Chief Counsel Advice

Training Materials

As Revised April 2006

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TABLE OF CONTENTS

Subject Matter	Page Number
(1) INTRODUCTION	3
(2) HISTORICAL BACKGROUND OF FOIA LITIGATION AND LEGISLATION APPLICABLE TO CHIEF COUNSEL ADVICE	4
(3) STANDARDS FOR REDACTION AND DISCLOSURE OF CHIEF COUNSEL ADVICE	7
(4) IRS'S AND THE ADMINISTRATION'S DISCRETIONARY DISCLOSURE POLICIES	16
(5) OFFICE OF CHIEF COUNSEL DIRECTIVES MANUAL AND CHIEF COUNSEL NOTICES	20
APPENDICES:	
(i) Chief Counsel Advice Legislation – Section 6110 as amended by the IRS Restructuring and Reform Act of 1998 (RRA98) (Pub.L. 105-206), the Ticket to Work and Work Incentives Improvement Act of 1999 (Pub.L. 106-70), and the Community Renewal Tax Relief Act of 2000 (Pub.L. 106-554)	i
(ii) Legislative history to amendments to section 6110, as amended by the RRA98, the Ticket to Work and Work Incentives Improvement Act of 1999, and the Community Renewal Tax Relief Act of 2000	xiii

Introduction

Section 6110 of the Internal Revenue Code codifies the outcome of several Freedom of Information Act (FOIA) lawsuits, brought by Tax Analysts dating back to the early 1970's, to make available for public inspection certain work products produced, in relevant part, by the National Office of Chief Counsel. Denominated as "written determinations," these work products are letter rulings, technical advice, determination letters, and – by virtue of the 1998 IRS Restructuring & Reform Act amendments -- Chief Counsel Advice. The legislative history to the 1998 amendment to section 6110 makes clear Congress' intent that "written documents issued by the National Office of Chief Counsel to its field components and field agents of the IRS should be subject to public release in a manner similar to technical advice memoranda or other written determinations. In this way, all taxpayers can be assured of access to the 'considered view of the Chief Counsel's national office on significant tax issues.' Creating a structured mechanism by which these types of legal memoranda are open to public inspection will increase the public's confidence that the tax system operates fairly and in an even-handed manner with respect to all taxpayers."

Like other types of written determinations, the process of making Chief Counsel Advice available to the public requires us to take steps to protect the taxpayer who is the subject of the advice. Unlike the other types of written determinations, however, Congress also afforded us a process by which appropriate governmental privileges may be asserted. In Section 2, we have included Guidelines to assist each of you in preparing Chief Counsel Advice for public inspection. This Section helps you to identify the type of information that is to be redacted to protect the identity of the taxpayer to whom the Chief Counsel Advice relates under section 6110(c)(1), as well as the type of information subject to FOIA exemptions, which have been incorporated into section 6110(i)(3), that may be deleted in order to protect legitimate governmental interests. This Section also contains guidance on the steps to follow whenever you determine that the entirety of the Chief Counsel Advice should be withheld on the basis of the work product doctrine, or any other applicable FOIA exemption.

Section 4 is a handy cross-reference to those parts of the Chief Counsel Directives Manual that touch upon the Chief Counsel Advice process, as well as the Chief Counsel Notices that have been issued on this subject. Chief Counsel personnel will also find useful the various Check Sheets that have been developed to walk you through these concepts.

For those of you interested in additional background on the development of FOIA and section 6110 as it applies to various Chief Counsel work products, Section 1 is designed for you. The 1998 amendment to section 6110 and its legislative history is reproduced in the Appendix.

Historical Background of FOIA Litigation and Legislation Applicable To Chief Counsel Advice

I. Introduction

This section provides you with an overview of section 6110 of the Internal Revenue Code, as amended by section 3509 of the Internal Revenue Service Restructuring and Reform Act of 1998, section 521 of the Ticket to Work and Work Incentives Improvement Act of 1999 (Pub.L. 106-70), and section 304 of the Community Renewal Tax Relief Act of 2000 (Pub.L. 106-554), which provides for the public inspection of Chief Counsel advice to field IRS or field Counsel offices. Section 6110, as amended, requires the disclosure of a number of Counsel work products, formerly known by such names as Field Service Advice (FSAs), Service Center Advice (SCA), Technical Assistance (to the field), Litigation Guideline Memoranda (LGMs), and various Bulletins. For purposes of section 6110, as amended, these work products are defined as Chief Counsel advice (CCA).

While we have attempted to provide you with this material for your ready reference, any questions not resolved should be directed to your managers. The Office of Chief Counsel has also published instructions to facilitate the issuance and preparation of CCA for public inspection. *See* CCDM 33.1.3.

II. Background of Relevant FOIA Litigation

Tax Analysts, Inc., a publisher of tax-related periodicals and other materials, brought suit in April 1994 under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, to compel the IRS to disclose FSAs. FSAs were issued by certain national office functions of the Office of Chief Counsel to advise and assist field Examination, Appeals, and district counsel offices by responding to their requests for advice, generally in cases pertaining to specific taxpayers.

After the district court ordered that FSAs be released to the public, as the expression of the Service's "working law," the Government appealed. In July 1997, the United States Court of Appeals for the District of Columbia Circuit issued its opinion and order, largely adverse to the IRS. *Tax Analysts v. IRS*, 117 F.3d 607 (D.C. Cir. 1997). First, the court held that, while there was no doubt that FSAs relating to particular taxpayers contained at least some return information, FSAs did not constitute, in their entirety, return information. After an analysis of the use and context of the word "data" in the statutory definition of return information found at I.R.C. § 6103(b)(2), along with a comparison of FSAs and technical advice memoranda (TAMs), the court concluded that the legal analyses and conclusions of law contained in FSAs did not constitute "data" such that the analyses and conclusions were not return information under I.R.C. § 6103(b)(2) and must be disclosed to plaintiff.

Second, with respect to the IRS's claim that the FSAs were exempt from disclosure in their entirety pursuant to FOIA subsection 5, which incorporates the attorney-client and deliberative process privileges and the work product doctrine, the court held that the legal conclusions provided by the national office of Chief Counsel to field personnel constitute agency working law, even if those conclusions are not formally binding. Accordingly, the deliberative process privilege did not apply to FSAs since they were neither predecisional nor deliberative. The court also held that the attorney-client privilege did not apply to the extent the legal conclusions in the FSAs were based upon information obtained from taxpayers. The court did note, however, that to the extent that the FSAs revealed confidential information regarding the scope, direction, or emphasis of audit activity, such communications were covered by the attorney-client privilege. The appellate court also found that the district court erred in confining the work product doctrine to the mental impressions, conclusions, opinions or legal theories of the attorney. It held that the work product doctrine also applied to factual materials prepared in anticipation of litigation. The D.C. Circuit remanded the case back to the district court for further consideration of, *inter alia*, various exemption claims.

On remand, the district court was faced with several issues, key among them the extent of material to be redacted from the FSAs as return information and work product. The district court ordered that the IRS redact only taxpayer identifiers from each portion of the FSAs (similar to the manner in which TAMs are edited under I.R.C. § 6110), relying heavily upon the Court of Appeals' observation (117 F.3d at 616) that "[w]ith respect to the purposes of § 6103, Technical Advice Memoranda and FSAs amount to the same thing." 81 A.F.T.R.2d ¶ 98-661, slip op. at 5. The district court also held that, given the entire tenor of the appellate court's opinion that agency working law is disclosable under the FOIA, the appellate court could not have intended that the FSAs issued in docketed cases be withheld in their entirety under the work product doctrine. Instead, the court held that, however work product is defined, a FOIA requester is entitled to agency working law (legal analysis and conclusions), as long as the mental impressions, conclusions, opinions, or legal theories of an attorney are protected. The district court later resolved the applicability of FOIA exemption (b)(7)(E), relating to law enforcement techniques and guidelines where disclosure could enable members of the public to circumvent the law. In light of subsequent legislative action (the enactment of section 6105), the parties settled the lawsuit before the district court could issue an opinion respecting the IRS's assertion of FOIA exemption (b)(3), in conjunction with tax treaty secrecy clauses (and later section 6105) with respect to portions of certain FSAs.

On June 14, 2002, the United States Court of Appeals for the District of Columbia Circuit issued its opinion, largely favorable to the IRS, in the FOIA action styled as *Tax Analysts v. IRS*, 294 F.3d 71 (D.C. Cir. 2002). Of relevance to CCA, the court rejected the approach taken by Judge Kessler in the FSA case on remand, in which she ordered the IRS to segregate work product portions from the working law portions of FSAs and release the documents in part. In its opinion, the court affirmed Judge Kollar-Kotelly's holding that "IRS need not segregate and release agency working law from [documents] withheld in their entirety pursuant to the attorney work product privilege." *Id.* at 76. As a result of this decision, the Office of Chief Counsel issued Notice CC-2003-022 (July 1,

2003). This Notice established new procedures for processing CCA that were to be withheld in their entirety because, *inter alia,* they were generated during docketed cases or under circumstances in which a litigation predicate could be established. Counsel's determination that CCA to which the work product doctrine attaches may be withheld in their entirety was upheld by the United States District Court for the District of Columbia in *Tax Analysts v. IRS,* 391 F. Supp.2d 122 (D.D.C. 2005).

The court next considered the Government's assertion that certain portions of technical assistance memoranda -- reflecting settlement criteria, litigating hazard assessments, and the like -- were exempt from disclosure under FOIA subsection (b)(7)(E), which protects "records or information compiled for law enforcement purposes , but only to the extent that the production of such law enforcement records or information ... (E) ... would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." For those technical assistance memoranda that were not prepared with respect to a particular taxpayer, the district court had found that the documents did not meet the (b)(7) threshold; that is, they were not "compiled for law enforcement purposes." The D.C. Circuit disagreed, clarifying a recent line of D.C. Circuit decisions that – according to Tax Analysts – limited assertions of (b)(7) to records relating to investigations focusing directly on specific alleged acts which could result in civil or criminal sanctions. The D.C. Circuit held that the 1986 FOIA amendments, which changed the (b)(7) threshold language, eliminated the requirement that records be "investigatory" and specifically intended that law enforcement manuals and similar matters be encompassed by the (b)(7) threshold.

III. Section 3509 of the IRS Restructuring and Reform Act of 1998

Section 3509 of the IRS Restructuring and Reform Act of 1998 deals with the release of CCA. This provision was developed through discussions Treasury and IRS had with Tax Analysts and other media stakeholders. The provision was designed to provide a structured process similar to that used for private letter rulings and technical advice, giving taxpayers an opportunity to request that information they consider confidential be deleted from the documents before they are made available to the public. The IRS may also delete information that it believes is privileged, based upon certain governmental interests, before providing the document either to the taxpayer or the public. There are procedures for taxpayers or members of the public to request additional deletions or additional disclosure, respectively, and to seek judicial review of the agency's response to these requests for additional deletion or disclosure. The category of documents known as CCA is much broader than FSAs; it includes essentially all Chief Counsel legal interpretations of the internal revenue laws (or related state, federal or foreign laws) issued by the national office to the field. These documents are made available to the public through the IRS Web Site at www.irs.gov/foia. The court decisions in the various Tax Analysts FOIA lawsuits discussed above, as well as evolving FOIA case law, guide us in how the various FOIA exemptions, incorporated into the CCA rules, are to be applied.

Standards for Redaction and Disclosure of Chief Counsel Advice

I. Taxpayer Identifying Information

● The D.C. Circuit, in analogizing FSAs to TAMs, commented that "[w]ith respect to the purposes of § 6103, Technical Advice Memoranda and FSAs amount to the same thing" and "only a Janus-faced Congress would, in § 6110, order the IRS to disclose the legal analysis portion of a Technical Advice Memorandum and then, in § 6103, order the IRS not to disclose the same portion of an FSA." Accordingly, the D.C. Circuit held that "legal analyses contained in FSAs are not 'return information' under § 6103, and the IRS's exemption 3 claim fails." 117 F.3d 607, 616 (D.C. Cir. 1997).

● On remand, the parties disagreed as to the manner in which FSAs would be redacted of "true return information," as defined by the D.C. Circuit. By order dated April 30, 1998, the district court determined that "the 'true return information' the D.C. Circuit held should be redacted from FSAs before release is the return information to be redacted from [TAMs] under § 6110(c)(1); *i.e.*, **the names, addresses, and other identifying details of the person to whom the written determination pertains and of any other person, other than a person with respect to whom a notation is made under subsection (d)(1) [third party contacts], identified in the written determination or any background file document.**" 81 A.F.T.R.2d ¶ 98-661, slip op. at 5 (emphasis added).

● According to the legislative history accompanying I.R.C. § 6110, as originally enacted and as amended, "identifying details consist of names, addresses, and any other information which the Secretary determines could identify any person, including the taxpayer's representative. In some situations, information included in a determination (other than a name or address) may not identify a person as of the time the determination is made open to public inspection, but that information, taken together with information that is expected to be disclosed by another source at a later date, will serve to identify a person. Consequently, in deciding whether a determination contains identifying information, the Secretary is to take into account information that is available to the public at the time that the determination is made open to public inspection as well as information that is expected to be publicly available from other sources within a reasonable time after the determination is made open to public inspection. Generally, it is intended that the standard the IRS is to use in determining whether information will identify a person is a standard of a reasonable person generally knowledgeable with respect to the appropriate community.[1] The standard is not, however, to be one of a

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[1] The appropriate community could be an industry or geographical community and will vary for the problem involved; *e.g.,* the "community" for a steel company will be all steel producers, but may also be the locale in which, *e.g.*, the main plant is to be located if the determination deals with a land transaction.

person with inside knowledge of the particular taxpayer." *See, e.g.*, Joint Comm. Print, GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1976, Pub. L. 455, 94th Cong. 305 (1976); Conf. Report to accompany H.R. 2676, INTERNAL REVENUE SERVICE RESTRUCTURING AND REFORM ACT OF 1998, H.R. Rep. 105-599, 105th Cong., 2d Sess. (June 24, 1998). *See also*, Treas. Reg. § 301.6110-3(a)(1).

- The following are examples of items of information that are deemed taxpayer identifiers *per se* pursuant to I.R.C. § 6110(c)(1).

1. Taxpayer Name(s)
2. Taxpayer's Address (Street or P.O. Box, not city or state)
3. Taxpayer Identification Number
4. Court docket number
5. Policy numbers
6. Outside consultants (names of individuals, but not necessarily firms)
7. Authorized representative (names of individuals, but not necessarily firms)
8. "Brand name" product lines
9. References to another case involving the same taxpayer(s)
10. Beneficiaries
11. Patents and trademarks
12. Trade secrets
13. Any quotation from an opinion or searchable database (*i.e.,* SEC lings), if they are associated with the taxpayer

- The following are examples of items of information that may be taxpayer identifiers, given the particular facts and circumstances of the document and the timing of its public release.

1. Dollar figures (do not redact the $ sign)
2. Dates, including tax years
3. Percentages (do not redact the % sign)
4. Type of business, if unique or small industry
5. Shareholder information
6. State of incorporation
7. Countries of operation
8. Region, district, city (including symbols), circuit court
9. References to state law
10. References to unique federal law that impacts few individuals or industries
11. Names of local IRS officers and employees
12. "Generic" product lines
13. Taxpayer hired consultants (firm names)
14. Firm(s) authorized to represent taxpayer

15. Any other information which could be cross referenced in other publicly available sets of information including electronic databases, such as LEXIS or WESTLAW

II. Attorney-Client Communications

- The D.C. Circuit, after rejecting the agency's assertion of attorney-client privilege to justify nondisclosure of FSAs in their entirety, acknowledged that "some FSAs may reveal confidential information transmitted by field personnel regarding 'the scope, direction, or emphasis of audit activity.' Communications revealing such client confidences are in a different category than those we have been discussing [for which no attorney-client privilege attaches]. They are clearly covered by the attorney-client privilege, and the IRS may still assert the privilege with respect to particular portions of FSAs containing this sort of confidential government information." 117 F.3d at 619-620.

- On remand, the district court stated that "[t]he Court of Appeals rules with a fair degree of specificity and clarity that FSAs with communications regarding 'the scope, direction, or emphasis of audit activity ... are clearly covered by the attorney-client privilege.' 117 F.3d at 619. When, in the next sentence, the Court of Appeals said that the ‘the IRS may still assert the privilege with respect to particular portions of FSAs containing *this sort of confidential government information*", *id.* (emphasis added), it was clearly referring back to the phrase 'the scope, direction, or emphasis of audit activity' and was not creating, as IRS argues, some new open-ended category of government information to be withheld as attorney client privilege." 81 A.F.T.R.2d ¶ 98-661, slip op. at 7. Thus, the court rejected the assertion of the attorney-client privilege for any other types of confidential government information in FSAs.

- Examples of material redacted as attorney-client communications:

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III. Work Product Doctrine

● In the FSA case, the D.C. Circuit held that the district court's original order, permitting only the redaction of "text concerning 'the mental impressions, conclusions, opinions, or legal theories of an attorney,'" was too narrow. The circuit held that "the work product doctrine protects such deliberative materials but it also protects factual materials prepared in anticipation of litigation." The court continued, stating that "any part of an FSA prepared in anticipation of litigation, not just the portions concerning opinions, legal theories, and the like, is protected by the work product doctrine and falls under exemption 5." 117 F.3d at 620. On remand, the IRS argued that the entirety of FSAs issued during the pendency of docketed cases were therefore privileged as work product. The district court rejected this argument. Tax Analysts argued successfully that, notwithstanding the scope of the work product doctrine, the requester "is entitled to the agency working law, legal analysis, and conclusions, so long as the 'mental impressions, conclusions, opinions, or legal theories of an attorney' are protected." 81 A.F.T.R.2d ¶ 98-661, slip op. at 6.

● In the "Guidance" case (dealing with, *inter alia*, technical assistance memoranda), the D.C. Circuit had its first opportunity to consider how the district court, on remand in the FSA case, had construed its earlier opinion on the work product doctrine. *Tax Analysts v. IRS*, 294 F.3rd 71, 76 (D.C. Cir. 2002). As a result of this D.C. Circuit opinion, where a document is prepared in anticipation of litigation, such that the work product doctrine attaches, the **entire document** may be withheld from disclosure. The appellate court, agreeing with the IRS, adopted the district court's holding that "IRS need not segregate and release agency working law from technical assistance memoranda in their entirety pursuant to the [work product doctrine]." *Id*. In order for the work product doctrine to apply, the document must have a "litigation predicate."

A litigation predicate will be established if one or more of the following statements is true: (1) The case is already docketed in court, including bankruptcy court, when the CCA is issued; (2) the taxpayer has litigated any issue addressed in the CCA during prior cycles; (3) the taxpayer or taxpayer's representative has affirmatively represented that they will litigate any issue(s) addressed in the CCA; (4) the case has been designated for litigation; (5) the case involves a listed transaction; (6) the taxpayer is reputed for its litigious nature; or (7) the taxpayer's representative has litigated the same issue that is addressed in the CCA for multiple clients. If it can fairly be stated that the document was prepared "primarily because of" litigation -- then the work product doctrine may attach. If you believe that there is a litigation predicate, but not based upon any of the seven factors enumerated herein, contact the office of the Assistant Chief Counsel (Disclosure & Privacy Law) to discuss the particular facts and circumstances of your case. Documents ordinarily prepared in the course of the audit or collection stream, such as reviews of statutory notices of deficiency or FPAAs, summonses, or information document requests, are not **per se** subject to the work product doctrine.

In light of the Guidance case, the Office of Chief Counsel issued CC-2003-022 (July 1, 2003), which establishes the procedures for processing taxpayer-specific CCA when it is determined that no portion of a particular CCA need be disclosed to the public. While certain information is required to be deleted from taxpayer-specific CCA (*i.e.,* identifying particulars of the taxpayer), other information may be deleted if it falls within the statutory exemptions of, or exclusions from, the FOIA. The withholding of CCA in its entirety will most often occur when the CCA is written with respect to a docketed case or under the facts and circumstances that trigger the assertion of the work product doctrine. Counsel's determination that CCA to which the work product doctrine attaches may be withheld in their entirety was upheld by the United States District Court for the District of Columbia in *Tax Analysts v. IRS,* 391 F. Supp.2d 122 (D.D.C. 2005). (Tax Analysts did not appeal this decision.)

IV. (b)(7)(E) Law Enforcement Guidelines, Disclosure of Which Could Enable Taxpayers to Circumvent the Law

● The district court in the FSA case ruled on several of the IRS's assertions of exemption (b)(7)(E), upholding several assertions but rejecting several others. The Government chose not to appeal this ruling. In one instance, the court upheld the IRS's assertion of exemption (b)(7)(E) for a description of a systemic weakness in an IRS enforcement tool dealing with last known addresses. In another instance, however, the court held that assessments of litigating hazards or of the relative strengths and weaknesses of legal positions would not result in taxpayers circumventing the law and therefore were not covered by exemption (b)(7)(E). The court also rejected the assertion of exemption (b)(7)(E) for a suggestion that a district could choose in its discretion not to devote its resources to cases of small monetary consequence or involving few taxpayers.

- It may not be asserted for matters publicly available, either through published guidance, the IRM, CCDM, Chief Counsel Notices, or other forms of guidance or instruction.

- It may not be asserted for legal analysis that discusses vulnerabilities in the statute itself. **Note:** On the other hand, it **may** be asserted to withhold vulnerabilities in the IRS's processes and procedures for detecting noncompliance; tolerances that govern (as opposed to suggest) how the IRS's limited compliance resources are used; settlement criteria that would enable taxpayers to structure future transactions with the knowledge that the Service will routinely settle at a certain level, etc.

- Discussions of litigating hazards, settlement criteria or the prospects for concession, in documents where there is no litigation predicate (so that the work product doctrine does not attach), when they affect similarly situated taxpayers and not just the particular taxpayer whose case is the subject of the CCA, may be redacted under FOIA exemption 7E, which protects guidelines for law enforcement investigations which, if disclosed, could reasonably be expected to risk circumvention of law. [2]

- Examples of matters withheld pursuant to exemption (b)(7)(E) are:

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[2] In addition, the Service may assert FOIA exemption 2, which has been interpreted by certain United States Courts of Appeals as reaching predominantly internal guidelines where disclosure is expected to risk circumvention of law. *Crooker v. BATF*, 670 F.2d 1051 (D.C. Cir. 1981) (*en banc*).

V. Other FOIA Exemptions

● In addition to the redactions of taxpayer-identifying information to protect taxpayer confidentiality, and the redactions of attorney-client communications, work product, and (b)(7)(E) information, as discussed above, which the Government litigated in the FSA case, section 3509 of the IRS Restructuring & Reform Act of 1998 also permits the redaction of certain types of information to protect taxpayer business or personal interests and certain legitimate governmental interests, borrowing from other FOIA exemptions. Key among them are:

< **Trade secrets & proprietary information** (Information ordinarily not introduced into the marketplace and which, if disclosed, could cause competitive harm to the owner) -- 5 U.S.C. § 552(b)(4)

< **Sensitive personnel, medical, or similar information** which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy (because the privacy interest outweighs the public interest, as reflective of how the agency transacts its business) -- 5 U.S.C. § 552(b)(6)

< **Law enforcement information which, if disclosed, could reasonably be expected to interfere with open examination, collection, criminal investigation, or judicial proceedings**; *e.g.,* reveal the scope, direction, and limits of the investigation or proceeding; reveal the identity of cooperating witnesses and/or informants; reveal physical and/or testimonial evidence gathered to date and the reliance placed by the Government upon that evidence; reveal litigating strategies or the strengths and weaknesses of the case; reveal transactions being investigated; and reveal the methods and subjects of surveillance. – 5 U.S.C. § 552(b)(7)(A)

VI. Placement of Privileged Material in the/Case Development Section

To ease the process of deleting privileged material from CCA prior to public inspection, attorneys should utilize the macros, the EWORD toolbar, and DOCUMENTUM in preparing CCA. In particular, attorneys should take care to segregate their analysis of the pertinent legal authorities and their applicability to the specific facts of the case (which must be disclosed) from strategic discussions, assessments of litigating hazards and the relative strengths and weaknesses of the IRS's position, recommendations as to the scope and direction of ongoing enforcement activities, and similar privileged matter that may be deleted. Ordinarily, if only the latter type of information is confined to the Case Development Section, the entire Section may be withheld. It is incumbent upon the Counsel office initiating the CCA to ensure that only privileged matter is deleted from the Case Development Section. **Note:** The following types of discussions, even if contained in the Case Development Section, may **not** be deleted:

- Counsel identifies an issue that the taxpayer did not bring up, develops and presents the legal argument in support of it. The content may also direct the agent how to develop the facts to fit within the argument. Only the information that directs the agent how to develop the government's case may be protected by the attorney-client privilege (FOIA exemption 5) or the interference with ongoing law enforcement proceedings exemption (FOIA exemption 7A).

- The taxpayer has brought up an issue that the incoming request parrots. Counsel then provides the IRS's legal analysis in agreement or disagreement with the taxpayer's position. Counsel's analysis might also reveal the assessment of the relative strengths and weaknesses of the government's case. Only the assessments of the strengths and weaknesses (but not a generic statement that there are strengths and weaknesses) can be protected under the interference with ongoing law enforcement exemption, or, to the extent the litigation predicate is established, the work product doctrine.

- The incoming request for a CCA raises an issue and offers an analysis in support of a conclusion, which Counsel then repeats in the CCA and provides reasons for agreement (or disagreement). None of this material is privileged under any exemption because there is no strategic advice as to how to develop the government's case. It is simply a statement of what we believe the law is, or is not.

- Counsel states that 'there are always litigating hazards with a particular Code section given its undeveloped state in the case law," "litigating hazards are minimal," "there is little or no case authority to support the government's position (even if there is no case authority on the taxpayer's side)," or that the "lack of factual development creates hazards" without any greater specificity. This material cannot be protected because it does not offer any concrete or specific advice. Moreover, the work product doctrine will only apply to specific litigation hazard assessments when the litigation predicate is met. In cases where the predicate is absent, you may rely on FOIA exemptions 2 or 7E to redact specific hazard discussions.

- The incoming request raises an issue and offers an analysis; Counsel agrees that the analysis is correct but without more factual development Counsel cannot be certain. The CCA does not provide any guidance to the field as to how to develop the missing facts. None of this material is privileged because there is no strategic advice as to how to develop the government's case. Legal analysis of the issue, including our view whether it is a correct or incorrect legal position, is the type of material we are obligated to disclose.

- The CCA suggests that if the field wants to develop a specified issue (which is acknowledged elsewhere in the publicly available portion of the CCA), it should come back with another request for legal advice. Since the CCA contains no

specific suggestions for factual development, there is nothing privileged to delete. The mere fact of the need for more factual development is not privileged.

- A discussion that begins “depending on the facts ….”, which is then followed by legal analysis, cannot be protected from disclosure because the advice does not explain to the field how the government ought to develop those facts. Since there is no advice as to the scope and direction of the enforcement activity or pending litigation, it is in the nature of straightforward legal analysis that we must make publicly available.

- The incoming request for a CCA outlines a difference of opinion between Examination and Appeals, which is parroted back in the CCA and then Counsel offers its analysis. The fact of this internal difference of opinion, with nothing more, is not a basis for deletion. It merely reflects different viewpoints of what the law, or is not, which is not privileged matter. However, if there is any content that reflects other deliberations that are going on; for example, this difference of opinion has resulted in the consideration of a regulation project, then references to those deliberations may be deleted on the basis the deliberative process privilege.

As a general rule, the publicly available portion of the CCA should reflect not only a discussion of the applicable legal authorities, but the attorney’s application of the law to the facts of the particular case. Opinions regarding the relative strengths and weaknesses of this legal analysis, specific assessments of litigating hazards, and recommendations as to how the field agent or field attorney should proceed are appropriately placed in the non-publicly available Case Development Section.

IRS's and the Administration's Discretionary Disclosure Policies

Even if a privilege may be asserted under the law, the Government may exercise discretion to release the information. In an October 2001 memorandum, then Attorney General Ashcroft outlined a revised approach for responding to requests for disclosure of agency records under the FOIA. Under the approach described in the Attorney General's memorandum, the Department of Justice committed to defending an agency's determination to withhold agency records pursuant to a FOIA exemption unless the determination lacks a "sound legal basis" or prejudices the ability of other agencies to protect their records. The Ashcroft memorandum expressed equal commitment to the fundamental values of government accountability, safeguarding national security, enhancing law enforcement effectiveness, protecting sensitive business information, preserving personal privacy, and enhancing candid and complete agency deliberations. The Ashcroft memorandum stated that any discretionary decision to disclose information protected under the FOIA should be made only "after full and deliberate consideration of the institutional, commercial, and personal privacy interests that could be implicated by disclosure of the information."

In April 2004, the Commissioner issued Policy Statement 11-13, Freedom of Information Act Requests, which adopts the language of the Attorney General's memorandum as the Service's own discretionary disclosure policy. Both policy statements emphasize a commitment to full compliance with the FOIA while recognizing the importance of protecting sensitive institutional, commercial, and personal interests that can be implicated in government records, such as the need to safeguard national security, enhance law enforcement effectiveness, respect business confidentiality, protect internal agency deliberations, and preserve personal privacy. In accordance with that policy, any discretionary decision to release information protected under the FOIA should be made only upon full and deliberate consideration of all interests involved. *See* Policy Statement P-11-13, Freedom of Information Act Requests, at www.irs.gov/pub/irs-utl/policystatement11-13.pdf .

In April 2005, the Office of Chief Counsel announced its implementation of the discretionary disclosure policy for Counsel records in Notice CC-2005-005 (April 8, 2005), at www.irs.gov/pub/irs-ccdm/cc-2005-005.pdf. This Notice provides that it is inappropriate to waive applicable discretionary privileges or FOIA exemptions for CCA and any privileged documents that are generated during the preparation of any CCA.

The Ashcroft Memorandum and Policy Statement 11-13 are reprinted, below.

Attorney General Ashcroft's FOIA Memorandum

October 12, 2001

MEMORANDUM FOR HEADS OF ALL FEDERAL DEPARTMENTS AND AGENCIES

SUBJECT: The Freedom of Information Act

As you know, the Department of Justice and this Administration are committed to full compliance with the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2000). It is only through a well-informed citizenry that the leaders of our nation remain accountable to the governed and the American people can be assured that neither fraud nor government waste is concealed.

The Department of Justice and this Administration are equally committed to protecting other fundamental values that are held by our society. Among them are safeguarding our national security, enhancing the effectiveness of our law enforcement agencies, protecting sensitive business information and, not least, preserving personal privacy.

Our citizens have a strong interest as well in a government that is fully functional and efficient. Congress and the courts have long recognized that certain legal privileges ensure candid and complete agency deliberations without fear that they will be made public. Other privileges ensure that lawyers'' deliberations and communications are kept private. No leader can operate effectively without confidential advice and counsel. Exemption 5 of the FOIA, 5 U.S.C. § 552(b)(5), incorporates these privileges and the sound policies underlying them.

I encourage your agency to carefully consider the protection of all such values and interests when making disclosure determinations under the FOIA. Any discretionary decision by your agency to disclose information protected under the FOIA should be made only after full and deliberate consideration of the institutional, commercial, and personal privacy interests that could be implicated by disclosure of the information.

In making these decisions, you should consult with the Department of Justice's Office of Information and Privacy when significant FOIA issues arise, as well as with our Civil Division on FOIA litigation matters. When you carefully consider FOIA requests and decide to withhold records in whole or in part, you can be assured that the Department of Justice will defend your decisions unless they lack a sound legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records.

This memorandum supersedes the Department of Justice's FOIA Memorandum of October 4, 1993, and it likewise creates no substantive or procedural rights enforceable at law.

Policy Statement 11-13

The Internal Revenue Service is committed to full compliance with the Freedom of Information Act (FOIA), 5 U.S.C. § 552. The FOIA provides that agency records are to be made available to the public unless required or permitted to be withheld. The FOIA accommodates the countervailing interests in disclosure and nondisclosure. The IRS is committed to administering the FOIA with respect to agency records in a manner consistent with preserving the fundamental values held by our society, including public accountability, safeguarding national security, enhancing the effectiveness of law enforcement agencies and the decision-making processes, protecting sensitive business information, and protecting personal privacy.

If information is not prohibited from disclosure, IRS personnel shall consider whether, as an exercise of administrative discretion, the information should be released or withheld. Any discretionary decision to release information protected under the FOIA should be made only after full and deliberate consideration of the institutional (i.e., public accountability, safeguarding national security, law enforcement effectiveness, and candid and complete deliberations), commercial, and personal privacy interests that could be implicated by disclosure of the information.

The administrative cost and impact on operations involved in furnishing information in response to a FOIA request is not to be a material factor in deciding to deny a request unless the cost or impact would be so substantial as to seriously impair IRS operations.

This policy creates no substantive or procedural rights enforceable at law.

Office of Chief Counsel Directives Manual and Chief Counsel Notices

For more information on the processing of Chief Counsel Advice for public inspection under section 6110 (and exceptions to that processing), please refer to:

CCDM 33.1.3 (August 4, 2005)

Notice CC-2004-012 (February 19, 2004)

Notice CC-2003-022 (July 1, 2003)

Notice CC-2002-026 (May 16, 2002)

Notice N(35)000-143a (February 16, 1999)

Notice N(35)000-158a (November 25, 1998)

APPENDIX

(i)

Section 6110. Public inspection of written determinations.

(a) General rule.

Except as otherwise provided in this section, the text of any written determination and any background file document relating to such written determination shall be open to public inspection at such place as the Secretary may by regulations prescribe.

(b) Definitions.

For purposes of this section-

(1) Written determination.

(A) In general. The term "written determination" means a ruling, determination letter, technical advice memorandum, or Chief Counsel advice.

(B) Exceptions. Such term shall not include any matter referred to in subparagraph (C) or (D) of section 6103(b)(2).

(2) Background file document. The term "background file document" with respect to a written determination includes the request for that written determination, any written material submitted in support of the request, and any communication (written or otherwise) between the Internal Revenue Service and persons outside the Internal Revenue Service in connection with such written determination (other than any communication between the Department of Justice and the Internal Revenue Service relating to a pending civil or criminal case or investigation) received before issuance of the written determination.

(3) Reference and general written determinations.

(A) Reference written determination. The term "reference written determination" means any written determination which has been determined by the Secretary to have significant reference value.

(B) General written determination. The term "general written determination" means any written determination other than a reference written determination.

(c) Exemptions from disclosure.

Before making any written determination or background file document open or available to public inspection under subsection (a), the Secretary shall delete -

(1) the names, addresses, and other identifying details of the person to whom the written determination pertains and of any other person, other than a person with respect to whom a notation is made under subsection (d)(1), identified in the written determination or any background file document;

(2) information specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy, and which is in fact properly classified pursuant to such Executive order;

(3) information specifically exempted from disclosure by any statute (other than this title) which is applicable to the Internal Revenue Service;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) information the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(6) information contained in or related to examination, operating, or condition reports prepared by, or on behalf of, of for use of an agency responsible for the regulation or supervision of financial institutions; and

(7) geological and geophysical information and data, including maps, concerning wells.

The Secretary shall determine the appropriate extent of such deletions and, except in the case of intentional or willful disregard of this subsection, shall not be required to make such deletions (nor be liable for failure to make deletions) unless the Secretary has agreed to such deletions or has been ordered by a court (in a proceeding under subsection (f)(3)) to make such deletions.

(d) Procedures with regard to third party contacts.

(1) Notations. If, before issuance of a written determination, the Internal Revenue Service receives any communication (written or otherwise) concerning such written determination, any request for such determination, or any other matter involving such written determination from a person other than an employee of the Internal Revenue Service or the person to whom such written determination pertains (or his authorized representative with regard to such written determination), the Internal Revenue Service shall indicate, on the written determination open to public inspection,

the category of the person making such communication and the date of such communication.

(2) Exception. Paragraph (1) shall not apply to any communication made by the Chief of Staff of the Joint Committee on Taxation.

(3) Disclosure of identity. In the case of any written determination to which paragraph (1) applies, any person may file a petition in the United States Tax Court or file a complaint in the United States District Court for the District of Columbia for an order requiring that the identity of any person to whom the written determination pertains be disclosed. The court shall order disclosure of such identity if there is evidence in the record from which one could reasonably conclude that an impropriety occurred or undue influence was exercised with respect to such written determination by or on behalf of such person. The court may also direct the Secretary to disclose any portion of any other deletions made in accordance with subsection (c) where such disclosure is in the public interest. If a proceeding is commenced under this paragraph, the person whose identity is subject to being disclosed and the person about whom a notation is made under paragraph (1) shall be notified of the proceeding in accordance with the procedures described in subsection (f)(4)(B) and shall have the right to intervene in the proceeding (anonymously, if appropriate).

(4) Period in which to bring action. No proceeding shall be commenced under paragraph (3) unless a petition is filed before the expiration of 36 months after the first day that the written determination is open to public inspection.

(e) Background file documents.

Whenever the Secretary makes a written determination open to public inspection under this section, he shall also make available to any person, but only upon the written request of that person, any background file document relating to the written determination.

(f) Resolution of disputes relating to disclosure.

(1) Notice of intention to disclose. Except as otherwise provided by subsection (i), the Secretary shall upon issuance of any written determination or upon receipt of a request for a background file document, mail a notice of intention to disclose such determination or document to any person to whom the written determination pertains (or a successor in interest, executor, or other person authorized by law to act for or on behalf of such person).

(2) Administrative remedies. The Secretary shall prescribe regulations establishing administrative remedies with respect to-

(A) requests for additional disclosure of any written determination or any background file document, and

(B) requests to restrain disclosure.

(3) Action to restrain disclosure.

(A) Creation of remedy. Any person-

(i) to whom a written determination pertains (or a successor in interest, executor, or other person authorized by law to act for or on behalf of such person), or who has a direct interest in maintaining the confidentiality of any such written determination or background file document (or portion thereof),

(ii) who disagrees with any failure to make a deletion with respect to that portion of any written determination or any background file document which is open or available to public inspection, and

(iii) who has exhausted his administrative remedies as prescribed pursuant to paragraph (2),

may, within 60 days after the mailing by the Secretary of a notice of intention to disclose any written determination or background file document under paragraph (1), together with the proposed deletions, file a petition in the United States Tax Court (anonymously, if appropriate) for a determination with respect to that portion of such written determination or background file document which is to be open to public inspection.

(B) Notice to certain persons. The Secretary shall notify any person to whom a written determination pertains (unless such person is the petitioner) of the filing of a petition under this paragraph with respect to such written determination or related background file document, and any such person may intervene (anonymously, if appropriate) in any proceeding conducted pursuant to this paragraph. The Secretary shall send such notice by registered or certified mail to the last known address of such person within 15 days after such petition is served on the Secretary. No person who has received such a notice may thereafter file any petition under this paragraph with respect to such written determination or background file document with respect to which such notice was received.

(4) Action to obtain additional disclosure.

(A) Creation of remedy. Any person who has exhausted the administrative remedies prescribed pursuant to paragraph (2) with respect to a request for disclosure may file a petition in the United States Tax Court or a

complaint in the United States District Court for the District of Columbia for an order requiring that any written determination or background file document (or portion thereof) be made open or available to public inspection. Except where inconsistent with subparagraph (B), the provisions of subparagraphs (C), (D), (E), (F), and (G) of section 552(a)(4) of title 5, United States Code, shall apply to any proceeding under this paragraph. The Court shall examine the matter de novo and without regard to a decision of a court under paragraph (3) with respect to such written determination or background file document, and may examine the entire text of such written determination or background file document in order to determine whether such written determination or background file document or any part thereof shall be open or available to public inspection under this section. The burden of proof with respect to the issue of disclosure of any information shall be on the Secretary and any other person seeking to restrain disclosure.

(B) Intervention. If a proceeding is commenced under this paragraph with respect to any written determination or background file document, the Secretary shall, within 15 days after notice of the petition filed under subparagraph (A) is served on him, send notice of the commencement of such proceeding to all persons who are identified by name and address in such written determination or background file document. The Secretary shall send such notice by registered or certified mail to the last known address of such person. Any person to whom such determination or background file document pertains may intervene in the proceeding (anonymously, if appropriate). If such notice is sent, the Secretary shall not be required to defend the action and shall not be liable for public disclosure of the written determination or background file document (or any portion thereof) in accordance with the final decision of the court.

(5) Expedition of determination. The Tax Court shall make a decision with respect to any petition described in paragraph (3) at the earliest practicable date.

(6) Publicity of Tax Court proceedings. Notwithstanding sections 7458 and 7461, the Tax Court may, in order to preserve the anonymity, privacy, or confidentiality of any person under this section, provide by rules adopted under section 7453 that portions of hearings, testimony, evidence, and reports in connection with proceedings under this section may be closed to the public or to inspection by the public.

(g) Time for disclosure.

(1) In general. Except as otherwise provided in this section, the text of any written determination or any background file document (as modified under subsection (c)) shall be open or available to public inspection-

(A) no earlier than 75 days, and no later than 90 days, after the notice provided in subsection (f)(1) is mailed, or, if later

(B) within 30 days after the date on which a court decision under subsection (f)(3) becomes final.

(2) Postponement by order of court. The court may extend the period referred to in paragraph (1)(B) for such time as the court finds necessary to allow the Secretary to comply with its decision.

(3) Postponement of disclosure for up to 90 days. At the written request of the person by whom or on whose behalf the request for the written determination was made, the period referred to in paragraph (1)(A) shall be extended (for not to exceed an additional 90 days) until the day which is 15 days after the date of the Secretary's determination that the transaction set forth in the written determination has been completed.

(4) Additional 180 days. If-

(A) the transaction set forth in the written determination is not completed during the period set forth in paragraph (3), and

(B) the person by whom or on whose behalf the request for the written determination was made establishes to the satisfaction of the Secretary that good cause exists for additional delay in opening the written determination to public inspection,

the period referred to in paragraph (3) shall be further extended (for not to exceed an additional 180 days) until the day which is 15 days after the date of the Secretary's determination that the transaction set forth in the written determination has been completed.

(5) Special rules for certain written determinations, etc. Notwithstanding the provisions of paragraph (1), the Secretary shall not be required to make available to the public –

(A) any technical advice memorandum, any Chief Counsel advice, and any related background file document involving any matter which is the subject of a civil fraud or criminal investigation or jeopardy or termination assessment until after any action relating to such investigation or assessment is completed, or

(B) any general written determination and any related background file document that relates solely to approval of the Secretary of any adoption or change of--

(i) the funding method or plan year of a plan under section 412,

(ii) a taxpayer's annual accounting period under section 442,

(iii) a taxpayer's method of accounting under section 446(e), or

(iv) a partnership or partner's taxable year under section 706,

but the Secretary shall make any such written determination and related background file document available upon the written request of any person after the date on which (except for this subparagraph) such determination would be open to public inspection.

(h) Disclosure of prior written determinations and related background file documents.

(1) In general. Except as otherwise provided in this subsection, a written determination issued pursuant to a request made before November 1, 1976, and any background file document relating to such written determination shall be open or available to public inspection in accordance with this section.

(2) Time for disclosure. In the case of any written determination or background file document which is to be made open or available to public inspection under paragraph (1)-

(A) subsection (g) shall not apply, but

(B) such written determination or background file document shall be made open or available to public inspection at the earliest practicable date after funds for that purpose have been appropriated and made available to the Internal Revenue Service.

(3) Order of release. Any written determination or background file document described in paragraph (1) shall be open or available to public inspection in the following order starting with the most recent written determination in each category:

(A) reference written determinations issued under this title;

(B) general written determinations issued after July 4, 1967; and

(C) reference written determinations issued under the Internal Revenue Code of 1939 or corresponding provisions of prior law.

General written determinations not described in subparagraph (B) shall be open to public inspection on written request, but not until after the written determinations referred to in subparagraphs (A), (B), and (C) are open to public inspection.

Any line marked with a # is for Official Use Only

(4) Notice that prior written determinations are open to public inspection. Notwithstanding the provisions of subsections (f)(1) and (f)(3)(A), not less than 90 days before making any portion of a written determination described in this subsection open to public inspection, the Secretary shall issue public notice in the Federal Register that such written determination is to be made open to public inspection. The person who received a written determination may, within 75 days after the date of publication of notice under this paragraph, file a petition in the United States Tax Court (anonymously, if appropriate) for a determination with respect to that portion of such written determination which is to be made open to public inspection. The provisions of subsections (f)(3)(B), (5), and (6) shall apply if such a petition is filed. If no petition is filed, the text of any written determination shall be open to public inspection no earlier than 90 days, and no later than 120 days, after notice is published in the Federal Register.

(5) Exclusion. Subsection (d) shall not apply to any written determination described in paragraph (1).

(i) Special Rules for Disclosure of Chief Counsel advice.

(1) Chief Counsel Advice Defined.

(A) In general. For purposes of this section, the term "Chief Counsel advice" means written advice or instruction, under whatever name or designation, prepared by any national office component of the Office of Chief Counsel which-

(i) is issued to field or service center employees of the Service or regional or district employees of the Office of Chief Counsel, and

(ii) conveys-

(I) any legal interpretation of a revenue provision,

(II) any Internal Revenue Service or Office of Chief Counsel position or policy concerning a revenue provision,

(III) any legal interpretation of State law, foreign law, or other Federal law relating to the assessment or collection of any liability under a revenue provision.

(B) Revenue provision defined. For purposes of subparagraph (A), the term "revenue provision" means any existing or former internal revenue law, regulation, revenue ruling, revenue procedure, other published or unpublished guidance, or tax treaty, either in general or as applied to specific taxpayers or groups of specific taxpayers.

(2) Additional documents treated as Chief Counsel advice. The Secretary may by regulation provide that this section shall apply to any advice or instruction prepared and issued by the Office of Chief Counsel which is not described in paragraph (1).

(3) Deletions for Chief Counsel advice. In the case of Chief Counsel advice open to public inspection pursuant to this section-

(A) paragraphs (2) through (7) of subsection (c) shall not apply, but

(B) the Secretary may make deletions of material in accordance with subsections (b) and (C) of section 552 of title 5, United States Code, except that in applying subsection (b)(3) of such section, no statutory provision of this title shall be taken into account.

(4) Notice of intention to disclose.

(A) Nontaxpayer-specific Chief Counsel advice. In the case of Chief Counsel advice which is written without reference to a specific taxpayer or group of specific taxpayers-

(i) subsection (f)(1) shall not apply, and

(ii) the Secretary shall, within 60 days after the issuance of the Chief Counsel advice, complete any deletions described in subsection (c)(1) or paragraph (3) and make the Chief Counsel advice, as so edited, open for public inspection.

(B) Taxpayer-specific Chief Counsel advice. In the case of Chief Counsel advice which is written with respect to a specific taxpayer or group of specific taxpayers, the Secretary shall, within 60 days after the issuance of the Chief Counsel advice, mail the notice required by subsection (f)(1) to each such taxpayer. The notice shall include a copy of the Chief Counsel advice on which is indicated the information that the Secretary proposes to delete pursuant to subsection (c)(1). The Secretary may also delete from the copy of the text of the Chief Counsel advice any of the information described in paragraph (3), and shall delete the names, addresses, and other identifying details of taxpayers other than the person to whom the advice pertains, except that the Secretary shall not delete from the copy of the Chief Counsel advice that is furnished to the taxpayer any information of which that taxpayer was the source.

(j) Civil Remedies.

(1) Civil action. Whenever the Secretary-

(A) fails to make deletions required in accordance with subsection (c), or

(B) fails to follow the procedures in subsection (g) or (i)(4)(B),

the recipient of the written determination or any person identified in the written determination shall have as an exclusive civil remedy an action against the Secretary in the United States Claims, which shall have jurisdiction to hear any action under this paragraph.

(2) Damages. In any suit brought under the provisions of paragraph (1)(A) in which the Court determines that an employee of the Internal Revenue Service intentionally or willfully failed to delete in accordance with subsection (c) or in any suit brought under subparagraph (1)(B) in which the Court determines that an employee intentionally or willfully failed to act in accordance with subsection (e), the United States shall be liable to the person in an amount equal to the sum of-

(A) actual damages sustained by the person but in no case shall be person be entitled to receive less than the sum of $1000, and

(B) the costs of the action together with reasonable attorney's fees as determined by the Court.

(k) Special provisions.

(1) Fees. The Secretary is authorized to assess actual costs-

(A) for duplication of any written determination or background file document open or available to the public under this section, and

(B) incurred in searching for and making deletions required under subsection (c)(1) or (i)(3) from any written determination or background file document which is available to public inspection only upon written request.

The Secretary shall furnish any written determination or background file document without charge or at a reduced charge if he determines that waiver or reduction of the fees is in the public interest because the furnishing of such determination or background file document can be considered as primarily benefiting the general public.

(2) Records disposal procedures. Nothing in this section shall prevent the Secretary from disposing of any general written determination or background file document described in subsection (b) in accordance with established records disposition procedures, but such disposal shall, except as provided in the following sentence, occur not earlier than 3 years after such written determination is first made open to public inspection. In the case of any general written determination described in subsection (h), the Secretary may dispose of such determination and any related

background file document in accordance with such procedures but such disposal shall not occur earlier than 3 years after such written determination is first made open to public inspection if funds are appropriated for such purpose before January 20, 1979, or not earlier than January 20, 1979, if funds are not appropriated before such date. The Secretary shall not dispose of any reference written determination and related background file documents.

(3) Precedential status. Unless the Secretary otherwise determines by regulations, a written determination may not be used or cited as precedent. The preceding sentence shall not apply to change the Precedential status (if any) of written determinations with regard to taxes imposed by subtitle D of this title.

(l) Section not to apply.

This section shall not apply to-

(1) any matter to which section 6104 or 6105 applies, or

(2) any-

(A) written determination issued pursuant to a request made before November 1, 1976, with respect to the exempt status under section 501(a) of an organization described in section 501(c) or (d), the status of an organization as a private foundation under section 509(a), or the status of an organization as an operating foundation under section 4942(j)(3),

(B) written determination described in subsection (g)(5)(B) issued pursuant to a request made before November 1, 1976,

(C) determination letter not otherwise described in subparagraph (A), (B), or (E) issued pursuant to a request made before November 1, 1976,

(D) background file document relating to any general written determination issued before July 5, 1967, or

(E) letter or other document described in section 6104(a)(1)(B)(iv) issued before September 2, 1974.

(m) Exclusive remedy.

Except as otherwise provided in this title, or with respect to a discovery order made in connection with a judicial proceeding, the Secretary shall not be required by any Court to make any written determination or background file document open or available to public inspection, or to refrain from disclosure of any such documents.

Note: Subsection (d) of section 3509 of the IRS Restructuring and Reform Act of 1998 provides as follows:

(d) Effective Dates.-

(1) In General.- Except as otherwise provided in this subsection, the amendments made by this section shall apply to any Chief Counsel advice issued more than 90 days after the date of the enactment of this Act.

(2) Transition Rules.- The amendments made by this section shall apply to any Chief Counsel advice issued after December 31, 1985, and before the 91st day after the date of the enactment of this Act by the offices of the associate chief counsel for domestic, employee benefits and exempt organizations, and international, except that any such Chief Counsel advice shall be treated as made available on a timely basis if such advice is made available for public inspection not later than the following dates:

(A) One year after the date of the enactment of this Act, in the case of all litigation guideline memoranda, service center advice, tax litigation bulletins, criminal tax bulletins, and general litigation bulletins.

(B) Eighteen months after such date of enactment, in the case of field service advice and technical assistance to the field issued on or after January 1, 1994.

(C) Three years after such date of enactment, in the case of field service advice and technical assistance to the field issued on or after January 1, 1992, and before January 1, 1994.

(D) Six years after such date of enactment, in the case of any other Chief Counsel advice issued after December 31, 1985.

(3) **Documents Treated as Chief Counsel Advice.-** If the Secretary of the Treasury by regulation provides pursuant to section 6110(i)(2) of the Internal Revenue Code of 1986, as added by this section, that any additional advice or instruction issued by the Office of Chief Counsel shall be treated as Chief Counsel advice, such additional advice or instruction shall be made available for public inspection pursuant to section 6110 of such Code, as amended by this section, only in accordance with the effective date set forth in such regulation.

(4) **Chief Counsel Advice to be Available Electronically**.- The Internal Revenue Service shall make any Chief Counsel advice issued more than 90 days after the date of the enactment of this Act and made available for public inspection pursuant to section 6110 of such Code, as amended by this section, also available by computer telecommunications within 1 year after issuance.

INTERNAL REVENUE SERVICE RESTRUCTURING AND REFORM ACT OF 1998

H.R. Conf. Rep. No. 599, 105th Cong. 2d Sess. 298-302 (June 24, 1998) (to accompany H.R. 2676)

Title III. Taxpayer Protection and Rights
...
F. Disclosures to Taxpayers

9. Disclosure of Chief Counsel advice

Present Law

Section 6110 of the Code provides for the public inspection of written determinations, i.e., rulings, determination letters, and technical advice memoranda. The IRS issues annual revenue procedures setting forth the procedures for requests for these various forms of written determinations and participation in the formulation of such determinations (footnote omitted). Under section 6110 and the regulations promulgated thereunder, the taxpayer who is the subject of a written determination can participate in the redaction of the documents to ensure that the taxpayer's privacy is protected and that sensitive private information is removed before the determination is publicly disclosed. In the event there is disagreement as to the information to be deleted, the section provides for litigation in the courts to resolve such disagreements.

One of the Office of Chief Counsel's major roles is to advise Internal Revenue Service personnel on legal matters at all stages of case development. The Office of Chief Counsel thus issues various forms of written legal advice to field agents of the IRS and to its own field attorneys that do not fall within the current definition of "written determination" under section 6110. Traditionally, field Counsel offices provided most of the assistance to the IRS, usually at IRS field offices, but since 1988, the National Office of Chief Counsel has been rendering more assistance to field Counsel and IRS offices. National Office of Chief Counsel assistance in taxpayer-specific cases is generally called "field service advice." The taxpayers who are the subject of field service advice generally do not participate in the process, leading some tax commentators to express concern that the field service advice process was displacing the technical advice process.

There has been controversy as to whether the Office of Chief Counsel must release forms of advice other than written determinations pursuant to the Freedom of Information Act (FOIA). In *Tax Analysts v. IRS*, 117 F.3d 607 (D.C. Cir. 1997), the D.C. Circuit held that the legal analysis portions of field service advice created in the context of specific taxpayers' cases are not "return information," as defined by section 6103(b)(2), and must

be released under FOIA. The court also found that portions of field service advice issued in docketed cases may be withheld as privileged attorney work product. However, some issues remain outstanding. Although the extent to which such materials must be released is still in dispute, it is clear that they are not expressly covered by section 6110. As a consequence, there exists no mechanism by which taxpayers may participate in the administrative process of redacting their private information from such documents or to resolve disagreements in court.

House Bill

No provision.

Senate Amendment

No provision.

Conference Agreement

In general

The conferees believe that written documents issued by the National Office of Chief Counsel to its field components and field agents of the IRS should be subject to public release in a manner similar to technical advice memoranda or other written determinations. In this way, all taxpayers can be assured of access to the "considered view of the Chief Counsel's national office on significant tax issues." 117 F.3d at 617. Creating a structured mechanism by which these types of legal memoranda are open to public inspection will increase the public's confidence that the tax system operates fairly and in an even-handed manner with respect to all taxpayers.

As part of making these documents public, however, the privacy of the taxpayer who is the subject of the advice must be protected. Any procedure for making such advice public must therefore include adequate safeguards for taxpayers whose privacy interests are implicated. There should be a mechanism for taxpayer participation in the deletion of any private information. There should also be a process whereby appropriate governmental privileges may be asserted by the IRS and contested by the public or the taxpayer.

The provision amends section 6110 of the Code, establishing a structured process by which the IRS will make certain work products, designated as "Chief Counsel Advice," open to public inspection on an ongoing basis. It is designed to protect taxpayer privacy while allowing the public inspection of these documents in a manner generally consistent with the mechanism of section 6110 for the public inspection of written determinations. In general, the provision operates by establishing that Chief Counsel Advice are written determinations subject to the public inspection provisions of section 6110.

Definition of Chief Counsel Advice

For purposes of this provision, Chief Counsel Advice is written advice or instruction prepared and issued by any national office component of the Office of Chief Counsel to held employees of the Service or the Office of Chief Counsel that convey certain legal interpretations or positions of the IRS or the Office of Chief Counsel concerning existing or former revenue provisions. For these purposes, the term "revenue provisions" includes, without limitation: the Internal Revenue Code itself; regulations, revenue rulings, revenue procedures, or other administrative interpretations or guidance, whether published or unpublished (including, for example, other Chief Counsel Advice); tax treaties; and court decisions and opinions. Chief Counsel Advice also includes legal interpretations of State law, foreign law, or other federal law relating to the assessment or collection of liabilities under revenue provisions.

Chief Counsel Advice may interpret or set forth policies concerning the internal revenue laws either in general or as applied to specific taxpayers or groups of specific taxpayers. The definition is, however, not meant to include advice written with respect to nontax matters, including but not limited to employment law, conflicts of interest, or procurement matters.

The new statutory category of written determination encompasses certain existing categories of advisory memoranda or instructions written by the National Office of Chief Counsel to field personnel of either the IRS or the Office of Chief Counsel. Specifically, Chief Counsel Advice includes field service advice, technical assistance to the field, service center advice, litigation guideline memoranda, tax litigation bulletins, general litigation bulletins, and criminal tax bulletins. The definition applies not only to the case-specific field service advice issued from the offices of the Associate Chief Counsel (International), Associate Chief Counsel (Employee Benefits and Exempt Organizations), and the Assistant Chief Counsel (Field Service), which were at issue in the *Tax Analysts* decision, but any case-specific or noncase-specific written advice or instructions issued by the National Office of Chief Counsel to field personnel of either the IRS or the Office of Chief Counsel.

Moreover, Chief Counsel Advice includes any documents created subsequent to the enactment of this provision that satisfy the general statutory definition, regardless of their name or designation. Chief Counsel Advice also includes any such advice or instruction even if the organizations currently issuing them are reorganized or reconstituted as part of any IRS restructuring.

The new subsection covers written advice "issued" to field personnel of either the IRS or the Office of Chief Counsel in its final form. With respect to Chief Counsel Advice, issuance occurs when the Chief Counsel Advice has been approved within the national office component of the office of Chief Counsel in which the Chief Counsel Advice was proposed, signed by the person authorized to do so (usually the Assistant Chief Counsel or a Branch Chief), and sent to the field. Chief Counsel Advice does not include written recordations of informal telephonic advice by the National Office of Chief Counsel to field personnel of either the IRS or the Office of Chief Counsel. Drafts of Chief Counsel Advice

sent to the field for review, criticism, or comment prior to approval within the National Office also need not be made public. However, Chief Counsel Advice may be treated as issued even if supplemental advice is contemplated. The Secretary is expected to issue regulations to clarify the distinction between issuance as it applies to Chief Counsel Advice and as it applies to other documents disclosed under section 6110.

The provision also allows the Secretary to promulgate regulations providing that additional types of advice or instruction issued by the Office of Chief Counsel (or components of the Office of Chief Counsel, such as regional or local Counsel offices) will be treated as Chief Counsel Advice and subject to public inspection pursuant to this provision. No inference shall be drawn from the failure of the Secretary to treat additional types of advice or instruction as Chief Counsel Advice in determining whether such advice or instruction is to be disclosed under FOIA.

As with other written determinations, Chief Counsel Advice may not be used or cited as precedent, except as the Secretary otherwise establishes by regulation.

Redaction process

Under this provision, Chief Counsel Advice will be redacted prior to their public release in a manner similar to that provided for private letter rulings, technical advice memoranda, and determination letters. Specific taxpayers or groups of specific taxpayers who are the subject of Chief Counsel Advice will be afforded the opportunity to participate in the process of redacting the Chief Counsel Advice prior to their public release.

In addition, the new provision affords additional protection for certain governmental interests implicated by Chief Counsel Advice. Information may be redacted from Chief Counsel Advice under sub-sections (b) and (c) of the Freedom of Information Act, 5 U.S.C. sec. 552 (except, with respect to 5 U.S.C. sec. 552(b)(3), only material required to be withheld under a Federal statute, other than title 26, may be redacted), as those provisions have been, or shall be, interpreted by the courts of the United States. For those deletions that are discretionary, such as those under FOIA section 552(b)(5) it is expected that the Office of Chief Counsel and the IRS will apply any discretionary standards applicable to federal agencies in general or the Chief Counsel or the IRS in particular [footnote omitted].

Under new section 6110(i), as with current section 6110(c)(1), identifying details consisting of names, addresses, and any other information that the Secretary determines could identify any person, including the taxpayer's representative, will be redacted, after the participation of the taxpayer in the redaction process. In some situations, information included in a Chief Counsel Advice (other than a name or address) may not identify a person as of the time the advice is made open to public inspection, but that information, together with information that is expected to be disclosed by another source at a later date, will serve to identify a person. Consequently, in deciding whether a Chief Counsel Advice contains identifying information, the Secretary is to take into account information that is available to the public at the time that the advice is made open to public inspection as well as information that is expected to be publicly available from other sources within a

reasonable time after the Chief Counsel Advice is made open to public inspection. Generally, it is intended that the standard the IRS is to use in determining whether information will identify a person is a standard of a reasonable person generally knowledgeable with respect to the appropriate community. The standard is not, however, to be one of a person with inside knowledge of the particular taxpayer.

As under current section 6110, taxpayers who are the subject of Chief Counsel Advice, as well as members of the public, will be afforded the opportunity to challenge judicially the redaction determinations by the Secretary.

Relation to present law

The public inspection of Chief Counsel Advice is to be accomplished only pursuant to the rules and procedures set forth in section 6110, as amended, and not under those of any other provision of law, such as FOIA. This provision is not intended to affect the disclosure under FOIA, or under any other provision of law, of any documents not included within the definition of Chief Counsel Advice in new sections 6110(i)(1) and (i)(2). The only FOIA exemption affected by this provision is 5 U.S.C. section 552(b)(3), to the extent that it incorporates section 6103 of the Code. The timetable and the manner in which existing Chief Counsel Advice may ultimately be open to public inspection shall be governed by this provision, except that the provision is inapplicable to Chief Counsel Advice that any federal district court has, prior to the date of enactment, ordered be disclosed. Disclosure of any documents that are subject to such a court order is to proceed pursuant to the order rather than this provision. Finally, no inference is intended with respect to the disclosure, under FOIA or any other provision of law, of any other documents produced by the Office of Chief Counsel that are not included in the definition of Chief Counsel Advice.

Effective date

The provision applies to Chief Counsel Advice issued more than ninety days after enactment. In addition, the provision contains certain rules governing disclosure of any document fitting the definition of Chief Counsel Advice issued after 1985 and before 90 days after the date of enactment by the offices of the associate chief counsel for domestic, employee benefits and exempt organizations, and international. It sets forth a schedule for the IRS to release such Chief Counsel Advice over a six year period after the date of enactment. Finally, additional advice or instruction that the Secretary determines by regulations to treat as Chief Counsel Advice shall be made public pursuant to this provision in accordance with the effective dates set forth in such regulations.

Section 6110 was amended by the Ticket to Work and Work Incentives Improvement Act of 1999, Pub. L. 106-170.

Ticket To Work and Work Incentives Improvement Act of 1999, Conf. Rep. 106-478, 106th Cong., 1st Sess. (Nov. 17, 1999):

Act Sec 521

Present Law

* * *

Section 6110 and the Freedom of Information Act

With certain exceptions, section 6110 makes the text of any written determination the IRS issues available for public inspection. A written determination is any ruling, determination letter, technical advice memorandum, or Chief Counsel advice. Once the IRS makes the written determination publicly available, the background file documents associated with such written determination are available for public inspection upon request. The Code defines "background file documents" as any written material submitted in support of the request. Background file documents also include any communications between the IRS and persons outside the IRS concerning such written determination that occur before the IRS issues the determination.

Before making them available for public inspection, section 6110 requires the IRS to delete specific categories of sensitive information from the written determination and background file documents [footnote omitted]. It also provides judicial and administrative procedures to resolve disputes over the scope of the information the IRS will disclose. In addition, Congress has also wholly exempted certain matters from section 6110's public disclosure requirements [footnote omitted]. Any part of a written determination or background file that is not disclosed under section 6110 constitutes "return information" [footnote omitted].

The Freedom of Information Act (FOIA) lists categories of information that a federal agency must make available for public inspection [footnote omitted]. It establishes a presumption that agency records are accessible to the public. The FOIA, however, also provides nine exemptions from public disclosure. One of those exemptions is for matters specifically exempted from disclosure by a statute other than the FOIA if the exempting statute meets certain requirements [footnote omitted]. Section 6103 qualifies as an exempting statute under this FOIA provision. Thus, returns and return information that section 6103 deems confidential are exempt from disclosure under the FOIA.

Section 6110 is the exclusive means for the public to view IRS written determinations. Section 6110(m). If section 6110 covers the written determination, then the public cannot use the FOIA to obtain that determination.

Advance Pricing Agreements

The Advance Pricing Agreement ("APA") program is an alternative dispute resolution program conducted by the IRS, which resolves international transfer pricing issues prior to the filing of the corporate tax return. Specifically, an APA is an advance agreement establishing an approved transfer pricing methodology entered into among the taxpayer, the IRS, and a foreign tax authority. The IRS and the foreign tax authority generally agree to accept the results of such approved methodology. Alternatively, an APA also may be negotiated between just the taxpayer and the IRS; such an APA establishes an approved transfer pricing methodology for U.S. tax purposes. The APA program focuses on identifying the appropriate transfer pricing methodology; it does not determine a taxpayer's tax liability. Taxpayers voluntarily participate in this program.

To resolve the transfer pricing issues, the taxpayer submits detailed and confidential financial information, business plans and projections to the IRS for consideration. Resolution involves an extensive analysis of the taxpayer's functions and risks. Since its inception in 1991, the APA program has resolved more than 180 APAs, and approximately 195 APA requests are pending.

Currently pending in the U.S. District Court for the District of Columbia are three consolidated lawsuits asserting that APAs are subject to public disclosure under either section 6110 or the FOIA (footnote omitted). Prior to this litigation and since the inception of the APA program, the IRS held the position that APAs were confidential return information protected from disclosure by section 6103 (footnote omitted). On January 11, 1999, the IRS conceded that APAs are "rulings" and therefore are "written determinations" for purposes of section 6110 (footnote omitted). Although the court has not yet issued a ruling in the case, the IRS announced its plan to publicly release both existing and future APAs. The IRS then transmitted existing APAs to the respective taxpayers with proposed deletions. It has received comments from some of the affected taxpayers. Where appropriate, foreign tax authorities have also received copies of the relevant APAs for comment on the proposed deletions. No APAs have yet been released to the public.

Some taxpayers asserted that the IRS erred in adopting the position that APAs are subject to section 6110 public disclosure. Several had sought to participate as amici in the lawsuit to block the release of APAs. They are concerned that release under section 6110 could expose them to expensive litigation to defend the deletion of the confidential information from their APAs. They are also concerned that the section 6110 procedures are insufficient to protect the confidentiality of their trade secrets and other financial and commercial information.

House Bill

No provision, but H.R. 2923, as approved by the Committee on Ways and Means, amends section 6103 to provide that APAs and related background information are confidential return information under section 6103. Related background information is meant to include: the request for an APA, any material submitted in support of the request, and any communication (written or otherwise) prepared or received by the Secretary in connection with an APA, regardless of when such communication is prepared or received. Protection is not limited to agreements actually executed; it includes material received and generated in the APA process that does not result in an executed agreement.

Further, APAs and related background information are not "written determinations" as that term is defined in section 6110. Therefore, the public inspection requirements of section 6110 do not apply to APAs and related background information. A document's incorporation in a background file, however, is not intended to be grounds for not disclosing an otherwise disclosable document from a source other than a background file.

H.R. 2923 requires that the Treasury Department prepare and publish an annual report on the status of APAs. The annual report is to contain the following information:

* * *

Effective date.-The provision is effective on the date of enactment; accordingly, no APAs, regardless of whether executed before or after enactment, or related background file documents, can be released to the public after the date of enactment. It requires the Treasury Department to publish the first annual report no later than March 30, 2000.

Senate Amendment

No provision.

Conference Agreement

The conference agreement includes H.R. 2923.

There were two amendments to section 6110 as part of the Community Renewal Tax Relief Act of 2000, Pub. L. 106-554.

Conference Committee Report (H.R. Conf. Rep. No. 106-1033):

Act Sec 304(c)

Present Law

* * *

Section 6110 and section 7121

Section 6110 of the Code provides for the disclosure of written determinations. With certain exceptions, section 6110 makes the text of any written determination the Internal Revenue Service ("IRS") issues available for public inspection. A written determination is any ruling, determination letter, technical advice memorandum, or Chief Counsel advice. The IRS is required to redact certain material before making these documents publicly available [footnote omitted]. Among the information to be redacted is information specifically exempted from disclosure by any statute (other than Title 26) that is applicable to the IRS. Once the IRS makes the written determination publicly available, the background file documents associated with such written determination are available for public inspection upon written request. Section 6110 defines "background file document" as any written material submitted by the taxpayer or other requester in support of the request. Background file documents also include any communication between the IRS and persons outside the IRS concerning such written determination that occur before the IRS issues the determination.

Section 6110 was added to the Code in 1976. The legislative history provided that a written determination would not be considered a ruling, technical advice memorandum, or determination letter, unless the document satisfies three criteria:

(1) The document recites the relevant facts;
(2) The document explains the applicable provisions of law; and
(3) The document shows the application of law to the facts.

[H.R. Rep. 94-658, at 315 (1976)].

The legislative history further provided that section 6110 "does not require public disclosure of a closing agreement entered into between the IRS and the taxpayer which finally determines the taxpayer's tax liability with respect to a taxable year. Your committee understands that a closing agreement is generally the result of a negotiated settlement and, as such, does not necessarily represent the IRS view of the law. Your committee intends, however, that the closing agreement exception is not to be used as a means of avoiding public disclosure of determinations which, under present practice, would be issued in a form which would be open to public inspection [under the bill]."

Any line marked with a # is for Official Use Only

Closing agreements are entered into under the authority of section 7121. Closing agreements finally and conclusively settle a tax issue between the IRS and a taxpayer. Closing agreements may (1) determine a taxpayer's entire tax liability for a previous tax period; or (2) fix the tax treatment of one or more specific items affecting tax liability for any tax period. Thus, closing agreements may settle the treatment of a specific item for periods ending after the execution of the agreement. A single closing agreement may cover both the determination of a taxpayer's entire tax liability for a previous tax period and fix the tax treatment of specific items for any tax period.

Freedom of Information Act

The Freedom of Information Act ("FOIA"), enacted in 1966, established a statutory right to access government information. While the purpose of section 6103 is to restrict access to returns and return information, the basic purpose of the FOIA is to ensure that the public has access to government documents. In general, the FOIA provides that any person has a right of access to Federal agency records, except to the extent that such records (or portions thereof) are protected from disclosure by one of nine exemptions or by one of three special law enforcement record exclusions. Exemption 3 of the FOIA allows the withholding of information prohibited from disclosure by another statute if certain requirements are met [5 U.S.C. § 552(b)(3)]. The right of access is enforceable in court.

Pending FOIA requests and litigation involving IRS records

Records covered by treaty secrecy clauses

A publisher of tax related material and commentary has made a FOIA request for the disclosure of competent authority agreements. The request has been pending since March 14, 2000 [footnote omitted]. The IRS has not denied the request, nor has it produced any documents responsive to the request. At this time, no suit has been filed to compel disclosure of these documents, although such a suit may be brought in the future.

In connection with a separate request, the IRS was used under the FOIA to compel disclosure of Field Service Advice memoranda ("FSAs"). [*Tax Analysts v. IRS,* 117 F.3d 607 (D.C. Cir. 1997)]. FSAs are prepared by attorneys in the IRS National Office of the Office of Chief Counsel. They are prepared in response to requests from IRS field personnel for legal guidance, usually with respect to issues pertaining to a particular taxpayer. FSAs usually contain a statement of issues, facts, legal analysis and conclusions. The primary purpose of FSAs is to ensure that IRS field personnel apply the law correctly and uniformly. The D.C. Circuit determined that FSAs are subject to disclosure. However, the court remanded the case to district court to address assertions of privilege, including those based on treaty secrecy. A decision on this issue by the district court is still pending. [*Tax Analysts v. IRS*, No. 94-CV-923 (GK) (D.D.C.).]

Prefiling agreements

On February 11, 2000, the IRS Issued Notice 2000-12, in which the IRS established a pilot program for “Pre-filing Agreements.” Under this program, large businesses may request a review and resolution of specific issues relating to tax returns they expect to file between September and December of 2000. The purpose of the program is to enable taxpayers and the IRS to resolve issues that are likely to be disputed in post-filing audits. Examples of such issues include: (1) asset valuation and the allocation of a business’s purchase or sale price among the assets acquired or sold; (2) the identification and documentation of hedging transactions; and (3) the determination of ‘market’ for taxpayers using the lower of cost or market method of inventory valuation in situations involving inactive markets. The program is intended to address issues for which the law is settled.

In Notice 2000-12, the IRS stated that pre-filing agreements are closing agreements entered into pursuant to section 7121. As such, the notice provides that the information generated or received by the IRS during the pre-filing agreement process constitutes return information. The notice further provides that pre-filing agreements are not written determinations as defined in section 6110, nor are they subject to disclosure under the FOIA.

Several pre-filing agreements have been completed. A FOIA request for these agreements has not been made.

House Bill

No provision. However, H.R. 5542 affirms that closing and similar agreements, and information exchanged and agreements reached pursuant to a tax treaty, are confidential. Further, the provision clarifies that such protected documents are not to be disclosed under the FOIA or section 6110.

* * *

Interaction with FOIA and section 6110

Under the provision, closing agreements and similar agreements would not be considered written determinations for purposes of section 6110 and, thus, would not be subject to public disclosure. Such agreements would be defined as return information under section 6103 and, therefore, such documents would be protected from disclosure pursuant to Exemption 3 of the FOIA in conjunction with section 6103.

In addition, under the provision, section 6110 would not apply to material covered by section 6105. In the litigation over FSAs, there has been some dispute as to whether treaties qualify as statutes for purposes of withholding information pursuant to

Exemption 3 of the FOIA. The conferees believe that treaties are the equivalent of statutes for purposes of Exemption 3 of the FOIA. Section 6105 satisfies Exemption 3 of the FOIA. Taxpayer-specific tax convention information concerning a taxpayer's tax liability, such as taxpayer-specific competent authority agreements, would be exempt from the FOIA as both return information under section 6103 and information protected from disclosure by tax convention under section 6105. Agreements not relating to a particular taxpayer, and other tax convention information related to such agreements, could be disclosed under FOIA if it is determined that the disclosure would not impair tax administration.

Effective Date

The provision applies to disclosures on, or after, the date of enactment, and thus, applies to all agreements in existence on, or created after, the date of enactment.

Senate Amendment

No provision.

Conference Agreement

The conference agreement follows H.R. 5542.

Act sec 313 Amendments relating to the Internal Revenue Service Restructuring and Reform Act of 1998

Conference Committee Report (H.R. CONF. REP. NO. 106-1033)

House Bill

No provision. However, H.R. 5542 includes tax technical corrections [footnote omitted]. Except as otherwise provided, the technical corrections contained in the bill generally are effective as if included in the originally enacted related legislation. ...

* * *

Other issues

* * *

Compliance.-Section 3509 of the IRS Restructuring and Reform Act of 1998 expanded the disclosure rules of section 6110 to also cover Chief Counsel advice (sec. 6110(i)). This is a conforming change related to ongoing investigations. The provision adds to section 6110(g)(5)(A), after the words "technical advice memorandum," "or Chief Counsel advice."

* * *

Senate Amendment

No provision.

Conference Agreement

The conference agreement follows H.R. 5422.