



## Due Process Procedures in Circular 230 Matters

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#### Due Process Procedures in Circular 230 Matters

The Office of Professional Responsibility (OPR) is taking the opportunity to highlight for the practitioner community the due process protections incorporated throughout the handling of a Circular 230 case, including an investigation and any disciplinary proceeding.

Referrals to the OPR alleging violations of Circular 230 (*Regulations Governing Practice before the Internal Revenue Service*) come from a variety of internal and external sources. When a referral is received, the OPR first determines whether the office has jurisdiction over the tax professional who is the subject of the referral—that is, whether the individual is a practitioner or is otherwise regulated by Circular 230. “Practitioners,” who are the focus of this article, are attorneys, certified public accountants, enrolled agents, enrolled retirement plan agents, and enrolled actuaries. Appraisers who submit appraisals supporting tax positions and tax return preparers granted limited-practice privileges under the IRS’s Annual Filing Season Program must also comply with Circular 230, as applicable. Assuming jurisdiction exists, the OPR independently determines whether the alleged violations concern a practitioner’s fitness to practice before the IRS and, if so, whether the allegations merit further scrutiny through inquiry or

investigation, the extent of which will depend on the facts and circumstances.

### Nonsanctionable Conduct

The OPR may determine that alleged misconduct is not sanctionable (that is, the alleged misconduct does not warrant a Circular 230 sanction or a Deferred Discipline Agreement). Sometimes the OPR receives a referral or complaint that does not contain sufficient or clear evidence that the practitioner acted willfully. The OPR may conclude that contacting the practitioner is warranted. If so, the office will often pursue a "Soft" letter process. This process gives the practitioner notice of the referral of suspected Circular 230 misconduct and an opportunity to be heard.

Prior to 2016, if the OPR decided not to act on an active case beyond a warning letter, a practitioner would not always have been aware that a referral had been made until the practitioner received a letter closing the case. Since 2016, the OPR has, prior to closing, corresponded with practitioners regarding referrals determined to be not actionable or that do not warrant a sanction, such as a censure or suspension. An initial "Soft" letter informs a practitioner of the information referred and provides the practitioner 60 days to submit a written response and any supporting documentation, if the practitioner wishes to do so. Upon receipt of a response from the practitioner (or their authorized representative), the OPR will carefully consider the contents. After consideration or when the 60-day period has lapsed, the OPR will mail either a clearance letter or, more typically, a closing "Soft" letter notifying the practitioner that the OPR is not taking any further action on the referral, the matter is closed, and the administrative file on the matter will be retained by OPR for the retention period prescribed in the applicable records control schedule.

The issuance of the "Soft" letters by the OPR and any communications between the OPR and the practitioner (or their authorized representative) resulting from these letters is not made public.

### Sanctionable Conduct

If the OPR determines one or more alleged violations are actionable and warrant discipline (including deferred discipline, when appropriate), the office will inform a practitioner of the purported misconduct by mailing a letter to the practitioner's "last known address" as defined in IRC section 6212. This letter describes the allegations and gives the practitioner an opportunity to respond. Practitioners under investigation have the right to retain representation, to submit evidence or mitigating information, to request materials from the OPR's case file pursuant to IRC section 6103, and to hold a conference with OPR attorneys. This process, which precedes the commencement of any formal proceeding, allows a practitioner to access evidence supporting alleged violation(s) of Circular

230 without submitting a Freedom of Information Act (FOIA) request. This process is designed to give the OPR and the practitioner a full and thorough understanding of the circumstances surrounding the alleged misconduct.

Most matters before the OPR are resolved without the office filing a complaint with an Administrative Law Judge (ALJ). A practitioner may propose settlement during an investigation, including consensual discipline or other corrective action. In response, the OPR will attempt to negotiate an appropriate outcome. Possible options include the sanctions of censure, suspension, or disbarment from practice or the sanction of a monetary penalty. All sanctions are made public. The office also has the discretion to enter into a Deferred Discipline Agreement or privately reprimand a practitioner if sufficient evidence exists that the practitioner violated Circular 230 and other case dispositions have been ruled out.

When the OPR believes a sanction is appropriate and is unable to negotiate a resolution with the practitioner, a formal "complaint" is drafted and the case is referred to the Office of Chief Counsel, General Legal Services (GLS). GLS sends a letter to the practitioner offering a final opportunity to resolve the matter without a proceeding. If settlement is not reached, GLS files the complaint to commence a civil proceeding before an ALJ. The ALJ presides over the proceeding and decides the merits of the case against the practitioner. The proceeding is generally governed by the Administrative Procedure Act (5 USC 500, *et seq.*). The ALJ may order a hearing to be held, during which the OPR and the practitioner (or their counsel) present each side's evidence and arguments. Although rare, the case may be settled by concurrence of both parties at any time prior to entry of a decision.

If a hearing is conducted, and after post-hearing briefs are submitted, the ALJ issues an Initial Decision and Order. The ALJ may find the OPR has proven the allegations of the complaint and conclude the practitioner committed violations of Circular 230 for which the practitioner should be sanctioned. The ALJ may then go on to impose the sanction that the OPR proposed. Alternatively, the ALJ may rule in the OPR's favor on the facts and law but increase or reduce the recommended sanction. Or the ALJ may reject both the OPR's version of events and its recommendation of a sanction, and thus dismiss the case.

Following the ALJ's Decision and Order, either party may appeal the case to the Treasury Appellate Authority (an attorney in another division of the Office of Chief Counsel who had no previous involvement with the case). If neither party appeals within 30 days, the ALJ's Initial Decision and Order becomes the Final Agency Decision. If either party appeals, the Appellate Authority will, after receiving briefs from both parties and reviewing the record, render the Final Agency Decision. For the OPR, a decision by the Appellate Authority is a final determination in the case.

A practitioner who is not satisfied with the Appellate Authority's Final Agency Decision may file a complaint in U.S. district court to contest it. This proceeding is also conducted according to the Administrative Procedure Act, under which the Federal district judge will review findings of facts based on the administrative record and will set aside agency action found to be arbitrary or capricious, contrary to law, an abuse of discretion, or otherwise improper.

The OPR recognizes the enormous authority and trust vested in the office and the substantial impact disciplinary action can have on a practitioner, as well as taxpayers. The OPR takes its mission seriously. As such, the office follows a cautious and measured approach when acting on a referral and ensures practitioners are given proper due process during the life of a case, from beginning to end.

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