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

OFFICE OF
CHIEF COUNSEL

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CASE No. 103365-99
MGallagher

MEMORANDUM FOR STEPHAN RICHARDSON
DIRECTOR, OFFICE OF MANAGING STATISTICS/1204

FROM: Dennis M. Ferrara Dennis M Ferrara
Deputy Associate Chief Counsel (GLS)

SUBJECT: Use of Records of Tax Enforcement Results in Self-Appraisals

This memorandum responds to your request for our opinion on whether an employee's inclusion of a record of tax enforcement results ("ROTERs") in a self-appraisal violates Section 1204 of the IRS Restructuring and Reform Act of 1998 ("Section 1204"). As explained below, we conclude that it does not violate Section 1204.

Section 1204 provides, in part, that "the Internal Revenue Service may not use records of tax enforcement results to evaluate employees..." Since the legislative history of Section 1204 does not specify the precise meaning which the Congress gave to this language, it is necessary to construe congressional intent from a review of the public policy underlying the statute as well as a review of the language in light of their commonly understood meaning.

The public policy underlying Section 1204 was to prohibit the Service from using ROTERs to evaluate employees since such use could lead to improper decision-making to the detriment of taxpayers. Thus, the emphasis in this statutory language is upon the Service making evaluations based upon the consideration of ROTERs. In turn, as "the Internal Revenue Service" evaluates its employees only through designated managers, we infer that the statutory prohibition is that managers may not use ROTERs in evaluating employees.

In the appraisal process, an employee may offer his/her manager a self-appraisal with the objective of reminding or informing the manager of the employee's accomplishments. In this manner, the ROTER is offered to the manager by the employee for the manager's consideration. A fundamental element in this appraisal process is that inclusion of any information in a self-appraisal is not tantamount to the manager using the information in the evaluation. In short, the manager is not required to use the information set forth in the employee's self-appraisal. For example, if an employee identified his/her race, color, creed or other prohibited criteria in a self-appraisal, the manager could not consider that factor in making the evaluation of the employee's performance. In this example, the employee has not committed a prohibited personnel practice by placing the information in the self-appraisal, but the manager would commit a prohibited personnel practice if he/she considered that information in conducting the evaluation. Likewise, the employee does not violate Section 1204 by including a ROTER in a self-appraisal, but the manager would violate Section 1204 if he considered the ROTER in making the evaluation.

[redacted] In our view, the conclusion reached in paragraph 1.9.1.1. in IRM 105.4, *Managing Statistics in a Balanced Measurement System Handbook,* dated September 15, 1999, and described here properly define the boundaries of section 1204. DP

Should you wish to discuss, please contact me or Mike Gallagher at 202-283-7900.