UNITED STATES
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Date: 11-17-03 **Pages (incl. transmittal page):** 6

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REMARKS:

UNITED STATES OF AMERICA
THE DEPARTMENT OF THE TREASURY

DIRECTOR,[1] OFFICE OF PROFESSIONAL RESPONSIBILITY,	)	
Complainant,	)	
v.	)	**Complaint No. 2003-2**
JOSEPH R. BANISTER,	)	
Respondent.	)	

ORDER ON RESPONDENT'S MOTION TO DISMISS THE AMENDED COMPLAINT

Respondent, on October 29, 2003, moved, through counsel, for the dismissal of the Amended Complaint[2] in this matter, on the grounds that it fails to state a claim upon which relief can be granted, ignores procedural requirements of the regulations governing the practice of those before the Internal Revenue Service (31 C.F.R. Part 10)("Practice Regulations"), and because it violates Mr. Banister's right to due process. IRS filed a Response in opposition on November 10, 2003.

Respondent first contends that the Practice Regulations codify those allegations which can comprise the basis for seeking a sanction for misconduct. While Respondent acknowledges that the amended Complaint adds the basis that Mr. Banister willfully failed to *file* tax returns, it asserts that the relied upon regulation only proscribes a willful failure to *make* such returns. 31 C.F.R. § 10.51(f). In contrast, pointing to 31 C.F.R. § 10.51(a), it contends that a willful failure to *file* a return can constitute disreputable conduct only if the Respondent has first been convicted

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[1]The Director, Office of Professional Responsibility, Internal Revenue Service, Department of the Treasury was formerly known as The Director of Practice. For convenience and as a practical frame of reference, the Court will refer to the Complainant as the "IRS."

[2]In an Order issued October 17, 2003, the Court granted the IRS motion to amend the (first) Complaint. The amended Complaint added allegations that the Respondent failed to file individual income tax returns for the years 1999 through 2002.

of the crime of willful failure to file a return.

In response, IRS, while acknowledging that 31 C.F.R. §10.51(f) refers to willfully failing to *make* a Federal Tax return in violation of the revenue laws of the United States, rejects the claim that this requirement is substantially different from the failing to *file* a return. It contends that to *make* a return, one must *file that return*. As IRS expresses it, "[u]ntil one files the required forms with the government he has not made a return but has merely collected and organized information." Response at 3.

The Court agrees with the position of the IRS. It would be nonsense to interpret this regulation as Respondent suggests. Such an interpretation would be inconsistent with the complete text of Section 10.51(f) and its broad intent to address those who would evade the duty to make a tax return when required by the revenue laws. *See also*, *Orwutsky v. Brady*, 1991 U.S. App. LEXIS 2613 at *4 (4th Cir. 1991) in which that court repeatedly referred to an attorney who failed to *file* his personal federal income tax returns and then cited the predecessor regulation to Section 10.51(f), (i.e. Section 10.51(d)), in support of the attorney's disbarment. Both versions refer to "willfully failing to *make* a federal tax return."

Respondent also asserts that the Amended Complaint fails to state any facts in support of the contention that Banister was required to file tax returns, and, instead, only "[a]lleg[es] mere legal conclusions [which] fail[] to put Banister on notice of what facts he will need to prepare his defense." Motion at 3. As a second theory in support of this contention, Respondent asserts that 31 C.F.R. § 10.59 limits the kind of supplemental allegations that can included in an amended complaint, which is entitled "Supplemental charges." Respondent construes this regulation as limiting any supplemental charges to "conduct within the pending proceedings, such as false testimony." *Id.* at 4. Respondent maintains that its interpretation, limiting supplemental charges "to conduct that takes place within the proceedings" protects a practitioner's right of due process. *Id.*

As to the assertion that the Amended Complaint fails to allege sufficient facts to enable Banister to prepare a defense, IRS responds that the Complaint is quite clear, as it lists the specific sections from Circular 230 alleged to have been violated and names the tax years in which Banister failed to file a federal income tax return. It observes that, as the Respondent is a Certified Public Accountant, presently authorized to practice before the IRS, he is certainly aware of the circumstances giving rise to an obligation to file a tax return and that one can defend against these charges by demonstrating that the returns were filed or that his income was insufficient to require filing of returns.

This claim of Respondent is also without merit. The charges could not be clearer. The specific regulation involved is listed together with the years of the alleged violations. While those authorized to practice before the IRS are presumed to have sufficient knowledge to deal with IRS matters, even one without such specialized knowledge would be able to appreciate the nature of the charges set

forth in the Complaint.

IRS also takes issue with Respondent's claim that the regulation addressing supplemental charges precludes the filing of the Amended Complaint. It asserts that 31 C.F.R.§ 10.59 (July 1994) does not bar an amendment when additional violations are discovered. To the contrary, IRS notes that 31 C.F.R. § 10.50(a) permits the Secretary of the Treasury or his delegate to censure, suspend or disbar practitioners, as long as there has been notice and an opportunity to respond. Here, Respondent became aware of the amended charges when the motion to amend the Complaint was filed in August 2003. The Court agrees with the IRS's position. 31 C.F.R. 10.59 (1994), (now revised as Section 10.65 (2002)), in no way limits the amendment of a complaint in the manner suggested by Respondent. Rather, it is obviously a tool to inhibit those facing a complaint from any temptation to make groundless denials in answers or to otherwise subvert the disciplinary process. The IRS is correct in its understanding of the clear precept that complaints, and answers, generally may be freely amended.

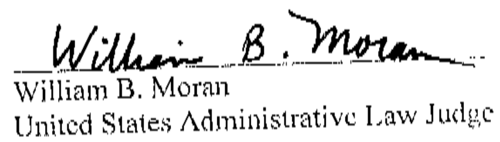
Last, Respondent contends that the Complaint was issued in violation of the administrative procedural protections which must be followed before the Complaint can be initiated. Respondent asserts that the Amended Complaint "skipped every part of the process" by failing to first establish a written referral by an IRS employee, by failing to have the Director issue a written report, by failing to notify the Respondent of the alleged problem, by failing to give the Respondent an opportunity to achieve compliance, and by failing to provide the Respondent a conference to discuss the issue with the Director. As authority, Respondent cites 31 C.F.R. §§ 10.53, 10.54, and 10.55. Respondent contends that failure to follow this process violates Mr. Banister's right to due process.

The IRS contests this claim that the Amended Complaint must be dismissed because it failed to first observe all the procedures in Circular 230. Observing again that, in general, amendments to administrative pleadings are allowed, it notes that in this instance judicial economy is served by addressing all charges against the Respondent in one disbarment proceeding.

Here again, Respondent's contentions are meritless. IRS Regulations 10.53, 10.54 and 10.55, (10.53, 10.60 and 10.61, respectively, under the revised regulations), do not bar the IRS from amending a complaint as Respondent has suggested. Section 10.53 addresses the duty of IRS employees to report suspected practice violations, but it certainly does not act as a de facto barrier, by imposing a condition precedent to the institution of a complaint. As for Section 10.54, that section refers to the institution of a proceeding. That has already occurred in this case by virtue of the filing of the original (i.e. First) Complaint. In addition, even that provision provides an exception to the procedures where, among other exceptions, willfulness is involved. The Amended Complaint deals with just that, "willfully failing" to make (i.e. *file*) a required federal tax return.

Accordingly, the Court rejects each of the Respondent's contentions and consequently the Respondent's Motion to Dismiss the Amended Complaint is **DENIED.**

SO ORDERED.



William B. Moran
United States Administrative Law Judge

Dated: November 17, 2003
Washington, D.C.

In the Matter of Joseph R. Banister, Respondent
Complaint No. 2003-2

CERTIFICATE OF SERVICE

I certify that a true copy of **Order On Respondent's Motion To Dismiss The Amended Complaint**, dated November 17, 2003, was sent this day in the following manner to the addressees listed below:

Nelida Torres
Legal Staff Assistant

Dated: November 17, 2003

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