

# The Stakes are High – Failure to Comply with Your Duties Under Circular 230 Could Place You on the Bench Indefinitely

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On March 3, 2014, the Internal Revenue Service published Announcement 2014-13 ("Announcement"). The Announcement sets forth the disciplinary actions the Office of Professional Responsibility ("OPR") recently took against practitioners.

The OPR is responsible for interpreting and applying the Treasury Regulations governing practice before the Internal Revenue Service (commonly known as "Circular 230"). It has exclusive responsibility for overseeing practitioner conduct and implementing discipline. For this purpose, practitioners include attorneys, certified public accountants, enrolled agents, enrolled actuaries, appraisers, and all other persons representing taxpayers before the Internal Revenue Service.

In essence, Circular 230 sets forth the "rules of the road" for tax practice before the Service. Circular 230 cases generally revolve around a practitioner's fitness to practice.

## **The OPR is comprised of three major divisions:**

- Office of the Director;
- Legal Analysis Branch; and
- Operations and Management Branch.

The Director, currently Karen Hawkins, has primary supervisory responsibility for OPR. She reports to the Commissioner and Deputy Commissioner of the Internal Revenue Service. Ms. Hawkins' authority includes oversight and control of OPR policy decisions.

The Legal Analysis Branch is tasked with the interpretation and application of Circular 230 in the cases involving practitioners. Jack Manhire is currently the Chief of the Legal Analysis Branch.

The Chief of the Operations and Management Branch is currently Robert Johnson. This group manages OPR's administration, communications, budgetary and personnel functions.

OPR's authority and case determinations are independent of the Internal Revenue Service enforcement functions. Referrals to OPR, alleging practitioner violations of Circular 230, typically come from two sources:

- Internal sources (e.g., Internal Revenue Service Examination Division); and
- External sources (e.g., taxpayers, boards of accountancy, practitioners, etc.).

Following receipt of a referral, the OPR is tasked with determining, based upon the facts and circumstances, whether a violation of Circular 230 occurred, whether the violation is one which calls into question the practitioner's fitness to practice, and the appropriate sanction, if any. The life of a referral generally takes the following path:

- The OPR performs a preliminary investigation of the facts and circumstances to determine whether it is likely a violation of Circular 230 occurred.
- If the OPR determines that a violation of Circular 230 likely occurred, it notifies the practitioner and gives the practitioner an opportunity to present evidence to support his or her case.
- After taking into consideration its investigatory findings and information presented by the practitioner, the OPR determines the level of discipline, if any, to apply to the case.
- If the OPR and the practitioner do not agree to an appropriate sanction, OPR prepares a complaint and refers the matter to the General Legal Services Division of the Office of Chief Counsel.
- The Office of Chief Counsel will generally attempt to work with the practitioner, giving him or her another opportunity to resolve the matter. If a resolution is not reached, however, the Office of Chief Counsel files the complaint so that the matter is presented to an administrative law judge ("ALJ") in accordance with the Administrative Procedures Act.
- The parties can always settle the case during the pendency of the ALJ proceeding.
- If the case is not resolved, a hearing before the ALJ will occur. The ALJ, after hearing the case, issues a decision commonly referred to as the "Initial Decision and Order."
- Either the OPR or the practitioner may appeal the ALJ decision to the Treasury Appellate Authority. In such event, the Treasury Appellate Authority reviews the case and issues what is commonly referred to as the "Final Agency Decision." The text of the Final Agency Decision is made available to the public.
- The practitioner may appeal a Final Agency Decision to the U.S. District Court. The proceeding is not, however, a *trial de novo*. Consequently, the court will only review the findings of fact on the record in the ALJ proceeding and will only set aside the decision if it was arbitrary or capricious, contrary to law, or an abuse of discretion.

- The burden of proof in these cases is on the OPR. It must show the practitioner willfully violated Circular 230 by "clear and convincing evidence."
- The sanctions against a practitioner in these cases generally include: disbarment or suspension of practice before the Internal Revenue Service; censure (public reprimand); and/or imposition of monetary penalties.

The types of matters referred to the OPR include, without limitation, practitioners involved in promoting abusive tax shelters, preparing and filing frivolous tax returns, willfully attempting to evade any federal tax, diverting taxpayer refunds, repeated patterns of misconduct, and willful violations of Circular 230.

As reflected in the Announcement, during the last half of 2013, three enrolled agents, seven CPAs, three unenrolled preparers, and three attorneys were subjected to OPR discipline. This included 11 suspensions and 5 disbarments.

The Announcement illustrates the high stakes. Practitioners must pay careful attention to Circular 230 and their obligations thereunder.

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