

Statement of Nina E. Olson, National Taxpayer Advocate

Regarding TIGTA Report 2017-30-025 on CI Enforcement of Structuring Laws

The Treasury Inspector General for Tax Administration (TIGTA) report confirms that the Criminal Investigation (CI) function did not administer the structuring rules “in a manner consistent with its stated goal of interdicting criminal enterprises.” Rather, CI seized the funds of otherwise law-abiding small business owners who may have been trying to avoid paperwork when making cash deposits at the bank (called “legal-source” structuring). CI interviewed many without telling them they were the subject of a criminal investigation or explaining their constitutional rights. Some businesses agreed to forfeit their deposits in exchange for the government’s promise not to pursue criminal prosecution.

Fourteen members of Congress concluded that these cases “unfairly harmed American citizens and have undermined Americans’ trust in their government.” In 2014, the IRS adopted the Taxpayer Bill of Rights (TBOR), which Congress codified in 2015. It contains ten rights, including the *right to be informed*, the *right to challenge the position of the Internal Revenue Service and be heard*, and the *right to privacy*.

In responding to TIGTA’s report, CI says it has issued guidance generally requiring agents to inform subjects of their constitutional rights in “administrative” investigations. I have two concerns about this guidance. First, TIGTA says it is “unclear whether this guidance would have benefited any of the property owners” in the cases it reviewed. TIGTA explains that “‘grand jury investigations’ are excluded from the requirement and the term ‘grand jury investigation’ is not clearly defined.”

Second, even in cases where the guidance does apply, CI is only stating that it will advise subjects of their *constitutional* rights. It is not agreeing to act in accord with *taxpayer* rights, as set forth in the Internal Revenue Code.

CI takes the position that taxpayer rights, such as those included in the TBOR, only apply when it is conducting investigations under Title 26 of the U.S. Code (*i.e.*, the Internal Revenue Code). CI says taxpayer rights do not apply in the cases examined in TIGTA’s report, either (1) because CI is acting at the direction of the Justice Department in a grand jury investigation or (2) because the structuring laws are codified in Title 31 of the U.S. Code (rather than Title 26), so the subject of the investigation should be viewed as a “property owner” rather than a “taxpayer.”

I find that position deeply concerning. First, when CI conducts structuring investigations, the investigations may lead to tax assessments or even criminal charges under Title 26, blurring the distinction between investigations under Title 31 and Title 26. Second, section 7803(a)(3) of the Internal Revenue Code requires the Commissioner to ensure that “employees of the Internal Revenue Service are familiar with and act in accord with taxpayer rights as afforded by [Title 26], including [the ten rights in the TBOR].” That blanket statement identifies Title 26 as a source of taxpayer rights

applicable to all IRS employees. Neither the TBOR nor the statute makes exceptions for CI employees or for IRS employees conducting investigations under other titles. To reach the conclusion that CI employees may ignore taxpayer rights when conducting investigations under Title 31, CI seems to be reading the statute as if the words “but only where IRS employees are investigating potential violations under Title 26” were appended at the end. Those words are not there.

If the IRS were to adopt CI’s interpretation that the TBOR does not apply outside the context of Title 26, all IRS employees would be able to ignore taxpayer rights when responding to Freedom of Information Act requests, making determinations, or promulgating regulations under Title 5; administering bankruptcy laws under Title 11; or enforcing the structuring laws under Title 31. Such a narrow interpretation would gut the TBOR and is unlikely to have been the IRS’s or Congress’ intent.

Of course, how the TBOR applies depends on the circumstances. Rights are rarely absolute and are often subject to limitations. For example, the Supreme Court has held that, although Americans enjoy a constitutional right to free speech, one may not shout “fire” in a crowded theatre (unless there is a fire). Similarly, in certain identity theft, terrorism, or drug-related cases where agents are approved to go under cover, there may be valid reasons for CI to authorize agents to withhold information from subjects. Just because it may be reasonable to limit taxpayer rights by withholding information in certain limited situations, however, does not mean it is reasonable to conclude that the TBOR does not apply at all.

The *right to be informed* is particularly important because, without adequate information, it is difficult to exercise the *right to challenge the IRS and be heard*. If people do not know what they are suspected of, they may not provide exculpatory information that they possess. At the same time, the government is more likely to waste resources pursuing cases against innocent people. Pursuing such cases also violates the *right to privacy*, which includes the right to “expect that enforcement will be no more intrusive than necessary.”

I believe the IRS should clarify that CI employees must act in accord with taxpayer rights, even in the context of grand jury investigations or the administration of laws not codified in Title 26. Situations where taxpayer rights are limited should be rare and clearly justified. Once the IRS clarifies how it will protect taxpayer rights in the context of CI investigations (e.g., by requiring agents to be forthright with subjects unless directed otherwise by the Justice Department or approved to go under cover), it should require that CI employees receive additional training to ensure they act in accord with taxpayer rights in the future.