A Rare Look Inside the IRS's Office of Professional Responsibility

By Kevin E. Thorn

Kevin Thorn, a former Senior Enforcement Attorney in the IRS's Office of Professional Responsibility, provides an inside view of how OPR operates and outlines some of the more important issues that practitioners should pay attention to in the near future.

There is no question that ethics controversy is on the rise. While the Internal Revenue Service has stepped up its enforcement activities across the board, the IRS's Office of Professional Responsibility (OPR or the "Office") has dramatically increased its presence and has become a focal point of attention by the tax practitioner community. In the past, OPR (or, the Office of the Director of Practice, as it used to be known) was viewed as a "backwater office"[1] and an organizational orphan that was moved from one part of the IRS to another. But with the support of IRS Commissioner Mark Everson and the leadership of the well-respected Cono Namorato, all of that has changed. Upon the arrival of Mr. Namorato, the Office of Professional Responsibility became the Commissioner's high-profile enforcer of tax practitioner ethics. OPR's enforcement mandate has benefited from newly formed cooperation within the government as OPR, the IRS and many other government agencies have become more efficient at sharing information and in conducting their investigations. Naturally, it did not take the tax practitioner community long to become concerned about possible OPR involvement in almost any case that walks in the door.

Most tax practitioners recognize that in the past few years OPR has been reinvigorated. More importantly, practitioners realize that in the years to come, OPR will be a much larger player in the IRS's enforcement activities, as well as in regulating the conduct of tax practitioners. But what most practitioners have yet to understand is that OPR will not only have a broad impact on individual practitioners; with its increased jurisdiction and new sanctions, the Office will be involved in regulating the ethical conduct of law firms, accounting firms and other entities at the entity level.

Over the last year or so, the practitioner community has been focusing on the new tax shelter-related regulations that went into effect on June 20, 2005[2] (the "June 2005 regulations"), but it has given little recognition to the fact that OPR has been steadily increasing its use of the "old" or "pre-shelter" Circular 230 procedures. In fact, the majority of OPR cases are still grounded in alleged violations of activity proscribed in the old Circular 230 regulations, not the "new" June 2005 regulations. The pre-shelter Circular 230 regulations have proven adequate to regulate most areas of practitioner conduct—or misconduct, as the case may be. For example, §10.22[3] of Circular 230, which refers to practitioners' due diligence requirement, has been around since long before the June 2005 regulations came into effect, and it has been used quite effectively to regulate the conduct of practitioners.[4] Similarly, there are many sections within Circular 230 that have not been utilized in past years, but are now becoming a part of OPR's enforcement activities.

Along with OPR's new leadership, increased presence and renewed emphasis on enforcement, came a cloak of mystery and speculation as to how the new OPR would operate and what its mission would be in the years to come. This article will try to shed some light on the inner workings of OPR and will outline some of the more important issues that practitioners should pay attention to in the near future. Along with providing

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an inside view on how OPR operates, this article will address the practical issues that a practitioner should be aware of in the representation of a client before OPR. After a discussion on how the OPR receives its referrals, the article discusses (1) what OPR does when it receives a referral, (2) how OPR decides if the alleged misconduct is actionable, (3) what are the key "tools" at OPR's disposal, (4) when does a practitioner have enough information and (5) OPR sanctions.

Where Does OPR Receive Its Referrals From?

Unlike the IRS, OPR does not randomly select practitioners to audit. Instead, all of OPR's cases stem from referrals. The Office's primary source of referrals is the personnel of the various operating divisions within the IRS. IRS employees frequently make referrals to OPR when they uncover suspected practitioner misconduct during an ongoing taxpayer audit or investigation. IRS personnel also refer practitioners to OPR if the practitioner behaves in an abusive manner toward an IRS employee. Generally, the alleged violations that are referred to OPR range from simple compliance issues and due diligence issues to abusive conduct, the involvement of practitioners in tax scams and schemes and the practitioner's submission of false documents to the IRS. This list does not describe all of the conduct the Office currently investigates or receives referrals on.

In addition to internal referrals, OPR receives many referrals from external sources. The list of external sources that OPR obtains referrals from is constantly growing, as the emphasis on enforcement activities within the IRS and other government agencies continues to receive more resources and attention. Currently, OPR receives external referrals from state licensing authorities, tax professionals, taxpayers and other federal government agencies. Thus, it is important for practitioners to consider that OPR may be a player when civil and criminal parallel investigations or multi-agency investigations are being discussed, and a tax practitioner or a firm is involved.

What Does OPR Do When it Receives a Referral?

Each referral is assigned to an Enforcement Attorney who is responsible for assessing the strength and merits of the case. The first thing the Enforcement Attorney does when he or she receives a referral is consider whether or not OPR has jurisdiction over the practitioner, and whether or not there is a statute of limitations issue to be considered. Therefore, when representing a practitioner or an entity before OPR, it is advisable to review the case to ensure proper jurisdiction and to determine whether or not a statute of limitations issue exists.

What Exactly is the OPR's Jurisdiction?

Jurisdiction is one of the issues that should be considered when representing a practitioner or entity before OPR. Before the American Jobs Creation Act ("Jobs Act") was passed in 2004,[5] OPR only had jurisdiction over attorneys, Certified Public Accountants, Enrolled Agents, Enrolled Actuaries and Appraisers.[6] Notwithstanding these professional designations, OPR has historically interpreted its jurisdiction to include only those individuals it could demonstrate had actually practiced before the IRS. This was based mostly on the interpretation of the language of the Adminstrative Practice Act[7] and the limitation of the scope of the Office's sanction authority. Of course, what constitutes actual practice before the IRS can take many different forms and is subject to various interpretations. In most situations, proof of practice entailed actually representing an individual or corporation before the IRS. This so-called "proof of practice" was in dispute in many situations, but could be found if a Form 2848 was found with the practitioner's signature on it, or if a signed statement given by a Revenue Officer or Revenue Agent was produced. Although there were other ways for proof of practice to be demonstrated and for jurisdiction to be found by OPR, the methods stated above were the most practical and convenient.

With the passage of the Jobs Act in 2004, the jurisdiction of OPR was vastly expanded by the Act's interpretation of what exactly practice before the IRS encompassed. In many respects, the language of the Jobs Act clarified the jurisdictional questions that once existed for OPR. As a result, the range of cases that OPR has jurisdiction to investigate has expanded to include practitioners who provide written advice to clients,[8] as well as practitioners who actually submit documents directly to the IRS or make personal appearances before the IRS.

Another crucial development that tax practitioners and tax practices need to consider is the Jobs Act's expansion of OPR jurisdiction to now encompass law firms, accounting firms and other types of entities.[9] Although many practitioners think that OPR's newly expanded jurisdiction is overly burdensome and may extend to entities the Jobs Act did not have in mind, it is hard to argue with the language of the legislation. Now, not only can OPR sanction an individual practitioner, but it can also sanction a firm or other entity. Along with this expanded jurisdiction, the Jobs Act has given the OPR the ability to issue monetary sanctions against practitioners, firms and other entities.[10] The monetary penalties will be discussed in greater detail later in this article.

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What Exactly Is OPR's Statute Of Limitations?

The second issue that OPR evaluates when it receives a referral is the Statute of Limitations. OPR's statute of limitations (SOL) is an issue that deserves some attention at the onset of the representation of any practitioner or other entity before OPR. The quick and easy answer concerning OPR's SOL is five years from the date of the alleged misconduct.[11] The Office's current policy concerning the SOL is that it will generally not pursue allegations that the IRS knew of, or should have known of, if the misconduct occurred more than five years prior to the date upon which OPR can reasonably expect to institute a proceeding. OPR considers the SOL's application on a case-by-case basis, and the OPR managers are given broad latitude in deciding whether or not a statute of limitations issue actually exists. When, if ever, a definitive SOL will be formulated is not clear; and, like so many other issues, only time will tell.

How Does OPR Decide If The Alleged Misconduct Is Actionable?

Once OPR determines it has jurisdiction and that there are no statute of limitations issues involved, the Enforcement Attorney assigned to the case will evaluate the facts and will attempt to gather additional evidence in order to determine whether or not OPR has an actionable claim against the practitioner. More often than not, this is when the attorneys at OPR decide which, if any, section of Circular 230 is implicated by the facts or the alleged misconduct. During this part of the evaluation process, many cases are closed without OPR issuing an allegation letter. On the other hand, if the OPR attorney determines that the case is actionable and that the evidence supports the issuance of an allegation letter or another type of letter, then the Enforcement Attorney will move the investigation forward and start the process of writing the appropriate letter.

What Are The Key Tools at OPR's Disposal?

If a practitioner receives a letter from the OPR enforcement unit, the odds are it will be one of three types of letters. Currently, OPR issues Allegation Letters, Requests for Information Letters and Expedited Suspension Letters. In the future, the OPR will almost certainly issue new types of letters that will undoubtedly coincide with the new legislation and the sections that have been recently added to Circular 230. But for the time being, practitioners should be on the look out for basically these three types of letters.

The Allegation Letter

The first type of letter that a practitioner may receive is an allegation letter.[12] This letter is the most common type that OPR issues. An allegation letter is written and sent out by OPR after the Enforcement Attorney has considered a large number of factors, including: the weight of the evidence, which sections of Circular 230 may be violated by the alleged misconduct, any possible defenses the practitioner could raise in his or her response, the range of penalties that might be appropriate if the allegations are proven true, and the potential impact the case may have on tax administration.

In most allegation letters, the OPR attorney will summarize the facts and allegations based on the evidence that was provided to the Office with the referral, as well as any other evidence the attorney has gathered during his or her investigation. Additionally, the letter will cite specific sections and paragraphs of Circular 230 that pertain to the alleged misconduct. Most allegation letters will simply state that OPR is "considering instituting" a proceeding for the disbarment or suspension from practice of the practitioner before the IRS. A normal allegation letter will request that the practitioner respond with a written submission to OPR within 30 days from the date of the letter.[13]

When OPR receives a response from a practitioner, the Enforcement Attorney evaluates the sufficiency and persuasiveness of the practitioner's defense, the credibility of the witnesses and the documentary evidence that the Office has in its possession. In many circumstances, the OPR attorney will then contact the referral source to determine if any further information may be available or needed for consideration. The OPR attorney will evaluate the practitioner's response and weigh the evidence obtained during the investigation. If the OPR attorney determines that the allegations against the practitioner have been appropriately refuted, the attorney will, in most circumstances, close the case without a sanction.

If, on the other hand, the OPR attorney decides the allegations against the practitioner have been supported by the evidence that he or she has received during the investigation, then the attorney may enter into discussions with the practitioner or practitioner's counsel concerning possible sanctions. In most situations, if the Director of OPR and the practitioner's counsel cannot come to an agreement on a reasonable sanction, the case will move forward in the litigation process.

The 10.20 Letter

Although the allegation letter has been the letter most often relied upon by OPR to notify a practitioner that allegations of misconduct have been raised against him or her, the Office has been increasingly turning to what is referred to as the information gathering "10.20 Letter." Section 10.20 of Circular 230 provides OPR with authority for this extremely useful investigative tool, and it is currently being used by the Office as a form of discovery. It has given the Office the power to require the production of information from a practitioner or from a firm. Although the 10.20 Letter is not a formal allegation letter, it serves as notice to a practitioner that OPR is investigating him or her.

Section 10.20 is broken down into three main sections. Section 10.20(a) provides that information must be furnished to the Internal Revenue Service upon request.[14] Similarly, §10.20(b) provides that information must be furnished to OPR if requested by the Office. A practitioner will not have to abide by either regulation if the practitioner believes in good faith and on reasonable grounds that the information in his or her possession is privileged. Section 10.20 (c) provides that a practitioner may not interfere, or attempt to interfere, with any proper and lawful effort by the IRS or OPR to obtain any record or information. Again, this request for information under §10.20(c) would not apply if the practitioner believes in good faith and on reasonable grounds that the record or information is privileged.

A 10.20 Letter, in most cases, pertains to an individual practitioner, a firm or a specific set of facts. More often than not, the letter will contain a list of questions for the practitioner to answer and will specify the subsection of §10.20 under which the letter is being sent. In most situations, the 10.20 Letter will request a written response within 20 days, although in certain situations, OPR will grant an extension to allow the practitioner to gather the information requested. If a practitioner decides not to respond to the 10.20 Letter, OPR has the ability to issue another letter for being nonresponsive.

The Expedited Suspension Letter

The third type of letter that a practitioner may receive from OPR is a letter under §10.82, otherwise known as an "Expedited Suspension Letter." Section 10.82 identifies the conduct that can result in an expedited suspension of a practitioner from practice before the IRS.[15] Such conduct includes the criminal conviction of a practitioner or the loss of the practitioner's professional license. In these situations, a practitioner does not receive the normal allegation letter that OPR would send out to investigate alleged practitioner misconduct. Rather, the letter will be in the form of a more formal complaint. The practitioner will have 30 days to respond in writing to the complaint under §10.82. Under §10.82(d),[16] the answer must be filed in accordance with the rules under §10.64,[17] and the practitioner is entitled to a conference, only if the conference is requested in a timely filed answer. If the practitioner does not respond to OPR in writing within the 30 days from the date the complaint is served, OPR will move for a decision by default.

In most situations, §10.82 applies to practitioners who were disbarred or suspended by state boards of accountancy or state bars for cause. This section does not apply to practitioners disbarred or suspended for failure to pay licensing fees.[18] Section 10.82 also specifically applies to practitioners who were convicted of any crime under the Internal Revenue Code, any crime involving dishonesty or breach of trust, or any felony conviction that renders the practitioner unfit to practice before the IRS. OPR utilizes §10.82 very effectively and gathers a great deal of information from state bar associations.

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When Does a Practitioner Have Enough Information?

When representing a practitioner before OPR, it is always important to find out what information the Office has in its possession. In most situations, OPR will be willing to share the information it has with the practitioner, so that it can evaluate the evidence in a fair and efficient manner. Basically, there are three avenues a practitioner can utilize to obtain the information OPR has in its possession when the Office is pursuing allegations against a practitioner. The practitioner can request that the Enforcement Attorney supply him or her with the information; the practitioner can submit a Freedom of Information Act (FOIA) request; or, the practitioner can request a conference with the Enforcement Attorney.

The first and easiest way to obtain the information OPR has in its possession pertaining to the allegations against a practitioner is simply to request any discoverable information available concerning the allegation from the Enforcement Attorney. The Enforcement Attorney has the discretion to honor or deny the request. In many circumstances, the Enforcement Attorney may be willing to cooperate and provide the information to the practitioner, so that the practitioner can submit a detailed written response to the allegations. The second and more time-consuming way to obtain information from the Office is to send in a FOIA request. Once the FOIA request has been honored, the practitioner will then have the information to respond to the allegation letter in a more complete manner.

If requests to the OPR attorney or under FOIA do not produce the desired results in obtaining sufficient information, then a practitioner may request a conference with the OPR attorney and his or her manager to discuss the allegations in detail and the evidence relied on by the Office. Although Circular 230 states the OPR "may" grant a conference in relation to an allegation that is brought against a practitioner, §10.61(a) does not specify the manner in which the conference may be held.[19] A conference can be by telephone, or by a face-to-face meeting between the OPR attorney and the practitioner or his or her representative at the OPR office in Washington, DC. A conference about an OPR letter should be requested in writing within the 30 day response period if the practitioner has received an allegation letter. An OPR conference, if used effectively, can be a useful tool that benefits both the practitioner and the OPR.

OPR Sanctions

The Office of Professional Responsibility does not publish guidelines pertaining to the sanctions it doles out to practitioners for their misconduct under Circular 230. In fact, the manner in which OPR decides how to sanction a practitioner is somewhat of a mystery to the practitioner community. In the past, OPR sanctions were generally given little attention. But with the passage of the Jobs Act in 2004, OPR has obtained the ability to issue monetary sanctions for practitioner and firm misconduct. Faced with this new weapon, the practitioner community and OPR should strive for some level of transparency and guidance in the issuance of sanctions. This part of the article will discuss the many different aspects of OPR's old, new and future sanctions.

The Factors OPR Evaluates to Determine Sanctions

Although there is some guidance regarding the factors that OPR utilizes when trying to determine an appropriate sanction for practitioner misconduct, there is no published formula. In most practitioner misconduct cases, OPR generally takes into consideration a broad set of factors. As with any disciplinary proceeding, OPR will take into consideration the nature and severity of the alleged practitioner misconduct and will determine if there has been a pattern of conduct, as opposed to one isolated incident. The Office will usually confirm if the practitioner has any prior disciplinary history within OPR. After the Office establishes a baseline idea for an appropriate level of sanction, the OPR attorney will factor in any aggravating or mitigating factors. In many cases, OPR will evaluate the practitioner's misconduct in relation to the pursuit of proper tax administration and the effect on the confidence of the practitioner community as a whole. Therefore, while the factors that OPR uses establish sanctions for practitioner misconduct may not be detailed or specific, the range of factors it utilizes establishes a somewhat uniform disciplinary system.

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The "Old" Sanctions

The sanctions often referred to as the "old" sanctions have been available to OPR for a long time. They are used frequently by the OPR, and there are no plans to reduce their use or to seek their repeal. They are old only in that they pre-date the new sanctions provided for in the Jobs Act.

Reprimand

The least-severe sanction available is the Reprimand. This sanction can be issued unilaterally against a practitioner by the Director of OPR.[20] Essentially, a Reprimand is a letter from the Director of OPR to a practitioner stating that the Director has found that the practitioner has committed some misconduct under Circular 230. What differentiates a Reprimand from all of the other sanctions is that a Reprimand is private—only the practitioner and the Director have knowledge of its existence. Although the issuance of a Reprimand is not publicized, it does stay on the practitioner's record. In the event the practitioner is sanctioned again, the Reprimand will be considered by OPR as establishing a history of misconduct when deciding on the appropriate sanction.

The other sanctions are all public; OPR will publicize the identity of the practitioner and the sanction he or she received. These other sanctions include Public Censure, Suspension and Disbarment. Under §10.52(a)(1), a practitioner may be censured, suspended or disbarred from practice before the IRS for willfully violating any of the regulations (other than §10.33) under Subpart C of Circular 230 and for recklessly, or through gross incompetence (within the meaning of §10.51(l)), violating §§10.34, 10.35, 10.36 or 10.37. Unlike the Reprimand, the Director of OPR cannot issue a Public Censure, Suspension or Disbarment unilaterally. These sanctions are only issued as the result of an agreement negotiated between the practitioner and the Director or by order of an Administrative Law Judge. The negotiation of sanctions is usually initiated by the practitioner under investigation. The Director has the discretion to either accept or reject the practitioner's proposed sanction.[21] If the Director views the practitioner's offer as unreasonable, then the practitioner's case will be forwarded on to the General Legal Services (GLS) division of the IRS for litigation before an Administrative Law Judge.

Public Censure

A Public Censure is a Reprimand that OPR and the practitioner agree will be made public. When a practitioner receives a Public Censure, his or her name is published in the Internal Revenue Bulletin (I.R.B.). The facts that gave rise to the Public Censure are not published in the I.R.B, but the Public Censure is a form of sanction that has been receiving more attention in recent years, and in certain situations can be used in conjunction with §10.79 (d), which permits OPR to place conditions on a practitioner after he or she has been either suspended or censured by the Office.[22] The conditions placed on the practitioner will be prescribed by the Director and will be designed to promote high standards of ethical conduct,[23] but a Public Censure does not stop the practitioner from practicing before the IRS.

Suspension

A practitioner who receives a Suspension is prohibited from practicing before the IRS for a specified period of time. However, the practitioner will still be able to prepare tax returns during his or her Suspension since the Suspension only prohibits the ability of the practitioner to represent clients before the IRS. The length of the Suspension can be agreed upon by the practitioner and the Director or it can be determined by an Administrative Law Judge. The practitioner's name will be published in the I.R.B. along with the fact that he or she was suspended from practice before the IRS. Presently, the facts that gave rise to the Suspension are not published in the I.R.B.

Disbarment

The most severe sanction is Disbarment. Generally, practitioners are only disbarred for egregious violations of Circular 230. When a practitioner is disbarred, he or she is permanently prohibited from practicing before the IRS. A practitioner may petition the Director of OPR for reinstatement after a period of five years has passed.[24] The Director may decline to reinstate the practitioner if he or she thinks the practitioner will not abide by the regulations under Circular 230, and if such reinstatement would be contrary to the public interest.[25]

In most situations, the Disbarment of a practitioner only results from the final decision of an Administrative Law Judge. In cases when the practitioner does not wish to negotiate a sanction with the Director of OPR, the case is usually referred to GLS for litigation. OPR recommends to GLS what it thinks the appropriate sanction is, given the facts of the case. This is important because, under §10.62(b), OPR must specify the sanction it is seeking in the complaint. Currently, hearings in front of an Administrative Law Judge remain private, unless the practitioner decides to make the proceedings public and the Administrative Law Judge grants the request.[26]

OPR's New Authority and the Potential Effect of the New Sanctions

The tax practitioner community will certainly be paying attention to how OPR decides to utilize the new arsenal of sanctions it received as a result of the passage of the Jobs Act in 2004. Of particular interest is OPR's new ability to issue monetary penalties,[27] and its ability to fine employers, firms and other entities.[28] In the past, the Office only had the ability to sanction individual practitioners and prevent those individuals from practicing before the IRS. Now, individual practitioners and entities alike need to be vigilant about their behavior in representing clients before the IRS.

Monetary Sanctions

The Jobs Act expands OPR's authority by permitting it to impose monetary penalties on any representative that engages in misconduct. OPR can seek to impose a monetary penalty either in lieu of, or in addition to, the Public Censure, Suspension or Disbarment of the practitioner.[29] Not only can OPR fine the individual practitioner, but it can also fine the practitioner's employer, firm or other related entity if the employer, firm or entity knew, or reasonably should have known, of the conduct giving rise to the penalty.[30] However, the penalty shall not exceed the gross income derived (or to be derived) from the conduct giving rise to the penalty.[31] In the future, how OPR administers the application of the monetary sanctions should be of particular interest to the practitioner community.

Injunctions

Although most of the attention has been on OPR's increased jurisdiction and the authority to impose sanctions on both individual practitioners and firms, there is another new development under the Jobs Act. The new legislation allows for a civil action in the name of the United States to enjoin any person from further engaging in specified conduct.[32] Such action may be commenced at the request of the Treasury. The legislation provides for injunctive relief with respect to any action, or failure to take action, that is in violation of any requirement under Circular 230.[33] This may be one section of the Jobs Act where practitioners will have to wait and see what OPR will decide to do with its newly found injunctive authority.

Conclusion

The Jobs Act has increased the jurisdiction of the Office of Professional Responsibility and, at the same time, has broadened the Office's ability to sanction practitioners, firms and other types of entities. Although the "old" Circular 230 procedures have served the Office of Professional Responsibility well over the last few years, it will be interesting to see how the Office will decide to use the new authority it has been granted. Practitioners and their firms should stay informed about the constant changes that are taking place within the Office of Professional Responsibility.

ENDNOTES

[1] Allen Kenney, *ABA Tax Section Meeting: IRS OPR Director Outlines "New Direction" of Office, Goals,* TAX NOTES, May 17, 2004, at 804.
[2] 31 CFR, part 10, Circular No. 230.
[3] All Section references are to Circular No. 230 (31 CFR, part 10, effective June 20, 2005), unless otherwise stated.
[4] Circular 230, §10.22.
[5] American Jobs Creation Act of 2004 (P.L. No. 108-357).
[6] Circular 230, §10.3. Although, OPR has jurisdiction over Appraisers only if a §6701(a) penalty has been assessed, Circular 230, §10.60(b).
[7] 5 USC §500.
[8] Act Sec. 822 of P.L. 108-357.
[9] *Id.*
[10] *Id.*
[11] 28 USC §2462 which imposes a five-year statute of limitations for actions initiated by the government to impose a civil fine, penalty or forfeiture on a private citizen.
[12] Circular 230, §10.60.
[13] Although the Enforcement Attorney will request a response within 30 days, there is nothing in Circular 230 that establishes a specific time frame for when responses are due.
[14] Circular 230, §10.20.
[15] Circular 230, §10.82.
[16] Circular 230, §10.82(d).
[17] Circular 230, §10.64.
[18] Circular 230, §10.82(b)(1).
[19] Circular 230, §10.61(a).
[20] Circular 230, §10.60.
[21] Circular 230, §10.61(b).
[22] Circular 230, §10.79.
[23] Circular 230, §10.79(d).
[24] Circular 230, §10.81.
[25] *Id.*
[26] Circular 230, §10.71(b).
[27] *Supra,* note 8.
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] Act Sec. 820 of P.L. No. 108-357.
[33] *Id.*