THE OFFICE OF PROFESSIONAL RESPONSIBILITY'S ANNUAL REPORT

FY 2018

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The Internal Revenue Service (IRS) published its Fiscal Year (FY) 2018-2022 Strategic Plan which provides the roadmap the IRS will use over the next five years to achieve its overall goals as an agency (Publication 3744). The Office of Professional Responsibility (OPR) supports the mission of the IRS by aligning our business-unit goals with those of the Strategic Plan.

The goals that the OPR focused on during FY 2018 were:

- *Empower and enable all taxpayers to meet their tax obligations.*
- *Collaborate with external partners proactively to improve tax administration.*
- *Protect the integrity of the tax system by encouraging compliance through administering and enforcing the law.*
- *Advance data access, usability and analytics to inform decision-making and improve operational outcomes.*
- *Drive increased agility, efficiency, effectiveness and security in IRS operations.*

GOAL: COLLABORATE WITH EXTERNAL PARTNERS PROACTIVELY TO IMPROVE TAX ADMINISTRATION

GOAL: EMPOWER AND ENABLE ALL TAXPAYERS TO MEET THEIR TAX OBLIGATIONS

The OPR continues to focus on educating tax professionals and enhancing their knowledge of relevant Circular 230 provisions, as well as educating IRS employees about the attributes of a quality, actionable referral to the OPR.

FY 2018 COMMUNICATIONS AND OUTREACH RESULTS

While the number of IRS employees who attended our presentations was slightly down this year in relation to the prior fiscal year (from 250 to 215), there was a substantial increase in attendance in other categories.

	Attendance Numbers			
Method	**FY 2016**	**FY 2017**	**FY 2018**	**% CHG**
• Internal Speaking Engagements	34	250	215	- 14%
• External Speaking Engagements	13,677	13,868	13,750	- 0.85%
• Webinars	14,029	10,559	16,067	+ 52%
• Stakeholder Liaison Presentations	0	992	4,857	+ 389%
Totals	**27,740**	**25,669**	**34,889**	**+ 36%**

Outreach to Professional and Other Organizations. The OPR spoke at over 40 events or programs on a variety of topics and practice areas affected by Circular 230 during FY 2018. Director Steve Whitlock, for example, spoke on a panel at the American Bar Association Tax Section's 2018 Midyear Meeting in late January 2018. The panel's presentation, titled, "Ethical Issues in Federal Tax Practice – The Government Perspective," provided updates on certain recent guidance from the IRS and Department of Treasury and on pending cases related to standards of tax practice. The panel discussed issues of concern and areas of focus for the OPR and the IRS's Office of Chief Counsel. The panel also expanded the discussion to include other recent developments (related to standards of practice) affecting tax practitioners more generally.

The OPR personnel also developed and delivered presentations to practitioner and other groups ranging from educational institutions to local, State-wide, regional, and national professional organizations of certified public accountants (CPAs), enrolled agents (EAs), and lawyers.

Web-Based Education. Over 8,500 tax professionals were reached through three rebroadcasts of an OPR webinar titled, "The Office of Professional Responsibility: What You Need to Know About Practicing before the IRS," followed by a live question-and-answer (Q&A) session with Director Whitlock. The webinar is archived and available for viewing on the IRS video portal. The OPR will continue to rebroadcast the webinar several times in FY 2019, and each rebroadcast will include a live Q&A session with the Director.

IRS Nationwide Tax Forums. The OPR devoted substantial attention to the 2018 Nationwide Tax forums. As in past years, the forums were a large part of the OPR's external outreach efforts during the fiscal year and provided a valuable opportunity to broadly disseminate the OPR's messages to the tax professional community. The OPR offered two separate Circular 230 presentations at the Tax Forums, and reached over 12,300 tax professionals. The two presentations were titled: "Circular 230: Diligence in Tax Practice" and "What is Your Authority for That?"

The first presentation provided an overview of Circular 230 diligence rules, practitioners' reasonable reliance on information provided by clients and others, and potential pitfalls to avoid in tax practice. The second presentation, which was more advanced, was an exploration of the rules in Circular 230 and the Internal Revenue Code (IRC or "Code") regarding authority for positions taken on a federal tax return. Both presentations were recorded and are available for viewing on the IRS Nationwide Tax Forums Online webpage.

Tax Talk Today. Director Whitlock delivered a presentation to over 1,000 viewers during a Tax Talk Today broadcast. The program titled, "Ethics & Standards for Practitioners – Circular 230 Review," discussed the rules governing practice before the IRS and the practical application of those rules. The discussion largely focused on the role of the OPR in assuring that practitioners maintain the highest ethical standards. Panelists also spoke about ethical issues most often faced by tax practitioners, the IRC penalties that may be imposed on practitioners, and the impact of preparer penalties on the conduct of a tax professional's practice. This online learning program, presented as a live webcast, is archived for QAS Self Study. The program will be available for viewing for 12 months after the live webcast (on May 8, 2018).

Stakeholder Liaison Presentations. Stakeholder Liaison (SL) in the Communications & Liaison Operating Division continued to deliver external presentations at tax-professional gatherings on behalf of the OPR. The SL conducted these educational sessions using several PowerPoint presentations that the OPR tailored and provided for that purpose, along with a Q&A document to assist the SL presenters in preparing for and responding to anticipated or commonly asked questions. This fiscal year, SL delivered presentations to 11 groups and reached over 4,850 tax professionals. Two web conferences involving an Ethics presentation to the CPA Academy totaled over 3,400 practitioners.

Updates to IRS.gov. The OPR did a comprehensive review of its materials accessible on IRS.gov. The OPR updated and replaced content on the office's external website to provide the most current and highest priority information to tax professionals and to IRS employees who interact with tax professionals.

GOAL: PROTECT THE INTEGRITY OF THE TAX SYSTEM, BY ENCOURAGING COMPLIANCE THROUGH ADMINISTERING AND ENFORCING THE LAW

The mission of the OPR's Legal Analysis Branch (LAB) is threefold: (1) to perform the legal work required to investigate, substantiate, and analyze allegations of misconduct by tax professionals to determine whether practitioners have violated Circular 230 and, if so the impact of the violation on the practitioner's fitness to practice before the IRS; (2) to negotiate whenever possible appropriate levels of discipline; and (3) to initiate disciplinary proceedings before Administrative Law Judges (ALJs), when necessary.

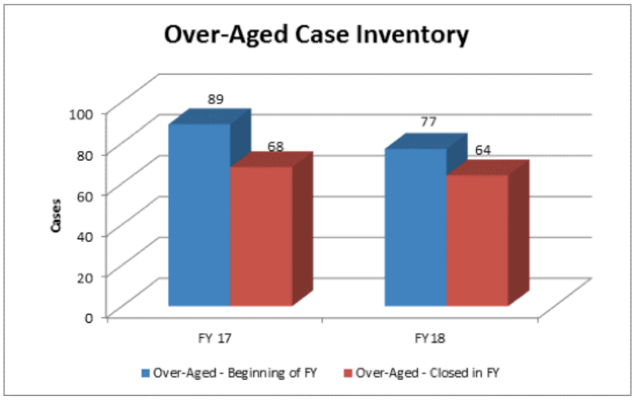
Case Inventory. The OPR is responsible for the oversight of tax practitioner conduct in federal tax matters and has exclusive authority for practitioner discipline, including the initiation of disciplinary proceedings to impose sanctions under Circular 230. A result of discharging the responsibility is that the OPR continuously opens new cases, while closing previously opened cases after final resolution. Consequently, the size of the office's case inventory is always changing. But our overall objective is to process cases timely and to close them as early as feasible, accounting for their individual characteristics. During the fiscal year, we continued our emphasis on the day-to-day investigation, analysis, and disposition of reports and other information of suspected practitioner misconduct and on our commitment to ensure consistent application of due process throughout the lifecycle of a case.

The table below compares case-inventory numbers for the last three fiscal years.

Measure	FY 2016	FY 2017	FY 2018[1]	% CHG
• Beginning Inventory	471	429	289	- 33%
❍ Intake (new cases opened)	846	1,641	2,672	+ 63%
❍ Closed	889	1,781	2,632	+ 48%
• Ending Inventory	428	289	329	+ 14%

[1] The OPR changed its approach to recording and counting referrals from State Boards of Accountancy and State Bar Disciplinary Authorities in mid-2017. The 2018 data reflects a full year using the different counting method.

In FY 2018, the OPR closed more cases than it did in FY 2017, while maintaining an increased attention on resolving over-aged inventory. Of the 77 over-aged cases at the beginning of the fiscal year, 64 (83%) were closed by the end of the year.



Actions. With regard to enforcement, we imposed or obtained a total of 285 disciplinary or corrective actions during FY 2018, including three Disbarments from practice before the IRS, 58 Suspensions from practice, and one Censure. We entered into five Deferred Discipline Agreements—these are consensual arrangements between the OPR and a practitioner, whereby the practitioner admits to specified Circular 230 violations and the OPR defers discipline for a probationary period during which conditions apply to the practitioner. The OPR also issued 19 reprimands and 38 “soft” notices. A “soft” notice informs the recipients of apparent (more likely than not) violations of Circular 230 and advises the individuals, after an opportunity to respond, that the OPR does not intend to take any further action under the circumstances. A notification is a reminder that good standing as a practitioner requires adherence to Circular 230 and warns against future misconduct.

In addition to the “soft notices,” the OPR issued 22 cease-and-desist letters to individuals who, despite being ineligible to practice on behalf of taxpayers (often because of a Circular 230 suspension or disbarment), have attempted to represent taxpayers before the IRS. Similarly, the OPR considered 32 petitions from disbarred or suspended practitioners seeking to be reinstated to practice. The OPR denied eight of those petitions, due to a continuing risk to taxpayers and tax administration.

Cases Adjudicated by Administrative Law Judges. The OPR may file a formal complaint against a practitioner with an ALJ if efforts to reach a negotiated resolution of misconduct allegations fail. Cases may also be brought before an ALJ if the OPR issues an Order of Indefinite Suspension under section 10.82 (an “expedited suspension”) and the practitioner demands that a complaint be filed. A practitioner’s demand that a complaint be filed is the practitioner’s avenue for appealing the Order of Indefinite Suspension, and the demand must be made within two years of the Order.

The complaints are filed in the name of the Director (as the Complainant) by attorneys in General Legal Services (GLS), part of the Office of Chief Counsel, and the complaint names the practitioner against whom it is filed is as the opposing party (the Respondent). The proceedings[2] initiated with the filing of the complaints are heard by ALJs in the Department of Housing and Urban Development and the U.S. Coast Guard, within the

[1]The OPR changed its approach to recording and counting referrals from State Boards of Accountancy and State Bar Disciplinary Authorities in mid-2017. The 2018 data reflects a full year using the different counting method.

Department of Homeland Security. The use of ALJs from other agencies is a long-standing practice for the OPR, because the Department of the Treasury does not employ any ALJs. This arrangement also provides an additional element of due process protection for practitioners, as the OPR must first demonstrate to GLS that the OPR can meet its burden of proof, and then must persuade an independent ALJ that it has done so.

At the beginning of FY 2018, the OPR had four cases pending in the ALJ process. Six additional complaints were filed during the fiscal year. At the end of FY 2018, the OPR received decisions from ALJs in eight cases, and reached settlements in the other two[3]. In each case decided by an ALJ, the sanction imposed was the one the OPR sought in its complaint. At the end of the fiscal year, three cases were on appeal to the Treasury Appellate Authority.[4] In a third case, the Treasury Appellate Authority found a deficiency in the OPR's mailing procedure, and overturned an ALJ finding that an answer was not filed timely. However, the Treasury Appellate Authority concluded that there was no dispute regarding the material facts alleged in the complaint, that no purpose would be served by a remand for further proceedings, and sustained the ALJ's decision to impose the sanction sought in the complaint.

There were some noteworthy commonalties among the cases decided during the year.

- Five complaints were filed in response to a practitioner's demand after the OPR issued an Order of Indefinite Suspension to the practitioner under section 10.82. These cases were based on (1) a suspension or revocation of practice privileges for cause by another authority, such as a State Bar or Board of Accountancy, or (2) conviction of a crime. Practitioner contentions that the underlying suspension, revocation or conviction was not within the scope of the OPR's authority under section 10.82 were resolved in the OPR's favor.

- Tax compliance issues in cases before ALJs included failure to file tax returns and failure to pay liabilities reflected on returns filed by the practitioners. In several cases, the OPR filed a complaint before an ALJ only after the practitioner repeatedly failed to follow through on commitments to take action to resolve the outstanding compliance issues.

- Conduct issues cited in the OPR complaints included false claims of valid licenses after those licenses had been suspended or revoked (or surrendered after a disciplinary proceeding was initiated), failure to meet standards for diligence and competence, and conviction of crimes involving breach of trust or dishonesty.

- Failure of practitioners to respond at the investigatory or adjudicative stage, or to respond as required by the applicable rules, was a factor in five cases. Problems included failure to follow through on commitments made in responses to the OPR, failure to respond to the complaint filed with the ALJ, and answers to complaints that did not address the allegations in the complaints. Circular 230 prohibits a general denial to a complaint, and provides that facts not addressed in the answer may be deemed admitted. Adverse findings were made in several cases when the practitioner failed to follow these rules.

[2]The proceedings are conducted in accordance with Subpart D of Circular 230, "Rules Applicable to Disciplinary Proceedings" (sections 10.60 – 10.82).

[3]Under the authority in Circular 230 sections 10.50(d) and 10.61(b)(1), the OPR and a practitioner can agree to settle a case, in which the practitioner consents to be sanctioned, in lieu of instituting or continuing a disciplinary proceeding.

[4]The Treasury Appellate Authority acts on behalf of the Secretary in rendering a final decision. The Appellate Authority is a senior Office of Chief Counsel attorney who has no other role with respect to the OPR matters, and who has been appointed to decide appeals of ALJ decisions.

Appointment of Administrative Law Judges. As already mentioned, ALJs from the Department of Housing and Urban Development and the U.S. Coast Guard are "loaned" to the IRS to act as judges in Circular 230 disciplinary proceedings. This is accomplished through interagency agreements between the IRS and the other two agencies.

Government-wide, ALJs commonly preside over and decide agency adjudications conducted under the Administrative Procedure Act (APA) (section 500 et seq. of Title 5, United States Code (U.S.C.)). The role of ALJs is incorporated into Circular 230, which states that a disciplinary proceeding commenced with a complaint issued against a practitioner "will be conducted by an" ALJ (section 10.70(a)), who is authorized to enter a decision either after a hearing or as a summary adjudication (§10.76(a)(1)-(2)).

Congress long ago provided for ALJs to decide administrative proceedings. Specifically, the APA authorizes federal agencies to "appoint as many administrative law judges as are necessary for [adjudicative] proceedings," and the Act allows an agency to lend use of its administrative judges to another agency that is not staffed with its own judges. 5 U.S.C. §§ 3105, 3344. Until recently, however, the status of ALJs as government employees or, alternatively, as "Officers" subject to the Appointments Clause of the Constitution was an unsettled issue. The issue derived from a clause in Article II of the Constitution that prescribes the appointment of "Officers of the United States."

In a June 21, 2018, decision in Lucia v. SEC, the United States Supreme Court settled the issue by holding that the ALJs of the Securities and Exchange Commission are "Officers of the United States" and not mere employees. The Court found that the Commission's ALJs—based on the nature of their positions, functions, and powers—satisfied all the criteria the Court established in its prior decisions for distinguishing officers from employees. The Court focused most of its analysis on explaining that ALJs acting in SEC enforcement proceedings are "near-carbon copies" of the special trial judges of the U.S. Tax Court, whom the Supreme Court earlier held to be officers under the Appointments Clause (Freytag v. Commissioner, 501 U.S. 868 (1991)).

As a result of the Lucia decision, ALJs across the Federal Government who were not already appointed in accordance with the Appointments Clause of the Constitution must be so appointed, typically by the head of the department in which an ALJ serves. In addition, after the decision, the Office of Personnel Management (OPM) issued guidance directing that for any ALJs loaned from their home agency to another federal agency, the head of the department of the receiving agency should also ratify in writing the use of each ALJ who is loaned to the agency and, further, approve the ALJs' appointment as the department head's "own act under the Constitution."

After the Supreme Court decision in Lucia, the Secretary of the Department of Homeland Security took action to ensure that all of the Coast Guard's ALJs were properly appointed to their positions, and the Secretary of the Department of Housing and Urban Development (HUD) did the same for the ALJs at HUD. Subsequently, pursuant to OPM's guidance, the Secretary of the Treasury executed a written ratification and approval for all the ALJs loaned to the Department of Treasury, including those who are loaned to the IRS for Circular 230 proceedings.

Although the OPR has never encountered an Appointments Clause challenge in any of our cases, if a challenge were to be raised in the future, the OPR will point to the actions of the Secretaries of the Treasury, Homeland Security and Housing and Urban Development as satisfying the requirements of the Appointments Clause.

Press Releases. The OPR published two press releases (IR-2018-154, IR-2018-155) on July 25, 2018, resulting from previously negotiated practitioner settlement agreements in three disciplinary matters. The practitioners agreed to any disclosures inherent in publishing the language that was negotiated in advance.

The first press release involved a practitioner who admitted to a conflict-of-interest violation between his representation of a client and his duty of care owed to a third-party (non-client). The practitioner provided misleading information to the third party, upon which the third party relied. The practitioner and the OPR agreed to a public censure as an appropriate resolution.

The second press release involved two related disciplinary matters, one as to an enrolled agent and the other his firm, in the offering of tax-debt relief services to the public. The EA admitted to creating false and misleading advertising to attract clients. The firm admitted to publishing, and then knowingly accepting clients resulting from, the false and misleading advertisements. The EA agreed to a deferred twelve-month suspension from practice, which will not be imposed unless the terms of a five-year probationary period are violated. The firm agreed to pay a monetary penalty calculated as a portion of the gross income derived from the misconduct. This outcome represents the OPR's second use of the monetary-penalty authority and the first such use arising from a referral to the OPR and our subsequent investigation.

Monetary Penalties. The fact of a monetary penalty obtained in FY 2018 provides the OPR with an opportunity to discuss monetary penalties in this report.

Monetary Penalties Generally. A monetary penalty asserted by the OPR is not a civil or criminal penalty provided for in the IRC. Rather, the source of the penalty is the same statue that authorizes the Secretary of the Treasury to regulate the practice of representatives (section 330 of Title 31, U.S.C.), and the penalty is also authorized by section 10.50(c) of Circular 230.

As with the case that was the subject of the second press release described above, a monetary penalty can be a meaningful sanction, particularly when a firm financially benefited from one or more members' violations of the regulations governing practice in Circular 230. Imposition of the penalty is not restricted to firms, however. A monetary penalty can be imposed on: (1) a practitioner who violated the regulations, including having committed incompetent or disreputable conduct (under section 10.51(a)); (2) an employer, firm, or other entity on whose behalf the practitioner was acting in connection with the sanctionable conduct; or (3) both the practitioner and the firm, employer, or similar entity. As to a practitioner, a monetary penalty can be imposed alone or in addition to another disciplinary sanction, such as suspension or disbarment from practice. Like other sanctions that a practitioner can agree to in a settlement with the OPR, practitioners and firms can consent to monetary penalties. Absent consent, the penalty can be involuntarily imposed in formal disciplinary proceedings conducted before ALJs.

Prerequisites. The sanction of a monetary penalty is subject to its own unique conditions and limitations, which relate to the applicability of the penalty to a firm (or other entity) and the allowable amount of a penalty.

Firm Liability

A firm can be penalized only if:

(1) A practitioner engaged in misconduct in violation of Circular 230 while acting on the firm's behalf (e.g., the practitioner violated Circular 230 while representing a taxpayer who was a client of the law or accounting firm where the practitioner was employed); and (2) The firm knew, or reasonably should have known, of the misconduct. Knowledge is imputed to a firm when one or more of the firm's officers or principal managers, or any officers or principal managers of a branch office (if applicable), knew of the prohibited conduct, or had information from which a person with similar experience and background would reasonably have known of the conduct.

Alternatively, the knowledge requirement is met when:

(1) The firm, through willfulness, recklessness, or gross indifference[5] did not take reasonable steps to ensure compliance with Circular 230; and

(2) The prohibited conduct of the practitioner, or others affiliated with the firm, harmed a client, the public, or federal tax administration, or the individual(s) engaged in a pattern or practice of failing to comply with Circular 230.

Dollar Amount

The amount of a monetary penalty cannot exceed the gross income derived, or to be derived, from the misconduct. If a monetary penalty is imposed on a practitioner and a monetary penalty is also imposed on a firm, the combined amount of the two penalties cannot be greater than the total gross income the practitioner and the firm derived (or expect to derive) from the conduct for which the penalties are imposed.

Use of the Monetary-Penalty Authority. In general, the OPR views the availability of a monetary penalty as likely to be most useful as a sanction against a firm that fails to satisfy the firm's responsibilities to oversee compliance by the firm's practitioners with Circular 230, and the failure caused or contributed to violations of the Circular or created a culture in which the misconduct could occur. In those situations, a monetary penalty may be the only way to affect a change in behavior at the firm. Unlike practitioners, firms and other entities are not potentially subject to any sanction other than a monetary penalty.

[5] Gross indifference includes ignoring facts that would lead a person of reasonable prudence and competence to investigate or ascertain the actual circumstances.

Conversely, for the OPR, suspension or disbarment of a practitioner from practice before the IRS is usually a preferable sanction to a monetary penalty, because a monetary penalty alone does not restrict practice privileges. To prevail on the counts of a complaint alleging a practitioner's violations of Circular 230, the OPR must prove, for almost all provisions that regulate practitioner conduct, that the practitioner acted willfully, and for the provisions in sections 10.34 and 10.36, that the practitioner acted willfully, recklessly, or through gross incompetence[6]. Also, the applicable standard of proof (under section 10.76(b)) for a disbarment or suspension of six months or longer (as well for a monetary penalty) is clear and convincing evidence—a relatively high standard. When the facts and evidence of a case against a practitioner satisfy those rigorous requirements of proof, it is fair to say that the practitioner is presumptively unfit to continue to practice before the IRS and, unless prevented from further practice, presents an ongoing risk of harm to taxpayers and to federal tax administration (in addition to whatever harm the practitioner has already caused). Although a monetary penalty may have a rehabilitative or curative effect, a penalty is not an assurance against recidivism and does not directly counter the risk, whereas a suspension or disbarment does. A practitioner may have the financial ability to pay a monetary penalty, yet may lack the necessary competence, professionalism, or ethical character to represent taxpayers with loyalty and fidelity to the taxpayers' best interests and due regard for the integrity of the federal tax system[7].

Case-by-Case Analysis. The OPR considers a number of factors in determining whether a monetary penalty is an appropriate sanction to pursue and, if so, in what amount. Many of the factors are found in Notice 2007-39. They include:

- The level of culpability of the practitioner responsible for the conduct giving rise to the penalty.
- The practitioner or the firm's violation, if any, of a duty owed to a client or prospective client.
- The actual or potential injury caused by the practitioner's conduct.
- The amount of income the practitioner or firm could reasonably expect to realize from the conduct giving rise to the penalty, irrespective of whether the amount has actually been received.
- The existence of aggravating or mitigating factors.
    - Aggravating factors could include, for example, whether the practitioner's conduct was not only in violation of Circular 230 but was fraudulent or criminal.
    - Mitigating factors may include whether the practitioner or the firm (i) took prompt action to correct the noncompliance after the prohibited conduct was discovered; (ii) promptly ceased engaging in the prohibited conduct; (iii) attempted to rectify any harm caused; or (iv) undertook measures to ensure that the prohibited conduct would not occur again in the future.

[6] Certain provisions of section 10.51(a) (which is a non-exclusive list of 18 types of "incompetence and disreputable conduct") contain a knowledge element that presumably the OPR must additionally prove, in order to establish a violation of the provision. For example, section 10.51(a)(4) prohibits "[g]iving false or misleading information" to the Treasury Department (or participating in doing so) "knowing the information to be false or misleading," and section 10.51(a)(11) prohibits "[k]nowingly aiding and abetting another person to practice before the Internal Revenue Service during a period of suspension, disbarment, or ineligibility of such other person."

[7] In that regard, published guidance on the monetary-penalty sanction notes, "Monetary penalties are not, however, a 'bargaining point' that a practitioner may offer to avoid suspension, disbarment, or censure if these sanctions are otherwise appropriate." Notice 2007-39 (2007-20 I.R.B. 1243).

For a monetary penalty that might be imposed on a firm, the Notice lists additional considerations:

- The gravity of the misconduct.
- The existence of any history of noncompliance by the firm.
- The extent of preventative measures in effect at the firm prior to the misconduct.
- The firm's actions after the firm learned of the practitioner's misconduct, especially any corrective measures the firm took or established. For example, depending on the type of misconduct that was committed, there may be question as to whether the firm provided refunds to clients, corrected its advertising or solicitation materials, or positively change the firm's procedures for tax return preparation or the supervision of non-practitioner assistants.

The OPR may conclude that a monetary penalty should be imposed on a firm when the firm clearly benefited in a substantial monetary way from the underlying misconduct. Certain Circular 230 violations, such as false advertising that has generated numerous client engagements and attendant fees paid to a firm, or the large-scale promotion of an abusive tax-avoidance or tax-evasion transaction, are notable candidates. Relatedly, it would be relevant to the OPR's deliberative process if there is credible evidence that competing firms were unfairly disadvantaged in the marketplace, due to the misconduct at the rival firm.

If the OPR decides to seek a monetary penalty against a firm, the knowledge standard may be a factor in the penalty amount that the OPR pursues. If the firm had constructive knowledge (under the standard of reasonably should have known), a lower penalty amount may be warranted than if the firm had actual knowledge of the practitioner's misconduct in violation of Circular 230 and consciously ignored or tolerated the behavior.

Finally, in analyzing a potential monetary penalty that might be imposed on a firm, the OPR may consider the availability of a sanction against a practitioner or practitioners under section 10.36 of Circular 230. Section 10.36 imposes procedural requirements on any practitioner who has, or shares with other practitioners, the "principal authority and responsibility for overseeing a firm's practice governed by" Circular 230, "including the provision of advice concerning Federal tax matters and preparation of tax returns, claims for refund, or other documents for submission to the" IRS. These practitioners must take reasonable steps to ensure the firm has adequate procedures in effect to maintain compliance with Circular 230 by all members, associates, and employees of the firm.

A practitioner who has this responsibility under the section can be sanctioned if:

(1) The practitioner through willfulness, recklessness, or gross incompetence did not take the reasonable steps required to ensure the presence of adequate procedures for compliance with Circular 230—or did not take reasonable steps to ensure that the procedures were properly followed—and one or more individuals, in their tax practice for the firm, engaged in a pattern or practice of failing to comply with Circular 230's standards; or

(2) The practitioner knew or should have known that one or more individuals, in their tax practice for the firm, engaged in a pattern or practice that did not comply with Circular 230, and the practitioner through willfulness, recklessness, or gross incompetence failed to take prompt action to correct the noncompliance.

In some cases, the OPR may determine that a non-monetary sanction against a practitioner or practitioners for willful violation(s) of section 10.36 is an adequate or superior alternative to a monetary penalty against the firm. A sanction on the practitioner or practitioners who failed to satisfy their obligations under section 10.36 may do more to correct behavior at a firm than a monetary penalty. A suspension or other sanction for violation of section 10.36 can be in tandem to any sanction against the practitioner or practitioners whose violations were the noncompliance that section 10.36's requirements are meant to prevent or, if necessary, redress. In other cases, the OPR may view a monetary penalty or multiple penalties as a better response to misconduct at a firm than other potentially available sanctions, even when practitioners can be held accountable for violating section 10.36. And, of course, there is the third option of a hybrid approach, if that seems like the best way to address problems at both a practitioner- and firm-level.

Some of the Common Complaints to the OPR, and How to Avoid Them. The information the OPR received throughout the fiscal year complaining about individual practitioners or reporting suspected practitioner misconduct reveals several types of common, recurring bad practices that are incompatible with rules in Circular 230.

1. **Form 2848 Issues.** The IRS Form 2848, Power of Attorney and Declaration of Representatives, is generally required to demonstrate to the IRS that a person has been authorized to represent a taxpayer. The form, when correctly completed, includes identifying information and signatures of the taxpayer and the representative. The form must also specify the tax matters covered by the authorization (as well as authorizing the representative to receive or inspect the taxpayer's tax information related to those matters), and the credential or relationship that qualifies the person to represent the taxpayer (e.g., CPA or immediate family member). Common problems with Forms 2848 include[8]:

[8] All of the scenarios are hypothetical illustrations.

a. *Amendments without authorization.* A Form 2848 authorizes a practitioner to represent a taxpayer, listing tax years 2014 and 2015, which are under examination. After the examination begins, the scope of the examination expands to cover tax year 2016. The practitioner prepares a new first page for the Form 2848, adding tax year 2016, and faxes it to the revenue agent with the original signature page. These acts are a violation of Circular 230 section10.22 (a failure to exercise diligence in determining the correctness of oral or written representations to the Department of the Treasury) and 10.51(a)(4) (giving false or misleading information to the Department of the Treasury). The taxpayer did not authorize representation, or any disclosure by the IRS of confidential tax information, for tax year 2016 when he/she signed the Form 2848, and the practitioner's attachment of the original signature page to the amended first page falsely asserts (under penalty of perjury) that the taxpayer did so.

b. *Claiming a credential that is not in good standing.* A Form 2848 identifies the practitioner as a California CPA. In fact, the practitioner's California CPA certificate is not valid, because the practitioner failed to renew it. The practitioner has made a false statement, violating Circular 230 section 10.22 (a failure of diligence in the accuracy of written representations on the form) and 10.51(a)(4) (giving false or misleading information on the form). If the California CPA certificate was the practitioner's only credential, failure to renew it rendered the practitioner ineligible to practice before the IRS. If the practitioner held other credentials that remained in good standing, this false statement may not be significant.

c. *Permitting others to sign, including use of stamped signatures.* A Form 2848 must be signed by the taxpayer and the practitioner(s) being given the authorization. These signatures are made with a jurat ("penalty of perjury" statement) attesting to the truth of information provided on the form. A practitioner cannot "delegate" authority to sign a jurat.

2. **Client communications.** Taxpayers entrust practitioners with sensitive financial information and with the authority to make representations to the IRS on behalf of the taxpayer. The OPR frequently receives complaints that the practitioner has failed to keep the client informed of the status of a matter before the IRS, or has misrepresented to the taxpayer that certain actions have been taken when in fact they have not. The OPR also receives complaints that taxpayer documents are not returned to the taxpayer upon request after a client relationship has ended. Often these matters reflect a breakdown in the relationship between the practitioner and client, and practitioners can point to actions by the client that caused the breakdown or made the issues worse. The OPR typically does not take action on issues involving poor client service, though failure to return records may be a violation of Circular 230 section 10.28, and a false statement to a client may be a violation of section 10.22. Corrective action by the practitioner often results in OPR closing the case with a warning letter, though more serious actions can be taken when the client is adversely affected by a practitioner's misrepresentations.

3. **Offer-in-Compromise practice issues.** Reports to the OPR of taxpayers' or IRS employees' concerns about practitioners' conduct in offer-in-compromise (OIC) practice include claims related to advertising, customer-service problems, and misrepresentations on the offer and supporting schedules prepared and submitted to the IRS.

a. False and misleading advertising claims in OIC practice generally involve false claims about results obtained, claims of "unique" access or insight available to practitioners at a firm that permits clients of the firm to qualify for "special" programs, and claims about the experience of staff who will work on the taxpayer's matter. All of these issues were present in a case that was the subject of the July 25, 2018, press release, mentioned earlier, in the "Press Releases" section. Practitioners should be mindful of sections 10.30 and 10.51(a)(5) of Circular 230, which address solicitation and advertising standards and prohibit false or misleading content.

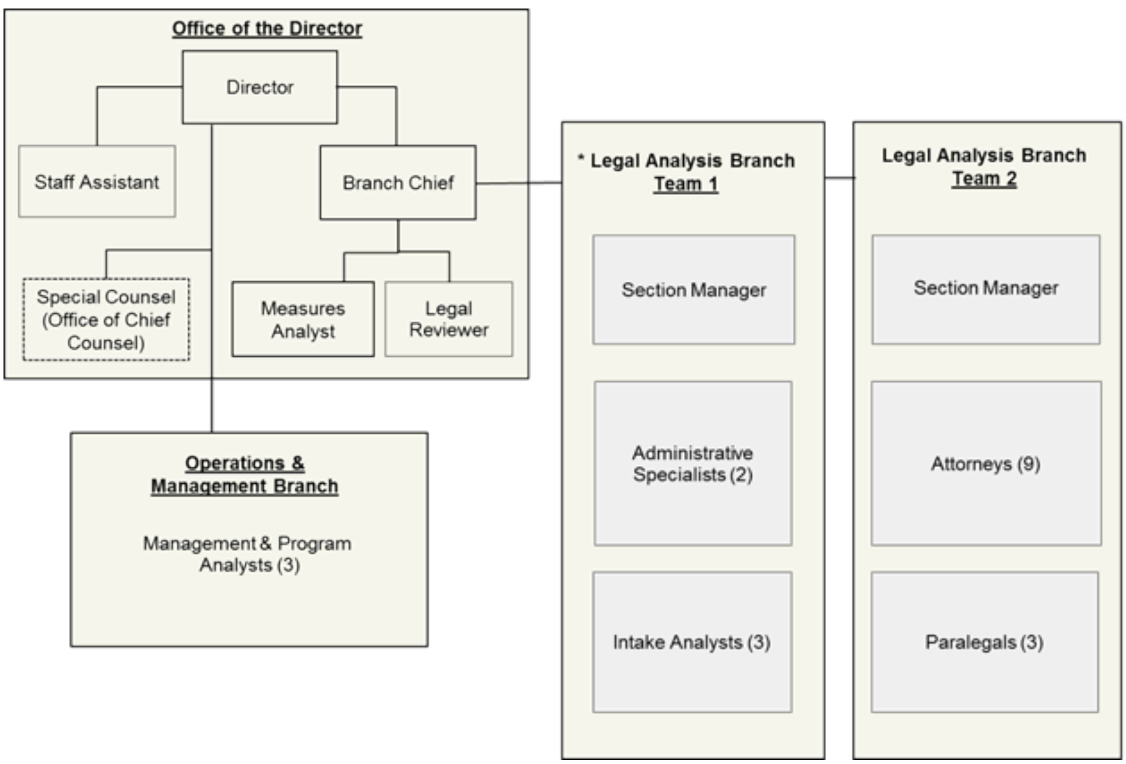
b. Customer-service issues include promises not kept regarding actions to be taken on behalf of a taxpayer and setting unrealistic expectations about likely outcomes. As is noted above, the OPR does not generally take action on matters involving poor client service. However, when the poor customer service crosses the line to false statements ("I submitted the OIC" or "I provided the required information to the Revenue Officer," when in fact those actions were not taken), the OPR may consider an action under section 10.22 of Circular 230. In extreme cases, the OPR has considered action under Section 10.27(a), for charging an unconscionable fee, when a practitioner charged substantial fees for services not performed.

c. Misrepresentations can be false or misleading information to the IRS regarding the taxpayer's assets, or to the taxpayer about qualifying for an OIC. For example, when a practitioner knows that the client is not compliant with current filing and payment obligations, but represents to the taxpayer that the OIC will qualify as an acceptable offer, the practitioner has violated section 10.22.

4. **Diligence related to refundable credits.** The OPR receives information from other IRS organizations when preparer diligence penalties are assessed against Circular 230 practitioners. The penalty assessments originate from the past behavior of the practitioner, while the OPR's evaluation seeks to determine whether that behavior is relevant to current and future fitness to practice. The OPR looks for patterns of behavior, seeks information about the underlying cause(s) of the diligence issues, and considers corrective actions that may have been taken. For example, if the diligence issues that resulted in penalty assessments are largely attributable to poor training and oversight of a staff member responsible for screening new clients, the OPR would consider information about the steps taken by a practitioner to improve staff training and quality review.

GOAL: ADVANCE DATA ACCESS, USABILITY, AND ANALYTICS TO INFORM DECISION MAKING AND IMPROVE OPERATIONAL OUTCOMES

Case Identification Research and Intake Processes. The OPR has been engaged in an extended project to identify opportunities to improve efficiency and operational effectiveness. We want to mention in this report two prominent aspects of that project. First, the OPR will restructure a large part of its operations. The OPR's organizational structure for many years has consisted of two branches—the Operations and Management and the LAB (referenced on p.3)—with the LAB divided into "teams," each staffed with attorney-advisors, paralegals, and intake analysts supervised by a team manager. Beginning in October 2018, the OPR will re-align the office's staff to consolidate in a separate team the analysts and administrative specialists who perform the intake and analysis of referrals and other information reporting potential practitioner misconduct. This consolidation will promote consistency in the initial review and processing of potential cases, and provide greater flexibility to respond to changes in workload.



Second, the OPR will begin using data-centric methods to identify new, workable cases for the office. The background for this effort is that while the Internal Revenue Manual requires IRS employees to refer to the OPR the fact of the assessment of penalties under IRC section 6694(b) against Circular 230 practitioners, and encourages such referrals when there is a pattern of assessed penalties under IRC section 6694(a), the OPR has found that more often than not these referrals are not made[9]. Efforts to encourage referrals through internal communications with IRS operating divisions have not made a difference in the volume of referrals. As part of its review of intake processes, the OPR looked for alternatives that will allow the OPR to identify matters that should be referred, so that we can reach out to obtain relevant information rather than wait for these matters to be referred. In FY 2019, the OPR will implement new case-development processes that take advantage of existing IRS data sources to achieve that result.

The IRS has extensive data on penalties assessed and tax compliance history, accessible through the Compliance Data Warehouse (CDW). With the assistance of staff from the Return Preparer Office who have extensive experience developing data queries in the CDW, the OPR now has the capability to extract from the CDW a list of practitioners against whom penalties (such as those in §§ 6694, 6701 and 6702), have been assessed, along with other data that will assist in identifying the cases most likely to reflect serious violations of Circular 230. In addition, this CDW project developed a new capability to identify potentially serious tax compliance issues on the part of practitioners. The OPR will no longer be limited to checking the tax compliance records of those who have been referred to us based on some other alleged conduct issue. The number of potential conduct and compliance cases[10] identified in the CDW data far exceeds the OPR's capacity to pursue, so the OPR's new intake processing team will use a set of objective criteria designed to select cases with the highest likelihood of actionable violations from the CDW data for further development. The cases that are opened based on CDW data (in conjunction with the selection criteria) will be integrated with cases from other sources to ensure the OPR maintains a balanced Circular 230 enforcement program.

GOAL: DRIVE INCREASED AGILITY, EFFICIENCY, EFFECTIVENESS, AND SECURITY IN IRS OPERATIONS

LEAN/Six Sigma. The OPR consulted with the IRS's LEAN/Six Sigma (LSS) experts to identify opportunities to improve the OPR's intake process. The LSS project included data collection and analysis to identify and understand the types and nature of Circular 230 cases that the OPR works and to identify ways to ensure that the OPR employees have the resources, training, and guidance needed to perform the appropriate case work. Key results of this project were the realignment of staff and the use of CDW data for case selection identified in the previous section.

[9] Also, Circular 230 section 10.53(a) requires IRS employees to report to the OPR a practitioner whom an employee has reason to believe violated any of the regulations governing practice.

[10] "Conduct" and "compliance" are case-opening categories used in the OPR's official system for case management (CCMS). "Compliance" cases are ones opened to investigate whether a practitioner has engaged in willful tax noncompliance in violation of section 10.51(a)(6) of Circular 230. "Conduct" is an umbrella term for cases opened to investigate other possible breaches of the Circular, including ones that are strongly indicated by the IRS's assessment of penalties against a practitioner, such as violations of section 10.22(a)(1)'s diligence requirements in return preparation or section 10.34(a)'s standards for federal tax returns.

Electronic Case Processing. Effective August 1, 2018, all case documents requiring approval by the Director are reviewed and signed using electronic case processing capabilities of the Case and Correspondence Management System (CCMS). Eliminating paper handling at the Executive level will save paper by deferring printing until a document is ready to be mailed, and will eliminate delays when employees are teleworking and are not in the office to print and submit paper files. The transition to electronic approval also supports a transition to electronic case files, which will allow the OPR to phase out creation, maintenance, and retention of paper files and the transfer of hardcopy files to a Federal Records Center (FRC). We will make appropriate modifications to our Standard Operating Procedures referencing new closing actions, which include handling of remaining paper files in the closing process, pending the eventual phase out of all paper files.

In connection with the transition to electronically stored information, the OPR generated an updated files plan, which was approved by the IRS's Office of Privacy, Governmental Liaison and Disclosure. Ultimately, the CCMS will become the official repository for the OPR's case and correspondence files. Among other things, use of the CCMS as the official repository will allow the OPR to dispose of paper records that have been scanned and uploaded into electronic case or correspondence files, and, as noted earlier, will substantially reduce or eliminate the transfer of paper records to a FRC.

Case Time Accounting. The OPR implemented case time accounting. The CCMS enables the OPR's employees to track the amount of time they spend working directly on OPR cases as well as time spent on training, policy issues, and general program administration. With the addition to the CCMS of the Time Reporting function, each employee can consistently and accurately input the amount of time they expend on different activities each workday. The additional insight into how staff time is used will assist managers in setting program priorities and measuring the extent to which the OPR staff time is committed to priority matters.

LOOKING AHEAD

The OPR goals for FY 2019 will build on accomplishments in 2018. Specifically, the OPR will:

- Continue working on the CDW case selection approach, refining search criteria as well as case selection criteria.
- Recruit managers and staff to fill behind several years of attrition.
- Continue efforts to improve case cycle time.
- Maintain a balanced program of outreach and education on practitioner obligations under Circular 230.
- Build on "transparency" initiatives by providing periodic reports on enforcement activities.

The OPR also acknowledges that Circular 230 was last revised in 2014, prompting the IRS Advisory Committee (IRSAC) to make several recommendations for changes in the substance, structure and format of the Circular. While the OPR agrees in principle and in substance with most of the IRSAC findings and recommendations, a revision of the Circular requires commitment of resources by the IRS, the Office of Chief Counsel, and the Office of the Assistant Secretary for Tax Policy. Commitments to other regulation projects, most notably those related to the Tax Cuts and Jobs Act, effectively precluded attention to a Circular 230 project in FY 2018. The OPR will stand ready to pursue one or more regulation projects when resources are available from other offices to do so.