

Practitioners See Possible Pros and Cons in Fraud Program Changes

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While there are few details on upcoming adjustments to the IRS's National Fraud Program, the possible changes could have both benefits and detriments for tax enforcement, according to practitioners.

The [unexplained planned changes](#) raise questions concerning the future of the fraud technical adviser position at the IRS.

Tax Analysts recently obtained a [notice the IRS sent](#) to the National Treasury Employees Union describing the "involuntary reassignment of 65 Bargaining Unit (BU) employees to permanent field positions" within the IRS Small Business/Self-Employed Division.

According to the notice, 61 fraud technical advisers will be reassigned as field revenue officers and revenue agents, along with four support staff, in October. The notice states that the National Fraud Program "model needs to be adjusted and right-sized to meet evolving business priorities" and refers to a change in the "outdated geographic footprint." The NTEU told Tax Analysts that the reassigned personnel are remaining at their current duty posts.

The questions raised by the lack of details also include the nature of the changing "geographic footprint," which could mean that scattered fraud technical adviser positions are being centralized in one location.

Mark E. Matthews of Caplin & Drysdale Chtd. said part of the reason for the creation of the fraud technical adviser position was to help revenue officers and agents distinguish what sorts of bad behavior have the "jury appeal" to justify further investigation by the Criminal Investigation division. Matthews, who was CI chief during the development and creation of the fraud technical adviser position, gave the example of a taxpayer with a large tax debt and significant assets, saying revenue officers and agents need someone to emphasize that purchase of those assets after the tax debt arose has **much better jury appeal in a criminal case for evasion of payment.**

That selection process also provides feedback to field examiners and collectors explaining why referrals were accepted or rejected, Matthews said. This was meant to both educate revenue agents and dispel the impression that CI didn't care about tax cases, he said.

Matthews said the initial reaction to the fraud technical advisers was positive, but that he does not know if any problems have arisen in the program in the meantime. "I don't know what is behind the thinking to make those moves," he said.

The IRS may have data concerning a peak in the fraud referral rate justifying a smaller number of fraud technical advisers, Matthews said. It is conceivable that the marginal utility of the last dozen or so fraud technical advisers is now exceeded by their cost, perhaps because of better training of revenue officers and agents, he said.

Pros and Cons

Josh O. Ungerman of Meadows, Collier, Reed, Cousins, Crouch & Ungerman LLP predicted that the reassigned fraud technical advisers “trained in identifying and documenting badges of fraud will produce an increased number of high-quality fraud referrals.”

CI Chief Don Fort has been calling for [more fraud referrals](#).

Taxpayers will have to be more careful in their future dealings with the IRS because of the existence of revenue officers and agents with fraud technical adviser training, Ungerman said. “In light of trained fraud technical advisers assimilating into the field as revenue officers and agents, there will no longer be routine interactions with the IRS,” he said.

Caroline D. Ciraolo of Kostelanetz & Fink LLP noted that fraud technical advisers serve two critical roles in the process of making fraud referrals to CI based on field examinations and collections. First, they contribute to training on badges of fraud that field revenue officers and agents receive, she said. And second, they help reinforce the separation of civil and criminal investigation functions as required by *United States v. Tweel*, [550 F.2d 297](#) (5th Cir. 1977), she said.

In *Tweel*, the appellate court found bad faith when a criminal investigation was conducted under the guise of a civil audit. The Fifth Circuit reversed the defendant’s conviction and held that evidence the defendant gave during a civil audit should have been suppressed because an IRS revenue agent used a “sneaky” but literally true statement to conceal a criminal investigatory purpose of the audit.

Ciraolo, former head of the Justice Department’s Tax Division, said that while the fraud technical adviser position serves an important function, the IRS would benefit from moving highly skilled, experienced fraud technical advisers into field collections and exams as large numbers of senior revenue officers and agents retire. Seasoned fraud technical advisers could take on cases and train new officers and agents, thereby increasing tax enforcement and, as a result, voluntary compliance, she said.

“However, if the IRS moves fraud technical advisers into the field, it needs to address the concern that first prompted the creation of the fraud technical adviser position — namely, that there be a clear distinction between civil exam and collections, and criminal investigation,” Ciraolo said.

“There is always a role for an independent review when it comes to fraud referrals,” Ciraolo said. “If the IRS wants to replace the [fraud technical adviser] program, it needs to address that role.” A fresh look from someone not involved in the initial investigation or collection effort leads to better fraud referrals by culling those matters driven by personal frustrations or animus that may have arisen during the collection or exam process, and cases in which taxpayers have

viable explanations or defenses to allegations of fraud, she said.

Kevin F. Sweeney of Chamberlain, Hrdlicka, White, Williams & Aughtry said that the possibility of centralizing the fraud technical advisers offers both advantages and disadvantages. “Oftentimes, by centralizing a function, you can increase the knowledge base and the experience by putting people who do the same thing together,” he said. On the other hand, if the fraud technical advisers are not where the revenue officers and agents are, they could be used less because they are “out of sight, out of mind,” he said.

Sweeney, a former tax prosecutor, said it is possible that centralization could result in a more focused role for fraud technical advisers in which they are called upon by revenue officers and agents in the field primarily for *Tweel* buffer functions as opposed to fraud development functions. Sometimes the latter function can make fraud technical advisers seem like criminal investigators meant to be kept separate from the civil audits and collections, he said.

Matthews agreed that centralizing the fraud technical advisers to create a “war room” to promote consistency and better use of data analytics could be a well-reasoned policy shift from the original emphasis on face-to-face availability.

Budget Issues

Ciraolo noted that the IRS has stated that it has work for more than twice its approximately 2,000 revenue officers. Despite recent attrition, field collection efforts result in the highest number of fraud referrals to CI, she said.

The IRS needs money not only to hire more revenue officers and reverse the recent attrition, but also to bring on retired personnel as contractors to train those new hires, Ciraolo said. Without that funding, the IRS will probably see fraud referrals and the resulting criminal investigations fall, she said.

Ciraolo said she hopes there will be more [funding from Congress](#) to support tax enforcement efforts and maintain voluntary compliance once the new IRS commissioner and chief counsel [are confirmed](#).

Matthews said he hopes the National Fraud Program changes are not reassigning fraud technical advisers merely to bolster [the falling audit rate](#), although he said he would be sympathetic to the temptation. It would be “penny wise, pound foolish” to reduce the emphasis on fraud referrals, he added.