Review of the
Internal Revenue Service's

Criminal Investigation Division

April 1999

For
Charles O. Rossotti
Commissioner, Internal Revenue Service

From
The Honorable William H. Webster

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DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

COMMISSIONER

April 12, 1999

The Honorable William H. Webster
International Square Building
1825 Eye Street, N.W.
Washington, D.C. 20006

Dear Judge Webster:

I have read the report of your extremely thorough and thoughtful review of the Internal Revenue Service Criminal Investigation Division (CID) and conclude that it will guide us to improve the work of this critically important component of tax administration for many years to come. Thank you for recognizing the critical role that CID plays in tax administration.

As you know, we are in the midst of major changes in the IRS as a whole, designed to improve the way the IRS executes its mission. Your conclusion that the criminal investigation function is an essential component of effective tax administration and that CID and other compliance resources should be carefully targeted to identify tax compliance problems using the full range of techniques to address these problems is fully consistent with our entire approach. In an era of rapid economic growth and declining IRS staff resources, this is the only approach that enables us to achieve our mission and meet the public's expectations. This approach will also allow us to develop more considered decisions, in consultation with the Treasury Department, on what portion of CID resources should be used for matters other than tax administration.

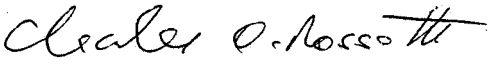
Your recommendation that CID be set up as a distinct unit within the IRS with clear responsibility for execution of agreed plans and strategies is also consistent with our new organization concept for the IRS as a whole. Formation of the four IRS operating divisions, each with responsibility for particular taxpayer groups, will facilitate a more systematic and current understanding of taxpayers and their specific compliance issues and equip us to be more knowledgeable and informed partners with the newly formed CID in developing appropriate compliance strategies. We also agree with your recommendation that the next head of CID should be a person with a strong record in tax law and law enforcement outside the IRS.

Your conclusion that "[CID] is an organization of dedicated, talented and hardworking individuals who carry out their law enforcement responsibilities in a professional manner' is fully consistent with what I have observed in my time in office. Your recommendations for improved training and management will help us further enhance their quality and professionalism.

In addition to these broad conclusions, we also concur with the 25 specific recommendations contained in your executive summary. As you noted, some of the recommendations, particularly those concerning organization structure, need further analysis and design work in coordination with our other organizational changes. We are prepared to appoint a design team in the immediate future to work out these details and to develop implementation plans.

Finally, I would like to offer my profound appreciation for the tremendous work that you, Michael Shaheen, Nancy Jardini and the whole team have done in preparing this report. I am confident that it will long be recognized as a most important milestone in the history of the IRS.

Sincerely,



Charles O. Rossotti

WILLIAM H. WEBSTER
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1825 EYE STREET, N.W.
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April 9, 1999

The Honorable Charles 0. Rossotti
Commissioner
Internal Revenue Service
1111 Constitution Avenue, N.W.
Room 3000
Washington, D.C. 20224

Re: Review of the Internal Revenue Service's Criminal Investigation Division

Dear Commissioner Rossotti:

I am pleased to submit herewith the Report of my review of the Internal Revenue Service's Criminal Investigation Division. During your Senate confirmation hearing in the fall of 1997, you committed to reform and improve the work of the Internal Revenue Service. As a first step to bringing positive change to the Service, you promised thorough reviews of each of its major components, including Criminal Investigation (CI).

You asked me to direct an independent review of CI and assess Cl's effectiveness in accomplishing its mission as the Service's criminal enforcement arm. With the assistance of Michael Shaheen, the former head of the Department of Justice's Office of Professional Responsibility, I assembled a task force of federal law enforcement personnel with extensive experience in financial investigations. The Task Force, supervised by Nancy Jardini, a trial attorney from the Fraud Section of the Criminal Division of the Department of Justice, conducted a full top-to-bottom review of CI, focusing specifically, as you had suggested, on the make-up of its caseload, its investigative methods, its organizational structure and its personnel policies and practices. Over the last nine months, the Task Force has conducted over six hundred interviews, has examined countless documents and has sought the opinions of a variety of law enforcement officials. This Report summarizes the results of the Task Force and contains my findings and recommendations.

It has been my privilege to undertake this assignment for you.

Sincerely,

William H. Webster

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Executive Summary

The central mission of the Criminal Investigation Division (CI) is to act as the Internal Revenue Service's criminal investigative component in support of the administration of the federal internal revenue laws. CI's focus has drifted from that primary mission. CI must recognize that despite the valuable contribution it makes to law enforcement generally, its principal role is to assist the Commissioner of the IRS in establishing an overall IRS compliance strategy and to apply its resources effectively to enforce that strategy. Unlike other law enforcement agencies, such as the Drug Enforcement Administration and the Bureau of Alcohol Tobacco and Firearms, which specialize in enforcement areas over which other agencies also exercise jurisdiction, CI is the only agency that can investigate potential criminal violations of the Internal Revenue Code. If CI fails to do its job effectively, no other agency can fill the void.

CI is an organization of dedicated, talented, and hardworking individuals who carry out their law enforcement responsibilities in a professional manner. Over the past two decades, however, CI has drifted from its primary mission of investigation of criminal violations of the Tax Code into the broader role of providing federal financial investigative expertise. This mission drift is likely the result of the expansion of CI's investigative authority to include money laundering and currency violations, and the demands placed on CI by other law enforcement entities to participate in narcotics investigations. The expansion in authority has not been met with guidance on how to prioritize these differing responsibilities. Nevertheless, CI must recognize that its principal mission is to investigate criminal violations of the internal revenue code.

Refocusing CI's Mission (Chapters I and II)

The IRS enforces the internal revenue laws through a variety of compliance mechanisms. The three main compliance functions are CI, Examination (Exam), and Collection. In the vast majority of cases of taxpayer noncompliance, the Service pursues civil remedies including assessment of additional taxes, imposition of fines, and seizure of property, through Exam and Collection. The Service generally pursues criminal enforcement through CI in cases of willful and egregious noncompliance, where criminal prosecution will not only terminate the unlawful conduct, but also will deter the same conduct by other taxpayers.

Although CI's powers are similar to those of other federal law enforcement agencies in that its agents may conduct searches, effect arrests, and carry firearms, CI is the only federal law enforcement agency with the authority to investigate criminal tax violations. Like the other IRS compliance components, CI aims to promote compliance with, and confidence in, the tax system.

Over the last twenty years, Congress and the Department of Treasury have expanded CI's jurisdiction to cover offenses not only under the Internal Revenue Code but also under the money laundering and currency reporting statutes. The apparent rationale for this expansion essentially has been that effective investigation of these crimes requires the sophisticated financial expertise that CI agents uniquely possess. Indeed, criminal organizations of all sizes increasingly use domestic and foreign financial transactions to facilitate their activities. As a result of the expansion of jurisdiction, CI now plays a major role in the investigation of offenses that have no obvious direct connection with tax compliance.

Since 1995, CI has formally categorized its cases into two broad programs: "Fraud" and "Narcotics." Fraud cases are broken down further into "Tax Gap" and "Other Fraud." The IRS's most recent estimate of the annual amount of unpaid taxes nationwide from legal sources of income is $195 billion. In CI's view, the cases it designates as Tax Gap, which constitute roughly sixty percent of all CI cases, are those that most directly address this shortfall in tax revenue.

As defined by CI, the term Tax Gap includes any case in which the target derived his or her principal source of income from a legal industry, the target was not involved in narcotics trafficking, and the primary potential CI violations are tax or tax-related. For example, a fraud case involving a target involved in a lawful business, such as commercial banking, where the target failed to report embezzled funds as income, would be characterized as a Tax Gap case. This broad definition of Tax Gap cases obscures any meaningful attempt to assess the degree to which CI's work promotes tax compliance. CI does not know what, if any, portion of its Tax Gap cases would deter noncompliance most effectively. However, one fact that is abundantly clear is that over time, the percentage of cases that CI investigates based upon referrals from Exam and Collection has dropped precipitously.

CI's primary mission is its role as the criminal investigative component of the IRS's compliance framework. It is the only federal law enforcement agency with the jurisdiction to do so. This report evaluates CI in that context and makes recommendations to strengthen and support CI in its tax enforcement mission. The recommendations concern CI's caseload, investigative techniques, personnel, and organizational structure, with the aim to facilitate the accomplishment of its mission.

Recommendations:

A. CI's mission, first and foremost, is to investigate potential violations of the nation's internal revenue laws. CI should communicate this mission clearly to each of its current and prospective employees. The mission should inform how each employee carries out his or her duties.

B. CI should remain within IRS. Criminal prosecution is one of many means by which the government promotes tax compliance. In order to ensure the uniform and proportionate enforcement of the tax laws, the decision to employ criminal or civil procedures – or none at all – in a given case, should be vested in a single government entity -- the IRS. Maintaining CI as part of IRS, rather than placing all or part of it in another agency, would also avoid the risk of marginalizing tax enforcement at the expense of other, more politically appealing enforcement agendas.

C. CI, in conjunction with the other IRS compliance components, should develop a compliance strategy that will enable it to determine how best to allocate its resources in a manner consistent with its tax enforcement mission. As an initial step, rigorous empirical studies of noncompliance will enable CI to identify those cases that will deter noncompliance most effectively, and thereby reduce the tax gap.

D. CI should continue to exercise its authority to investigate violations of the money laundering and currency statutes in a way that is consistent with the compliance strategy.

E. CI devotes considerable resources to narcotics investigations for which it is not reimbursed. Narcotics investigations contribute only incidentally, if at all, to fostering tax compliance. Resources devoted to narcotics investigations in excess of reimbursed funds should be brought under control so as not to deplete resources devoted to tax compliance.

F. Examination, Collection, and CI must reinvigorate the fraud referral program. Among other things, this entails reestablishing lines of communication among each of them and making clear CI's commitment to tax enforcement.

G. CI's caseload database (CIMIS) should reflect the participation of other law enforcement agencies in CI cases.

H. Like the other components of IRS, CI should adopt several methods of measuring its performance as an organization. CI should measure its "Business Results" based on the time agents work on investigations that result in convictions on charges within CI's jurisdiction and the time agents work on investigations within the compliance strategy. The Commissioner should not require CI, however, to assess "Customer Satisfaction" until the other federal law enforcement components develop an acceptable measure in this area. CI should measure "Employee Satisfaction" in the same way as the other IRS components.

Methods of Investigation (Chapter III)

An assessment of an investigative agency naturally entails scrutinizing the methods by which it conducts investigations. The Task Force was directed to focus on certain issues relating to investigatory practices: whether CI uses the grand jury process excessively at the expense of its administrative authority; whether agents seek search warrants and use undercover operations appropriately; whether agents carry appropriate weaponry and are adequately trained to use them; and whether agents conduct their investigations in a way that respects the rights of taxpayers. During their April 1998 hearings into CI's investigatory practices, members of the Senate Finance Committee expressed concern about many of these issues.

Generally, CI employs sound methods of investigation and does not routinely violate the constitutional rights of the subjects of its investigations. While isolated and individual incidents of misconduct exist, no evidence was found of systemic abuses by CI agents. CI agents must be aware, however, that even isolated incidents of abuse of authority can create impressions that undermine the public's confidence in the integrity of all CI agents and the IRS as a whole.

Findings:

-- CI agents have two methods of investigating cases available to them: administrative investigations and grand jury investigations. Over the last twenty years, CI's participation in grand jury investigations has increased sharply while administrative investigations have dropped off. No evidence was found that the growing participation of CI agents in grand jury investigations compared to administrative investigations has spawned agent misconduct or is inherently improper.

-- Unlike other federal law enforcement agents, CI Special Agents may employ only the "least intrusive means" necessary to investigate their cases effectively. Although search warrants are appropriate and often indispensable tools in the investigation of allegations of tax violations, CI agents do not routinely make detailed analyses of whether search warrants are the least intrusive means necessary to investigate their cases. Nevertheless, no evidence was found of systemic abuse by CI of its search warrant authority.

-- CI's undercover techniques and practices and its use of confidential informants generally conform with the joint Treasury and Justice Department Uniform Guidelines, IRS policy, and the law.

-- CI agents are appropriately and adequately armed and trained to use their weapons.

Recommendations

A. The Commissioner should not set a limit on the number or percentage of grand jury investigations in which CI can participate. IRS's compliance strategy and the facts of each investigation should dictate the extent to which CI will participate in grand jury investigations in the future.

B. CI agents who wish to seek search warrants should produce a thorough written evaluation as to why conducting a search in the case is the least intrusive means necessary to obtain evidence.

C. CI agents should not participate in high-risk entries during enforcement operations. CI agents are not adequately trained for high-risk entries, nor should they be. In the event that such entries are required in a CI case or a joint investigation, the agent should seek the assistance of another law enforcement agency to carry them out.

Personnel (Chapter IV)

All aspects of CI's personnel policies and practices were reviewed.

Findings

-- Recent changes in the CI disciplinary processes have addressed several problems identified with the previous processes.

-- No patterns or practices of egregious misconduct were observed, nor were allegations of misconduct found to be centered in any particular geographic area.

-- Over the last several years, CI's agent force has shrunk. It will continue to decline over the next few years as many agents approach retirement age. In fact, within three years, more than one-third of CI's approximately 3000 agents will be eligible for retirement.

Recommendations

A. One of the first issues that the Commissioner must address once a compliance strategy has been developed is the declining pool of Special Agents.

B. CI's newly implemented centralized hiring plan should include an "office of preference" program to provide Special Agents with a mechanism for transferring to a preferred CI division.

C. The initial training of Special Agents should include formal instruction in substantive tax law, rather than the independent study course in the current curriculum. CI should carefully monitor the new interactive case study method of training new Special Agents to ensure that it adequately trains Special Agents to fulfill all of their job responsibilities.

D. Educational courses for experienced Special Agents should be refocused to correct the notable deficiency in topics related to substantive tax law.

E. CI should limit the length of time Special Agents are assigned to specialized multi-agency task forces. Prolonged assignment to specialized task forces can result in a diminution of a Special Agent's technical tax investigative skills.

F. More confidence in the disciplinary process would be fostered if CI issued a periodic report for all employees that reported incidents of misconduct and the disciplinary actions taken in response thereto. Further, CI should monitor the new disciplinary processes carefully to ensure that the prior problems are eliminated and that there is uniform and fair treatment of all employees.

G. CI should set no limitation on the number of Special Agents that it can promote to the GS-13 level, the highest level for nonsupervisory agents.

Organizational Structure (Chapter V)

Once CI adopts a comprehensive compliance strategy, it must ensure that the strategy is implemented from the top of the organization to the bottom. It is imperative, therefore, that CI's management be arranged in a way that guarantees effective oversight of its operations. The current organizational structure, wherein CI field Division Chiefs report to a multi-functional IRS civil manager, and not a CI manager, does not provide effective or meaningful oversight. Moreover, this organizational structure has not promoted the referral of high-quality potential criminal cases from the civil compliance components to CI. The current chain of command and organizational structure must be revised to advance CI's priorities.

Recommendations

A. The IRS should establish CI as a separate operating division within the newly restructured IRS. The overall head of CI should have the title of "Director," replacing the current title of Assistant Commissioner. The Director should report directly to the IRS Commissioner and his Deputies.

B. The IRS should eliminate the District Director from the CI chain of command between the National Office and the CID field offices. A District Director with no experience in criminal investigations does little to assist CI in the accomplishment of its tax enforcement mission. Instead, this position in the CI chain of command detracts from the ability of the CI National Office to effectively oversee and direct CI operations and policy.

C. A reorganization of the CI National Office structure is necessary to allow for more efficient administration of the CI program and to emphasize CI's primary goals of compliance strategy and enforcement oversight. Consequently, the Director of CI and his Deputy should be supported by an Assistant Director for Strategic Management and Planning and an Assistant Director for Enforcement and Program Operations. The proposed reorganized structure is set forth in Chart 5-3 in Chapter V.

D. The Assistant Director for Strategic Management and Planning should be responsible for formulating a joint compliance strategy with the other four operating divisions in the IRS.

E. The Assistant Director for Enforcement and Program Operations should be responsible for ensuring that CI effectively implements the compliance strategy. This executive should oversee all field

operations, the forensic laboratory, and sensitive enforcement operations.

F. The IRS should establish a position of Criminal Investigation Divisional Counsel in each field Division to provide prompt expert legal advice to CI regarding case selection, investigation activities, and prosecution recommendations. This program should be directed by the Assistant Chief Counsel for Criminal Investigation, who will be responsible for selecting, training, and supervising these attorneys who will specialize in criminal tax matters. Divisional Counsel should provide legal advice to CI agents and managers, should act as liaisons between CI, the local U.S. Attorney's Office, and the Department of Justice Tax Division, and should be available to assist in the litigation of criminal tax cases in United States District Court. They should review all CI requests for enforcement operations and prosecution recommendations, but should not have approval authority.

G. CI should realign its field offices to be consistent with the boundaries of United States judicial districts, and the number of CI Divisions should be limited to approximately 15 - 20. The head of each CI Division should be designated as Special Agent in Charge (SAC), replacing the current title of Chief. Some of these positions should have executive status.

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INTRODUCTION

During his Senate confirmation hearing in the fall of 1997 Commissioner Charles Rossotti committed to improving the quality of service provided by the Internal Revenue Service. In furtherance of this goal, he launched reviews of each segment of the Service including Criminal Investigation (CI). The Commissioner then asked me to assemble a task force to compile data and information from which I could evaluate CI, determine its effectiveness in accomplishing its mission, and make recommendations for improvement.

Commissioner Rossotti announced my appointment to conduct this review in July, 1998. Michael Shaheen, former head of the Department of Justice Office of Professional Responsibility, assisted me in convening a task force to conduct the review. We recruited Nancy Jardini, a trial attorney from the Fraud Section of the Criminal Division of the Department of Justice, to supervise a staff with extensive criminal investigative, law enforcement, and federal prosecutive experience, including two other experienced prosecutors from the Department of Justice and nine federal law enforcement Special Agents.[1]

I relied on data, documents, and interviews to formulate the recommendations made in this report.[2] The Task Force conducted over 600 interviews including: current and former employees of CI; current and former employees and executives from all components of the IRS both at national headquarters and in the field; the current IRS Commissioner and four former IRS Commissioners; United States District Court Judges; trial attorneys and managers from the Department of Justice Criminal Division, Tax Division, and United States Attorneys Offices nationwide, including the Assistant Attorney General for the Criminal Division and the Assistant Attorney General for the Tax Division; private attorneys who regularly represent targets of criminal tax investigations nationwide; agents, supervisors and executives of other federal law enforcement agencies, including the Commissioner of Customs and the Director of the FBI; Treasury Department executives, including the Under Secretary of Enforcement; staff members from both the House Judiciary Committee and the Senate Finance Committee; members of the public who have had contact with CI; and witnesses and investigators involved in the information presented to the Senate Finance Committee in April 1998.

The Task Force members visited nine IRS districts (Brooklyn, Manhattan, New Jersey, Illinois, North Texas, Georgia, South Florida, Los Angeles, and Rocky Mountain), the National CI Training Academy at FLETC, the CI Offices of Automation and Graphics in Florence, Kentucky, the CI laboratory in Chicago, and the IRS Service Center at Florence, Kentucky. Numerous interviews and extensive file reviews were conducted during these visits.

The Task Force compiled and reviewed countless documents, reports, and statistical analyses, including prior reports and studies on CI, CI policies, CI manuals, GAO reports, Internal Audits, policies of other federal law enforcement agencies, Treasury and Justice Department policies and delegations orders, proposed legislation, and the Internal Revenue Manual.

Finally, the Task Force received and reviewed letters from private individuals and IRS employees commenting about a variety of issues related to CI investigative activities. Any

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[1] These agents were seconded by the Bureau of Alcohol Tobacco and Firearms (ATF), the United States Customs Service, the Federal Bureau of Investigation (FBI), and the Secret Service.

[2] Although I relied on the information collected by the Task Force, the recommendations contained in this report are mine.

specific issues raised were incorporated into the review to determine whether they were indicative of systemic problems or whether the complaints were isolated incidents. Any allegation of specific instances of misconduct by IRS personnel were forwarded to the Treasury Inspector General for Tax Administration unless they had previously been referred to an appropriate authority for investigation.

In keeping with the Task Force mission, I charged Mr. Shaheen and the Task Force with investigating all essential aspects of CI. The report is presented in five chapters:

CHAPTER I: THE IRS AND CRIMINAL INVESTIGATION
This chapter examines the missions of both the IRS and CI and discusses whether CI should remain a part of the IRS.

CHAPTER II: CONFORMING THE WORK TO THE MISSION
This chapter describes how CI investigative resources have been allocated and highlights the need for the IRS to establish a compliance strategy to more efficiently target CI's caseload.

CHAPTER III: METHODS OF INVESTIGATION
This chapter evaluates how CI conducts its investigations, including the use of grand juries and intrusive enforcement techniques, such as undercover operations and search warrants.

CHAPTER IV: PERSONNEL
This chapter thoroughly analyzes personnel issues, including hiring, training, promotions, and disciplinary actions.

CHAPTER V: ORGANIZATIONAL STRUCTURE
This chapter evolved because of findings and recommendations made in the other chapters. It recommends a reorganization of CI designed to highlight CI's two priorities: enforcement oversight and compliance strategy development.

It is important to note that although this report identifies numerous issues and recommends changes, smooth and efficient transition will require additional study and practical analysis. The Commissioner should appoint a design team to facilitate the effective implementation of these recommendations.

CHAPTER I: THE IRS AND CRIMINAL INVESTIGATION

The IRS impacts nearly every citizen of this country. Although the IRS is not responsible for enacting tax laws, it is the agency within the Treasury Department tasked with administering and enforcing them. The IRS's assessment and collection of federal taxes is often unpopular and paying taxes has frequently been viewed as onerous and complicated. However, as the United States Supreme Court has aptly noted, "taxes are what we pay for civilized society."[3]

The IRS is required to determine who is not in compliance with their tax-paying responsibilities and to bring them into compliance pursuant to its role as tax collector. The most recent estimate of the net tax gap, *i.e.* taxes owed but not paid, is $195 billion, which, if allocated to individual returns would amount to an additional assessment of $1,625 per return. [4] Of course, the tax gap places an unnecessary financial burden upon law-abiding taxpayers and creates a drain on our national budget.

Congress has granted the IRS a wide variety of legal powers to enforce tax laws and reduce the tax gap, including penalties ranging from minor fines to lengthy prison sentences. Civil remedies generally involve monetary penalties and sometimes the seizure of property to satisfy tax liabilities. Criminal penalties are more severe; they carry the potential for incarceration.

The IRS generally pursues civil remedies through its Examination and Collection Divisions. The Examination Division audits federal tax returns to ensure compliance with the law, while the Collection Division, with the help of the information provided by the Examination Division, collects delinquent taxes and pursues delinquent returns. The Collection Division has the authority to collect taxes through the seizure of private property. It also has the authority to impose civil fines and penalties for delinquent payments and filings.

CI is exclusively responsible for detecting and preventing criminal violations of the tax code. CI investigates suspected tax fraud and related violations of the Internal Revenue Code and determines whether sufficient evidence exists to recommend prosecution for willful attempts to violate federal tax laws. Criminal penalties are sought only for the more egregious and willful violations of the tax code.

Not only is CI the only federal law enforcement agency with the authority to investigate criminal tax violations, it is also the only component of the IRS with law enforcement authority -- allowing it to conduct searches, effect arrests, and carry firearms. The IRS created CI, originally known as the Intelligence Unit, in 1919 to investigate alleged or suspected criminal violations of the newly expanded revenue laws.[5] The unit adopted the name "Criminal Investigation Division" in 1978 to clarify its role for the public. While CI has powers similar to other federal law enforcement agencies, its primary role is enforcement of tax laws.

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[3] *Compania General de Tabacos de Filipinas v. Collector of Internal Revenue*, 275 U.S. 87, 100 (1927).

[4] IRS Research Division estimate.

[5] *Criminal Investigation History 1919-1987*, Department of the Treasury, Internal Revenue Service, Document 7233 (12-87).

CI was originally established as a tax crimes investigative agency. However, because of the recognition of its agents' expertise in financial investigations, its jurisdiction was expanded. In 1970, Congress enacted the Bank Secrecy Act, (P.L. 91-508) codified in Titles 12 and 31 of the United States Code, to enable law enforcement officials to combat drug trafficking and the laundering of proceeds of illegal activities. The Treasury Department delegated the authority to investigate those violations to several agencies, including CI.

CI's jurisdiction expanded in the 1980s, with the increased emphasis on the war on drugs. In 1984, Congress enacted Internal Revenue Code Section 6050I, which requires businesses to report cash transactions exceeding $10,000. CI has the exclusive jurisdiction to enforce this law. The Anti-Drug Abuse Act of 1986 (P.L. 99-570) codified money laundering offenses (18 U.S.C. §§1956 and 1957), which were delegated to CI for investigation under certain circumstances. The Anti-Drug Abuse Act of 1988 and the Treasury Forfeiture Fund Act of 1992 strengthened and expanded CI's jurisdiction in money laundering.

During the last 30 years Congress and the Treasury Department added to CI's jurisdiction. Originally, CI was solely a criminal tax investigation organization;[6] over time, however, it has been increasingly called upon to participate in the investigation of a whole new array of financial crimes and narcotics investigations. This additional jurisdiction was not accompanied by clear guidance on what CI' s investigative priorities should be. Thus, CI has been placed in the tenuous position of having new, expanded, and varied responsibilities with no significant guidance or corresponding enhancement of its resources.[7] The result, as detailed in this report, is confusion and disagreement within the federal government concerning CI's role in federal law enforcement.

Although CI has similar powers and responsibilities to those of other law enforcement agencies, several factors differentiate its role significantly. Our federal tax system is based upon voluntary compliance. It is founded on trust in the taxpayer's honesty to comply with the tax system, and on the taxpayer's confidence in the fairness of the tax administration system.[8] Each year every qualifying income earner is required to file a tax return and pay taxes to the federal government. The willful failure to do so constitutes a criminal offense within CI's jurisdiction. Consequently, most citizens in this country are required to take affirmative action, *i.e.*, filing a tax return, in order to comply with the law. In contrast, other law enforcement agencies generally investigate subjects who have taken affirmative steps to violate the law, a much smaller pool of potential targets. Many citizens will never come into contact with these other agencies.

In order to encourage voluntary compliance, CI must target enforcement to stop not only identified wrongdoers but also to discourage other potential evaders from cheating. This deterrent effect is essential to tax law enforcement because CI does not have the resources to investigate every potential cheater. CI is staffed with approximately three thousand Special

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[6] Although CI only had jurisdiction for tax code violations, their investigations involved both legal and illegal income, including the famous prosecution of Al Capone.

[7] In 1970 CI was staffed with 2,547 Special Agents. At the end of FY 1998 there were 3004 CI Special Agents. *FY 1998 Annual Report National Operations, Internal Revenue Service, Criminal Investigation.*

[8] *Internal Revenue Service Orientation Guide*, Department of the Treasury, Internal Revenue Service, Document 6073 (5-90).

Agents for the purpose of influencing millions of taxpayers to voluntarily comply with their taxpaying obligations. The need to create a strong deterrent to the general public also differentiates CI's law enforcement mission from that of other agencies.

Another distinction is the CI concern about its public perception, which requires the application of the least amount of force needed in the investigation of tax crimes. Tax offenses typically have no element of violence and are often viewed as victimless crimes. Consequently, traditionally acceptable law enforcement techniques such as raids and sting operations are not generally considered to be appropriate in the investigation of the average tax cheat. In order to inspire the confidence of the public, CI must exercise restraint in the application of force during the course of an investigation, particularly its use of aggressive or invasive tactics.

Finally, CI is distinct from other agencies because the tax crimes it investigates require highly specialized technical skill. CI agents are not only expected to be professional law enforcement officers, but also sophisticated financial investigators. Tax crimes investigations require detailed and often tedious analyses of complicated financial documents. Despite the fact that other federal law enforcement agencies have financial crimes sections, CI's preeminence in this arena is unparalleled. Department of Justice officials acknowledge that they frequently attempt to involve CI in any investigation with a significant financial aspect.

THE CI MISSION

The official "mission statement" of CI adequately describes the role of CI and focuses appropriately on its role as a component of the overall IRS enforcement mission:

> In support of the overall IRS mission, Criminal Investigation enforces the criminal statutes relative to tax administration and related financial crimes in order to encourage and achieve, directly or indirectly, voluntary compliance with the internal revenue laws.[9]

However, the focus on tax enforcement has become obscured by CI's broader jurisdiction. While Congress and the Treasury Department have expanded the crimes over which CI has jurisdiction to investigate, they have not reduced CI's burden as the sole investigators of criminal violations of the tax code.[10] Although many law enforcement interests pull CI and its resources in many different directions, the one clear mission that is solely and exclusively CI's is tax enforcement. If CI does not enforce the criminal statutes of the tax code, no one will.

In order to effectively administer the tax code, the IRS Commissioner needs the ability to direct the application of both civil and criminal sanctions. Consistent and fair enforcement of the tax laws inspires the confidence of the public. Uniform application of penalties requires close coordination among the IRS components investigating suspected noncompliance, and strict oversight by one authority -- the Commissioner of the Internal Revenue Service.

However, serious consideration has been given to removing CI from the IRS and establishing it as a separate stand-alone law enforcement organization within the Treasury Department. While this arrangement would satisfy many CI Special Agents, it would not accomplish CI's mission most effectively.

Fifty-nine percent of CI Special Agents and first line managers interviewed believe that CI should be removed from the IRS and reestablished as a separate law enforcement agency. The Federal Law Enforcement Officers Association agrees.[11] The primary rationale for this view is that CI, a relatively small criminal enforcement component of a large civil bureaucracy, is misunderstood by the new "customer friendly" IRS. CI agents believe they are insufficiently supported by the IRS in their enforcement mission.

The primary problem with removing CI from the IRS is the likelihood that the CI tax enforcement mission would be eventually marginalized by criminal enforcement agendas more

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[9] IRM 9.1.4.2

[10] *See* Chapter II: Conforming the Work to the Mission, Investigative Authority.

[11] FLEOA was represented by President Richard J. Gallo and CI FLEOA representative Thomas Interdonato.

politically popular than tax enforcement.[12] While the IRS Commissioner is a political appointee who reports to the Secretary of the Treasury, his sole mission is the administration of the tax collection system.[13] The Secretary of the Treasury has a broader agenda and more varied criminal enforcement priorities. Without the support of a highly placed advocate of the tax enforcement mission such as the Commissioner of IRS, the less popular and lower profile function of criminal tax enforcement could become secondary to Treasury's other enforcement priorities.

This concern is supported by the failure of many CI Special Agents to identify tax enforcement as their primary mission. During our field interviews, CI Special Agents repeatedly emphasized that our nation suffers from criminal enforcement problems more serious than tax code violations, *i.e.* narcotics and organized crime. They argued that the tax enforcement agenda of the IRS hampered their ability to attack the most serious criminal conduct with their sophisticated financial investigative skills. However, overall federal law enforcement priorities are not CI's primary concern. CI primarily performs one aspect of federal law enforcement, and that is tax code enforcement.

Another concern about removing CI from the IRS is the long-term maintenance of CI's sophisticated technical skills. As mentioned repeatedly throughout this report, CI agents are unquestionably the nation's premier financial crimes investigators. CI's expertise is borne of a variety of sources. Special Agents who join CI do so with the knowledge and understanding that they are joining a tax enforcement organization (IRS), to investigate tax and related financial crimes. Therefore, the type of agent attracted to CI must have a financial or accounting background and be interested in conducting tax-focused investigations. Agents with similar backgrounds who join the FBI or DEA do so with the understanding that they will probably be assigned a non-financial caseload. Prospective agents with a desire to focus on tax and financial investigations join CI.

The majority of CI Special Agents stated that administratively investigated tax cases are the most difficult cases they investigate. A new CI agent generally spends the first few years of his or her career doing these types of investigations. This is where the skills of CI's financial investigators are finely honed and its unique culture of expertise is developed and maintained. It is uncertain that this high degree of expertise could be maintained over time if it were removed from the culture of the IRS and if the focus on tax investigations were diminished.[14]

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[12] Removal of CI to some portion of the Department of Justice, either as part of another law enforcement agency or as a stand alone agency was also considered. Following the logic that the tax enforcement mission cannot be guaranteed to be preserved outside the IRS but within the Treasury Department, removal to the Department of Justice was summarily rejected.

[13] Also, the Commissioner of the IRS is appointed for a five year term. The Secretary of the Treasury is a cabinet member who serves at the pleasure of the President. Consequently, the Commissioner of the IRS has greater political autonomy.

[14] It is for this same reason that transferring CI's resources (including personnel) devoted to money laundering and other non-tax investigations to another federal law enforcement agency was rejected. Although this arrangement would allow IRS to retain criminal investigators devoted entirely to tax enforcement, the "financial crimes investigative specialists" assigned to another agency would not maintain the same level of skill. Furthermore, the FBI, DEA, Customs Service, Secret Service and ATF are all law enforcement agencies that investigate money laundering but not tax crimes.

Analyzing the statutory jurisdiction of CI, the sensitivity of tax enforcement, and the necessity of effectively fostering voluntary compliance, the logical conclusion is that CI is primarily a tax enforcement organization that should remain within the IRS. There is no alternative that can accomplish CI's role effectively. The organizational changes recommended in this Report address the legitimate concerns of those who favor removing CI from IRS.

CHAPTER II: CONFORMING THE WORK TO THE MISSION

CI's caseload was evaluated to assess whether CI effectively accomplishes its mission through its investigations. As stated in the previous chapter, CI's primary mission is to support the tax compliance efforts of the IRS through the investigation of alleged criminal violations of the Internal Revenue Code. Consequently, the cases it investigates should strategically target suspected criminal violations in order not only to terminate the criminal conduct, but also to deter other prospective offenders.

The broad categorical definitions CI applies to its caseload create the impression that the majority of its investigative resources are devoted to cases which directly and efficiently foster voluntary compliance with the tax code and reduce the $195 billion national tax gap. There is no empirical evidence that this is true. Despite the fact that 60% of CI's investigations focus on potential tax or tax-related violations, it is unknown with reasonable certainty what, if any, effect CI investigations have upon voluntary compliance or general deterrence.

CI's amorphous categorization of cases not only fails to specifically target CI resources to known areas of noncompliance, but it allows CI agents to pursue a broad range of investigations with little regard to the impact these investigations have on overall tax compliance. Because the Tax Gap definition is so broad, it permits CI agents to participate, at the request of an Assistant United States Attorney, in almost any investigation with a potential criminal tax violation. Consequently, the United States Attorneys' Offices, and not the IRS, determine CI's investigative agenda.

The failure to aggressively pursue an IRS compliance agenda is starkly apparent in the sharply declining rate of cases referred from the civil compliance components of the IRS to CI for criminal investigation. Over the last 20 years the rate of cases that commenced as civil audits and were referred to CI for criminal investigation due to suspected egregious and willful noncompliance has precipitously dropped. At the same time, the number of grand jury investigations in which CI participates with an Assistant United States Attorney has skyrocketed. The conclusion is that overall federal law enforcement initiatives are being pursued by CI at the expense of tax enforcement.

Another problem with CI's caseload is that nearly 25% of Special Agents' investigative time is devoted to narcotics investigations that have no known impact on tax compliance. Although CI's valuable contribution to narcotics law enforcement is widely recognized, other law enforcement agencies have jurisdiction to investigate those offenses. Those same agencies cannot investigate violations of the tax code.

In order to address the problems identified with the CI caseload, the IRS should establish an overall compliance strategy to be implemented by both the civil and criminal compliance components. This compliance strategy should determine who is not paying their taxes and what remedies will most effectively bring them into compliance and deter others from the same behavior. CI should then apply its resources in a manner that targets that compliance strategy.

Even if narcotics investigations are not included in the compliance strategy, CI should continue its involvement in them to the extent to which resources devoted to its tax compliance mission are not depleted. CI is reimbursed through a variety of sources for its participation in narcotics investigations. Its expenditure of resources far exceeds its reimbursement, however. In recognition of the significance of narcotics investigations to the law enforcement community

in general, CI should continue to participate in these investigations, although such participation should be more heavily based upon reimbursement.

THE TYPES OF CASES CI INVESTIGATES

CI is authorized by statute, regulation, and Memoranda of Understanding (MOU) to investigate crimes under United States Code, Title 26 (Sections 7201-7211, 7212(a) (corrupt endeavors to obstruct or impede the administration of the Internal Revenue Code), 7212(b) (forcible rescue of seized property), 7215, 7231 *et seq.*), Title 18 (tax-related and money laundering (Sections 1956 & 1957)), and Title 31 (currency record keeping and reporting violations).

A. CI'S CATEGORIZATION OF ITS CASELOAD

CI categorizes its cases into two broad program areas: Fraud and Narcotics. The Fraud program is subdivided into Tax Gap and Other Fraud. Tax Gap investigations include all investigations in which the target was involved in a legal industry and was not involved in narcotics, and the primary potential or actual CI violations were only tax or tax-related charges. This category also includes money laundering investigations, but only where tax or tax-related charges are the primary violations.[15] The fact that the target may have committed illegal acts, such as bribery, embezzlement, or extortion, does not disqualify the case as a Tax Gap investigation, as long as the primary, underlying business was involved in legitimate activities.

The category of Narcotics investigations includes all investigations where the source of funds under investigation is believed to be illegal narcotics trafficking. They include both OCDETF and other narcotics investigations.[16]

Other Fraud investigations include all investigations of targets involved in an illegal industry and all investigations of targets involved in a legal industry where the primary potential or actual CI violation is neither tax nor tax-related. Such cases might include the investigation of a street prostitution business (illegal industry) for any potential CI violations and the investigation of an attorney (legal industry), not involved in narcotics trafficking, where the primary, potential CI violations are non-narcotics, money laundering charges.

During the past three fiscal years (1996-1998) CI devoted approximately 60% of direct investigative time (DIT)[17] that agents worked on cases to Tax Gap investigations and 23% of DIT to Narcotics investigations. These amounts are consistent with the annual program goals CI set for itself.

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[15] IRM 9.1.1.3.1.2. The tax or tax-related charges include Title 26 charges, except for failure to file a currency transaction report (Section 7203) and all violations of Section 6050I, and 18 U.S.C. 286, 287, & 371 (conspiracy to defraud IRS or multi-object conspiracy to defraud IRS and commit money laundering). The tax or tax-related violation need not be the primary violation of the *overall* investigation. It must only be the primary violation among the violations that CI is investigating in the case.

[16] OCDETF stands for the Organized Crime Drug Enforcement Task Force Program. It is part of the Interagency Crime and Drug Enforcement Program. Initiated in 1982, it is a joint federal, state, and local law enforcement effort to attack drug trafficking organizations. CI has been a member agency in OCDETF since its inception. CI also provides resources to the HIDTA program (High Intensity Drug Trafficking Area), a multi-agency drug enforcement program.

[17] Direct investigative time is the time that Special Agents spend on investigations as well as time spent on other law enforcement activities. *FY 1998 Annual Report National Operations, Internal Revenue Service, Criminal Investigation*, at 4.

According to the CI National Operations Division Director, CI did not use any scientific basis for setting its annual program goals. The CI national office set these numbers based on CI's general experience and what seemed like the proper percentage allocations of DIT to achieve its mission.

CI's definition of its largest category of cases (Tax Gap investigations) is so broad that it is impossible to know whether those cases are ones that really further CI's mission of tax enforcement or whether they principally further some other law enforcement mission. For example, CI categorized a recent espionage investigation as a Tax Gap investigation because the defendant was an employee of the federal government (a legal industry) and the CI charges brought against him were tax charges. It is difficult to believe, however, that any would-be tax cheaters were deterred by the prosecution of this case.

The CI definition of Tax Gap investigations is so broad that it gives Special Agents wide discretion in selecting new cases to investigate. Interviews with agents revealed that they have substantial freedom to work almost whatever cases they find that include potential violations under CI's jurisdiction.

Furthermore, it is clear from interviews with agents that the IRS is not setting their caseload agenda, but, instead, mainly U.S. Attorneys and other law enforcement agencies are doing so. Many agents identified these two entities as the primary sources of their new cases. Agents stated that CI rarely, if ever, rejects a request by a U.S. Attorney to participate in a grand jury investigation. With the CI definition of Tax Gap investigations being so open-ended, agents can and do accept almost any case a prosecutor presents that appeals to them, that includes a potential CI charge, and that appears to have prosecution potential, regardless of whether prosecuting the case would foster voluntary compliance and accomplish CI's mission.

B. RELEVANT STAKEHOLDERS' VIEWS ON THE CURRENT CASELOAD

Individuals with an interest in CI's work were interviewed regarding their views on the types of cases that CI investigates. These individuals included CI agents and supervisors, prosecutors, private defense attorneys, and federal judges.

Most CI agents and managers interviewed believe that the current caseload, including money laundering and narcotics cases, furthers their mission of tax enforcement. Some agents and managers and one CI executive stated that CI's participation in narcotics prosecutions may not further general tax enforcement, but they believe nevertheless that CI's role in these cases is meaningful to the vital law enforcement initiative against narcotics trafficking.

The IRS defines "tax gap" as "the total 'true' tax liability [of all taxpayers] less those taxes that are voluntarily paid."[18] CI believes that its Tax Gap cases will have the greatest impact on narrowing the actual tax gap, although there is no empirical evidence to support this belief. CI contends that *all* of its investigations have some impact on voluntary compliance and

[18] *FY 1997 National Operations' Annual Report, Internal Revenue Service, Criminal Investigation*, at 9. See also IRM 9.1.1.3.1.1. Although the written IRS definition of "tax gap" makes no distinction between legal and illegal income or industries, a CI executive advised that in fact the IRS includes only legal industry income and tax due in its computation of the tax gap and does not include unreported income and tax due from illegal industries, such as narcotics trafficking.

reducing the tax gap and that its Tax Gap investigations specifically target the actual, national tax gap and have the greatest impact.[19]

Prosecutors differ on the issue of whether CI's caseload is appropriate and meets CI's mission. Leadership of the Department of Justice Tax Division has long believed that CI does not do enough traditional Title 26 tax cases and works too many money laundering and narcotics cases. In their view, money laundering and narcotics cases do not further national tax enforcement. In fact, Loretta Argrett, the Assistant Attorney General in charge of the Tax Division, recommends that Congress eliminate CI's authority to investigate money laundering violations, to ensure that CI will conduct more traditional tax investigations.[20]

The leadership of the Department of Justice Criminal Division and the Executive Office of OCDETF, United States Attorneys, and Assistant United States Attorneys generally view CI's current caseload as appropriate and oppose any reduction in CI's participation in narcotics and money laundering investigations.[21] CI Special Agents' ability to unravel complex financial transactions is invaluable to the success of many of these investigations. By "following the money," CI agents are able to find the evidence that supports both tax and non-tax charges.

The Executive Office of OCDETF is adamant that any significant reduction in CI resources devoted to narcotics cases would be devastating to drug enforcement. They believe no other agency can fill in for CI, because Special Agents in other law enforcement agencies are not capable of conducting financial investigations as well as CI agents.

Generally, attorneys in the private defense bar who regularly represent targets of CI investigations believe that CI should investigate substantially more legal income cases. They contend that CI agents have acquired attitudes and learned tactics from their participation in illegal income investigations (primarily narcotics) that are overly aggressive, and that the use of such aggressive tactics by CI agents will engender negative public sentiment and impact adversely on voluntary compliance.

Federal judges interviewed offered differing opinions on CI's current caseload. Some said the current caseload is appropriate, while another stated that if he were designing the system he would limit CI to tax cases only. Yet another recommends that CI investigate more traditional tax, legal income cases, because it is the only federal agency that can investigate such cases.

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[19] *FY 1997 National Operations' Annual Report, Internal Revenue Service, Criminal Investigation*, at 9.

[20] Interview of Loretta C. Argrett, Assistant Attorney General, Department of Justice Tax Division, on January 5, 1999. Ms. Argrett stated that CI should be investigating more legal source income cases because the Tax Division believes those cases produce maximum deterrence.

[21] A Deputy United States Attorney in the Southern District of New York offered a contrary view. She stated that CI should devote more resources to legal source income cases and fewer resources to money laundering and narcotics cases. In her view, CI's limited resources should not be used to help other law enforcement agencies investigate drug cases and even questioned the need for such assistance. Memo from Shirah Neiman, Deputy United States Attorney, to Michael Shaheen, Special Counsel, dated February 23, 1999.

THE TYPES OF CASES CI SHOULD BE INVESTIGATING

CI should focus its caseload more specifically on cases that will promote voluntary compliance with the tax laws. These should be cases that are within known areas of significant noncompliance, both nationally and locally. Furthermore, these should be cases within sectors of the population that will respond positively to the criminal prosecution of similarly situated taxpayers and thereby will be deterred from cheating on their own taxes.

As stated previously, CI is one of the IRS's compliance components. For this reason, the IRS should assert greater control over CI's caseload, by designating the areas of noncompliance to which CI should devote its limited resources. The most logical way for the IRS to determine the areas of noncompliance that warrant criminal enforcement is through the use of empirical research. This research should seek to determine who is not paying taxes due, who requires criminal enforcement to be brought back into the taxpaying fold, who will respond best to criminal enforcement as a deterrent to noncompliance, what criminal enforcement techniques will produce the best results in terms of compliance with the tax laws, and what cases must be prosecuted in order to generate and maintain public confidence in the tax system. The answers to these questions will assist the IRS and CI in determining the areas of non-paying taxpayers on which CI should focus its caseload.

Given that CI and the other compliance components within the IRS have limited resources, and that there are millions of taxpayers filing returns each year, the Commissioner cannot afford to let CI, or any other compliance component, use its resources in a haphazard or unfocused way, not knowing whether it is being effective in accomplishing its mission. CI management contends that no one can say for sure whether its work is or is not furthering compliance. This inability to assess compliance is unacceptable, and the Commissioner should find it unacceptable, as well.

A. COMPLIANCE STRATEGY

Currently, the IRS does not have an articulable, overall compliance strategy. A compliance strategy should be a coordinated plan using all of the compliance components of the organization, including CI, Examination, and Collection, to achieve the highest possible rate of compliance with the tax laws. The plan would designate the major areas of noncompliance within the population and determine to which areas each of the components should devote resources in order to achieve the highest possible degree of compliance.

It appears that the IRS has the capability to formulate a comprehensive compliance strategy, but it has failed to do so. The Office of Research theoretically could accomplish this, but the IRS has not utilized this Office to develop an overall compliance strategy. The Applied Research component of the Office of Research designs, coordinates, and conducts overall research efforts and studies related to compliance, among other things. This research is designed to estimate the tax gap and measure the effects of IRS activities on taxpayer compliance. The National Office Research and Analysis (NORA) and District Office Research and Analysis (DORA) Operations of the Office of Research attempt to determine how to collect the proper amount of tax revenues at the least cost to the government.[22]

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[22] *A Guide to the IRS: Information about the Internal Revenue Service for Congressional Staff including Contacts and a Directory of Offices by State* (1998), at pp. 68-69.

The so-called Crossroads Report[23] noted a lack of criminal tax deterrence research. It stated that CI always has presumed that criminal sanctions for tax fraud act as a general deterrence to tax fraud by the taxpaying public. Research confirming this longstanding presumption, however, was scant.

The Commissioner should devise an overall agency compliance strategy that informs CI which areas of tax fraud it should investigate. The best way for the Commissioner to determine this is to conduct rigorous, empirically-based analyses and studies of noncompliance. During the past ten years, there has been some effort to study the effect of criminal enforcement on compliance, but much more research is required. The research studies previously done fail to address the fundamental issues necessary for the development of a comprehensive compliance strategy, such as who is willfully not paying their taxes, who will respond best to criminal enforcement, which types of criminal cases will have the most positive effect on deterring potential tax cheaters, which, if any, enforcement tactics used by CI will have a negative impact on tax compliance,[24] and which criminal statutes within CI's jurisdiction work best to foster its mission.

This compliance research should be done both nationally and locally. Local areas may have particular compliance problems unique to the district, which of course must be addressed. Based on local studies of noncompliance, CI may make staffing decisions, as well as decisions on which cases to investigate.

As noted later in this report, there should be an Office of Compliance Strategy Development in the CI national office. The responsibilities of this unit would be to coordinate compliance efforts throughout the country, to oversee the development of national strategies for compliance, to propose and oversee ongoing compliance research, to interact with other components of IRS on compliance issues, to ensure that CI is working on current compliance problems, and to inform the field offices of current compliance strategies and the results of compliance studies.

The lack of empirical evidence makes it impossible to prove that the cases CI has investigated previously and is currently investigating either do or do not foster compliance. Thus, whether CI's seemingly arbitrary mix of tax gap, narcotics, and other fraud cases provides the most effective deterrent to tax fraud and whether any different mix would lead to a larger tax gap and a lower rate of compliance remain untested.

CI should craft its caseload based on empirical research and an IRS compliance strategy that focuses on tax enforcement and the fostering of voluntary compliance. Before the results of this research are known, no recommendation can reliably be made regarding particular cases for CI to investigate.

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[23] *Criminal Investigation: At The Crossroads*, IRS (August 1991).

[24] A number of people speculate that heavy-handed tactics by CI agents may so enrage some taxpayers that they stop paying their taxes as a form of protest. This hypothesis should be tested so that CI will know which, if any, restraints it should consider placing on enforcement tactics. If the empirical research shows that CI must be more restrained than other law enforcement agencies, then this data also will be helpful in convincing CI agents of the need for restraint. For a more detailed discussion of CI's enforcement operations, see Chapter III: Methods of Investigation, Use of Investigative Enforcement Techniques, *infra*.

Any significant reduction in CI's current level of participation in nontraditional tax cases may not be popular among other law enforcement agencies and U.S. Attorneys' Offices, who have come to depend heavily on CI to do financial investigations in many types of cases. U.S. Attorneys will have to demand that other agencies provide agents sufficiently skilled in financial investigations to replace the CI agents. If compliance research dictates that CI work fewer general financial investigations with U.S. Attorneys and other law enforcement agencies, then the other law enforcement agencies can and must fill this investigative shortfall.[25]

B. INVESTIGATIVE AUTHORITY

An issue that has been raised is whether CI's statutory investigative authority is too broad and that this expanded authority is the cause of CI investigating fewer traditional tax cases today. As noted previously, CI agents currently have jurisdiction to investigate violations of Title 26, Title 18 (tax-related and money laundering), and Title 31 (currency violations).

A number of people, including the Assistant Attorney General for the Department of Justice Tax Division,[26] have suggested that the Commissioner seek to limit CI's investigative authority to traditional tax matters only and that he seek to have CI's authority to investigate potential money laundering violations reduced, if not eliminated altogether. The rationale behind this recommendation is that the prosecution of money laundering violations does little, if anything, to foster voluntary compliance with the tax laws. Thus, the time that CI agents spend investigating money laundering matters is time lost to the investigation of traditional tax cases, to the detriment of national tax enforcement.

Others argue that the prosecution of money laundering violations does foster voluntary compliance, but does so indirectly. CI agents and executives generally support this position. Those who espouse this view believe that the prosecution of money laundering violations has an impact on tax fraud and that it is an appropriate investigative field for CI, because people who commit tax fraud often commit money laundering crimes in conjunction with the tax crimes. Separating the two violations, *i.e.*, preventing a Special Agent from investigating both violations and forcing another agency to investigate the money laundering violations, would be inefficient. Assistant U.S. Attorneys oppose any reduction in CI's investigative jurisdiction.[27]

Neither the Commissioner, the Secretary of the Treasury Department, nor Congress should do anything at this time to reduce the current investigative authority of CI. Specifically, they should allow CI to retain its authority to investigate money laundering violations, in addition to tax fraud and currency violations.

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[25] There were mixed responses from supervisors and agents of other law enforcement agencies on the issue of their agency's ability to fill the gap if CI's investigative authority were reduced. Most stated that, given the appropriate funding and time to hire and train agents, they should be able to replicate the work that CI now does, although they did not endorse the proposal to pull CI out of all non-tax cases. Others stated that their agencies could not duplicate what CI does.

[26] *See* footnote 18, *supra.*

[27] Another issue raised was whether U.S. Attorneys require CI to assist prosecutors on non-tax, financial grand jury investigations as a *quid pro quo* for prosecuting CI's tax cases. No evidence was found that prosecutors either directly or indirectly seek to extract such a *quid pro quo* from CI in exchange for pursuing tax cases.

At this time it is not known what the IRS's compliance strategy program will be and what empirical research will yield as to the best cases and violations for CI to pursue. Thus, it is premature to make any decision to alter CI's investigative jurisdiction. In order to ensure that CI will be able to investigate any matter that falls within its identified compliance strategy goals, the Commissioner should not limit its jurisdictional reach. But the Commissioner should be able to control the mix.

C. NARCOTICS INVESTIGATIONS

As noted previously, the decision as to specific types of cases that CI should be working should be made as a result of compliance research and the overall IRS compliance strategy.

CI should remain involved in narcotics investigations, however, even if IRS compliance research does not identify narcotics cases as an area of tax non-compliance that warrants criminal enforcement. Narcotics trafficking is such an important matter for federal law enforcement that it is appropriate for the IRS to devote some of its resources to it, even if drug cases do not fall strictly within the tax compliance strategy plan. However, the Commissioner should consider reducing the unreimbursed resources that CI currently devotes to OCDETF and other narcotics investigations for the reasons cited below.

The IRS, through CI, is a member agency in the Interagency Crime and Drug Enforcement - Organized Crime Drug Enforcement Task Force Program (OCDETF). The OCDETF program, initiated in 1982, is a joint federal, state, and local law enforcement effort against drug trafficking organizations. CI also participates in the High Intensity Drug Trafficking Area Program (HIDTA) and investigates narcotics cases that are not part of OCDETF or HIDTA.[28]

CI has been a major player in the OCDETF program for many years. Since the inception of the program in 1982, CI has been involved in 61.1% of all OCDETF investigations. "Many United States Attorneys report that IRS participation is one of the most critical aspects of an OCDETF case."[29]

In spite of the high praise that OCDETF investigators heap on CI, OCDETF has not rewarded CI's contribution to the program with adequate funding. CI suffers from "overburn," *i.e.*, it expends substantial resources on OCDETF investigations for which it is not reimbursed by OCDETF. For example, in FY 1997, CI spent approximately $11.3 million more than the reimbursed amount in support of OCDETF. This amount was second only to the FBI, which spent $18.3 million over reimbursement, and ahead of DEA, which spent $6.3 million over reimbursement.[30]

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[28] CI works on many narcotics cases that are not in the OCDETF program. In FY 1998, it initiated 456 non-OCDETF narcotics investigations and 61 HIDTA investigations. These represented approximately 11% of the total subject investigations CI initiated that year. In comparison, it opened 875 OCDETF investigations and 157 joint OCDETF/HIDTA investigations, which equaled approximately 22% of the total subject investigations initiated that year. *FY 1998 Annual Report, Internal Revenue Service, Criminal Investigation*, at 5.

[29] *Interagency Crime and Drug Enforcement Budget Estimates to the Office of Management and Budget, FY 2000*, at 20 & 80.

[30] *Id.* at 16-17.

As valuable as CI's role is to the OCDETF program, it is difficult to justify such a large expenditure of unreimbursed resources on investigations that may have little or no real impact on CI's main mission to foster voluntary tax compliance.[31] In fact, prosecutors rarely pursue tax charges in OCDETF investigations.[32] For this reason, the Commissioner cannot readily justify the expenditure of substantial resources on narcotics matters that are not ultimately reimbursed.

Resources devoted to narcotics investigations in excess of reimbursed funds should be brought under control so as not to deplete resources devoted to tax compliance. There is no evidence that CI's participation in the OCDETF program contributes to its IRS mission. While many law enforcement agencies contribute to the war on illegal drugs, including agencies staffed with financial investigative specialists, no other agency investigates federal tax crimes. Thus, any unreimbursed resources that CI devotes to narcotics investigations result in fewer resources devoted to its primary mission of tax enforcement.

[31] One CI executive acknowledged there is no tax enforcement reason for CI to investigate narcotics cases.

[32] In FY 1997, among all OCDETF defendants charged, only 26 (0.3%) were charged with Title 26 violations and eight (0.1%) were charged with tax conspiracy. In addition, 41 indictments or informations, or 1.8 % of the total OCDETF indictments and informations, included tax violations. *Interagency Crime and Drug Enforcement Budget Estimates to the Office of Management and Budget, FY 2000*, at 52 & 62.

REFERRALS

Once the compliance research is completed and the IRS has adopted a compliance strategy, CI must focus on prosecutable cases that conform to this strategy. If compliance research shows that CI should be doing more traditional tax cases, then it is likely that Revenue Agents from Exam and, to a lesser extent, Revenue Officers from Collection will be rich sources for most of these cases. That type of criminal case often begins as a civil tax case investigated by a Revenue Agent or Revenue Officer. Thus, the Revenue Agents and Officers will be in an ideal position to identify those cases within the compliance strategy that may warrant criminal prosecution. In order to ensure that CI gets these cases for investigation, the IRS should revive the fraud referral program, which has been in decline for many years.

A. HISTORY

The fraud referral program involves cases initiated in Examination and Collection as civil matters (*e.g.*, audit or levies) that are transferred to CI for criminal investigation and prosecution. When a Revenue Agent or Revenue Officer investigates a case and determines that there are "firm indications of fraud," the agent or officer is required to transfer or "refer" the case to CI for criminal investigation of the target.[33] After this referral, CI conducts a preliminary review of the matter, to determine whether it agrees with the assessment that the case is appropriate for criminal investigation. If CI agrees and accepts the case for criminal investigation, the Revenue Agent or Officer will suspend the civil investigation until the criminal investigation by CI is concluded.[34]

The number of quality criminal cases referred from Exam and Collection to CI has declined in recent years. The percentage of CI criminal investigations started through an Exam audit declined from 30% in 1979 to less than 20% in 1988, while the percentage of CI prosecutions that began as Exam audits declined from nearly 30% to 14% during the same time period.[35] From FY 1996 to FY 1998, the percentage of investigations initiated by CI each year based on referrals from Exam fell from 15% to 10%.[36] A similar downward trend is evident from CI investigations that came from *any* component of the IRS, not just Exam. Other IRS components include International, Collection, EP/EO, Service Centers, and other unspecified areas.[37]

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[33] IRM 104.2.4.3; IRM 4.4565.21(1).

[34] The Revenue Agent or Officer and his Group Manager fill out IRS Form 2797 to refer a case to CI. The form also includes a section for CI to fill out, noting its evaluation of the referral. The form seems to be clear. It requires sufficient information for CI to make an informed decision on acceptance or rejection of the referral.

[35] Dubin, Graetz and Wilde, *The Changing Face of Tax Enforcement, 1978-1988*, 43 Tax Lawyer 893 (Summer 1990).

[36] Likewise, the percentage of cases in which CI recommended prosecution that had been initiated with a referral by Exam dropped from 11% to 9% during the same time period. These figures are based on information obtained from CIMIS.

[37] For the same three fiscal years (1996-1998), in-house IRS-generated cases equaled 29%, 25%, and 22%, respectively, of the total investigations initiated by CI each year, while 25%, 21%, and 20%, respectively, of the total cases in which CI recommended prosecution were generated within the

B. REFERRALS TODAY

Revenue Agents cite systemic disincentives in Exam for making referrals. For example, a Revenue Agent is responsible for a case under audit, even after Exam has referred it to CI. Exam trains its agents to be mindful of civil statutes of limitations in their cases and never to let one expire. Thus, the Revenue Agent is responsible for ensuring that no civil statute of limitations expires without written notification to and authorization by the agent's manager. Once CI has accepted a referral for investigation, however, the Revenue Agent loses control over the matter. Thus, the agent is placed in the difficult situation of being responsible for a significant legal issue in an investigation over which he has no control. It is much easier for a Revenue Agent simply to keep a case, finish the audit, settle it with the taxpayer, and avoid any statute of limitations issues.

The manner in which Exam measures "cycle time" (the duration of an audit) also discourages referrals.[38] Exam seeks to keep cycle time down on its cases. The referral of a case by Exam to CI necessarily increases the cycle time of that case, because Exam does not remove the time that CI spends investigating a referred case from the computation of the cycle time of the case. If CI accepts the referral and does a complete criminal investigation, this increases the cycle time of that case substantially. Revenue Agents believe that Exam expects them to keep cycle time down on *all* their cases, with no exception even for referrals. Therefore, agents are discouraged from making referrals.

Finally, another disincentive to referring cases to CI is that Revenue Agents currently are spending less direct examination time on audits. The IRS is demanding that they spend more time on customer service matters, such as helping taxpayers prepare returns and responding to taxpayer complaints. Thus, a Revenue Agent is less able today to devote the time necessary to develop a potential fraud case so that it meets CI's standards for a referral. The message that Revenue Agents hear from the IRS today is "customer service first." They believe, therefore, that it is preferable to settle an audit quickly, to the satisfaction of the taxpayer, than to refer it to CI for what might be a prolonged criminal investigation.

Two studies done within the IRS since 1990 confirm the problems with the referral program and make meaningful recommendations for improvement. The Core Business Systems Fraud Referral Task Force[39] made a number of recommendations for improving the process, including the creation of a District Fraud Coordinator in key districts to act as a liaison

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IRS.

Service Center referrals come from CIB, the Criminal Investigation Branch, which is a unit of each IRS Service Center. The function of CIB is to identify and detect questionable refunds, to prevent the issuance of false refunds, and to provide support to the CI district offices. IRM 9.8.1. EP/EO is the IRS organization that handles matters regarding employee plans and tax exempt organizations. IRM 7.

[38] Cycle time is a measure of the number of days that Exam works on an audit, from the first day a Revenue Agent begins the examination until Exam either closes the case, after reaching an agreement with the taxpayer on a tax deficiency, or sends the case to the Office of Appeals as unagreed. Witnesses advised that Exam seeks to keep cycle time down. A low cycle time means that Exam is resolving cases quickly and presumably will lead to a higher level of "customer satisfaction."

[39] The task force was composed of individuals from CI, Exam, and Collection. It issued its report in November 1994.

among the three IRS compliance components, the implementation of a four-way conference between the referring component (Group Manager and Revenue Agent or Revenue Officer) and CI (Group Manager and Special Agent) to evaluate referrals within 10 days of receipt by CI, and the empowerment of CI chiefs to set local criteria for fraud referrals to address unique district compliance needs. A 1997 joint CI and Exam sponsored report on the referral program (Joint Report) noted the continuing decrease in the number of referrals, reiterated the recommendations of the Core Business Systems Fraud Referral Task Force, and offered additional suggestions to improve the referral process.[40]

C. RECOMMENDATIONS

The fraud referral program from Exam and Collection must be reinvigorated. A compliance strategy the IRS develops likely will require CI to investigate more cases referred from Exam and Collection. The civil divisions will be working on cases in designated areas of noncompliance within the compliance strategy. Revenue Agents and Officers will be ideally situated, therefore, to first identify those cases that may be appropriate criminal cases in conformity with the compliance strategy.

The IRS should follow the recommendations of the recent reports on the fraud referral program. In those districts where it has not done so already, Exam should create a full-time fraud coordinator position to oversee its referral program. Collection should create at least a part-time fraud coordinator or liaison position to oversee its referral program. The Fraud Coordinator or Liaison should regularly meet with referring agents or officers to discuss their referrals and screen every referral before it goes to CI, to ensure that it meets CI standards and that it is fully developed. Each CI office should appoint a liaison to interact with the local fraud coordinators from Exam and Collection.

All fraud referrals should be evaluated in a "four-way conference" by the CI Group Manager and Special Agent, the referring Group Manager and Revenue Agent or Officer, and the District Fraud Coordinator.[41] Better communication between CI, Exam, and Collection undoubtedly will strengthen the fraud referral program. The four-way conference is an essential means of improving communication on the nature of each referral and any concerns that CI has regarding the current and future referrals. When CI rejects a referral, the Group Manager and Special Agent must clearly and fully explain his or her decision in person, as well as in written form.

All three compliance components must provide fraud referral training for their agents and officers, with particular emphasis on employees in the civil components learning what factors make an acceptable referral. The Fraud Coordinator should oversee this training for Revenue Agents, with the assistance of the CI National Office CI office and the local CI office in the development of the training. Clearly, local issues will affect which referrals a particular CI office will accept or reject.

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[40] *State of the Fraud Referral Program*, Joint Trip Report (September 1997).

[41] The term "four-way" conference is something of a misnomer, because the Fraud Coordinator, and possibly a District Counsel attorney, should attend the conference, in addition to the two agents and their managers.

Exam should remove what appears to be a major disincentive to referrals -- the inclusion of time that CI holds a referred case in the computation of Exam's cycle time. As long as the CI time is included in any computation of Exam's cycle time on a case, Revenue Agents likely will believe that they could be held accountable for this time in some way, and they will be discouraged from making referrals.

Finally, the fraud referral program will never improve without the total support of upper management in all three compliance components. This is not a problem that CI can solve alone, because the causes of the decline in prosecutions based on civil referrals lie in all three components. The recommendations in the Core Business Systems Task Force Report and the Joint Report appear to be sound, but they will not be effective without the full endorsement of civil and criminal managers and supervisors.

TRACKING CASES AND MEASURING RESULTS

A. CIMIS

The Criminal Investigation Management Information System (CIMIS) is the database used by CI for "tracking the status and progress of CI investigations as well as time expended by CI employees."[42] CIMIS tracks a significant amount of useful information on each case. The information appears to be easily retrievable.

Data is fed into CIMIS on CI investigations through the preparation of various forms by the Special Agent working on the investigation. The agent will prepare a form to report the opening and closing of the investigation and the occurrence of any significant event in the investigation, such as the recommendation of charges, the return or filing of charges, a trial verdict, or a sentencing. The agent also prepares a form every month to report the time he spent working on the case. After a supervisor reviews and approves the information in these forms, a local designated CIMIS terminal operator then inputs the information into the system. The database system is centrally maintained in CI headquarters in Washington, D.C.[43]

The accuracy of the information in CIMIS was called into question during the Senate Finance Committee hearings last year. For that reason, CIMIS was included in this review.

1. Accuracy of CIMIS Data

a. TRAC. During the Senate Finance Committee hearings, two witnesses who work with the Transactional Records Access Clearinghouse (TRAC), a data-gathering, data-research, and data-distribution organization associated with Syracuse University, alleged that CIMIS information was not accurate. The TRAC witnesses were its co-directors, David Burnham, an author and former investigative reporter, and Dr. Susan Long, a professor and statistician at Syracuse. Based on data they had compiled on referrals, convictions, and sentences in tax cases from three separate sources -- IRS, Department of Justice, and federal courts[44] -- Burnham and Long alleged that CIMIS overstates the accomplishments of CI in convictions and sentences of defendants. They contended further that, because of the inaccuracies in CIMIS, CI does not really know what its agents are doing.

b. Audit of CIMIS. In response to these allegations that CIMIS inaccurately tracks information on the results of investigations and the amount of time expended by agents on investigations, an attempt was made to perform an audit of CIMIS and test the accuracy of the database. A statistically valid random sample of 331 cases was drawn from among all closed CI investigations during the past three fiscal years (FY 1996-1998). Copies of documents from the case files in CI offices in the filed were obtained, such as the opening and closing forms, case rating form, Special Agent's report, District Counsel criminal reference letter, Indictment or Information, plea agreement, and judgment and commitment order.

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[42] *CIMIS Operators Guide*, March 7, 1996, at 5.

[43] *Id.*

[44] IRS data came from CIMIS; Department of Justice data came from records of the Executive Office of United States Attorneys (EOUSA); and federal courts data came from records of the Administrative Office of the United States Courts.

Unfortunately, it was not possible to complete the audit of CIMIS and determine the accuracy of its data, because the grand jury secrecy constraints of the Federal Rules of Criminal Procedure prevented review of the documents from most of the cases in the sample.[45] Based on the inability to do a thorough audit of CIMIS, it also was not possible to either confirm or refute the allegations of TRAC regarding the accuracy of the CIMIS database. Some isolated, apparent inaccuracies in data were uncovered.[46] There were no apparent mistakes in CIMIS, however, in the matters that TRAC analyzed -- referrals, indictments, convictions, and sentences. No broad conclusion regarding the overall accuracy of CIMIS data can be drawn from the few errors uncovered.

c. CI response to TRAC. CI prepared a written response to the allegations raised by TRAC. Generally, CI contends that the databases that TRAC compared -- CIMIS, the Department of Justice, and the federal courts -- input data differently, use different definitions for their categories, and include different types of cases in their categories. Therefore, the fact that the information contained in CIMIS may appear to differ from the information contained in the other two databases does not establish that the CIMIS data is inaccurate.[47]

CI identifies several reasons why there could be discrepancies between the CIMIS database and the database on criminal tax cases compiled by TRAC, with neither database necessarily being inaccurate. First, TRAC includes in its tax case database cases that were investigated by the IRS Inspection Service, along with cases investigated by CI. CI does not

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[45] Approximately 70% of the cases in the random sample were investigated through a grand jury. Rule 6(e) of the Federal Rules of Criminal Procedure mandates generally that matters occurring before a grand jury cannot be disclosed publicly. Therefore, only the documents from the small percentage of the random sample of cases that were not investigated through a grand jury could be reviewed.

Rule 6(e) contains exceptions for individuals to whom disclosure of secret grand jury materials may be made. In August 1998 IRS Commissioner Charles Rossotti sought the assistance of the United States Department of Justice to acquire authorization, through such an exception, for the members of the Task Force to review grand jury materials and conduct a more detailed evaluation of CI's caseload and practices.

As is reflected in correspondence with Justice Department officials, the Department failed to respond to the Commissioner's request until January 1999, the month targeted for completion of this Report. The Department finally offered an unacceptably cumbersome plan for assistance in mid-February 1999. Because of the Department's untimely response to the Commissioner's request and because of its unreasonably narrow reading of Rule 6(e), a further and more complete assessment of the CI caseload and possibly related grand jury violations could not be conducted.

[46] There were cases reported in CIMIS as being closed, but which were still open, according to Special Agents interviewed. There were other cases in which CIMIS recorded no grand jury being opened, but the case files showed grand jury activity. Finally, there were instances of CIMIS reporting the execution of a search warrant during an investigation, when in fact it was a seizure warrant that had been executed.

[47] *TRAC and the Criminal Investigation Division, Analysis of TRAC Data and Conclusions* (July 13, 1998). CI notes also that TRAC never actually reviewed CIMIS or its databases because of the disclosure constraints of Section 6103. Instead, TRAC compiled information on tax cases from the other two sources (Justice and the federal courts), presumed this information to be accurate because data from these two sources seemed to be consistent, and then concluded that the CI information must be inaccurate because it was substantially inconsistent with the data from the other two sources.

include Inspection cases in CIMIS, however, because Inspection was a separate division in the IRS.[48]

Second, CI and the Department of Justice define "referral" differently. CI counts as a "referral" in its database only those cases transmitted to the Justice Department for *prosecution*. The Justice Department includes other actions in its count of IRS referrals, such as requests from CI for authorization of a tax grand jury, a search warrant, and asset seizure actions. Thus, comparing the numbers of "referrals" from the two databases is somewhat meaningless because, by definition, they contain different data elements.

Third, Justice Department data apparently does not record cases as "tax" cases when there is a multi-agency investigation and the IRS is not the lead agency. For example, in a joint narcotics and tax investigation, the Justice Department may track the matter as a DEA narcotics case, with no reference to the IRS, even though charges within CI's jurisdiction (tax, money laundering, or currency violations) are included in the indictment. While it would be perfectly proper for CI to track such a case as a CI case, which CIMIS does, the Justice Department's database would not recognize this case as a CI case. In this way, Justice Department statistics understate CI's work.

Finally, CI notes that a difference in the dates that each database records convictions also may account for some of the differences between the CIMIS and Justice Department statistics on this subject. CIMIS records a conviction on the date it occurs, while the Justice Department records a conviction when the Court sentences the defendant and issues a judgment and commitment order.

To support the validity of its conclusions on the causes for the discrepancies in the CIMIS and Justice Department data, CI did a case-by-case reconciliation of its data for one year with the data from the Justice Department for four judicial districts.[49] This comparison confirmed the factual accuracy of the CIMIS data on convictions for that year (FY 1996). It also confirmed CI's contention that the Justice Department records convictions at the time of sentencing, while CI records them at the time of conviction.

d. Conclusion. The Commissioner should conduct a thorough, empirical audit of CIMIS to ensure that its data is accurate. CI's response to the concerns raised by TRAC is reasonable, but it only suggests what *might* cause some of the alleged inconsistencies in data between CI statistics and those maintained by the Department of Justice and the federal courts. The CI response does not provide a complete explanation for these alleged discrepancies.

It is unknown if CIMIS does or does not accurately track data on its investigations. As noted, the secrecy constraints of Rule 6(e) and the Justice Department's inattention to a request for assistance to access the necessary materials made an audit of CIMIS, to test the

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[48] The Inspection Service recently was eliminated from the IRS. Congress created a separate and independent agency under the Treasury Department's Under Secretary for Enforcement to assume Inspection's responsibilities. The new organization is known as the Office of the Treasury Inspector General for Tax Administration. 26 U.S.C. 7803(d); Internal Revenue Service Restructuring and Reform Act of 1998, Sec. 1103 (P.L. 105-178).

[49] The districts CI chose (Northern Florida, Northern Illinois, Northern New York, and Southern West Virginia) had been highlighted by TRAC as districts with large per capita variations in convictions in 1996. CI compared FY 1996 CIMIS data with FY 1995, FY 1996, and FY 1997 EOUSA data.

concerns raised by TRAC, impossible. The Commissioner should pursue the audit of the database that the Task Force was not able to accomplish.

2. Recommendation

CIMIS should track participation of other law enforcement agencies and the inclusion of non-CI charges in an indictment or information in a CI case. This information would be relevant to a determination of the true nature of the investigation -- whether it was a noncompliance, tax enforcement matter or a nontax, financial crime to which CI was lending its financial investigative skills. The participation of another law enforcement agency and other, nontax criminal conduct in a CI investigation may indicate that the matter really was not a tax compliance matter. The Commissioner may find that information useful in determining whether CI was deploying the IRS's criminal enforcement resources appropriately.

B. CASE MEASUREMENTS

Case measurements are the statistics an organization uses to determine its success in achieving its mission. CI has measured its performance as an organization each year in various manners. Currently, CI measures only its agents' investigative time in two categories of investigations, Tax Gap and Narcotics. Although it records numerous other ratios and substantial other information in CIMIS, CI uses only these two statistics as indications of success and sets annual percentage goals for only these two statistics.

1. CI Measurements Task Force

In 1998, CI commissioned a task force to review case measurements. The Criminal Investigation Measurements Task Force draft report, issued in August 1998, recommends that CI evaluate itself in accordance with the "Balanced Scorecard" mandated for all IRS components.[50]

For the first component of the Balanced Scorecard, Business Results, the CI Measurements Task Force proposed a new measure called the Resource Effectiveness Rate. It measures the ratio of investigative time that agents spend on successful investigations to the total time they spend on all investigations.[51]

The second component of the Balanced Scorecard for CI is Customer Service or Customer Satisfaction. The proposed measures of this component would be Conviction Rate and Incarceration Rate of Subjects.[52]

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[50] In their book *Reinventing Service at the IRS, Report of the Customer Service Task Force*, at p. 78, Vice President Gore and Treasury Secretary Rubin propose that the IRS use a "balanced scorecard" to rate the performance of the organization and its employees. The three components of the balanced scorecard are business results, customer service or satisfaction, and employee satisfaction.

[51] A "successful investigation" is one in which at least one subject of the investigation is convicted on at least one criminal charge within CI's jurisdiction.

[52] The conviction rate generally is the ratio of the number of convictions to the number of all cases charged. Convictions equal guilty pleas, nolo contendere pleas, and trial guilty verdicts; the number of cases charged equals all convictions plus acquittals and dismissals. The Incarceration Rate is the ratio of the number of defendants sentenced to jail time to the total number of defendants sentenced.

Finally, the Measurements Task Force did not propose any specific measures for Employee Satisfaction, the third component of the Balanced Scorecard. It left that task to the IRS generally. It did suggest, however, that consideration be given to such measures as EEO complaint rate, employee retention rate, and sick leave usage rate.

2. Recommendations

a. Business Results. Generally, the proposed new measure of Resource Effectiveness Rate should be a good indicator of CI's Business Results. CI is most effective in furthering its mission with convictions of its targets. Convictions and jail sentences attract public attention and thereby deter tax cheating.[53]

In addition, CI should also create and maintain a new measure to show the rate of its work in areas that IRS compliance research has identified specifically as being appropriate for criminal enforcement. It should measure the ratio of agents' investigative time on investigations in identified areas of noncompliance to the total investigative time of agents on all investigations.[54]

b. Customer Satisfaction. CI should not follow the recommendation of the Measurements Task Force to measure Customer Satisfaction.[55] Because of the difficulty in

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[53] The Measurements Task Force's definition of a "successful investigation" (at least one subject in the investigation is convicted on at least one criminal charge within CI's jurisdiction) also is reasonable. Requiring the conviction of all subjects is too high a standard for success. CI can achieve substantial deterrence from a case with the conviction of the primary subject(s). It would be unreasonable to require CI to obtain the conviction of all subjects to grade the investigation as a success.

The Measurements Task Force did not propose any differentiation among convicted subjects. As long as *any* one subject is convicted, whether it be a primary or secondary subject, a leader of a criminal enterprise or an underling, the investigation would be deemed a success.

It would be more appropriate, however, to require CI to differentiate primary from secondary subjects in its investigations and to require the conviction of at least one primary subject on a CI charge in order to rate the investigation a success. It is difficult to view an investigation as a success from CI's perspective if only a secondary subject is convicted on a CI charge. A secondary subject's conviction likely will generate less publicity than a primary subject's conviction, if any, and a secondary subject likely will receive a lesser sentence. Neither reduced publicity nor lower jail sentences would be beneficial to CI's mission.

CI should set a goal of less than 100% for its Resource Effectiveness Rate, in order to encourage agents to work some more difficult investigations that may not appear to be sure convictions at the outset. It is important for CI agents to take some risks and to work complex cases in an effort to find the more sophisticated fraud schemes that are harder to uncover and prove at trial. CI should treat this percentage as a target, and not a minimum required percentage. Any significant deviation from the target, either above it or below it, would be unacceptable.

[54] This recommendation follows the recommendation that CI focus its workload on the areas of noncompliance that have been identified by empirical research.

[55] Convictions would include cases in which the defendant pleaded guilty. This is no measure of either prosecutors' or taxpayers' satisfaction with CI's work. The Incarceration Rate is an inappropriate measure of Customer Satisfaction for CI, because there are variables that support a judge's decision to incarcerate a convicted defendant that have nothing to do with how satisfied the judge or anyone else may

identifying and quantifying "customer satisfaction" in the context of law enforcement, no Treasury Department law enforcement bureau currently attempts to measure Customer Satisfaction.[56] Therefore, until the Treasury Department develops an appropriate means of measuring Customer Satisfaction, the Commissioner should not require CI to measure this component of the Balanced Scorecard.

c. Employee Satisfaction. CI should use the same general measures for Employee Satisfaction that the rest of the IRS uses, in accordance with the recommendation of the CI Measurements Task Force. There are employee concerns that are common to both CI and other IRS components, such as how employees feel about their leadership and management and the quality of their working environment. The rates at which employees are filing EEO complaints, taking sick leave, and staying employed within the particular component of the organization all are appropriate measures of how satisfied employees are with their jobs, whether they are in CI or another IRS component.

3. Conclusions

In sum, there does not appear to be one single measure for an overall evaluation of CI. The Measurements Task Force's recommendation to use a combination of measures is the best way to evaluate CI. As long as all the measures balance well, in the sense that the scores of all are within an acceptable range and none are far out of line, the Commissioner can feel confident that his criminal enforcement component is working effectively towards achievement of its mission.

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be with the Special Agent's performance.

The Measurements Task Force correctly concludes that CI's customers are the *taxpaying* public and federal prosecutors who work with CI agents on investigations, not the *tax evading* targets of CI investigations. A common misperception and source of consternation among Special Agents is that the IRS will treat targets of criminal investigations and defendants as the "customers" of CI in the new Balanced Scorecard. Defining "customer" in this way would be a major mistake. Although CI focuses on these people while doing its work, it would be absurd to require CI to "satisfy" the targets of its investigations in any normal meaning of this word. The very nature of CI's law enforcement mission creates an adversarial relationship with targets and defendants. It is unreasonable to rate the work of Special Agents based on input from the targets who were subjects of CI investigations.

[56] The Treasury Department Office of Strategic Planning advised that neither the Treasury Department law enforcement bureaus nor any other federal law enforcement agency has been able to develop an acceptable measure for Customer Satisfaction. They have considered the possibility of an independent survey of the general public on their perception of the organization and its operation, specifically whether Special Agents are exhibiting professionalism, fairness, and timeliness in their investigations. They have not been able to agree upon a format of questions that would accurately measure such conduct, however. They also have considered the Conviction Rate and the Indictment Rate as potential measures of Customer Satisfaction, but the Department of Justice discourages the use of such measures. The Department believes that using these measures gives the appearance of law enforcement "bounty hunting."

CHAPTER III: METHODS OF INVESTIGATION

In keeping with the Task Force mandate, CI's case investigation standards and methodology were evaluated. The primary issues reviewed were:

Whether CI institutes the appropriate types of investigation, either administrative or grand jury;

Whether CI employs investigative enforcement techniques, such as search warrants and undercover operations, appropriately and in conformity with law and IRS policy;

Whether CI agents are adequately and appropriately armed;

Whether CI agents are adequately trained in the use of available weapons, and;

Whether CI agents are overly aggressive in the use of weapons.

ADMINISTRATIVE VERSUS GRAND JURY INVESTIGATIONS

A. BACKGROUND

A CI investigation typically begins with the receipt by CI of information concerning potential criminal violations of one or more of the above statutes. This information may come from the general public, another IRS component, a U.S. Attorney's Office, another law enforcement agency, or another CI investigation. Although a division chief must approve the opening of a CI investigation of an individual or entity, he may delegate this authority to a Branch Chief for all but money laundering violations.

Once CI has opened an investigation, a Group Manager will assign a Special Agent to conduct the investigation. The Special Agent then will proceed with various investigative activities, such as interviewing witnesses and obtaining and reviewing records. If the agent determines that there is sufficient evidence to establish the target's guilt beyond a reasonable doubt and with a reasonable probability of conviction, he will prepare a Special Agent's report (SAR) recommending prosecution and detailing the proposed charges and the evidence to support them. The agent's Group Manager, Branch Chief, and Division Chief will review the SAR. The Division Chief will refer the case for prosecution to IRS District Counsel's Office, if the chief agrees with the agent's recommendation. If District Counsel concurs with CI that prosecution should be authorized, Counsel will refer the case to the Department of Justice for authorization and prosecution. If the Department of Justice determines that prosecution is warranted and brings charges against the target, the Special Agent will assist the prosecutor in the trial of the case.

Historically, CI has initiated most investigations through the administrative process. It then converted some administrative investigations into grand jury investigations. That process still occurs, but CI now begins many investigations as grand jury investigations, without ever using the administrative procedure.

A number of people have complained about the increase in grand jury investigations, alleging that it has lead to more incidents of CI Special Agents using inappropriately aggressive enforcement tactics and a failure by CI to pursue a strong tax enforcement mission.

B. ADMINISTRATIVE INVESTIGATION

A Special Agent conducts an administrative investigation by using IRS summonses to obtain records and statements from witnesses. A summons requires a witness to respond, and the government can seek enforcement of a summons in court if a witness fails to respond.[57]

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[57] 26 U.S.C. 7602 & 7604. An Assistant U.S. Attorney or Department of Justice Tax Division attorney represents the IRS in a suit to obtain an order of enforcement of an IRS summons in federal district court. The general requirements for enforcement are: (1) the summons was issued for a proper purpose (the information is being sought as part of a legitimate IRS investigation), (2) the material sought is relevant to that purpose, (3) the information sought is not already within the Commissioner's possession, and (4) the administrative steps required by the Internal Revenue Code for service of a summons have been followed. *United States v. Powell*, 379 U.S. 48, 57-58 (1964). In addition, a summons cannot be enforced if the matter has been referred to the Department of Justice for criminal prosecution.

A summons issued to a third-party record keeper such as a bank, concerning the tax liability of

At the end of an administrative investigation, assuming the agent has determined that prosecution is warranted, the agent will prepare a Special Agent's Report (SAR) recommending prosecution. At no point during an administrative investigation, with limited exceptions, is a prosecutor or other law enforcement agent involved because of the non-disclosure strictures of 26 U.S.C. 6103. One exception that would require the involvement of a prosecutor occurs when an agent seeks authorization to execute a search warrant during an administrative investigation.

C. GRAND JURY INVESTIGATION

If the Special Agent determines that an administrative investigation is not viable or appropriate, then he will seek to conduct the investigation through a federal grand jury. A federal grand jury is composed of 23 court appointed private citizens who meet regularly for a set period of time to investigate potential federal crimes. A prosecutor oversees the work of the grand jury. The grand jury conducts the investigation, and the Special Agent assists the grand jury, as its agent. The prosecutor, with the help of the Special Agent, directs the course of the investigation.

The standard that a Special Agent follows in deciding to request a grand jury investigation is: "whenever ... using a grand jury would be more efficient, *e.g.*, the administrative process cannot develop the relevant facts within a reasonable period of time; [or] an investigation has proceeded as far as the administrative process allows, but prosecution potential would be strengthened by the grand jury process."[58] Specific reasons a Special Agent might seek authorization of a grand jury investigation include the noncooperation of witnesses, the need to determine which, if any, witnesses to immunize, and the investigation of the target by another law enforcement agency. It is also more efficient for the federal government to investigate all potential violations by a target in one investigation, rather than conduct separate, parallel investigations.

Once a CI grand jury investigation is authorized, the Special Agent works with a prosecutor (either an Assistant U.S. Attorney or a Tax Division attorney). Often other federal law enforcement agents are involved in a grand jury investigation, although a Special Agent could use a grand jury investigation only for potential tax crimes, with no other law enforcement agents involved in the investigation. A Special Agent uses grand jury subpoenas to obtain statements and records from witnesses.[59] At the completion of a grand jury investigation the Special Agent prepares an SAR recommending prosecution, if warranted, just as in an administrative investigation.[60]

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another person or entity is governed by 26 U.S.C. 7609, which generally requires that the IRS notify the target of the investigation that it has served the summons on the record-keeper. The target then has the right to file a petition in district court to quash the summons.

[58] IRM 9.5.2.2.0

[59] Once CI has made the institutional determination to investigate through a grand jury, and the Department of Justice has approved the grand jury investigation, the law precludes CI from using administrative summonses. 26 U.S.C. 7602(c).

[60] Although the agent and his managers make their own prosecution decision, the prosecutor will exert tremendous influence over this decision in most grand jury investigations. That is, CI will recommend the charges that the prosecutor believes are warranted. In some grand jury investigations,

D. CONCERNS REGARDING GRAND JURY INVESTIGATIONS

A concern was raised regarding the increasing percentage of CI investigations conducted through a grand jury and the corresponding decrease in administrative investigations. The percentage of CI prosecution recommendations that resulted from grand jury investigations increased dramatically from 1980 to 1990 (13% to 66%). By fiscal year 1997, that percentage had risen to 78%.[61]

Some argue CI should conduct more of its investigations through the administrative process and participate in fewer grand jury investigations. Most prominent amongst those with that view are attorneys with the American Bar Association's Section of Taxation and officials of the Department of Justice Tax Division. Members of the Committee on Civil and Criminal Penalties of the Section of Taxation of the American Bar Association assert that "the assignment of IRS Special Agents to illegal income and grand jury investigations transfers control of tax investigations from the Tax Division to local Assistant United States Attorneys" and that "[t]his transfer of control dilutes national standards governing the conduct of criminal tax prosecutions . . . ." They also contend that this transfer of control of tax cases contributes to the type of alleged improper conduct by Special Agents highlighted in the Senate Finance Committee hearings in the spring of 1998.[62]

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however, the prosecutor will defer to CI.

[61] Public Release during Senate Finance Committee Hearings, FS-98-7, at 4. CI used a grand jury investigation in approximately 70% of the investigations within the random sample of CI investigations closed in fiscal years 1996-1998. This figure includes investigations that CI started with a grand jury and investigations CI started as administrative and converted to grand jury during the investigation. *See* Chapter II: Conforming the Work to the Mission, Tracking Cases and Measuring Results, A.1.b. Audit of CIMIS, *supra.*

[62] *The Future of the Criminal Investigation Division, A Report of the Committee on Civil and Criminal Tax Penalties to the Criminal Investigation Review Task Force*, submitted December 23, 1998, at 4-5. The previously referenced Crossroads Report noted and rejected a similar argument against grand jury investigations by private practitioners. It recognized that a grand jury is a legitimate investigative tool, even for tax cases, and that it is often more effective than an administrative investigation. The Crossroads Report refused to recommend that CI conduct only a certain percentage of investigations through a grand jury, but instead called on CI managers to ensure that agents' participation in grand jury investigations did not draw CI away from its tax compliance goals.

The Crossroads Report also reviewed the findings by the Commissioner's Review Panel on IRS Integrity Controls. In its October 1990 Report, the Review Panel recommended a reduction in CI's involvement in grand jury investigations, on the theory that CI supervisors were not adequately managing their Special Agents involved in grand jury investigations and that, as a result, there was an increase in incidents of agent misconduct. The Crossroads Report found no clear link between the allegations of misconduct and the fact that there was a grand jury investigation, and it found no necessary lack of management by CI supervisors over Special Agents involved in grand jury investigations. Thus, the Crossroads Report refused to endorse the Review Panel's recommendation to reduce the number of CI's grand jury investigations. *Criminal Investigation: At The Crossroads*, IRS (August 1991), at 32-34.

A review of disciplinary actions, *Bivens* complaints, and tort suits revealed no pattern of abuse or misconduct by Special Agents working on grand jury investigations, as opposed to agents working on administrative investigations. Neither was any evidence found of systemic or repeated disclosure violations (Section 6103) or violations of grand jury secrecy provisions (Rule 6(e)) in the initiation or conduct of grand jury investigations.

Tax Division officials also have expressed concern with the high percentage of investigations that CI is conducting through a grand jury because they believe it allows the U.S. Attorneys' Offices, and not the IRS, to control CI's caseload and agenda. Tax Division officials also believe that the increase in grand jury investigations has resulted in a reduction in the investigation of traditional tax cases.[63] These officials believe that CI is working on the cases that support the law enforcement initiatives of the U.S. Attorneys, instead of the mission of the IRS and national tax enforcement.

E. FINDINGS REGARDING GRAND JURY INVESTIGATIONS

There is nothing inherently improper about CI conducting investigations through a grand jury, rather than administratively. Neither method of investigation accomplishes CI's mission any better than the other. There are legitimate prosecutorial reasons for conducting an investigation through a grand jury.[64]

There are appropriate reasons for conducting an investigation, even a purely tax investigation, through a grand jury. Prosecutors are trained and experienced in criminal litigation and are sensitive to important legal and trial-practice issues, such as the admissibility of evidence at trial, the suitability of subjects of an investigation to be government witnesses instead of defendants, and the sentencing ramifications of evidence. Thus, a prosecutor generally will be better suited to make important investigation phase decisions regarding issues such as immunity for reluctant witnesses and interference from targets and their counsel. Ultimately, an investigation is likely to have fewer errors if a prosecutor is directing it.

From the perspective of general federal law enforcement, it is more efficient for CI to participate in a joint grand jury investigation when there are potential charges outside of CI's jurisdiction which require the assistance of one or more other federal law enforcement agencies. A joint grand jury investigation allows the various law enforcement agencies to share information and ideas, avoiding duplicative, and possibly conflicting, efforts.[65]

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[63] "Traditional tax cases" generally refers to cases involving only tax fraud, or with tax fraud as the primary violation, and prosecuted under Title 26.

[64] These same conclusions were reached by the Crossroads Report in 1991.

[65] CI agents may not freely share tax returns and return information with other law enforcement agents. 26 U.S.C. 6103 governs access to and disclosure of such information. Generally, IRS employees can access returns and return information only if their official duties require such access for tax administration purposes. They may disclose returns and return information to a Department of Justice attorney under limited circumstances, generally only when the attorney is working on a tax case or only for the attorney's use on that tax case. 26 U.S.C. 6103(h)(2).

A Special Agent also may disclose returns and return information to a Department of Justice attorney when the agent is working on a non-tax grand jury investigation, *e.g.*, money laundering or currency violations, and CI has determined that there is a potential tax charge in the investigation or that the money laundering or currency violation was committed in furtherance of a tax violation. The procedure for accomplishing this disclosure is the so-called "related statute call" made by the CI field Division Chief. 26 U.S.C. 6103(b)(4)(A)(I); IRM 9.3.1.4.1.1.2.

With substantial restrictions, the Special Agent may disclose returns or return information to other law enforcement agents. This limitation on disclosure has caused concern among some Special Agents. Many feel that it prevents them from being full participants in joint investigations with other agencies. The

There is no evidence that CI managers supervise Special Agents working on grand jury investigations less than they supervise agents working on administrative investigations. There is nothing inherent in a grand jury investigation that would prevent a CI manager from properly supervising his agent's work. The manager routinely is on the grand jury Rule 6(e) list and thus has full access to all grand jury material.[66] Therefore, the manager should have the same capacity to manage an agent in a grand jury investigation that he has with an agent conducting an administrative investigation. If managers are not supervising their agents during grand jury investigations, this is a failure of specific managers and not a systemic failure.

A CI manager would have less control in steering the direction of a grand jury investigation than he would with an administrative investigation, because the supervising Assistant U.S. Attorney likely will be directing the course of the grand jury investigation. Nevertheless, the CI manager still is aware of the subject matter and progress of the investigation, and may supervise and direct the case agent.

Finally, there is no evidence to support the contention that the Department of Justice Tax Division cedes control of an investigation when it is conducted through a grand jury. First, the Tax Division has no control over an administrative investigation, other than to authorize a search warrant or immunity for a witness, and no prosecutor is involved in an administrative investigation. Second, the requirements regarding the Tax Division's authorization of prosecution are the same whether the case has been investigated by grand jury or administratively. For example, the Tax Division must authorize prosecution of tax evasion charges, pursuant to 26 U.S.C. 7201, before a prosecutor can seek an indictment on such charges, whether CI investigated the charges administratively or through a grand jury. Similarly, the Tax Division must authorize the execution of a CI-proposed search warrant of an attorney's office, regardless of whether CI is conducting an administrative or grand jury investigation. Therefore, the Tax Division generally has the same control over a CI grand jury investigation that it has over a CI administrative investigation.

F. CONCERNS REGARDING ADMINISTRATIVE INVESTIGATIONS

Many agents have contended that an administrative investigation is cumbersome, inefficient, and inherently more difficult to complete than a grand jury investigation because witnesses generally treat an IRS summons less seriously than a grand jury subpoena. Agents stated that witnesses, especially banks and other financial institutions, respond more promptly

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fact that information sharing is basically a one-way street -- CI can see everything that anyone else has, but CI cannot freely share its evidence with other agents -- does not foster cooperation in a joint investigation.

[66] Fed. R. Crim. Pro. Rule 6(e) governs the recording and disclosure of grand jury proceedings, prohibiting disclosure of grand jury materials or information, except under limited circumstances. One exception to the rule of nondisclosure is the disclosure to government personnel who assist the prosecutor in the investigation. Rule 6(e)(3)(A)(ii). In accordance with this exception, it is standard practice for a prosecutor to prepare what is referred to as a Rule 6(e) list, which contains the names of all government employees who are assisting him in the investigation and to whom he has disclosed or will disclose grand jury materials for the purpose of assisting him. A prosecutor routinely will put the names of the CI case agent and his manager and other supervisors within CI on the Rule 6(e) list, because all these people will need to see grand jury materials in order to assist the prosecutor in the decision-making process on any tax charges. CI also will prepare its own list of all IRS employees who are expected to have access to grand jury materials, on IRS Form 9510.

to a grand jury subpoena. In addition, witnesses allegedly are more likely to challenge a summons, in an effort to forestall turning over records, than a grand jury subpoena. Finally, agents said that summons enforcement proceedings take too long, making a summons essentially ineffective as an evidence gathering tool.

A Senior Tax Division executive advised that summons enforcement proceedings can be time-consuming, taking as long as nine months to a year before the IRS finally gets the summoned documents. However, this official did not attribute the delay to any particular segment of the process but to the fact that a summons enforcement proceeding involves multiple steps.[67]

A Deputy U.S. Attorney with extensive experience in tax prosecutions shared these concerns regarding administrative investigations and IRS summonses. She stated that administrative cases generally proceed slowly because the "[s]ervice of an administrative summons simply does not convey the urgency of a grand jury subpoena, and is not as readily enforceable as a subpoena, and represented subjects of administrative investigations often succeed in dragging out these investigations for unimaginably long periods."[68]

G. FINDINGS REGARDING ADMINISTRATIVE INVESTIGATIONS

The validity of the concerns regarding the difficulty of conducting an administrative investigation could not be verified. There is little doubt that summons enforcement is a time-consuming process, but CI does not resort to summons enforcement that often. During FY 1996 - 1998, CI proposed a total of 391 summons enforcement actions. During the same time period, CI recommended prosecution in 2587 administrative investigations. Thus, CI was able to complete the vast majority of its administrative investigations without any summons enforcement delay.[69] Although grand jury investigations generally take less time to complete than administrative investigations, because so many variables affect the time it takes to complete an investigation, that fact alone is inconclusive and the time differential cannot be attributed solely to the lengthy summons enforcement process.

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[67] Very generally, the process begins with a recommendation for enforcement of the summons by CI to District Counsel. Counsel reviews the recommendation and, if it concurs, refers the matter to the Department of Justice. Justice reviews the recommendation and, if it agrees, files a petition to enforce the summons in United States District Court. If the Court agrees, it will sign an order to show cause, which is served on the summoned party. The party is allowed time to respond to the order, and the government may file a reply to any response. The Court may then rule at that time, without a hearing, or it may conduct a hearing and decide the matter after the hearing. The Court then will issue an opinion. (If a Magistrate Judge hears the summons enforcement proceeding, which often is the case, then a District Court Judge will review the Magistrate Judge's recommendation before the District Court Judge renders a final opinion.) The summoned party can appeal the ruling of the District Court Judge to the Court of Appeals, which could delay the resolution of the matter substantially.

[68] Memo from Shirah Neiman, Deputy United States Attorney, to Michael Shaheen, Special Counsel, dated February 23, 1999, at 9.

[69] Data on summons enforcement actions was provided by IRS, Office of Chief Counsel, Enforcement Litigation. Data on prosecution recommendations was acquired from CIMIS.

H. CONCLUSIONS AND RECOMMENDATIONS

CI should choose its investigations based on the facts of each case and how the case fits within an overall compliance strategy, and not the anticipated method of investigation. Once CI has made the decision to open an investigation, it should use the most effective and efficient method. The Commissioner should not mandate that CI reduce the number or percentage of investigations that it conducts through a grand jury. Neither should he set a maximum percentage of CI investigations that can be investigated through a grand jury.

There are legitimate reasons for proceeding with a grand jury, instead of an administrative investigation. As long as CI managers exercise appropriate supervisory authority over their agents conducting grand jury investigations and choose new cases based on CI's tax enforcement mission and the goals of the IRS compliance strategy, there is no reason to impose artificial limitations on the percentage of cases investigated through a grand jury.

USE OF INVESTIGATIVE ENFORCEMENT TECHNIQUES

CI's use of intrusive law enforcement investigative techniques, such as search warrants and confidential informants, was reviewed to determine whether CI respects the constitutional rights of subjects and adheres to its own internal policies. Members of the Senate Finance Committee expressed pointed concern over allegations that CI employs unreasonably forceful, and sometimes unlawful, tactics during enforcement operations, particularly the execution of search warrants. Exhaustive review revealed that generally CI effectively and responsibly implements enforcement operations. No evidence was found to support claims that CI routinely violates the constitutional rights of citizens or uses excessive force in their investigations, in spite of the existence of several isolated incidents of misconduct.[70] It should be noted, however, that even isolated incidents can create an impression which undermines the public's confidence in the integrity of a law enforcement agency.[71]

A. SEARCH WARRANTS

Congress has empowered CI agents to seek and execute search warrants in the investigation of their statutes of jurisdiction.[72] A search warrant is often indispensable in investigating criminal conduct related to violations of the tax code. Execution of a search warrant can ensure the retrieval of evidence in a way that a subpoena or summons cannot. Awareness of a looming prosecution commonly influences potential criminal defendants, whether violent or non-violent, to destroy evidence. Documentary and computerized evidence of tax crimes can be destroyed instantaneously, sometimes at the touch of a button. Subjects of CI investigations are often sophisticated individuals who have formulated complex means to conceal their criminal conduct and to dispose of evidence. Without the element of surprise that searches afford CI agents, evidence of tax-related offenses in many investigations might be lost.

As a general principle, CI agents are guided in their use of search warrants by CI policies and procedures. IRS policies were evaluated to determine whether they are in conformity with constitutional requirements and the policies of other federal law enforcement agencies. Field operations were reviewed to determine whether the policies and procedures were being strictly followed.

1. Acquisition of Search Warrants: CI Policy

CI agents are constrained by the requirements of the Internal Revenue Manual regarding the tactical choice to use a search warrant, which requires them "to execute their law enforcement responsibilities by continually assessing . . . the probable impact of their

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[70] The investigation and adjudication of disciplinary actions based upon incidents of misconduct is addressed in Chapter IV: Personnel.

[71] Several such specific allegations of misconduct were raised during the April 1998 Senate Finance Committee Hearings. Investigation of those allegations was specifically excluded from the mandate of this review. Those allegations were referred by the Senate Finance Committee to the General Accounting Office, Office of Special Investigations. As of the date of transmittal of this report, GAO has not published any findings regarding its investigation of the allegations.

[72] United States Constitution, Amendment IV; 26 U.S.C.§ 7608; 18 U.S.C. §§3105 and 3109; and F.R.Crim.P., Rule 41.

enforcement activities on the image of the Service." [73] This directive is interpreted by both IRS and CI management as requiring CI to employ the least intrusive means needed in their investigations. Both IRS and Justice Department policy allow for the use of search warrants in tax and tax-related investigations "with restraint and only in significant tax cases."[74] IRM 9.4.9.6.1 establishes the following guidelines for use of search warrants in Title 26 tax investigations and tax-related Title 18 investigations:

> (1) Search warrants are recognized as viable investigative tools in potential criminal tax cases. Search warrants may be authorized in income tax, multiple refund and return preparer cases. **However, it is the policy of the Internal Revenue Service and the Department of Justice that search warrants will be utilized with restraint and only in significant tax cases.** The significance of a tax case may be determined by a consideration of such factors as:
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> a. the amount of taxes due;
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> b. the nature of the fraud;
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> c. the need for evidence to be seized; and
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> d. the impact of the potential criminal tax case on voluntary compliance with the revenue laws.
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> (emphasis supplied)

No other federal law enforcement agency is similarly constrained in its authority to use search warrants as an investigative tool. The limitations on CI in tax and tax-related cases are a recognition of the peculiar sensitivity of those investigations and the desire of the public to be assured that intrusive investigative means are not being used unless absolutely necessary.

CI agents should not be held to a higher probable cause standard, nor should CI assess the risks of a search warrant execution any differently. CI is required, however, to make a threshold determination based upon its own policies as to whether to seek a warrant, even if probable cause clearly exists. The CI agent and his managers must critically assess whether the use of the search warrant is the only available means to effectively acquire the evidence of the criminal activity.

The issue of whether CI is abiding by its own internal policy of employing minimally intrusive means in all cases, and whether it is making the additional assessment required by IRM 9.4.6.1 in tax and tax-related cases, was raised by a number of sources. The Commissioner asked that the use of search warrants be evaluated to determine whether "CI is adhering to the IRS policy of employing the least intrusive investigative techniques possible" and whether "investigative techniques employed in tax cases should differ from those utilized in illegal income cases." The Senate Finance Committee raised these same issues. Additionally members of the American Bar Association Section of Taxation claim that CI agents are applying aggressive tactics from non-tax cases to tax investigations, ignoring the requirement that an assessment of intrusiveness be made. These issues were addressed in all field

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[73] IRM 9.1.4.4(1)

[74] IRM 9.4.9.6.1.

interviews including those with defense attorneys, United States Attorneys, Assistant United States Attorneys, and United States District Court Judges. In addition, 196 search warrant files from nine Districts were reviewed and 136 affiants of those warrants were interviewed.

Of the 196 search warrant files, 52% of the affidavits reflected potential tax or tax-related charges but no money laundering charges. However, none of those files contained any indication that the analysis required by IRM 9.4.6.1 was completed. Interviews of the 136 affiants of those warrants, and the field interviews generally, revealed the most common answer to the question of why a search warrant was used --it was the only way to acquire the evidence. Fewer than 25% of the affiants interviewed were able to articulate a specific necessity for the search warrant, such as an established likelihood that the evidence in question would otherwise be destroyed. Frequently Special Agents stated that search warrant decisions were justified because the Assistant United States Attorney and United States Magistrate Judge agreed with the agent's assessment that probable cause existed. While this adequately meets the legal threshold, it is not the sole determinant under CI internal policies of whether a search warrant is appropriate in a particular case. No agent stated, nor was there any documentation to show, that the evaluative criteria of IRM 9.4.6.1 were considered, or that any other determination was made that the use of the warrant satisfied IRS policy.

One case that involved a search of the residence and business of a professional tax preparer suspected of preparing illegal returns is a good example of this problem. There was no evidence that the tax preparer was attempting to conceal her preparation of the returns. An interview with her attorney established that she frequently gave public seminars regarding her allegedly unlawful tax preparation methods. Upon interview, the affiant stated that no objective facts were developed to indicate that the defendant might destroy evidence. From these facts it seemed likely that the subject of this investigation would have complied with a subpoena for her records. Additionally, because she was not concealing her preparation of the taxes and her name appeared on the returns she prepared, service center records would have revealed much of the same tax return evidence acquired during the search. While use of a search warrant under these circumstances was legally valid, there were insufficient facts to justify it according to CI's internal policies.

Members of the ABA Section of Taxation posit that CI's involvement in grand jury cases, in combination with their greater involvement in narcotics task forces, has caused CI to bring overly aggressive tactics to tax-related investigations. It is certainly possible that CI involvement in grand jury investigations contributes to de-emphasizing its own policy on intrusiveness. The majority of cases CI investigates, and the types of cases in which the majority of search warrants are executed, involve grand jury investigations. Of the 196 search warrant files, 65% were used in grand jury investigations, and 35% were used in administrative cases, roughly commensurate with the caseload statistics. CI Special Agents participating in investigations with other law enforcement agencies may become less vigilant over time to their own agency policies, particularly when no other law enforcement agency has the same requirements. Regular contact with Assistant United States Attorneys and other agencies may be a contributing factor to Special Agents' failure to recognize that, unlike other agencies, the IRS should not employ search warrants in every case simply because there is probable cause.[75]

[75] This should not be construed as a criticism of CI's participation in grand jury investigations. It only attempts to identify a possible cause of the failure to follow internal policy.

A detailed evaluation of intrusiveness consistent with CI policy should be made in every search warrant request. In tax-related cases, the inquiry should include the factors cited in IRM 9.4.6.1 in addition to the following considerations which should be taken into account in every case: any objective evidence indicating the subject would destroy evidence (such as statements to informants or undercover agents); whether records are specifically identified for destruction (such as a secret double set of books); the type of records sought;[76] and whether a "forthwith" subpoena could be used to successfully acquire records. This assessment should be part of the internal written request to seek a search warrant and should be evaluated by the manager and Special-Agent-in-Charge.[77] This recommendation does not imply criticism of the number of search warrants sought by CI, and this recommendation is not made in an attempt to decrease the frequency of their use.[78] Nor should this recommendation be construed as an indication that CI's use of search warrants has been abusive. However, there is insufficient evidence that CI has consistently assessed the relevant intrusiveness criteria prior to acquisition of the search warrants. It must do so, and must document it. While this may make the search warrant process more cumbersome, it is the only way to ensure compliance with IRS policy.

2. Approval Process

CI's failure to strictly conform to their own policies regarding the use of search warrants brings into question their internal approval process and whether Special Agents receive adequate guidance from management when they seek to use a search warrant in an investigation. There are two distinct aspects of the approval process. The first is whether CI management actively participates in the decision to seek a warrant. The second is whether CI management reviews and approves the tactics planned for the execution of search warrants.

The function of an approval process is to evaluate the judgment made by the case agent and determine whether all relevant factors were considered when making the decision. However, the Internal Revenue Manual contains no provisions for an internal approval process for the acquisition of a search warrant by a CI manager.[79] Regarding execution of the warrant, the case agent is only required to brief the appropriate manager "as deemed necessary by district management policy . . . on all appropriate aspects of the search warrant activity" prior to execution of the warrant.[80] These guidelines for management involvement in the acquisition and execution of search warrants are insufficient. They do not ensure strict or consistent oversight nor do they establish clear accountability for approval of the warrant.

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[76] Frequently agents cited "bank records" as critical evidence acquired in a search. There was never any indication as to why such records could not have been acquired by the often time-consuming and frustrating method, although ultimately least intrusive method, of subpoenaing the bank.

[77] As discussed elsewhere in this report, it is recommended that the title of Division Chief be changed to Special-Agent-In-Charge (SAC).

[78] Other federal law enforcement agencies, United States Attorneys' Offices and members of the defense bar generally recognized CI as being among the most conservative in the law enforcement community in all respects, including their use of search warrants.

[79] IRM 9.4.9.6.1 requires that District Counsel approve an application for a search warrant in a tax or tax-related investigation. This requirement is universally ignored in grand jury investigations.

[80] IRM 9.4.9.8.1

Generally, although there is no formal policy, Group Managers and Branch Chiefs verbally approve the application for a search warrant. Interviews revealed that these managers seem to have a thorough working knowledge of the cases they supervise, although there is no documentation available to evaluate whether they apply consistent standards and provide meaningful input. The files reviewed contained no documented evidence of any management review, approval, or input.

One case that highlights concerns regarding the approval process resulted in suppression of evidence seized during a search with warrant in a grand jury investigation. The CI affiant stated that his supervisors did not review or approve the use of the warrant or the affidavit because he was working with a United States Attorney. This signals a clear failure of CI management in this particular case.[81]

In order to establish a greater degree of management oversight and accountability, a written approval process should be adopted for all enforcement operations. It is recommended that the Division Chief should be the final approving authority on the use of a search warrant and that the judgment exercised become a critical portion of the Chief's annual evaluation. The Chiefs are in the best position to evaluate search warrants because they have more direct communication with the relevant parties, including the case agent, the Group Manager and, potentially, any undercover agent or cooperative witness. To the extent that an issue may arise with the Assistant United States Attorney over the appropriateness of using a search warrant, the Chief should take final responsibility for it and communicate his or her decision to the prosecutor. The Chief should rely on the advice of his Divisional Counsel in approving all search warrants to assure that they meet the policy requirement of the IRS Manual and are legally sufficient.[82] Divisional Counsel should review all search warrants when a CI agent is the affiant, not just tax or administrative cases. Final authority will rest with the Chief although counsel should prepare written objections, if necessary, for purposes of his or her own annual review and that of the Chief.

3. Constitutional Rights Violations in the Acquisition or Execution of Search Warrants

IRS's requirement that CI agents employ the least intrusive means of investigation pertains to the choice of investigative techniques in a given case. Once that choice has been made, the acquisition of that warrant must comport with the Constitution. Search warrants were evaluated to determine to what degree, if at all, CI agents fail to comply with the Constitution in the application for, and execution of, search warrants. Evaluation of constitutional rights protections included not only whether the search warrant affidavits were legally sufficient but also whether the force applied in the execution of search warrants was excessive.

One hundred ninety-six individual search warrants that resulted in execution of warrants at over four hundred locations were reviewed; 136 affiants of those warrants were interviewed;

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[81] This appears to be an isolated case and not systemic.

[82] It is not necessary for counsel to be involved in the approval of operational plans because counsel lacks enforcement expertise. They should be consulted, however, if there is any legal issue surrounding execution, such as the search of an attorney's office. *See* Chapter V, *infra,* regarding the proposed new position of Divisional Counsel within the Office of Chief Counsel.

every *Bivens*[83] and tort claim filed against a CI agent during the last three years was reviewed; and CI personnel, as well as other law enforcement agencies, Assistant United States Attorneys, United States District Court Judges, and defense attorneys were interviewed.

The first question addressed was whether CI agents follow proper legal procedure in the acquisition of search warrants. There was no evidence to suggest that CI agents did not follow the appropriate steps for acquiring the approval of the United States Attorneys Office and the signature of a United States Magistrate Judge.

The second question was whether the search warrant affidavits were legally flawed in any way, and particularly, whether the affidavits revealed any systemic violations of constitutional rights. No irregularities were observed in the search warrant affidavits, and all affidavits appeared to be supported by sufficient probable cause.[84] Interviews of the affiants of those warrants revealed that in seven cases motions to suppress were filed, although none were successful.

Eighty-seven *Bivens* claims filed against CI agents from FY 1996 through FY 1998 were reviewed. Twenty-three of those involved acquisition or execution of search warrants. None of the *Bivens* claims were successful. Interviews of the agent, the attorney handling the litigation, or the defense attorney were conducted in each *Bivens* case. This review did not reveal any systemic unconstitutional, illegal, or unreasonable behavior.

Ninety-three percent of tort claims filed against CI agents from FY 1996 through FY 1998 involved vehicle accidents and only three cases concerned the execution of a search warrant. Two of the claims did not present any creditable claim of misconduct by the CI agents and were dismissed. The final tort claim alleged a failure of proper supervision in the individual case. There was neither an intentional constitutional violation, nor any indication of a systemic problem.

During the field visits many of the most active criminal tax defense practitioners in each jurisdiction were interviewed. In several areas representatives of the Federal Public Defender's Office who had experience in criminal tax defense were interviewed as were numerous prominent criminal tax attorneys in Washington, D.C., many of whom practice in courts nationwide. Input was solicited from the American Bar Association Section of Taxation, which submitted a written statement. The defense bar uniformly complained about an increased incidence of CI use of search warrants in inappropriate cases, *i.e.*, cases where less intrusive means would have produced the necessary evidence. They also alleged that CI uses unnecessary force in the execution of search warrants. They did not, however, complain of legal insufficiencies or constitutional violations.

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[83] A *Bivens* action refers to the case *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971) which allows for civil tort claims against law enforcement officers for violations of constitutional rights of subjects.

[84] The warrants were also reviewed to determine whether confidential informant evidence used as the basis for the probable cause was amply corroborated. *See* B.2. Confidential Informants, *infra*.

4. Use of Force in the Execution of Search Warrants

The force employed by CI agents in the execution of the warrants, primarily whether CI agents wear appropriate attire, whether the number of agents used is reasonable, and whether they seize only evidence that falls within the scope of the warrant was evaluated.[85] Although CI agents are required to make an assessment of intrusiveness prior to seeking a warrant, once a search warrant is obtained, its execution should conform to standard law enforcement procedures. Although minimizing intrusiveness is a factor, the top priority in the execution of every search warrant must be agent and public safety.

a. Determination of the amount of force used to execute a warrant -- risk assessment. CI, like all other law enforcement agencies, requires the case agent to conduct a detailed assessment of risks prior to engaging in any enforcement operation, including the execution of search warrants.[86] The risk assessment theoretically assists in classifying the warrant execution as a low, medium, or high-risk operation and in determining the force required to safely and successfully execute it. The risk assessment is a standardized form that requires the case agent to evaluate factors such as time of day, expectation of forced entry, subject background, weapons or animals on premises, and other relevant factors. CI agents are trained in completing the risk assessment at the Federal Law Enforcement Training Center. When completed in the field, the assessments are reviewed by the agent's immediate supervisor.

CI has no written guidelines to direct agents on how to uniformly classify risks. There is no guidance in the Internal Revenue Manual as to the definition of low, medium, or high risk searches. These determinations are left to the independent judgment and common sense of the case agent and his or her manager. Although the risk assessments evaluated were adequately prepared and the conclusions seemed sound, additional and uniform guidance should be required. The factors, or combination of factors, which classify the execution of a search warrant as low, medium, or high risk must be specifically and uniformly identified.[87]

According to CI management, CI has a policy that its agents should not participate in high-risk entries, although this is not formalized in the Internal Revenue Manual. A high-risk entry could involve circumstances such as an individual who has a violent criminal record or is known to possess sophisticated weaponry, or involves the search of a fortified location. This policy is sound. CI agents are not trained, nor should they be, in the tactics necessary to effect high-risk entries. The demands of their caseload do not suggest that they should be so trained. Disallowing use of ballistic shields and helmets supports this conclusion. The file review revealed that in circumstances where the entry was classified as high-risk, CI agents generally relied upon specially trained agents from other agencies to complete the entries. The policy prohibiting high-risk entries should be formally adopted in the Internal Revenue Manual. The

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[85] A review of the time of day warrants were executed revealed no instances where the hour was unreasonable. While certain business people may be offended by searches accomplished during business hours, frequently it is the most efficient way to identify witnesses and secure assistance of employees in retrieving documents.

[86] IRM 9.4.6.7

[87] There is, of course, no way to divorce a Special Agent's judgment from this decisional process. The manual guidelines should include precise definitions and specific examples to assist in application of the guidelines.

manual should formally define a high-risk entry and require CI to acquire assistance from specially trained teams from other agencies in those circumstances.

b. Determination of the amount of force used to execute a warrant -- pre-operational plan. Once the risk assessment is made by the case agent, a team leader is designated for each search site. The team leader is responsible for completing the "pre-operational plan." This is a narrative report that contains information such as the number of agents required and their assignments, time of the search, methods of communication during the search, and other pertinent information.[88] The special agent in charge of the investigation is required to brief a superior regarding all aspects of the search warrant activity although there is no formal approval process.

Even though in all of the warrants reviewed the operational plans were thorough, complete, and conformed to the requirements of the manual, a formalized approval process for search warrant operational plans is necessary to maintain accountability. The appropriate approving authority for a search warrant operational plan is the Special-Agent-In-Charge,[89] a local authority much more familiar with the unique aspects of each search warrant than a national manager.[90] The SAC has direct personal contact with the case agent, his or her managers, any undercover agent or informant, and the Assistant United States Attorney. The risk assessment and operational plan can be more competently reviewed by the SAC, who should be familiar with the character of the neighborhood of each search site. As discussed below, all aspects of the search warrant, including the risk assessment and the operational plan, will be reviewed nationally on a pilot project basis to assure uniform application of all guidelines. After the initial period of transition, this review will become part of the District Peer Review and the annual evaluation of each SAC.

c. Number of agents executing warrants. Search warrant files were evaluated to determine whether CI is making appropriate decisions regarding the number of agents used in search warrant executions. This determination was impossible to make with certainty because CI does not require a post-operation memorandum. Consequently, it was only possible to estimate the number of agents used based upon the pre-operational plans and interview of the affiant agents. Based on the pre-operational plans, the average number of agents executing a warrant was seven.[91] Generally fewer agents were used in business searches than in searches of residences.[92] Interviews of the affiants revealed that more agents participated in the execution of warrants to facilitate expedient review at locations containing

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[88] IRM 9.4.9.8.1

[89] It is proposed elsewhere in this report that the title of CI Division Chief be changed to Special Agent In Charge (SAC).

[90] No other Treasury law enforcement agency nor the FBI requires headquarters' review of search warrant operation plans.

[91] This estimate includes agents from other agencies participating in the search.

[92] Interviews of the affiants confirmed these results.

voluminous records.[93] Accordingly, the number of agents used during the execution of search warrants was found to be reasonable and acceptable, and conformed to general law enforcement standards and practices. However, the need for a post-operational memorandum should be stressed to identify and quantify the force actually employed in warrant execution.

d. Weapons carried during execution of search warrants. The weapons CI agents used in the execution of search warrants were evaluated to determine whether CI agents were excessively armed. As discussed elsewhere in this report, the only weapons used in the execution of the search warrants were the agents' service-issued weapons. There were no instances when the use of shotguns or other weapons was authorized. There is no credible evidence that CI agents were improperly unholstering or displaying their weapons in an offensive or aggressive manner.

e. Attire worn during the execution of search warrants. Whether CI agents are making appropriate decisions regarding their attire during the execution of warrants was also evaluated. This was in response to criticism that CI agents unnecessarily drew attention to their presence by wearing raid jackets, particularly in a business setting.

Treasury Department policy requires that all Treasury Department law enforcement agents be provided with a ballistic (bullet-proof) vest for protection. CI national policy requires that ballistic vests be worn by all Special Agents and supervisors participating in the execution of search or arrest warrants, when acting as a member of a cover team for an undercover operation, or at any other time when there is a likelihood of armed confrontation. The policy allows for an exception to this rule on a case-by-case basis as determined by the supervisor of the enforcement operation.[94]

CI agents are supplied with raid jackets. These windbreakers are emblazoned with "IRS" in large letters, and are worn over the ballistic vests during the execution of search warrants. These jackets identify CI Special Agents to citizens, their fellow agents and officers from other agencies. The jackets also help to prevent a surprised subject of a search from mistaking the law enforcement officer for an intruder.

The current standard issue CI ballistic vest cannot be worn under business clothing, and so must be covered by the raid jacket. Because CI policy is justifiably weighted in favor of wearing the vest during enforcement operations, agents wear the raid jackets in the majority of their search warrant executions. While some agents, particularly in the large metropolitan areas, executed warrants in businesses where they were able to wear business attire without ballistic vests, this was uncommon.[95] Current policy regarding attire may be altered when all CI

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[93] We were not charged with investigating the allegations raised during the IRS hearings by the Senate Finance Committee. However, we note that an allegation of an excessive number of agents used to search a residence was lodged during the hearings. This claim was investigated by the Treasury Department's Office of Inspector General and was not substantiated.

[94] This exception allows CI Special Agents to forego the ballistic vest in business situations where its use could be both unnecessary for agent safety and unduly intimidating to the public.

[95] It should also be noted that the record retrieval and examination accomplished during the execution of a search warrant can frequently be dirty and physically demanding, even in the search of a business, if the records are warehoused in boxes or filing cabinets. Agent attire should be appropriate to the activities needed to be accomplished during the search, even if the site is a business.

agents are outfitted with vests that fit under a business suit if the execution of the search warrant occurs under circumstances where agents could be identified less conspicuously. However, CI's current policies and procedure are adequate to address public and agent safety.

5. Unnecessary Seizure of Property During the Execution of Search Warrants

CI search warrant inventories were evaluated to determine whether CI agents were exceeding the authority of search warrants, and seizing unauthorized items. CI policy regarding what should be seized during the execution of a warrant was found to be the same standardized policy that applies to all other Treasury law enforcement agencies and the FBI. Review of the inventory of items seized by CI during search warrants did not reveal any irregularities or excessive seizures. CI agents were often responsive to subjects' business needs and seized property accordingly. Several cases were examined in which the defendant filed a motion for return of property, but only two were successful. While the affiant agent interviews established that CI agents adequately took into consideration the treatment of property necessary for the operation of an ongoing business, this evaluation should be formally required of the pre-operational plan in searches involving ongoing businesses.[96]

6. Extended Time Between Execution of Warrant and Prosecutive Action

Whether an unacceptably long period of time elapses between execution of a search warrant and the filing of formal charges was evaluated. Also, case files were reviewed to determine whether a significant number of investigations were discontinued after execution of search warrants. The majority of CI cases conform to acceptable law enforcement standards.

No case resulted in a delay of more than two years from search to the filing of a formal charge. In many of those cases the CI prosecution recommendation was pending approval in either the District Counsel's Office, the Department of Justice Tax Division, or the United States Attorney's Office for an extended period of time prior to formal charging. The few delays that did occur resulted from legitimate difficulties in obtaining evidence independent of the search, such as subpoenaed records and witness testimony. There was no suggestion of routine delay between search and indictment.

Search warrants were evaluated to determine whether investigations are routinely discontinued after the execution of a search warrant. Such a finding could indicate that CI agents are not being truthful in their probable cause affidavits, that they are not vigorously pursuing investigations, or that they are using search warrants to harass subjects. Of the 196 search warrant affidavits reviewed, thirteen were discontinued after execution of the warrant. Four of those discontinuations resulted from the subsequent infirmity, death, or deportation of the subject. Three were discontinued because the subjects were charged in a different investigation, or the investigation was transferred to another jurisdiction. Three investigations were discontinued based upon a District Counsel or United States Attorney's Office assessment that the tax loss was not significant enough to warrant criminal prosecution. Only two discontinuations were based on an inability to acquire sufficient evidence to pursue

[96] Of course, this requirement would not include search warrants of illegal businesses, but only of businesses that could legitimately be expected to remain in operation after the execution of a search warrant, like a medical facility, brokerage house, or pawn shop.

prosecution.[97] The vast majority of the search warrants reviewed led to the ultimate prosecution of one or more subjects. There is no information to suggest that CI routinely discontinues investigations after the execution of a search warrant.

7. Post-Operational Memoranda

A deficiency in CI's search warrant procedures is that CI regulations do not require agents to complete a detailed report on the execution of a search warrant, unlike the policies governing most other federal law enforcement agencies. The Customs Service, Secret Service, and FBI require a written report of the activity. ATF requires a written memorandum only if unusual activity occurred. Although IRS regulations require a "post-operational review," (a meeting involving all personnel involved in the search), they do not require any post-operational written documentation unless a witness interview was conducted during the execution of the warrant. While the post-operational review is undoubtedly helpful in identifying problems and ensuring solutions, it is no substitute for a detailed written account.[98]

The purpose of a post-operational memorandum is similar to the purpose of a memorandum of interview. It is to memorialize the facts for any subsequent legal evaluation and to refresh the recollection of all parties involved. The post-operational memo should detail the participants and their responsibilities, the mode of entry, the citizens on the premises and any statements they made and any particular problems that might have occurred. This memo would also be helpful to the case agent and any other participants who may be called upon to testify about the search warrant execution. One senior manager in a metropolitan area explained that while testifying in a *Bivens* lawsuit concerning the execution of a search warrant five years earlier, he could not recall even the most basic details because the warrant was executed without incident. Thus, even when the execution of a warrant is unremarkable, a memorandum of the event should be prepared.

The requirement of a post-operational memorandum should be mandated as a national policy and should be specified as such in the Internal Revenue Manual. The memorandum should be prepared by the team leader, or someone who was on sight at all times during the execution of the warrant and should: identify all agents involved and what their specific responsibilities were; note the time and method of entry and exit; identify any people on the premises, any statements they made, and indicate how they were treated during the search; identify whether any particular problems were encountered during the search execution; indicate the condition of the premises upon entry and exit of the search team, if not videotaped; and include a copy of the inventory and return. The document should be made part of the permanent case file.

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[97] The reason for discontinuation of one case was not determined because the file did not possess adequate information, the case agent was retired, and no one who had sufficient information about the case could be located.

[98] Even though a written memorandum is not currently required by national policy unless an interview is conducted during the execution of the warrant, some Division Chiefs require them. In those divisions requiring a post-operational memo, they were not consistently prepared and did not contain sufficient information.

8. Post-Operational Review

All search warrant documents, including approvals, the affidavit, the operational plan, and the post-operational memorandum, should be evaluated at the national level after execution on a pilot project basis for at least three months after implementation of all other recommendations made in this section. This recommendation is based upon the experience of the National Operations Division during the months following the Senate Finance Committee hearings last spring. In response to the Senate Finance Committee hearings, "Interim guidelines" for approval of search warrants were adopted on May 6, 1998**,** which required that CI regional Directors of Investigations approve all search warrant requests, operational plans, and CI participation in search warrants of other agencies. That order was rescinded on July 20, 1998, and approval authority was restored to the Division Chiefs. When the interim guidelines were first established, the national reviewers found that different review standards were being applied nationwide. Once the standards were strictly applied by the national review, however, they were able to establish uniformity among the Divisions. The National Operations staff believed that this was a result of effectively communicating the same standards to all Chiefs.

The Special Agent In Charge is the appropriate authority for approving the search warrants for the reasons stated above, though during the period of transition there should be national post-operational review to ensure establishment of uniform standards. This will not only ensure headquarters that national policy is being followed, but will also provide the districts with feedback on whether they are operating within the guidelines. Once the Commissioner is satisfied that all the search warrant procedures have been implemented uniformly, the national review may be terminated. Strict adherence to the policies and procedures should then become a significant factor in the District Peer Review and the SACs' annual evaluations.

9. File Maintenance

Finally, CI must establish a uniform policy for search warrant file maintenance. Throughout the districts the files reviewed were incomplete and not uniformly maintained. Frequently documents were missing from the files, although they were usually produced upon request. Orderly or complete file maintenance was not observed in any District. CI must establish a national protocol for all file maintenance that includes a list of mandatory documents and an appropriate organization of those documents.

10. Conclusion

No person relishes the thought of armed agents forcibly searching their residence or business. However, the execution of search warrants is a legitimate and necessary tool in all effective law enforcement, including IRS law enforcement. Implementation of these recommendations will not eradicate all complaints about CI's use of search warrants but should satisfy Congress and law-abiding taxpayers that all reasonable steps are being taken to continue to safeguard the rights of citizens.

B. UNDERCOVER OPERATIONS AND USE OF CONFIDENTIAL INFORMANTS[99]

Undercover operations and confidential informants are two valuable law enforcement tools that can be used to effectively detect and expose criminal activity. Frequently they are used in concert: an undercover operation corroborating information provided by an informant. Most experienced law enforcement officers characterize an undercover operation as the most intrusive investigative technique available because it places the undercover operative inside the suspected criminal enterprise. While these tools are necessary to the success of any law enforcement agency, irresponsible use can endanger agents and innocent people, as well as result in unjustified investigations and even prosecutions of innocent citizens.

In addition to the interviews completed both in the field and in Washington, D.C., CI informant files and undercover files for the last three fiscal years were reviewed in each District visited to determine whether CI was using undercover operations and confidential informants legally, responsibly, and in conformity with law enforcement standards and practices.[100]

1. Undercover Operations

An undercover operation is a law enforcement technique whereby an agent acting under an assumed identity or an informant infiltrates a suspected criminal organization without the knowledge of the perpetrators for the purpose of acquiring evidence of criminal activity. CI undercover operations are classified as either Group I or Group II. Group I operations, the more sensitive, are those that are anticipated to last longer than six months, involve an expenditure of confidential funds in excess of $10,000, or fall into one of the sensitive areas indicated in the Internal Revenue Manual.[101] Currently Group I operations must be approved by the Assistant Commissioner of CI, upon the recommendation of the National Undercover Committee. Any other undercover operation that does not meet Group I criteria is a Group II undercover operation and is approved by the regional Director of Investigations.

One hundred twenty-six CI Special Agents are trained undercover agents and assigned to field offices. They conduct regular investigations when not working in an undercover capacity. Once deployed in an investigation, the undercover agent is assigned one or more contact agents who oversee the safety and security of the undercover agent and transmit instructions. In addition to the 126 specially trained undercover agents, there are approximately one hundred CI Special Agents nationwide trained as undercover return preparer “shoppers.”

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[99] All aspects of undercover operations are outlined in IRM 9.4.8. IRM 9.4.2 provides the guidelines for the use, control, documentation, and evaluation of confidential informants. The guidelines on confidential informants were amended in 1996 to conform to the joint Department of Treasury/Attorney General Guidelines for Cooperating Individuals and Confidential Informants.

[100] Because of our inability to access secret grand jury materials pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure, evaluation of a significant portion of these files was impossible.

[101] Some of the sensitive factors that may render an undercover operation a Group I are: significant civil claims against the United States; indemnification agreements for losses; impact more than one geographic region; involve a public official, foreign government, religious or political organization or the news media; damaging statements made about the activities of an innocent person; illegal activity on the part of the undercover agent; risk of arrest of undercover agent; giving sworn testimony in undercover capacity; acquiring attorney-client privileged information; posing as an attorney, physician, clergyman, or member of the news media; risk of violence, physical injury, or financial loss. IRM 9.4.8.3.1

These agents generally are used by CI to investigate suspect tax preparer businesses during the tax season. Usually these "shopping" undercovers are classified as Group II.

The undercover program nationwide is coordinated by the Regional Undercover Program Managers (RUPM), Grade 14 Special Agents who are assigned to the Director of Investigations' staff. Currently, each region has at least one full-time RUPM and a full-time Special Agent analyst/assistant. The RUPMs assist the case agent in the formulation of the undercover request, presentation of the request to the Director of Investigations or the Undercover Committee, selection of the undercover agent, and ongoing oversight of the operation, including conducting the ninety day review. They also participate in the training of the undercover and contact agents. The FBI and Customs manage their undercover operations through a similarly tasked regional undercover coordinator.

At the national level, the undercover program is managed by the Office of Special Investigative Techniques (SIT) of the National Operations Division. SIT processes and provides technical assistance regarding field requests for the use of special investigative techniques including undercover operations, pen-registers, consensual monitoring, and non-consensual monitoring.[102]

a. Group I undercovers. An initial request for a Group I operation includes general background information, plus additional narratives to assist the Undercover Committee and the Assistant Commissioner in evaluating the request. The narratives explain why the target is in violation of the law, why alternative investigative actions would not be as successful, and what compliance problem the District expects to address through the operation. The request also includes a plan of action, the type of undercover agent needed, an itemized list of projected expenses, and other pertinent information. The request is generated by the case agent with the assistance of the RUPM and the approval of the Group Manager, Branch Chief, and Division Chief. Once approved at the District level, the request is forwarded through the regional Director of Investigations to SIT for evaluation and review.

The SIT reviewing analyst in turn presents the request to the National Undercover Committee. The National Undercover Committee is comprised of the CI National Director of Operations, Assistant Chief Counsel for Criminal Investigation, and the Chief of SIT.[103] It also includes a Justice Department representative from either the Criminal Division or the Tax Division, depending upon the targeted conduct. The undercover committee meets twice a week, with emergency meetings when necessary, to evaluate Group I undercover requests and advise the Assistant Commissioner of Criminal Investigation regarding approval. It also evaluates elevations of Group II undercovers, and deviations or extensions of ongoing Group I undercovers.

b. Group II undercovers. Group II undercover operations are proposed in the same manner as Group I, but are approved by the Regional Director of Investigations after review by the Regional Undercover Committee. Approval authority for Group II undercover

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[102] The RUPMs and their back-ups should report directly to the Chief of SIT due to removal of the regional Directors of Investigation. The RUPMs should be reassigned to posts-of-duty in the Districts most active in undercover operations.

[103] The National Director of Operations and the Assistant Chief Counsel for Criminal Investigation can designate a staff member to sit on their behalf.

operations should be vested in the Deputy Assistant Director of National Operations, with the advice and assistance of a Group II undercover committee. The Group II undercover committee should be comprised of the evaluating analyst from SIT, a representative from Assistant Chief Counsel for Criminal Investigation, and the Deputy Assistant Director of National Operations (or a designee).[104]

Approved Group I and Group II undercover operations must be reviewed at least every ninety days by the RUPM, who prepares a written report detailing the progress of the investigation. The Group Manager and contact agent must participate in the review, as well as the undercover agent, if possible. The Division Chief is summarily briefed on the status of the case at that time. The purpose of the review is to provide support and/or assistance and keep management aware of all undercover activities.

c. Evaluation of undercover operations -- methodology. In evaluating CI undercover operations, 104 closed Group I and Group II undercover files were reviewed, agents were interviewed regarding their use of undercover techniques, the relevant Department of Justice participants in the National Undercover Committee were interviewed, a National Undercover Committee meeting was observed, the Office of Special Investigative Techniques presented a briefing, the Deputy Director of National Operations (the Director's designee on the Undercover Committee) was briefed, a national meeting coordinating a multi-district investigation with multiple on-going undercover operations was observed, all *Bivens* actions and tort claims that involved alleged misconduct during undercover operations were reviewed, all disciplinary and Inspector General actions related to undercover operations were reviewed, relevant portions of the IRM were reviewed and compared with other federal law enforcement policies, all recent internal audit evaluations of CI undercover operations were reviewed and nationwide CIMIS data for undercover operations for the last three fiscal years were reviewed.

CI engages in undercover operations responsibly, effectively, and in accordance with its own prescribed policies. Its policies in initiating, monitoring, reviewing, and terminating undercover operations are similar to those of other federal law enforcement agencies and are thorough and in conformity with the law. The National Undercover Committee timely and thoroughly reviews Group I undercover requests.[105] A Department of Justice official who sits on several National Undercover Committees characterizes CI's committee as, "very, very good." He noted that it is very "tight" and imposes strict controls on CI undercover operations. An Internal Audit report issued by the IRS Regional Inspector on June 24, 1998, found that, despite several technical problems, "the use of undercover investigative techniques was effective in accomplishing operations objectives [and] controls were effective in initiating and monitoring the undercover operations."[106] No complaint was received from the United States District Courts, the United States Attorneys' Offices, other law enforcement entities, or the defense bar regarding CI's use of undercover operations. No tort claims, *Bivens* actions, motions to

[104] Because of the consolidation of the regional offices, SIT may need additional analysts to adequately evaluate the Group II requests.

[105] Based upon the proposed reorganization, all Group I and Group II undercover operations will be reviewed at the national level.

[106] *Final Internal Audit Report -- Review of Controls over Criminal Investigation Undercover Operations (Official Use Only)* (Internal Audit Project #970059); June 24, 1998.

suppress evidence, or disciplinary actions indicated any significant or systemic abuses of CI policy, federal law, or the constitutional rights of subjects.[107]

Of the 105 undercover files reviewed, 32 were Group I and 73 were Group II. 61% of the undercover operations were used in tax-related investigations, and 35% were used in narcotics-related money laundering investigations. Based upon the recommendation that CI conform its caseload to a compliance strategy that is as yet undetermined, no conclusion can be drawn about whether CI is using undercover operations in appropriate cases. However, it is clear that undercover operations are often critical in establishing or developing competent evidence in tax-related cases. The first-hand evidence and statements acquired during undercover operations can be particularly valuable in return preparer cases and foreign and domestic trust investigations. Other than the recommendations for changes based upon the abolition of the Director of Investigations' role, there is no reason to criticize or alter the current functioning of CI undercover operations.

2. Confidential Informants[108]

Acquisition of evidence and information from confidential informants is an invaluable tool of law enforcement. While informants can provide information about criminal activity that could remain undetected but for the cooperation of that witness, they may have ulterior motives for providing misinformation. To prevent abuses, stringent and detailed standards must be applied prior to utilizing an informant.

a. Uniform Treasury and Justice Department policy. In June 1996 the Treasury and Justice Departments jointly adopted Uniform Guidelines for Cooperating Individuals and Confidential Informants to provide guidance to all federal law enforcement officers in determining the suitability of confidential informants.[109] The Uniform Guidelines set forth an extensive list of factors that must be evaluated before a cooperating individual or confidential informant may be used. Some of the factors considered are: age, criminal history, motivation, history of substance abuse, and risk of physical harm to the informant and his or her family. Once the factors have been assessed and the use of the informant has been approved

[107] One case reviewed was the source of both a *Bivens* action and a disciplinary action for misconduct during an undercover operation. A motion to suppress evidence filed in the subsequent criminal prosecution was denied. This case represented an isolated incident and is not representative of a systemic problem.

[108] The Uniform Treasury Department Guidelines define a "Cooperating Individual" as an individual who provides information concerning criminal or other unlawful activity and works under the direction and control of a law enforcement agency or is paid more than $2,500 per year. They define "confidential informant" similarly except that the confidential informant has a reasonable expectation of anonymity. CI does not make this distinction, and their definition of "confidential informant" encompasses both definitions. IRM 9.4.2.5.2.3

[109] In addition to CI, these guidelines apply to the FBI, the DEA, the Marshals Service, the Immigration and Naturalization Service, Justice and Treasury Departments, Offices of Inspector General, the Customs Service, ATF, and Secret Service.

by a supervisor,[110] the informant must be advised of a lengthy and explicit set of regulations governing their status as a confidential informant. Only after completion of the above steps can a cooperating individual or confidential informant provide information to the Special Agent. The Uniform Guidelines provide specific regulations regarding payments to informants, and require semi-annual review of the confidential informant file and a written determination regarding their suitability to continue.

b. CI policy. CI adopted the Uniform Guidelines substantially verbatim on August 19, 1996.[111] Not only are the requirements set forth at length in the Internal Revenue Manual, but CI has standardized forms for the approval, advisement, payment, and review of informants to ensure compliance. Both the Internal Revenue Manual and the standardized forms require analysis of the same information required by the Uniform Guidelines.

The only major difference between the Uniform Guidelines and CI regulations is that CI mandates a more thorough semi-annual review of ongoing informant activities than the Uniform Guidelines. The Uniform Guidelines require only a semi-annual written determination to assess whether a confidential informant should be continued, deactivitated, or terminated. CI requirements are much more extensive. They require, among other things, a summary of all payments to the informant, the number of investigations opened as a result of this informant's activities, and whether the informant filed an annual tax return and declared all payments received from CI.[112]

During field interviews 208 confidential informant case files were reviewed. Generally the files contained all the necessary documentation. The forms reviewed were thoroughly completed, appropriately approved, and adequately reviewed. There was no case that did not conform to the Uniform Guidelines and IRS requirements.

c. Problems associated with CI's use of informants. Because of concerns raised during the Senate Finance Committee hearings, the issue of whether CI agents seek search warrants based upon unsubstantiated or uncorroborated information received from biased or untruthful confidential informants was evaluated. Of 136 search warrant affiants interviewed, 52 warrants were based upon information provided by confidential informants. None of these warrants were the subject of motions to suppress. Information provided by confidential informants in those affidavits was amply corroborated by undercover operations, records, surveillance, or other witnesses. There was no affidavit based solely upon the testimony of a confidential informant.

One tort claim arose, in part, from the use of a confidential informant in a search warrant affidavit. In granting a motion to suppress evidence acquired as a result of the search, the court found that the CI agent lied in the affidavit about information provided by the confidential informant. According to the agent and the Assistant United States Attorney, the agent did not lie. Instead, the confidential informant changed his story. The evidence corroborating the

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[110] Certain categories of informants, such as federal prisoners and participants in the Federal Witness Security Program, require the approval of the Department of Justice Office of Enforcement Operations.

[111] IRM 9.4.2

[112] IRM 9.4.2.5.6.5

confidential informant's testimony, which primarily consisted of documents acquired from another law enforcement agency, was not reliable. While this case is troublesome, it is not representative of systemic mismanagement of confidential informants by CI.

Field agents uniformly complained about the extensive approval process required to register a confidential informant. It is a widely held perception among CI agents that Special Agents from other law enforcement agencies may use confidential informants without conducting the detailed review required by CI. The scope of this review does not include the field practices of other law enforcement agencies. CI policy and procedure is in strict conformity with the requirements of the Treasury and Justice Department Uniform Guidelines. CI is only more restrictive than the Uniform Guidelines in relation to information contained in the semi-annual reviews, which does not impact the Special Agent.

Finally, the recommendations for alteration of the CI chain of command require two changes to the review and approval processes for confidential informants. Currently the District Director must approve the registration of a confidential informant, although that authority may be delegated to the CI Division Chief.[113] The Division Chief should be the final approval authority for registration of the informant. This will not eliminate the Chief's responsibility to conduct the semi-annual written review of all informant activity required by IRM 9.4.2.5.6.5.

Also, the Regional Directors of Investigation are currently required to report annually to the National Operations Director[114] on each District's informant activity to ensure compliance with guidelines and policy.[115] If the Commissioner accepts the recommendation to abolish the role of the Director of Investigation, the annual review of informant activity should be completed by the Office of Special Investigative Techniques.

[113] IRM 9.4.2.5.3

[114] That report was to be designated specifically for the Office of Special Investigative Techniques within National Operations.

[115] IRM 9.4.2.5.6.6

WEAPONS AND PROTECTIVE GEAR

In general, law enforcement agents investigating and enforcing violations of the federal criminal code should be authorized to carry firearms. The issue of whether CI agents, whose primary mission (albeit not the sole one) it is to enforce the tax code, should also carry weapons in the course of their duties was evaluated. It is concluded that even if all other statutes of jurisdiction were removed, and CI agents were only responsible for investigating violations of the tax code, they should be armed adequately enough to ensure their safety and the safety of the public.

Congress has never formally and explicitly authorized CI agents to carry firearms. CI's authority to carry firearms is based on a 1962 Treasury General Counsel decision that found that CI agents have an implied authority to carry firearms incidental and necessary to their authority to arrest.[116] After enactment of 26 U.S.C. § 7608(b), which formally codified CI agents' authority to arrest and to execute search and arrest warrants, IRS Chief Counsel concluded that enactment of 26 U.S.C. § 7608(b) did not diminish CI's implied authority to carry firearms.[117]

It is axiomatic that the safety of the men and women who enforce criminal laws be ensured to the greatest possible degree. Criminal conduct, no matter how minor it may seem, necessarily carries with it the prospect of the loss of liberty, which sometimes inspires resistance and violence. In order to meet that threat, law enforcement officers must be given reasonable means to protect themselves with at least the same types of weapons that any prospective criminal defendant could reasonably possess. CI agents are no different.

Not all tax evaders are nonviolent. CI retains a catalog of weapons and other dangerous implements recovered during the execution of search warrants or during interviews, including numerous handguns, machine guns, assault weapons, knives, ammunition, and explosives, including pipe bombs. In some instances these weapons were recovered from subjects or witnesses who had been characterized by a risk assessment as "nonviolent." A CI compilation of "dangerous situations" encountered by CI agents since 1990 reflects that while most of the violent, dangerous situations involved narcotics offenders, the next most prevalent categories were return preparers and tax protesters.

The rise of militia-type organizations and increasing threats of domestic terrorism heighten the security risk of CI agents. According to Larry Shovar, IRS Inspector and National Employee Protection Coordinator, a fundamental principle of many anti-government organizations is to oppose and protest our mandatory tax system. The Federal Bureau of Investigation has noted that militant domestic terrorist organizations "frequently articulat[e] anti-taxation sentiments and refus[e] to pay federal income taxes."[118] A compliance strategy will likely dictate that offenders of this nature be investigated by CI.

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[116] *See* Department of Treasury General Counsel Memorandum dated October 10, 1962; IRM 9122.4.

[117] *See* Memo of Chief Counsel, Criminal Tax dated June 24, 1985.

[118] *See Terrorism in the United States 1996*, United States Department of Justice, Federal Bureau of Investigation.

It has been suggested that if unarmed IRS Collection Division Revenue Officers are required to engage in the sometimes dangerous seizure of property, CI should also be able to exercise their seizure and arrest jurisdiction without weapons. However, whenever a revenue officer feels threatened during the completion of a collection activity, he or she may request an armed CI escort.[119] Revenue Officers are required to seek CI escort if the contact they are making is with the subject of a narcotics investigation.[120] If a Revenue Officer does not have an armed escort and is assaulted, threatened, or harassed, he or she is required to immediately retreat and terminate that collection activity.[121]

Criminal investigators cannot be mandated like Revenue Officers to terminate and retreat from any enforcement action that presents a real or potential threat. The purpose of executing a search warrant is to acquire evidence that might potentially be destroyed. Arrest is effected to subdue and detain a criminal subject. If CI Special Agents were unarmed and followed the same rules as Collection Division Revenue Officers, their powers to arrest and conduct seizures would be rendered meaningless.

A. CI SERVICE WEAPONS

CI agents are appropriately armed to perform their law enforcement duties. The standard issue CI service weapon is the Sig Sauer Model 228 nine millimeter semi-automatic pistol.[122] This is the same service weapon currently provided to ATF and Secret Service agents.[123] U.S. Customs agents are provided with the same caliber weapon made by Smith & Wesson.[124] The FBI issues the larger Glock .40 caliber semi-automatic pistol.

B. ADDITIONAL WEAPONS

In general, the only other weapons available to the field divisions are a limited number of shotguns in each District.[125] These shotguns are available for use only with the express permission of the Division Chief, who must notify the Director of Investigations and District Director within twenty-four hours of making the decision.[126] All CI Special Agents are required to shoot the shotgun training course twice per year for familiarization. Only those agents

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[119] IRM 5143.2

[120] *Id.*

[121] *Id.*

[122] CI policy requires agents to have their service weapon "available" to them twenty-four hours a day. This is consistent with all other law enforcement agencies' policy regarding weapons.

[123] Secret Service will upgrade to the larger Sig Sauer model 229, .357 caliber, in FY 1999.

[124] Customs will change to the Glock model 19, nine millimeter semi-automatic pistol, in FY 1999.

[125] CI has a much more limited weapons inventory than most other federal law enforcement agencies. However, they do have a limited number of additional weapons, primarily handguns, available for use in undercover operations. These inventories are maintained at both the National Office and in the districts. An agent must qualify with the alternate weapon prior to carrying it.

[126] IRM 9.1.4.7, Directive Four

designated as members of each Districts limited shotgun cadre who shoot a qualifying score are permitted to carry the shotguns during enforcement operations.

There are no instances in which a Division Chief authorized the use of shotguns. In the 196 search warrant files reviewed, use of a shotgun was never requested, and CI executed the searches with the protection of their service weapons and ballistic vests. There have been no complaints or lawsuits involving the use of shotguns during enforcement operations, nor were they the subject of any lawsuit.

CI agents and managers bring an appropriately conservative view to use of shotguns during enforcement operations. They carry these weapons only in the rarest circumstances when necessary for public and agent safety. They should continue to apply these same standards. Final approval authority to carry shotguns during enforcement operations should remain with the SAC, although he or she should notify the Deputy Assistant Director for Field Operations within twenty-four hours of making the decision.

C. RURAL AREA PROBLEMS

Most agents stated that they believe they are adequately armed and appropriately trained in the use of force, but several agents assigned to rural areas, particularly in the Western Region, were concerned that they are not adequately armed to address their unique risks. They frequently serve subpoenas and summonses, execute search warrants, interview subjects, and provide armed escorts to Revenue Officers in isolated areas. As a result, they are vulnerable because assistance or back-up is not readily available to them in dangerous situations. The agents added that they do not always have sufficient or responsive support from other federal or local authorities due to limited resources. The growing presence of militia organizations, often the subjects of tax-related investigations, heightens the danger. The agents understandably expressed a genuine fear that because of the restrictive firearms policy of CI they are often not adequately protected.

The Internal Revenue Manual permits Division Chiefs in these types of areas to provide additional protective firearms if necessary. IRM 9.1.4.7(5) permits the Division Chief to "authorize Special Agents to carry Service-owned weapons other than their personally assigned firearm (for example, shotguns)." While acquisition of additional weapons purchases is not encouraged, CI management should conduct regular and thorough reviews of the unique enforcement problems facing each district. It may be necessary given the unique circumstances of certain districts to provide more advanced protective firearms to agents in unique circumstances. If that becomes necessary, CI should bring the same conservative approach to requests for use of these weapons.

D. OLEORESIN CAPSICUM SPRAY

In addition to the service weapons and shotguns, Oleoresin Capsicum (OC) spray (pepper spray) is the authorized intermediate weapon for CI agents. CI classifies OC spray as Level Three on the use of force response model, which means that OC spray should be used on an assaultive subject before physical contact is made. This classification is consistent with the practice of the Federal Law Enforcement Training Center, the FBI, and other Treasury law enforcement agencies. It is also consistent with studies conducted by the Los Angeles Police Department and the New York City Police Department which establish that injuries to both

subjects and police officers are greatly reduced when officers use OC spray rather than physical force to subdue a subject.[127]

E. USE OF FORCE INCIDENTS

CI agents are required to complete a use of force incident report every time force is used that results in injury, property damage, or death.[128] Review of all nine use of force incident reports generated from 1995 to the present[129] reveals that only one involved CI weapon use -- the shooting of a pitbull which charged an agent during the execution of a search warrant. There were two incidents of CI agents using OC spray: once on a husband and wife who were physically assaulting the agent and once on a dog during the execution of a search warrant. With the exception of one handcuffing incident reported during the execution of a search warrant, the other incidents involved use of force by other agencies in CI's presence.[130] There was no evidence in the use of force incidents to suggest that CI agents are overly aggressive, use force unnecessarily or are improperly trained in the use of force.

F. WEAPONS TRAINING

CI agents are initially trained at the Federal Law Enforcement Training Center on the use of force generally, including defensive tactics and firearms. After initial training they are required to qualify with their service weapons semiannually, although they are required to practice quarterly. They must shoot the shotgun qualification course once a year for familiarization, unless they are specially designated for shotgun qualification.

Between August 4, 1994, and January 29, 1998, CI agents were required to participate in enforcement training eight days per year. In January 1998 that number was reduced to six days per year.[131] This training includes firearms training, defensive tactics, physical fitness assessments, and any additional enforcement area needing emphasis.[132] The dearth of incidents involving force establishes that CI's regular tactical training does not result in creating overly aggressive field agents. CI agents are adequately armed and trained to use their weapons and they do not use them aggressively or recklessly.

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[127] Memorandum for Assistant Commissioner on Level of Oleoresin Capsicum Spray, November 21, 1997.

[128] IRM 9.2.3.7

[129] This evaluation excluded the Los Angeles shooting incident involving an off-duty CI agent and his personal weapon, ruled by the Los Angeles County District Attorney's Office and the Justice Department as self-defense.

[130] During the interrogation of a suspected multiple tax return filer, CI agents were accompanied by state law enforcement authorities because there was an outstanding failure-to-appear arrest warrant for the subject. During the interview the subject pulled a gun and held it to the state officer's head, and was ultimately shot by the other state officer present.

[131] Because CI management believed that previous enforcement training was inadequate, the number of days of enforcement training was originally set at eight days to focus attention on it. The reduction to six days was contemplated in the original strategy.

[132] 88% of all Special Agents and managers interviewed believe that the continuing training on tactical issues is meaningful.

G. BALLISTIC SHIELDS AND HELMETS

Various districts in the Northeast and Midstates regions possess a total of 28 ballistic shields and 60 ballistic helmets[133] that were purchased prior to the current policy that prohibits their use. The existence of the prohibited protective gear is a source of frustration for the agents in those districts who question why available protective gear cannot be used. One agent in a large metropolitan area assigned to an OCDETF group told us that he sometimes borrows a ballistic helmet from another federal law enforcement agency during the joint execution of search warrants. Several agents in rural areas suggested that the availability of a ballistic shield might be helpful to provide cover in situations where danger unexpectedly erupts in a rural setting.

Ballistic shields and helmets are primarily tools to be used in riot control and special strategic and dangerous entries. The rationale of the policy against their use by CI agents, that CI agents should not intentionally become involved in those types of enforcement activities, is sound and reasonable. CI agents are responsible for thoroughly assessing the risk of every enforcement operation. If the risk assessment indicates that there may be a medium or high risk of violence that would justify the use of ballistic shields and helmets, the CI agents should not be involved in the entry. They are not adequately trained to effectively and safely achieve entry during a high-risk enforcement operation. That job should be left to specially trained teams from other agencies. Once those entry teams have secured the premises, CI agents can complete the operation.

[133] No districts in either the Southeast or Western regions possess any ballistic shields or helmets.

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CHAPTER IV: PERSONNEL

The review included a complete assessment of CI's personnel practices and problems. This chapter discusses the staffing, hiring, training, and promotion of CI employees as well as the disciplinary process for Special Agents and CI management.

Interviews were conducted with numerous CI employees and IRS officials, data of Special Agent staffing levels were gathered, personnel policies were reviewed, and CI training facilities visited. CI personnel practices were compared with those of other federal law enforcement agencies. Over 750 disciplinary files were reviewed at the Treasury Inspector General, the IRS Inspection Service, and local CI offices. The personnel issues were also discussed during most of the 600 interviews conducted by the Task Force.

CURRENT SPECIAL AGENT STAFFING

CI employed 3,009[134] Special Agents at the beginning of fiscal year 1999, down from an all-time high of 3,319 in fiscal year 1997.[135] The number of Special Agents may continue to decrease over the coming years as a significant number of Special Agents are currently, or soon will be, eligible to retire and hiring does not proceed at the same rate as attrition. A 1998 IRS Office of Budget Formulation report analyzed the numbers of certain compliance-related personnel, including Special Agents, eligible to retire over the next five years.[136] The study projected the number and percentage of Special Agents who will be eligible to retire at the end of the following fiscal years:

Fiscal Year	Cumulative Number Eligible	Cumulative Percentage	Per Annum Projected Retires
1998	659	21.92%	126
1999	807	25.62%	130
2000	953	31.25%	133
2001	1,066	33.84%	129
2002	1,186	37.65%	128

Thus, more than one-third (1,066) of current Special Agents are projected to be eligible to retire by the end of fiscal year 2001, less than three years from now.[137]

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[134] Special Agents employed as of December 5, 1998. Information provided by the office of the Director, CI Finance Division.

[135] *Analysis of Retirement Eligibility for Selected Compliance Professionals*, IRS Office of Budget Formulation (October 21, 1998) (Special Agents employed at the end of the first pay period in the fiscal year). There were 3,142 Special Agents in fiscal year 1993, (*Id.*), 2,823 in 1985, and 2,547 in 1970 (Statement of the IRS Assistant Commissioner for Criminal Investigation before the Commission on the Advancement of Federal Law Enforcement (January 14, 1999)).

[136] *Analysis of Retirement Eligibility for Selected Compliance Professionals*, IRS Office of Budget Formulation (October 21, 1998).

[137] The office of the Director, CI Finance Division, also submitted projected numbers of Special Agents eligible to retire in fiscal years 1998 through 2002, which approximate the numbers shown above. The two sets of projections differed slightly because CI projections are based on calendar years while the IRS Office of Budget Analysis projections are based on fiscal years.

It should be noted that the trend will continue. CI projections continue through the year 2005, with cumulative percentages of Special Agents eligible to retire of 41.36%, 45.35%, and 48.84% on December 31 of 2003, 2004, and 2005, respectively.

The decline in the number of Special Agents is the result of CI hiring not keeping pace with attrition. There were 112, 153, and 168 Special Agent retirements during fiscal years 1996, 1997, and 1998, respectively.[138] In fiscal years 1997 and 1998, there were 28 and 101 Special Agents hired, respectively. This trend is continuing as the projected number of retirements during the current fiscal year (130)[139] is nearly twice the number of new Special Agents CI expects to hire (72).[140]

There is disagreement between CI budget officials and IRS budget officials regarding the lack of staffing funds. CI's budget process is not within the scope of this review, but the following budget related observations are noted. The IRS Office of Budget Formulation report concluded that the retirement concerns of IRS compliance functions[141] are no different than those faced by the rest of IRS. The CI budget is allocated from the Tax Enforcement portion of the overall IRS budget, which covers all compliance functions. To the extent CI is facing a serious reduction in its number of agents, it is no different from the other compliance functions of the IRS.[142] If the Tax Enforcement component of the budget is reduced, all compliance functions of the IRS will be affected, not just CI.

Concern about the decreasing number of CI Special Agents has been expressed by CI personnel, Department of Justice Tax Division officials, United States Attorneys and Assistant United States Attorneys, and defense counsel. Prosecutors believe that the number of CI Special Agents available is insufficient to meet their needs. Some Special Agents said that CI recently has begun to turn down prosecutors' requests to participate in multi-agency investigations because of insufficient staffing. A related concern expressed by some was that the loss of senior level Special Agents has resulted in a diminution in CI's institutional capacity to address complex tax issues.

The Commissioner should determine the appropriate number of agents necessary to accomplish CI's role in the overall IRS compliance strategy. CI's strategic plan should incorporate projections of the number of Special Agents expected to retire or to leave and should include a plan for hiring to fill those vacancies to maintain a relatively constant number

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[138] *Analysis of Retirement Eligibility for Selected Compliance Professionals*, The IRS Office of Budget Formulation (October 21, 1998); and information supplied by the office of the Director, CI Finance Division.

[139] This figure does not include Special Agents who might leave for reasons other than retirement. Although CI quantifies non-retirement attrition (there was a gross loss of 214 Special Agents in fiscal year 1998), no effort is made to track the reasons these Special Agents leave.

[140] Office of the Director, CI Finance Division.

[141] For purposes of the Office of Budget Formulation report, IRS employees included in the definition of "compliance functions" include only certain specified employees from CI, Examination, Collection, and Employee Plans/Exempt Organizations. Not all employees from each function are included.

[142] Special Agents do, however, have a much higher rate of projected retirement eligibility than Examination Revenue Agents and Collection Revenue Officers. As noted, over 33% of the CI Special Agents will be eligible to retire by the end of fiscal year 2001. By that same date, less than 18% of Examination Revenue Agents and less than 19% of Collection Revenue Officers will be eligible to retire. *Analysis of Retirement Eligibility for Selected Compliance Professionals*, The IRS Office of Budget Formulation (October 21, 1998).

of Special Agents. While the IRS Commissioner can, of course, determine that the amount of resources devoted to IRS compliance functions should be reduced, a reduction in CI resources is likely to be met with resistance by prosecutors and other law enforcement components that consider CI participation crucial to all types of financial investigations.

SPECIAL AGENT HIRING

CI has recently implemented a centralized hiring process[143] for Special Agents with all aspects now controlled from one location. Personnel specialists at this one location, or host site (currently St. Louis), review job applications for completeness, coordinate background investigations, and provide counsel on disciplinary matters that arise during training.

Before CI went to a centralized hiring process, CI Division Chiefs hired Special Agents whenever the CI National Office allowed the Chief to fill an opening. The CI National Office determined the number of Special Agents allocated to each division. Because the previous noncentralized hiring process gave local CI Division Chiefs total control over hiring in their divisions, there was no national uniformity in the process or in the qualifications of individuals hired.

Under the recently implemented centralized hiring process, initial recruitment efforts for new Special Agents are made at national and local levels. Advertisements are placed in publications with a nationwide circulation. There is a recruiter in each CI Division office who attends local job fairs and conducts recruitment efforts at local colleges and universities.

The selection process was designed by CI to be uniformly applied throughout the nation.[144] To qualify for a Special Agent position, an applicant must have a four year course of study or a bachelor's degree in any field of study, with at least fifteen semester hours of accounting and nine semester hours in a field closely related to accounting.[145] The applicant also must achieve an acceptable score on the Treasury Enforcement Agent (TEA) Examination.[146] In order to be hired, an applicant must be interviewed in person. Applicant interviews are conducted at four locations by teams made up of three CI Group Managers and a CI Branch Chief.

Special Agents are hired to fill CI personnel needs on a nationwide basis and not for a specific vacancy in a district.[147] Centralized assignment allows CI to assign new hires to field division offices determined to have need at the time the newly hired Special Agents start training. Special Agents first report to training at the Federal Law Enforcement Training Center

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[143] A centralized hiring process is used by other federal law enforcement agencies (such as FBI, DEA, Customs, ATF, and Secret Service).

[144] While the uniformity of the selection process may exist for applicants from outside the IRS, some current CI support personnel have filed complaints with the Inspection Service alleging that CI unfairly rejected their applications for Special Agent positions despite their qualifications. This Task Force did not review the qualifications of these CI support personnel to become Special Agents.

[145] Applicants may also meet the education requirement with three years of successful, responsible accounting and business experience, a combination of education and experience, or specialized experience.

[146] The TEA Examination is used for all law enforcement positions within the Treasury Department.

[147] CI management determines the total number of Special Agents assigned to each office location. Newly hired Special Agents are assigned to office locations operating below the authorized number of Special Agents for that office.

(FLETC) and then to their post of duty location. A recent group of new Special Agents were advised of their assignments just before they began training.

The centralized hiring process appears to be a vast improvement over the previous process. It provides a nationwide pool of applicants, thereby eliminating the problem previously faced by local offices in remote areas with a limited applicant pool. The nationwide pool ensures that specialized needs of a locality can be filled even if no applicant with those special qualifications lives in that locality. Regional biases should no longer exist now that interviews are standardized. CI management now has ultimate flexibility to place newly hired Special Agents wherever they are needed throughout the country. The centralized "host site" that handles all hiring matters should ensure uniformity in the hiring process.[148]

Special Agents in each of the first two classes of Special Agents hired under the recently implemented centralized process were interviewed at FLETC. The quality of these new Special Agents was deemed very high, suggesting that the new centralized hiring process is functioning well. The interviewees included future Special Agents with experience as attorneys, CPA's, police officers, tax return preparers, and IRS Revenue Agents and Revenue Officers.

Although the centralized hiring process has numerous positive features, several concerns with the process were raised. These concerns fell into four areas: 1) a lack of transfer opportunities for Special Agents once they received their initial post of duty; 2) inefficiencies and a failure to address local needs (*e.g.*, bilingual agents); 3) fewer Revenue Agents will be hired as Special Agents; and 4) the displeasure of some newly hired Special Agents with the prospect of conducting tax investigations.

Newly hired Special Agents may be required to remain in the city to which they are initially assigned under centralized hiring for their entire careers because current Special Agent employment guidelines do not provide a well-defined mechanism for Special Agents to transfer from one CI Division to another. Other law enforcement agencies have programs in place allowing their Special Agents to transfer to different office locations. The FBI has the most formal program, which generally allows its Special Agents to state an office of preference after they have been with the FBI for three years. Transfers to the office of preference are generally accommodated at FBI expense, if there is an opening. The Secret Service allows its Special Agents to make their office preferences known to management. It will move the Special Agent to the office requested as openings permit at management's discretion and at agency expense. A Secret Service move usually occurs only after a Special Agent has completed his or her initial investigative and protective assignments (six to eight years). ATF permits its Special Agents to state a preference office to which the agency will transfer the Special Agent, at agency expense, if an opening is available. The Customs Service has an informal transfer program whereby Special Agents are able to move between offices, at their own expense, as openings permit.

[148] IRS should consider centralizing all of CI's personnel support services in one location based on the success of using a host site to handle those matters during the hiring process. All personnel matters related to Special Agents, including retirement, disciplinary actions, drug testing, background investigations, and medical qualifications could then be handled uniformly. An additional factor in favor of centralized personnel support services is that CI labor relations procedures differ from most of the rest of the IRS because CI, unlike most of the IRS, is a nonbargaining unit. Employee grievance procedures also are different because of their non-union status.

CI should establish an Office of Preference program similar to those in other law enforcement agencies. The time a Special Agent is required to serve in his or her initial post of duty should reflect the significant investment made by the initial post of duty office to create an effective and mature financial crimes investigator. This program should cover preferential transfers only, and exist independently of hardship transfers[149] and transfers resulting from CI moving a Special Agent to a new location when that agent is promoted to a management position.

Current Special Agents expressed several concerns with the new centralized hiring process. They feel it is unreasonable to require applicants to accept a job offer without knowing the location of their assignment. They believe it is foolish to bring non-local hires into an area where there may be a substantial number of qualified local applicants who need less time to "learn the streets." Furthermore, agents believe the specific needs of a local office will be ignored by the centralized process, *e.g.*, certain CI offices benefit from bilingual Special Agents who can communicate better with major sectors of local business and, frequently, targets and witnesses.

The concern regarding new Special Agents being assigned to unfamiliar areas is unfounded. Other federal law enforcement agencies constantly move Special Agents into unfamiliar cities. Moreover, it is reasonable to expect that all Special Agents be able to adapt themselves to new locations. Furthermore, it happens that many new Special Agents will be assigned to their first choice of office location. Typically, this will be an area near where he or she was raised. Also, most duty posts will have at least one Special Agent who is familiar with the location and can impart this knowledge to a new Special Agent. There may even be an advantage associated with coming from a different part of the country. A new Special Agent unfamiliar with an area may bring a fresh approach to the locale. The new Special Agent's investigative curiosity will permit him or her to follow investigative leads unfettered by parochialism, local prejudices, or preconceived notions about where or from whom information may be obtained.

CI can easily address concerns over specific local hiring needs. Whenever CI plans a new round of hiring, the centralized hiring committee should canvas the offices with openings for newly hired Special Agents and ask whether they have any specific needs. Then, for example, if an office has a need for several bilingual Special Agents, the centralized hiring committee can hire individuals qualified to meet those specific needs. In fact, CI is currently making efforts to address the needs of some offices for minority applicants by placing advertisements in a number of publications targeted to minorities. The centralized hiring committee should prepare guidelines for the submission and consideration of specific local needs so that there is no misunderstanding of exactly what the committee is attempting to accomplish.

[149] The IRS has a formal hardship transfer program followed by CI, which provides the opportunity for employees suffering a personal hardship to transfer from one District to another if a position is available and the employee pays for the move. The employee may also have to agree to a reduced grade level.

Some Special Agents and others expressed a concern that current Revenue Agents[150] will not apply for Special Agent jobs under the centralized hiring process.[151] However, the percentage of newly hired Special Agents coming from applicants within the IRS (*i.e.*, former Revenue Agents, Revenue Officers, and others) under the centralized hiring process is approximately the same as the percentage of internal hires under the previous localized hiring procedures.[152] Because they are often considered to make high quality Special Agents, if, in the future, the number of Revenue Agent applicants declines significantly, CI should consider methods to encourage Revenue Agents to apply.

An opinion expressed by several of the newly hired Special Agents, that they could not wait to get through their initial years of investigating tax cases so they could become involved in the more exciting areas of money laundering, narcotics, and other financial crimes, should be cause for concern. A few new Special Agents expressed their strong view that CI should be separated from the IRS. This collective sense of the younger agents appears to have come from a culture of experienced Special Agents who have come to hold opinions now inconsistent with the primary tax enforcement mission of CI.

Local recruiting and mentor Special Agents[153] should make a concerted effort to inform new hires that CI's primary role is to create a general deterrent to tax fraud and to foster voluntary compliance with the requirements of the Internal Revenue Code. Recruiting efforts should be consistent with CI's mission as it fits within the overall IRS mission. CI recruitment efforts fall, in some measure, on the local division offices. Local personnel are responsible for seeking out and encouraging potential applicants to apply for Special Agent positions with CI. Local personnel often assist in the application process by guiding potential applicants through all the necessary steps. Great influence can be exerted over those without CI job experience. If experienced agents tell new hires that tax cases are uninteresting and unrewarding before they begin to work, the new agents' effectiveness as tax investigators inevitably will be compromised. Agent candidates should know that CI is responsible for tax enforcement first and foremost.

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[150] A view commonly held is that some of the best Special Agents are former Revenue Agents because of a belief that the experience gained as a Revenue Agent enables a Special Agent to conduct complex criminal tax investigations more effectively. This view may not be accurate. As discussed under the Training section of this Chapter, new Special Agents are required to take an examination of tax knowledge. In the five most recent groups of Special Agents hired, 27.6% of 29 Revenue Agents taking the test did not pass the first time compared with 18.7% of the 48 external hires. Interestingly, 100% of the six Revenue Officers, as opposed to Revenue Agents, hired passed the examination on their first attempt. Statistics provided by the Chief, Basic Training Section, National CI Training Academy.

[151] Several current Special Agents who are former Revenue Agents stated they would not have applied to be a Special Agent if the centralized hiring process had been in place because they would not have been willing to risk moving to an unknown location.

[152] National CI Training Academy.

[153] After CI offers a position to an applicant, the CI Division Chief assigns a local Special Agent to be his or her mentor while the new hire awaits training.

SPECIAL AGENT TRAINING

CI Special Agents are trained through four primary means: (1) a formal, comprehensive initial training program for all new Special Agents through the National Criminal Investigation Training Academy (NCITA) at the Federal Law Enforcement Training Center (FLETC) prior to beginning work in a CI field office; (2) an on-the-job training program, under the guidance of an experienced agent, for all new agents after they complete initial NCITA training and begin work at their assigned post of duty; (3) a Continuing Professional Education seminar every year in each District for all Special Agents; and (4) Advanced Special Agent Training, a two-week formal training program for experienced agents taught through NCITA at FLETC.

A. INITIAL NCITA TRAINING

The first official post of duty to which CI assigns all new Special Agents is FLETC at Glynco, Georgia.[154] FLETC is a comprehensive law enforcement training facility used by nearly all federal law enforcement agencies, the major exceptions being the FBI and DEA.[155] Newly hired Special Agents begin training with a one week IRS-CI orientation program acquainting them with training program policies on professional and ethical matters and the organizational structure of the IRS and CI. Agents then receive an additional 21 weeks of continuous training in two major segments. The first segment is the Criminal Investigator Training Program (CITP), and the second segment is Special Agent Basic Training (SABT).

The CITP segment is a nine week FLETC administered basic training program in general law enforcement that is required of all Treasury Department Special Agents, regardless of agency affiliation. Topics covered include Law and Evidence, Physical Fitness, Arrest Techniques, Firearms, Criminalistics, and Computers for Investigators. Students are instructed in a classroom setting on a variety of issues including legal requirements of criminal investigations and receive practical instruction through, for example, the mock execution of search warrants, training in defensive tactics, weapons training at the firearms range, and practicing arrest situations.

Upon graduation from the CITP segment, new hires begin the 12 week SABT segment, which is administered by NCITA and includes topics and investigative techniques that pertain specifically to CI. The primary course work of SABT includes Methods of Proof, Interviewing and Court Testifying Practical Exercises, Report Writing, CI Specific Software Applications, Money Laundering/Asset Forfeiture, and Defensive Tactics/Firearms. CI completely revised the SABT course work for all classes beginning in 1998. The new format is highly interactive and includes two separate case studies and many hands-on/simulated exercise type lessons.[156] It provides an emphasis on problem solving and is heavily centered on the students themselves rather than on the instructors. CI was the first law enforcement agency to implement this

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[154] Prior to centralized hiring, new Special Agents first reported to their field post of duty and often began working on investigations before receiving formal training. They were later sent to FLETC when space was available in the training classes. Assigning new Special Agents to work on investigations before they receive formal training is not an acceptable practice.

[155] A number of state and local law enforcement agencies also have training opportunities at FLETC.

[156] The new program was adopted from the training program used by the Royal Canadian Mounted Police.

training method at FLETC. Other law enforcement agencies have expressed enthusiasm about the CI program and may adopt it. CI's new program appears to operate efficiently and the students seemed excited over the training they were receiving, based on observations of NCITA classrooms at FLETC and interviews of students and instructors. Because the new program is in its infancy, an assessment of its effectiveness relative to the previous training was not possible.

Even though the NCITA training for new Special Agents is rigorous and lengthy, it is lacking a vital component - substantive tax law.[157] Substantive tax training is essential for agents who are tasked with investigating criminal violations of the tax laws.

NCITA advises new hires about the specific areas of tax law they are expected to know and provides study guides before they arrive at FLETC. During the IRS-CI orientation program, students are tested on these tax areas. The test is compartmentalized into specific areas. If an agent does not achieve a passing score of 80% he or she must be retested on the specific areas which were not passed.

Any student answering a question incorrectly on their first taking of the test is required to write a paper on the specific tax issue addressed by that test question. Thus, every student writes one or more papers unless that student scores 100% on the first test. The length of the paper depends on the issue presented but must address the issue and cite authority for the conclusion reached. There were 104 students in the most recent five classes of new Special Agents. Seventy-nine of them passed the tax test on the first taking with scores of 80% or higher. The remaining 25 passed when retested. Every student wrote at least one paper because none of the them scored 100% on the test.

In order to provide some practical tax training, the SABT segment includes the application of substantive tax knowledge to issues that arise in the two case studies included in the SABT course work. This approach is sound, as it allows Special Agents to see substantive tax issues in the context of a criminal case and to focus on the importance of identifying potential substantive tax issues. Because it was only recently implemented, the results of this approach to substantive tax training should be monitored closely over the next several years.

Not only is there a concern that new CI Special Agents do not receive proper training in substantive tax areas, but the lack of a structured course of instruction on tax issues may send the wrong message to new Special Agents that tax law is not a priority. This is particularly true given the comments made by some of the new Special Agents at FLETC expressing a discernible lack of interest in investigating tax cases.

[157] The initial CI training in substantive tax law has diminished over the last ten years from five weeks, to three weeks, to 12 days, and finally to its current level - an independent study course. CI implemented the independent study program because of the greatly diverse tax backgrounds of new hires. While some new hires have advanced degrees in taxation or significant work experience in tax issues, others have had no tax instruction beyond undergraduate course work and little or no tax work experience. The prior course materials proved too easy for students with advanced degrees or with work experience in tax issues.

B. ON-THE-JOB TRAINING

After completing the initial training at FLETC, Special Agents continue their training through the On-the-Job Training (OJT) program at their post of duty. An experienced Special Agent is assigned to be the new Special Agent's On-the-Job Instructor (OJI). This training continues for one to two years or until all training objectives are met. The OJI is required to maintain a record of the training objectives accomplished in an OJT Progress Record,[158] sometimes referred to as the "Orange Book." The new Special Agent's Group Manager must certify that the agent has completed each training objective and must conduct quarterly reviews of the agent's progress. Once the new agent and his or her OJI accomplish the training objectives, the local CI Division Chief signs the "Orange Book," certifying that the new Special Agent has completed his or her OJT program.

Field visits established that there is no uniformity among CI Divisions in their adherence to the OJT requirements. Some divisions strictly adhere to the program. CI personnel in other divisions ridiculed the OJT program because it was not followed. A concern often expressed was that some senior Special Agents were assigned to be OJI's against their wishes and, for that reason, did not perform well as OJI's and new Special Agents did not benefit from the OJT program. The overwhelming opinion of most Special Agents interviewed is that the OJT program is dysfunctional.

The OJT program is particularly important to CI because of the unique technical skills necessary to conduct complex criminal tax investigations. CI needs to take advantage of the skills possessed by its senior Special Agents to maintain its specialized institutional knowledge and expertise. To ensure the OJT program functions well, CI should make the meaningful implementation of OJT part of the annual evaluation of all CI Division Chiefs.

C. CONTINUING PROFESSIONAL EDUCATION

The Continuing Professional Education (CPE) program of CI is designed to provide ongoing training to CI Special Agents about both local and national issues. The organization and presentation of CPE courses is the responsibility of the local division, which is expected to hold CPE courses once a year.[159] The courses are typically held over several days at a common location for the entire division and are taught by Special Agents, Assistant U.S. Attorneys, IRS District Counsel Attorneys, and others.

CI selects nationally required topics for CPE. These topics are selected based upon input by CI executives and field managers as well as the CI Training Council.[160] Some of the

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[158] This Record, along with the OJT program, was substantially revised in October 1998 to parallel changes made in the SABT course work.

[159] Some divisions have not held CPE every year as a result of the associated travel expense. For divisions that cover large geographic areas the expense can be quite high. CI requires the travel expenses for CPE to come out of the local division's budget. Some CI divisions' training budgets are inadequate to cover the cost of CPE and the division must provide the additional funding out of its investigative travel budget.

[160] The CI Training Council meets twice a year and provides advice to the Assistant Commissioner (Criminal Investigation) regarding training. The Council is chaired by the Deputy Assistant Commissioner (Criminal Investigation) and co-chaired by the Director, National Criminal Investigation Training Academy.

nationally required topics for the last several years have been Surveillance Assignments, Informants, Management of Enforcement Operations, Protective Assignments, Pension Fraud, Foreign and Domestic Trusts, Entitlement and Subsidy Fraud, Building Entry/Room Clearing, Advanced Interviewing, Liability, and Emerging Issues -- Bankruptcy Fraud, Health Care Fraud, Telemarketing Fraud, Gaming Fraud, and Return Preparer Fraud. NCITA assembles and distributes the CPE training materials as hard copies and computer media, with some materials accessible via the IRS Intranet. The CPE topic materials are distributed throughout the year and are available for individualized study as well as group study.

In addition to providing agents with substantive knowledge, CPE is worthwhile for affording an opportunity for all Special Agents in a division to meet one another and share ideas and information on investigative techniques and specific cases. This is particularly helpful in geographically expansive districts, where agents see each other less frequently than agents in geographically smaller divisions. Many Special Agents considered this the most valuable aspect of CPE.

Every Division's CPE topics, both national and local, for fiscal years 1996-98 were analyzed. While the CPE courses frequently included investigative techniques, administrative matters, enforcement operations, defensive tactics, and personnel matters of concern to Special Agents, course titles containing tax issues were noticeably absent.[161]

Current criminal tax issues should be the focus of continuing education courses. Tax law is complicated and constantly changing, and CI Special Agents need to keep abreast of those changes and how they impact criminal tax cases. More than a basic understanding of tax law is essential for a Special Agent to effectively conduct a complex criminal tax investigation.

D. ADVANCED SPECIAL AGENT TRAINING

Advanced Special Agent Training (ASAT), offered by CI at FLETC, is open to GS-12 or GS-13 Special Agents with six to twelve years of experience. The course lasts nearly two weeks and has received high praise by the Special Agents who have attended. According to NCITA personnel, 99% of the Special Agents who attend recommend the course to others.

Generally, ASAT covers advanced techniques in financial investigations, defensive tactics, enforcement operations, and computer training. The topics covered are timely and appropriate for experienced Special Agents. Several complaints were received from Special Agents who believe that CPE and the ASAT course focus too heavily on enforcement tactics and physical ability. Training in enforcement tactics is addressed in Chapter III of this review.

Once again, conspicuously absent from the list of course topics is any tax topic. If the focus of CI is shifted more heavily towards criminal tax cases, the message must be clear in all CI materials that criminal tax investigations, as determined by overall IRS compliance strategy, are CI's top priority.

Other members are the Deputy Director, National Operations Division; Chief/Branch Chief representatives; and eight field representatives (two from each IRS Region).

[161] This conclusion is based only on a review of the course titles, not the contents of the courses. Although the course titles did not refer specifically to tax issues, the contents of the courses could have included substantive tax and tax-related information.

CASELOAD ASSIGNMENT

During the course of the field visits an attempt was made to ascertain how CI assigns cases to Special Agents. The selection of case assignments is crucial to CI's ability to further its mission and to maintain the expertise of its Special Agents. This review also focused on the long-term assignment of Special Agents to multi-agency task forces.

A. ASSIGNMENT OF CASES THAT IMPROVE DESIRED SKILLS

CI investigations involve a variety of financial and tax fraud schemes, some more complex than others. Special Agents need to work on many different types of investigations to develop, maintain, and improve their skills.

CI managers should assign agents a variety of cases so the agents will be able to improve their skills and progress in their careers. Moreover, the selection of cases should be consistent with CI's role in achieving overall IRS compliance objectives.

B. ASSIGNMENT TO SPECIALIZED TASK FORCES

CI has 327 Special Agents assigned full-time and another 258 Special Agents assigned part-time to multi-agency task forces. Task forces typically consist of a group of investigative agents from various federal, and, sometimes, local law enforcement agencies, directed by federal prosecutors. These task forces focus on specific types of crime including narcotics/money laundering (HIDTA, OCDETF, and other local efforts), health care fraud, bankruptcy fraud, gangs, telemarketing fraud, terrorism, violent crimes, and securities fraud. The objectives of a task force can include a tax enforcement purpose, though tax enforcement is infrequently the principal objective.

Special Agents participating in task forces make meaningful contributions to overall federal law enforcement objectives. As discussed, prosecutors and other law enforcement officials deem participation by CI Special Agents essential to the success of the task forces assembled in their districts. However, long term assignment to task forces may diminish an agent's skills in achieving CI's primary mission of tax enforcement.

As discussed in Chapter III, the April 1998 Senate Finance Committee hearings and defense attorneys have raised concerns about overly aggressive investigative techniques employed by Special Agents. However, this Task Force found that the assignment of CI Special Agents to specialized task forces has not resulted in these agents bringing to their criminal tax investigations heavy-handed investigative tactics they may have seen other agents use in the task forces.

Special Agents should be encouraged to develop varied investigative skills for use, as warranted, in criminal tax investigations. The knowledge or ability to use varied investigative skills should not give rise to claims of heavy-handedness. A lack of discretion in using some of the more aggressive techniques, however, may give rise to such claims. The exercise of discretion in the use of investigative techniques appropriate to the sensitive nature of criminal tax investigations is one of the factors that distinguishes CI Special Agents from other federal law enforcement officers.

There should be a limit to the length of time CI Special Agents are assigned to specialized task forces so their skills as a criminal tax investigator are not diminished.[162] Likewise, the time a Special Agent is required to spend working CI-specific cases between task force assignments should be long enough for the agent to make significant contributions to CI and to refine and hone his or her skills in tax investigations. With reasonable time limits, CI Special Agent participation in specialized task forces can provide valuable experience to the Special Agent while simultaneously contributing to overall federal law enforcement efforts.

[162] The duration of assignment should be determined by an analysis of how much time is necessary for the Special Agent to make an appreciable contribution to the task force. If Special Agents are assigned to a task force for too short a period of time, it is neither beneficial to the task force nor to the Special Agent's ability to learn new skills.

PROMOTION AND COMPENSATION OF LAW ENFORCEMENT PERSONNEL

CI's promotion practices concerning its Special Agents were reviewed. The practices were reviewed from entry level through the process of competitive promotions to the GS-13 level. The "full working" (historically, journeyman) level of GS-12 and competitive promotion to the GS-13 level were compared to the practices of several other law enforcement agencies.

The selection of Special Agents to fill management positions was also analyzed. Management compensation for the heads of field offices was reviewed, as well as that of other law enforcement agencies. The mobility requirement attending management positions was also reviewed.

A. SPECIAL AGENTS

CI Special Agents are paid under the federal government's system of General Schedule employees (GS).[163] Special Agents are initially employed at either the GS-5 or GS-7 level.[164] To be hired at the GS-7 level, an applicant must have superior academic credentials, have completed graduate level studies, or have work experience in investigating financial crimes. All CI Special Agents are designated as being employed under the GS-1811 Series, reserved for law enforcement officers. In general, GS-1811 Series employees differ from most other federal employees in that they have special retirement provisions, earn Law Enforcement Availability Pay (a 25% addition to their basic pay), are authorized to carry firearms, and are required to maintain a set level of medical qualifications.

Once a year, each Group Manager rates his or her Special Agents on their job performance using a Performance Appraisal form. The form sets forth seven job elements, six of which are critical to a Special Agent's job.[165] Managers assign one of five possible rating levels for each job element -- unacceptable, minimally acceptable, fully successful, excellent, and outstanding. The manager also gives each Special Agent an overall rating.

For a Special Agent to receive a promotion from one GS grade level to the next, he or she must receive an overall rating of at least fully successful. A Special Agent must remain at a GS grade level for a minimum of one year before he or she is eligible to be promoted to the next level. The typical promotion progression for a Special Agent is GS-5 level, to GS-7 level, to GS-9 level, and to GS-11 level before being promoted to the full working level of GS-12. A promotion to GS-12 represents that the Special Agent is a mature investigator and is able to perform all duties expected by CI. Thus, a typical Special Agent who is performing up to all expectations will be promoted to the GS-12 level after four years on the job.

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[163] There are various pay levels within the GS system designated by grade levels from GS-1 through GS-15.

[164] Special Agents hired from within the IRS, *e.g.*, Revenue Agents, may start at a higher GS grade level, depending on their IRS experience and their GS grade level at the time they are hired.

[165] The 6 critical job elements are: (1) Application of Legal and Accounting Principles; (2) Investigative Planning and Implementation; (3) Interviewing Principles and Witnesses; (4) Report Writing, Oral and Other Written Communications; (5) Court-Related Activities; and (6) Other Enforcement Activities. The non-critical job element is Other Duties and Assignments.

Unlike the other GS grade levels, CI has set a 60% limitation on the number of Special Agents it will promote, on a competitive basis, to the GS-13 level.[166] To be eligible for promotion to the GS-13 level, a Special Agent must have a minimum of one year of experience at the GS-12 level and have a current performance appraisal overall rating of fully successful or higher. In addition, a Special Agent must submit a statement of Knowledge, Skills, and Abilities (KSA). A ranking panel evaluates the KSA statement and determines a score for each applicant. A list of the best qualified applicants is prepared for the local CI Division Chief, who selects the Special Agents for promotion based on the number of GS-13 openings available in his or her district.

Several other federal law enforcement agencies have made Grade GS-13 the full working level for their Special Agents. Secret Service recently implemented this change in December 1998. The FBI has had this policy in place for some time. ATF sets no limit on the number of its GS-13 Special Agents. The Customs Service, however, limits GS-13 Special Agents to approximately 45% of its agents, exclusive of management level Special Agents.

With the 60% cap in place, there is a potential risk that young hard working Special Agents will leave CI for another agency if they are not promoted to a salary level they can achieve in another law enforcement agency.[167] It states the obvious to assert that CI benefits from retaining its best Special Agents by promoting them.

A concern repeatedly heard was that promotions are often disparate and discriminatory because the local CI Division Chief promotes only the Special Agent most in favor with the Chief instead of the Special Agent with the greatest ability. This alleged disparity is exacerbated by the limit on the number of GS-13 Special Agents and the fact one person has the power to make promotion decisions.

CI personnel offered mixed opinions on the issue of whether promotions to the GS-13 level should be competitive. Approximately one-half agreed that it should be competitive while the other half either disagreed or were neutral on the issue.[168]

CI should remove the limitation on the number of Special Agents at the GS-13 level. However, the full working level should remain GS-12. By doing so, all agents who deserve to be promoted to GS-13 based on their work will be promoted, regardless of the grade level of other agents in their district. This is a more fair and equitable system for the Special Agents.

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[166] This limitation is based, in part, on the number of GS-13 level cases that CI maintains in its inventory and, in part, on financial considerations. If the limitation is lifted, Special Agents also should be rated on their ability to develop cases for themselves that are at a level appropriate to their abilities (they are not currently rated on case development).

[167] This is not to suggest that CI should make every effort possible to retain every Special Agent it hires. If a Special Agent expresses displeasure with the techniques and tactics used in CI investigations, and disagreement with the mission and objectives of CI, management should encourage and assist that agent in finding a position in another law enforcement agency better suited to that Special Agent. CI does not maintain data concerning Special Agents who leave for other law enforcement positions.

[168] Interviewees who either disagreed or were neutral on the issue were not further questioned on whether the promotion to GS-13 should be automatic (based purely on time in grade) or whether any other requirements should be imposed.

Under this proposal, Special Agents will not be guaranteed an automatic promotion to GS-13 based simply on the number of years they have worked in CI. They still will have to fulfill specific experience requirements.[169] The specific experience requirements to be met should focus almost exclusively on the investigative techniques and tactics encountered in complex criminal tax matters versus general criminal investigative techniques used in nearly all federal law enforcement agencies, including CI. General criminal investigative techniques used by federal law enforcement agents are merely a portion of what it takes to be a good CI Special Agent. In addition, CI should set the requirements high enough that promotions to GS-13 are not merely *pro forma*, in fact and as perceived by the agents.

Experience requirements based on complex criminal tax matters will also serve as an incentive for Special Agents to focus on their primary mission of tax enforcement. Emphasizing the importance of the degree of publicity generated for the IRS and the number of prosecutions generated by each Special Agent creates an incentive for Special Agents to seek shorter duration, less complicated, higher profile cases like drug money laundering or those in which a simple tax charge is merely an add-on to the overall prosecution. These cases result in greater recognition to a Special Agent and a quicker way to achieve the requirements necessary for a GS-13 position. A Special Agent's desire to receive quick promotions is effectively a disincentive for the agent to become involved in complex tax investigations.

B. MANAGEMENT

Several of CI's personnel procedures and promotion requirements for its management positions were reviewed as well as management pay levels. The review in this portion of the report focuses on management positions in the field division offices. Field division office management is structured with a Group Manager as the first level supervisor, a Branch Chief as a mid-level manager, and a Chief as the top manager.

In general, any Special Agent applying for a GS-14 level position or higher is required to participate in the Criminal Investigation Succession Planning Program. CI Succession Planning was designed to provide a means to select and promote management officials in a planned and organized manner. A key feature of Succession Planning from the perspective of CI personnel is a requirement that personnel covered by it may be moved to any office as necessary to meet the needs of the Service.[170] The CI Succession Planning Program provides five tiers, or levels, of management position, each of which requires experience at the prior level.

CI should exempt the Group Manager position from the Succession Planning Program.[171] This exception would permit Special Agents to be promoted in their local offices, or elsewhere, to the position of Group Manager without a commitment to the mobility clause of Succession Planning. Special Agents devote much attention to CI's Succession Planning Program requirement for a Special Agent to be promoted to management level positions. Many

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[169] This proposal is similar to the promotion system employed by ATF, where promotions to GS-13 are based upon the completion of established criteria. When an ATF agent satisfies these requirements, his or her performance is reviewed by a committee at headquarters before being promoted.

[170] IRM 9.11.4.9.

[171] GS-14 positions, including Group Managers, were not included in Succession Planning until July 1994. No Group Manager has been forced to move under Succession Planning since then, according to the Director, CI Finance Division.

of them stated that some Special Agents who would make the best Group Managers did not apply for management positions because they would be required to participate in the Succession Planning Program and they either did not want to move, or could not because of family concerns. Because of this requirement, many agents believe that the Special Agents most interested in applying for Group Manager openings are those who are most mobile, as opposed to those who are best qualified to be Group Managers.[172] Accepting the requirements of Succession Planning is, in reality, often a commitment by two wage earners to mobility. This is too stringent a requirement, and CI may not be getting the best Group Managers in its system because of it.[173]

Certain CI Division Chief[174] positions should be compensated at the Senior Executive Service (SES) level. This recommendation is consistent with the concept that CI Division Chiefs will no longer report to a soon to be nonexistent District Director. Generally, CI matters over which District Directors previously had authority would now be assumed by CI Division Chiefs. In addition, as discussed in Chapter V of this review, most matters over which CI Directors of Investigations had authority would also be assumed by CI Division Chiefs. The Chiefs will now have increased responsibility, increased accountability, and in many instances, increased numbers of Special Agents to supervise. FBI, Customs, and Secret Service each compensate certain of their Special Agents in Charge at the SES level. An increase in compensation will essentially achieve parity for CI Division Chiefs and their counterparts at other federal law enforcement agencies.[175]

CI Division offices[176] should be divided into three levels. The levels should be distinguished by such factors as the number employees, especially the size of the CI Special

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[172] CI field personnel were asked whether the promotion system operates to promote the best Special Agents to managers. The responses varied by position. Of the Special Agents interviewed, approximately 15% agreed while 65% disagreed. At the Group Manager and Branch Chief level, approximately 30% agreed, with the remainder either disagreeing or neutral. The Chiefs interviewed were evenly split between those who agree (50%) that the best Special Agents are promoted and those who disagree or are neutral.

[173] One possible alternative to exempting the Group Manager position from the Succession Planning Program altogether, would be to make one-half of them career positions with no Succession Planning requirement.

[174] Chapter V includes a recommendation to rename the position of CI Division Chief to Special Agent in Charge.

[175] A higher compensation level will also help alleviate a salary compression concern at the Division Chief level. CI Special Agents (including management through the GS-15 level), like other federal law enforcement officers, receive Law Enforcement Availability Pay for the additional hours required by their work. Non-SES level government employees have a cap imposed on the amount of compensation they receive. As of September 1998, 64% of the GS-15 managers (81.6% of the Division Chiefs and 50.9% of the Branch Chiefs) in CI were at the compensation cap. Division Chiefs are essentially compensated at the same level as Branch Chiefs. They receive no salary increase for their increased responsibilities and are penalized by having a government owned vehicle taken away when they are promoted from Branch Chief to Division Chief (the local heads of other federal law enforcement agencies are typically provided a government owned vehicle). The pay compression issue is exacerbated in those localities where law enforcement officials receive even higher compensation (an additional 16%), *e.g.*, New York and Los Angeles, where some Grade GS-13 Special Agents' income equals that of the CI Division Chief.

[176] See the discussion of CI Division offices in Chapter V.

Agent complement, supervised; the subject population of the Division; the caseload inventory; and the type of issues historically presented by each office.[177] SES positions should then be created at the two highest levels of CI Division offices with all levels incorporated as part of the CI Succession Planning progressive tier structure. If possible, the top level should receive greater SES compensation than the middle level to reflect the increased complexities of the responsibilities associated with the highest level of CI Division offices.

[177] An analysis will have to be conducted of these matters when a final determination is made on the number of division offices and the Judicial Districts to be covered by each CI Division.

DISCIPLINARY PROCESSES

The Restructuring and Reform Act of 1998, in conjunction with other internal changes made by CI in 1998, has significantly altered the CI disciplinary process. It is believed that most of the changes will foster more thorough investigation and more uniform imposition of discipline. However, there is insufficient evidence at this time to draw any conclusions about the new disciplinary process.

Both the old and the new disciplinary processes entail two stages: investigation and adjudication. If the investigation uncovers criminal conduct, the investigating unit presents the facts supporting prosecution to the United States Attorney. If the United States Attorney declines prosecution, the case is referred to the IRS for administrative adjudication. The investigating unit submits its findings to an adjudicatory body that recommends punishment.

A. PRIOR PROCESS

Under the prior discipline process, a distinction was made between senior and executive management positions, and all other CI employees. Different investigative units existed for each, as well as different adjudicatory units.

The prior process is discussed to highlight its deficiencies and to provide a baseline for comparing the new disciplinary process. Numerous files of disciplinary and adverse action taken under the old process were reviewed.

1. Investigation

Before the IRS Restructuring and Reform Act of 1998, the IRS Inspection Service investigated allegations of misconduct committed by support staff, CI Special Agents, and first line managers.[178] Once the Inspection Service received an allegation of misconduct, the matter was forwarded to a Regional Inspection Office, which made an initial determination whether the matter merited further investigation.[179] If the initial determination was that the matter warranted further investigation, the Regional Inspection Office conducted an investigation of the alleged employee misconduct. If not, then Inspection forwarded the allegation to CI management for their information and possible further inquiry.

If the Inspection Service investigation substantiated the allegations of misconduct (non-criminal), a Regional Inspector prepared a report and forwarded it to the IRS Labor Relations office in the District where the agent was employed.[180] If the investigation did not substantiate the allegations, the Inspector closed the case as unsubstantiated and forwarded it to CI management for their information and possible further inquiry.

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[178] This category includes all employees at grade GS-14 and below.

[179] IRM 10.14.5.1 required Inspection to initiate an investigation if there were one or more specific allegations, positive identification of an employee was made, and the allegation or complaint came from a reliable source.

[180] If the finding constituted a potential criminal violation, the Inspection Service referred the matter to the appropriate component of the Department of Justice. If the Department of Justice declined prosecution, the matter was handled in the same manner as the other cases where misconduct was found.

A total of 225 Miscellaneous Information Files (MIFs) from the four regions of the Inspection Service (Southeast, Midstates, Western, Northeast) for fiscal years 1995-97 were reviewed. MIFs represent allegations against IRS employees that did not meet the elements necessary for an Inspection Service investigation. Only the name of the subject and the allegation were capable of evaluation because no investigation was conducted. Based on the files reviewed, it appears that all credible, specific allegations of misconduct were investigated.

In addition, the 228 Inspection Service files of misconduct investigations for fiscal years 1995-97 were reviewed. The investigations done by Inspection were found to be thorough and complete. No obvious failures to pursue evidence or witnesses diligently were detected, and the investigations were found to be well documented. The investigative means employed were found to be generally adequate, with one exception. There was a complete absence of the use of polygraphs when interviewing witnesses or subjects. Other agencies use polygraphs in internal affairs investigations, including the FBI and the Secret Service. Polygraph examinations in limited circumstances may be an appropriate investigative tool when investigating especially sensitive matters, such as leaks to targets of criminal investigations or the media.

The recent creation of the Treasury Inspector General for Tax Administration (TIGTA), described below, provides an investigative entity completely independent of the IRS for allegations of misconduct by all levels of IRS employees. TIGTA policy anticipates using polygraph examinations only in criminal cases or where extraordinary circumstances merit their use. No further guidance is provided on what constitutes extraordinary circumstances.

Prior to the Restructuring Act, the Treasury Department Office of Inspector General (OIG) investigated allegations of misconduct against CI senior managers and executives.[181] The OIG procedures were similar to those of the Inspection Service. When it received an allegation, the OIG determined whether it was within its jurisdiction and whether further investigation was warranted. If the OIG conducted an investigation, it forwarded its investigative report to IRS senior level officials for adjudicative action. It was then left up to the IRS officials to report any final action back to the OIG.[182]

A total of 85 Treasury Inspector General files related to CI for fiscal years 1995-98 were reviewed. No obvious irregularities or insufficiencies were observed in the investigative process, though the files notably lacked documentation and follow-up on cases referred to IRS management. Because an evaluation of the internal operations of the OIG was not included in the Mission Statement, the reasons for the deficient files were not delved into further. There was a concern, however, with what appeared, based on the lack of documentation, to be a significant number of cases investigated by the OIG in which the IRS had not yet taken any action.

2. Adjudication

Upon conclusion of the Inspection Service investigation, Inspection referred the findings to the IRS Labor Relations Office in the subject's District. Labor Relations consulted with the District Director and the CI Division Chief to determine the appropriate disciplinary action. In

[181] This category includes all employees grade GS-15 and above.

[182] Any finding of suspected criminal conduct was referred to the Justice Department.

order to formulate a recommendation for disciplinary action consistent with actions taken nationwide, Labor Relations should have consulted with the national disciplinary action database, Automated Labor Employee Relations Tracking System (ALERTS), though it was not required to do so.

The 191 local IRS Labor Relations files reviewed revealed that the severity of the disciplinary actions imposed was not uniform nationwide. Most cases drew attention due to the exceedingly lenient punishment imposed by local IRS and CI officials upon a finding of misconduct. In one case, a CI agent acting in an undercover capacity had sexual relations with the target of the investigation. The target, who ultimately pleaded guilty, received a sharply reduced sentence based upon the Court's assessment of the undercover agent's inappropriate conduct. The subsequent disciplinary action resulted in the agent's suspension for 15 days. While the ALERTS system catalogs no other similar case, this punishment appeared to be inexplicably lenient for such outrageous conduct, particularly when compared to other similar punishments meted out for findings of lesser misconduct by other agents.[183]

In another example of lenient punishment, a Group Manager was arrested and convicted of drunk driving in a government owned vehicle. The Group Manager never informed CI of the arrest or conviction, though there are no CI regulations that require such reporting.[184] While conducting a routine fingerprint check, the FBI learned of the conviction and notified CI managers. This Group Manager received only a three-day suspension.[185] In another case, a CI Special Agent in a different district received the same three-day suspension for drunk driving, although she was not driving a government car at the time of her arrest.[186] Finally, while not a CI case, drunk driving in a government owned vehicle has been found to constitute misuse of a government vehicle resulting in a 40-day suspension.[187]

The disparity in discipline nationwide and the apparent leniency in punishment in some cases, may be attributed to the decentralization of managers imposing discipline. In each district, the District Director made the final determination and was not bound by any precedent or guideline. Though a national database of imposed discipline was an available reference for the District Director, there was generally not specific and clear guidance regarding the imposition of disciplinary sanctions. As noted, even when there was a statutorily mandated penalty for specific misconduct, it was not imposed. A CI national level manager explained that the leniency in punishments occurred for two reasons. One reason advanced was that the field

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[183] An agent in a different district received a 14-day suspension for failure to report that another agent improperly drew his weapon during an argument. An agent in yet another district received a 14-day suspension for unauthorized access to the National Crime Information Center terminal.

[184] However, a routine background update for security clearance purposes conducted every five years would have required the Group Manager to supply information concerning his arrest and conviction.

[185] A mandatory minimum 30 day suspension is prescribed for willful misuse of a government owned vehicle. 31 U.S.C. Section 1349(b).

[186] This case also provides an example of disparate discipline.

[187] See *Coleman v. United States Secret Service*, 749 F.2d 726 (Fed. Cir. 1984). The Secret Service has a regulation which prohibits employees from using intoxicants when traveling in an official automobile whether on duty or not. IRS regulations provide that a government vehicle operated in violation of any federal, state, or municipal regulation is defined as unauthorized use. IRM 1(14)47.1-144.

managers imposing the discipline probably knew the subject agents well and may have been swayed by personal respect or empathy for the subject. The other reason was that the local managers may have been less likely to impose a severe penalty because it might alienate not only the subject agent, but that agent's colleagues as well.

The recent centralization of the CI disciplinary process, described below, allows for the Centralized Adjudication Unit (CAU) to provide uniform advice on misconduct and punishment. In addition, transferring the deciding office duties to the National Office should alleviate geographic and parochially inspired disparities in the treatment of similar misconduct.

On matters involving senior level employees (GS-15 and SES), either senior CI National Office executives or the Deputy Commissioner of the IRS determines the appropriate level of discipline based upon the investigation of the OIG. As noted above, a significant number of the OIG investigative files lacked a record of any resultant action taken by the IRS. The IRS had no record at all of these OIG investigations. This indicates an unacceptable failure to track OIG misconduct investigations through the final disciplinary result by the IRS. Under the current process, effective communication must occur between the IRS and TIGTA to ensure that this failure does not recur.

B. CURRENT PROCESS

Allegations of misconduct involving all CI personnel, including executives, are now investigated by the Treasury Inspector General for Tax Administration (TIGTA). Congress created TIGTA as part of the Restructuring and Reform Act of 1998 because of a perceived lack of autonomy of the IRS Inspection Service from the rest of the IRS. TIGTA began operations in January 1999. Consequently, there is insufficient anecdotal information available to comment upon its effectiveness.

The Centralized Adjudication Unit (CAU) provides a singly centralized entity for making recommendations on disciplinary actions, assuming the role previously held by District Labor Relations. CAU was originally created to address allegations throughout the entire IRS of unauthorized access to tax return information. Its duties were expanded in May 1998 to make recommendations in disciplinary actions for CI support staff, Special Agents, and first-level managers. The disciplinary recommendation function was centralized to ensure consistent punishments in all CI disciplinary actions. CAU formulates its recommendation based upon ALERTS, the CI disciplinary guidelines, and in consultation with Chief Counsel.

Any CAU recommendation of less than suspension, *i.e.*, an admonishment or a reprimand, is referred to the employee's District office for final imposition, but is tracked by CAU. Any initial recommendation of suspension or greater is referred to the employee's District office for proposal of the disciplinary action, which is ultimately decided by the Director, CI Finance Division.

Recommendations made by CAU since its expansion in May 1998 (when it became involved in CI discipline) were reviewed. While nothing unusual was noted in the CAU recommendations, and they seem to be consistent, it is too soon to determine whether the present system will achieve the national uniformity in the imposition of sanctions that was previously lacking.

Investigative reports from TIGTA concerning senior managers and executives currently follow the same path they did under the prior process. Determinations are made either at the

upper levels of CI or in the Commissioner's office depending on the position occupied by the employee committing the misconduct. The deciding official on disciplinary matters for GS-15 level CI employees is the Assistant Commissioner (Criminal Investigation). Recommendations concerning misconduct committed by executive level CI employees are still handled by the IRS Director, Office of Labor Relations.

C. RECOMMENDATIONS FOR IMPROVEMENT OF THE CURRENT DISCIPLINARY SYSTEM

The establishment of TIGTA, the expansion of CAU's role, and the centralization of decisions on all recommendations of suspension from the local CI office to the National Office should be endorsed. While the CI disciplinary process has made laudable changes, several improvements should be considered.

As noted earlier, CI Special Agents currently are not required to report their own arrests or convictions to management. The FBI, ATF, Customs Service, and Secret Service all have written policies requiring all Special Agents to promptly report their arrest. CI should implement an immediate policy change requiring Special Agents and all other employees to report to management if they are arrested, charged with a crime, or convicted of a crime. Moreover, failure to report an arrest, a criminal charge, or conviction should, by itself, constitute actionable misconduct.

Disciplinary action should be taken much more swiftly in order to affirm IRS commitment to promptly and decisively address employee misconduct. The current CAU guidelines allow 180 days from receipt of a TIGTA investigative report to issuance of a recommendation for disciplinary action. Only after the recommendation is made is the action forwarded to the appropriate official for final determination and imposition. The time period for a recommendation, absent adequate justification, should be sharply curtailed to a maximum of 45 days.

While vesting final decisional authority in the CI National Office for disciplinary actions recommending suspension that involve support staff, Special Agents, and first-line managers should be endorsed, the final disciplinary decision should be made by a three-person board rather than one person. Currently, the final determination is made by the Director, CI Finance Division. These critical decisions should be considered by several people, and should be decided by majority vote.[188]

Finally, CI should develop a procedure to inform all Special Agents of the actual results of findings of misconduct by CI employees. Field interviews revealed a general lack of knowledge and understanding among field agents about the disciplinary process and potential sanctions. There is a widely held perception in the field that management is given preferential treatment in disciplinary actions and is rarely held accountable for their own misconduct. Only 25% of field agents interviewed agreed that disciplinary issues are handled appropriately, though few could cite specific examples of matters handled improperly. More confidence in the national disciplinary process would be fostered if CI established some form of national report of

[188] This recommendation should be carefully reviewed by personnel specialists to ensure the legality of a panel fulfilling the role of a deciding official. While Customs has a three person Disciplinary Review Board, it functions similarly to CAU by making a recommendation of discipline rather than deciding the discipline.

disciplinary actions that does not violate the privacy rights of the individuals involved, much like the Customs Service does in its quarterly newsletter.

D. DISCIPLINARY PROBLEMS

The disciplinary files of both the Inspection Service and the Treasury Office of Inspector General were reviewed to determine whether they presented any systemic or prevalent patterns of misconduct. Of 228 Inspection Service files of misconduct investigations from fiscal years 1995-97, 76% (174) involved allegations of misconduct by Special Agents (GS-14 level and below).[189] The majority of misconduct allegations were evenly distributed among the areas of alleged criminal conduct, misuse of position, unauthorized disclosure, false statements, and use of intoxicants. No notable pattern, nor any indication that any specific alleged misconduct was recurrent in any particular geographic area was uncovered. The vast majority of the misconduct allegations resulted in no finding of misconduct. The lack of misconduct findings was not found to be the result of inadequate investigations.

Also, of the 85 files reviewed from the Treasury Inspector General containing allegations of potential misconduct by CI personnel, over 90% concerned Special Agents, including executives. The majority of the allegations involved alleged false statements, unethical behavior, misuse of government resources, misuse of government owned vehicles, time/attendance issues, and performance of duty issues. As stated earlier, the final disposition of more than half of the allegations investigated by the Treasury Inspector General could not be determined. The OIG files contained no notice of disposition, nor was there any record found of those matters in the IRS. This problem does not merit a recommendation due to the establishment of TIGTA, which has supplanted the Treasury Office of Inspector General in investigating these matters. Based upon the available information, however, no patterns or practices of egregious misconduct were observed, nor did there appear to be allegations of misconduct centered in any particular geographic area.

E. SECTION 1203 ALLEGATIONS

Section 1203 of the IRS Restructuring and Reform Act of 1998 sets forth ten specific types of misconduct for which an employee must be terminated by the IRS.[190] CI personnel

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[189] The remaining 24% involved non-Special Agent CI support staff personnel.

[190] Section 1203 of the IRS Restructuring and Reform Act of 1998 (P.L. 105-178) provides, in part:

> (a) IN GENERAL.--Subject to subsection (c), the Commissioner of the Internal Revenue shall terminate the employment of any employee of the Internal Revenue Service if there is a final administrative or judicial determination that such employee committed any act or omission described under subsection (b) in the performance of the employee's official duties. Such termination shall be a removal for cause on charges of misconduct.
>
> (b) ACTS OR OMISSIONS.--The acts or omissions referred to under subsection (a) are--
>
> (1) willful failure to obtain the required approval signatures on documents authorizing the seizure of a taxpayer's home, personal belongings, or business assets;
>
> (2) providing a false statement under oath with respect to a material matter involving a taxpayer or taxpayer representative;
>
> (3) with respect to a taxpayer, taxpayer representative, or other employee of the Internal Revenue Service, the violation of--
>
> (A) any right under the Constitution of the United States; or
>
> (B) any civil right established under--

have expressed a great deal of interest in and concern over this statute. They fear that they cannot perform their law enforcement responsibilities in light of the new prohibitions and that defense counsel will routinely and abusively invoke them to stop on-going criminal investigations.

Although the IRS has not yet promulgated procedures on how to handle allegations of potential violations of Section 1203, consideration is being given to immediately referring all such allegations concerning CI employees to TIGTA. This is the procedure followed for all other allegations of Special Agent misconduct. The immediate referral of Section 1203 allegations should be endorsed. This will blunt any argument by a target of a criminal investigation that CI management whitewashed the allegation of misconduct merely to allow the investigation or prosecution of the target to go forward.

The more difficult procedural issue that CI must address is whether to remove a Special Agent from an investigation when there is an allegation of Section 1203 misconduct by the agent. CI should handle Section 1203 allegations no differently than it handles other allegations of misconduct. It should apply current procedural standards and rules.

CI Special Agents and managers should find some degree of comfort in knowing that Section 1203 does not create new categories of misconduct. The ten acts or omissions contained in the statute constituted misconduct before enactment of Section 1203. The Act does, however, increase the punishment for the acts of misconduct enumerated.

(i) title VI or VII of the Civil Rights Act of 1964;
(ii) title IX of the Education Amendments of 1972;
(iii) the Age Discrimination in Employment Act of 1967;
(iv) the Age Discrimination Act of 1975;
(v) section 501 or 504 of the Rehabilitation Act of 1973; or
(vi) title I of the Americans with Disabilities Act of 1990;

(4) falsifying or destroying documents to conceal mistakes made by any employee with respect to a matter involving a taxpayer or taxpayer representative;

(5) assault or battery on a taxpayer, taxpayer representative, or other employee of the Internal Revenue Service, but only if there is a criminal conviction, or a final judgment by a court in a civil case, with respect to the assault or battery;

(6) violation of the Internal Revenue Code of 1986, Department of Treasury regulations, or policies of the Internal Revenue Service (including the Internal Revenue Manual) for the purpose of retaliating against, or harassing, a taxpayer, taxpayer representative, or other employee of the Internal Revenue Service;

(7) willful misuse of the provisions of section 6103 of the Internal Revenue Code of 1986 for the purpose of concealing information from a congressional inquiry;

(8) willful failure to file any return of tax required under the Internal Revenue Code of 1986 on or before the date prescribed therefor (including any extensions), unless such failure is due to reasonable cause and not to willful neglect;

(9) willful understatement of Federal tax liability, unless such understatement is due to reasonable cause and not to willful neglect; and

(10) threatening to audit a taxpayer for the purpose of extracting personal gain or benefit.

F. EQUAL EMPLOYMENT OPPORTUNITY COMPLAINTS

Every EEO complaint file in all nine District offices visited by the Task Force and at FLETC for fiscal years 1995-97 was reviewed.[191] Also, the National Director of EEO and Diversity and the EEO coordinators in several Districts were interviewed. There was a total of 36 EEO complaints filed by 25 CI employees.[192] The claims included racial, sexual, and age discrimination or a combination of these. Several claims alleged reprisal for previous EEO complaints. The files reviewed did not reveal any pattern of discrimination in any particular office or any indication of systemic EEO violations, nor did interviews of the local EEO coordinators alert the interviewers to any such problems.

During field interviews several CI employees voiced concern about systematic racial discrimination in promotion and hiring practices, although none provided any follow-up information. Some cited fear of reprisal by CI management as a reason for not providing follow-up information.[193] No information was discovered to support these claims, though a detailed analysis of the racial profile of CI hiring and promotional practices was not conducted.[194] On the issue of racial and gender diversity, CI, as a whole, appears to compare favorably with the other Treasury Department law enforcement bureaus of ATF, Customs, and Secret Service, based on statistics compiled as of April 1998. CI's percentage of female Special Agents is approximately double the percentage of those in ATF and Customs and more than double the percentage in Secret Service. Its percentage of non-white Special Agents ranks second among the Treasury law enforcement bureaus.[195] As discussed earlier, CI is actively pursuing minority job applicants during its current hiring initiative.

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[191] It was not within the mandate of the Mission Statement to review EEO files or complaints. However, an overview of these matters was undertaken to complete as extensive a review as possible.

[192] Some employees filed multiple claims.

[193] On August 5, 1998, Commissioner Rossotti issued a memorandum to all IRS employees advising that reprisals will not be tolerated within the IRS and that any employee who engages in such conduct will be subject to disciplinary action. He encouraged employees to report any claims of reprisal for appropriate action.

[194] A Congressionally mandated 1998 evaluation of the Milwaukee, Wisconsin, IRS Office for its EEO practices found racial discrimination issues, but CI was not the focus of that review.

[195] CI ranks first in Asian, second in African-American, third in Native American, and last in Hispanic Special Agents as a percentage of their respective totals, among the four Treasury law enforcement bureaus.

SUPPORT STAFF PERSONNEL MATTERS

Various personnel and Special Agents raised concerns regarding CI's support staff in correspondence, field interviews, and open forum meetings held in CI Division offices that were visited by the Task Force.[196] The concerns regarding support staff personnel were focused in several areas. Group Secretaries and Tax Fraud Investigative Aides complain of insufficient compensation, particularly in relation to other agencies and other divisions of IRS. They also believe they do not receive adequate training. Some Special Agents noted a reduced number of Group Secretaries, presumably because of low pay, resulting in an undue burden on the Special Agents to perform secretarial tasks.

Concerns raised by support staff personnel were not evaluated. However, adequate support staff is critical to the successful operation of CI and the issue should be reviewed by IRS and CI management.

[196] The mission statement did not require an evaluation of CI's support staff, which includes Group Secretaries, Computer Assistants, Tax Fraud Investigative Aides (TFIA), and Intelligence Analysts.

CHAPTER V: ORGANIZATIONAL STRUCTURE

REORGANIZATION OF CI IS NECESSARY TO ACCOMPLISH ITS MISSION

As already discussed, the two issues that should become and remain CI's top priorities as a result of this review are the establishment of a compliance strategy, as well as continued strict oversight of enforcement operations. The development of a compliance strategy will enable CI to devote resources to investigations that most effectively deter noncompliance. Because the use of aggressive enforcement tactics in tax cases is of great concern both to the public and to CI, vigilant oversight of those operations is necessary to maintain CI's reputation for prudence and excellence. CI's current chain of command and organizational structure must be revised to advance its priorities. The proposed reorganization of CI not only focuses the organization on its primary mission, but also removes unnecessary impediments to CI's efficient operation.

A. CURRENT ORGANIZATION

CI field Division Chiefs currently report to an IRS multi-functional civil compliance manager, the District Director, who is responsible for coordinating both the civil and criminal compliance efforts in every district. Thus, the District Director is responsible for overseeing and directing not only CI, but also several civil components including Examination and Collection. This structure was designed to allow one manager to direct all compliance resources and strategy in each district. This chain of command has not produced any comprehensive compliance strategy or effective oversight of CI enforcement operations.

B. FIELD OFFICES

No district had any discernable joint compliance strategy as contemplated by Chapter II of this report. In each district, CI agents and managers were asked whether they were ever provided any guidance from the District Director or any other IRS manager concerning what cases should be targeted for criminal investigation. The answer was universally "no." Although several districts have a nominal "Compliance Council," comprised of managers from Examination, Collection, CI, and other local IRS components, most managers admitted that the Compliance Councils were not productive.

Referrals from Examination and Collection traditionally have been viewed as a significant component of a joint civil and criminal compliance effort. Theoretically, the District Director facilitates and directs the referral process as the manager of all three relevant divisions. But, as outlined in Chapter II, the referral process has ceased to function properly. Indeed, while this problem has been apparent for many years, the District Directors have failed to ameliorate the steep decline of the referral process that has occurred over the last twenty years.

Not only have the District Directors failed to foster any successful compliance initiatives, they generally do not have the law enforcement background necessary to exercise adequate supervision and oversight of the CI operations. Currently only two of the thirty-three District Directors nationwide have any criminal investigation experience. As a result, in some districts the Director relies completely on the CI Chief in exercising his or her authority and applies little independent judgment. In other districts the Director exercises his or her own judgment, but relies heavily on the CI Chief briefing him or her extensively on the issues, an unnecessary duplication of effort. Neither of these managerial styles is efficient or productive. In some

districts the role of the District Director is utterly unnecessary to the decisional process of CI. In others, it is only burdensome and time-consuming.

Additionally, because the District Director is the evaluating supervisor of the Division Chief, policy guidance from the CI National Office will only be adopted if it does not conflict with the policies of the District Director. Most Division Chiefs stated that they would always accept the policy decisions of their District Director, even if it conflicted with CI headquarters management guidance. This impedes CI national management from directly and effectively implementing uniform CI policy nationwide.

Finally, this chain of command has created a discernable morale problem. Many Special Agents expressed frustration and a lack of confidence in the civil management chain. They believe their function as criminal investigators is neither understood nor supported by their district management. While almost 60% of agents and first line managers interviewed believe that CI should be removed from the IRS, many of those same agents advised that removing the civil managers from the CI chain of command would be an acceptable alternative.

C. RECOMMENDATION

There is no productive role for civil managers in the CI chain of command, and the civil managers detract from the ability of the CI National Office to oversee and direct CI operations and policy efficiently. Consequently, CI should be an autonomous component, and not report through any civil chain of command. It should be established as a separate operating division within the new IRS organization led by a "Director, Criminal Investigation." The Director of CI should have the authority to establish and enforce all policy and compliance strategies within the Division.

Direct-line authority would provide the strict oversight necessary for CI. All operational decisions will be reviewed by a chain of command comprised of law enforcement professionals, and the Director of CI will have the authority to make policy decisions that cannot be overruled by local civil authorities. The Under Secretary of Treasury for Enforcement, James Johnson, believes that this is the most important issue to be addressed in this Review because it will result in more efficient oversight and more effective policy implementation within CI. Every other law enforcement executive interviewed, including Commissioner of Customs Kelly and FBI Director Freeh, concurred with this recommendation.

NATIONAL OFFICE

The top-level manager in CI, the Assistant Commissioner for Criminal Investigation, currently reports to the IRS Chief Operating Officer (COO), who also supervises eleven other IRS Divisions.[197] The Director of CI, as the leader of a very sensitive and high-profile Division, should not report to a lower level executive, but should report directly to the Commissioner of the IRS and his Deputies. The Director of CI should be directly accountable to the Commissioner for implementation and enforcement of a compliance strategy that focuses on tax administration and for the responsible use of CI's enforcement operations.

The removal of the COO from the CI Director's chain of command would affect the submission of CI's annual budget. Previously, the proposed CI budget was submitted to the IRS's Chief Financial Officer through the COO. The COO then represented CI, along with his other eleven Divisions, in the Executive Committee for Budget, which assists in formulating the annual IRS budget. Under this proposal to remove the COO from the CI chain of command, CI would submit its annual budget directly to the CFO and would represent itself on the Executive Committee for Budget.

At least during the period of modernization, the Commissioner of IRS should appoint a Director of CI who has a tax law and law enforcement background, but who is not a current IRS employee. This is not a condemnation of the performance or quality of CI's current national management. Rather, this recommendation is based upon a recognition that this Report proposes fundamental changes to the agency that will necessitate leadership unencumbered by a bias in favor of past practices.

A. REORGANIZATION OF NATIONAL MANAGEMENT STRUCTURE

The organizational structure of CI's national management is confusing and inefficient.[198] A review of the organizational chart provides few clues of what CI's national priorities are and what its mission is. Currently, ten managers report directly to the Assistant Commissioner of CI: four Regional Directors of Investigation, Director of National Operations, Director of Finance, Director of Policy and Information, Director of the National Training Academy, Director of the Office of Tax Refund Fraud, and the Director of the Review and Program Evaluation (Peer Review). Some of these managers have few functions, some have disparate functions, and some are responsible for too many functions.

A reorganization of the current national management would promote administrative efficiency and advance CI's primary goals of enforcement oversight and overall compliance.[199] The restructured CI National Office organization should be led by a Director of CI and a Deputy Director. The two primary executives reporting to the Director and the Deputy will be the Assistant Director for Strategic Management and Planning and the Assistant Director for Enforcement Operations.

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[197] *See* Chart 5-1.

[198] *See* Chart 5-2.

[199] *See* Chart 5-3.

Generally, the Assistant Director for Strategic Management and Planning will be responsible for all organizational components that support the development of a compliance strategy, the planning necessary to ensure that the field has the appropriate tools to implement it, and the continuing review of the field divisions to ensure that the compliance strategy is being accomplished. The Assistant Director for Enforcement and Program Operations would direct the implementation of the compliance strategy and provide oversight and guidance for all enforcement operations.

1. Assistant Director for Strategic Management and Planning

Neither the IRS, nor CI specifically, has a coherent overall compliance strategy. No determination of what types of cases CI should be investigating can be recommended without credible research into where compliance problems exist and what enforcement efforts most effectively address and deter them. Identification and implementation of this compliance strategy will require a close coordination between CI and the other IRS operating divisions that does not currently exist. Implementation of a compliance strategy also will require insightful strategic planning within CI in the areas of finance, hiring, training, and review. The Strategic Management and Planning Section is intended not only to formulate the strategy, but also to direct CI resources so that the strategy can be effectively implemented in the field. The Assistant Director for Strategic Management and Planning will be the executive position responsible for achieving this objective. Because this is such a critical section with extensive responsibility, the Assistant Director for Strategic Management and Planning should be supported by an executive Deputy Assistant.

a. Office of Compliance Strategy Development. The Office of Compliance Strategy Development should be the most critical element under the direction of the Assistant Director for Strategic Management and Planning. This section should have the responsibility of formulating a comprehensive compliance strategy in coordination with the other elements of the IRS and for reinvigorating the referral process in conformity with the goals of the compliance strategy.

The Chief of the Office of Compliance Strategy Development, along with the Directors of Compliance Strategy from the other IRS operating divisions, would be responsible for formulating and implementing a comprehensive compliance strategy based upon the data and analysis provided by their research divisions. In addition to formulating the strategy, the Chief would also be responsible for monitoring its implementation. The strategy should include specific targeted caseload goals for each compliance unit, including CI, and specific allocations of investigative resources to compliance problems. The two components of this office which should support the Chief of the Office of Compliance Strategy Development are Research and Liaison.

As discussed in Chapter II, insufficient information currently exists to determine which potential taxpayers are not paying their taxes, and what penalties are most effective to bring them into compliance. The IRS also does not know which civil and criminal compliance penalties have the greatest general deterrent effect upon other taxpayers. The Research Division of the Office of Compliance Strategy Development, along with the Research Divisions of the other IRS operating divisions, should answer these questions. This research should be an ongoing process to foster a flexible compliance strategy that consistently identifies new and emerging issues. Research should analyze not only relevant national information, but also each district's data to target localized compliance problems.

The Liaison to Operating Divisions should be responsible for communication and cooperation between CI and the other IRS operating divisions. The purpose is not only to establish and maintain the compliance strategy, but also to reinvigorate the referral process in conformity with it. Each operating division within the IRS, including CI, should be staffed with a compliance liaison to promote and maintain the compliance strategy. These liaisons should be co-located to facilitate cooperation and communication.[200] They should provide education and feedback to their respective operating divisions regarding what is expected of them and how best to accomplish it.

b. Finance, Training, and Review. In order to effectively direct implementation of the compliance strategy, the Assistant Director for Strategic Management and Planning must direct all support and review functions. Consequently, this same executive also should control Finance, Personnel, Training, Review and Program Evaluation, and Computer Information Systems Management. All of these resources should be directed to developing, supporting, and reinforcing the compliance strategy.

This concept conforms to the Government Performance and Results Act of 1993 (GPRA). GPRA was enacted to apply private sector principles of sound management to government agencies. GPRA mandates that government agencies pursue a clearly defined organizational mission through the integration of strategic planning, budgeting, and performance measurement review.

The Finance Division of CI has traditionally been a discrete unit, disconnected from the operational or planning components. In order for the Assistant Director for Strategic Management and Planning to effectively implement a compliance strategy, however, he or she must be able to direct the financial resources of CI to promote the strategic plan.

Strategic planning also must extend to hiring and training. Not only does the hiring budget need to be targeted to identified needs in the strategic plan, but the impending retirement of existing agents must be evaluated in projected hiring and budgetary needs. All training for new agents and existing agents must focus on communicating both the compliance strategy and the specific methods by which to pursue the strategy successfully.[201]

In order to complete the necessary follow-up to assure effective implementation of the compliance strategy, the Assistant Director for Strategic Management and Planning should control the evaluative review functions of the organization. CI has two forms of review: the Review and Program Evaluation Division, which thoroughly reviews all field divisions approximately once every three years, and the annual report, which comprehensively studies organizational accomplishments and activities every year.

The Review and Program Evaluation Division, hereinafter referred to as Peer Review, is currently based in Dallas, Texas, though it reports directly to the Assistant Commissioner in Washington, D.C. Peer Review, implemented in 1995, directs a rotating team of managers and agents from districts throughout the country to complete a detailed review of each CI district office. The evaluation focuses on the impact of management, communication within the

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[200] Liaison offices should be created in the headquarters of the operating divisions projected to provide the most cases impacting the compliance strategy.

[201] These issues are discussed in detail in Chapter IV: Personnel.

division, delivery of program goals, and productivity levels. Results of the review are addressed with the Division Chief of the reviewed district, and any recommendations are followed-up by the Regional Director of Investigations after six months. Peer Review of each field Division occurs approximately once every three years.

The Peer Review Director was interviewed and every Peer Review report produced since the inception of the program in 1995 was reviewed. The Peer Review process generally operates effectively and efficiently, though there are several areas for improvement. Although the Director of Peer Review is based in Dallas, his staff is located in different offices throughout the country. Peer Review uses agents and managers from other districts to complete the reviews, an excellent method for both achieving objectivity in the reviews and educating the review team members about management practices in other districts. While it is productive to bring in managers and agents from many districts to complete each review, it is counter-productive for the Director and staff of the organization to be geographically dispersed. The Peer Review Director and staff should be relocated to the Washington, D.C. headquarters to be more directly responsive to the Assistant Director for Strategic Management and Planning and to interact with other national level managers and staff.

Three years is an unacceptably long time between Peer Reviews. U.S. Customs recently implemented a policy that reduced its Peer Review frequency from once every two to four years to once every eighteen to twenty-four months. FBI policy requires Peer Review every two years. The recommendation that the number of districts be reduced from thirty-three to less than twenty should facilitate increased frequency of the Peer Reviews. Particularly during the period of modernization and initial implementation of the compliance strategy, Peer Reviews should be completed promptly and reported to the Assistant Director for Strategic Management and Planning.

Currently, the Director of Investigations conducts a six month follow-up on problems identified by the Peer Review. Because that position should no longer exist, the six-month follow-up will be the responsibility of the Peer Review staff.

c. Annual Report. The CI Annual Report on National Operations is produced by the National Operations Division. It details the past year's CI activities and accomplishments, including the types of cases investigated, the programs pursued, and the techniques used. It is a valuable tool in the analysis of the workload and strategy of CI. The National Operations Division has assumed responsibility for the production of this report because the analysts most familiar with the issues are assigned to offices within that division. While this may be the most efficient way to continue production of the report, the Assistant Director for Strategic Management and Planning should direct the contents of the report in the future in order to evaluate the activities of CI in relation to the compliance strategy.

d. Information Systems and Support. The Office of Refund Fraud, the operational program dedicated to detecting and preventing issuance of fraudulent refunds, also had responsibility for the automation components of CI until January 3, 1999.[202] Currently automation is divided into three branches and is supervised by the Director of Investigations for the Northeast Region. Systems Development and Support Branch 1 manages CI's database and is responsible for its security and support. Systems Development and Support Branch 2 develops agent software and applications and administers the troubleshooting hotline. Systems

[202] *See* Chart 5-2.

Branch 1 and 2 are located at the national office in Washington, D.C. The Network Operations Center Branch is generally responsible for telecommunications software and network hardware, and is located in Florence, Kentucky.

There is no practical reason for the Director of the Office of Refund Fraud or the Director of Investigations for the Northeast Region to also oversee the automation branches. There is no connection between the responsibilities, and the expertise required to successfully run the automation programs bears no relation to the expertise necessary to detect refund fraud or to manage CI agents. Management of the automation branches often presents urgent problems associated with national systems operation that can consume the agenda of a manager with other important responsibilities.

The automation branches described above should be directed by a manager on site in the national office who reports directly to the Assistant Director for Strategic Management and Planning. This will allow one manager, expert in the area of systems maintenance and management, to devote complete attention to the efficient and secure operation of CI's information systems.

In order to centralize all CI computer systems technology, training, and equipment, the Computer Investigative Specialist Program and the Computer Forensics Section of the Laboratory should be joined and directed by the Chief of the Automation Division. CI has trained and certified approximately one hundred Special Agents as Computer Investigative Specialists (CIS) who are experts in automating CI investigations and in computer evidence recovery techniques. The recruitment, training, and technical support of the CISs is currently directed by the Peer Review Division in Dallas, although the CISs are located in the districts throughout the country and are supervised by the Division Chiefs.

The Computer Forensics Division of the National Laboratory provides up-to-date information about computer equipment, operating systems, and software for evidence recovery and storage purposes. Currently only one agent is assigned full-time to this area at the National Laboratory.

Because the investigation of financial crimes commonly entails reviewing information stored in computerized databases, computer forensic expertise and research is necessary not only to retrieve evidence effectively, but also to minimize the intrusiveness of computer searches. Given the centrality of computer investigative techniques to CI's mission, it is critical that CI further develop and maintain expertise in the area of computer forensics that is readily accessible to the field. The joining of all computer forensic and computer information specialist positions under the automation section should focus the necessary attention on this area. The Director of CI should assess whether sufficient resources are deployed to developing computer forensics technology and training.

Finally, CI systems and systems management should remain an independent and discrete entity from the main IRS information systems. While the security needs of IRS systems in general are critical, CI information systems security is even more sensitive. In addition to taxpayer information, CI automation systems contain other highly sensitive information, such as secret grand jury evidence and information about covert undercover operations and confidential informants. A compromise of CI systems security could not only result in violation of grand jury secrecy laws, but could also jeopardize the safety of CI agents

and witnesses.[203] The Information Systems Organization Design Team, which is modernizing and centralizing IRS systems, concurs with this finding.

e. Internal Revenue Manual updates. The Internal Revenue Manual (IRM) provides policies and regulations for all IRS employees. Chapter Nine is solely devoted to issues related to CI. Updates to the IRM do not occur contemporaneously with policy changes. The IRM should accurately reflect current CI policy and the IRS should update it regularly in order to provide clear guidance to all CI employees. The Assistant Director for Strategic Management and Planning should oversee this function.

2. Assistant Director for Enforcement and Program Operations

CI's top priorities should be the development of a coherent compliance strategy to target the caseload, the implementation of that strategy by the field divisions, and the strict oversight of the investigative and enforcement techniques used. The latter two functions should be the responsibility of the Assistant Director for Enforcement Operations and Programs. This executive would be responsible to the other components of the IRS to assure that CI effectively enforces and promotes the IRS compliance strategy. He or she also should oversee the most publicly sensitive operations of CI, such as execution of search warrants and undercover operations. The Assistant Director should be assisted by three executive level Deputy Assistant Directors: field operations, enforcement operations and program operations.

a. Deputy Assistant Director for Field Operations. Currently four Regional Directors of Investigation (DI) report directly to the Assistant Commissioner of CI and oversee field operations. The DIs are generally responsible for developing, monitoring, and providing a Criminal Investigation program for a geographic region. They provide general support and guidance to the CI Division Chiefs within their regions, and they act as liaisons between the Division Chiefs and the National Office. The DI's have a support staff of senior analysts and program managers.

Though they have the generalized role of supporting and directing the Division Chiefs and the field divisions, the DI's have no direct supervisory authority.[204] The DI is designated to provide program guidance, but has no authority to enforce the program because actual authority is so limited. Each DI effectively defines his or her own role. As one DI stated, "the job is pretty much whatever you want to make it." The four regional DI positions should be eliminated, and replaced by one Deputy Assistant Director for Field Operations based at the National Office.[205]

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[203] Concern is heightened by a recent GAO review which highlighted problems associated with IRS systems security entitled *IRS Systems Security: Although Significant Improvements Made, Tax Processing Operations and Data Still at Serious Risk* (GAO/AIMD-99-38, December 1998).

[204] The only concrete authority the DI has is the approval of Group II undercover operations (those that last less than six months and use less than $10,000) and an annual review of all confidential informant operations in the district.

[205] The current DI analysts, both Special Agent and management analysts, should be reassigned either to the National Office or to a SAC at the discretion of the Director of CI. The Undercover Program Managers should be assigned to the Office of Special Investigative Techniques, as described in greater detail below.

The recommendation for a direct line of authority within CI and the removal of the District Director also removes the current oversight and evaluation of the Division Chiefs. A CI executive with a law enforcement background and a strong connection to CI national program goals should fill that role as the Deputy Assistant Director for Field Operations. Creation of this role is consistent with the structures of other federal law enforcement organizations. This executive should report directly to the Assistant Director for Enforcement and Program Operations and assume the oversight and evaluation responsibility of the SACs.

SAC evaluations should be weighted to ensure that each of their field divisions meet the program goals and abide by the enforcement standards set by National Enforcement and Program Operations. Consequently, the Deputy Assistant Director for Field Operations should seek input from the Office of Compliance Strategy Development, Peer Review, Special Investigative Techniques and the national program offices to assess the effectiveness of each SAC. The Deputy Assistant Director for Field Operations should also be a source of guidance and support for the SACs. He or she should have input into all management promotions, but all final decisions on promotions to management positions should be made by the Director of CI. All enforcement operations should be approved either by the SAC (search warrants) or the National Office (undercovers, wiretaps, consensual monitoring), and the Deputy Assistant Director for Field Operations should not have approval authority over any enforcement operation. However, the SAC's performance in this area should weigh heavily in their annual evaluations by the Deputy Assistant Director for Field Operations.[206]

b. Deputy Assistant Director for Enforcement Operations. The Deputy Assistant Director for Enforcement Operations should be an executive manager who is responsible for supervising all enforcement operations. There should be three offices under the direction of the Deputy Assistant Director for Enforcement Operations: Special Investigative Techniques, National Forensic Laboratory, and the Office of Refund Fraud.

i. Office of Special Investigative Techniques. The Office of Special Investigative Techniques (SIT) oversees sensitive enforcement operations: undercover operations, consensual monitoring, pen registers, and wiretaps.[207] Its staff of analysts painstakingly evaluates all requests for use of these techniques and provides guidance on their appropriateness for the investigation. It is the final approval authority for all consensual monitoring and pen register requests. An SIT senior analyst evaluates all Group I undercover operation requests and presents them to the National Undercover committee. The Chief of SIT is a voting member of the National Undercover Committee.

SIT should be a valuable, efficient, and competent resource for the field. Its involvement in the undercover operation, consensual monitoring, and pen registers provides consistency and uniformity in the use of these investigative techniques. There should be two changes to SIT's current responsibilities: first, the undercover program managers should be added to the SIT staff, though they should be located in duty posts throughout the country; second, SIT should assume the responsibility of the annual confidential informant reviews, previously accomplished by the regional Directors of Investigation.

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[206] This division of evaluation and approval responsibility is consistent with the organization of the FBI.

[207] CI's use of Title III wiretaps is almost nonexistent. Not one wiretap was sought by CI in FY 1998.

The Undercover Program Managers and their associated Special Agent analyst assistants should be reassigned to report directly to the Chief of SIT.[208] This will allow national Enforcement Operations to directly supervise and review all ongoing undercover operations. The Chief of SIT should identify the areas or districts with the most active undercover operations and assign the undercover program managers to duty posts within those geographic areas. The undercover program manager may be responsible for operations in more than one district and the duty posts should be in a central location with the most undercover activity. SIT should reevaluate this duty post designation on a regular basis and relocate it, if necessary, to meet the program needs.

The role of the Undercover Program Manager (UPM), a GS-14 staff position, will not change. The UPM will be responsible for managing all Group I and Group II undercover proposals and operations within a specified geographic area. The UPMs are responsible for assisting with presentation of the proposal of the undercover operation to either the Group I or Group II Undercover Committee.[209] They also identify undercover agents appropriate for proposed operations and participate in the training of both undercover and contact agents. All undercover program managers should be supported by at least one analyst to assist in evaluations and to fill in during absences.

ii. National Forensic Laboratory. The National Forensic Laboratory, with locations in Chicago, Illinois, and Florence, Kentucky, services every CI field office nationwide through its eleven divisions. The Questioned Document Evaluation Unit conducts visual and microscopic examination and comparison of questioned handwriting. The Electronics Unit enhances the intelligibility and quality of audio and video tape. The Evidence Control Unit is responsible for ensuring the integrity of evidence retained at the Lab. The Forensic Photography and Electronic Imaging Unit provides forensic photography and scanning services. The Ink and Paper Chemistry Division evaluates documentary evidence to determine the age and source of questioned documents. The Computer Forensics Division provides up-to-date information about computer equipment, operating systems, and software for evidence recovery and storage purposes. The Polygraph Division trains Special Agents in the use of lie detector tests. The Trial Illustration Division generates trial exhibits to facilitate the presentation of documentary evidence to trial juries. The Transcription Division organizes and summarizes voluminous evidentiary records for efficient access by the investigating agent.

Both locations of the National Laboratory were visited, operations were observed, and interviews were conducted with its staff. Both sites are well organized and efficient. Field interviews established a general satisfaction with the operation and accessibility of the Laboratory services among Special Agents in the field, and there were no complaints. Assistant United States Attorneys frequently cited the Trial Illustration Section as being particularly skilled and helpful.

Although there is no problem with the performance or internal organization of the Laboratory, its alignment in the organization should reflect its role as a national resource.

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[208] Currently, each region has a full-time Undercover Program Manager and a full-time analyst except for the Southeast Region, which has two full time Undercover Program Managers. All of these positions should be reassigned to SIT.

[209] The Undercover Committee is discussed more thoroughly in Chapter II: Methods of Investigation, Use of Investigative Enforcement Techniques.

Currently the Laboratory is directly supervised by the Director of Investigations for the Midstates Region because its primary site is in Chicago. However, because the Laboratory services and supports enforcement operations nationwide, it should be directly under the supervision of a national executive. The Laboratory should be organizationally aligned within National Enforcement and Program Operations, and the Laboratory Director should report to the Deputy Assistant Director for Enforcement. The physical location of the Laboratory and the assignment of its Director to the Chicago location should remain unchanged.

The forensic laboratory should pursue accreditation with the American Society for Crime Lab Directors (ASCLD). In order to acquire ASCLD accreditation, the laboratory must submit to a rigorous on-sight review by ASCLD members. Every aspect of lab function including equipment, training, processes, and standards is scrutinized to determine whether they meet the quality requirements of ASCLD. Accreditation will enhance the credibility of the staff when testifying, will foreclose significant areas of cross-examination, and will ensure the maintenance of quality in the laboratory. The FBI, Secret Service, ATF and DEA labs are all currently ASCLD accredited.[210]

iii. Office of Refund Fraud. Prior to 1994, the detection of refund fraud was the responsibility of the Service Centers. A 1994 study of fraud in IRS's electronic filing program highlighted the need to focus on pre-refund intervention and recommended changes to improve the detection of refund fraud at the Service Centers.[211] Based on the study's recommendations, CI took responsibility for reinvigorating the refund fraud detection program and established a national division titled the Office of Refund Fraud (ORF).

ORF, directed by a National Office based CI executive, is responsible for detection and prevention of the payment of fraudulent refund requests. Criminal Investigation Branches (CIBs) in each service center implement ORF's fraud detection program. The CIBs utilize computerized scanning and electronic evaluation of returns to identify potentially fraudulent returns. The "Questionable Refund Program" evaluates and ranks scanned returns based upon the number of suspicious criteria they present. The Criminal Investigation Branch then reviews as many of the identified returns as possible with the available time and staffing. The Branch operates under very strict time constraints to evaluate suspicious returns before the refund is issued, because once a fraudulent refund is issued it is highly unlikely that the Service will be able to recover the funds if CIB later determines the refund was fraudulent.

Notwithstanding that the Office of Refund Fraud directs the refund fraud detection initiative, the Special Agents who administer the program at the Service Centers report to and are evaluated by the Service Center Chief Compliance Officer, who reports directly to the Director of the Service Center. The CI Chief of the Office of Refund Fraud does not have direct authority over the CIBs that implement the program. This chain of command is inconsistent with the proposed direct-line reporting within CI. It also impedes efficient administration of the refund fraud detection initiative, because the goals of the service center Directors often conflict with the function of the Office of Refund Fraud and the service center fraud detection branches.

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[210] The Customs Service and Postal Inspection Service laboratories are currently undergoing ASCLD review for accreditation.

[211] *Fraud in the Electronic Filing Program, A Vulnerability Assessment*, Dr. Malcolm K. Sparrow, September 1993. A follow-up study completed in August 1998 reflects that EITC overpayments remain unacceptably high and recommends specific suggestions for improvement of refund fraud detection.

The goal of Service Center Directors is to satisfy taxpayers by processing returns and issuing refunds quickly. Customer service and satisfaction is a fundamental principle of the IRS Restructuring and Reform Act of 1998. More efficient processing of returns and a quicker issuance of refunds is central to the service center's goal of "customer satisfaction."

ORF's mandate, on the other hand, is to identify and stop fraudulent refunds. Fulfilling this function naturally delays the issuance of refunds. The refund fraud branches at the Service Centers currently operate at a frenzied pace to review suspicious returns in an abbreviated time-frame to minimize any delay. Nevertheless, the withholding of refunds could have a negative impact upon the customer satisfaction rating of the Service Center. Consequently, Service Center Directors may be disinclined to encourage the fraud detection function and may seek to curtail further the time frame for evaluating returns. The Directors also may be reluctant to provide adequate staffing to the refund fraud branch at the Service Center. Due to this conflict in functions, the CI refund fraud branches at the Service Centers should report to the Chief of the Office of Refund Fraud, the CI manager charged with detecting and preventing refund fraud, who does not labor under the same customer satisfaction requirements of the Service Center Directors.[212]

Currently ORF is directed by an executive who reports directly to the Assistant Commissioner for CI. In his memo to then Assistant Commissioner Don Vogel recommending establishment of ORF, current Assistant Commissioner Ted Brown recommended that the Office of Refund Fraud be directed by a national level executive to initiate the effort. He also stated that "once the original growing pains are completed . . . it would probably be appropriate to reduce the level of management to a GS-15 criminal investigator."

A GS-15 manager is the appropriate level for the Chief of ORF, particularly now that the responsibilities of that position have been reduced. Previously, the Chief was responsible for both refund fraud detection and all automation functions, the latter of which was eliminated on January 3, 1999. Removal of the automation function was appropriate because those responsibilities were inconsistent with the responsibilities of refund fraud detection, and significantly detracted from the Chief's ability to provide strict program guidance.

The Chief of ORF will now have direct management and supervision responsibilities of the refund fraud managers at the Service Centers who are GS-13 first line managers. There is no other area of CI where GS-13 managers are directly supervised by an executive, and there is no justification for ORF to be an exception.

Finally, the Chief of ORF should report to the Assistant Director for Enforcement Operations instead of directly to the Director of CI. Current CI executives oppose this recommendation. They believe it downgrades the significance of the program to have it "buried" so deeply in the organizational chart and sends a message to the entire organization that refund fraud is a low priority. They emphasize that a non-executive Chief of the Office of Refund Fraud will not have the status to acquire the cooperation and resources from other operating divisions necessary for the success of the program. However, the Deputy Assistant

[212] Once the Service Centers are reorganized in the business line configuration, it may be necessary to reallocate the refund fraud branch resources. Currently each Service Center is similarly staffed. Once reorganized, however, each Service Center will be dedicated to returns in a particular business-line category. ORF will have to determine the extent to which each business line generates fraudulent refund returns and assign its resources to the Services Centers accordingly.

Director for Enforcement Operations is an executive and is accountable for the successful operation of ORF and, consequently, should make any necessary executive contacts.

3. International

The International Program supports enforcement operations and should report directly to the Deputy Assistant Director for Programs. Although the International Program is currently focused on support to field operations, compliance research will likely indicate a need to emphasize development of CI investigations abroad.

The CI International Strategy was formally implemented in 1995 with the following goals: facilitating the acquisition of information obtained in host countries to support domestic investigations; assisting foreign governments in establishing money laundering, tax, and forfeiture statutes; assisting foreign governments to develop exchange of information agreements; and conducting training courses for host governments and establishing liaison contacts with foreign law enforcement officials. CI has Special Agents posted in Bogota, Colombia, Mexico City, Mexico, Ottawa, Canada, Frankfurt, Germany, and Hong Kong, China, to meet these program goals. Because their staffing is so limited, the attaches have vast geographic responsibilities. For example, the attache in Frankfurt is responsible for meeting program goals in all of Western and Eastern Europe and Africa.

These foreign attaches primarily assist domestic investigators in acquiring foreign evidence and witnesses in money laundering and tax investigations. For example, the international attache is critical in the acquisition of admissible foreign bank evidence in cases where foreign bank accounts are used to evade U.S. taxes or launder the proceeds of illegal activity. The foreign attaches also participate in international training programs designed to educate foreign law enforcement officials about the enforcement of money laundering statutes. Another of their responsibilities is to liaison with foreign enforcement officials to facilitate cooperation in the international investigation of cases.

Proactive case development is conspicuously absent from the International Program goals. Although International Program managers encourage the attaches to develop cases, the urgency, importance, and volume of their other duties prevent them from doing so effectively. According to Jonathan Winer, Deputy Assistant Secretary of State, Bureau of International Narcotics and Law Enforcement Affairs, there is massive noncompliance related to foreign bank accounts and trusts that cannot be adequately addressed by only identifying and developing schemes that have a domestic component. While several CI managers stated that developing a strong proactive international initiative would be extremely difficult due to both administrative and legal impediments, the State Department advised that several foreign governments, particularly Great Britain, have been very successful in this area.[213]

[213] The review mandate does not extend to determining whether expansion into international case development would contribute to the mission of CI, nor has the feasibility of instituting a more aggressive international investigative program been investigated. This area should be studied further, however, and appropriate action should be taken.

4. Office of Seizure and Forfeiture

The Office of Seizure and Forfeiture directs and provides guidance for all subject seizure investigations. It is responsible for ensuring that CI implements its seizure authority uniformly and in conformity with national CI policy. It also ensures that CI gets an appropriate share of seized assets when CI participates in a seizure with other law enforcement agencies.

Currently the Office of Seizure and Forfeiture is joined with the Narcotics Section, the office that tracks and provides guidance for all CI narcotics investigations. These offices relate to significant program operations and should be independent. Consequently, they should operate as separate program offices directed by the Deputy Assistant Director for Program Operations.[214]

5. Program Offices

In addition to International and Seizure and Forfeiture, CI has three other program offices that provide policy and program advice and guidance in three primary enforcement areas: tax crimes, narcotics, and money laundering. These offices provide support to the field in their areas of expertise and insure that the field offices are meeting caseload objectives. They are a resource to both the field and to national management to provide a centralized resource for information about the program goals and current investigative operations. While these program offices relate to field operations, they do not directly supervise enforcement operations. Consequently, they should report to a Deputy Assistant Director for Programs.

6. Public Affairs, Legislative Affairs, and Treasury Department Liaison

The public affairs staff is currently part of the Policy and Information Division. The public affairs staff should be reassigned to the staff of the Director of Criminal Investigation. Currently the roles of legislative liaison and Treasury Department liaison are filled by one person who reports to the National Director of Operations. These two critical roles should be adequately staffed by two people and should also be reassigned to the staff of the Director of Criminal Investigation.

[214] Subject seizure files were randomly reviewed during the field visits. The files contained adequate support and the oversight and approvals were sufficient. No complaints were heard from the public, agents, defense lawyers, Assistant United States Attorneys, or Congress regarding CI's seizure activities. No civil lawsuits, motions, or judgments were based on seizure and forfeiture actions. In sum, CI is exercising its seizure authority appropriately.

ROLE OF COUNSEL

A. CHIEF COUNSEL

The Office of Chief Counsel generally provides the legal advice and review for CI investigations. The Assistant Chief Counsel Criminal Tax is the national program manager for the criminal tax program, which is responsible for providing advice to CI agents during their investigations and for providing a legal evaluation of most of their prosecution recommendations. The national program manager has no direct authority over the District Counsel attorneys in the field who actually provide the legal advice and support to CI. The Assistant Chief Counsel only provides guidance and training to the attorneys in the field.

District Counsel Attorneys in the field are not dedicated solely to criminal tax. Generally, they have a wide variety of civil and criminal responsibilities. Thus, the criminal tax program consists of a small national office cadre of full-time specialists who provide guidance to many district level attorneys who in turn generally spend only a small portion of their time doing criminal tax work, but are solely responsible for providing the legal advice to CI field agents.[215]

Notwithstanding that the field attorneys are generally not devoted to the arena of criminal tax on a full-time basis, they are expected to give competent legal advice regarding such complex criminal law matters as pending investigations, search warrants, undercover operations and immunity orders. They have approval authority over Title 26 investigations, search warrants, and Title 26 forfeitures. These are complicated areas of the law, which require a high level of experience, commitment, and involvement to ensure the provision of complete and correct legal advice. The current organization of Counsel does not represent a model that delivers the expert criminal tax support CI requires and deserves. Field interviews established that CI Special Agents generally have little confidence in the legal advice of their IRS Counsel due to the Counsels' lack of criminal litigation expertise. Consequently Special Agents rely heavily on Assistant United States Attorneys for advice during investigations.

In addition to the lack of full-time specialized criminal tax experts, Counsel's approval authority for prosecution recommendations in administrative tax investigations adds an unnecessary layer to an already onerous approval process and creates animosity between Counsel and the investigating agents. The agent's own internal management chain must first approve a tax prosecution recommendation. In an administrative investigative, the recommendation then must be approved by Counsel, who is the referral authority to the Department of Justice pursuant to the delegation order of the Secretary of the Treasury. The authority to "kill" a recommended prosecution often creates a great measure of hostility between the two functions in many districts. If Counsel approves the prosecution, generally it is then referred to the Department of Justice Tax Division for another review and approval, and then is referred to the appropriate United States Attorney's Office for prosecution. The Department of Justice Tax Division adequately performs the critical function of uniform national review of tax prosecutions to address the unique enforcement priorities of fostering voluntary tax compliance. Approval authority with Counsel is not only duplicative, but fosters an

[215] Criminal tax work accounts for approximately 40 full time staff year equivalents, although that work is completed by well over 100 attorneys.

adversarial relationship between agents in the field and the attorneys they should be turning to for advice during their investigations.[216]

B. RECOMMENDATION

1. Assistant Chief Counsel for Criminal Investigation

Counsel should be reorganized to foster specialization and promote the provision of prompt legal advice regarding case selection, investigation, and prosecution recommendation.[217] Consequently, Counsel should create the position of "Criminal Investigation Divisional Counsel" directed by an Assistant Chief Counsel for Criminal Investigation, who should have direct line authority over all Counsel resources devoted to criminal tax. Consistent with the requirement of I.R.C. § 7803(b)(4), the Assistant Chief Counsel for Criminal Investigation will report to Chief Counsel. However, to foster better communication and cooperation, the office and national staff of the Assistant Chief Counsel for Criminal Investigation should be located physically near the office of the Director of CI. For the same reason, the Divisional Counsel offices should be located in the CI field offices.

The Assistant Chief Counsel for Criminal Investigation will be responsible for selecting, training, supervising, and evaluating a cadre of criminal tax experts who will act as Divisional Counsels within each CI Division ("Divisional Counsels").[218] In addition, the Assistant Chief Counsel for Criminal Investigation will assume the current responsibilities of the Assistant Regional Counsels for Criminal Tax, such as the review of grand jury requests, directly act in all designated sensitive matters, advise and coordinate with the Department of Justice Tax Division, and advise the Director of CI, Chief Counsel, Commissioner, and Treasury Officials as necessary.[219]

2. Divisional Counsel

The Assistant Chief Counsel for Criminal Investigation should assign at least two Divisional Counsel attorneys to each CI Division.[220] The CI SAC should be afforded input in the selection and evaluation of the Divisional Counsels, but should not have authority over them. In

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[216] Over 95% of cases referred to counsel are approved for prosecution. Although detailed evaluation of counsel's review is outside the scope of this Report, these statistics cast doubt on whether District Counsel currently conducts a meaningful case approval review.

[217] Department of Justice Tax Division Assistant Attorney General Loretta C. Argrett also advocates a system that promotes strong and effective Counsel guidance to CI.

[218] This proposal is consistent with the redesign of the other sections of the Office of Chief Counsel according to the Counsel Modernization Team.

[219] The Assistant Chief Counsel should be assigned a national staff to support the enhanced role. This staff should include a Deputy Assistant, at least two field review Chiefs, and technical assistance staff.

[220] Currently, Counsel devotes approximately 40 full-time staff years to CI matters. Given the proposal for reorganization of the field offices, appropriate national and field staffing of the criminal tax program could be accomplished by the addition of approximately 10 full-time staff years to those currently devoted.

order to assure objectivity, Divisional Counsels must be functionally independent of CI. The role of the Divisional Counsels will be to provide legal advice to agents and supervisors regarding all of CI's investigations, both administrative and grand jury, and all enforcement activities related to crimes within CI's jurisdiction. However, the CI SAC should become the referral authority of proposed Title 26 and Title 18 tax-related prosecution recommendations to the Department of Justice.[221] This change allows Divisional Counsel to provide constructive and cooperative advice to the investigating agent without the animosity generated by approval responsibility.[222]

Divisional Counsel's review role should be applied to prosecution recommendations, search warrant requests, undercover requests, and other enforcement operations. It is not necessary for the Divisional Counsel to engage in the time consuming process of a full written evaluation unless he or she perceives problems with the proposed action.[223] Assistant Chief Counsel for Criminal Investigation may evaluate whether the Divisional Counsel is meaningfully performing the review function without reviewing written memoranda on every action. In addition to the review requirements, Divisional Counsel should be available and receptive to providing legal advice to both the investigating agents and their managers. A constructive relationship with the agents in the Division should be a critical element in the Divisional Counsel's annual evaluation.

Divisional Counsel will be the primary liaison between the CI Division and the Department of Justice and the local United States Attorney's Offices. This role will become particularly critical once a coherent compliance strategy is developed by the IRS. The Tax Division and the local United States Attorney's Offices will need to understand the compliance mission of CI and the importance of prosecuting cases that foster that mission. Although interviews did not establish that the majority of local United States Attorney's Offices employ a *quid pro quo,* requiring CI agents to participate in non-tax investigations in order to acquire their assistance in tax cases, United States Attorney's Offices currently effectively control the local CI investigative agenda.[224] Refocusing investigative and prosecutive efforts on an IRS identified compliance strategy will require additional coordination and communication with the local United States Attorneys Offices. The Divisional Counsel also will give agents a liaison to contact if an approved case is languishing in a United States Attorney's Office without action.

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[221] This proposal will require a change in the Treasury Department's General Delegation Order #4, which confers referral authority upon Chief Counsel.

[222] One potential criticism of the elimination of District Counsel is that it will also result in the elimination of the conference they offer potential criminal defendants during the legal review of a proposed CI prosecution recommendation to present mitigating or exculpatory evidence to be considered along with the CI prosecution recommendation. The Justice Department Tax Division will still review all tax prosecution recommendations, however, and offer the same type of conference during its review. A defendant may also present mitigating evidence to the Divisional Counsel during the course of an investigation at the discretion of the Assistant Chief Counsel, Criminal Investigation.

[223] The Divisional Counsel is expected to sign every document reviewed. Signature does not indicate approval, but only review. If the Divisional Counsel disapproves, however, he or she should make a written record and forward it to the SAC, Assistant Chief Counsel, Criminal Investigation, and to the Deputy Assistant Director of Field Operations.

[224] 84% of Assistant United States Attorneys interviewed denied a *quid pro quo*. 68% of Special Agents interviewed denied it or were neutral.

Although the SAC also must participate in this role, the Divisional Counsel should take the lead in the establishment and promotion of this relationship with the United States Attorney's Office.

Finally, the role of the Divisional Counsel should include a limited amount of litigation in the United States District Court to provide practical experience for the attorneys. One frequent complaint of CI agents is that, unlike the Assistant United States Attorneys, the District Counsel attorneys bring little criminal litigation experience to their advice. Participating as a designated "Special Assistant United States Attorney" in a limited number of cases will not only give the Divisional Counsel necessary practical experience, but also will foster the respect of both the agents and local prosecutors.[225] However, the priority of the Divisional Counsel staff should always be support and review of CI investigations.[226]

[225] The Commissioner of the IRS must acquire authorization from the Attorney General and the local United States Attorney to allow Divisional Counsels to appear in United States Federal District Court as Special Assistant United States Attorneys.

[226] It is for this reason that each SAC office should have at least two Divisional Counsels. If one is actively involved in time-consuming litigation, the other counsel will be available to the agents.

PLACEMENT OF CI FIELD OFFICES

CI field offices are currently located in each of the thirty-three IRS districts because they are under the direction of the IRS District Director.[227] The implementation of the IRS Restructuring and Reform Act of 1998 will eliminate the IRS districts and mandate a reevaluation of the placement of CI field offices. A specific determination of the placement of the field offices is beyond the scope of this Review, but the Commissioner should be aware of several key points in making this determination.

A. CI FIELD MANAGERS SHOULD BE RENAMED "SPECIAL AGENTS IN CHARGE"

Currently, the top-level manager in all CI districts has the title of "Division Chief." The similarly positioned manager in other federal law enforcement in known as the "Special Agent In Charge" or "SAC".[228] The difference in title is confusing to both the law enforcement community and the public and serves no useful purpose.[229] CI should adopt the title of "Special Agent In Charge" or "SAC" in place of "Division Chief", and "Assistant Special Agent in Charge" or "ASAC" in place of "Branch Chief."

B. CI FIELD OFFICES SHOULD BE ALIGNED WITH UNITED STATES JUDICIAL DISTRICTS

The current IRS district alignment completely disregards United States judicial districts. One judicial district with one Chief United States District Court Judge and one United States Attorney may include two or three CI districts. It is impossible for these officials to determine which of the three equal top-level CI managers they should contact regarding law enforcement issues that affect the entire judicial district. Additionally, if either the court or the United States Attorney's Office experiences a problem with a CI agent or case, it may not be easy to determine who the responsible manager is. Also, in the future, CI's responsibility for communicating the IRS compliance strategy to the United States Attorney's Office will require in some districts that two different SACs and Divisional Counsels interact with one United States Attorney. This arrangement is inefficient and unacceptable.

Therefore, CI Divisions should be realigned along the boundaries of United States judicial districts. Just like other law enforcement organizations, CI SACs may still be required to interact with more than one District Court bench and United States Attorney's Office, but the court and the U.S. Attorney's Office can hold one CI manager, the SAC, responsible for all CI activity and policy within their district. CI enforcement operations and compliance strategy

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[227] The CI Division Chief and a significant number of Special Agents are located at the district headquarters. There are CI duty posts throughout the district, however. The duty posts range in size from several groups and Group Managers to one agent.

[228] The term SAC is used by ATF and FBI. All Treasury Department law enforcement agencies except ATF employ the acronym "SAIC."

[229] Originally, the title was adopted for parity between the three IRS compliance function "chiefs" reporting to the District Director. Due to both the restructuring and these recommendations, this distinction is obsolete.

policy can be communicated from one central source, the SAC and his or her Divisional Counsel.

C. THE NUMBER OF FIELD DIVISIONS SHOULD BE REDUCED

The elimination of the 33 IRS districts requires reevaluation of the number of CI divisions, and their placement. CI is staffed with approximately 3,000 Special Agents assigned to these 33 districts. U.S. Customs has approximately 2,600 assigned to 20 districts; ATF has approximately 1,750 assigned to 23 districts; FBI has approximately 10,000 assigned to 56 districts; DEA has approximately 4,400 assigned to 21 districts.[230] Given this comparison, a reduction in the number of CI field divisions to 15 or 20 would be in conformity with other federal law enforcement agencies. Allocation of agents to districts and duty posts within those districts should be accomplished in a manner that is consistent with both the compliance strategy and the most significant areas of noncompliance. The location of other federal law enforcement field offices should be considered in determining where to assign SACs to promote and facilitate communication and cooperation between the different agencies.

D. THE LARGEST CI DIVISIONS SHOULD BE DIRECTED BY AN EXECUTIVE SAC

At least four or five of the largest CI field divisions with the greatest responsibility for agent supervision and caseload production should be directed by an "Executive SAC". The primary reason for this recommendation is to provide incentive for competent CI managers to aspire to the leadership of one of these more difficult field positions. Currently, with the pay compression in the GS pay scale (see Chapter IV) the average SAC may earn the same amount as experienced managers two levels beneath him or her on the organizational chart.[231] Consequently, there is no incentive to take on the difficult task of managing a very large CI division. As with other federal law enforcement agencies, CI SACs who take on the most difficult assignments should be compensated for it.

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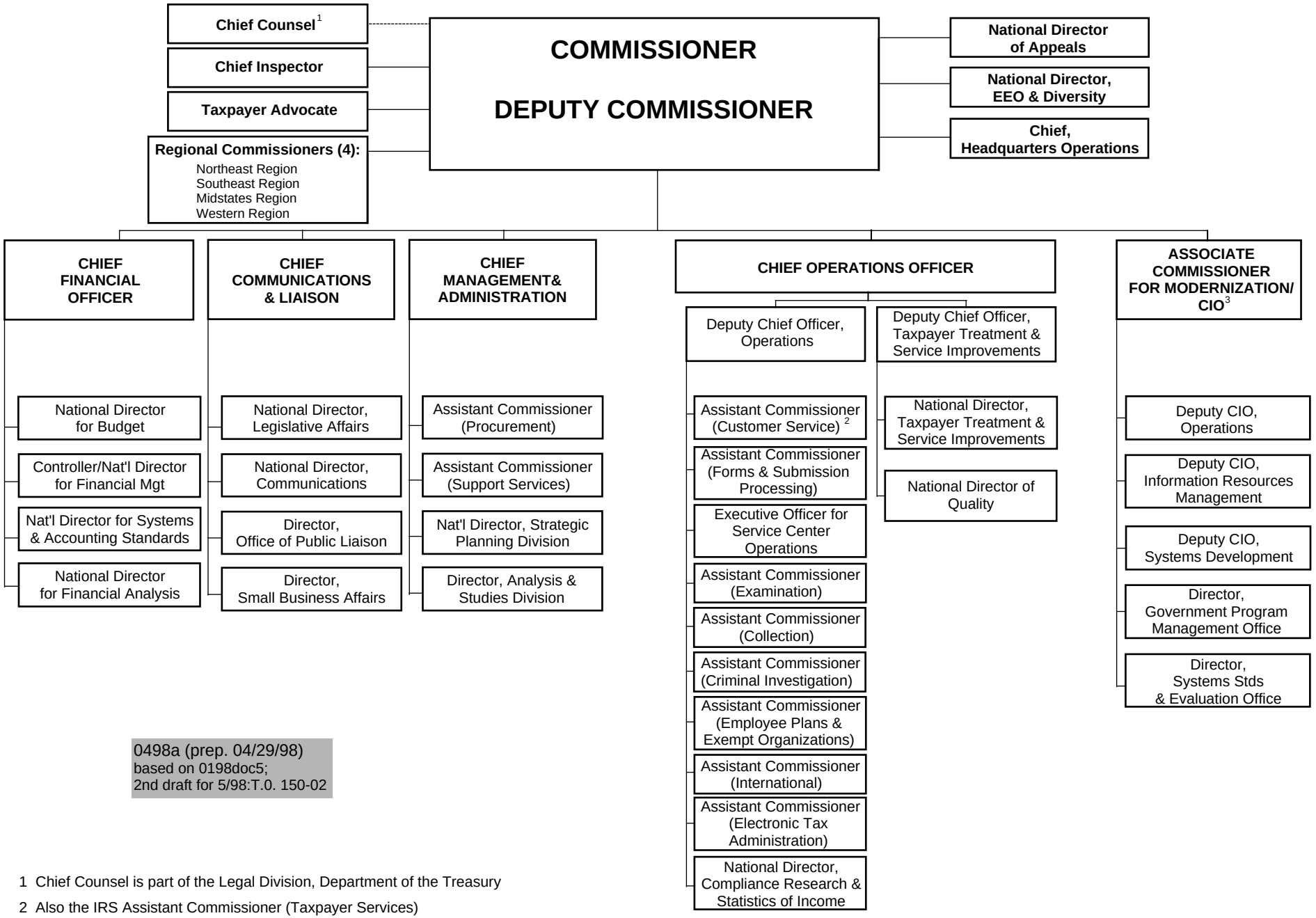
[230] While each of these agencies is unique, Secret Service, staffed with approximately 3,000 Special Agents, serves a very specialized role with its primary objective of protection. Consequently, because their geographic dispersion is based on an assignment and function that are unique, it is not included in this comparison.

[231] *See* Chapter IV: Personnel, *infra.*

IRS ORGANIZATION

May 1998

CHART 5-1



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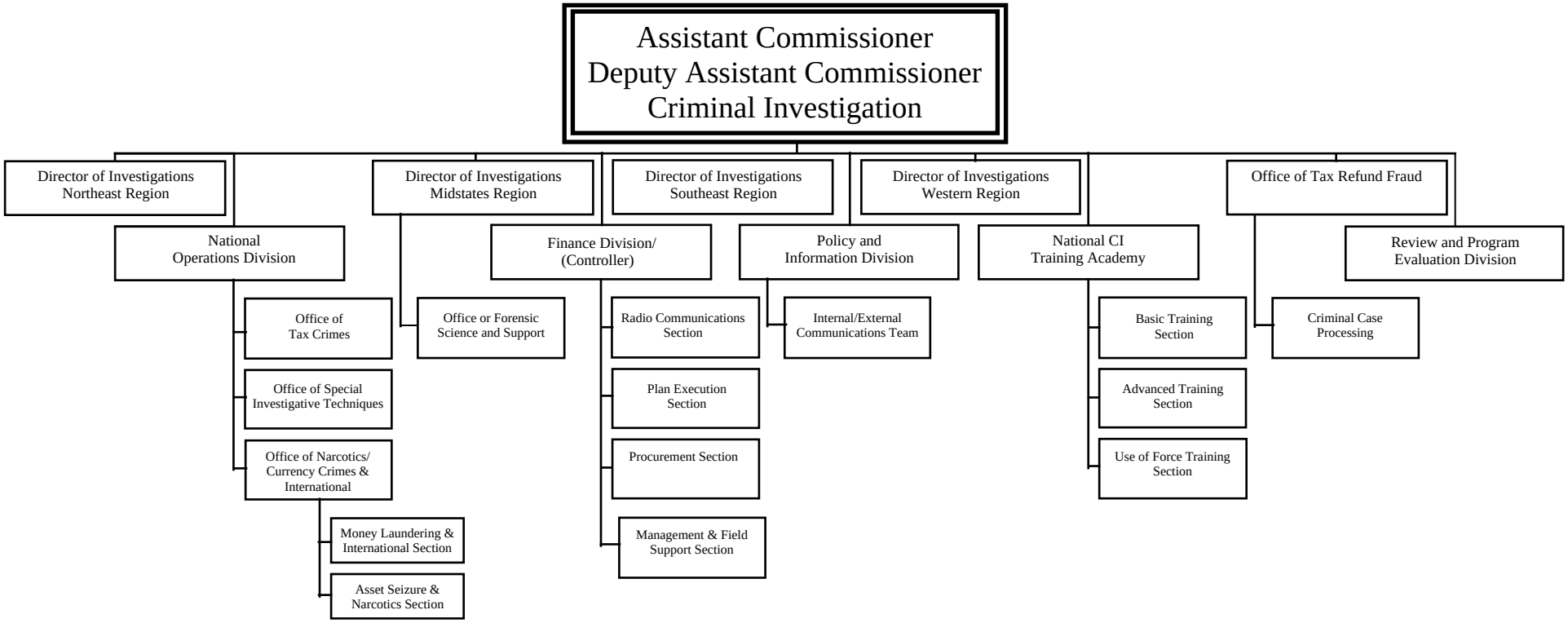
based on 0198doc5;
2nd draft for 5/98:T.O. 150-02

1 Chief Counsel is part of the Legal Division, Department of the Treasury

2 Also the IRS Assistant Commissioner (Taxpayer Services)

3 Associate Commissioner for Modernization and Chief Information Officer

INTERNAL REVENUE SERVICE
CRIMINAL INVESTIGATION



Criminal Investigation Division Proposed Restructuring

CHART 5-3