TAX EXECUTIVES INSTITUTE – COMMISSIONER OF INTERNAL REVENUE AND LARGE BUSINESS & INTERNATIONAL DIVISION
LIAISON MEETING
February 22, 2017
AGENDA

I. Welcome and Introductions

II. Commissioner's 2017 Priorities and Future State Initiatives

TEI members appreciate the Commissioner's leadership and unwavering dedication to the IRS during an exceedingly difficult period. Despite severe budgetary challenges, the agency has continued to fulfill its mission and has made significant progress enhancing taxpayer services through technology. We invite the Commissioner to reflect on the highlights and challenges of his tenure with the IRS, as well as to comment on agency priorities and future state initiatives for 2017 and beyond.

III. New EIN Challenges

Large business taxpayers frequently create new legal entities when implementing significant business transactions. Negotiations of such transactions are unpredictable, and, once terms are agreed to, the time period allowed for execution is almost always short. The IRS's on-line system for requesting EINs is very helpful to taxpayers involved in these types of transactions. However, requests for new EINs cannot be obtained through the system if the parent company's EIN was previously obtained electronically through the Internet. This restriction requires impacted taxpayers to use other, less efficient means of obtaining new EINs, which generally have processing times exceeding four weeks. This time lag causes significant problems for taxpayers implementing transactions in compressed timeframes, and we invite discussion of the possibility of modifying the IRS's online system to eliminate the issue.

IV. LB&I

A. Key Challenges, Priorities and New Initiatives

LB&I leadership spent much of 2016 implementing an ambitious division-wide restructuring and a fundamental revision of its examination program. We invite LB&I leadership to comment on key challenges the division faces in these efforts, as well as its priorities and new initiatives planned for 2017.

B. Centralized Risk Assessment and Campaigns

Centralized risk assessment is a significant aspect of LB&I's new examination strategy, yet little is known about how LB&I intends to risk assess returns and what results will flow from the assessments. We invite discussion of LB&I's plans and how they will impact CIC taxpayers, an update on progress that has been made to date (in particular, progress on pilot programs), and opportunities for stakeholder involvement in this effort.

On January 31, 2017, LB&I publicly announced the first tranche of campaigns. The extensive effort includes thirteen campaign issues spread across a broad spectrum of the Internal Revenue Code, impacting a variety of taxpayers and implementing a range of different treatment streams (e.g., individuals and entities, domestic and international, issue-focused examinations, soft letters and Industry Issue Resolution). We welcome LB&I's thoughts on the following campaign topics:

- Selection and notification of taxpayers subject to a campaign;
- Selection of campaign team members (e.g., executive sponsor, counsel, engineers, economists, others);
- Rules of engagement for campaign issues and coordination with other issue teams;
- Possibility of announcing acceptable exit strategies for resolving campaign issues;
- Internal monitoring and review of campaign issues and treatment streams;
- Timing of the next release of campaign issues; and
- Opportunities for stakeholder input in development of future campaigns.

We also invite representatives of the Office of Chief Counsel to discuss their involvement in the campaign initiative, in particular in the identification of campaign issues, the development of treatment streams, and the application of treatment streams to taxpayers. Does Chief Counsel anticipate rolling out new types of guidance in connection with the campaign initiative?

C. LB&I Examination Process Implementation

Culture shifts and accountability. Successful implementation of LB&I's new examination strategy requires fundamental cultural change in a number of areas, including:

- Shift away from individual agent judgment towards centralized risk assessment, pre-selected issues and centrally developed treatment streams;
- Shift away from exam teams working independently towards a collaborative examination environment in which issues are identified and developed with taxpayers in an open and transparent way;
- Shift away from a holistic examination of a return towards a targeted examination of material issues;
- Shift away from pursuing an issue to its end regardless of outcome towards flexible examination plans in which issue development is strategically reviewed throughout the process and issues are abandoned if they fail to satisfy centralized compliance objectives.

These represent significant challenges, and we invite discussion of steps being taken to shift culture and instill accountability in LB&I's workforce.

Case management challenges. TEI has been actively monitoring its members' experiences with the new examination procedures. The following three issues have emerged as particularly widespread and troublesome to our membership:

- Single point of contact for overall case management;
- Transparent and collaborative issue selection and development; and
- Achieving closure in a timely manner.

We invite discussion of challenges faced in these three areas and possibilities for improving the process.

Stakeholder involvement. We are encouraged by the increased level of stakeholder outreach that has occurred in early 2017 and hope it continues. We firmly believe more can be achieved when working in collaboration with stakeholders and have identified three areas in which we believe LB&I would benefit from increased stakeholder input:

- Improving audit efficiency and resolving systemic challenges;
- Improving industry knowledge and commercial awareness; and
- Achieving a uniform understanding of elevation procedures.

We welcome discussion of ways in which TEI members can work with LB&I to address these three areas.

D. Future of CAP

As part of its strategic restructuring and movement to an issue-focused examination approach, LB&I is undertaking a comprehensive evaluation of its CAP program. In response, TEI members have actively engaged with LB&I senior leadership concerning how CAP fits within and enhances LB&I's overall mission. TEI firmly believes a cooperative compliance program like CAP plays an important role in the large-case tax administration process and it would be a significant step backward for the IRS not to offer a program like CAP to its largest, most complex, and most sophisticated taxpayers. Indeed, without CAP or a replacement cooperative compliance program, the IRS would become an outlier among sophisticated revenue bodies[1] and would forgo a valuable resource to its overall tax administration efforts.

We have summarized below some of the points that demonstrate the importance of CAP and justify retaining the program. We invite discussion of these and any other points the IRS thinks are relevant to its CAP evaluation.

[1] As of 2013, 24 different countries were developing or already administering cooperative compliance programs like CAP. *See* OECD, CO-OPERATIVE COMPLIANCE: A FRAMEWORK. FROM ENHANCED RELATIONSHIP TO CO-OPERATIVE COMPLIANCE (2013), available at http://www.oecd.org/ctp/administration/co-operative-compliance.htm [the OECD Cooperative Compliance Report].

Benefits of CAP

- When it works, CAP examinations are extraordinarily efficient with the IRS and taxpayers jointly benefiting. CAP Maintenance taxpayers are "best practice" role models.
- CAP taxpayers make a commitment of transparency, which has a chilling effect and deters aggressive behavior. CAP taxpayers routinely reevaluate transactions that enter grey areas. This heightened awareness also serves to regulate advice rendered by external tax advisors, who are reluctant to pitch aggressive tax transactions when they know the transactions will be examined in real time.
- CAP promotes a real-time audit of issues supported by readily available documents and fresh recollections from taxpayers who are still available for interviews.
- Public company boards depend on the certainty and currency provided by CAP, and large-case taxpayers are willing to pay more in taxes to get it. In a recent survey of its membership, TEI learned that twenty-three CAP and CAP Maintenance taxpayers paid $30.4 billion in taxes for TY 2015.
- Cooperative compliance programs like CAP have been adopted and endorsed by major economies throughout the world. As of 2013, twenty-three other countries were developing or administering cooperative compliance programs like CAP. The United States was a pioneer in this effort.

Audit Efficiency. Like any decentralized government program, the CAP program has not been implemented perfectly across all participating taxpayers. There are reported instances where taxpayers and CAP examination teams have not fully embraced CAP principles and are not running efficient examinations. These inefficient CAP engagements are the exception, not the rule, and should not taint the entire program to the detriment of the well run cases. TEI recommends the following steps to address efficiency concerns:

- Form external stakeholder working groups to assist with problems and propose solutions.
- Study the outliers. If CAP program metrics for a particular case are unusually favorable or unusually unfavorable, find out why. Use this information to improve the program.
- Develop new metrics that are more in-tune with and capable of better assessing the success of a cooperative compliance program like CAP. *See* Chapter 6 of the OECD Cooperative Compliance Report.
- Take thoughtful, incremental steps to improve CAP efficiency (e.g., reduce the number of quarterly disclosures, reduce pre-scheduled meetings, eliminate the use of specialists for routine issues).

Eliminate the Chaff. Based on a survey of our membership, TEI estimates 10% of CAP examinations are not being run in accordance with CAP principles. These outliers adversely impact the metrics of the entire CAP program. To resolve this issue, we recommend developing a transparent process for identifying underperforming CAP taxpayers and underperforming CAP examination teams and eliminating them from the program. Taxpayers should be eliminated for bad behavior (e.g., uncooperative, not transparent, not promptly responding to requests). CAP team members who are not following CAP principles should likewise be eliminated from CAP examination teams (e.g., failure to limit the examination to large, unusual, and material transactions disclosed in the MOU; failure to involve specialists only when a CAP disclosure or campaign issue requires one; failure to apply resolutions of previously audited and agreed upon issues to later cycles unless there is a change in facts).

It Is Premature to Disband CAP at This Time. LB&I's current focus on CAP arose in part from anticipation that the division would eliminate the CIC Program (i.e., the continuous examination program for the largest companies). Elimination of the CIC Program is frequently cited as a reason CAP is no longer necessary, the rationale being continuous examinations of compliant, large-case taxpayers is not an efficient use of LB&I's scarce resources and these returns should be "surveyed" in future years, which consumes far less resources. TEI members have seen no indication that continuous examinations of large-case taxpayers are ending. It is therefore premature to disband CAP at this time.

E. U.S. International

Country-by-Country reporting. TEI has a number of questions, comments, and concerns surrounding taxpayer compliance with, and the IRS's administration of, the country-by-country reporting information set forth in the final report under Action 13 of the OECD's Base Erosion and Profit Shifting (BEPS) project.

1. *Form status*

The IRS has designated Form 8975 as the mechanism for taxpayers to report country-by-country information. With respect to this form:

a. When will the final version of the form (with instructions) be available to taxpayers?

b. What changes does the IRS anticipate making to the draft form in the final version?

c. When does the IRS anticipate issuing additional guidance on the term definitions and other issues requiring clarity under the country-by-country reporting regulations (generally Treas. Reg. §1.6038-4) identified at the GW/IRS Institute on Current Issues in International Taxation in December 2016 and reaffirmed at the IRS's January 12, 2017, country-by-country roundtable?

d. How does the IRS/LB&I anticipate integrating the country-by-country information it receives from U.S. and foreign-parented MNEs in its risk assessment and audit processes? Who will have access to and use the information? Will the information

be collected and analyzed centrally? Will and, if so, under what circumstances will revenue agents have access to the country-by-country reports of taxpayers they are auditing?

2. *Information sharing/Competent Authority Arrangements*

The IRS has stated it will enter into Competent Authority Arrangements (CAAs) with other jurisdictions to exchange country-by-country reports of U.S. and foreign-parented MNEs.

a. Does the IRS anticipate developing a model CAA and, if so, will the model be publicly available? Does the IRS anticipate that the CAAs from jurisdiction to jurisdiction will be substantially identical? If not, what terms of the CAA may vary by country and under what circumstances?

b. What type of review will the IRS perform regarding the safety and confidentiality of foreign tax authorities' information systems and practices in connection with country-by-country reports? Will this review (if any) rely upon prior review conducted by the IRS for other purposes (e.g., FATCA)?

c. What provisions will be included in the CAAs? TEI is particularly interested in the following issues and terms:

- Clear delineation of what constitutes "appropriate" and "inappropriate" use of country-by-country reporting information.
- The conditions under which the IRS will suspend or "pause" country-by-country information sharing due to inappropriate use of the information by foreign tax authorities. In particular, what sort of misuse by foreign tax authorities may cause the IRS to pause such information sharing outside of a breach of taxpayer confidentiality (e.g., will the IRS pause information sharing if the foreign jurisdiction is using the information to make transfer pricing adjustments without further analysis?).
- The avenues available to taxpayers to report misuse of this information by tax authorities to their competent authority. If this is not covered in the CAAs, then will the IRS make such avenues available to taxpayers and, if so, what mechanism(s) does the IRS anticipate will be available to taxpayers? TEI recommends that the IRS develop a dedicated mechanism for U.S.-parented MNEs to report misuse of this information.
- A mechanism for settling disputes between a taxpayer and a foreign tax authority regarding the foreign tax authority's legal entitlement to the taxpayer's country-by-country reporting information. That is, if a taxpayer reports no activity in a foreign jurisdiction on its Form 8975, but the jurisdiction asserts the taxpayer has sufficient local presence to require reporting and thus the IRS should share the form with the jurisdiction, how will the dispute be handled? Will the taxpayer be able to participate in any such mechanism?

d. Will the full text of these CAAs be publicly available? If not, what information will be available?

e. How many countries does the IRS anticipate having CAAs with (approximately)? What is the timeline for completing these CAAs?

f. TEI recommends that the IRS publicly maintain a list of countries (i) with which it is currently exchanging country-by-country reporting information; (ii) it is in negotiations with to share such information in the future (and the status of the negotiations); and (iii) with which the IRS previously shared such information but has now suspended such sharing and the reasons for the suspension (along with status updates as to when such information sharing is likely to resume). This information will help taxpayers satisfy their country-by-country reporting compliance obligations in other countries.

g. TEI also recommends that the IRS announce when it has transmitted the information to a particular foreign jurisdiction (or the date on which the IRS has transmitted the information to all foreign jurisdictions if the transmission is done concurrently). This information will enable taxpayers to address foreign tax authorities' questions regarding the availability of country-by-country reporting information, as well as provide taxpayers with fair warning of when they can expect substantive questions from foreign tax authorities regarding their country-by-country reports.

h. The OECD recently published documents under BEPS Action 13 regarding the peer review process for country-by-country reporting.[2] What involvement will the IRS have in this peer review process, both from the standpoint of reviewing other countries and being subject to peer review itself? What is the timeline for completing peer reviews and sharing the results? Will the results be publicly available?

3. *Penalties*

Does the IRS anticipate affording taxpayers who make good faith efforts to comply with the country-by-country reporting regulations penalty relief during the first couple filing seasons for the form?

Update on the IRS's work with the Forum on Tax Administration. In light of the substantial completion of the BEPS project and the aforementioned peer review process for BEPS Action 13 (along with peer review documents released under Action 5 regarding a transparency framework for harmful tax practices and Action 14 regarding the MAP process), what will the work of the FTA consist of going forward and how will it impact taxpayers?

[2] *See* http://www.oecd.org/tax/beps/beps-action-13-on-country-by-country-reporting-peer-review-documents.pdf.

APMA program update. We welcome an operations update on the APMA program, including:

- *Staffing* – current staffing levels, recent changes, anticipation of new hiring authority (assuming the hiring freeze implemented by the new administration is eventually ended);
- *Progress on APAs* – inventory, time from filing to agreement, review of experience (positive and negative) with APAs filed under the new revenue procedure; and
- *Experience in MAP as BEPS moves to implementation phase* – impact on case inventory, length of cases, summary of experience (positive and negative) under the new MAP revenue procedure.

F. Increasing the Efficiency of Research Credit Examinations

LB&I is working with a number of taxpayers in the high tech industry on an Industry Issue Resolution (IIR) project aimed at developing safe harbor resolution procedures that rely on audited financial statement data prepared pursuant to ASC 730 as a starting point. TEI members enthusiastically support these types of initiatives and are hopeful the IIR will be released soon. There are other technical areas in research credit examinations that would benefit from safe harbor examination approaches. We invite discussion of whether LB&I would be interested in pursuing other safe harbor approaches that are not tied to audited financial statement amounts. For example, unrealistically low materiality thresholds applied in examinations of large-case taxpayers often result in burdensome examinations of low risk issues. TEI would welcome the opportunity to work with LB&I to develop a uniform approach.

V. Appeals

A. Key Challenges, Priorities, and New Initiatives

The Appeals Division plays a vital role in the return examination process for large business taxpayers. Absent a well-functioning Appeals Division, case closures would stagnate and courts would quickly be overwhelmed with tax controversies. We invite Appeals Division leadership to comment on key challenges the division faces, as well as its priorities and new initiatives planned for 2017.

B. Recent Changes to Case Resolution Procedures

TEI members routinely participate in large, complex cases at Appeals and are concerned with the policy changes adopted in fall of 2016. We invite discussion of Appeals' views of the practical impacts of:

- Requiring an appeals team manager to review a case prior to an appeals team case leader finalizing a settlement;
- Appeals having discretion to invite Counsel and/or Compliance to a conference; and
- Limiting instances in which Appeals provides in-person conferences.

VI. Office of Chief Counsel

Key challenges, priorities, and new initiatives. The Office of Chief Counsel is facing changes on a number of fronts, including new leadership and an executive order aimed at reducing federal regulations and controlling regulatory costs. We invite discussion of key challenges Chief Counsel faces, as well as its priorities and new initiatives planned for in 2017.

Formal and informal guidance expectations. President Trump's January 30 Executive Order provides that for every one new regulation issued at least two prior regulations must be identified for elimination and that the cost of planned regulations be prudently managed and controlled through a budgeting process. We invite discussion of Chief Counsel's regulatory guidance priorities for 2017 and how the Executive Order may change the priority guidance plan or types of guidance Chief Counsel issues.

We have been encouraged by recent reports that the IRS is seeking to broaden the scope of guidance available through the private letter ruling process, which has been limited in recent years to ruling on whether particular aspects of a transaction prevent tax-free treatment rather than ruling that the transaction itself qualifies for tax-free treatment. We welcome discussion of this welcomed development.

Abuse of discretion review. In October 2016, the internal revenue manual was revised to clarify that Appeals will not review cases solely involving abuse of discretion in an accounting method change or denial of 9100 relief. What have been the practical implications of this policy change? Has it resulted in requests for chief counsel to reconsider a determination or cases that have gone to court?

Section 7525 tax practitioner privilege. TEI members routinely rely on accounting firms to assist them plan and implement complex business transactions in a tax-efficient manner. Our membership has watched with great interest and concern the district court litigation involving Microsoft in which the government is taking the position that written communications made in connection with analyzing and implementing a cost sharing arrangement do not qualify for the section 7525 tax practitioner privilege because, among other reasons, the communications were made in connection with the promotion of a tax shelter. We invite discussion of Chief Counsel's general view of how to distinguish ordinary tax advisor relationships from tax shelter promotion.

Tax advice provided for complex business transactions routinely covers actions necessary to implement the advice. In the Microsoft case, the government argues that a number of documents concerning the implementation of the cost sharing arrangement in issue are not the kinds of documents that section 7525 protects from disclosure. We invite discussion of Chief Counsel's general view of when written communications concerning the implementation of tax advice may or may not be covered by the section 7525 tax practitioner privilege.