

Practitioners Speculate LB&I Campaign Details May Come Soon

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Since it was announced nearly a year ago that the IRS's Large Business and International Division would be making a major shift toward using campaigns to address compliance risk, the IRS has offered few details about specific issues being contemplated, although some practitioners are speculating that that may change in the coming months.

The IRS has made no secret that the goal of the campaigns is to improve transparency. Under the new model, the IRS will seek to identify, and deploy its resources to focus on, the largest risks in tax administration. Increased compliance would be a natural outgrowth of that transparency, Douglas O'Donnell, LB&I commissioner, said when first announcing the new procedures in September 2015. In February the IRS released Publication 5125, *Large Business & International Examination Process*, which sets out procedures to complete examinations more efficiently to ensure that "the examination team and the taxpayer work together in a spirit of cooperation, responsiveness, and transparency." It offered no specifics regarding campaigns. (Prior coverage: *Tax Notes*, Sept. 21, 2015, p. 1330; and *Tax Notes*, Mar. 7, 2016, p. 1100.)

Since February the IRS's position on campaign transparency in action has become no more lucid. In June an IRS official said the agency had not decided whether all campaigns would be made public. Less than a week later, LB&I Deputy Commissioner Rosemary Sereti emphasized the need for the government to adequately communicate its position and potential outcomes behind a campaign, rather than providing taxpayers with a bare-bones announcement that merely names a campaign. Before anyone had the opportunity to place too much stock in that statement, the next day another official announced that a campaign was underway, regarding the transfer pricing practice and inbound distributors, and that another two regarding basket options and captive insurance had been approved, but details behind the campaigns were lacking. (Prior coverage: *Tax Notes*, June 13, 2016, p. 1459; and *Tax Notes*, June 13, 2016, p. 1461.)

The Coalition for Effective and Efficient Tax Administration, in a July 20 letter to O'Donnell, asked the IRS to include the public in the development of its campaigns, "otherwise the intended transparency of the new process runs the risk of becoming one-way glass." The IRS said in June that an offer of input from practitioners and taxpayers

about campaigns would be appreciated and that there would likely be outreach from the agency.

Practitioners who spoke to Tax Analysts, however, were unaware of any IRS outreach efforts. "To be effective . . . [since] not everything will be an audit — some will be soft letters or educational [programs] — you would think it would be to everyone's benefit to be transparent about the campaigns so taxpayers and advisers can know what is of concern to the IRS and act accordingly," David B. Auclair of Grant Thornton LLP said. He added that he was surprised that the available information so far had come from informal practitioner questions at conferences, rather than a more fleshed-out landing page, notice, or press release.

Given the lack of formal notice, Auclair was concerned that there could be campaigns already implemented for which the IRS was offering little insight. But "to be fair, at LB&I a lot is going on," he added, referencing the broader organizational restructuring that was announced in conjunction with the campaigns in September 2015. The restructuring has seen LB&I shift to nine practice areas tasked with studying compliance issues — five based on subject matter and four on geography.

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Despite the lack of clarity on campaigns, Jennifer Breen of Morgan, Lewis & Bockius LLP said practitioners appreciated that the IRS had presented informal information about the campaigns at various conferences and that any diversity in opinions likely resulted from the diversity of speakers from the IRS. Breen said she thought the absence of any information about campaigns in Publication 5125 was because it's still too early to discuss those matters and that the IRS didn't want to address anything partially. While the Internal Revenue Manual is silent on campaigns, it could be an avenue for the IRS to clarify its position in the future, Breen said, adding that that was not the only place practitioners might glean hints about coming campaigns.

"The IRS has been pretty prolific putting out the [international practice units] for their examiners," Breen said. "I definitely think that's something people [should] keep an eye on." International practice units serve as job aids and training materials for IRS staff on international tax concepts and specific transactions. Since the start of 2016, the IRS has released 43 of them.

In a written statement to Tax Analysts, the IRS said it was continuing "to develop and refine the

details of the campaign identification and approval process” and that it would provide more information at an unspecified later date. It emphasized the importance of “working with taxpayers and the practitioner community to ensure our views regarding various issues that may or do present risk are properly articulated.”

“We expect to achieve these efforts by posting Practice Units to IRS.gov and soliciting input from our partners in the tax community,” the IRS said. “We will also continue to have conversations and interact with stakeholders on this and other important tax administration issues.”

A Dramatic Change

Breen said she wasn’t surprised that her clients hadn’t participated in an examination that featured a campaign and that they had yet to be contacted to solicit feedback. Resource constraints at the IRS may play no small part in the lengthy rollout, she speculated.

“Not only are they working with a smaller force, they are dramatically changing the way that they are approaching IRS examinations. They are considering not only the approach they are going to take in an examination, but whether they are going to roll out various treatment streams,” Breen said. “Figuring out what those may look like and how internally they organize — that is a large undertaking.”

Kevin Brown of PwC said he was unaware of any newly initiated campaigns. He added that those approved campaigns that had been alluded to in June were likely holdovers from issues the IRS had been analyzing before the announcement of the new campaign model rather than newly generated ideas.

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Brown said he was not surprised by the lack of any formal IRS announcement or publication about specific campaigns or the pace at which they had been rolled out. There are many uncertainties in making the move to campaigns that may warrant caution from the IRS’s perspective, Brown argued, although he said he was sure the IRS “was anxious to get going” and make its intentions known more publicly. Publicity would increase a campaign’s deterrence factor if taxpayers knew the IRS was spending resources to pursue specific issues, he argued. But advanced publicity had to be weighed against the need for methodical evaluation, Brown said.

“It’s a pretty big endeavor to launch something like that. First you’ve got to identify an issue [and] talk about the importance of it. Does it affect a lot of taxpayers? Does it affect a lot of dollars? Is there a lot of controversy that is chewing up time, both on the IRS side and the taxpayer side?” Brown asked. “Do we have a clear position of the law? Do we have the chief counsel’s attorneys on board in terms of how we are supposed to interpret this?”

Brown noted that another overarching challenge is the exam agents that would have to be shifted onto a new campaign. That would present a risk to the IRS, as agents would be moved off projects already deemed productive and moved to areas where training would likely be necessary, he said. He recalled hearing that the IRS had received over a hundred suggestions from its employees about potential campaigns, although he surmised there was likely substantial overlap in those proposals.

“There are all kinds of things you could do to signal that we don’t want this to be business as usual, where it just grinds on and takes years and we have uneven results,” Brown said, arguing that the particular guidance vehicle a campaign resembled would likely vary depending on the issue. Something like a section 199 deduction, for which entrenched attitudes permeate both taxpayer and IRS perspectives, may require only an IRS position statement and possibly a safe harbor to tamp down controversy and may not require notice and comment, he said.

OVDP Template

As practitioners try to discern what to expect of a system that has few concrete details, and whether the vehicles for campaigns will be published guidance, revenue procedures, industry issue resolutions, a combination of those, or something else altogether, some have looked to the offshore voluntary disclosure program as an example of what to expect from the impending LB&I campaigns. (Prior coverage: *Tax Notes*, Mar. 14, 2016, p. 1283.)

Citing OVDP as a successful campaign, Brown noted the program’s identification of a problem and the initiation of a publicity campaign to drive individuals into compliance lest they face prosecution. The IRS’s carrot-and-stick approach to changing individuals’ behavior reflected the fact that it lacked the resources to audit everyone, he said.

Still, Brown cautioned against drawing too many parallels between OVDP and the coming LB&I campaigns. “[OVDP] is a very black-and-white issue. If you are parking money offshore and you are not reporting it, you are clearly not compliant. Many of the issues that large business taxpayers have are in grayer areas,” he said.

Breen said she didn’t doubt the IRS’s sincerity in its commitment to transparency and feedback in

campaigns, a goal that has been advocated in the IRS's future state and concept of operations, which were laid out in late 2015 and describe how the IRS will change its structure and the way it selects work to develop better tools for educating employees and establishing compliance goals. Breen pointed to the acknowledgment of treatment streams as possibly assuaging taxpayers' concerns that the IRS might instead take a "one-size-fits-all approach." Tailored treatment streams would also necessitate practitioner and taxpayer feedback, she argued. (Prior coverage: *Tax Notes*, Feb. 22, 2016, p. 847.)

Shamik Trivedi of Grant Thornton also saw OVDP as a prototype for campaigns. "It was brought out with great fanfare, and every quarter there was another press release touting how successful this program was," Trivedi said, noting that the success of OVDP was dependent on its promotion. "The way it is in play now, with [multiple] options, is different from the way it was rolled out in 2009. . . . A lot of those changes to the [frequently asked questions for OVDP] came from practitioner input and meetings with the government. There is certainly precedent for a campaign to evolve with greater taxpayer and practitioner input."

Auclair viewed campaigns as a replacement for the tiered issues program, but pointed out a key difference. "When the IRS did tiered issues, there was a lot of information around it. It was posted — a lot of information about the IRS's views, the advice for examination. That was much more structured. Hopefully there will be a lot more information accompanying a name of a campaign," he said.

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LB&I officially ended its tiered issue program — which was used to set exam priorities in the hopes of seeking uniformity of treatment and to combat tax shelters — to unanimous praise from practitioners in 2012, who had been wary of its inflexibility. (Prior coverage: *Tax Notes*, Sept. 24, 2012, p. 1556.)

Practitioners were also anxious to receive official indication from the IRS about who might be in charge when a single taxpayer is involved in multiple campaigns during the reorganization, Auclair said. "The concern is that although [the IRS] wanted to streamline [exams], at least in appearance it has the potential to be more complicated," he said.

Timeline Measured in Months?

Brown suspected that clients and practitioners might start seeing newly rolled-out campaigns be-

fore the end of 2016, and Auclair and Trivedi were optimistic that more information would become available soon.

"A lot of the success of these programs is going to depend on how well the IRS trains its people and how well these directions are sent down the chain from LB&I leadership," Trivedi said.

Breen expected that the timeline for unveiling more details would likely be measured in months rather than years, with more campaigns (and information about them) possibly coming by early next year.

"They are starting small and expanding," Breen said, citing the IRS's informal announcement in June that its inbound distributor campaign would initially be limited to five unnamed states before expanding to another five states by the end of the year. "As they work through the three campaigns they've got, they are going to be learning a lot, and we'll start seeing more and more," including details and treatment streams, she said. ■