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**From:**

**Sent:** Friday, December 11, 2015 12:50 PM

**To:**

**Cc:**

**Bcc:**

**Subject:** Employee Audits

You asked whether employees must attend the initial interview in an employee tax audit. The concern is that some employees, using the provisions of section 7521(c) are choosing not to appear at the initial interview and are instead sending a representative or, in some cases, not appearing at all. You asked us to consider whether section 7521(d), which states that the provisions of section 7521 do not apply to “investigations relating to the integrity of any officer or employee of the IRS,” would allow the Service to require the employee to be present at the initial interview. As discussed below, where an employee audit is an investigation relating to the integrity of that employee, the employee does not have the right to send his or her representative to the interview without accompanying them. Moreover, we believe the Service may take the position that employee investigations of employees in auditable positions are investigations relating to integrity, whereas investigations of employee in non-auditable positions are not necessarily investigations relating to integrity. However, we caution that nothing in section 7521 allows the Service to compel the employee’s cooperation.

Section 7521(a) describes the type of interviews to which section 7521 applies, and defines these as in person interviews between any officer or employee of the IRS and any taxpayer “relating to the determination or collection of any tax[.]” It provides certain rights which taxpayers may assert in connection with these interviews. Section 7521(c), in relevant part, allows a taxpayer to be represented by an authorized representative in any interview described in subsection (a), and prevents the Service from requiring the taxpayer to attend interviews along with that representative. Essentially, the taxpayer may send their representative in their place. Section 7521(d) provides that section 7521 “shall not apply to criminal investigations or investigations relating to the integrity of any officer or employee of the Internal Revenue service.

Statutes should be construed “so as to avoid rendering superfluous” any statutory language. Astoria Federal Savings & Loan Ass’n v. Solamino, 501 U.S. 104, 112 (1991). The language of section 7521(d) does not provide an exception for every investigation of every IRS employee. Instead, Congress limited this exception to

criminal investigations and investigations relating to the integrity of IRS employees. If all employee audits fell within the exception, there would be no reason for Congress to specify integrity investigations. In fact, the statute could have just stated that section 7521 did not apply to employees of the Internal Revenue Service. Thus, the investigations relating to the integrity of an IRS employee must be a subset of all employee investigations.

The Service separates its employees into essentially two categories, auditable positions and non-auditable positions. We think this is the relevant distinction for purposes of the applicability of section 7521(d). The Service has already made a judgment about which employees should be considered auditable. Presumably that is because in positions involving tax administration, it is important that the employees enforcing and applying the tax laws be compliant with their own taxes in order to maintain public confidence and maintain the integrity of the Internal Revenue Service. An audit of an employee in such an auditable position, therefore, is an investigation relating to the integrity of that employee in a way that is less true of an employee in a non-auditable position lacking tax administration responsibilities.

Finally, we note that this advice relates to initial interviews. Should you wish further guidance regarding whether an employee investigation could convert from a non-integrity investigation to an investigation relating to integrity for purposes of section 7521, we would need to consider the facts of those specific cases or the specific policies you were looking to implement.

Please let me know if you have any questions or concerns.