

## More Prosecutions Likely In IRS Scheme Promoter Crackdown

By Joshua Rosenberg

*Law360 (April 23, 2021, 7:41 PM EDT)* -- After years of the IRS pursuing litigation against promoter schemes it considers abusive, the forging of a new office at the agency to centralize enforcement activities signals continued resolve to investigate schemes and a likely increase in criminal prosecutions.

The Internal Revenue Service's newly minted Office of Promoter Investigations, which publicly launched April 19, is charged with coordinating enforcement efforts related to promotions of abusive tax schemes such as microcaptive insurance companies and syndicated conservation easements.

Microcaptive schemes and syndicated easements have proliferated even as the agency has successfully pursued litigation in the sector and has consistently publicized its commitment to crack down on such abuses.

It therefore seems all but inevitable that the agency's next step in its attempts to punish parties it has determined to have acted in bad faith, and to deter others from engaging in such behavior, would be to ramp up criminal prosecutions.

"In light of the significant publicity the IRS has put out about the abusive nature of many of these transactions, I would think that there will also be more criminal prosecutions since everyone has been put on very public notice," former IRS Commissioner John Koskinen told Law360.

The promoter office will be housed in the IRS' Small Business/Self-Employed Division. However, it will engage in agency-wide compliance activities, including coordinating work with promoter teams in other business divisions, to tamp down abusive transactions.

Lois Deitrich, who previously served as the Southwest area field examination director in the SB/SE Division, will take the helm at the office. She'll take control of work started under Brendan O'Dell, who was temporarily tapped to serve as promoter investigations coordinator in February 2020.

Before the promoter investigation office was set up, the IRS' small business division brought field exam staffers who work on such investigations under a single director. That move will also help the division's enforcement against abusive transactions, SB/SE Exam Commissioner De Lon Harris said earlier this month.

The agency's enforcement against abusive conservation easement structures and microcaptive

insurance arrangements is nothing new. In 2017, the IRS flagged syndicated conservation easements — which exploit the tax deduction available for donating property for conservation by securing appraisals that vastly overestimate the value of the property — as tax avoidance transactions.

Likewise, in 2016 the IRS identified microcaptive insurance arrangements — in which companies set up small, in-house insurers that are taxed only on investment income — as transactions of interest with a potential for tax avoidance that must be reported to the agency under the threat of penalties.

What's new about the Office of Promoter Investigations is the IRS creating an arm that will make policing such schemes and other abusive transactions the central focus. The agency did not immediately respond to a request for comment about other schemes that might fall under the office's purview.

The establishing of the office comes as syndicated conservation easements continue to proliferate even after the IRS has litigated a bevy of cases against promoters of the schemes. According to correspondence between the IRS and lawmakers released last year, the number of syndicated conservation easement deals reported to the IRS increased to 17,182 for tax year 2018, the most recent year for which data was available, compared with 15,499 for 2017. The IRS has identified 16,900 unique investors in conservation easement deals in 2018 compared with 14,000 the previous year, according to the correspondence.

"I have been surprised by the continued marketing of suspect transactions by promoters in both areas after all the publicity and successful audits," Koskinen said.

It seems likely that the agency will now look to ramp up its pursuit of criminal prosecutions, he said.

The agency's decision to establish the office "might be a recognition that there needs to be, in the IRS' view, a little bit more of active management of these things as they evolve, rather than just retrospectively," S. Starling Marshall, partner in Crowell & Moring LLP's tax and litigation groups, told Law360.

The office likely will be well-positioned to use the agency's artificial intelligence and data analytics capabilities to more readily identify promotion schemes that may violate the law, Carina Federico, counsel at Crowell & Moring's tax group, told Law360.

"They're able to connect all these little bits of information and put together a bigger story," she said.

And the agency's decision to commit resources to the office speaks to the positive results it has achieved in courts and through settlements, Federico said.

But given the office's mandate, there's a strong likelihood it will prioritize combining civil charges with criminal ones in the space, Marshall said, even if such coordination hasn't been especially systematic until now.

"They're part of the same tax administration process; they're two sides of the same coin," she said. "I think it's going to be formalized from here on out."

--Additional reporting by David van den Berg. Editing by Tim Ruel and Neil Cohen.  
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