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The IRS Office of Professional Responsibility

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By Scott D. Michel and Justin A. Thornton

What Responsible Professionals Need to Know

As many criminal practitioners are acutely aware, the Internal Revenue Service has recently ramped up compliance and enforcement efforts with budget increases and enhanced resources. A lesser-known component of this revitalized enforcement is the IRS Office of Professional Responsibility (OPR), which is charged with regulating professionals -- mostly lawyers and accountants -- who practice before the IRS. OPR enforces ethical rules that govern practice before the Service, commonly known as "Circular 230," and may sanction practitioners who violate those rules. Because OPR matters can interact with the criminal process in many respects, conscientious white-collar practitioners and corporate tax counsel should familiarize themselves with OPR and its power over tax professionals.

OPR Jurisdiction and Process

Circular 230 applies to persons practicing before the IRS, *ie*, accountants and lawyers who appear on an IRS power of attorney, entitling them to represent clients in audits, collection matters or criminal inquiries, regardless of whether such practitioners are in a private firm or a corporation's tax department. Circular 230 includes requirements that practitioners comply with all laws with regard to their own tax filings; avoid improper conflicts of interest; act with "due diligence" in the rendering of tax advice; cooperate to the extent legally required in any IRS examination of a client; and act with integrity and honesty in dealing with the IRS. Thus, for example, a violation of Circular 230 may occur where:

- a corporate tax official fails to file a personal tax return, files a materially false return, or knowingly assists another in the filing of a false return;
- an accountant makes misstatements about the availability of information to an IRS agent during an audit; or
- a tax lawyer knowingly markets a tax shelter product contrary to law or regulation.

A violation of Circular 230 can lead to potential sanctions, including reprimand, suspension from practice before the IRS for a period of time, or permanent disbarment from such practice. (Disbarred practitioners may apply for reinstatement after 5 years.) The new tax bill, signed into law in October 2004, provides OPR with additional authority -- to seek injunctive relief, to levy monetary sanctions and to impose its practice-related sanctions against entities, such as accounting or law firms. Additionally, OPR may refer matters to state licensing authorities,

thereby placing at risk a professional's right to practice altogether.

OPR may initiate a matter on its own, or, more commonly, on referrals from audits, collection matters, or criminal investigations, in which an IRS employee believes there is evidence of practitioner misconduct. Informants also constitute a source of referrals. Once a file is opened, OPR conducts an inquiry, notifies the practitioner of the investigation, and offers the practitioner the opportunity to present a defense or settle the case. The practitioner may appeal an adverse administrative decision within the Treasury Department. If the matter is still not resolved, OPR initiates a proceeding before an Administrative Law Judge, who conducts a trial, makes findings, and, if OPR prevails, imposes a sanction. The practitioner may appeal an adverse ALJ decision to a federal district court. OPR matters are confidential until such an appeal unless the practitioner wishes otherwise.

OPR's Nexus to Criminal Tax Matters

There are important reasons for understanding the potential interaction between OPR and an IRS criminal tax investigation. For openers, it is noteworthy that the new Director of OPR, Cono R. Namorato, is a seasoned former criminal tax prosecutor and defense attorney, who some believe is likely to operate the office with a more "prosecutorial approach." Moreover, recent OPR pronouncements and "scuttlebutt" about pending matters reveal ways in which OPR can intersect with the criminal process.

First, like any other branch of the IRS, OPR may refer a matter for criminal investigation upon ascertaining a "firm indication of fraud." Thus, even if no criminal investigation is pending, if OPR believes that information from an IRS agent contains evidence that a practitioner engaged in fraud, it can refer the file to the IRS Criminal Investigation Division (CID). CID may then open an investigation if it believes one is warranted. So, for example, if an IRS collection official believes that a professional has assisted a client in evading payment of tax and refers the matter to OPR, that Office can refer the matter to CID, which might open an investigation into criminal evasion of payment.

Second, in a new development, OPR and the criminal process may intersect during an ongoing criminal tax investigation. The IRS had long observed a strict boundary between the IRS criminal and civil processes -- normally, when a criminal tax investigation begins, all civil activity related to the case ceases. Recently, however, this wall has eroded, and in this vein, OPR officials have said that it will not cease an inquiry into practitioner misconduct simply because the matter relates to an ongoing criminal tax investigation; to the extent OPR can conduct a parallel inquiry without jeopardizing the criminal matter, it may do so.

Further, while OPR does not have summons authority over witnesses and documents, it may issue a letter of demand, seeking information, to a practitioner. A practitioner's failure to cooperate is a material factor in OPR's resolution of a case. OPR can enlist Revenue Agents to gather information on its behalf. OPR may also receive from the Department of Justice information about statements made by unsworn witnesses who voluntarily meet with prosecutors during a grand jury investigation. (The government presumably would maintain that grand jury secrecy rules do not apply under such circumstances.)

Thus, a professional may be the subject of both a grand jury investigation and an OPR inquiry. For example, a grand jury may be investigating a corporate tax official's role in helping his company evade tax through participation in a potentially criminal tax shelter, while,

simultaneously, OPR may be evaluating that practitioner's conduct in a related, prior civil examination or even with regard to his or her individual tax compliance. If the professional cooperates with OPR, that information can be shared with those handling the criminal case; if no cooperation is forthcoming, the practitioner will likely be suspended or disbarred from practicing before the IRS and face potential loss of his license to practice altogether.

While OPR will surely proceed with caution in conducting parallel inquiries, Office officials have said that they will continue their own inquiry so long as it does not harm the criminal matter. While this development carries risks for involved practitioners, recent remarks by IRS and DOJ officials point to a possible benefit - that practitioners may be able to reach a "global settlement" to resolve simultaneously the criminal and OPR matters.

Further, OPR can play a role in a closed-out criminal tax matter. Obviously, where a practitioner is convicted of a tax crime or related offense, OPR will take expedited steps to prohibit such a person from practicing before the IRS; the professional is likely to face a permanent loss of license anyway.

OPR's new authority against entities, however, takes on heightened relevance in this context. If a professional at an accounting or law firm is convicted of a criminal offense but the firm has escaped indictment, OPR might nonetheless seek a firm-wide sanction. The Office could move to suspend or disbar from IRS practice an entire firm based on the criminal conduct of a firm employee. For a law or accounting firm that specializes in tax practice, this could be tantamount to putting the firm out of business. Or OPR could exercise its new authority and impose a stiff monetary sanction.

Finally, OPR might play a role where the government decides to decline prosecution in a criminal tax case. A prosecutor who concludes that a criminal tax case is not worthy of prosecution, may, after obtaining court order releasing grand jury secrecy, send the file to OPR for action against the practitioner. Alternatively, in a close case, counsel for a practitioner who is the target of the investigation might propose a criminal declination with the practitioner's cooperation in an OPR inquiry or consent to an OPR sanction.

Conclusion

At first blush, OPR may appear to be a purely civil process directed at the unethical conduct of a tax practitioner. But OPR's jurisdiction, procedures, and sanctions may well converge with criminal tax investigations and prosecutions. With its growing presence and increased authority, OPR should neither be ignored nor underestimated.

The authors are Washington, DC, practitioners specializing in the representation of individuals and entities investigated or accused of criminal tax fraud and related matters. **Justin A. Thornton** is a former federal prosecutor and member of this newsletter's Board of Editors. **Scott D. Michel** is a member of Caplin & Drysdale and former Chair of the ABA Tax Section's Committee on Civil and Criminal Tax Penalties.