of their client, about its impact on privileged communications, and the ability of the taxpayer to challenge an unlawful request. The final rule did not change the practitioner’s ability to resist efforts by the Government to obtain documents or information that are irrelevant, confidential, privileged or otherwise immune from compulsion. That resistance must be based on a good faith belief and reasonable grounds, and usually will happen through summons enforcement proceedings.

On a proper and lawful request from OPR, a practitioner must provide information he/she has concerning an inquiry by OPR into an alleged violation of Circular 230 by any person, and to testify regarding this information in any proceeding. We use this authority to develop information to enable us to determine whether a violation may have occurred.

**Prompt Disposition of Pending Matters 10.23**

• A practitioner may not unreasonably delay. Instances of missed appointments or other agreed upon deadlines may occur in IRS/practitioner relationships periodically. We often hear that the practitioner has overbooked himself in an
effort to accommodate all of his clients, who have no one else to look to. But a practitioner’s failure to manage his practice, or his willingness to take on more clients than he can adequately serve, can cause delays in the resolution of a significant number of cases, adversely affecting both the Service and his clients. Unreasonable delay under Section 10.23 covers a wide range of behavior; it can take the form of several long delays or a pattern of short delays.

**False and misleading information** 10.51(d)

- This section defines disreputable conduct to include providing false or misleading information, or participating in any way in the giving of false and misleading information. Under 10.51(d), a practitioner may be disciplined for submitting false or misleading information before the IRS knowing such information to be false or misleading. False or misleading information includes matters contained in testimony, Federal tax returns, financial statements, applications for enrollment, affidavits, declarations, or any other document or statement, written or oral.

**Conflicts** 10.29

- The Circular 230 prohibition on representation if there is a conflict of interest is virtually identical to the ABA Model Rule on conflicts. In evaluating whether a conflict may exist, OPR draws on the same body of law that applies to conflicts in
The concepts are no different. Where we may differ is in process—Circular 230 requires that the informed client consent must be confirmed in writing, that the writing be retained for at least 3 years after the conclusion of the representation, and that the writing be made available to any officer or employee of the IRS on request.

We have a proposed change to this regulation that the writing must be from the client OR documented by practitioner and countersigned by the client. This proposed change would make it absolutely clear that the client understood the conflict before agreeing to the representation.

**Due Diligence 10.22**

- The general standard for exercise of due diligence is in 10.22. It applies to preparing or assisting in preparation of returns and other papers to IRS, and determining the correctness of oral or written representations by the practitioner to IRS or Client. Under this section you may rely on work of others if reasonable care in engaging them.
A practical application of the diligence rules reaches a variety of situations, including making reasonable inquiries when client provides information that suggests possible participation in an abusive transaction. It would also cover, for example, your review of a financial statement in connection with an OIC.

**Standard for return positions 10.34**

- Return positions must have a realistic possibility of being sustained on merits or not be frivolous and the client must be advised of the opportunity to avoid accuracy penalties by disclosing the position. Under this section, you may rely on information provided by client, in good faith.

  But much like section 10.22, you may not ignore implications of information provided or actually known. Thus, you must make reasonable inquiries if information appears incorrect, inconsistent with an important fact or factual assumption, or incomplete.

The proposed regulations extend these rules to advice on other documents that are to be submitted to the IRS, such as, for example, papers involving procedural or factual matters.

Under the proposed regulations a practitioner may not advise a client to take a position on a submission to the IRS unless the position is not frivolous. A
practitioner also may not advise a client to submit a document to the IRS that is meant primarily for delay; is frivolous or groundless; or contains or omits information in a manner that demonstrates an intentional disregard of a rule or regulation.

These standards would supplement (NOT replace) the existing requirement in §10.22 that practitioners exercise due diligence in preparing, or assisting in the preparation of, tax returns and other documents relating to IRS matters.

Contingent Fees 10.27

- The current rules preclude contingent fees in connection with an original return, but permit a contingent fee for preparation of, or advice in connection with, an amended return or claim for refund—but only if the practitioner reasonably anticipates substantive review of the amended return or claim for refund. This is an unworkable standard.

The Treasury Department and the IRS continue to believe that a rule restricting contingent fees for preparing tax returns supports voluntary compliance with the Federal tax laws by discouraging return positions that exploit the audit selection process. Additionally, a broader prohibition against contingent fee arrangements is appropriate in light of concerns regarding attorney and auditor independence. The recent shift toward even greater independence, including rules adopted by
the Securities and Exchange Commission (SEC) and the Public Company
Accounting Oversight Board, also support expanding the prohibition on
contingent fees with respect to Federal tax matters.

We are currently considering comments to the proposed rule. Under the current
proposed rule, a practitioner generally is precluded from charging a contingent
fee for services rendered in connection with any matter before the Service,
including the preparation or filing of a tax return, amended tax return or claim for
refund or credit.

There are some exceptions to this general rule. A practitioner may charge a
contingent fee for services rendered in connection with the Service’s examination
of, or challenge to, an original tax return. Practitioners may also charge a
contingent fee for services rendered in connection with the Service’s examination
of, or challenge to, an amended return or claim for refund or credit filed prior to
the taxpayer receiving notice of the examination of, or challenge to the original
tax return.

There is also an exception which allows contingent fees for any judicial
proceeding arising under the Internal Revenue Code.
XP Procedures:

- Certain offenses are so egregious that we are allowed to impose an expedited suspension unilaterally without the initial involvement of an administrative law judge. Even for those cases we ask the practitioner to file an answer to our complaint and he or she is allowed a conference with us. Currently this procedure is for only convictions of crimes under Title 26, a loss of licensure by the practitioner’s state agency, or the violation by the practitioner of a prior settlement. We do have proposed regulations that would extend this to egregious tax non-compliance defined as failure to file or pay a tax required annually in three of the preceding five years, or in four of the preceding 7 periods for taxes required more frequently than annually. Also it would be extended is a finding by a court of competent jurisdiction that the practitioner has instituted proceedings primarily for delay, has advanced frivolous or groundless arguments, either relating to a taxpayer’s tax or the practitioner’s own tax issues, or has failed to pursue available administrative remedies for a client.

We have had comments that this rule is unnecessary as there probably isn’t a large population of tax professionals not paying their own taxes. Unfortunately, one of the most common violations of our rules is here.
CIRCULAR 230 CASE DEVELOPMENT

- **The Three Part Screening Process**: 1.) Determine Jurisdiction; 2.) Determine whether alleged misconduct is actionable; and 3.) Determine whether alleged misconduct is timely.

Not every type of wrongdoing is a matter that should come before our office. For example, our office would not open a case on a practitioner who has been sued by a former employee for sexual harassment, or who received a series of parking tickets. The misconduct must be of a type contemplated by Circular 230. Section 10.51 defines "disreputable conduct" as including, but not limited to, certain enumerated actions. However, this should not be read as a "catch-all" provision; the conduct, even if not covered by the subsequent paragraphs in Section 10.51, should be of the same general type as the conduct described therein.

As a matter of policy, OPR generally will not pursue allegations of which the IRS knew or should have known of the misconduct more than five years before the date upon which we can reasonably expect a proceeding will be instituted.

- **Gather The Evidence**

An Enforcement Attorney and a Paralegal will identify and take action to collect the appropriate types of evidence. The Enforcement Attorney, together with the
Team Chief, will review the evidence and determine if it supports the allegations of misconduct. For example, in a case involving the submission of false or misleading information (Section 10.51 (d)), the Enforcement Attorney would likely secure the returns at issue, as well as any audit work papers or Revenue Agent Reports. In some cases, we will make requests for information under Section 10.20 in order to develop the facts.

- **Issue an Allegation Letter**

After initial screening and fact finding, OPR must decide whether to issue what we call an allegation letter. Either the case will move forward for the issuance of an allegation letter, be held for further consideration, or be closed without action.

Among the factors to consider in determining whether to issue an allegation letter are: 1.) The weight of the evidence; 2.) The framing of the charges (*i.e.*, which sections of Circular No. 230 to move under); 3.) Possible defenses the practitioner could raise; 4.) The range of acceptable penalties that might be appropriate if the allegations are proven true; 5.) The potential impact of case on tax administration.

If an allegation letter is warranted the enforcement attorney drafts the letter, summarizing the allegations based upon the evidence provided. The allegations will cite specific sections and paragraphs of Circular 230. The practitioner
generally is not informed of the exact sanction that may be imposed; the letter may simply state that OPR is considering instituting a proceeding for the practitioner's "disbarment or suspension from practice before the Internal Revenue Service." Ultimately, the appropriate sanction must be specified in the complaint. The letter will invite the practitioner to submit anything in writing he or she might choose to submit, and invite them to meet with us to discuss the allegations.

The allegation letter states that a response is due within thirty days, but the practitioner may request an extension of time to gather evidence and / or retain a representative. Further extensions may be granted with appropriate approval.

- **The Initial Response**

Affording the practitioner an opportunity to respond to the allegations before the issuance of a complaint is a "win-win" situation - it is often in the practitioner's interest to avoid a disciplinary proceeding by affirmatively responding to the allegations, and it is likewise in the interests of OPR not to pursue allegations that are unlikely to be substantiated. The practitioner's response is evaluated according to the following factors: 1.) The sufficiency of the defense (taken as true); 2.) The persuasiveness of the defense (i.e., the probability that the defense will be believed); 3.) The availability of documentary evidence and the
credibility of witnesses we anticipate the practitioner will utilize in his or her defense.

OPR sometimes conducts supplemental reviews to determine if it can rebut the practitioner's defenses before determining our course of action. If the practitioner's response is sufficient to overcome all of the stated allegations, the Enforcement Attorney issues a "Close Without Action" letter.

If the practitioner's response is sufficient to overcome some, but not all, of the allegations, the Enforcement Attorney contacts the practitioner or his or her representative by telephone, and explains why the other charges remain unresolved. If the response is inadequate, the OPR matter will proceed.

• **Conferences**

When a practitioner so requests, OPR will afford the practitioner or his/her representative a conference. Section 10.61 (a) does not specify the manner in which the conference may be held. The Enforcement Attorney offers the following options to practitioners: 1.) A face to face meeting with the practitioner and his or her representative at the OPR office in Washington; or 2.) A telephone conference call with the practitioner and his or her representative from the respective offices of all parties.
Sanctions

- OPR is required to state what sanction we are seeking when we initiate a proceeding through a formal complaint (see Section 10.62(b)). This decision by OPR has important consequences for the case, because the Administrative Law Judge will apply a heightened burden of proof ("clear and convincing evidence") to a case in which OPR seeks disbarment or a suspension of six months or greater. The goal is to recommend a penalty that is commensurate with the misconduct at issue (i.e., the punishment should fit the "crime").

Factors

- Circular 230 provides no hard and fast formula for determination of the appropriate sanction in each case. Generally, OPR looks at the following factors: 1.) The nature and severity of the offense(s) in question, including injury to the client, "the system," and the public; 2.) The repetitiveness of the conduct (i.e., a pattern of behavior is generally more serious than an isolated incident); 3.) The practitioner's prior disciplinary history, if any, with our office; 4.) Any aggravating or mitigating factors which may be present (see list below); and 5.) The impact that not adequately disciplining the practitioner would have on tax administration, the confidence of the practitioner community and the taxpaying public in our enforcement efforts.
General Aggravating Factors (this list is not exhaustive): 1.) Sum of money at issue; 2.) Motive, especially when there is personal gain involved; 3.) Degree of frequency with which practitioner engages in practice before the Service.

General Mitigating Factors (this list is not exhaustive): 1.) Age of the allegations (not the age of the practitioner); 2.) Practitioner's good-faith reliance on faulty information furnished by his or her client or a third party; 3.) Degree of contrition expressed by practitioner, as well as any corrective actions taken to prevent future violations; 4.) Health problems, extenuating circumstances or personal hardships experienced by practitioner; 5.) Potential for rehabilitation—we generally reserve disbarment for those practitioners for whom the evidence indicates that a less severe sanction would likely have little or no deterrent effect.

Anatomy of an ALJ proceeding

- Circular No. 230 is not terribly specific with respect to the conduct of hearings. Individual ALJ’s may set forth particular requirements for the conduct of such proceedings, but Circular 230 proceedings typically move forward in the following fashion:

GLS will file a complaint on behalf of the Director, OPR. The complaint is filed with the Chief ALJ and served upon the practitioner at his or her last known residential address as reflected on their 1040 return. For practical purposes,
GLS will serve the complaint at another place if the practitioner or his or her representative have so requested. The practitioner will either file a responsive pleading (such as an answer or motion to dismiss), or fail to respond, in which case GLS can move for a decision by default. The Chief ALJ will designate him or herself or another ALJ to preside over the case, and send out an Order of Designation to the parties notifying them of same.

The ALJs may send out a Pre-hearing Order, which usually requires the parties to report on the progress of settlement discussions (without disclosing the terms of such discussions to the ALJ). Should a settlement result prior to a hearing, an "acceptance letter" acknowledging receipt of the practitioner's settlement offer and accepting the practitioner's offer of consent to the sanction in question will be prepared. This letter must be approved by the Director of OPR. If there has been no settlement, the parties are usually required to exchange witness lists and copies of documentary evidence they intend to offer at the hearing.

The parties may, in rare instances, move for leave to take the deposition of a witness in advance of the hearing. In such instances, the party would need to demonstrate to the ALJ that simply having the witness testify at the hearing is not sufficient, either because the witness would be unavailable at the hearing or because having the deposition testimony in advance of the hearing is critical for the preparation of the party's case.
Although not expressly provided for by Circular 230, the parties may move for summary judgment.

The hearing is held in the presence of a Certified Court Reporter. These hearings are closed to the public unless the practitioner requests that it be opened. When proceedings are opened to the public, care is taken to safeguard confidential taxpayer information from unauthorized disclosure;

Under the current rule disciplinary proceedings are closed to the public unless the practitioner requests otherwise, under 10.71(b), subject to protecting from disclosure confidential tax information. We have had occasions where it was requested to be made public. The proposed rule at 10.72 (d) provides that hearings, reports, evidence and decisions in a disciplinary proceeding will be open to public inspection. Information about third party taxpayers must be protected, and the ALJ may issue a protective order for matters that may be privileged, confidential or sensitive in some other way. For example, in some cases a practitioner's medical condition may be raised as a defense or mitigation issue. It may be appropriate to limit public release of such information. At the conclusion of the proceeding, all returns and return information will be redacted and replaced with a code.

The purpose of this proposal is to provide transparency for disciplinary proceedings. There is a public interest in such matters, as evidenced by the ABA
Model Rule on this topic which as been adopted in whole or part in 41 States.

Transparent proceedings increase the accountability of both practitioners and the OPR, and will provide a body of case law for interpreting Circular 230.

It has been suggested that OPR’s close connection with IRS enforcement puts us in a different position than a Bar discipline board. And it is true we get most of our cases from IRS exam. But without transparency we cannot defend ourselves on the issue of independence.

The parties may be required to submit post-hearing briefs and/or proposed findings of fact and conclusions of law. Some ALJ's prefer oral closing arguments at the conclusion of the hearing. The burden of proof that must be met ranges from a standard of “preponderance of the evidence” for sanctions of less than six months, to the more difficult “clear and convincing” standard for sanctions of greater than six months.

The ALJ issues a Decision, determining whether misconduct occurred and evaluating the misconduct for determination of the appropriate sanction.
Disposition of ALJ Decisions and Processing of Appeals

- Should an Administrative Law Judge (ALJ) issue a decision authorizing any sanction at all, the practitioner has thirty days to appeal this decision to the Secretary of the Treasury. If the ALJ issues a decision dismissing the complaint or if the sanction is considered by OPR to be too lenient, OPR will request that GLS file an appeal with the Secretary of the Treasury.

  If there is no appeal within thirty days, the ALJ decision becomes the final agency decision. If an appeal is filed, the decision by the Secretary or the Secretary’s designee is the final agency decision. Final agency decisions can be challenged in Federal District Court, but these challenges are rare and there are very few reported decisions. Under our current rules, the proceedings only become public, when the case reaches the District Court.

  The IRS and the Department of Justice often seek injunctive relief to prevent the promotion of fraudulent and abusive tax schemes, including the promotion of frivolous return positions. OPR looks at each injunction case involving a Circular 230 practitioner to determine whether additional action may be necessary or appropriate. Some injunctions issued by the District Courts include relief that has the effect of barring practitioners from representing clients before the Service. This may be viewed as tantamount to disbarment, making OPR action moot. In other cases, the injunction only proscribes certain abusive practices but still
allows a practitioner to represent clients before the Service. The findings of fact by the District Court in such a case could be cited in the OPR proceeding. Additionally, preliminary injunctions barring representation of clients before the Service are, by their very nature, temporary, and may require OPR follow-up.

- Disclosure of Result to State Licensing Authority

One initiative actively being pursued by OPR is increased sharing of information with state licensing authorities. Notice of the fact that a practitioner has been disbarred, suspended or censured is currently published in the Internal Revenue Bulletin. As such, the fact that discipline has been imposed is a matter of public record. However, absent a request by the practitioner that the proceeding be made public, OPR does not have the ability to disclose the nature of the underlying allegations. This has proven frustrating to those state licensing authorities whose own rules require more information than is currently available from OPR before determining whether to take reciprocal action. Some jurisdictions have obtained consent to disclose from the attorney or CPA, permitting us to share information about the basis for the disciplinary action.

If you would like more information on OPR, you can visit the IRS' website at www.irs.gov, click on Tax Professionals, and scroll down to Standards of Practice. You can download a copy of Circular 230, there are links to relevant publications and a form 2848 and other information relevant to practice.