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INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

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MEMORANDUM FOR LEWIS BODDIE

Acting Assistant Director, Employee Services

FROM:

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SUBJECT:

Section 1204: Fair and Equitable Treatment of Taxpayers

This memorandum responds to a series of questions you asked regarding Section 1204 of the IRS Restructuring and Reform Act. The questions you asked are reproduced below followed by our answers.

Question 1. Section 1204(b) states, "The Internal Revenue Service shall use the fair and equitable treatment of taxpayers by employees as one of the standards for evaluating employee performance." You ask whether the word "standard" in section 1204 has the same meaning as a "retention standard" in Section 1201.

Neither the statute nor its legislative history define the term "standard" as used in Section 1204(b). However, our review of the statute leads us to conclude that the term "standard" as contained in Section 1204(b) is not synonymous with the term "retention standard" as contained in Section 1201. We believe that if the two terms were meant to be synonymous, Congress would have used the same terminology in both section 1201 and 1204(b). Congress, however, did not do so.

A "retention standard" is that standard which describes the level of performance necessary to be retained in a job. *Workforce Performance*, Vol. 5, No. 5 (June 1998). Section 1201 of the RRA requires the Service to establish one or more "retention standards" for each employee; make periodic determinations of whether each employee meets or does not meet the established retention standards, and take actions with respect to any employee whose performance does not meet the established retention standards. Section 1201 defines "unacceptable performance" as performance which fails to meet the established retention standard.

We do not believe Congress intended the requirement that employees be evaluated on whether taxpayers are treated fairly and equitably to be a "retention standard," because it does not describe the performance level necessary to be retained in a

PMTA : 00333

job. Neither do we believe Congress intended the "fair and equitable treatment of taxpayers" to be a "performance standard" because it does not define the threshold levels of performance that must be met in order to be appraised at a particular level of performance.¹ Rather, it appears that the "fair and equitable treatment of taxpayers" requirement is something in the nature of a subject area upon which employee performance must be rated.

The Service's current performance appraisal system is based, in part, on critical elements and subelements. Our conclusion then leads to the following question: whether the subject area "fair and equitable treatment of taxpayers" must be something that rises to the level of a "critical element,"² such that performance below the retention standard will result in unacceptable performance, or whether it can simply be one of several subelements upon which employees are rated under the critical element. Neither the statute nor its legislative history reveals a conclusive answer to this question. Consequently, it is probably within the Service's discretion, under its current performance management system, to determine whether to use "fair and equitable treatment" as a critical element or as a subelement.

The new performance appraisal system required under Section 1201, however, must be based on retention standards whereby employees are judged and rated on whether they meet or do not meet the retention standards, and an employee's performance will be deemed unacceptable if he/she does not meet the retention standard. Consequently, under the performance management system developed pursuant to Section 1201, we believe that the "fair and equitable treatment of taxpayers" must be a subject area around which a retention standard is developed such that failure to meet the retention standard will render the employee's performance unacceptable.

Question 2: Does the requirement that employees be rated on whether they provide fair and equitable treatment to taxpayers apply to all employees or only to those employees who occupy positions requiring interaction with taxpayers.

¹ A "performance standard" is defined as "the management-approved expression of the performance threshold(s), requirement(s), or expectations(s) that must be met to be appraised at a particular level of performance." 5 C.F.R. § 430.203.

² A "critical element" is defined as a "work assignment or responsibility of such importance that unacceptable performance on the element would result in a determination that an employee's overall performance is unacceptable."

Once again, Section 1204(b) provides, "The Internal Revenue Service shall use the fair and equitable treatment of taxpayers by employees as one of the standards for evaluating employee performance." The statute provides for no exceptions and its plain meaning appears to apply to all employees.

We all understand, however, that not all employees occupy positions requiring taxpayer contact or interaction, or occupy positions which support those employees who have taxpayer contact or interaction. Consequently, such employees cannot be rated on this element. An agency cannot evaluate an employee on a particular element if the employee has no work assignments or responsibilities related to the element. Consequently, while such an employee may have the element "fair and equitable treatment of taxpayers" in his performance plan, the employee would receive a rating of "Not Applicable" on this element. Admittedly, this puts the IRS in the awkward position of placing critical elements in employees' performance plans that are not applicable. However, we believe that such an approach not only meets the requirements of the statute, but also meets achieves the public policy established by Congress.

Question 3: If all employees must be rated on whether they provide "fair and equitable treatment to taxpayers," will it be defensible if an "unsatisfactory rating" results in a performance-based action.

Once again, if the employee has no contact or interaction with taxpayers, or provides no support to employees who have taxpayer contact and interaction, such an employee should receive a rating of "Not Applicable" on his or her performance appraisal on the element "fair and equitable treatment of taxpayers." Consequently, there should be no resulting performance-based action. If an employee who has some form or responsibility for ensuring taxpayers are treated fairly and equitably fails to meet the retention standard for this element, the Service should be able to sustain a performance-based action so long as the retention standard was appropriately established and the employee was properly evaluated.

Question 4: Is there a definition of "fair and equitable" in the legislative history.

No, the legislative history of Section 1204 does not provide a definition of "fair and equitable."

Question 5: Does the current Executive/Managerial Performance Plan meet the requirement of Section 1204(b) that employees be evaluated on whether taxpayers are treated fairly and equitably by employees?

The current Executive/Managerial Performance Plan contains the critical element "Increase Compliance." Under this critical element, one of the management

standards (or subelements) is to "administer the tax laws with empowered employees who protect taxpayers' rights and treat them ethically with honesty, integrity, fairness, and respect." Under the current law regarding performance management systems, this standard appears to be consistent with the plain meaning of Section 1204(b).

The current Executive/Managerial Performance Plan will not, however, meet the requirements of Section 1201 because it does not establish a retention standard for the subject area "fair and equitable treatment of taxpayers." We believe, however, that the Service will satisfy both Sections 1204(b) and 1201 if it developed a retention standard for executives around the subject area "administer the tax laws with empowered employees who protect taxpayer's rights and treat them ethically with honesty, integrity, fairness, and respect."

If you have any further questions or comments, please feel free to contact Julie Barry at 401-4013.