

Small Business Enforcement Gets Fresh Focus From New IRS Bosses

Posted on Aug. 20, 2019

By Nathan J. Richman

IRS Commissioner Charles Rettig's commitment to fighting tax fraud seems to have manifested itself in at least one of his recent personnel moves.

[Starting September 1](#), the deputy chief of the Criminal Investigation division, Eric Hylton, will take over as commissioner of the Small Business/Self-Employed Division, and [a couple days later](#), Darren Guillot will move from director of field collection to be Hylton's deputy.

Kathy Keneally of Jones Day told *Tax Notes* that Hylton's move is a visible demonstration of Rettig's [repeatedly stated](#) emphasis on civil and criminal tax fraud enforcement. "No one person can affect what an agency is going to do — you implement what you want to accomplish by who you put in place to get the job done," she said.

Hylton's appointment seems to telegraph IRS management's mindset, according to Steven Toscher of Hochman Salkin Toscher Perez PC. He couldn't recall a similar situation in which a CI deputy chief took over an operating division. In addition to showing management's confidence in Hylton, the move demonstrates "the enforcement-mindedness of the powers that be," Toscher said.

Mark E. Matthews of Caplin & Drysdale Chtd. said intraagency moves in or out of CI are rare but happen occasionally, and one reason for Hylton's selection has to be to increase fraud referrals from civil investigators.

New Sheriff in Town

When Keneally was the head of the Justice Department's Tax Division she worked with Hylton in developing the current unreported foreign bank account program and the underlying concepts for many prosecutions that followed. She said Hylton brings along experience in both building good criminal tax cases and in distinguishing cases involving criminal intent from those that should be handled civilly.

"If you've got a new sheriff at the top, it will be interesting to see what message or training finds its way to the line agents," Keneally said. She added that there is an additional tax system benefit to keeping cases that should stay civil out of the criminal enforcement system. Hylton "will be an extremely good sheriff, but he's no cowboy," she said.

Rettig has been trying to build both the IRS workforce and its morale while putting his imprint on the agency, Toscher noted. Before Rettig took over the IRS, he and Toscher were law partners.

Toscher cautioned against reading too much into Hylton's move to SB/SE regarding expected fraud referrals. While CI will suffer a loss, the possible improvements to the lines of communication will benefit both divisions, he said. He added that Tamera Ripperda's move from SB/SE to the Tax-Exempt and Government Entities Division presented the same sort of possible communication improvements.

There should be more of a sea change over time than a tsunami of new fraud referrals and sensitive civil audits, Toscher said.

Matthews, a former CI chief, said that he expects fraud referrals at SB/SE to increase under Hylton. "For the exam side, it's a clear win. You sort of hate for CI people to lose a strong executive like Eric, but they will still gain from him sitting in his new position," he added.

Since last year, SB/SE [has been updating](#) the IRS's National Fraud Program.

Employment Tax Cases

Hylton's presence is also expected to bring a particular improvement to SB/SE's employment tax fraud referrals.

Matthews said Hylton should bring his experience evaluating the jury appeal of a case to civil examiners' consideration of potential fraud referrals. When Matthews was CI chief, civil examiners might have looked at an unpaid employment tax case, seen flashy assets like a big house or a boat, and jumped to the conclusion that those are where the withheld taxes went, he said. This approach ignores the importance of the timing of the unpaid taxes and asset purchases.

Large purchases after the tax debt arose may make for a good criminal tax case, but large purchases long before a cash flow crunch or business downturn could lead to rejection of a fraud referral, Matthews said. Civil examiners sometimes took rejection of the latter cases as a message that CI and the Justice Department didn't want employment tax cases, he said, adding that clear communication of the importance of jury appeal can head off this issue.

Keneally also recounted the historical need for better employment tax criminal referrals. Sometimes a case would come in for injunction or civil enforcement and a lawyer would look at it and wonder how the facts didn't add up to a criminal employment tax case, she said.

Toscher said that employment tax criminal enforcement has improved sufficiently, but that history in this area shows the dangers of indiscriminately boosting the number of fraud referrals. He said it led to lower-quality referrals that CI had to weed out.