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JGrabel

**MEMORANDUM FOR JONATHAN L. EDELSON
SUPERVISORY MANAGEMENT AND PROGRAM ANALYST,
OFFICE OF PROGRAM EVALUATION AND RISK ANALYSIS**

FROM: Neil B. Worden *by Julie A. Barry*
Chief, Claims, Labor and Personnel Law

SUBJECT: Use of Records of Tax Enforcement Results in a Proposed
Long Term Goal

This memorandum responds to your request that we review a proposed Long Term Goal which measures Nonrevenue Enforcement to ensure it complies with RRA'98 Section 1204 and the regulations at 26 C.F.R. Section 801 regarding the use of records of tax enforcement results (ROTERS). You indicated that the proposed Nonrevenue Enforcement Long Term Goal will be one of five which will be attached to a strategic plan and shared externally.

A tax enforcement result is the outcome produced by an IRS employee's exercise of judgment recommending or determining whether or how the IRS should pursue enforcement of the tax laws. IRM 1.5.2.8 (1). Records of tax enforcement results (ROTERS) are data, statistics, compilations of information, or other numerical or quantitative results reached in one or more cases. IRM 1.5.2.9(1). The fundamental purpose of the restrictions on the use of ROTERS is to ensure IRS employees make decisions on pursuing enforcement of tax laws (including but not limited to determining tax liability and ability to pay) based solely on the correct application of the law to the facts of each case and on the exercise of reasonable judgment. RRA'98 Section 1204 and the relevant regulations prohibit tax enforcement results from being used in ways that might inappropriately influence IRS personnel to act in a manner inconsistent with these principles. IRM 1.5.2.7.

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We have reviewed the proposed Long Term Goal, and it is our opinion that the methodology used to determine the figures utilizes ROTERs. ROTERs may properly be used for business purposes such as forecasting, financial planning, resource management, and the formulation of case selection criteria. IRM 1.5.2.16. If the proposed use of the Long Term Goal at issue is solely for one of these purposes, the prohibitions in Section 1204 and the C.F.R. do not apply. It is our opinion that the use of the Nonrevenue Enforcement Long Term Goal for other ends would be impermissible.

You have informed us that the measurement of the goal will entail combining a figure from TEGE and a figure from CI. The contributing figure from TEGE will be the number of "examinations and compliance activities *resulting in a corrective action* (emphasis added)." In our opinion this information is ROTERs, as it tabulates the examinations and compliance activities in which the exercise of judgment by a TEGE employee effects a change - specifically a corrective action. Further guidance for TEGE regarding the type of information considered tax enforcement results can be found at IRM 1.5.9.

You have indicated that a figure representing "tax and tax related completions" will be CI's contribution to the Long Term Goal measurement. Andrea Whelan, Acting Director HQ Planning & Strategy, has informed us that "tax and tax related completions" is the number of CI tax related cases opened for investigation and then resolved, whether the ultimate resolution is a prosecution recommendation or a discontinued investigation.¹ While this would seem to be outcome-neutral, "number of prosecution recommendations" is specifically listed at IRM 1.5.5.3(1)(c) as an example of CI ROTERs, and "number of discontinued investigations" is listed at IRM 1.5.5.3(1)(f) as another such example. Thus, the figure is comprised of ROTERs.

Perhaps more problematic is the fact that the annual increases projected in the Nonrevenue Enforcement Long Term Goal might influence CI employees to open cases for investigation based on a desire to meet the goal number. CI employees review incoming tax related cases and exercise judgment regarding whether or not each case warrants the IRS opening an investigation to pursue enforcement of the tax laws. Some cases do not call for investigation. The "completion" figure used in the Long Term Goal is a record of those cases in which pursuit of tax enforcement via investigation was initially recommended, and a decision to either prosecute or discontinue the investigation was ultimately made. The use of this figure in the Long Term Goal may influence an employee's initial judgment regarding whether a case warrants an investigation, as a greater number of cases opened for investigation would likely result in a greater number of "tax and tax related completions."

The Long Term Goal you propose is based on a combination of the above information from TEGE and CI. The fact that the figures are combined and used as a basis for

¹ The figure does not encompass the tax and tax related cases opened for investigation which are still in the open inventory pending a decision to either discontinue the investigation or recommend prosecution.

Further calculations does not negate the fact that ROTERs are involved. Utilizing these ROTERs to set a Long Term Goal might inappropriately influence employees to recommend or take action in taxpayer cases based on something other than the exercise of reasonable judgment and proper application of the law to the facts. Thus, we do not believe that combining these ROTERs into an index takes this outside the scope of Section 1204. Unless the goal is solely for one of the purposes listed at IRM 1.5.2.16, it is our opinion that the proposed Long Term Goal involves an impermissible use of ROTERs.

If you have any questions or require further assistance, please contact Jennifer Gabel at (202) 283-7921.