



Chief Counsel  
**PROCEDURE &  
ADMINISTRATION**

# Disclosure & Privacy Law Reference Guide

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## **To the Reader:**

This reference guide updates and replaces the Disclosure Litigation and Reference Book last revised in 2011. It covers the primary disclosure laws that affect the Internal Revenue Service (I.R.C. §§ 6103 and 6110, the Freedom of Information Act (FOIA), and the Privacy Act of 1974), related statutes, and testimony authorization procedures. Together, these laws represent efforts by the Congress to strike a balance between a citizen's expectation of privacy and an open and effective government. Guidance on legal matters concerning these disclosure laws is provided by the Office of the Associate Chief Counsel (Procedure & Administration). This office is also responsible for defending litigation filed pursuant to I.R.C. §§ 6103 and 6110, FOIA, and the Privacy Act.

Electronic distribution of judicial opinions has provided wide access to decisions that the issuing courts did not view as important or precedential. Although this guide cites to "unpublished" cases by reference to the federal reporter's table citation followed by an applicable electronic or specialized reporter citation number, court rules often instruct that decisions a court has affirmatively designated not to be published should not be cited at all or only under severely limited circumstances. They are included in this guide to elucidate the courts' reasoning on the various legal issues outlined herein for which there is a relatively sparse body of case law. Before you cite a decision that the deciding court has labeled "unpublished" or "non-precedential" you should consult that court's rules on this point. We have not cited to multiple reporters when there is more than one source for an opinion, but the default preference for electronically available opinions is Westlaw.

Obviously, correct legal advice concerning the matters addressed in this guide depends upon the facts of each question. This guide was prepared for reference purposes only; it may not be used or cited as authority for setting or sustaining a legal position.

## CHAPTER 1

### PART I: HISTORY AND OVERVIEW – I.R.C. § 6103

#### I. HISTORY OF TAX CONFIDENTIALITY LAWS<sup>1</sup>

##### A. Introduction

Except for a few periods in our history, taxpayers' tax information generally has not been available to the public – disclosure has been restricted. Congress has used two basic approaches in determining whether, and under what circumstances, tax information could be disclosed. Under the first approach, taken prior to 1977, tax information was considered a "public record," but was only open to inspection under Treasury regulations approved by the President or under presidential order. Under this scheme, the Executive Branch essentially created all the rules regarding disclosure.

By the mid 1970s, there was increased congressional and public concern about the widespread use of tax information by government agencies for purposes unrelated to tax administration. This concern culminated with the enactment of section 6103, passed as part of the Tax Reform Act of 1976. Pub. L. No. 94-455, 90 Stat. 1520 (1976) (Tax Reform Act codified at scattered sections of 7, 26, and 46 U.S.C.). There, Congress eliminated much of the executive discretion concerning the disclosure of returns or return information. With this second approach, Congress established a new statutory scheme under which returns and return information are confidential and not subject to disclosure except to the extent explicitly provided by the Internal Revenue Code. Although there have been many amendments to the law since that time, the basic statutory scheme established in 1976 remains in place today.

##### B. Publicity of Tax Returns

The history of tax information confidentiality may be traced to the Civil War Income Tax Act of 1862,<sup>2</sup> when tax information was posted on courthouse doors

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<sup>1</sup> Much of the information in this chapter was taken from *Report on Administrative Procedures of the Internal Revenue Service*, S. Doc. No. 94-266, at 821-1028 (1975); HOWARD M. ZARITSKY, CONG. RESEARCH SERV., 74- 211A, LEGISLATIVE HISTORY OF TAX RETURN CONFIDENTIALITY: SECTION 6103 OF THE INTERNAL REVENUE CODE OF 1954 AND ITS PREDECESSORS (1974); Richard F. Janssen, *Income Tax Snooping Through History*, WALL ST. J., May 6, 1970, at 18; and Mitchell Rogovin, *Privacy and Income Tax Returns*, WASH. POST, Oct. 13, 1974, at C4.

<sup>2</sup> Act of July 1, 1862, ch. 109, 12 Stat. 432, 437. Ambiguities in that provision regarding public inspection led Congress, in 1864, to explicitly permit public inspection of the assessment list:

It shall be the duty of the assessor . . . to submit the proceedings of the assessors . . . and the annual lists taken and returned as aforesaid, to the inspection of any and all persons who may apply for that purpose. (continued on next page)

and sometimes published in newspapers to promote taxpayer surveillance of neighbors. For the next 70 years, there was debate in Congress as to the effect of public disclosure on the tax system and to societal interests in general.

## 1. 1866 - 1913

In 1866, Congress debated prohibiting publication of assessment lists in the newspapers, but the proposal failed principally because many congressmen believed that publication of the assessed tax would assist in preventing tax fraud.

In 1870, the Commissioner prohibited newspaper publication of the annual list of assessments, but the list itself remained available for public inspection.<sup>3</sup> The Revenue Act of 1870 confirmed this directive.<sup>4</sup> Two years later, in part because of problems stemming from publicity of tax returns, the income tax law was allowed to expire. When the income tax was reinstated by the Revenue Act of 1894, Congress affirmatively prohibited both the printing and the publishing in any manner of any income tax return unless otherwise provided by law, and provided criminal sanctions for unlawful disclosure.<sup>5</sup> In 1895, the Supreme Court declared the income tax unconstitutional in Pollock v. Farmers' Loan and Trust Co., 157 U.S. 429 (1895). After this decision, according to one commentator, the cause of confidentiality received its ultimate victory, the burning of all tax returns.

It was not until the enactment of the Payne-Aldrich Tariff Act of 1909,<sup>6</sup> which imposed a special excise tax on corporations, that the question of tax return publicity was raised anew. Paragraph six of section 38 of that Act seemed to provide that corporate returns were fully public, but paragraph seven imposed a penalty for the disclosure of any information obtained by a U.S. employee in the discharge of his duties.<sup>7</sup> The

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Act of June 30, 1864, ch. 173, 13 Stat. 218, 228.

<sup>3</sup> Circular Letter to Assessors-Publication of the Annual list of Assessment on Income Returns to be Discontinued, Internal Revenue Record and Customs Journal, Vol. XI, Number 15 (Apr. 5, 1870).

<sup>4</sup> Act of July 14, 1870, ch. 255, 16 Stat. 256, 259.

<sup>5</sup> Income Tax Act of August 15, 1894, ch. 349, 28 Stat. 509.

<sup>6</sup> Act of August 5, 1909, 36 Stat. 11,116.

<sup>7</sup> Section 38 of the legislation read, in part, as follows:

Sixth. When the assessment shall be made, as provided in this section, the returns, together with any corrections thereof which may have been made by the Commissioner, shall be filed in the office of the Commissioner of Internal Revenue and *shall constitute public records and be open to inspection as such.*

Seventh. It shall be unlawful for any collector, deputy collector, agent, clerk, or other officer or employee of the United States to divulge or make known in any manner (continued on next page)

legislative history does little to illuminate these apparently conflicting provisions. Since, however, the Payne-Aldrich legislation did not provide any funds for the examination of returns filed pursuant to the Act, it became necessary, in 1910, to appropriate them. During the debate on the Appropriations Act of 1910, considerable light was shed upon the congressional intention behind the 1909 legislation.

The prevailing opinion was that paragraph six of the 1909 legislation was intended to make corporate tax returns "public records," that were open to public inspection.<sup>8</sup> Many believed that public inspection of corporate tax returns would be of great assistance in the supervision and control of corporate entities. There was considerable fear of the power of corporations at that time.

The contrary minority view acknowledged that the 1909 legislation made tax returns public documents. However, paragraph seven of the law made it a criminal offense for any government officer or employee to release material contained in these public documents without special instruction from the President. If, the argument proceeded, the public access granted by paragraph six had been entirely unfettered, paragraph seven would not have imposed criminal sanctions for divulging information without the President's consent. This illogical result was taken to mean that tax returns had not been opened to indiscriminate public inspection but only to persons having a proper interest in the returns.<sup>9</sup>

Although there was disagreement over what was intended by the 1909 legislation, it was universally conceded that it altogether failed to open corporate returns to the public. Some blame this result on poor draftsmanship. Others thought the failure lay in the lack of an appropriation to provide clerks to do the publicizing. At any rate, a majority did conclude that another approach was necessary. An amendment to the provision in the 1910 Appropriations Act resulted.

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whatever not provided by law to any person any information obtained by him in the discharge of his official duty, or to divulge or make known in any manner not provided by law any document received, evidence taken, or report made under this section except upon the special direction of the President; and any offense against the foregoing provision shall be a misdemeanor and be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding one year, or both, at the discretion of the court. (Emphasis added).

<sup>8</sup> "The truth is, however, that the intention was to provide complete publicity of the returns made by these corporations." 45 CONG. REC. 4137 (1910) (Comments of Rep. Fitzgerald).

<sup>9</sup> "It will be noted that the law does not provide the returns shall be subject to public inspection, but that the returns shall become public records and open to inspection as such . . . the mere branding of these instruments as public records did not carry with it the right of indiscriminate public inspection." 45 CONG. REC. 4136 (1910) (Comments of Rep. Smith).

The 1910 legislation, which appropriated funds for the necessary classifying, indexing, and processing of corporate returns, also stated:

[A]ny and all such returns shall be open to inspection only upon the order of the President under rules and regulations to be prescribed by the Secretary of the Treasury and approved by the President.<sup>10</sup>

The debate surrounding the 1910 Act plainly indicates that Congress intended by the quoted provision to back away from the fully "public" treatment of corporate returns. Some Congressmen argued for full publicity, as opposed to publicity only at the whim of the Administration, as provided by the bill. The majority, however, chose the approach that returns would be made public only on the order of the President.

Left standing from the 1909 Act was the notion that returns constitute "public records" open to public inspection. The 1910 effort to revise congressional intent merely added on the seemingly contradictory and confusing concept that these "public" records would be available only upon order of the President.

## **2. Income Tax Law of 1913**

Even though the 1910 Act had two rather inconsistent threads, Congress wove both of them into the Income Tax Law of 1913. In pertinent part, it provided:

(G)(d) When the assessment shall be made, as provided in this section, the returns, together with any corrections thereof which may have been made by the Commissioner, shall be filed in the office of the Commissioner of Internal Revenue and shall constitute public records and be open to inspection as such: Provided, that any and all such returns shall be open to inspection only upon the order of the President, under rules and regulations to be prescribed by the Secretary of the Treasury and approved by the President.<sup>11</sup>

The 1913 Congress thereby merged the mismatching philosophies from the 1909 Act and the 1910 amendment. Although there was, through the years, some change in language, the basic pattern adopted in 1913 remained part of the law until 1976.

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<sup>10</sup> Act of June 17, 1910, ch. 197, 36 Stat. 468, 494.

<sup>11</sup> Income Tax Law of 1913, Pub. L. No. 63-13, II(G)(d), 28 Stat. 114, 72.



### 3. 1913 - 1976

The enactment of each revenue act subsequent to 1913 was, at least through 1934, accompanied by debate on the question of whether individual and corporate returns should be made fully public. Two main arguments were made in favor of making tax returns public:

1. publicity in the affairs of businesses generally is appropriate and would serve to end improper trade policies, business methods, and conduct; and
2. publicity would assure fuller and more accurate reporting by taxpayers.

The proponents of full disclosure obtained their fundamental philosophy from a speech by former President Benjamin Harrison who, before the Union League Club of Chicago in 1898, stated:

Each citizen has a personal interest, a pecuniary interest in the tax return of his neighbor. We are members of a great partnership, and it is the right of each to know what every other member is contributing to the partnership and what he is taking from it.<sup>12</sup>

The other point of view, consistently taken over the years by the Department of the Treasury, opposed the publicity of tax information. Secretary of the Treasury Andrew Mellon articulated this position when he stated that:

While the government does not know every source of income of a taxpayer and must rely upon the good faith of those reporting income, still in the great majority of cases this reliance is entirely justifiable, principally because the taxpayer knows that in making a truthful disclosure of the sources of his income, information stops with the government. It is like confiding in one's lawyer.<sup>13</sup>

Secretary Mellon later suggested:

There is no excuse for the publicity provisions except the gratification of idle curiosity and filling of newspaper space at the time the information is released.<sup>14</sup>

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<sup>12</sup> Mitchell Rogovin, *Privacy and Income Tax Returns*, WASH. POST (Oct. 13, 1974), at C4.

<sup>13</sup> *Hearings on Revenue Revision Before the House Ways and Means Comm.*, 69th Cong. 8-9 (1925).

<sup>14</sup> S. REP. NO. 94-266, at 1039 n.51 (*citing Hearings on Revenue Revision Before the House Ways and Means Comm.*, 69th Cong. 8-9 (1925)).

The proponents of full disclosure had a limited victory in 1924. The Revenue Act of 1924 provided that the Commissioner would:

as soon as practicable in each year cause to be prepared and made available to public inspection . . . lists containing the name and . . . address of each person making an income tax return . . . together with the amount of income tax paid by such person.<sup>15</sup>

As a result of the 1924 Act, newspapers devoted pages to publishing the taxes paid by taxpayers, and the right of newspapers to publish these lists was upheld by the Supreme Court.<sup>16</sup> The Revenue Act of 1926, however, removed the provision requiring that the amount of tax be made public while leaving the requirement that a list be published containing the name and address of each person making an income tax return.<sup>17</sup>

In 1934, after a widely publicized income tax evasion scandal, Congress enacted another form of limited disclosure. The Revenue Act of 1934 contained a provision for the mandatory filing of a so-called "pink slip" with the taxpayer's return.<sup>18</sup> The pink slip was to set forth the taxpayer's gross income, total deductions, net income and tax payable. The pink slip was to be open to public inspection. Fueled by images of kidnappers sifting through pink slips looking for worthwhile victims, the provision was repealed even before it took effect.<sup>19</sup>

From 1934 until 1976 there was no substantial change in the statute respecting the disclosure of tax returns. The pre-1976 statute was thus very much the product of the 1909 and 1910 legislation, continuing with the oddity of "public" records only open to inspection under regulations or orders of the President.

### **C. Disclosure to Government Agencies**

Although corporate returns were, in 1910, made available to the public, as well as to other government agencies, individual returns were kept within Treasury until 1920. In 1920, individual returns joined corporate returns as being generally available to federal agencies.<sup>20</sup> The 1930s saw a new trend of more general

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<sup>15</sup> Act of June 2, 1924, ch. 234, 43 Stat. 253, 293. One news article reported that in 1924, within 24 hours after it was announced that tax lists were ready for inspection, Internal Revenue officers throughout the country were besieged by applications from promoters, salespeople, and advertisers.

<sup>16</sup> U.S. v. Dickey, 268 U.S. 378 (1925).

<sup>17</sup> Act of Feb. 26, 1926, ch. 27, 44 Stat. 9, 51-52.

<sup>18</sup> Revenue Act of 1934, ch. 277, 48 Stat. 680, 698.

<sup>19</sup> Act of April 19, 1935, ch. 74, 49 Stat. 158.

<sup>20</sup> T.D. 2961, 2 C.B. 249 (1920).

access being granted to specific agencies as well as to congressional committees. The 1940s, 1950s, and 1960s were marked by almost unrestrained growth in the use of tax returns by government agencies. During this time, tax returns became a generalized governmental asset. The public, however, was denied access.

#### **D. Summary 1866 - 1970**

This history of disclosure reveals the existence of a statute that, in all significant respects, went unchanged since 1910. Thus, the story is one of the exercise of discretion granted by a Congress unwilling to define precisely the policy to be followed. Having ceded discretion to the President and an agency headed by his designee, the expanded uses of tax information was not surprising. Indeed, it would have been unrealistic to expect the President to resist agency arguments for access to more information on which to base important decisions even though such information might be neither necessary nor used for their originally intended purposes.

#### **E. Developments in the 1970s**

By the mid 1970s, Congress became increasingly concerned about the disclosure and use of information gathered from and about citizens by federal agencies.<sup>21</sup> The events leading to the revision of the tax disclosure laws in 1976 can, however, be directly traced to Executive Orders 11697<sup>22</sup> and 11709,<sup>23</sup> issued by President Richard M. Nixon authorizing the Department of Agriculture to inspect the tax returns of all farmers “for statistical purposes.”

In 1973, two subcommittees of the House of Representatives held hearings regarding the Department of Agriculture's need for the tax data disclosed under the authority of the two executive orders.<sup>24</sup> During these hearings, sentiments against the orders were expressed. Officers of the Department of Justice testified that the two orders were prototypes for future orders opening other tax returns to inspection by other agencies. Responding to the adverse sentiment

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<sup>21</sup> This concern led directly to the enactment of the Privacy Act of 1974, 5 U.S.C. § 552a.

<sup>22</sup> Inspection by Department of Agriculture of Income Tax Returns Made Under the Internal Revenue Code of 1954 of Persons Having Farm Operations, 38 Fed. Reg. 1723 (Jan. 18, 1973).

<sup>23</sup> Inspection by Department of Agriculture of Income Tax Returns Made Under the Internal Revenue Code of 1954 of Persons Having Farm Operations, 38 Fed. Reg. 8131 (Mar. 29, 1973) (superseding Exec. Order No. 11,697, narrowing the scope of the return information to be made available to the Department of Agriculture).

<sup>24</sup> *Hearings on Executive Orders 11697 and 11709 Permitting Inspection by the Department of Agriculture of Farmers' Income Tax Returns Before House Subcomm. on Foreign Operations and Government Information of Comm. on Government Operations*, 93rd Cong. (1973).

expressed in these hearings, the President revoked both with Executive Order 11773 on March 21, 1974.<sup>25</sup>

Concern over tax return confidentiality remained after revocation of the two executive orders. The Senate Select Committee on Presidential Campaign Activities (Watergate Committee) hearings revealed that former White House counsel John Dean had sought from the IRS political information on so-called "enemies." Furthermore, it was disclosed that the White House actually was supplied with information about IRS investigations of Howard Hughes and Charles Rebozo. The Committee noted that tax information and income tax audits were commonly requested by White House staff and supplied by IRS personnel.

The House Judiciary Committee investigating the possible impeachment of President Nixon learned of the apparently unauthorized use of IRS tax data by the President. One of the Articles of Impeachment proposed by the Judiciary Committee alleged that President Nixon had:

endeavored to obtain from the Internal Revenue Service, in violation of the constitutional rights of citizens, confidential information contained in income tax returns for purposes not authorized by law.<sup>26</sup>

Congressional interest in tax return confidentiality also manifested itself in 1974 when, as part of the Privacy Act of 1974, Congress ordered the newly established Privacy Protection Study Commission to report to the President and Congress, and suggest restrictions on the disclosure of federal income tax information. This report, issued on June 9, 1976, recommended major changes in the disclosure of tax data. On June 10, 1976, the Senate Finance Committee issued its report on H.R. 10612, the Tax Reform Act of 1976, in which it, too, proposed substantial revisions in the rules governing tax return confidentiality.<sup>27</sup> The Committee's proposal dealt with the same general issues as had the Privacy Protection Study Commission, but it resolved them differently. With few technical changes, the Conference Committee on H.R. 10612 adopted the Senate Finance Committee's version of the tax confidentiality rules as part of the Tax Reform Act of 1976.<sup>28</sup>

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<sup>25</sup> Revoking the Authority of the Department of Agriculture To Inspect Income Tax Returns, 39 Fed. Reg. 10881 (Mar. 22, 1974).

<sup>26</sup> REPORT ON THE IMPEACHMENT OF RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, H.R. REP. NO. 93-1305, at 3 (1974).

<sup>27</sup> S. REP. NO. 94-938 at 315-49, 1976-3 C.B. (Vol. 3) 353-87.

<sup>28</sup> Pub. L. No. 94-455, 90 Stat. 1520 (1976).

## II. PRINCIPAL AREAS OF REVISION IN THE TAX REFORM ACT OF 1976

### A. Congressional Philosophy Behind the 1976 Amendments to I.R.C. § 6103

Congress recognized that the IRS had more information about citizens than any other federal agency and that other agencies routinely sought access to that information. Congress also understood that citizens reasonably expected the IRS would protect the privacy of the tax information they were required to supply. If the IRS abused that reasonable expectation of privacy, the resulting loss of public confidence could seriously impair the tax system.

Although Congress felt that the flow of tax information should be more tightly regulated, not everyone agreed where the lines should be drawn. The debates on accessibility were most heated in the area of nontax criminal law enforcement. One side, led by Senator Long, sought more liberal access rules in order to fight white collar crime, organized crime, and other violations of the law. This side felt "the Justice Department is part of this Federal Government. It is all one Government." The other side, led by Senator Weicker, wanted very restrictive rules. This side recognized that it was cheaper and easier for Justice to come directly to the IRS, but they also believed that when citizens made out their tax returns, they made them out for the IRS and no one else.

Ultimately, Congress amended section 6103 to provide that tax returns and return information are confidential and are not subject to disclosure, except in the limited situations delineated by the Internal Revenue Code. In each area of authorized disclosure, Congress attempted to balance the particular office or agency's need for the information with the citizen's right to privacy, as well as the impact of the disclosure upon continued compliance with the voluntary tax assessment system.<sup>29</sup> In short, Congress undertook direct responsibility for determining the types and manner of permissible disclosures.

### B. Structure of Tax Information Confidentiality Provisions

The Tax Reform Act of 1976 created a comprehensive statutory scheme for the disclosure and use of tax returns and return information. The four basic parts to this statutory scheme are:

- The general rule of section 6103(a) making tax returns and return information confidential except as expressly authorized in the Code. Definitions of key terms, such as return and return information, are in section 6103(b).

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<sup>29</sup> *General Explanation of the Tax Reform Act of 1976*, H.R. 10612, Pub. L. No. 94-455 (JCS-33-76), at 313-16 (J. Comm. Print 1976), 1976-3 C.B. (Vol. 2) 325-28.

- The exceptions to the general rule, detailing permissible disclosures. I.R.C. § 6103(c) – (o).
- Technical, administrative, and physical safeguard provisions to prohibit recipients of returns or return information from using or disclosing the information in an unauthorized manner, and accounting, recordkeeping, and reporting requirements that detail the purposes for which certain disclosures were made to assist in congressional oversight. I.R.C. § 6103(p).
- Criminal penalties, including a felony for the willful unauthorized disclosure of returns or return information and a civil cause of action for the taxpayer whose information has been inspected or disclosed in a manner not authorized by section 6103. I.R.C. §§ 7213 (criminal penalty for unauthorized disclosure) and 7431 (civil damages provision).<sup>30</sup>

### **C. Summary of Disclosure Issues in Tax Reform Act of 1976**

The remainder of this reference guide describes the various disclosures permitted within the statutory framework of the Code. Below is a summary of some of the major issues Congress addressed in the 1976 Act.

#### **1. Congress**

Even though Congress, particularly its tax writing committees, requires access to returns or return information in certain instances to carry out its legislative responsibilities, it decided it could continue to meet these responsibilities under more restrictive disclosure rules than those provided under pre-1976 law.

The Ways and Means Committee, the Finance Committee, and the Joint Committee on Taxation (JCT), can have access upon the written request of their respective chairmen or the Chief of Staff of the JCT. The nontax committees may be furnished returns or return information upon (1) a committee action approving the decision to request such returns, (2) an authorizing resolution of the House or Senate, as the case may be, and (3) the written request by the chairman of the committee on its behalf for disclosure of the information.

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<sup>30</sup> The Taxpayer Browsing Protection Act of 1997 created a misdemeanor for the unauthorized inspection of returns or return information (section 7213A). In addition, in 1996, Public Law 104-294 provided that the unauthorized access of returns or return information in government computer files is a felony under 18 U.S.C. § 1030(a)(2)(B). Pub. L. No. 104-294, 110 Stat. 3488 (1996). See generally Chapter 1, Part III of this guide.

Taxpayers sometime write to a member of Congress with a tax question or problem they are having with the IRS. The member of Congress or other person generally forwards such letters to the IRS and requests that the IRS response be made directly to him or her.

Members of Congress in their individual capacity are entitled to no greater access to returns or return information than any other person inquiring about the tax affairs of a third party. Disclosure of returns or return information to a taxpayer's designee, including a member of Congress inquiring on behalf of a constituent, may be made only in accordance with section 6103. Generally, section 6103 provides that returns and return information are protected from disclosure unless a request or authorization is obtained from the taxpayer. Chapter 4 of the IRM section on Disclosure of Official Information, IRM 11.3.4, contains further instructions concerning disclosures in response to congressional inquiries. See *also* Chapter 2, Part III.

## **2. White House**

The IRS may disclose returns or return information to the President and/or to certain named employees of the White House upon the written request of the President, signed by the President personally. A request must specify, among other things, the reason disclosure is requested. The President (or a duly authorized representative of the Executive Office) and the head of a federal agency also may make a written request for a "tax check" with respect to prospective appointees.

The White House is required to report quarterly to Congress regarding the disclosures of returns or return information made to it. Similarly, federal agencies are required to report on tax checks.

## **3. Nontax Civil Cases**

Section 6103 generally prohibits the disclosure of returns and return information to the Department of Justice (DOJ) or other enforcement agencies in nontax civil cases.

## **4. Government Accountability Office (GAO)**

Section 6103 authorizes the GAO (formerly the General Accounting Office) to inspect returns and return information to the extent necessary in conducting any audit of the IRS, the Bureau of Alcohol, Tobacco, Firearms, and Explosives, DOJ, or the Tax and Trade Bureau, Department of the Treasury which may be required by section 713 of Title 31, United States Code, as proposed by section 117 of the Budget and Accounting Procedures Act of 1950. Congress intended that GAO examine returns

and return information only for the purpose of, and to the extent necessary to serve as a reasonable basis for, evaluating the effectiveness, efficiency and economy of IRS operations and activities. Congress did not intend that GAO would superimpose its judgment upon that of the IRS in specific tax cases.

Section 6103 allows GAO to have access to returns or return information in the possession of any federal agency when it is auditing an agency program or activity involving the use of returns and return information. Furthermore, under certain circumstances, GAO may access returns or return information that a federal agency could have requested for nontax administration purposes.

GAO is to notify the JCT in writing of the subject matter of a planned audit and any plans for inspection of tax returns. GAO can proceed with its audit unless the JCT, by a two thirds vote of its members, vetoes the audit plan within 30 days of receiving written notice of the proposed audit.

Section 6103 also authorizes GAO to review and evaluate federal and state agencies' compliance with the requirements for the use and safeguarding of returns and return information received from the IRS.

Finally, GAO may access returns or return information when it audits IRS operations as an agent of the tax writing committees.

## **5. Inspector General**

In the Internal Revenue Service Restructuring and Reform Act of 1998, Congress created the Office of Treasury Inspector General for Tax Administration (TIGTA), and invested it with all the duties and responsibilities of the former Office of the Chief Inspector. Pursuant to section 6103(h)(1), TIGTA officers and employees whose official tax administration duties require access to returns and return information may access such information in the same manner accorded to other Treasury employees. No written notice of intent to access is required for TIGTA to obtain information.

## **6. Statistical Use**

Congress recognized the importance of returns and return information for other federal agencies' statistical and research functions. Congress decided that returns and return information should be available for statistical use by certain agencies other than the IRS because there did not appear to be any real likelihood that the use of such information by these agencies would, under the procedures and safeguards provided for



by section 6103, result in an abuse of the privacy or other rights of taxpayers.

## **7. Disclosures for Federal Programs**

Section 6103 permits limited disclosures to a number of agencies in defined situations where returns and return information are directly related to programs administered by the agency in question, including the Social Security Administration, the Railroad Retirement Board, the Department of Labor, and the Pension Benefit Guaranty Corporation. Provisions are also made for disclosures to verify income eligibility for certain programs, refund offsets for child support cases, certain unemployment compensation cases, and federal debt collection purposes. Additionally, the Internal Revenue Service Restructuring and Reform Act of 1998 amended section 6103(l) by adding section 6103(l)(17), which requires the IRS to disclose section 6103 protected records to officers and employees of National Archives and Records Administration (NARA), upon written request of the Archivist of the United States, for purposes of the appraisal of such records for destruction or retention. See Pub. L. No. 105-206, 112 Stat. 685 (1998). Such tax data may not be open to the public, however.

## **8. Federal Nontax Crimes and Terrorism**

In 1976, Congress significantly changed the circumstances under which tax information could be shared with, and used by, Federal law enforcement agencies. Believing that the information taxpayers were compelled by the tax laws to disclose to IRS was entitled to the same degree of privacy as information maintained in the taxpayers' homes, Congress imposed a court order mechanism in order for Federal criminal law enforcement agencies to access returns or return information that was furnished to the IRS by taxpayers or their representatives. For return information that was obtained from other sources, a written request would suffice and provisions were also made to allow IRS to share such return information on its own initiative to apprise Federal criminal law enforcement agencies of possible crimes.

After enactment of the Patriot Act in September 2001, Congress recognized the need to permit the IRS to share tax information not only with Federal criminal law enforcement agencies, but also with intelligence agencies, both for purposes of punishing violators and detecting and preventing terrorist activities. The mechanisms for the disclosure of returns and return information for anti-terrorism purposes include the same court-order and written request processes that are used for Federal nontax criminal law enforcement, except Congress also gave the IRS the authority to initiate the *ex parte* court order process. Victims of Terrorism Tax Relief Act of 2001, Pub. L. No. 107-134, § 201, 115 Stat. 2427 (2001);

Tax Extenders and Alternative Minimum Tax Relief Act of 2008, Pub. L. No. 110-343, Div. C, Title IV, § 402(a) and (b), 122 Stat. 3765.

## **9. Recordkeeping (Accounting)**

Section 6103 requires the IRS to maintain a standardized system of permanent records about the use and disclosure of returns and return information. This includes copies of all requests for inspection or disclosure of returns and return information and a record of all inspections and disclosures of such information. The recordkeeping requirements do not apply in certain situations, including disclosures to: the general public (accepted offers in compromise, the amounts of outstanding tax liens, etc.); Treasury (including IRS) employees or DOJ for tax administration and tax litigation purposes; persons with a material interest; persons upon the taxpayer's written consent; the media (taxpayer identity information for unclaimed refunds); and contractors that perform tax administration functions.

In addition to the recordkeeping requirements imposed on the IRS, section 6103 provides generally (with limited exceptions) that each federal and state agency that receives returns or return information is required to maintain a standardized system of permanent records about the use and disclosure of that information. Maintaining such records is a prerequisite to obtaining and continuing to receive returns or return information.

## **10. Safeguards**

Section 6103 provides that the IRS may not furnish returns and return information to another agency unless that agency establishes procedures satisfactory to the IRS for safeguarding the returns or return information it receives. Disclosure to other agencies is conditioned on the recipient: maintaining a secure place for storing the information; restricting access to the information to people to whom disclosure can be made under the law; restricting the use of the information to the purpose for which it was provided; providing other safeguards necessary to keeping the information confidential; and, returning or destroying the information when the agency is finished with it. The IRS must review, on a regular basis, safeguards established by other agencies.

If there are any unauthorized disclosures by employees of the other agency, the IRS may discontinue disclosures of returns or return information to that agency until it is satisfied that the agency took adequate protective measures to prevent a repetition of the unauthorized disclosure. In addition, the IRS may terminate disclosure to any agency if the IRS determines that adequate safeguards are not being maintained by the agency in question.

## 11. Reports to Congress

Because the use of returns or return information for purposes other than tax administration resulted in serious abuses of the rights of taxpayers in the past, and because the potential for abuse necessarily exists in any situation in which returns or return information is disclosed for purposes other than the administration of the federal tax laws, Congress believed that it must closely review the use of returns and return information and the extent to which taxpayer privacy is being protected. In order to permit that review, Congress requires the IRS to make comprehensive annual reports to the JCT as to the use of returns and return information.

Specifically, section 6103 requires the IRS to make a confidential report to the JCT each year on all requests (and the reasons therefor) received for disclosure of returns and return information. The report must include a section for public dissemination that includes a listing of all agencies that received returns and return information, the number of instances in which the IRS made disclosures to them during the year, and the general purposes for which the agencies made the requests. In addition, the IRS is required to file a quarterly report with the tax committees regarding procedures and safeguards followed by recipients of returns and return information.

## 12. Enforcement

Congress concluded that the prior provisions of law designed to enforce the rules against improper disclosure were inadequate, and that the penalties should be increased.

In section 6103(a), Congress explicitly applied the prohibition against disclosure to present and former officers and employees of the United States, and to certain other designated individuals.

Congress amended section 7213 to make a willful violation of the disclosure rules a felony, with a fine up to \$5,000, and up to five years imprisonment. See United States v. Richey, 924 F.2d 857 (9th Cir. 1991); In re Seper (United Liquor Co. v. Gard), 705 F.2d 1499 (9th Cir. 1983); Reporters Comm. for Freedom of the Press v. Am. Tele. and Tele. Co., 593 F.2d 1030 (D.C. Cir. 1978). In 1996, Congress amended 18 U.S.C. § 1030(a)(2) to make the unauthorized access of government computers a felony, *amended by* Pub. L. No. 104-294, 110 Stat. 3488. This provision includes the unauthorized access of returns or return information in government computer files. In 1998, Congress enacted section 7213A to specifically make the unauthorized inspection of returns or return information, whether in paper or computer files, a misdemeanor. See Pub. L. No. 105-206, 112 Stat. 711 (1998).

Before 1982, section 7217 provided civil remedies against individual employees for unauthorized disclosures of returns or return information. Because these remedies stifled some legitimate federal conduct, Congress amended the law and enacted section 7431 establishing a civil remedy against the United States for any taxpayer damaged by an unlawful disclosure of returns or return information by federal employees (codified as amended at 26 U.S.C. § 7431). Because of the difficulty in establishing actual monetary damages sustained by a taxpayer as the result of the invasion of privacy caused by an unlawful disclosure of returns or return information, section 7431 provides for liquidated damages of \$1,000 for each unauthorized disclosure. In the alternative, liability extends to actual damages plus court costs. The statute also provides for punitive damages in addition to actual damages in situations where the unlawful disclosure is willful or is the result of gross negligence.

The law does not provide a remedy for a disclosure or inspection of returns or return information made at the request of the taxpayer or pursuant to a good faith, but erroneous, interpretation of the confidentiality rules. Instead, a disclosure or inspection giving rise to civil liability is limited to situations where the unauthorized disclosure or inspection results from a willful or negligent failure of the person to comply with the law.

### **13. Miscellaneous Disclosure Authority<sup>31</sup>**

Section 6103(a) prohibits the disclosure of returns and return information except to the extent specifically authorized by section 6103, or other sections of the Code. Examples of other sections of the Code that regulate the disclosure of returns or return information in certain circumstances include:

- 274(h)(6) - Caribbean Basin exchange agreements
- 3406 - backup withholding
- 4424 - wagering tax information
- 6104 - exempt organizations and employee plans information
- 6105 - tax convention information
- 6108 - statistical studies

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<sup>31</sup> Many of these Code sections were added either before or after the Tax Reform Act of 1976.

- 6110 - written determinations (letter rulings, determination letters, technical advice memoranda, and Chief Counsel advice)
- 6323(f) - notice of federal tax lien
- 7461 - publicity of Tax Court proceedings

See *also* Chapter I, Part II, Section VI.

### **III. SECTION 3802 OF THE IRS RESTRUCTURING AND REFORM ACT**

Section 3802 of the IRS Restructuring and Reform Act (RRA 98) mandated that the Treasury Department and the JCT conduct studies on the provisions regarding taxpayer confidentiality. The studies were to examine the present protections for taxpayer privacy, any need for third parties to use returns or return information, whether publicizing the names of persons who are legally required to file tax returns but who do not do so would achieve greater levels of voluntary compliance, and the interrelationship between the Freedom of Information Act (FOIA) and section 6103. The JCT published its study on January 28, 2000. STAFF OF THE JOINT COMMITTEE ON TAXATION, 106TH CONG., STUDY OF PRESENT-LAW TAXPAYER CONFIDENTIALITY AND DISCLOSURE PROVISIONS AS REQUIRED BY SECTION 3802 OF THE INTERNAL REVENUE SERVICE RESTRUCTURING AND REFORM ACT OF 1998, JCS-1-00 NO.1, 2 AND 3 (Comm. Print 2000) (<http://www.jct.gov/publications>). Treasury published its study on October 2, 2002, and it is available on the Department of Treasury website at <http://www.treasury.gov/resource-center/tax-policy/Documents/confide.pdf>. These were the first comprehensive reviews of the Code disclosure provisions since the 1976 amendments. Both studies generally endorsed the structure and approach of the current statute, but differed most significantly on the role of contractors' receipt and use of returns and return information.

### **IV. CONCLUSION**

A distinguishing characteristic and, indeed, one of the strengths of American tax administration, is the self assessment feature of the system. Employees of the Office of Chief Counsel and the IRS must be constantly aware that in fostering this system, there must be public confidence with respect to the confidentiality of personal and financial information given to us for tax administration purposes.

Thus, we must administer the disclosure provisions of the internal revenue laws in accordance with the spirit and intent of the law, ever mindful of this public trust. The law makes the confidential relationship between the taxpayer and the IRS quite apparent. By the single act of filing a tax return, a record is created and also a trust. We are responsible for maintaining both.

There is probably no other government agency having as much contact with as many citizens as the IRS in the course of carrying out its responsibility of collecting the

revenue. As a result, a vast majority of our records are confidential in the very real sense that they represent information the American people have provided to their government in confidence. The confidential nature of these records requires that each request for information be evaluated in the light of a considerable body of law and regulations that either authorize or prohibit disclosure. The diversity of our records, the size of our organization, and the complexity of our operations, all contribute to the issues we must consider when performing our official duties.

**PART II: CIVIL DAMAGES FOR UNAUTHORIZED INSPECTION  
AND DISCLOSURE  
I.R.C. § 7431**

**I. CAUSE OF ACTION**

**A. Background**

As discussed in Part I, in 1982, section 7431 replaced section 7217. The purpose of this amendment was to substitute the United States, rather than individual employees, as the proper defendant in an unauthorized disclosure action arising from the conduct of a federal employee. See below, Section V., A., “Proper Party”.

In 1997, section 7431 was amended by the Taxpayer Browsing Protection Act to specifically make damages available for the unauthorized inspection of returns and return information. See Pub. L. No. 105-35, 111 Stat. 1104 (1997). The Act also added subsection 7431(b)(2), which provides for a good faith defense when inspection or disclosure is requested by the taxpayer and subsection 7431(e), which requires the notification of the taxpayer when any person is criminally charged by indictment or information with the offenses of unauthorized inspection or disclosure of that taxpayer's return or return information in violation of section 7213(a), section 7213A, or 18 U.S.C. § 1030(a)(2)(B).

**B. Elements of Claim**

For a taxpayer to prevail under section 7431(a)(1), he must demonstrate that an unauthorized inspection or disclosure of his returns or return information was made by an officer or employee of the United States, the inspection or disclosure was made knowingly or negligently, and that the inspection or disclosure was made in violation of section 6103. Christensen v. United States, 733 F. Supp. 844, 848 (D.N.J. 1990), *aff'd*, 925 F.2d 416 (3d Cir. 1991) (table cite); Fliippo v. United States, 670 F. Supp. 638, 641 (W.D.N.C. 1987), *aff'd mem.*, 849 F.2d 604 (4th Cir. 1988) (table cite).

1. Sharer v. United States, No. Civ. S-98-0116EJG/JFM, 1999 WL 671010, at \*2 (E.D. Cal. Feb. 12, 1999) (plaintiff bears burden of proving unauthorized disclosure of return information).
2. Tobin v. Troutman, No. Civ. A 3: 98-CV-663-H, 1999 WL 501004, at \*4-5 (W.D. Ky. June 8, 1999) (plaintiff failed to state a claim under section 7431 where the information allegedly inspected was retained copies of the taxpayer's returns and workpapers in the taxpayer's home (citing Stokwitz v. United States, 831 F.2d 893 (9th Cir. 1987), *cert. denied*, 485 U.S. 1033 (1988), court ruled the information was not return information because it had not been received by the IRS)).

3. Weiner v. IRS, 789 F. Supp. 655, 656 (S.D.N.Y. 1992) (plaintiff must show: (1) that the disclosure was unauthorized; (2) that the disclosure was made knowingly or by reason of negligence; and, (3) that the disclosure was in violation of section 6103), *aff'd*, 986 F.2d 12 (2d Cir. 1993).
4. Wilkerson v. United States, 67 F.3d 112, 115 (5th Cir. 1995) (section 7431 claim requires plaintiff to prove that the IRS disclosed confidential tax return information either knowingly or negligently and that this disclosure was not authorized by section 6103).

**Note:** The analysis for determining whether an unauthorized disclosure has occurred is as follows:

- a. Was there a disclosure of returns or return information? See Baskin v. United States, 135 F.3d 338, 342-43 (5th Cir. 1998) (IRS special agent's possession and transfer of data to the local police while on temporary assignment to the grand jury did not make the data disclosed "return information" for purposes of section 6103); Stokwitz v. United States, 831 F.2d at 896 (disclosure of the taxpayer's retained copies of returns did not violate section 6103 because the returns did not pass through the IRS).
- b. Was the return or return information disclosed that of the plaintiff/taxpayer? See Section V., I., "Standing," below.
- c. Was the disclosure authorized by some provision in Title 26?
- d. Was the disclosure made knowingly or negligently? See Weiner v. IRS, 789 F. Supp. 655, 656 (S.D. N.Y. 1992) (to hold IRS liable for disclosure through levy resulting from computer error would hold IRS to higher standard than Congress intended in enacting statute); Messinger v. United States, 769 F. Supp. 935, 940 (D. Md. 1991) (mere showing of unauthorized disclosure insufficient to demonstrate negligence) *rejecting* Husby v. United States, 672 F. Supp. 442 (N.D. Cal. 1987) (which held that the fact that an unauthorized disclosure was made is *prima facie* case for section 7431); Christensen v. United States, 733 F. Supp. 844, 854 (D. N.J. 1990) (disclosure resulting from ministerial computer error does not rise to negligence); Timmerman v. Swenson, Civ. No. 4-78-547, 1979 U.S. Dist. LEXIS 10172 at \*6 (D. Minn. Aug. 27, 1979) (under section 7217, court applying duty of due care negligence standard determined that IRS was not negligent when it sent levy to bank as result of clerical error).



## II. GOOD FAITH DEFENSE UNDER I.R.C. § 7431(b)

### A. Statutory Provision

The United States is not liable for unauthorized inspections or unauthorized disclosures of returns or return information that are the result of good faith, but erroneous, interpretations of section 6103. Good faith is generally judged by an objective standard, *i.e.*, whether an IRS employee reasonably would have known of rights provided and of the agency's applicable regulations and internal rules. Although the circuits have split over whether good faith is an affirmative defense or whether bad faith must be pled by the plaintiff in the complaint, the Office of Chief Counsel and the Tax Division have officially adopted the position that good faith is an affirmative defense that must be pled by the government (and not negated by the taxpayer). Compare Davidson v. Brady, 732 F.2d 552, 554 (6th Cir. 1984) (in section 7217 case, court concluded that bad faith was an element of case that plaintiff must allege to state a claim) with McDonald v. United States, 102 F.3d 1009, 1010-11 (9th Cir. 1996) (criticizing Davidson, court held that good faith was an affirmative defense that the government must prove).

### B. Case Law

1. Agbanc v. United States, No. 87-383, slip op. at 18-19 (D. Ariz. Dec. 21, 1988) (error by revenue agent in sending out wrong report did not occur as a result of a good faith but erroneous interpretation of section 6103, but as a result of negligence).
2. Balanced Financial Management, Inc. v. Fay, 662 F. Supp. 100, 106 (D. Utah 1987) (prefiling notification letters issued in compliance with revenue procedure were sent in good faith).
3. Barrett v. United States, 51 F.3d 475, 480 (5th Cir. 1995) (court was not persuaded by the record of testimony at trial that it was necessary to reveal the fact of criminal investigation in circular letters sent to plaintiff's patients; because the special agent did not review section 6103 provisions contained in the IRM prior to sending the letters and, "of paramount importance," did not obtain prior approval of the CID Chief, as provided by the IRM, the court concluded that a reasonable agent would not have violated the express provisions of the manual and, thus, did not act in good faith) *remanded to* 917 F. Supp. 493 (S.D. Tex. 1995), *aff'd*, 100 F.3d 35 (5th Cir. 1996). *Cf.* May v. United States, No. 91-0650-CV-W-9, 1995 WL 761107, at \*6 (W.D. Mo. Oct. 5, 1995) (because letters conformed to IRM provisions, disclosures fell within section 7431(b) good faith provision), *aff'd*, 141 F.3d 1169 (table cite), 1998 WL 71545 (8th Cir. Feb. 23, 1998).

4. Datamatic Servs. Corp. v. United States, No. C-86-6447 EFL, 1987 WL 28603, at \*4-5 (N.D. Cal. Dec. 18, 1987) (because prefiling notification letters followed revenue procedure, good faith defense was available).
5. Diamond v. United States, 944 F.2d 431, 435 (8th Cir. 1991) (although it was improper for special agent to identify himself as an employee of the Criminal Investigation Division in circular letters that he sent to doctor's patients, no liability found because he had followed the IRM).
6. Flippo v. United States, 670 F. Supp. 638, 643 (W.D.N.C. 1987) (plaintiff produced no evidence that revenue agent's actions were in bad faith, as he acted under the assumption that his attempts to contact the petitioner and his servicing of liens and levies for the collection of delinquent taxes were authorized under the Code) *aff'd mem.*, 849 F.2d 604 (4th Cir. 1988) (table cite) (text published by 1988 WL 60765, at \*1 (4th Cir. 1988)).
7. Gandy v. United States, 234 F.3d 281, 286-87 (5th Cir. 2000) (court skipped determination of whether an unauthorized disclosure had occurred, but instead found no liability because agents acted in good faith belief that IRM and section 6103 permitted disclosure; in dicta, court stated that special agents are permitted to show their badges and credentials when conducting third-party interviews).
8. Harris v. United States, 35 Fed. App'x 390, 89 A.F.T.R.2d 2002-2687 (5th Cir. 2002) (affirming lower court finding that revenue officer who disclosed that the plaintiffs had a judgment filed against them for a specific amount had acted in a good faith belief that the disclosure was permitted as a disclosure of information in the public record).
9. Huckaby v. United States, 794 F.2d 1041, 1049, *reh'g denied, clarified*, 804 F.2d 297 (5th Cir. 1986) (revenue officer disclosed return information based upon taxpayer's oral consent; court found that section 6103(c) requires a written consent and because the statute and regulations were clear, revenue officer's failure to follow them could not be a good faith, but erroneous, interpretation of section 6103).
10. Husby v. United States, 672 F. Supp. 442, 445 (N.D. Cal. 1987) (good faith defense applies only to good faith, but erroneous, interpretations of section 6103, not to general defense of good faith errors in deficiency assessments and subsequent collection activities).
11. Ingham v. United States, 167 F.3d 1240, 1245-46 (9th Cir. 1999) (without deciding whether disclosure to a man that his former wife had filed for a refund was authorized by section 6103(h)(4), government

was protected by good faith defense because the IRM instructed agents that such disclosure was permitted).

12. Johnson v. Sawyer, 640 F. Supp. 1126, 1134 (S.D. Tex. 1986) (subsequent history omitted) (public affairs officer failed to contact AUSA, as required by district guidelines, before issuing press release which contained return information; under predecessor to section 7431, failure to follow established procedures formed basis for finding of bad faith).
13. Jones v. United States, 954 F. Supp. 191, 192 (D. Neb. 1997) (subsequent history omitted) (special agent who did not consult either IRM or Code before disclosing to a confidential informant that a search warrant was to be executed the following day at taxpayers' place of business failed to establish a good faith, but erroneous, interpretation of the statute).
14. LeBaron v. United States, 794 F. Supp. 947, 953-54 (C.D. Cal. 1992) (citing Huckaby, found nothing in the statute, case law, or IRS policies or regulations to suggest that the IRS personnel who made the disclosure had interpreted section 6103 in an objectively unreasonable manner).
15. McLarty v. United States, 741 F. Supp. 751, 756-58 (D. Minn. 1990), *on reconsideration*, 784 F. Supp. 1401, 1404 (D. Minn. 1991) (initially adopted a test that contained both objective and subjective components for judging good faith defense; following Diamond, above, issued a subsequent opinion adopting objective standard (*i.e.*, did wrongful disclosure of the plaintiff's return information violate a clearly established statutory right of which a reasonable person would have known), and found that IRS agent and AUSA were presumed to know, as a general matter, that it is improper to disclose return information), *aff'd*, 6 F.3d 545 (8th Cir. 1993).
16. Millenium Marketing Group, LLC v. United States, Civ. No. H-06-962, 2010 WL 1768235, at \*13-20 (S.D. Tex. Feb. 9, 2010) *adopted by* 2010 WL 1485925 (S.D. Tex. Mar. 24, 2010) (disclosures made to plan participants regarding the abusive nature of the tax plan were allowable under section 6103(e), (k), and in the alternative, both Chief Counsel attorneys met the good faith exception under section 7431(b)(1)).
17. Payne v. United States, 289 F.3d 377, 385 (5th Cir. 2002) (district court did not have the benefit of the court's decision in Gandy, above; reversed plaintiff's \$1.5 million judgment and remanded for the district court to apply the Gandy rationale).

**Note:** In a well-reasoned concurrence/dissent, Judge Garza cautioned that the district court had incorrectly applied the good faith defense because it had failed to first determine whether any unauthorized disclosures had occurred. 289 F.3d at 391-92.

18. Plotkin v. United States, 465 Fed. App'x. 833-34 (11th Cir. 2012) (Where compliance with IRS-related conditions of probation in a criminal tax case required the defendant to file and pay all taxes, the court held that the IRS's disclosure of the defendant's return information to his probation officers was authorized by section 6103(h)(4)(A) upon finding that the probation revocation proceedings were an extension of the defendant's criminal proceeding for tax crimes. Even assuming arguendo that disclosure was not authorized, the court concluded that the good faith exception would apply because the Internal Revenue Manual allowed for disclosure of return information to a probation officer under similar circumstances.)
19. Rhodes v. United States, 903 F. Supp. 819, 822, 826 (M.D. Pa. 1995) (upon reconsideration, rejected the Fifth and Eighth Circuits' reasoning in Barrett and Diamond, above, respectively, that disclosure of the fact of criminal investigation was not "necessary" to obtain information sought; fashioned its own objective, rather than subjective, standard: "Would a reasonable agent, under the circumstances of the case and knowing that disclosure must be kept to a minimum, disclose this amount of information in order to obtain the cooperation of a reasonable person receiving the form letter?").
20. Rorex v. Traynor, 771 F.2d 383, 387 (8th Cir. 1985) (taxpayers entered into installment payment plan, which was subsequently disallowed by revenue officer's manager, and revenue officer failed to notify taxpayers of disallowance and served a notice of levy on the taxpayers' bank; court, using an objective standard, found that a reasonable person would have known that he was violating the taxpayers' rights under section 6103).

**Note:** This case was decided before the addition of section 7433 to the Code. Section 7433 addresses damages arising from improper collection practices. Under today's statutory scheme, this case would (should) have been brought under section 7433.

21. Ryan v. United States, No. Civ. A. AQ-97-3548, 1998 WL 919881, at \*3-4 (D. Md. July 30, 1998) (although disclosure was permitted under section 6103(h)(4), also held that the disclosure was made with the good faith belief that section 6103 permitted it because it was a "close call").

22. Rubel v. United States, No. ST-C-87-28, 1988 WL 167270, at \*6 (W.D.N.C. Aug. 26, 1988) (government officials acted in good faith in issuing press release).
23. Schachter v. United States, 866 F. Supp. 1273, 1275 (N.D. Cal. 1994) (circular letters were sent to present and former customers of taxpayers' company and IRM in effect at the time recommended that special agents state that the taxpayer was "under investigation" and instructed special agents to identify themselves in personal interviews by showing their badge and credentials; agent and IRS acted in good faith because, based on these provisions, a reasonable special agent would not have known that he should not have disclosed that taxpayer was under investigation), *aff'd*, 77 F.3d 490 (9th Cir. 1996).
24. Smith v. United States, 703 F. Supp. 1344, 1348 (C.D. Ill. 1989) (District Director's disclosures to Illinois Department of Revenue did not follow the procedures set forth in the Implementing Agreement, and therefore violated section 6103(d); moreover, the District Director was "no stranger to the disclosure provisions" and under the Huckaby objective standard, lacked good faith), *aff'd in part & rev'd in part on other grounds*, 964 F.2d 630, 635 (7th Cir. 1992) (not addressing the good faith issue, the Agreement on Coordination satisfied section 6103(d)'s written request requirement and, therefore, the disclosure was authorized).
25. Snider v. United States, 468 F.3d 500, 506-07 (8th Cir. 2006), *petition for reh'g en banc denied*, No. 05-3636 (8th Cir. Feb. 1, 2007), *nonacq.*, I.R.B. 2007-30 (July 23, 2007) (In a holding to which the Service does not acquiesce, and in conflict with other circuit court decisions, the Eighth Circuit concluded that a special agent's disclosure of the identity of the taxpayer being investigated was not authorized by section 6103(k)(6) because the government had not shown that such disclosure was necessary and because "Section 6103 clearly defines both 'a taxpayer's identity' and 'whether the taxpayer's return was, is being, or will be examined or subject to other investigation' as 'return information.' . . . An agent violates the statute, as well as the Internal Revenue Manual, when he or she identifies the subject of his or her investigation." *Id.* at 507.). Action on decision (disagreeing with the Eighth Circuit's holdings) is available at: <http://www.irs.gov/pub/irs-aod/aod200703.pdf>.
26. Traxler v. United States, No. CV-F-87-725 REC, 1988 WL 149358, at \*5 (E.D. Cal. Nov. 23, 1988) (even if deficiency assessment was unauthorized, there would be no liability because of the good faith exception and compliance with section 6103(k)(6)).

**Note:** Although we realize there is a certain judicial economy in deciding the matter without first ruling whether an unauthorized disclosure actually occurred, skipping that step disserves the IRS and the public. If the court finds no liability based on the good faith defense absent ruling on the validity of the disclosure, the IRS is unable to determine whether the challenged conduct is unlawful and take any necessary remedial steps.

### III. DAMAGES FOR UNAUTHORIZED DISCLOSURE AND INSPECTION

The statute provides two damage computations. A prevailing plaintiff may recover the costs of the action plus the greater of (1) statutory damages of \$1,000 for each act of unauthorized inspection or disclosure or (2) the sum of actual damages plus, in the case of a willful inspection or disclosure, or an inspection or disclosure resulting from gross negligence, punitive damages. I.R.C. § 7431(c).

#### A. Statutory Damages

Statutory damages are limited to each act of inspection or disclosure, rather than each item of return information inspected or disclosed; the inspection or disclosure of multiple items of return information is not multiple inspections or disclosures. Moreover, the Service's position is that damages are not based upon the number of persons who eventually may read or hear the information wrongfully disclosed. Therefore, the United States should not be held responsible for redisclosures of return information, *e.g.*, to a newspaper's subscribers.

1. Barrett v. United States, 917 F. Supp. 493, 502 (S.D. Tex. 1995), *after remand from* 51 F.3d 475 (5th Cir. 1995), *aff'd*, 100 F.3d 35 (5th Cir. 1996) (after finding of liability, plaintiff entitled to statutory damages in the amount of \$260,000, based on the number of patients it was presumed received circular letters from the IRS in absence of proof that they had not received the letters, but was not entitled to actual or punitive damages).
2. Huckaby v. United States, 794 F.2d 1041, 1050 (5th Cir. 1986) (disclosure of taxpayer's records to state agency based upon oral consent was only one act of unauthorized disclosure, and did not warrant punitive damages).

**Note:** Huckaby was decided before the amendments to section 6103(c) and the publication of Treas. Reg. § 301.6103(c)-1 that permit the acceptance of a verbal consent in specific circumstances. See *generally* Chapter 2, Part II.

3. Johnson v. Sawyer, 640 F. Supp. 1126, 1136 (S.D. Tex. 1986), *aff'd*, 980 F.2d 1490 (5th Cir. 1992), *rev'd and remanded on other grounds*, 47 F.3d 716, 738 (5th Cir. 1995) (damages for unauthorized disclosures of a press release determined by number of media outlets sent the document, not number of persons who may have actually read it - "the degree of a violator's punishment should turn upon a factor within the violator's knowledge and control (*e.g.*, the number of media outlets receiving the release) rather than a factor outside her knowledge or control (*e.g.*, the number of employees each of those outlets happens to allow to read the release)").
4. Mallas v. United States, 993 F.2d 1111, 1125 (4th Cir. 1993) (single letter addressed to two named persons in a single envelope constituted two disclosures).
5. Marré v. United States, Civ. A. No. H-88-1103, 1992 WL 240527, at \*2 (S.D. Tex. June 22, 1992) (a single communication cannot be split into pieces to create multiple disclosures, nor does disclosure of the same information to the same person on multiple occasions constitute multiple disclosures), *aff'd in part on other grounds, modified in part on other grounds, vacated in part on other grounds*, 38 F.3d 823 (5th Cir. 1994).
6. Miller v. United States, 66 F.3d 220, 223-24 (9th Cir. 1995) (limiting damages to \$1,000 and rejecting taxpayer's argument that statutory damages for unauthorized disclosure to a newspaper reporter should be calculated by reference to number of potential readers, "in the modern era of mass communication," strong public policy concerns exist for not allowing this form of second-party dissemination to be actionable, and disclosure to person(s) likely to publish the information is relevant only in determining degree of negligence or recklessness involved, not number of disclosures).
7. Rorex v. Traynor, 771 F.2d 383, 385 (8th Cir. 1985) (although levy contained multiple items of return information, court awarded \$1,000 because only one levy was issued).
8. Siddiqui v. United States, 359 F.3d 1200, 1203 (9th Cir. 2004) (act of disclosure, not size of the audience that is counted for purposes of statutory damages), *aff'g* 217 F. Supp.2d 985, 989-91 (D. Ariz. 2002).
9. Smith v. United States, 730 F. Supp. 948, 954 (C.D. Ill. 1990) (memorandum to two people at one time was only one act of disclosure), *rev'd in part and aff'd in part*, 964 F.2d 630, 636 (7th Cir. 1992).

Successful plaintiffs rarely recover actual damages due to the difficulty of establishing losses attributable to the disclosure of returns or return information.

1. Jones v. United States, 9 F. Supp. 2d 1119, 1137 (D. Neb. 1998) (common law elements of causation must be proven to recover actual damages, *i.e.*, "but for" the disclosure the harm would not have occurred and the harm was the foreseeable result of the disclosure - plaintiffs could recover for economic losses of operating business, damages from sale of real and personal property, and emotional distress), *following determination of liability in* 954 F. Supp. 191 (D. Neb. 1997) (prior and subsequent history omitted).
2. Wilkerson v. United States, No. 3:92-cv-78 (E.D. Tex. May 16, 1994) (plaintiff awarded \$229,547.19 based primarily upon the value of her business, "which was effectively destroyed by the unauthorized disclosures" in levies), *rev'd in part on other grounds*, 67 F.3d 112 (5th Cir. 1995).

## **B. Emotional Distress**

One issue addressed infrequently is whether actual damages are limited to economic loss or include recovery for non-pecuniary items such as emotional distress.

1. Jones v. United States, 9 F. Supp. 2d 1119, 1149 (D. Neb. 1998) (plaintiffs entitled to emotional distress damages when they demonstrate out of pocket damages), *following determination of liability in* 954 F. Supp. 191 (D. Neb. 1997) (prior and subsequent history omitted).
2. Rorex v. Traynor, 771 F.2d 383, 387-88 (8th Cir. 1985) (taxpayers were awarded \$15,000 each for emotional suffering; however, on appeal, the Eighth Circuit found that plaintiffs had produced no evidence of emotional distress other than personal embarrassment and the court did not believe that "hurt feelings alone constitute actual damages compensable under the statute").
3. Schipper v. United States, No. CV-94-4049 (CPS), 1998 WL 786451, at \*10-11 (E.D.N.Y. Sept. 15, 1998) (unauthorized disclosures made in the course of unlawful levies humiliated plaintiff in eyes of coworkers; plaintiff awarded damages for physiological symptoms stemming from humiliation).
4. Wilkerson v. United States, 67 F.3d 112, 117-18 (5th Cir. 1995) *reversing in part*, No. 3:92-cv-78 (E.D. Tex. May 16, 1994) (reversing award of \$20,000 for emotional distress upon a determination that no



unauthorized disclosure had occurred through the issuance of an invalid levy).

Cases under the Privacy Act are analogous because the Privacy Act has a similar damages provision. Generally, the courts have held that actual damages for violations of the Privacy Act are limited to out-of-pocket losses. See, e.g., Hudson v. Reno, 130 F.3d 1193, 1207 (6th Cir. 1997); Fitzpatrick v. IRS, 665 F.2d 327, 329-31 (11th Cir. 1982); DiMura v. FBI, 823 F. Supp. 45, 48 (D. Mass. 1993); Pope v. Bond, 641 F. Supp. 489, 500-01 (D.D.C. 1986); and Houston v. Dep't of Treasury, 494 F. Supp. 24, 30 (D.D.C. 1979). Note that in Johnson v. IRS, 700 F.2d 971, 974-80 (5th Cir. 1983), the court held that actual damages included pain and suffering, and in Albright v. United States, 732 F.2d 181, 185-86 n.11 (D.C. Cir. 1984), the court noted, in dicta, that non-economic injuries or damages other than out-of-pocket expenses could qualify as "actual damages" under 5 U.S.C. § 552a(g)(4). Cf. Doe v. Chao, 540 U.S. 614, 614-15 (2004) (unlike section 6103, which provides for award of statutory damages in absence of actual damages, Privacy Act requires proof of actual damages, however minimal, to qualify for minimum damage award).

The legislative history is silent as to whether Congress intended for section 7431 to include recovery for emotional distress within the ambit of "negligence." The Senate Report merely parrots the statutory language by noting that the United States is liable to a person whose returns or return information was knowingly or negligently disclosed in violation of section 6103. See S. REP. NO. 97-760, at 676 (1982). Although it could be argued that when Congress used the phrase "negligence" in the statute it intended for the general law of negligence to apply, including the applicable law on damages, the Supreme Court's opinions relating to the waiver of sovereign immunity in two cases interpreting other statutes may be instructive.

In United States v. Nordic Vill. Inc., 503 U.S. 30, 33-34 (1992), the Supreme Court held that in the absence of clear statutory authority waiving sovereign immunity, a bankruptcy trustee cannot recover monetary damages from the government for post-petition transfers. The court noted the established doctrine that waivers of sovereign immunity must be unequivocally expressed and must be construed strictly in favor of the government. The Court stated "Legislative history has no bearing on the ambiguity point . . . . [T]he 'unequivocal expression' of elimination of sovereign immunity that we insist upon is an expression in statutory text. If clarity does not exist there, it cannot be supplied by a committee report." *Id.* at 37. In Lane v. Pena, 518 U.S. 187, 192 (1996), the Supreme Court held that a Merchant Marine cadet who was discharged from the academy in violation of the Rehabilitation Act cannot recover monetary damages from the government because the 1986 amendments to the Act did not provide for monetary damages against federal agencies. Accordingly, a damage award against the United States must be limited to only so much as is authorized by the

statute waiving sovereign immunity, and if the statute does not clearly provide for recovery for emotional distress, recovery should not be awarded.

**Note:** Section 7433, which was added to the Code in 1988 and provides for civil damages for unauthorized collection activity, provides only for "actual, direct economic damages" plus the costs of the action (enacted by Pub. L. No. 100-647, § 6241(a), 102 Stat. 3342 (1988)).

### C. Punitive Damages

1. Barrett v. United States, 917 F. Supp. 493, 503 (S.D. Tex. 1995) (no punitive damages because (1) disclosures were not willful or grossly negligent and (2) statutory language of section 7431(c) precludes award of punitive damages where actual damages not proven, which is consistent with the common law tort rule), *aff'd*, 100 F.3d 35 (5th Cir. 1996).
2. Mallas v. United States, 993 F.2d 1111, 1125 (4th Cir. 1993) (taxpayer may recover punitive damages in excess and instead of statutory damages, not in addition to statutory damages, even if the actual damages are zero).
3. Marré v. United States, Civ. A. No. H-88-1103, 1992 WL 240527, at \*4 n.3 (S.D. Tex. June 22, 1992) ("Though we take a decidedly dim view of [the agent's] actions, we are precluded from granting punitive damages without an award of actual damages"), *aff'd on other grounds*, 38 F.3d 823, 826-27 (5th Cir. 1994) (without deciding whether district court was correct, found special agent's conduct was not so egregious as to warrant punitive damages).
4. Mid-South Music Corp. v. United States, 579 F. Supp. 481, 485 (M.D. Tenn. 1985), *aff'd in part, rev'd in part*, 756 F.2d 23 (6th Cir. 1984) *remanded to* 1985 WL 3673 (M.D. Tenn. Sept. 24, 1985), *rev'd*, 818 F.2d 536, 537 (6th Cir. 1987) (district court awarded \$174,000 in statutory damages, plus \$1,000 in punitive damages for unauthorized disclosure of return information; circuit court reversed and remanded to district court for entry of judgment for defendant, as no liability exists where the IRS disclosed taxpayer's own information to taxpayer).
5. Rorex v. Traynor, 771 F.2d 383, 387 (8th Cir. 1985) (on appeal, court did not find any evidence to support the conclusion that the disclosure was either willful or the result of gross negligence).

**Note:** This case was decided before the addition of section 7433 to the Code. Section 7433 addresses damages arising from improper

collection practices. Under today's statutory scheme, this case would (should) have been brought under section 7433.

6. William E. Schrambling Accountancy Corp. v. United States, 689 F. Supp 1001, 1008 (N.D. Cal. 1988) (punitive damages are not available unless plaintiff proves actual damage), *rev'd on other grounds*, 937 F.2d 1485 (9th Cir. 1991).
7. Siddiqui v. United States, 395 F.3d 1200, 1201 (9th Cir. 2004) (no punitive damages without proof of actual damages), *aff'g* 217 F. Supp. 2d 985, 989-91 (D. Ariz. 2002).
8. Smith v. United States, 730 F. Supp. 948, 954-55 (C.D. Ill. 1990) (criticizing the district court in Mid-South Music, above, punitive damages not available in the absence of actual damages), *rev'd on other grounds*, 964 F.2d 630 (7th Cir. 1992).

#### IV. ATTORNEYS FEES IN I.R.C. § 7431 ACTIONS

Section 7431(c) provides that the plaintiff may recover

(1) the greater of (A) \$1,000 for each act of unauthorized inspection or disclosure of a return or return information with respect to which such defendant is found liable, or (B) the sum of – (i) the actual damages sustained by the plaintiff as a result of such unauthorized inspection or disclosure, plus (ii) in the case of a willful inspection or disclosure or an inspection or disclosure which is the result of gross negligence, punitive damages, plus (2) the costs of the action, plus (3) in the case of a plaintiff which is described in section 7430(c)(4)(A)(ii) [meets the requirements of 28 U.S.C. § 2412(d)(1)(B), *i.e.*, by submitting request within 30 days showing entitlement], reasonable attorneys fees, except that if the defendant is the United States, reasonable attorneys fees may be awarded only if the plaintiff is the prevailing party (as determined under section 7430(c)(4)).

To be considered the prevailing party under section 7430, plaintiffs must establish (1) that the position of the United States is not substantially justified, and (2) that they have prevailed with respect to the amount in controversy or with respect to the most significant issue presented. I.R.C. § 7430(c)(4).<sup>32</sup>

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<sup>32</sup> There is little case law on the application of the provisions under sections 7430 and 7431. Before 1998 when section 7430 was amended, the circuits were split as to whether a plaintiff could recover attorneys fees for successfully prosecuting a section 7431 suit. *Compare* McLarty v. United States, 6 F.3d 545 (8th Cir. 1993) (where the underlying proceeding was unrelated to a civil tax proceeding, section 7430 was inapplicable) *and* Scrimgeour v. IRS, 149 F.3d 318 (4th Cir. 1998) (underlying claim of unauthorized disclosure did not pertain to determination of any tax) *with* Huckaby v. United States, 804 F.2d 297 (5th Cir. 1986) (concluding that underlying claim pertained to tax liability because the IRS was in possession of plaintiff's records - which were disclosed - for the purpose of determining his liability). By amending the statute to include attorneys fees, Congress was sending a clear

## V. OTHER ISSUES IN I.R.C. § 7431 ACTIONS

### A. Proper Party

The United States is the only proper party defendant for unauthorized disclosures by federal employees. Nevertheless, the alleged unauthorized disclosure must have been made by an individual who was an officer or employee of the federal government at the time of the disclosure.

1. Adelman v. Discover Card Servs., 915 F. Supp. 1163, 1165 (D. Utah 1996) (rejecting argument that United States was liable because of special relationship between state agency and federal government, court held no liability where a state employee accessed plaintiff's files and disclosed confidential tax records).
2. Clode-Baker v. Cocke, No. A-11-CV-977-LY, 2012 WL 1357023 (April 16, 2012, W.D.Tex.) (Plaintiff failed to state a claim where she alleged her former daughter-in-law obtained copies of her returns and forwarded them to the IRS Whistleblowers office. Section 6103 only prohibits disclosure of return information by certain individuals who fall within the statute.)
3. Diamond v. United States, 944 F.2d 431, 432 (8th Cir. 1991) (United States is the only proper party defendant even though special agent's actions formed the basis for the unauthorized disclosure action).
4. Flippo v. United States, 670 F. Supp. 638, 639 (W.D.N.C. 1987) (rejected plaintiff's attempt to name a revenue agent as a defendant), *aff'd mem.*, 849 F.2d 604 (table cite), 1988 WL 60765, at \*1 (4th Cir. June 7, 1988).
5. Hassell v. United States, 203 F.R.D. 241, 244 (N.D. Tex. 1999) (even assuming IRS employees made unauthorized disclosures of return information, the claim is against the United States, not individual employees).
6. Henkell v. United States, No. S-96-2228 MLS GGH, S-97-0017 MLS GGH, 1998 WL 41565, at \*8 (E.D. Cal. Jan. 9, 1998) (by its express language, section 7431 authorizes suit only against the United States and not against individual employees).

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message that "when the IRS violates taxpayer's right to privacy by engaging in unauthorized inspection or disclosure activities, it is appropriate to reimburse taxpayers for the costs of their damages." S. REP. NO. 105-174, *reproduced at* IRS Restructuring and Reform, Law, Explanation and Analysis, ¶ 10250 at 599 (CCH 1998).

7. Payne v. United States, No. Civ. A. H-97-2255, 1998 WL 773625, at \*3 (S.D. Tex. Feb. 10, 1998) (even though "the United States may not be held liable in a civil action for unlawful disclosure of tax return information by a *former* officer or employee," the plaintiff was given leave to amend complaint to add former employee).
8. Ungaro v. Desert Palace, No. CV S 88-838 RDF, 1989 WL 199264, at \*4-5 (D. Nev. Nov. 17, 1989) (because the disclosures were specifically authorized under section 6103(h), no violation of 6103 occurred; section 7431 does not apply as a remedy against individual employees).
9. Young v. Boyle, 849 F.2d. 610 (table cite), No. 83-1789, 1988 WL 62397 at \*2 (6th Cir. 1988) (claims for damages against judge and law clerk for summons enforcement proceedings in which financial information was disclosed were barred by doctrine of judicial immunity), *aff'g* No. 83-1789 (E.D. Mich. Nov. 30, 1982) (unpublished opinion).

## **B. Specificity**

A complaint filed pursuant to section 7431 must allege with specificity the returns or return information inspected or disclosed, the dates of inspection or disclosure, to whom information was disclosed, and any other facts sufficient to inform the defendant of the particulars of the alleged violation. Absent such information, motions to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) have been successful. Generally, however, courts dismiss without prejudice and provide plaintiffs an opportunity to amend the complaint.

1. Aloe Vera of Am., Inc. v. United States, 580 F.3d 867, 872 (9th Cir. 2009) (two-year statute of limitations on claim for wrongful disclosure of return information accrues when plaintiffs knew or should have known of disclosure), *remanded to* 730 F. Supp. 2d 1020 (D. Ariz. 2010) (on remand, district court held that certain plaintiffs' failure to establish specific dates barred portions of their complaint asserting that the IRS had disclosed false information to a foreign tax authority and that the IRS knew or should have known that the information would be leaked), *appeal docketed*, No. 10-17136 (9th Cir. Sept. 24, 2010).
2. Bleavins v. United States, No. 90-3178, 1991 U.S. Dist. LEXIS 20975, at \*3-4 (C.D. Ill. Jan. 18, 1991) (complaint did not allege to whom the information was disclosed or the items of information disclosed; action dismissed without prejudice, providing plaintiff 20 days to amend complaint).

3. Colton v. IRS, No. CV-R-85-635-ECR, 1989 U.S. Dist. LEXIS 12021, at \*17-18 (D. Nev. Apr. 4, 1989) (dismissed complaint because it contained mere legal conclusions not factual allegations).
4. Flippo v. United States, 670 F. Supp. 638, 641 (W.D.N.C. 1987) (case dismissed against revenue agent personally and non-government defendants for failure to allege specific instances of wrongdoing; district court examined only whether violations of 6103 occurred in revenue agent's efforts to contact petitioner or institute collection), *aff'd mem.*, 849 F.2d 604 (table cite), 1988 WL 60765, at \*1 (4th Cir. June 7, 1988).
5. May v. United States, No. 91-0650-CV-W-9, 1992 U.S. Dist. LEXIS 16055, at \*6 (W.D. Mo. Apr. 17, 1992) (plaintiff must specifically allege who made the alleged disclosures, to whom they were made, the nature of the disclosures, the circumstances surrounding them, and the dates on which they were made).
6. Soghomonian v. United States, 82 F. Supp.2d 1134, 1146-47 (E.D. Cal. 1999) (section 7431 claim was subject to dismissal where complaint failed to state the "specific taxpayer information allegedly disclosed, the timing of such alleged disclosures," and other pertinent information).
7. Tobin v. Troutman, No. Civ. A. 3:98-CV-663-H, 1999 WL 501004, at \*4 (W.D. Ky. June 8, 1999) (more than a mere allegation of a violation is needed to state a claim).

### C. Jury Trials

Section 7431 lawsuits are not subject to jury trials. The Seventh Amendment right to a jury trial does not apply in actions against the federal government unless Congress has waived sovereign immunity and created that right by statute. See Lehman v. Nakshian, 453 U.S. 156, 162 n.9 (1981) ("Since there is no generally applicable jury trial right that attaches when the United States consents to suit, the accepted principles of sovereign immunity require that a jury trial right be clearly provided in the legislation creating the cause of action."); see *also* United States v. Testan, 424 U.S. 392, 399 (1976) ("the United States, as sovereign, is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction . . . a waiver of the traditional sovereign immunity cannot be implied but must be unequivocally expressed") (internal quotations omitted).

Section 7431 is silent regarding a jury trial. Following the rationale in Lehman, no such right exists in section 7431 cases. Accordingly, courts that have considered whether a plaintiff is entitled to a jury trial pursuant to section 7431 have unanimously found that there is no such entitlement.

1. Agbanc v. Berry, 678 F. Supp. 804, 809 (D. Ariz. 1988).
2. Carbo v. United States, No. Civ. A. 97-2461, 1998 WL 918473, at \*3 (W.D. La. Dec. 30, 1998).
3. Christensen v. United States, 733 F. Supp. 844, 854 (D.N.J. 1990), *aff'd*, 925 F.2d 416 (3d Cir. 1991) (table cite).
4. Ret. Care Assoc. v. United States, 3 F. Supp. 2d 1434, 1445 (N.D. Ga. 1998).

#### **D. Exclusive Remedy**

It is the IRS's position, and most courts have agreed, that section 7431 is the exclusive remedy for unauthorized disclosure of returns or return information. This section explores some other remedies that plaintiffs have sought for alleged disclosure violations.

##### **1. Bivens**

In Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971), the Supreme Court recognized a cause of action against federal employees who violated an individual's Fourth Amendment rights, even though the Fourth Amendment did not expressly authorize a remedy. The court reasoned that "it is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasions, federal courts may use any available remedy to make good the wrong done." *Id.* at 396 (citing Bell v. Hood, 327 U.S. 678, 684 (1946)). However, the courts generally have declined to provide Bivens relief to taxpayers for claims premised on tax administration activities because of the comprehensive remedial scheme Congress passed in the Code.

- a. Cameron v. IRS, 773 F.2d 126, 129 (7th Cir. 1985) ("Congress has given taxpayers . . . rights against an overzealous [official], including . . . the right to sue the government for a refund if forced to overpay taxes, and it would make the collection of taxes chaotic if a taxpayer could bypass the remedies provided by Congress simply by bringing a damage action against Treasury employees").
- b. Fishburn v. Brown, 125 F.3d 979, 982-83 (6th Cir. 1997) (court declined to create Bivens action against revenue officers for alleged due process violations during seizure) (section 7433 case).

- c. Judicial Watch, Inc. v. Rossotti, 317 F.3d 401, 413 (4th Cir. 2003) (“it would be inappropriate to supplement the regulatory scheme with a new judicial remedy’ for alleged retaliatory tax audits”) (citing Bush v. Lucas, 462 U.S. 367 (1983)).
- d. Malis v. United States, No. CV 83-7767 (CBM), 1986 WL 15721, at \*6 (C.D. Cal. Dec. 17, 1986) (no Bivens remedy lies for improper disclosure of returns or return information).
- e. Shreiber v. Mastrogiovanni, 214 F.3d 148, 155 (3d Cir. 2000) (denial of Bivens remedy where plaintiff alleged violation of equal protection based on religious animus because “Congress’s efforts to govern the relationship between the taxpayer and the taxman indicate that Congress has provided what it considers to be adequate remedial mechanisms for wrongs that may occur in the course of this relationship”).

## 2. Federal Tort Claims Act

A Federal Tort Claims Act (FTCA) claim cannot be premised on an unauthorized disclosure because the liability of the United States arises only when the law of the state where the alleged wrong occurred would impose it. Because section 6103 - which creates the general confidentiality rule covering returns and return information - is federal law, not state law, there can be no action for unauthorized disclosures under the FTCA.

- a. Cecile Indus., Inc. v. United States, 793 F.2d 97, 100 (3d Cir. 1986) (FTCA not satisfied by federal statutes or regulations).
- b. Fishburn v. Brown, 125 F.3d 979, 982 (6th Cir. 1997) (suits alleging liability based on activity connected to the assessment or collection of taxes are expressly excluded from the FTCA).
- c. Johnson v. Sawyer, 47 F.3d 716, 729-30 (5th Cir. 1995) (*en banc*) (claim wholly grounded on a duty imposed by federal statute is not enough; state law of “negligence per se” and *respondeat superior* were insufficient bases for federal tort claim), *rev’g and remanding*, 980 F.2d 1490 (5th Cir. 1992).
- d. Sellfors v. United States, 697 F.2d 1362, 1365 (11th Cir. 1983) (FTCA not intended to redress breaches of federal statutory duties).



### 3. Exclusionary rule

- a. In re Grand Jury, M.D.B. No. 82 536, slip op. at 10 (D. Mass. Feb. 22, 1983) (quashing of a grand jury subpoena on the grounds of a section 6103 violation is not a proper remedy under section 7431).
- b. Nowicki v. Commissioner, 262 F.3d 1162, 1163 (11th Cir. 2001) (“[The] imposition of the exclusionary rule is not warranted for a disclosure of return information which violates section 6103. Congress has specifically provided civil (section 7431) as well as criminal penalties (section 7213) for violations of section 6103. There is no statutory provision requiring exclusion of evidence obtained in violation of section 6103 and we will not invent one.”).
- c. United States v. Chem. Bank, 593 F.2d 451, 457 (2d Cir. 1979) (suppression of evidence may be available for a section 6103 violation) (dicta).
- d. United States v. Lavin, 604 F. Supp. 350, 355-56 (E.D. Pa. 1985) (relying on Chemical Bank, above, to set aside portions of an affidavit supporting a search warrant application because of unauthorized disclosure).
- e. United States v. Mangan, 575 F.2d 32, 41 (2d Cir. 1978) (sections 7431 and 7213 are exclusive and therefore the exclusionary rule is not available to redress alleged wrongful disclosures) (dicta).

### 4. Injunctive relief

Trahan v. Regan, 718 F.2d 449, 455-57 (D.C. Cir. 1983) (declaratory judgment is available to declare contemplated disclosures illegal and that, if declared illegal, injunctive relief could be granted to enjoin the contemplated disclosures) (subsequent history omitted).<sup>33</sup>

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<sup>33</sup> This is the only case where a court determined that declaratory relief was available to halt a proposed disclosure. The facts of the case make the holding unique. Congress had directed the Social Security Administration to check on the eligibility of benefits recipients. The GAO suggested that the SSA use returns and return information to identify ineligible recipients. Faced with the confidentiality provision of section 6103, the SSA mailed consent forms to over 4 million benefits recipients. Contemporaneous class actions were brought against the IRS and SSA to, *inter alia*, halt the disclosures, and for a determination as to the appropriateness of the consents. In granting the injunction, the court of appeals noted that the consent forms mailed by the SSA failed to meet the requirements of the Treasury regulations under section 6103(c).

## 5. Conditional summons enforcement

There is a split in the circuits concerning conditional enforcement of summonses.

- a. United States v. Author Servs., Inc., 804 F.2d 1520, 1525 (9th Cir. 1986) (relying on Texas Heart, below, even though government had satisfied all the requirements for summons enforcement, a court may, as part of its inherent authority to assure that part of its process is not abused, condition summons enforcement on the requirement that the government secure court approval before the summoned records are disclosed to other government agencies (the condition being imposed to assure that any disclosure is in accordance with section 6103)), *amended by*, 811 F.2d 1264 (9th Cir. 1987).
- b. United States v. Barrett, 837 F.2d 1341, 1349 (5th Cir. 1988) (*en banc*) (overruled Texas Heart, below, indicating that conditional summons enforcement was inappropriate), *cert. denied*, 492 U.S. 926, *reh'g denied*, 493 U.S. 883 (1989).
- c. United States v. Texas Heart, 755 F.2d 469, 482 (5th Cir. 1985) (appropriate for district court to determine whether section 6103 was violated and, if so, to condition summons enforcement on compliance with that section) *overruled by Barrett*, above.
- d. United States v. Zolin, 491 U.S. 554, 561 (1989) (equally divided Supreme Court let stand Ninth Circuit's position on conditional summons enforcement first adopted in Author Services, above) *on remand to* 905 F.2d 1344 (9th Cir. 1990).

## 6. Privacy Act

Generally, courts have held that the Privacy Act is not available to redress unauthorized disclosures of return information.

- a. Berridge v. Heiser, 993 F. Supp. 1136, 1144 (S.D. Ohio 1997) (plaintiffs erroneously brought their suit under the Privacy Act; section 7431 is the exclusive remedy by which to bring a cause of action for the unauthorized disclosure of returns or return information).
- b. Hobbs v. United States, 209 F.3d 408, 412 (5th Cir. 2000) (“§ 6103 is a more detailed statute that should preempt the more general remedies of the Privacy Act, at least where, as here, those remedies are in conflict”).

- c. Sinicki v. United States, No. 97 CIV. 0901 (JSM), 1998 WL 80188, at \*2-3 (S.D.N.Y. Feb. 24, 1998) (plaintiff brought suit alleging that IRS violated Privacy Act by placing her tax returns in her personnel file; court rejected IRS's arguments that section 6103 prevails over the Privacy Act, and held that plaintiff may pursue action for wrongful disclosure under both the Privacy Act and section 7431, but noted, however, that to extent the Privacy Act conflicted with section 6103, section 6103 prevailed).

## 7. 18 U.S.C. § 1030(g)

For claims arising from the alleged unauthorized inspection of return information through the use of a computer, a civil remedy may also be available under this criminal statute. However, certain conditions apply.

## 8. I.R.C. § 7433

The Code provides a civil damages remedy for unauthorized collection activity occurring after November 10, 1988. The exclusive remedy for alleged unauthorized disclosures occurring in the course of collection activities is section 7433.

- a. Elias v. United States, No. CV 90-0432-WJR(JRX), 1990 WL 264722, at \*2 & n.7 (C.D. Cal. Dec. 21, 1990) (taxpayer may not use section 7431 to challenge the merits of the assessment; it is reasonable to assume that Congress did not intend for section 7431 damage suits to be maintained in situations arising from collection activities given enactment of section 7433), *aff'd mem.*, 974 F.2d 1341 (9th Cir. 1992) (table cite).
- b. Mann v. United States, 204 F.3d 1012, 1017 (10th Cir. Feb. 18, 2000) (section 7433 provides taxpayers a remedy for unauthorized collection activities; court does not address exclusivity issue).
- c. Schipper v. United States, No. CV-94-4049 (CPS), 1998 WL 786451, at \*9-12 (E.D.N.Y. Sept. 15, 1998) (United States liable for unauthorized disclosures resulting from erroneous levies in the course of a failed collection of a tax refund on plaintiff's wages and bank accounts despite plaintiff's and plaintiff's counsel's effort to correct the error; not a section 7433 matter because IRS sought to recover an erroneous refund rather than a tax assessment).

- d. Shwarz v. United States, 234 F.3d 428, 432-33 (9th Cir. 2000) (section 7433 addresses the willful or negligent act of disregarding Title 26 during the collection of taxes; therefore any violation of section 6103 during collection of taxes is addressed by section 7433).
- e. Simpson v. United States, No. 90-30021-RV, 1991 WL 253014, at \*6-7 & n.8 (N.D. Fla. Oct. 9, 1991) (although disclosures in various liens and levies were authorized by section 6103(k)(6), section 7433(a) applied to one of the levy claims and precluded any section 7431 liability).
- f. Soghomonian v. United States, 82 F. Supp. 2d 1134, 1147 (E.D. Cal. 1999) (plaintiff failed to state a claim when he brought claim for unauthorized disclosure through filing of Notice of Federal Tax Lien; section 7433 is the exclusive remedy).<sup>34</sup>

#### **E. Authorized Disclosures Based Upon Validity of Summonses, Liens or Levies**

There is a split in the circuits concerning the relevance of the validity of summonses, liens or levies to whether certain disclosures were authorized.

- 1. "[W]hether a disclosure is authorized under section 6103 is in no way dependent upon the validity of the underlying summons, lien, or levy." Elias v. United States, No. CV 90-0432-WJR (JRX), 1990 WL 264722, at \*5 (C.D. Cal. Dec. 21, 1990), *aff'd mem.*, 974 F.2d 1341 (9th Cir. 1992) (table cite).
  - a. Farr v. United States, 990 F.2d 451, 455 (9th Cir. 1993) (where disclosures were necessary to collection procedures, fact that they may have been defective does not make disclosures wrongful).
  - b. Huff v. United States, 10 F.3d 1440, 1447 (9th Cir. 1993) (possible procedural lapses in collection process will not render necessary disclosures wrongful).
  - c. Mann v. United States, 204 F.3d 1012, 1018-19 (10th Cir. 2000) (distinguishing Chandler v. United States, 687 F. Supp. 1515 (D.

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<sup>34</sup> The amendments to section 7433 in RRA 98 lowered the threshold from willful to negligent violations in the collection process and eliminated the use of section 7431 to collaterally attack unauthorized collection actions.

Utah 1988), *aff'd per curiam*, 887 F.2d 1397 (10th Cir. 1989), which had been decided before the passage of section 7433, where section 6103(k)(6) permits the issuance of levies and the filings of liens, it is irrelevant whether there is a procedural defect in the collection activity; "sections 6103 and 7431 address improper disclosure of return information and not improper collection activity").

- d. McAdams v. United States, Civ. A. No. 3:95-621, 1996 WL 303271, at \*3 (W.D. La. June 24, 1996) (principle "that the propriety of the underlying actions is irrelevant to the propriety of the disclosure at issue, controls here").
  - e. Spence v. United States, 114 F.3d 1198 (table cite), No. 96-2196, 1997 WL 314836, at \*4 (10th Cir. June 12, 1997) ("Neither the plain language of the statute or the Treasury regulation [sic] authorize this court to look behind the summons to determine whether they [sic] were properly issued; §§ 7431 and 6103 address improper disclosure, not improper summons").
  - f. Venen v. United States, 38 F.3d 100, 105 (3d Cir. 1994) (court joined "those cases that decline to consider the validity of the underlying levy in deciding whether the IRS has disclosed in violation of [I.R.C.] § 6103").
  - g. Wilkerson v. United States, 67 F.3d 112, 117-18 n.10 (5th Cir. 1995), *reversing in part*, No. 3:92-cv-78 (E.D. Tex. May 16, 1994) (Congress enacted separate and distinct provisions concerning collection activities and information handling, and "[t]hese two bodies of law must remain distinct[;]" absent additional evidence, proof of a wrongful levy is "legally insufficient" to support a claim for wrongful disclosure).
2. Another line of cases does consider the validity of the levy to be relevant to and/or determinative of unauthorized disclosures under section 7431.
- a. Husby v. United States, 672 F. Supp. 442, 445 (N.D. Cal. 1987) (disclosures made pursuant to a levy resulting from a computer error did not fall under "good faith" exception because no interpretation of section 6103 was involved).
  - b. Maisano v. United States, 908 F.2d 408, 409-10 (9th Cir. 1990) (although not specifically linking the two, court considered validity of the underlying tax liens and levies before finding IRS authorized to disclose under section 6103).

- c. Rorex v. Traynor, 771 F.2d 383, 386 (8th Cir. 1985) ("disclosure in pursuance of an unlawful levy violates the confidentiality requirement of § 6103(a) and is not authorized under § 6103(k)(6)").
- d. Schipper v. United States, No. CV-94-4049 (CPS), 1998 WL 786451, at \*9-12 (E.D.N.Y. Sept. 15, 1998) (United States held liable for unauthorized disclosures resulting from repeated erroneous levies on plaintiff's wages and bank accounts despite plaintiff's and plaintiff's counsel's effort to correct error; however, the disclosures in this case occurred in the context of a failed collection of a tax refund, not the collection of a tax liability).
- e. William E. Schrambling Accountancy Corp. v. United States, 689 F. Supp. 1001, 1006 (N.D. Cal. 1988) (improper notice of levy is basis for liability under section 7431), *rev'd on other grounds*, 937 F.2d 1485 (9th Cir. 1991).

See also Chapter 4, pertaining to investigative disclosures, and Treas. Reg. § 301.6103(k)(6)-1.

## F. Statute of Limitations

Section 7431(d) provides that actions for alleged unauthorized inspections or disclosures of returns or return information must be brought within two years after the date of discovery by the plaintiff of the unauthorized inspection or disclosure.

1. Aloe Vera of Am., Inc. v. United States, 580 F.3d 867, 872 (9th Cir. Sept. 2, 2009) (two-year statute of limitations on claim for wrongful disclosure of return information accrues when plaintiffs knew or should have known of disclosure), *remanded to* 730 F. Supp. 2d 1020 (D. Ariz. Aug. 3, 2010) (district court held that plaintiffs' failure to establish specific dates barred portions of their complaint asserting false IRS disclosures to a foreign tax authority), *appeal docketed*, No. 10-17136 (9th Cir. Sept. 24, 2010).
2. Amcor Capital Corp. v. United States, No. CV 94-6814 (GHKx), 1995 WL 515690, at \*2-5 (C.D. Cal. June 13, 1995) (unauthorized disclosure claim was time-barred because plaintiff failed to allege that it discovered the unauthorized disclosure within two years of date claim was made against United States; plaintiff's own letters and internal memoranda proved that its allegations of not discovering the government's misconduct and unauthorized disclosures until a later date were false), *aff'd*, 106 F.3d 406 (table cite), 1997 WL 22248 (9th Cir. Jan. 15, 1997).

3. Carlson v. United States, CV. No. 94-00924 ACK, 1995 WL 687110, at \*2 (D. Haw. Sept. 22, 1995) (action filed in 1994 was outside the limitations period when Certificate of Assessments and Payments demonstrated that the administrative levies made against plaintiff resulted in payments to IRS in 1989 and 1990).
4. Clark v. Internal Revenue Service, No. 06-CV-00544, 2011 WL 3157196, \*15-16 (D. Haw. July 26, 2011) (District Court held that it did not have jurisdiction over plaintiff's section 7431 action upon finding that plaintiff had actual knowledge that the Service issued a refund check to an incorrect party (and thus made an unauthorized disclosure) more than sixteen years before plaintiff filed her lawsuit alleging the unauthorized disclosure of return information. The court concluded that plaintiff's "knowledge of the improperly issued refund check put her on inquiry notice of any disclosures prior to the issuance of the refund check." Thus, the court did not have jurisdiction over plaintiff's section 7431 lawsuit.)
5. Darby v. Jensen, 75 A.F.T.R.2d 95-2549, at \*11-12 (D. Colo. May 15, 1995) (complaint, filed March 10, 1994, was outside statute of limitations where plaintiff alleged his response to the IRS's letter concerning dispute about 1989 exemptions and tax withholding was mailed on March 22, 1991), *aff'd*, 78 F.3d 597 (table cite), 1996 WL 84111 (10th Cir. Feb. 27, 1996).
6. Gandy v. United States, 234 F.3d 281, 283-84 (5th Cir. 2000) (plaintiff became aware that circular letters were sent to clients in September 1990, but suit was filed in August 1996; therefore, the section 7431 claim pertaining to those letters was time barred).
7. Hobbs v. United States, 1997 U.S. Dist. LEXIS 19230, at \*18 (S.D. Tex. Nov. 3, 1997) (plaintiff was aware that disclosures of his returns and return information were made as early as 1990 and certainly by April 1994; thus, when suit was brought in November 1996, claims which accrued prior to November 1994 were time barred).
8. Pack v. United States, Civil No. 90-1002-LKK-PAN, 1991 U.S. Dist. LEXIS 15523, at \*3-4 (E.D. Cal. Oct. 11, 1991) (claims time barred where plaintiff failed to submit any admissible evidence that he discovered alleged wrongful disclosures within two years of filing of complaint).
9. William E. Schrambling Accountancy Corp. v. United States, 689 F. Supp. 1001, 1008 (N.D. Cal. 1988) (claims regarding levies issued more than two years before filing of lawsuit barred by the statute of limitations).

## **G. Limited Stay of Discovery**

Courts will often issue a limited stay of discovery in section 7431 cases while awaiting the outcome of a pending related criminal proceeding.

1. Diamond v. United States, No. 3:87-cv-80086 (S.D. Iowa Sept. 6, 1990) (limited stay of discovery in section 7431 case because there was a potential criminal prosecution of the plaintiff pending) (subsequent history omitted).
2. Lancon v. United States, No. 4:92-cv-3499 (S.D. Tex. Feb. 11, 1998) (Order Nov. 12, 1993 to "administratively close" section 7431 action until conclusion of criminal proceedings involving the IRS employee who made the alleged unauthorized disclosure).
3. McQueen v. United States, No. 4:91-cv-329 (S.D. Tex. Sept. 29, 1997) (June 7, 1991 order granting an unlimited stay of discovery pending resolution of related criminal investigation).

## **H. Survivability**

Courts are split in determining whether a cause of action under section 7431 survives death of the plaintiff such that a plaintiff's estate may be substituted for the plaintiff.

1. Schachter v. United States, 847 F. Supp. 140, 141-42 (N.D. Cal. 1993) (rejecting argument that a section 7431 case was in the nature of a personal tort action not intended to survive plaintiff's death, instead finding it a property interest that should survive death and noting that the statute provided for actual damages, an indication that property rights were to be taken into account; administrator could be substituted as plaintiff).
2. Shapiro v. Smith, 652 F. Supp. 218, 218-19 (S.D. Ohio 1986) (statute was designed to protect only personal privacy rights and is therefore governed by the rule that privacy actions do not survive the death of the injured party).

## **I. Standing**

1. Brown v. United States, 755 F. Supp. 285, 286-87 (N.D. Cal. 1990) (no cause of action for disclosure of a Notice of Levy to plaintiff's employer regarding her former husband's liability because it was not plaintiff's return information, but that of her husband; under section 6103 there had been no wrongful disclosure of her return information).



2. Haywood v. United States, 642 F. Supp. 188, 192 (D. Kan. 1986) (notice sent to taxpayer's employer revealed husband's tax liability, not plaintiff's).
3. Kaiawe v. Dep't of Treasury, Civ. No. 95-00166 HG, 1995 WL 552260, at \*1 (D. Haw. June 21, 1995) (notwithstanding plaintiff's status as president and sole shareholder of corporate taxpayer, plaintiff lacked standing to assert wrongful disclosure and wrongful collection claims pursuant to sections 7431 and 7433 on behalf of corporate taxpayer; no evidence was presented that plaintiff was taxpayer's alter ego or that he had personally suffered any injury).
4. Newberry v. United States, No. LR-C-86-13, 1986 WL 9460, at \*3 (E.D. Ark. June 4, 1986) (allegation that IRS received information unlawfully resulted in dismissal for failure to state a claim under section 7431 because action lies only for the improper disclosure of returns or return information).
5. Rogers v. United States, No. 94-1305-J(AJB), 1995 WL 775245, at \*1 (S.D. Cal. Oct. 24, 1995) (government incorrectly assumed that plaintiff was asserting that the return information of a third party was wrongfully disclosed; court read complaint to clearly assert that plaintiff's own return information was wrongfully disclosed and thus the government's motion to dismiss for lack of standing was denied).
6. Ruiz-Rivera v. IRS, 226 F. Supp. 2d 345, 349 (D.P.R. 2002) (only the taxpayer whose return or return information has allegedly been disclosed has standing to sue under section 7431).
7. Simpson v. United States, No. 91-30293 RV, 1991 WL 330932, at \*2-3 (N.D. Fla. Nov. 27, 1991) (plaintiff's allegations that - concerning investigation of husband - circular letters requesting payment history of husband, his company or payments made to plaintiff, insufficient to confer standing to sue upon plaintiff), *aff'd mem.*, 986 F.2d 507 (table cite) (11th Cir. 1993).
8. Soghomonian v. United States, 82 F. Supp. 2d 1134, 1147 (E.D. Cal. 1999) (wife of taxpayer complainant does not have standing under section 7431; also, where information disclosed was that of partnership, not the plaintiff, and plaintiff was neither a partner nor liable for partnership's taxes; plaintiff does not have standing to sue for unauthorized disclosure of return information).

## VI. OTHER CODE SECTIONS AUTHORIZING DISCLOSURE

Section 6103(a) provides that return information is confidential and may not be disclosed "except as otherwise provided by" Title 26. Accordingly, permissible disclosures of returns and return information are not limited to the exceptions to the general rule enumerated in section 6103(c)-(o).

### A. Case Law

1. Messinger v. United States, 769 F. Supp. 935, 938 (D. Md. 1991) (under section 3406(c)(1), the IRS is authorized to release return information to financial institutions to notify them of the necessity to deduct interest and dividends for payees who are underreporting when certain conditions occur; "Title 26 U.S.C. § 3406(c)(1) allows the IRS to disclose the return information in question, provided that it met the specific requirements set forth in the statute").
2. O'Donnell v. United States, No. 84-2055-CIV-KEHOE, 1985 WL 1565, at \*2-3 (S.D. Fla. Mar. 26, 1985) (the IRS did not violate section 6103 by disclosing to plaintiff's employer that plaintiff had filed a defective certificate of exemptions because section "6103(a) prohibits the disclosure of certain tax information except as authorized by this title which refers to Title 26 U.S.C., the Internal Revenue Code," and section 3402 requires an employer to withhold taxes from wages in accordance with procedures promulgated by the Secretary; inasmuch as the procedures provide that the IRS will notify the employer when the certificate is defective, it is evident that the IRS cannot so notify the employer without disclosing the employee's return information).
3. Swierkowski v. United States, 620 F. Supp. 149, 151 (E.D. Cal. 1985) (section 3402(m)-(n) authorizes the promulgation of regulations relating to claims for withholding allowances and for exemptions from withholding; Treas. Reg. § 31.3402(f)(2)-1(g)(5) instructs the IRS to furnish an employer with information such as an employee's status, withholding allowances, etc.), *aff'd mem.*, 800 F.2d 1145 (9th Cir. 1986) (table cite).
4. Van Skiver v. United States, No. 89-1490-C, 1990 WL 11038, at \*2 (D. Kan. Jan. 31, 1990) (subsequent history omitted) (dealing with the disclosure of return information through the filing of proper Notices of Federal Tax Lien and issuing of levies authorized under Title 26; as a matter of law, "[b]oth acts are not only permitted but required by the statutes and the Regulations of the Internal Revenue Service when tax assessments have been made and unpaid"; thus disclosures to effectuate such liens or levies do not violate section 6103).

## **B. I.R.C. § 9706(f)(1)**

A mine operator can, within 30 days of receipt of an assignment of a United Mine Workers of America (UMWA) beneficiary, “request from the Commissioner of the Social Security Administration detailed information as to the work history of the beneficiary and the basis of the assignment.” I.R.C. § 9706(f)(1). If section 9706(f)(1) permits the mine operator to request the wage information of the assigned beneficiaries from the SSA, it necessarily implies that the SSA can disclose the wage information to the mine operators. Section 9706 also contains, at subparagraph (g), a provision pertaining to the confidentiality of such information.

CONFIDENTIALITY OF INFORMATION — Any person to which information is provided by the Commissioner of Social Security under this section shall not disclose such information except in any proceedings related to this section. Any civil or criminal penalty which is applicable to an unauthorized disclosure under section 6103 shall apply to any unauthorized disclosure under this section.

Reading subsections (g) and (f) of section 9706 in concert suggests that Congress had a distinct reason for allowing and limiting the disclosure of beneficiaries’ wage information in order to effectuate the Energy Policy Act of 1992, *amended by* Pub. L. No. 103-296, Title I, § 108(h)(9)(B) (1994), 108 Stat. 1487 and Pub. L. No. 109-432, Div. C, Title II, § 212(a)(3) (2006), 120 Stat. 3025.

For additional provisions of the Code that authorize the disclosure of returns and return information, see *generally* Chapters 2 - 12, 14.

## **PART III: CRIMINAL LIABILITY FOR WILLFUL UNAUTHORIZED INSPECTION AND DISCLOSURE**

### **I. I.R.C. § 7213 – UNAUTHORIZED DISCLOSURES**

#### **A. Background**

Section 7213(a) provides for felony criminal liability for the willful unauthorized disclosure of returns and return information, punishable by imprisonment of not more than five years, or a fine of not more than \$5000, or both, together with prosecution costs. In the case of an employee or officer of the United States, section 7213 mandates that the employee or officer be dismissed from office or discharged from employment upon conviction. The statute does not create a right of action for a taxpayer against the United States. See Nordbrook v. United States, 96 F. Supp. 2d 944, 948 (D. Ariz. 2000) (district court dismissed plaintiffs' claims premised on RICO, wire fraud, false statement, unauthorized disclosures, and extortion, concluding that these criminal statutes do not apply to the United States).

Although section 7213 expressly provides for a fine of not more than \$5,000, 18 U.S.C. § 3571(b)(3) authorizes a greater fine if certain factors are present. See *generally* UNITED STATES SENTENCING COMMISSION, UNITED STATES SENTENCING GUIDELINES MANUAL, § 5E1.2 (2003), and commentary. For purposes of sentencing, United States Sentencing Guidelines Manual § 2H3.1 (2009) is applied. See UNITED STATES SENTENCING COMMISSION, UNITED STATES SENTENCING GUIDELINES MANUAL, APP. A, 18 U.S.C. App. A (2000). 18 U.S.C. § 3571(b)(3) provides for a fine no more than the greater of the amount in the Code section or \$250,000.

#### **B. Elements of I.R.C. § 7213**

To sustain a conviction under section 7213(a)(1), the United States must prove beyond a reasonable doubt that: (1) an officer or employee of the United States, or any person described in section 6103(n), or a former officer or employee; (2) disclosed; (3) returns or return information; (4) in a manner not authorized by the Internal Revenue Code; and (5) the disclosure was made willfully.

##### **1. Persons Covered**

- a. Section 7213(a)(1) expressly applies to "any officer or employee of the United States or any person described in section 6103(n) (or an officer or employee of any such person), or any *former officer or employee*." (emphasis added).

- b. It applies to State officers and employees and anybody else who receives the information under the authority of the Code sections listed in section 7213(a)(2).
- c. Section 7213(a)(3) makes it a criminal offense for any person to whom returns or return information is disclosed in a manner which is not authorized by Title 26 willfully to print or publish in any manner not provided by law any such return or return information. In other words, a party who knowingly receives returns or return information in a manner not permitted by Title 26 may be subject to criminal sanctions if such party knowingly rediscloses, through some media, a return or return information in a manner not authorized by Title 26.

## **2. Disclosed**

- a. Although section 7213 does not define "disclose," or any variant of that term, section 6103(b)(8) defines "disclosure" as "[t]he making known to any person in any manner whatever a return or return information."
- b. In cases decided under section 7431, which provides a civil remedy for unauthorized disclosures of returns and return information, there is a split of authority regarding whether returns and return information may be "disclosed," within the meaning of section 6103, when they are already a matter of public record as a result of the IRS's tax administration activities or in judicial tax proceedings.

The Service adheres to a limited public records exception. For a more detailed discussion of the public record exception to section 6103, see *generally* Chapter 2, Part IV.

## **3. Return or return information**

Section 7213(a) expressly references section 6103(b) for the definitions of return and return information. See *generally* Chapter 2.

## **4. Not authorized by the Internal Revenue Code**

For a disclosure of any return or return information to be authorized by the Code, there must be an affirmative authorization because section 6103(a) otherwise prohibits the disclosure of any return or return information by any person covered by section 7213(a)(1). In general, however, section 6103 is the primary, but *not* exclusive, provision of Title 26 that authorizes disclosure. Section 6103 contains numerous subsections addressing

various circumstances in which returns and return information may be disclosed.

## **5. Willfulness**

Section 7213 was amended in 1978 to require proof that a disclosure was made "willfully." Revenue Act of 1978, Pub. L. No. 95-600 § 701(bb)(6)(A), 92 Stat. 2763 (1978). The Staff of the Joint Committee on Taxation explained that the term "willfully" as used in the amendment of section 7213 relates to a "voluntary, intentional violation of a known legal duty," *citing* United States v. Pomponio, 429 U.S. 10, 12 (1976). *General Explanation of the Revenue Act of 1978*, H.R. 13511, Pub. L. No. 95-600 (JCS-1-79), at 398 (J. Comm. Print 1979). In Pomponio, the Supreme Court explained that the term "willfully," in the context of criminal violations of the Code, does not require a showing of evil motive beyond a specific intent to violate the law, holding the term simply connotes a voluntary, intentional violation of a known legal duty. 429 U.S. at 12.

## **C. Statute of Limitations**

The statute of limitations applicable to offenses under section 7213 is section 6531, which prohibits prosecution "unless an indictment is found or the information instituted within 3 years next after the commission of the offense . . ." This period is tolled, however, for any period of time that the offender is outside the United States or is a fugitive from justice within the meaning of 18 U.S.C. § 3290.

## **D. Cases Under I.R.C. § 7213(a)**

1. United States v. Beretta, No. 5:93-cr-20013 (N.D. Cal. sentenced Mar. 28, 1994) (indictment of IRS employee for, *inter alia*, willfully disclosing tax return information to a third party; employee subsequently pled guilty to this charge).
2. United States v. Kynard, No. 4:95-cr-00229 (S.D. Tex. sentenced Feb. 20, 1996) (an IRS computer assistant entered a plea of guilty for the unauthorized disclosure of return information in violation of section 7213, admitting that, at the request of her husband's boss, she used the IRS's Integrated Data Retrieval System (IDRS) to gain unauthorized access to return information of the requester's partner and disclosing this information to the requester; employee sentenced to five years probation, a \$5,000 fine, and 100 hours of community service).

3. United States v. Marty, No. CR-F-87-3 (E.D. Cal. June 8, 1987) (IRS employee disclosed return information to assist family members' business enterprise and government had recommended probation; in sentencing employee to one year in prison for disclosing return information to assist family members' business enterprise, court "absolutely amazed" at government recommendation of probation, observing "[t]he crime strikes at the very heart of the internal revenue system"; if people could not be certain that their return information was confidential, the voluntary system of self assessment would collapse and further expressed hope that the "sentence is widely communicated to other" IRS employees).
4. United States v. Moore, 47 F.3d 1171 (table cite), No. 94-5342, 1995 WL 7969, at \*3 (6th Cir. Jan. 9, 1995) (per curiam) (conviction and sentence of 19 months in prison and five years probation affirmed for IRS tax adjuster who examined taxpayer accounts on IRS computer systems without authorization and later disclosed information he accessed in letters; United States was required to prove not only that employee accessed return information on the IRS's computers, but that he also disclosed it).
5. United States v. Richey, 924 F.2d 857, 863 (9th Cir. 1991) (upheld conviction of former IRS employee for willfully disclosing to the press that while he was an IRS employee and before the judge's appointment to the bench, he had audited the judge's tax returns and found discrepancies; statements to the press in violation of section 6103 were not protected by the First Amendment).
6. United States v. Schultz, No. 2:95-cr-277 (E.D. Pa. sentenced Oct. 6, 1995) (employee entered a guilty plea to one count of unauthorized disclosure of information under section 7213(a)(1) for accessing IDRS and obtaining third-party return information that she forwarded to an attorney who was representing her in a matter unrelated to any duties she had as an IRS employee; guilty plea memorandum that United States Attorney submitted to the court stated that government had evidence confirming that the attorney was representing the employee without an increased fee in return for the tax disclosures that the attorney wanted for pursuing her own affairs).
7. United States v. Wilson, No. 1:95-cr-350 (N.D. Ohio sentenced Jan. 16, 1996) (employee pled guilty to one count of unauthorized disclosure of information under section 7213(a)(1) acknowledging that, while employed as a taxpayer service representative, she accessed return information from an IRS computer multiple times and disclosed some of the return information to a third party).

## E. Additional Provisions of I.R.C. § 7213

Each of the offenses is punishable by the same term of imprisonment and/or fine applicable to violations of section 7213(a)(1), together with the costs of prosecution.

1. Section 7213(a)(2) makes it a criminal offense for state employees and other persons who acquire returns or return information pursuant to certain selected provisions of section 6103 willfully to disclose those returns and return information, except as authorized by the Code.
2. Section 7213(a)(3) makes it a criminal offense for any person to whom returns or return information is disclosed in a manner which is not authorized by Title 26 willfully to print or publish in any manner not provided by law any such return or return information. In other words, a party who knowingly receives information in a manner not permitted by Title 26 may be subject to criminal sanctions if such party knowingly rediscloses, through some media, a return or return information in a manner not authorized by Title 26.
3. Section 7213(a)(4) makes it a criminal offense for any person willfully to offer any item of material value in exchange for returns or return information and to receive as a result of such solicitation any such return or return information.
4. Section 7213(a)(5) makes it a criminal offense for any person to whom returns or return information is disclosed pursuant to section 6103(e)(1)(D)(iii) (*i.e.*, a person who is at least a one-percent shareholder) to disclose such returns or return information in any manner not provided by law.

**Note:** This criminal provision comports with section 6103(a)(3), which imposes the general disclosure prohibition of section 6103 on one-percent shareholders, as well as officers and employees of the United States, among others.

## II. I.R.C. § 7213A – UNAUTHORIZED ACCESSES (UNAX)

### A. Background

"Browsing" is a term used to describe the unauthorized access to, or inspection of, returns or return information without regard to whether the "browser" further disclosed that information to another person. The IRS also refers to this activity as unauthorized access, or UNAX. UNAX typically arises in the context of IRS employees accessing taxpayer accounts on an automated database, such as the Integrated Data Retrieval System (IDRS), without a tax administration purpose.



Section 7213A(b) provides that a conviction can result in a fine in any amount not exceeding \$1,000, or imprisonment of not more than a year, or both. In addition, conviction results in a dismissal from office or discharge from employment.

Although section 7213A expressly provides for a fine of not more than \$1,000, 18 U.S.C. § 3571 authorizes a greater fine if certain factors are present. See *generally* UNITED STATES SENTENCING COMMISSION, UNITED STATES SENTENCING GUIDELINES MANUAL, § 5E1.2 (2003), and commentary. For purposes of sentencing, United States Sentencing Guidelines Manual § 2H3.1 (2009) is applied. See UNITED STATES SENTENCING COMMISSION, UNITED STATES SENTENCING GUIDELINES MANUAL, APP. A, 18 U.S.C. App. A (2000). Section 3571 of Title 18 provides for a fine of no more than the greater of the amount in the Code section or \$100,000. See UNITED STATES SENTENCING COMMISSION, UNITED STATES SENTENCING GUIDELINES MANUAL APP. A, 18 U.S.C. App. A (2000). See *also* REVENUE RECONCILIATION ACT OF 1997, REPORT OF THE COMMITTEE ON THE BUDGET OF THE HOUSE OF REPRESENTATIVE TO ACCOMPANY H.R. 2014, H.R. REP. NO. 105-148, at 612 n.16 (Comm. Print 1997) (“Pursuant to 18 U.S.C. sec. 3571 (added by the Sentencing Reform Act of 1984), the amount of the fine is not more than the greater of the amount specified in this new Code section or \$100,000”).

1. Section 7213A(a)(1) makes it unlawful for any officer or employee of the United States, or any person described in section 6103(l)(18) or (n) or officer or employee of such person, to willfully inspect, except as authorized in Title 26, any return or return information.
2. Section 7213A(a)(2), relating to state and other employees who acquired returns or return information under certain provisions of section 6103, makes it "unlawful for any [such] person willfully to inspect such return or return information except as authorized by [Title 26]."

## **B. Elements of I.R.C. § 7213A**

To sustain a conviction under section 7213A(a), the United States must prove beyond a reasonable doubt that: (1) an officer or employee of the United States, any person described in section 6103(l)(18) or (n), or a state or other employee described in section 7213A(a)(2); (2) inspected; (3) any return or return information; (4) in a manner not authorized by the Internal Revenue Code; and (5) such inspection was made willfully. The elements are identical to the elements of a section 7213 offense, with the exception that in the place of an unauthorized “disclosure,” the prosecution must demonstrate that there was an unauthorized “inspection.”

Although section 7213A does not define "inspect," or any variant of that term, it specifically refers to the definitional section at section 6103(b)(7). Section

6103(b)(7) states that the "terms 'inspected' and 'inspection' mean any examination of a return or return information." The legislative history evidences a congressional intent to prohibit unauthorized inspections:

The Committee believes that it is important to have a criminal penalty in the Internal Revenue Code to punish this type of behavior. . . . The Congress views any unauthorized inspection of tax returns or return information as a very serious offense; this new criminal penalty reflects that view. The Congress also believes that unauthorized inspection warrants very serious personnel sanctions against IRS employees who engage in unauthorized inspection, and that it is appropriate to fire employees who do this.

REVENUE RECONCILIATION ACT OF 1997, H.R. REP. NO. 105-148, *reprinted in* Report of the Committee on the Budget House of Representatives to Accompany H.R. 2014, 105th Cong., 611-12 (1997). The statute specifically provides that the element of willfulness must be met, as it must be for section 7213 violations. This is intended to exempt inspections resulting from inadvertent or mistaken accesses.

### **III. 18 U.S.C. § 1030(a)(2)(B) – UNAUTHORIZED COMPUTER ACCESSES**

#### **A. Statutory Provisions**

The Economic Espionage Act of 1996, Pub. L. No. 104-294, 110 Stat. 3488, amended 18 U.S.C. § 1030(a)(2) to penalize whoever “intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains . . . (B) information from any department or agency of the United States . . . .”

The elements of the offense which the United States has to demonstrate, beyond a reasonable doubt, are that an individual (1) intentionally; (2) accesses a computer; (3) without authorization or exceeding authorization; and (4) obtains information from any department or agency of the United States. The statute of limitations applicable to an offense under 18 U.S.C. § 1030 expires five years after the date of the alleged offense. 18 U.S.C. § 3282. This statute places no limitation on the status of the individual making the unauthorized access, *i.e.*, it is not limited to United States employees.

#### **B. Punishment**

18 U.S.C. § 1030(c) has an elaborate punishment provision, depending upon whether the conviction is a first offense, and whether there is commercial or financial gain. For purposes of sentencing, United States Sentencing Guidelines Manual § 2B1.1 (2010) is applied. See UNITED STATES SENTENCING COMMISSION,

UNITED STATES SENTENCING GUIDELINES MANUAL, APP. A, 18 U.S.C. App. A (2000).

**Note:** Section 7213 applies to unauthorized disclosures by former employees, whereas section 7213A does not apply to former employees. 18 U.S.C. § 1030(a)(2)(B) applies only to the unauthorized access to government information stored on computers; it does not address unauthorized access to information stored on other media, *e.g.*, paper files. On the other hand, section 7213A applies to all unauthorized inspections of returns and return information, regardless of storage medium.

## CHAPTER 2

### PART I: DEFINITIONS

#### I. I.R.C. § 6103(b) – DEFINITIONS

##### A. "Return" – I.R.C. § 6103(b)(1)

1. Tax or information returns (e.g., Forms 1040, 1120, 941, 1099), estimated tax declarations, or refund claims, and any amendments or supplements, including supporting schedules (e.g., Schedules A and B for 1040, Schedule K-1), attachments, or lists which are supplemental to, or part of, the return;
2. That are required by, provided for, or authorized by Title 26; and
3. That are filed with the Secretary by, on behalf of, or with respect to, any person.
  - a. "**Secretary**" means Secretary of the Treasury or his delegate. I.R.C. § 7701(a)(11)(B). Thus, "Secretary" includes any officer or employee of the Department of the Treasury authorized to perform the acts referred to in each provision of the Code.
  - b. Forms W-2 and W-3 filed with the Social Security Administration pursuant to the Combined Annual Wage Reporting program in accordance with sections 6041, 6051, and 6103(l)(5), are "returns" within the meaning of section 6103(b). Judicial Watch, Inc. v. SSA, 799 F. Supp. 2d 91, 96, 97 (D.D.C. 2011) (FOIA request for a listing of employers sent the most "no-match" letters (based upon the Forms W-2 filed by the employers) denied because the listing, like the letters, are the return information of the employers that file the Forms W-2); Davis, Crowell & Bowe, LLP v. SSA, 2002 WL 1034085 (N.D. Cal. May 16, 2002) (FOIA request sought mismatch information related to W-2 filings by certain employers), vacated, 281 F. Supp. 2d 1154 (N.D. Cal. 2003) (joint motion to vacate due to settlement granted.);
  - c. Copies of returns retained by the taxpayer are *not* protected by section 6103. See, e.g., Stokwitz v. Dep't of Navy, 831 F.2d 893, 894-96 (9th Cir. 1987) (civilian's personal copies of his tax returns, retained in his office and taken by Navy agents during an investigation, were not return information), *cert. denied*, 485 U.S. 1033 (1988); Memorandum Opinion for the General Counsel, Federal Mine Safety and Health Review Commission, 3 Op. O.L.C. 201, 201 (1979); S. REP. NO. 94-938, at 330, 1976-3 C.B. 369 (1976) ("By this amendment [creating 6103(h)], the Committee does not [intend] to limit the right of an agency (or other party) to obtain returns and return information directly from the

taxpayer through the applicable discovery procedures."); Hrubec v. Nat'l R.R. Passenger Corp., No. 91 C 4447, 1994 WL 27882, at \*2-3, n.4 (N.D. Ill. Jan. 31, 1994) (section 6103 "was not intended to curtail the behavior of people without legitimate access to tax information, but to ensure that the IRS and other government agencies behave responsibly in disseminating tax data," and should not be construed as a general prohibition against the release of tax information by any party), *aff'd*, 49 F.3d 1269 (7th Cir. 1995).

- d. "**Fifth Amendment**" returns with jurat crossed out, left blank except for Fifth Amendment plea, or those not containing sufficient financial information from which a tax liability could be calculated, *are not* "returns." I.R.C. § 7203.

## **B. "Return Information" – I.R.C. § 6103(b)(2)**

1. Taxpayer's identity (name of person with respect to whom a return is filed, the person's mailing address, and taxpayer identifying number (*e.g.*, SSN, EIN, ATIN, or ITIN), or a combination thereof). I.R.C. § 6103(b)(6) and (b)(9); or
2. The nature, source, or amount of income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, tax payments; or
3. Whether the return was, is being, or will be examined or subject to other investigation or processing; or
4. Any part of any written determination or background file document which is not open to public inspection under section 6110; or
5. Any advance pricing agreement entered into by a taxpayer and the Secretary and any background information related to such agreement or any application for an advance pricing agreement; or
6. Any closing agreement under section 7121, and any similar agreement, and background information related to the agreement or request for agreement; or
7. Any other data; and
8. Which is received by, recorded by, prepared by, furnished to, or collected by the IRS; and
9. With respect to a return *or* with respect to the determination of the existence or possible existence of liability or the amount of liability;
10. Of any "person," see section 7701(a)(1);

11. Under Title 26;
12. For any tax, penalty, interest, fine, forfeiture, or other imposition or offense.

The term “return information” is broad and includes any information gathered by the IRS with regard to a taxpayer's liability under the Code. See McQueen v. United States, 264 F. Supp. 2d 502, 516 (S.D. Tex. 2003), *aff'd*, 100 F. App'x 964 (5th Cir. 2004); LaRouche v. Dep't of Treasury, 112 F. Supp. 2d 48, 54 (D.D.C. 2000) (“return information is defined broadly”); Hull et al v. IRS, 656 F.3d 1174, 1195-96 (10th Cir. 2011) (Data created or compiled by the IRS while determining an employee benefit plan’s compliance is return information).

Despite the breadth of the statutory definition, some courts rejected the IRS’s position that certain matter constituted return information. The D.C. Circuit rejected the IRS’s position in a FOIA case that field service advice memoranda, which were written generally to provide advice to field examiners during the audits they were conducting of taxpayers, constitute return information in their entirety, ruling that the national office subject matter experts’ legal analyses contained in the memoranda was not “data” within the meaning of “return information” found in section 6103(b)(2)(A). Tax Analysts v. IRS, 117 F.3d 607, 611-16 (D.C. Cir. 1997). In Kamman v. IRS, 56 F.3d 46, 49 (9th Cir. 1995), *rev'g* 1993 WL 522891 (D. Ariz. July 7, 1993), the 9th Circuit found that the affidavits introduced by the government in support of its motion for summary judgment in a FOIA case failed to demonstrate how property appraisals obtained by revenue officers during their efforts to collect on a taxpayer’s (already established) tax liability fit within the definition of return information.

Section 521, Title V, of the Ticket to Work and Work Incentives Improvement Act of 1999, Pub. L. No. 106-170, 113 Stat. 1860, 1925-27 (effective December 17, 1999), amended section 6103 to expressly provide that advance pricing agreements (APAs) and related background information *are* confidential return information. Related background information includes: the request for an APA, any material submitted in support of the request, and any communication (written or otherwise) prepared or received by the IRS in connection with an APA, regardless of when the 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. See 149 CON. REC. S10297-02 \*10330 (July 30, 2003).

Section 304(a) of the Consolidated Appropriations Act of 2001, Pub. L. No. 106-554, 114 Stat. 2763, 2763A-632-33 (effective December 21, 2000), amended section 6103(b)(2) to explicitly provide that closing agreements under section 7121, similar agreements, and background information concerning them, are confidential return information under section 6103(b)(2)(D).

Information concerning Title 26 violations that are not connected to assessment or collection of taxes (e.g., sections 7213, 7214) is "return information" of the person(s) being investigated. See, e.g., O'Connor v. IRS, 698 F. Supp. 204, 206 (D. Nev. 1988) (a threat against an IRS employee is a violation of section 7212 and information collected with respect to that offense is return information), *aff'd mem.*, 935 F.2d 275 (9th Cir. 1991); Conn v. United States, No. C-91-2192JW (PVT), 1991 WL 333707, at \*1, 92-1 U.S.T.C. 50,123 (N.D. Cal. Dec. 10, 1991) (investigation report prepared by Inspection concerning conduct of IRS employee accused of making unauthorized disclosure is return information of the accused employee).

Though protest "Fifth Amendment" returns with crossed-out jurats are not "returns," as noted above, they *are* "return information."

The courts are split with respect to whether information that the Department of Justice (DOJ) generates or obtains after the IRS's referral of the tax case is "return information." United States v. Bachelet, 611 F.2d 443, 449 (3d Cir. 1979) determined that this is return information because DOJ acted as the Secretary's attorney. By contrast, the court in Ryan v. United States, 74 F.3d 1161, 1163 (11th Cir. 1996), ruled that the statutory definition of return information confines it to information that has passed through the IRS, and therefore a prosecutor's memorandum distilled from statements of trial witnesses in a criminal tax case were not return information. See also Baskin v. United States, 135 F.3d 338, 342-43 (5th Cir. 1998) (IRS special agent's possession of data collected by a grand jury investigating nontax crimes did not transform the data into return information, thus transfer of the data to Houston police officers was not prohibited by section 6103).

Statistical compilations or other amalgamations that do not directly or indirectly identify a particular taxpayer are excluded from coverage by the plain language of the statute. I.R.C. § 6103(b)(2) (flush language, commonly referred to as the Haskell amendment).

Return information from which identifiers (e.g., name, taxpayer identification number, zip code) have been deleted is still subject to the disclosure restrictions of section 6103. The statute is more than an identity test. See Church of Scientology of Cal. v. IRS, 484 U.S. 9, 14-18 (1987); Long v. IRS, No. 08-35672, 2010 WL 3677445 at \*2-3 (9th Cir. Sept. 16, 2010) (confidential return information "maintains that status when it appears unaltered in a tabulation with only identifying information removed," citing Long v. IRS, 891 F.2d 222, 223 (9th Cir. 1989) (even after deletion of taxpayer identifying information, TCMP check sheets containing reported and corrected return line item data were return information, and were not a reformulated database eligible for disclosure under the Haskell amendment)); Judicial Watch, Inc., 799 F. Supp. 2d at 96-97 (list of employers sent "no-match" letters identifies particular employer taxpayers and therefore is not a statistical compilation).

### C. "Taxpayer Return Information" – I.R.C. § 6103(b)(3)

Taxpayer return information is return information filed with or furnished to the IRS by or on behalf of the taxpayer to whom the information relates. Information filed on the taxpayer's behalf by the taxpayer's representative (e.g., attorney or accountant), either voluntarily or pursuant to summons, is taxpayer return information.

1. An item taken directly from a return is taxpayer return information.
2. The distinction between "return information" and "taxpayer return information" is significant *only* in the context of disclosures for nontax federal criminal matters under section 6103(i). See *generally* Chapter 5.

### D. "Tax Administration" – I.R.C. § 6103(b)(4)

1. Administration, management, conduct, direction, and supervision;
2. Of the execution and application of the internal revenue laws and related statutes (or equivalent laws of a state);
3. And tax conventions to which the United States is a party; and
4. The development and formulation of federal tax policy relating to existing internal revenue laws, related statutes, and tax conventions;
5. Including assessment, collection, enforcement, litigation, publication, and statistical gathering;
6. Under the internal revenue laws, related statutes, and conventions.

The meaning of "tax administration" is sweeping. See, e.g., First W. Gov't Sec., Inc. v. United States, 796 F.2d 356, 360 (10th Cir.1986) (the term "tax administration" should be interpreted broadly). Nonetheless, not every act performed by IRS officers and employees is a tax administration function. For example, as an employer, the IRS routinely addresses employment and personnel related issues. Whether an employment or personnel issue falls within the category of a "tax administration" matter depends on the nexus between the personnel matter at hand and the employee's ability to support and further the integrity of the tax laws. Although the relationship between an IRS employee's personal compliance with the tax laws and the integrity of the tax system, even from a purely personnel perspective, is likely to be considered a tax administration matter, an IRS employee's compliance with nontax laws that may affect his or her personnel status does not necessarily rise to the level of a "tax administration" matter simply because the employer investigating the possible noncompliance is the IRS. Compare Sanders v. State, 469 A.2d 476, 485 (Md.



App. 1984) (prosecution for planned murder of revenue agent pertained to tax administration and defendant's returns and return information were lawfully disclosed in the prosecution) *with* United States v. Sumpter, 133 F.R.D. 580, 584 n.3 (D. Neb. 1990) (in case with insufficient factual record, court found no indication that prosecution under 18 U.S.C. § 876 for mailing threatening letters to IRS agent would cause case to be characterized as tax administration; court would have granted evidentiary hearing to develop the facts, but deemed it unnecessary because the relief sought by defendant, suppression of the evidence, is unavailable for a violation of section 6103).

A state tax authority is authorized, by the tax administration exemption of section 6103(d), to disclose return information in the context of conducting an inquiry designed to ensure the integrity of the state tax system. Rueckert v. IRS, 775 F.2d 208, 212 (7th Cir. 1985) (relevant, specific information disclosed in the context of investigating a state tax agency employee's outside employment served to ensure the integrity of the state's system of administering its tax laws, and was authorized under section 6103).

The use of an IRS employee's returns for handwriting exemplars as evidence that he prepared and filed false and fictitious returns in others' names was for a tax administration purpose. United States v. Mangan, 575 F.2d 32, 40 (2d Cir. 1978), *cert. denied*, 439 U.S. 931 (1978).

Tax administration includes enforcement and litigation functions under the internal revenue laws, including summons enforcement proceedings. See, e.g., Lebaron v. United States, 794 F. Supp. 947, 950 (C.D. Cal. 1992) (tax administration includes IRS disclosures of returns and return information to a magistrate during a proceeding to enforce an IRS administrative summons issued to a third party).

A *pro hac vice* hearing for an attorney who sought to represent a taxpayer in a criminal tax prosecution was not a matter pertaining to tax administration for purposes of section 6103. McLarty v. United States, 741 F. Supp. 751, 755-56 (D. Minn. 1990), *reconsideration granted* 784 F. Supp. 1401 (D. Minn. 1991) (defense motion for summary judgment on good faith defense denied).

A proceeding involving the efforts of a confidential informant to recover reward money from the IRS for providing information leading to the collection of a taxpayer's unpaid taxes is a matter pertaining to tax administration under section 6103(b)(4). Confidential Informant 92-95-932X v. United States, 45 Fed. Cl. 556, 559 (2000).

## **E. "Disclosure" – I.R.C. § 6103(b)(8)**

The term "disclosure" means:

1. The making known
2. to any person
3. in any manner whatever
4. a return or return information.

There is no "making known" of return information if the recipient already has knowledge of the information. See Brown v. United States, 755 F. Supp. 285, 287 (N.D. Cal. 1990); Haywood v. United States, 642 F. Supp. 188, 190-91 (D. Kan. 1986) (disclosure of taxpayer's name and taxpayer identification number was tangential consequence of levy and was not material because employer already knew that information).

If otherwise confidential return information has become a matter of public record in a judicial or administrative proceeding pertaining to tax administration, taxpayers no longer have a legitimate claim of privacy in the information and the information is no longer afforded the protection of section 6103. See *generally* Chapter 2, Part IV.

## **F. "Terrorist Incident, Threat, or Activity" – I.R.C. § 6103(b)(11)**

The Victims of Terrorism Tax Relief Act of 2001, P.L. No. 107-134, 115 Stat. 2427 (2002) amended section 6103 in several places to specify authorized disclosures to aid in combating terrorism. Section 6103(b)(11) was added to define a terrorist incident, threat, or activity to mean an incident, threat or activity involving an act of domestic terrorism as defined in 18 U.S.C. § 2331(5) or international terrorism as defined in 18 U.S.C. § 2331(1).

## **II. I.R.C. § 6103 – WHOSE INFORMATION IS PROTECTED**

### **A. Section 6103 of the Code Permits Disclosure Only as Authorized By Title 26.**

Before the Tax Reform Act of 1976, disclosures were permitted to the extent "authorized by law."

### **B. Deciding Whose Return/Return Information Is At Issue**

1. The source of a tax return or return information is not always controlling. The same item of information may be the return information of more than one taxpayer, *i.e.*, data supplied to the IRS by Taxpayer A that may affect Taxpayer B's tax return may be the return information of Taxpayer A alone, of Taxpayers A and B, of Taxpayer B alone, or of neither

Taxpayer A nor B. For example, information contained on a Form 1099 may pertain to both the payor's tax liability and the payee's tax liability. See Tanoue v. IRS, 904 F. Supp. 1161, 1166 (D. Hawaii 1995) (information collected from FOIA requester during tax investigation of third party was the third party's return information).

2. Although information supplied by one taxpayer with respect to his or her own tax liability often affects the liability of another taxpayer, section 6103 does not automatically authorize disclosure to that second taxpayer merely because of its possible effect. Compare Martin v. IRS, 857 F.2d 722, 725-26 (10th Cir. 1988) (following audit of partnership and adjustment of co-partners' individual returns, protest filed by each partner was return information of filing partner, protected by section 6103; one partner was not entitled to disclosure under FOIA of protests filed by other partners) with Solargistic Corp. v. United States, 921 F.2d 729, 731 (7th Cir. 1991) (the fact of an audit of a shelter promoter was both promoter's and investors' return information; IRS disclosure of information relating to a tax shelter promoted by a corporate taxpayer in letters sent to the corporate taxpayer's customers/investors did not constitute an unlawful disclosure of return information). See also Mid-South Music Corp. v. IRS, 818 F.2d 536, 539 (6th Cir. 1987) (audit of shelter is also return information of investors); First W. Gov't Sec., Inc. v. IRS, 796 F.2d 356, 359-60 (10th Cir. 1986) (information in revenue agent report was collected during audit of investors and was investors' return information); Haywood v. United States, 642 F. Supp. 188, 192 (D. Kan. 1986) (disclosure of husband's return information to wife's employer was not a disclosure of the wife's return information).
3. "Basket Analogy" of Martin:

Suppose the IRS has a basket for each taxpayer and corporate entity. When the IRS makes a determination about an entity's return, the report is placed in the entity's basket. Under the authority of section 6103(e), it is also placed in the baskets of the entity's partners/shareholders. Individual reactions [*i.e.*, protests] to the report are placed only in the basket of that taxpayer. If the IRS then reacts to the protests and [makes adjustments to] the entity's return, that information is again placed both in the entity's basket and in those of its partners/shareholders.

Martin, 857 F.2d at 725.

4. In determining whose return information it is, the key factor is not whose tax liability may be affected by the data, but rather, whose tax liability is under investigation by the IRS when the information is obtained or generated by the IRS. *Id.*

**PART II: DISCLOSURES TO PERSONS WITH A MATERIAL INTEREST**  
**I.R.C. § 6103(e)**

**I. I.R.C. § 6103(e) – DISCLOSURES UPON WRITTEN REQUEST**

**A. I.R.C. § 6103(e)(1)(A)**

Individual returns are available to:

1. The individual who filed the return.

Example: Mr. and Mrs. Boggs filed separate returns for 1995. Mrs. Boggs submitted a written request for Mr. Boggs' 1995 return. Mrs. Boggs is authorized to receive only her own 1995 return; not her husband's.

2. The child of the individual to the extent necessary to comply with section 1(g) (and for tax years beginning *before* December 31, 1997, but not thereafter, section 59(j)).

Example: Carl Yaz, 13 year old son of the Yazs, files his own separate return. To determine his applicable tax rate for his 1990 tax return pursuant to section 1(g), Carl submits a written request for a copy of the Yazs' 1990 joint tax return. Carl is entitled to a copy of his parents' 1990 joint return only "to the extent necessary" to comply with section 1(g); normally the *entire* return would not be available to Carl because normally the entire return would not be "necessary" for Carl's purposes.

**B. I.R.C. § 6103(e)(1)(B)**

Joint returns are available to either spouse on whose behalf the joint return was filed.

Example: Ted and Alice filed a joint return for 1996. They divorced and filed separate returns for 1997. In 1998, Alice submits a written request for a copy of the 1996 joint return and Ted's 1997 return. Because a joint return was filed in 1996, Alice is authorized to receive a copy of that return. She may not, however, receive a copy of Ted's 1997 return.

**Note**: The IRS may not disclose to Alice whether Ted filed a return for 1997 or any information from or about such a return.

### C. I.R.C. § 6103(e)(1)(C)

Partnership returns are available to any person who was a member of the partnership during any part of the period covered by the return.

Example: Partner A was a member of the ABC partnership from March 16, 1990, through May 16, 1990. Partner A submits a written request for a copy of the ABC's partnership return for 1990. Because A was a partner of the ABC partnership for a part of the period covered by the return, A is authorized to receive a copy of the return.

Example: The ABC partnership utilizes a fiscal year beginning July 1, 1996, and ending June 30, 1997 ("the 1996 return"). B became a partner on October 30, 1997, and submits a written request for a copy of ABC's 1996 return. Because B was not a member of the ABC partnership for any part of the period covered by the 1996 return, B is not authorized to receive a copy.

**Note:** The partnership return includes Schedules K-1, but see section 6103(e)(10) and section K, below.

### D. I.R.C. § 6103(e)(1)(D)

Corporation and corporate subsidiary returns are available to:

1. Any person designated by resolution of the corporation's board of directors.
2. Any corporate officer or employee if a written request has been submitted by a principal officer and attested to by any other corporate officer.
3. Any corporate officer authorized by the corporation in accordance with applicable state law to legally bind the corporation.
4. A *bona fide* shareholder of record owning at least one percent of the outstanding corporate stock:
  - a. Must be a current one percent shareholder.

Example: As of March 16, 1997, shareholder A owned 10% of the outstanding stock of Bosox, Inc. Shareholder A sold his stock to shareholder B on October 30, 1997. Shareholder A submitted a request for a copy of Bosox Inc.'s 1997 tax return on November 1, 1997. Because shareholder A was not a shareholder of record on the date of his request, he is not authorized to receive a copy of the corporate return.

A former shareholder of an existing company could not compel the IRS to produce technical advice memoranda relating to the company for use in a pending securities fraud case. Shareholder inspection privileges extend only to *bona fide* shareholders at the time when inspection is sought; former shareholders are denied this right. See, e.g., Kirk v. First Nat'l Bank of Columbus, Civ. A. No. 76-533A, 1976 WL 1111, at \*2 (N.D. Ga. Aug. 27, 1976). Pursuant to section 6110, however, these documents may be otherwise obtainable in redacted form. At the time of the Kirk decision, section 6110 did not exist.

- b. The requestor must be a shareholder of record and must have both equitable and legal ownership.

Example: Ten percent of the stock of the Rocketman Corporation is held in the street name of the Helpless Brokerage House. Because Helpless' customers are the equitable, but not legal, owners of the shares, Helpless is not authorized to access Rocketman's tax return.

- c. Section 6103(a) restricts a 1% shareholder from making further disclosures of the corporate return; further disclosure could subject the 1% shareholder to criminal penalties under section 7213(a)(5), and to a civil damages action under section 7431. See IRM 11.3.2.

5. Any member of a consolidated return group is authorized to receive a copy of the entire consolidated return for any period in which it was a member. See Yorkshire v. IRS, 26 F.3d 942, 945-46 (9th Cir. 1994).
6. Any shareholder of a Subchapter S corporation who was a shareholder during any part of the period covered by the return.
7. Any person authorized by state law to act on behalf of a dissolved corporation or any person who has been determined by the Secretary to have a material interest which will be affected by information contained in the dissolved corporation's tax return. See, e.g., McAdams v. United States, 1996 WL 303271, at \*3-4 (W.D. La. June 24, 1996) (a 50% shareholder of a dissolved corporation had a material interest in the return information of taxpayer-corporation).

#### **E. I.R.C. § 6103(e)(1)(E), (3)**

Estate returns and decedent's returns are available to:

1. The administrator, executor, or trustee of the estate.

2. Any heir at law, next of kin, beneficiary under the will or donee of the decedent's property, but only if the person has a material interest which will be affected by information contained in the return. The Secretary determines whether such material interest exists. State law should be consulted when determining who is an heir at law.

Example: Notwithstanding the illegitimate status of a taxpayer, because state law recognized his status as an heir, he was found to have a material interest in decedent's return information. Williams v. Commissioner, 523 F. Supp. 89, 91 (E.D. Mo. 1981).

**Note:** Rev. Rul. 2004-68, 2004-31 I.R.B. 118, held the income tax return of an intestate decedent for the calendar year prior to decedent's death shall be open to inspection by or disclosure to any heir at law or next of kin who is a distributee, under applicable state law, of the probate estate of the decedent, and the existence of a material interest of such a person that is affected by information contained in that return will be presumed.

#### **F. I.R.C. § 6103(e)(1)(F)**

Trust returns are available to:

1. Any trustee.
2. Any beneficiary if the Secretary has determined that the beneficiary has a material interest which will be affected by information contained in the return.

**Note:** Be aware of the interplay between sections 6103(e) and 6104 when dealing with beneficiaries of a pension plan. The IRS position set forth in Nichols v. Bd. of Tr., 725 F. Supp. 568, 572 (D.D.C. 1989), is that access to return information of a pension plan is governed solely by section 6104. By contrast, the court in Duncan v. N. Alaska Carpenters Ret. Fund, No. MS90-273, 1991 WL 165052, at \*2-4 (W.D. Wash. Jan. 10, 1991), ruled that access is governed by section 6103(e)(1)(F), and did not reach the issue of access under section 6104.

#### **G. I.R.C. § 6103(e)(2)**

Returns of incompetent taxpayers are available to the committee, trustee, or guardian of an incompetent taxpayer's estate.

Whether a person is the committee, trustee, or guardian of an incompetent is a matter of state law. Some states' laws include provisions granting guardianship of minors' estates to parents or to other specified persons. A person asserting to be the committee, trustee, or guardian of the estate of an incompetent must provide documentation demonstrating this status and the extent of the authority.

With respect to minors, other provisions of the Code authorize disclosure of the minor's tax information to parents or other specific persons under certain circumstances.

1. If the minor's return reflects earned income, the minor's tax information may be disclosed to the minor's parents. Pursuant to section 6201(c), an unpaid assessment against a minor is also considered to be an unpaid assessment against the parent, to the extent it is based on compensation for the minor's services. If the return reflects earned income of the minor, the return may be disclosed to the parent pursuant to section 6103(e)(1)(A)(i) and the return information pertaining thereto may be disclose to the parent pursuant to section 6103(e)(7). IRM 11.3.2.4.10(3)
2. Disclosures may be made to the parent who signed the return on behalf of the child. Rev. Rul. 82-206, 1982-2 C.B. 356, advises that, if the minor cannot make and file his own tax return, the parent should do so on behalf of the minor by the use of the following language: "By (signature) Parent (or guardian) for minor child." The revenue ruling is derived from section 6012 and the regulations promulgated thereunder. Treas. Reg. § 1.6012-1(a)(4) requires the guardian or other person charged with the care of the minor's person or property to make and file the return on behalf of the minor if the minor did not make and file the return. Inherent in this section is the authority to discuss the return and resulting tax liability, including any necessary collection activities, with the parent who signed the return. IRM 11.3.2.4.10(2).
3. If the minor signed the return, the minor is the taxpayer, and the minor may consent to disclosure of his own return and return information by executing a Form 8821, Tax Information Authorization, or other consent meeting the requirements of section 6103(c) and Treas. Reg. § 301.6103(c)-1. If a parent signed the return on behalf of the minor, the signing parent may execute a Form 8821 on behalf of the minor to designate disclosure to others (such as the non-signing parent or an accountant). If the parent is the guardian of the minor's estate under state law, the parent may also sign a consent on behalf of the minor. See Treas. Reg. § 301.6103(c)-1(e)(4) (authority to execute disclosure consents). Similarly the minor or the parent who signed the minor's return can execute a Form 2848, Power of Attorney and Declaration of



Representative, to have a third party represent the minor before the Service.

**Note:** The Conference and Practice Requirements, Treas. Reg. § 601.501 – 601.509, do not address whether the IRS may recognize a Form 2848 executed by a minor. A prudent approach would be to look to state law to see whether a minor is capable of entering into an agency relationship. If so, then the IRS should recognize a power of attorney signed by a minor.

There is no disclosure authority for the parent who did not sign the minor's return that reflects only unearned income to execute a Form 8821 or Form 2848 on behalf of the minor. If, however, under state law the parent is the legal guardian of the minor's estate or if the parent has been appointed (by the appropriate court) the guardian of the minor's estate, that parent may execute a Form 8821 on behalf of the minor irrespective of who signed the minor's return. In those states in which the parent is not the guardian of the minor's estate, the parent who did not sign the minor's return which reflects only unearned income may not execute a Form 8821 on behalf of the minor.

#### **H. I.R.C. § 6103(e)(4), (5) – Returns of a Debtor in a Bankruptcy Case**

See *generally* materials in Chapter 6, Disclosure of Returns and Return Information in Bankruptcy Cases.

#### **I. I.R.C. § 6103(e)(6) – Attorney-in-fact**

1. Upon written request, a duly authorized attorney-in-fact may inspect the return of any person described in section 6103(e) if the attorney-in-fact is authorized in writing by the person(s) to inspect the return.

Exception: A taxpayer who is an authorized recipient under section 6103(e)(1)(D)(iii) (a one percent corporate shareholder), however, may *not* authorize disclosure to his attorney-in-fact, pursuant to the limitations in section 6103(a)(3). See *also* IRM 11.3.2.5.1(9).

2. A general power of attorney authorizing an individual to do all acts and receive all information on behalf of an individual would not authorize access to the individual's return because the tax year is not specified. See I.R.C. § 6103(c); Treas. Reg. § 301.6103(c)-1(b)(1)(iv); IRS Form 2848, Power of Attorney and Declaration of Representative.
3. In the context of a Tax Court proceeding, however, a power of attorney or tax information authorization is *not* required for disclosures to the Petitioner's attorney of record. See Treas. Reg. § 601.509.

4. In a bankruptcy proceeding involving the tax liabilities of a debtor-taxpayer, the IRS may disclose to the debtor-taxpayer's attorney of record the debtor-taxpayer's return information relevant to the resolution of those tax matters affected by the proceeding. See IRM 11.3.3.1.6(4) and Chapter 6.

**J. I.R.C. § 6103(e)(8), (9) – Collection Activities with Respect to a Joint Return and Certain Information Where More Than One Person Subject to Penalty Under I.R.C. § 6672**

The Taxpayer Bill of Rights 2 (TBOR2), Pub. L. No. 104-168, 110 Stat. 1452, 1459-60 and 1466 (1996), amended section 6103(e) by adding new paragraphs (8) and (9).

1. Section 6103(e)(8), Disclosure of Collection Activities with Respect to Joint Return, requires that if a deficiency is assessed with respect to a joint return and the individuals who filed the return are divorced or no longer reside in the same household (former spouses), the IRS must disclose, in writing, certain information about the IRS's collection activities with respect to the joint liability assessed against both former spouses, to one of the former spouses, or to the former spouse's authorized representative, in response to a written request from that former spouse, or from that former spouse's authorized representative.

The information that the IRS must disclose, in writing, in response to a section 6103(e)(8) written request is:

- a. whether the IRS has attempted to collect the deficiency from the other former spouse;
  - b. the amount, if any, collected from the other former spouse;
  - c. the current collection status (e.g., Taxpayer Delinquent Account ("TDA"), installment agreement, suspended); and
  - d. if suspended, the reason (e.g., unable to locate, hardship).
2. Section 6103(e)(8) does not require or authorize disclosure to one former spouse, or to that former spouse's authorized representative, of personal information about the other former spouse, such as the other former spouse's:
    - a. location or telephone number;
    - b. any information about the other former spouse's employment, income, or assets; nor
    - c. the income level at which a currently not collectible account will be reactivated.

3. There is some overlap between disclosures *authorized* under section 6103(e)(1)(B) in conjunction with section 6103(e)(7), *see generally* Chapter 2, Part II, section II, and written disclosures *mandated* by section 6103(e)(8). To the extent a written request by one former spouse, or by that former spouse's authorized representative, does not specifically invoke section 6103(e)(8), section 6103(e)(1)(B) in conjunction with section 6103(e)(7) would authorize release of the same collection-related information available under section 6103(e)(8).

**Note:** Disclosures authorized by section 6103(e)(7), *see generally* Chapter 2, Part II, section II, are not required to be made or requested in writing; they are not limited to, but routinely include, the four items of collection-related information disclosed in writing pursuant to a written request under section 6103(e)(8); and they are subject to a determination by the IRS that disclosure would not seriously impair federal tax administration. Disclosures pursuant to section 6103(e)(1)(B) may be potentially broader than section 6103(e)(8) disclosures, but the IRS routinely declines to disclose personal information about one former spouse to the other former spouse under the authority of section 6103(e)(7).

General procedural guidelines regarding disclosures of collection-related information to former spouses with respect to a joint liability assessed against both former spouses have been incorporated in IRM 5.1.22.1.

Example: Husband and Wife were married and filed a joint return in 1996; however, by 1997 they were divorced and filing separately. In 1998, the IRS examined Husband and Wife's 1996 joint tax return and determined that the taxpayers underreported their income. The IRS issued statutory notices to the taxpayers. Wife wants to know what amount, if any, of the deficiency the IRS has collected from Husband. Wife has a number of options for requesting this collection information: (1) The wife or her authorized representative could submit a written request expressly citing section 6103(e)(8). Under these circumstances, the IRS must respond in writing. The written request, presumably, would take the form of a letter to the local disclosure office; however, any writing by the wife or her authorized representative would be adequate, including a handwritten request handed to a Collection Officer during an interview. A Freedom of Information Act (FOIA) request by the wife or her authorized representative also would be adequate, but is not required; and (2) The wife or her authorized representative could submit a written request that does not specifically reference section 6103(e)(8), or telephone, or "walk

into" the local disclosure office (which would require a confirmation of identity) and make a request, or make a request orally during an interview with, *e.g.*, a Collection Officer, or, submit a FOIA request. Disclosure in each of these scenarios would be authorized under section 6103(e)(1)(B) in conjunction with section 6103(e)(7).

4. Section 6103(e)(9), Disclosure of Certain Information Where More Than One Person Liable for Penalty for Failure to Collect and Pay Over Tax. Section 6672 provides that any person with responsibility for, and who fails to forward to the government, taxes withheld from employees' paychecks (as well as other taxes owed the government) can be assessed a penalty equal to 100% of the amount owed. Disclosure concerns generally arise when, as is often the case with companies, more than one person is assessed the penalty, each of whom is liable for the entire amount. In these situations, a person against whom the penalty has been assessed often seeks information concerning the extent to which the penalty was considered with respect to, assessed against, or has been satisfied by, other individuals.

Section 6103(e)(9) allows a person determined to be liable for the Trust Fund Recovery Penalty under section 6672, and that person's authorized representative, to obtain, pursuant to a written request, the following information:

- a. the name of any other person determined to be liable for the penalty;
  - b. whether the IRS has attempted to collect such penalty from any other liable person and the nature of the collection activities;
  - c. the current collection status (*e.g.*, notice, TDA, installment agreement, suspended, and if suspended, the reason); and,
  - d. the amount, if any, collected from each individual assessed the penalty.
5. Information that can not be disclosed in response to a request pursuant to section 6103(e)(9) includes the following:
    - a. the liable person's location or telephone number;
    - b. information about any individual whom the IRS did not assess (including individuals investigated or considered for potential liability but who were not assessed the liability);
    - c. any information about the liable person's employment, income, or assets; and

- d. the income level at which a currently not collectible account will be reactivated.

#### **K. I.R.C. § 6103(e)(10) – Limitation on Certain Disclosures Authorized by Subsection 6103(e)**

The Mortgage Forgiveness Debt Relief Act of 2007, Pub. L. No. 110-142, 121 Stat. 1803, 1807, amended section 6103(e) by adding new paragraph (10). The provision limits the amount of information provided to a requester in cases of inspection or disclosure relating to the return of a partnership, S corporation, trust, or an estate. In those cases, the information inspected or disclosed *shall not* include any supporting schedule, attachment or list that includes the taxpayer identity information of a person other than the entity making the return or the person conducting the inspection or to whom the disclosure is made. In particular, this means that, pursuant to section 6103(e), IRS can disclose to each partner only his own K-1; other partners' K-1s must be withheld.

**Note:** This provision does not affect disclosure in a judicial or administrative tax administration proceeding pursuant to section 6103(h)(4). See Chapter 3, Section V., Part C.

#### **II. I.R.C. § 6103(e)(7) – DISCLOSURES OF RETURN INFORMATION**

Any person who is authorized to inspect a return may also inspect return information related thereto, without written request, if the Secretary determines that disclosure would not seriously impair federal tax administration. I.R.C. § 6103(e)(7).

Example: Mr. Dent submits a written request to the IRS seeking access to his 1997 examination file. One of the documents contained in the examination file is a witness statement submitted by Mr. Torres concerning Mr. Dent's dealings with the Green Monster Corporation. The appropriate supervisor (pursuant to Deleg. Order 11-2) has determined that disclosure of the witness statement would seriously impair federal tax administration by divulging the identity of third-party witnesses and the scope/direction of the IRS's investigation. Because an impairment determination has been made, Mr. Dent may not have access to the witness statement.

**PART III: DISCLOSURES PURSUANT TO TAXPAYER'S CONSENT**  
**I.R.C. § 6103(c)**

**I. INTRODUCTION**

Section 6103(c) and its implementing regulations authorize the IRS to disclose returns and return information to any person or persons the taxpayer may designate in a request for or consent to disclosure, or to any other person at the taxpayer's request to the extent necessary to comply with a request for information or assistance made by the taxpayer to the other person. Disclosure is authorized subject to any requirements and conditions as may be prescribed by regulations.

Before 1996, section 6103 provided that consents had to be in writing. In 1996, section 1207 of the Taxpayer Bill of Rights 2, Pub. L. No. 104-168, 110 Stat. 1452, 1473 (1996), amended section 6103(c) by deleting the word "written" from the language requiring a written request or consent before the IRS could disclose returns or return information to a third party designated by the taxpayer. In January 2001, the IRS promulgated temporary regulations authorizing, among other things, oral consents when the designee is assisting the taxpayer to resolve a tax matter. See Treas. Reg. § 301.6103(c)-1T(c). On April 29, 2003, final regulations including the oral consent provision replaced the temporary regulations. See Treas. Reg. § 301.6103(c)-1. By Notice 2010-8, 2010-3 I.R.B. 297 (Jan. 19, 2010), the IRS gave notice of its intention to revise the regulations to extend the time period for receipt of consents from 60 days to 120 days and to effect this change in practice immediately. The IRS promulgated the proposed regulations for this extension (76 Fed. Reg. 14827), on March 18, 2011.

**II. DISCLOSURES TO DESIGNEES PURSUANT TO A WRITTEN REQUEST OR CONSENT WHERE THE PURPOSE IS UNRELATED TO A TAX MATTER**

Treas. Reg. § 301.6103(c)-1(b) contains the requirements for consents to disclose returns or return information to designated third parties where the consent is not for the purpose of assisting the taxpayer to resolve a tax matter. This type of consent, commonly referred to as "general purpose consent," must be in the form of a separate written document pertaining solely to the authorized disclosure. The regulation defines separate written document to mean text appearing on one or more sheets of 8½-inch by 11-inch or larger paper, or text appearing on one or more computer screens. See Treas. Reg. § 301.6103(c)-1(e)(1).

This regulation requires that the following information be set forth in the written authorization:

1. the taxpayer's identity: name, address or taxpayer identifying number (*e.g.*, SSN, ITIN, ATIN, or EIN), or any combination thereof, which enables the IRS to clearly identify the taxpayer;
2. the identity of the person to whom disclosure is to be made;

3. the type of return (or the specific portion of the return) or return information (including particular data) to be disclosed; and
4. the taxable period covered by the return or return information.

The consent must be signed and dated and the IRS must receive the consent within 120 days of execution. Form 8821 (Tax Information Authorization) has been designed to meet the requirements of Treas. Reg. § 301.6103(c)-1(b).

Example: Mr. Smith applies for a bank loan. As part of the loan application form, Mr. Smith states that his 2002 tax return and related information may be mailed to the bank's loan officer, Mr. Robinson. The authorization is not contained in a separate document pertaining solely to the consent to disclose Mr. Smith's return and return information; consequently, the IRS may not provide the information to Mr. Robinson.

Example: Mr. Williams submits a written authorization to the IRS authorizing the disclosure of his 2009 criminal investigation file to Mr. Green. The authorization is dated April 6, 2010, and contains all information required by Treas. Reg. § 301.6103(c)-1(b). The IRS receives the authorization on September 1, 2010. Because the authorization was received by the IRS more than 120 days after the date of execution, it is not valid.

### **III. DISCLOSURE TO DESIGNEES TO COMPLY WITH A TAXPAYER'S REQUEST FOR ASSISTANCE WITH A TAX MATTER**

#### **A. In General**

Treas. Reg. § 301.6103(c)-1(c) contains the requirements for requests made by the taxpayer to other persons, such as a Member of Congress or a relative, for information or assistance relating to the taxpayer's return or a transaction or other contact between the taxpayer and the IRS. Consents under this provision may be in writing or oral.

#### **B. Written Requests for Information or Assistance**

1. Taxpayers sometimes write to a Member of Congress to seek assistance with a tax question or problem they are having with the IRS. The Member of Congress often forwards the letters to the IRS and requests that the IRS response be made directly to him or her.
2. According to Treas. Reg. § 301.6103(c)-1(c)(1)(i), the taxpayer's letter is a tax information authorization provided it contains the following:

- a. the taxpayer's identity: name, address or taxpayer identifying number, or any combination thereof, which enables the IRS to clearly identify the taxpayer;
  - b. the identity of the person to whom disclosure is to be made;
  - c. sufficient facts about the request for information or assistance to enable the IRS to determine the nature and extent of the information or assistance requested and the tax information to be disclosed; and
  - d. the signature of the taxpayer and the date of the letter.
3. A person who receives a copy of a taxpayer's written request for information or assistance but who is not the addressee of the request, such as a Member of Congress who is provided with a courtesy copy of a taxpayer's letter to another Member of Congress or to the IRS, cannot receive return or return information under Treas. Reg. § 301.6103(c)-1(c)(1). An exception to this rule will be made when the taxpayer includes a signed addendum requesting the third party's assistance in the matter, and the letter otherwise meets the above requirements for a valid disclosure authorization.

### **C. Oral Requests for Information or Assistance**

1. Treas. Reg. § 301.6103(c)-1(c)(2) authorizes the IRS to accept a taxpayer's oral consent to disclose returns or return information to parties assisting the taxpayer in resolving a federal tax matter provided that the IRS has:
  - a. obtained from the taxpayer sufficient facts underlying the request for information or assistance to enable the IRS to determine the nature and extent of the information or assistance requested and the returns or return information to be disclosed in order to comply with the taxpayer's request;
  - b. confirmed the identity of the taxpayer and the designee; and
  - c. confirmed the date, the nature, and the extent of the information or assistance requested.
2. Examples of disclosures pursuant to oral requests for information or assistance include, but are not limited to, disclosures to a friend, relative, or other person whom the taxpayer brings to an interview or meeting with IRS officials, and disclosures to a person whom the taxpayer wishes to involve in a telephone conversation with IRS officials.



3. Provided that the requirements listed above in paragraph C.1. are met, the taxpayer does not need to be present, either in person or as part of a telephone conversation, for disclosures of returns or return information to be made to the other person. However, the IRS cannot infer a taxpayer's consent merely because a third party is present at a meeting or on a telephone call. Oral consent must be explicit, and must precede any discussion that includes the third party. Also, oral consent must be made by the taxpayer directly to the IRS employee; the third party cannot convey a message of oral consent.
4. An IRS employee should record on a history sheet or history screen whenever possible the fact of and date of an oral consent and what information the taxpayer consented to be disclosed. IRM 11.3.3.2.1(2).

#### **IV. PERMISSIBLE DESIGNEES AND PUBLIC FORUMS**

##### **A. Permissible Designees Include:**

1. individuals;
2. trusts;
3. estates;
4. corporations;
5. partnerships;
6. federal, state, local, and foreign government agencies, or subunits of these agencies; and
7. the general public.

To designate multiple individuals, the consent should list the specific individuals. To designate a group or the staff of an entity (such as an agency), the consent should list the group or entity name and other identifying information.

##### **B. Designees Not Permitted**

When a designee is an individual, section 6103(c) and its implementing regulations do not authorize disclosures to others associated with the individual, such as employees of the individual or members of the individual's staff.

##### **C. Public Forums**

When disclosures are to be made in a public forum, like a courtroom or congressional hearing, the request for or consent to disclosure must describe the circumstances surrounding the public disclosure (e.g., congressional hearing,

judicial proceeding, media, etc.) and the date or dates of the disclosure. Treas. Reg. § 301.6103(c)-1(e)(3).

## **V. WHO MUST SIGN THE CONSENT**

Any person who may obtain returns under section 6103(e)(1) through (5), except section 6103(e)(1)(D)(iii) (relating to a shareholder of 1% or more ownership of stock in a corporation), may execute a request for or consent to disclose a return or return information to third parties. For instance, in the case of a:

Joint return – Either spouse may sign the consent.

Corporation – Any officer of the corporation with authority under applicable state law to legally bind the corporation may sign the consent.

Partnership – Any person who was a partner during the period covered by the return may sign the consent.

For rules on who may sign a consent with respect to other entities, see I.R.C. § 6103(e)(1)-(5) and IRM 11.3.2.4.

## **VI. TYPES OF CONSENT DOCUMENTS**

### **A. FORM 8821 – TAX INFORMATION AUTHORIZATION**

1. Form 8821 is a “general purpose” consent form that meets the requirements of section 6103(c) and Treas. Reg. § 301.6103(c)-1(b).
2. It is not a power of attorney and cannot be used to name a representative.
3. Facsimile transmission of the form is acceptable.
4. An "all years" provision is invalid. The period of the authorization may not extend for more than five years forward.
5. The IRS must receive the form within 120 days of the date it was signed and dated by the taxpayer.
6. A subsequently executed Form 8821 revokes prior Forms 8821 covering the same material listed on any previous 8821 unless box 4 of the prior Form 8821 was checked, and unless box 6 of the current form is checked and the prior Forms 8821 that should remain in effect are attached.
7. The form does not revoke any Form 2848 power of attorney in effect.

## **B. FORM 2848 – POWER OF ATTORNEY AND DECLARATION OF REPRESENTATIVE**

1. See Treas. Reg. §§ 601.501-601.527.
2. Form 2848 can be used only to designate individuals authorized to practice before the IRS pursuant to Treasury Department Circular No. 230.
3. Facsimile transmission of the power of attorney is acceptable.
4. Certain actions by the representative are authorized only if that authority is specified on line 5 of the form. These include substitution and delegation of representatives and authority to authorize the IRS to disclose the taxpayer's returns or return information to a third party.
5. An "all years" provision is invalid. A power of attorney may not extend for more than three years forward (see Form 2848 instructions).
6. A new Form 2848 revokes prior Forms 2848 covering the same tax matters and periods; it will not revoke a Form 8821, Tax Information Authorization.

## **C. GENERAL/DURABLE/LIMITED POWER OF ATTORNEYS**

1. These types of powers of attorney are acceptable if they meet all IRS requirements. See Treas. Reg. § 601.503.
2. These powers of attorney will be entered on the CAF only if a properly executed transmittal Form 2848 is attached. See Treas. Reg. § 601.503(b)(2).

## **D. GENERAL CONSIDERATIONS**

1. Section 6103 imposes no use or disclosure restrictions on a designee who receives returns or return information pursuant to section 6103(c).
2. The taxpayer seeking disclosure is responsible for obtaining necessary consents. The IRS cannot provide identity or contact information of the third-party taxpayer whose consent is sought.
3. When deciding whether a consent received from a taxpayer authorizes the disclosure requested, consult Treas. Reg. § 301.6103(c)-1 to determine the sufficiency of the consent.

4. The consent should be as specific as possible in describing the returns or return information to be disclosed. Only information the taxpayer clearly intended to have disclosed should be provided.
5. In a situation involving a conference with multiple taxpayers, consents must be obtained from each taxpayer participating in the conference. Each participating taxpayer must consent to disclosure of that taxpayer's returns and/or return information to every other participating taxpayer. In such situations, each taxpayer's returns or return information can be disclosed to the others only after the IRS receives the consent from that taxpayer.
6. In addition, consent must be obtained if someone other than the taxpayer or the taxpayer's duly authorized representative is to be present during a taxpayer conference. In these situations, an oral consent may be obtained from the taxpayer to authorize disclosures to people attending the conference or meeting, so long as those in attendance are helping to resolve a tax matter for the consenting taxpayer, such as an organization's employees who are familiar with the facts surrounding a particular issue.
7. Even with a valid consent, the IRS can refuse to disclose returns or return information if it determines that disclosure will seriously impair federal tax administration. See I.R.C. § 6103(c); Treas. Reg. § 301.6103(c)-1(e)(5); I.R.S. Deleg. Order No. 11-2 (formerly DO-156, Rev. 17), IRM 1.2.49.3.

Example: In United States v. Finch, 434 F. Supp. 1085, 1087 (D. Colo. 1977), the court held in a summons enforcement context that, even with the consent of the taxpayers, the summoned party could not invite third parties to attend a summons interview if attendance would seriously impair federal tax administration (e.g., be disruptive).

8. The consent rules do not apply to disclosures to a taxpayer's representative in connection with practice before the IRS; power of attorney rules apply in these circumstances. See Treas. Reg. § 301.6103(c)-1(c)(3). For disclosures pursuant to a power of attorney or to an attorney-in-fact, see I.R.C. § 6103(e)(6); Treas. Reg. §§ 601.502-601.527.
9. Consent rules do not apply to disclosures made to a taxpayer's attorney of record in a Tax Court proceeding. See Treas. Reg. § 601.509.

10. The taxpayer's designee or individual holding power of attorney cannot consent to disclosure by the IRS to a third party unless the designation or power of attorney specifically permits it.
11. A power of attorney document that is not valid for purposes of representation will not be honored as a disclosure authorization. See IRM 11.3.3.3(4).
12. For information on processing requests under section 6103(c) and Treas. Reg. § 301.6103(c)-1, see IRM 11.3.3.

## VII. CASE LAW

### A. Circuit Court Cases

1. Huckaby v. IRS, 794 F.2d 1041, 1050 (5th Cir. 1986) (disclosures to state agency based upon taxpayer's oral consent held unlawful).

**Note:** Section 7431(b)(2) now provides that no liability will arise for disclosures requested by the taxpayer. The court found liability despite the consent because, at the time of this case, the statute and regulations required written consent to or request for disclosure and section 7431(b)(2) had not yet been enacted.

2. Tierney v. Schweiker, 718 F.2d 449, 454 (D.C. Cir. 1983) (open-ended consents (e.g., "all years") do not comply with the Treasury regulations requiring that the consent identify the taxable year(s) covered by the consent; in *dicta*, court stated that consents signed by taxpayers were coerced because they were executed at the risk of losing supplemental security income benefits and, therefore, did not constitute the type of knowing and voluntary consent contemplated by section 6103(c)).

### B. District Court Cases

1. Ward v. United States, 973 F. Supp. 996, 1000 (D. Colo. 1997) (to comply with the regulations, a consent must identify or designate the third parties to whom the disclosures are to be made; disclosures to public during radio broadcast were not authorized because the taxpayer's consent did not designate or identify persons to whom the disclosures via radio broadcast were to be made).
2. Hefti v. Loeb, No. 91-3311, 1992 U.S. Dist. LEXIS 12644, at \*3 (C.D. Ill. Aug. 11, 1992) (defendants acted in good faith pursuant to section 6103(c) when disclosing Mr. Hefti's 1987 tax year return information to his wife because all correspondence to the IRS was signed by both husband and wife; Mrs. Hefti wrote to President Bush to enlist his help

with the IRS on behalf of herself and her husband, and in Tax Court she advised she would be representing both herself and her husband concerning the 1987 return).

3. Olsen v. Egger, 594 F. Supp. 644, 646 (S.D.N.Y. 1984) (IRS not authorized to disclose ex-husband's tax returns to ex-wife because the separation agreement entered into by the parties, which directed the ex-husband to supply the ex-wife with copies of his returns, failed to meet the requirements for disclosure of tax returns to third parties via consent).

## PART IV: DISCLOSURE OF INFORMATION AVAILABLE IN THE PUBLIC RECORD

### I. GENERAL PRINCIPLES

Neither section 6103 nor any other provision of the Code contains any express exception authorizing publication of returns or return information that have become a matter of public record.

The Supreme Court has held that what transpires in a court of law is a matter of public record and can be reported with impunity. No reasonable expectation of privacy attaches to information that is a matter of public record. Nixon v. Warner Commc'ns., Inc., 435 U.S. 589, 609 (1978) (media is entitled to portions of tapes already released during trial); Cox Broad. v. Cohn, 420 U.S. 469, 491-92 (1975) (“even the prevailing law of invasion of privacy generally recognizes that the interests in privacy fade when the information involved already appears on the public record”); Craig v. Harney, 331 U.S. 367, 374 (1947) (“A trial is a public event. What transpires in the court room is public property”). See also Restatement (Second) of Torts § 652D, cmt. b (1977) (“There is no liability when the defendant merely gives further publicity to information about the plaintiff that is already public. Thus, there is no liability for giving publicity to facts about the plaintiff’s life that are matters of public record...”). But see Dep’t of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 762-67 (1989) (inherent privacy interest in the nondisclosure of something that may once have been public but has, with passage of time, passed into practical obscurity).

### II. CASE LAW

#### A. Despite Section 6103’s Confidentiality Mandate, Courts Have Applied the General Principles Discussed Above When Considering Whether to Order Disclosure of Returns or Return Information that Became a Matter of Public Record.

1. United States v. Posner, 594 F. Supp. 930, 936 (S.D. Fla. 1984) (denying a defendant taxpayer’s motion for protective order and granting newspaper’s request for access to tax returns that had been admitted into evidence; once certain information is in the public domain the entitlement to privacy is lost, even when the information is federal tax information), *aff’d*, 764 F.2d 1535 (11th Cir. 1985).
2. Cooper v. IRS, 450 F. Supp. 752, 755 (D.D.C. 1977) (once confidential information is released in Tax Court proceeding, it is never again confidential for purposes of the Freedom of Information Act).

## B. Circuits

In the context of unauthorized disclosure lawsuits, however, the circuits are split regarding the proper treatment of returns and return information that have become a matter of public record in connection with tax administration.

The Ninth Circuit has held that returns and return information actually placed in and made a part of the public record (either as a result of judicial tax proceedings or as a part of collection activities) is no longer subject to section 6103's disclosure restrictions.

1. William E. Schrambling Accountancy Corp. v. United States, 937 F.2d 1485, 1489 (9th Cir. 1991) (information contained in Notice of Federal Tax Lien and bankruptcy petition are no longer confidential, therefore disclosure did not violate section 6103), *cert. denied*, 502 U.S. 1066 (1992).
2. Lampert v. United States, 854 F.2d 335, 338 (9th Cir. 1988) (once tax return information is made a part of the public domain, that taxpayer can no longer claim a right of privacy in that information), *cert. denied*, 490 U.S. 1034 (1989). The Ninth Circuit's opinion affirmed three district court decisions: Peinado v. United States, 669 F. Supp. 953 (N.D. Cal. 1987); Lampert, No. C-86-3463 RFP, 1987 WL 48210 (N.D. Cal. Apr. 8, 1987); and Figur v. United States, 662 F. Supp. 515 (N.D. Cal. 1987).
3. Tanoue v. IRS, 904 F. Supp. 1161, 1167-68 (D. Haw. 1995) (only those items of information actually placed in and made a part of the public record are no longer subject to section 6103's disclosure restrictions).

The Sixth Circuit has held that returns and return information that have been made public in connection with recording a federal tax lien is no longer protected by section 6103, but has not ruled with respect to disclosures made in judicial proceedings. See Rowley v. United States, 76 F.3d 796, 801-02 (6th Cir. 1996) (general rule of confidentiality not applicable where information was disclosed in tax lien filings and later disclosed in notices of sale that were made for tax administration purposes).

The Fourth Circuit has relied on the absence of an express exception in section 6103 to find that the otherwise unauthorized release of return information previously publicized (in judicial proceedings) violates section 6103. Mallas v. United States, 993 F.2d 1111, 1120-21 (4th Cir. 1993) (even to the extent that the revenue agent's reports repeated information otherwise available to the public, they still fell within the broad definition of return information).



The Seventh Circuit has adopted a hybrid test referred to as the "immediate source" test, *i.e.*, "that the definition of return information comes into play only when the immediate source of the information is a return, or some internal document based on a return, as these terms are defined in § 6103(b)(2), and not when the immediate source is a public document lawfully prepared by an agency that is separate from the Internal Revenue Service and has lawful access to tax returns." Thomas v. United States, 890 F.2d 18, 21 (7th Cir. 1989) (IRS release of court's opinion in tax case to newspaper, which then published article based on the decision, was not an unauthorized disclosure because the information was obtained from the court's opinion).

The Third Circuit has not ruled on this issue in a published opinion. It issued a summary opinion in Barnes v. United States, 17 F.3d 1428 (table cite) (3d Cir. 1994), No. 93-3240, affirming the district court's adoption of the Magistrate's Report and Recommendation. See 1991 U.S. Dist. LEXIS 21633, at \*14-15 (W.D. Pa. Aug. 2, 1991) (magistrate's recommendation), *adopted at* 1991 U.S. Dist. LEXIS 12883 (W.D. Pa. Aug. 27, 1991). The Magistrate, citing Cox Broadcasting and Lampert, concluded that a press release announcing an indictment issued by the U.S. Attorney's office was not an unauthorized disclosure because the information was already a matter of public record.

The Eighth Circuit cited Thomas in an unpublished opinion, with little analysis or discussion, to approve disclosures based upon public record information. Noske v. United States, 998 F.2d 1018 (table cite), No. 92-2761, 1993 WL 264531, at \*2 (8th Cir. July 15, 1993) (no unauthorized disclosure of return information when the IRS provided a copy of a district court opinion to the local paper).

The Tenth Circuit has adopted the Seventh Circuit approach. See Rice v. United States, 166 F.3d 1088, 1091 (10th Cir. 1999) (press release issued based on public affairs officer's attendance at trial, and not on IRS documents, was not an unauthorized disclosure), *cert. denied*, 528 U.S. 933 (1999). *But see* Rodgers v. Hyatt, 697 F.2d 899, 904, 906 (10th Cir. 1983) (an IRS agent's in-court testimony at a summons enforcement hearing did not authorize the agent's subsequent out-of-court statements to a third party regarding an ongoing investigation where the agent actually obtained his confidential information from the taxpayer's tax return and not at the public hearing).

The Fifth Circuit also applies the "immediate source" test, thereby implicitly adopting the Seventh Circuit's approach in Thomas.

1. Johnson v. Sawyer, 120 F.3d 1307, 1323 (5th Cir. 1997) (IRS authorized to issue a press release from court documents or proceedings; however, where information in press release came from IRS records, an unauthorized disclosure occurred).

2. Harris v. United States, 35 F. App'x 390 (table cite), No. 01-20543, 2002 WL 760887, at \*3 (5th Cir. Apr. 17, 2002) (revenue officer who disclosed that the plaintiffs had a judgment filed against them for a specific amount had acted in a good faith belief that the disclosure was authorized as a disclosure of information in the public record), *cert. denied*, 538 U.S. 922 (2003).

### **III. IRS POSITION ON PUBLIC RECORD INFORMATION**

Although section 6103 bars disclosure of returns and return information taken directly from IRS files, it does not ban the disclosure of information *that is taken from the public court record*. The IRS's position has confined the disclosure of public record information to returns and return information that have been made a matter of public record in connection with collection activities (such as filing notices of federal tax lien, announcements of tax sales of property) and judicial tax proceedings (and criminal proceedings for which returns and return information were disclosed pursuant to section 6103(i)). The following provides a framework for analyzing public record information.

#### **A. Public Records**

Return information loses any confidential status if it becomes a matter of public record. Returns and return information that have become public as a result of actions taken by, or on behalf of, the IRS are no longer subject to the confidentiality provisions of the Code and may be provided to a third-party requester. Great care should be exercised in determining whether returns or return information have actually become a matter of public record, as information that has not been made public remains subject to the confidentiality provisions. See Tax Analysts v. United States, 391 F. Supp. 2d. 122, 131 (D.D.C. 2005) (internal check sheets and supporting documents that accompany Chief Counsel Advice memoranda subject to public inspection consistent with section 6110(i) cannot be disclosed in a FOIA suit; they reveal more information than what appears in the public record of the Tax Court proceedings to which the CCA relate). IRS employees should consult with their local disclosure officer if they have any questions.

#### **B. Special Circumstances – Manner of Entering Public Record**

Information made public by a taxpayer or third party does not affect the confidentiality of identical return or return information in the possession of the IRS. Thus, the IRS cannot use return information to confirm information made public by any other party unless specifically authorized to do so by section 6103. For example, if a Fortune 500 company announces that the IRS is auditing its inventory accounting practices for purposes of determining income, the IRS cannot confirm that announcement because there is no statutory authority authorizing the IRS's disclosure.

Information that the IRS obtains from public record sources (such as copies of court filings, incorporation documents, or real estate ownership records) for purposes of determining liability under Title 26 is return information in the IRS files. The fact that the IRS tax administration files include this otherwise public information is itself return information (and not a matter of public record), because it discloses, albeit indirectly, the fact that the taxpayer is the subject of some tax compliance activity such that the IRS cannot acknowledge holding such information except as authorized by section 6103. By authorizing the release of return information only after it has become a matter of public record in connection with tax administration, the IRS avoids linking otherwise innocuous public information with a person's tax liability.

See *generally* IRM 11.3.11.13, Information Which Has Become Public Record, for further explanation.

**PART V: DISCLOSURES TO COMMITTEES OF CONGRESS**  
**I.R.C. § 6103(f)**

**I. INTRODUCTION**

Returns and return information may be disclosed to the congressional tax writing committees (Joint Committee on Taxation (JCT), House Ways and Means Committee, and Senate Finance Committee) upon written request from the chairperson of those committees. Returns and return information may also be disclosed to the Chief of Staff of the JCT upon written request. The chairpersons of the tax writing committees and the Chief of Staff of the JCT may designate agents to receive returns and return information on their behalf.<sup>35</sup>

The nontax writing committees may also receive returns and return information, but under more restrictive circumstances than apply to the tax writing committees.

Finally, returns and return information may be disclosed by a whistleblower to a tax writing committee or to an agent of a tax writing committee if the whistleblower believes that the information may relate to evidence of possible misconduct, maladministration, or taxpayer abuse.

**II. DISCLOSURES TO TAX WRITING COMMITTEES AND CHIEF OF STAFF OF THE JOINT COMMITTEE ON TAXATION**

**A. I.R.C. § 6103(f)(1)**

This section permits returns and return information to be disclosed to the House Ways and Means Committee, Senate Finance Committee, or the JCT upon written request from the chairperson of the committee. Returns and return information that can directly or indirectly identify a specific taxpayer may only be furnished to the committee when sitting in closed executive session (unless the taxpayer consents in writing).

**B. I.R.C. § 6103(f)(2)**

This section permits returns and return information to be disclosed to the Chief of Staff of the JCT upon his or her written request. The Chief of Staff may submit the return or return information to the House Ways and Means Committee, Senate Finance Committee, or the JCT, except that any return or return information that can directly or indirectly identify a specific taxpayer may only be furnished to the committee when sitting in closed executive session (unless the taxpayer consents in writing).

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<sup>35</sup> Members of Congress in their individual capacity may not have access to returns and return information absent a valid consent from the taxpayer requesting that the Member have access. See *generally* Chapter 2, Part III.

### **C. I.R.C. § 6103(f)(4)(A)**

This section permits the chairperson of the House Ways and Means Committee, Senate Finance Committee, or the JCT, or the Chief of Staff of the JCT, to designate agents to receive returns and return information on their behalf. For example, the Government Accountability Office routinely is designated as an agent of one of the tax writing committees to receive returns and return information for purposes of conducting investigations.

### **D. Additional Information**

For procedures on processing requests received from the congressional committees and the Chief of Staff of the JCT for the disclosure of returns and return information, see IRM 11.3.4.4.

## **III. DISCLOSURES TO NONTAX WRITING COMMITTEES**

Section 6103(f)(3) permits returns and return information to be disclosed to a nontax writing committee or a duly authorized and designated subcommittee upon: (1) a committee action approving the decision to request the information; (2) an authorizing resolution of the House or Senate (or, in the case of a joint committee, a concurrent resolution); and (3) a written request by the chairperson of the committee, on behalf of the committee, for disclosure of the information. Returns and return information may only be furnished when the committee or subcommittee is sitting in closed executive session unless the taxpayer consents in writing. Requests pursuant to section 6103(f)(3) are infrequent.

## **IV. DISCLOSURES BY WHISTLEBLOWERS**

Section 6103(f)(5) permits any person (*i.e.*, a whistleblower) who otherwise has or had access to any return or return information under section 6103 to disclose the return or return information to a tax writing committee or to an agent of a tax writing committee designated under the authority of section 6103(f)(4)(A) if the whistleblower believes that the return or return information may relate to evidence of possible misconduct, maladministration, or taxpayer abuse.

**PART VI: DISCLOSURES TO PRESIDENT AND CERTAIN OTHER PERSONS**  
**I.R.C. § 6103(g)**

**I. INTRODUCTION**

Returns and return information may be furnished to the President or certain specified Presidential designees upon receipt of a written request signed personally by the President.

Requests for returns and return information by the President must be reported to the Joint Committee on Taxation (JCT) on a quarterly basis. The report must include the reason for each request.

Return information may also be disclosed for the tax check of a person under consideration for appointment in the executive or judicial branch of the Federal Government. Under current practice, these disclosures are made pursuant to the taxpayer's consent.

**II. DISCLOSURES TO THE PRESIDENT AND THE WHITE HOUSE**

**A. History**

Prior to the amendment of section 6103 in 1976, there was a concern that presidents and their staffs were accessing and using returns and return information, at their convenience, for purposes other than tax administration. Much of this concern came to light during the Watergate era. Thus, when amended in 1976, section 6103 authorized the President to access returns and return information, but only as specified by the statute, which includes a provision for an accounting of requests.

**B. I.R.C. § 6103(g)(1)**

Under this provision, the President can gain access to returns and return information only upon written request signed by the President personally. The statute requires no formality other than that the request: (1) name the taxpayer and provide the taxpayer's address; (2) set forth the type of return or return information being requested and the taxable periods involved; and (3) indicate the reason why disclosure is sought.

The President may also designate by name in the written request employees of the White House Office to whom disclosure is authorized.

### **C. I.R.C. § 6103(g)(3)**

This provision, however, specifically precludes redisclosure of returns and return information by those employees without the personal written direction of the President.

### **D. I.R.C. § 6103(g)(4)**

This provision precludes disclosure of returns and return information under this section to any employee of the White House Office whose annual rate of basic pay is less than the Executive Level V pay rate. It is likely that this provision was intended as a limitation not only on IRS disclosures in the first instance to individuals at a certain executive level, but also on redisclosure by persons, including the President, who have received such information under section 6103(g)(1). The legislative history for this section indicates that the provision, to a large extent, codifies former President Ford's Exec. Order No. 11805, 39 Fed. Reg. 34261 (Sept. 20, 1974). A similar provision in the Executive Order was intended to restrict access to returns and return information to a relatively limited number of people in the White House. S. REP. NO. 94-938, at 325 (1976); 1976-3 C.B. (Vol. 3) 323.

### **E. I.R.C. § 6103(g)(5)**

This provision requires that the President file a report with the JCT, thirty days after the close of each calendar quarter, setting forth the taxpayers with respect to whom disclosure requests pursuant to this section were made during the quarter, the returns and return information involved, and the reason for such request. To date, no disclosures pursuant to section 6103(g)(5) have been made.

## **III. TAX CHECKS**

Section 6103(g)(2) provides for tax check disclosures, upon written request by the President or head of an agency, for individuals under consideration for an appointment in the executive or judicial branch of the federal government. The same restrictions as to redisclosure (section 6103(g)(3)), executive level disclosure (section 6103(g)(4)), and the reporting requirements (section 6103(g)(5)), discussed above, apply to the President and the head of an agency regarding tax checks. However, it is the practice to perform these tax checks pursuant to taxpayer consents. Consents to disclose for tax checks are processed centrally by the IRS Office of Governmental Liaison and Disclosure, Tax Checks Section. See Treas. Reg. § 301.6103(c)-1(b). See *generally* Chapter 2, Part III.

## CHAPTER 3

### TAX ADMINISTRATION DISCLOSURES

#### I.R.C. § 6103(h)

#### I. INTRODUCTION

Section 6103(h) concerns disclosures for tax administration purposes. Under section 6103(h)(1), returns and return information are, without written request, open to inspection by or disclosure to officers and employees of the Department of the Treasury whose official duties require the inspection or disclosure for tax administration purposes.

Sections 6103(h)(2) and (3) provide the mechanism for the Department of Justice (DOJ) to obtain returns and return information in connection with carrying out its responsibilities in both the civil and criminal tax contexts. Section 6103(h)(2) describes what information can be disclosed and for what purposes. Section 6103(h)(3) contains the procedural prerequisites for disclosure.

Under section 6103(h)(4), returns and return information may be disclosed in federal or state judicial or administrative tax proceedings if certain conditions are satisfied. The rules relating to disclosure in judicial and administrative tax proceedings are narrower than the rules that authorize disclosures to DOJ; *i.e.*, they require that a more strict test be met before disclosure may be made in a tax proceeding.

Section 6103(h)(6) addresses access to returns and return information by members of the IRS Oversight Board. The Internal Revenue Service Restructuring and Reform Act of 1998 (RRA 98), Pub. L. No. 105-206, § 1101, 112 Stat. 685 (1998), created the IRS Oversight Board to oversee the IRS in its administration, management, conduct, direction, supervision, execution, and application of the tax laws. Generally, presidential appointees to the Board and employees and detailees of the Board are not entitled to returns or return information. An exception exists for reports containing returns or return information, prepared by the Commissioner of Internal Revenue or the Treasury Inspector General for Tax Administration, to assist the IRS Oversight Board in, and for the sole purpose of, carrying out its duties.

#### II. DISCLOSURES TO TREASURY EMPLOYEES

Section 6103(h)(1) authorizes disclosure of tax returns and return information to officers and employees of the Department of the Treasury whose official duties require access to the material for tax administration purposes. In essence, this section authorizes access to returns and return information when the recipient-employee establishes a "need to know" to perform a tax administration function. This is not a "cannot function without it" test; rather, it is a question of whether the employee can perform the duties more efficiently, more accurately, and/or more timely with the information than without it.



## A. Disclosures within the IRS and the Office of Chief Counsel

On many occasions, employees other than those assigned to work a particular case have an official need for returns and return information to carry out their tax administration responsibilities. These employees may be other field attorneys or IRS employees working similar or related cases. The propriety of each disclosure will hinge on whether there is an official tax administration need for the material. The authority to disclose returns and return information to an employee working an examination, collection, appeals, criminal investigation, or tax litigation case, or other self-evident tax matter case, is rarely questioned. See, e.g., NTEU v. FLRA, 791 F.2d 183, 187 n.7 (D.C. Cir. 1986) (personnel discipline case; referring to section 6103(h)(1), the court stated “[t]his inroad on privacy is both necessary and expected; the very reason for requiring returns and return information from the public is ‘for purposes of tax administration’”); Gardner v. United States, No. Civ. A. 96-1467.EGS., 1999 WL 164412, at \*3 (D.D.C. Jan. 29, 1999) (disclosure of former employee’s returns and return information authorized under section 6103(h)(1) to determine grounds for termination and denial of unemployment benefits), *aff’d*, 213 F.3d 735 (D.C. Cir. 2000), *cert. denied*, 531 U.S. 1153 (2001); Hobbs v. United States, No. H-96-4260, 1997 WL 879824 (S.D. Tex. Nov. 3, 1997) (no page numbers on Westlaw, see section IV of the opinion) (disclosures among IRS employees made in connection with reopening audit of former IRS employee were authorized by section 6103(h)(1)); Kenny v. United States, No. 10-4432, 2012 WL 2945683, at \*2-3 (3d Cir June 4, 2012) (inspection of practitioner's returns by Office of Professional Responsibility (OPR) employees was authorized by section 6103(h)(1) because compliance checks fall within their official duties); *cf.* Barnard v. United States, No. 78-5291-Civ-JCP, 1981 WL 1754, at \*2 (S.D. Fla. Mar. 5, 1981) (former employee asserting Freedom of Information Act claim had no right under section 6103(h)(1) to obtain portion of his conduct investigation report containing third-party return information).

**Example:** Attorney A has been assigned a case involving the question of whether a transfer of property, which was cast as a sale-leaseback, was in reality a financing arrangement. A learns that attorney B worked on a similar case involving the same leasing company, but a different taxpayer. A requests certain information from B's case file. The information sought by A may be provided to him, because A has an official need for the material for purposes of tax administration.

**Note:** The information obtained from B should be maintained separately from A's case file and clearly marked as third-party return information with the identity of the third-party taxpayer.

## **B. Disclosures to Other Treasury Employees**

Section 6103(h)(1) also authorizes disclosure to employees of other Treasury components. Again, the key to whether disclosure is authorized is whether there is an official need for the employee to know the return or return information for purposes of tax administration.

Treasury Inspector General for Tax Administration (TIGTA) employees, as employees of a component of the Department of the Treasury, are authorized to inspect or to receive disclosure of returns or return information in the course of their official tax administration duties under section 6103(h)(1). According to the legislative history, “[t]axpayer returns and return information are available for inspection by the Treasury IG [Inspector General] for Tax Administration pursuant to section 6103(h)(1). Thus, the Treasury IG for Tax Administration has the same access to taxpayer returns and return information as does the Chief Inspector under present law.” IRS RESTRUCTURING AND REFORM ACT OF 1998, Conference Report, H.R. REP. NO. 105-599, at 224 (1998).

Whereas section 6103(h)(1) provides that a written request for disclosure of returns and return information is not necessary, the IRS has adopted a practice that written requests will generally be required before any disclosure will be made to employees of other Treasury offices. See IRM 11.3.22.4(4). An e-mail message is a sufficient written request for this purpose.

## **III. DISCLOSURES TO THE DEPARTMENT OF JUSTICE – REFERRAL**

Section 6103(h)(3) outlines two methods by which DOJ may secure returns and return information for use in tax administration proceedings before a federal grand jury or any federal or state court, or to prepare for these proceedings, or for use in investigations that may result in these proceedings.

Section 6103(h)(3)(A) provides that the IRS may make disclosures to DOJ under section 6103(h)(2) on its own motion where a tax case has been referred to DOJ, or, a taxpayer or third party initiates a suit against the IRS under sections 7421-7436.

Although section 6103 contains no definition of “referral,” the term has generally been construed as an institutional decision by the IRS to request that DOJ defend, prosecute, or take other affirmative action on a tax case.

The term “referral” is defined in section 7602(d) in the context of an administrative summons, and includes a recommendation for a grand jury investigation or criminal prosecution for offenses connected with the administration of the internal revenue laws. This definition is encompassed within the meaning of referral for purposes of section 6103(h)(3). But a referral for purposes of section 6103 is not limited to a referral for purposes of section 7602. It also includes other situations where the Service asks DOJ to prosecute, defend, or take action on a tax case on behalf of the IRS, such as search

warrants, summons enforcement, writs of entry, etc. See United States v. Bacheler, 611 F.2d 443, 447-49 (3d Cir. 1979) (referral to DOJ for criminal tax prosecution proper under section 6103(h)(3)(A)).

A referral for purposes of section 6103(h)(3) may, in appropriate circumstances, include the necessary solicitation by the IRS of advice and assistance from DOJ with respect to a case before a referral of the entire case, often called “referral for limited purpose.” Disclosures of returns and return information by IRS to DOJ in connection with the necessary solicitation of advice and assistance will be authorized by section 6103(h)(3)(A), provided the requirements of section 6103(h)(2) are satisfied. See *General Explanation of the Tax Reform Act of 1976*, H.R. 10612, Pub. L. No. 94-455 (JCS-33-76), at 313-16 (J. Comm. Print 1976), 1976-3 C.B. (Vol. 2) 334.

Note, however, that strict procedural constraints apply even when the solicitation of advice is necessary for federal tax administration. In particular, solicitations for advice that entail the disclosure of returns and return information may be made only by IRS personnel with the delegated authority to refer the underlying matter, or with specific delegated authority to refer a case for legal advice to DOJ. Furthermore, disclosures in connection with the solicitation of advice are not authorized after the point that the advice is rendered, *i.e.*, there is no authority to make disclosures to “keep DOJ apprised” of developments in a tax investigation or to give DOJ periodic updates on non-referred cases. The referral (and disclosure authority) terminates once the advice or assistance is rendered.

Under section 6103(h)(3)(B), DOJ may initiate the referral. In these circumstances, a written disclosure request is required from the Attorney General, Deputy Attorney General, or an Assistant Attorney General. This authority to request returns and return information cannot be delegated. Therefore, a request from a United States Attorney in these circumstances cannot be honored. See Williams v. United States, Nos. 86-T-331-S to 86-T-334-S, 86-T-340-S, 86-T-352-S, 86-T-394-S, 1986 WL 9721, at \*2-4 (M.D. Ala. June 24, 1986).

Courts have scrutinized the IRS's procedures and delegation orders in the context of reviewing challenges to disclosures in referred and non-referred cases. See Bacheler, 611 F.2d at 447 (technical requirements of referral; in tax cases “there are two possible routes under which disclosure of tax returns and return information can be made” to DOJ attorneys – compliance with either section 6103(h)(3)(A) or section 6103(h)(3)(B)); United States v. Chem. Bank, 593 F.2d 451, 457 (2d Cir. 1979) (DOJ attorneys may obtain returns and return information pursuant to section 6103(h)(2) “only on compliance with” section 6103(h)(3)); United States v. Mangan, 575 F.2d 32, 37-41 (2d Cir. 1978) (technicalities of disclosure to DOJ); United States v. Robertson, 634 F. Supp. 1020, 1027 n.9 (E.D. Cal. 1986) (“Section 6103(h)(3) sets forth two alternative procedures by which the Department of Justice may inspect return information when [section 6103(h)(2)] is satisfied . . . .”), *aff'd mem.*, 815 F.2d 714 (9th Cir. 1987); see also United States v. Feldman, 731 F. Supp. 1189, 1197-98 (S.D.N.Y. 1990) (requirements for referrals - summons context); Williams v. United States, 1986 WL

9721 at \*2-4 (same); United States v. Carr, 585 F. Supp. 863, 866 (E.D. La. 1984) (same); McTaggart v. United States, 570 F. Supp. 547, 550 (E.D. Mich. 1983) (same). The only remedies available to an individual asserting an unauthorized disclosure, including disclosure to DOJ, are specified in section 7431. United States v. Michaelian, 803 F.2d 1042 (9th Cir. 1986) (dismissal of indictment and suppression of evidence were not available remedies if criminal defendant's return information had been improperly disclosed to DOJ).

#### **IV. DISCLOSURES TO THE DEPARTMENT OF JUSTICE TO PREPARE FOR CASES**

##### **A. Disclosures to DOJ**

Section 6103(h)(2) recognizes the need of DOJ to access returns and return information to carry out its civil and criminal tax responsibilities in cases referred under section 6103(h)(3). Under section 6103(h)(2), returns and return information may be disclosed to DOJ officers and employees (including United States attorneys) personally and directly engaged in, and solely for their use in any proceeding before a federal grand jury or in preparation for any proceeding (or investigation which may result in a proceeding) before a federal grand jury or any federal or state court in matters involving tax administration if:

1. the taxpayer is or may be a party to the proceeding, or the proceeding arose out of, or in connection with, determining the taxpayer's civil or criminal liability, or the collection of civil liability, with respect to tax (section 6103(h)(2)(A));

Example: A section 7203 willful failure to file case has been referred to DOJ for prosecution. The DOJ attorney assigned to the case orally requests certain information pertaining to the taxpayer's past filing history. The material requested may be provided as part of the referred case under section 6103(h)(2)(A), since the DOJ attorney is "personally and directly engaged in" the referred tax case and the taxpayer is or may be a party to the tax proceeding.

Example: In a summons enforcement case against a bank, in which the taxpayer chooses not to intervene, information regarding the nature of the underlying investigation of the taxpayer may be provided to the DOJ attorney "personally and directly engaged in" the summons enforcement tax proceeding, pursuant to section 6103(h)(2)(A), since the summons enforcement proceeding arose in connection with determining the taxpayer's civil or criminal federal tax liability.

Example: In a wrongful levy action under section 7426, the return and return information of the taxpayer may be disclosed to DOJ

under section 6103(h)(2)(A) because the proceeding arises out of or in connection with collecting the taxpayer's liability.

2. the treatment of an item reflected on a return is or may be related to the resolution of an issue in the proceeding (section 6103(h)(2)(B) – the “item” test); or
3. the return or return information relates or may relate to a transactional relationship between a person who is or may be a party to the proceeding and the taxpayer whose information would be disclosed which affects, or may affect the resolution of an issue in the proceeding (section 6103(h)(2)(C) – the “transactional relationship” test). See Davidson v. Brady, 559 F. Supp. 456, 461-62 (W.D. Mich. 1983), *aff'd on other grounds*, 732 F.2d 552 (6th Cir. 1984) (third-party tax information in tax evasion case); Hostetler v. Yungbluth, No. 77-1929-Civ-NCR, 1977 WL 1297, at \*1 (S.D. Fla. Sept. 30, 1977) (disclosure to United States Attorney authorized in summons enforcement case even though taxpayer was not entitled to be a party to the proceedings). Hostetler was decided under the original version of section 6103(h)(2), in which section 6103(h)(2)(A) only authorized disclosure of returns and return information of a taxpayer who “is or may be” a party to the proceeding. The court relied on the transactional relationship test of section 6103(h)(2)(C) as authorization for the disclosure. See part V.C., below, for more information regarding section 6103(h)(4)(A).

Example: Assume that unreported income is a major issue in a tax prosecution case, and that the amount of unreported income was determined by a net worth method. During the investigation, the taxpayer expended a substantial amount of cash in purchasing a capital asset from a third party. Inspection of the third party's return revealed that the total amount paid by the taxpayer was reported by the third party on Schedule D. Since both the “item” and “transactional relationship” tests of section 6103(h)(2) have been met, the third party's Schedule D may be furnished to the DOJ attorney assigned to the case. Other portions of the third party's return, however, do not relate, or potentially relate, to resolution of the unreported income issue, and therefore, should not be disclosed to the DOJ attorney.

For a further discussion of the “item” and “transactional relationship” tests, see Section V. The legislative history cited in Section V actually relates to section 6103(h)(2). However, because sections 6103(h)(2) and (h)(4) have similar “item” and “transactional relationship” tests, the legislative history is applicable to both Code sections.

## B. Case Law

1. United States v. Chemical Bank, 593 F.2d 451, 457 (2d Cir. 1979) (disclosures to DOJ in the context of an IRS audit requested by DOJ Strike Force Program must follow “institutional system of procedures,” e.g., requisite written request, to ensure IRS does not become “information gathering agency” for DOJ).
2. Heimark v. United States, 14 Cl. Ct. 643, 647 (1988) (section 6103(h)(2) covers only disclosures to DOJ, not disclosures in court).
3. United States v. Mangan, 575 F.2d 32, 37-41 (2d Cir. 1978) (technicalities of disclosure to DOJ).
4. McLarty v. United States, 741 F. Supp. 751, 753-57 (D. Minn. 1990) (disclosure of counsel’s return to DOJ and the court in connection with criminal case *pro hac vice* hearing not permissible; *pro hac vice* hearing is not tax administration), *related proceeding*, 784 F. Supp. 1401 (D. Minn. 1991).
5. Topercer v. Lee, No. 77-1837A, 1978 WL 1211, at \*2 (N.D. Ga. Apr. 6, 1978) (disclosure to DOJ for grand jury proceedings permissible).
6. United States v. Lavin, 604 F. Supp. 350, 355-56 (E.D. Pa. 1985) (disclosure procedures to be strictly followed; drug trafficking is not tax administration).
7. Young v. Burks, 849 F.2d 610 (table cite), No. 84-1805, 1988 WL 62396, at \*3 (6th Cir. June 21, 1988) (referral for routine summons enforcement actions).

## V. DISCLOSURES IN JUDICIAL AND ADMINISTRATIVE TAX PROCEEDINGS

### A. Rules and Requirements

Section 6103(h)(4) provides rules regarding the disclosure of returns and return information in judicial and administrative tax proceedings. The tax proceedings may be at either the federal or state level, including refund suits and proceedings before the Tax Court. The rules outlined in section 6103(h)(4) are in addition to the rules of evidence and other rules governing discovery in judicial and administrative tax proceedings, and also subject to rules imposed by tax conventions or treaties and tax information exchange agreements on returns or return information disclosed pursuant to those conventions or agreements.

The principal purpose behind section 6103(h)(4) is to regulate the sensitive returns and return information that is disclosed in proceedings which are often

public. Although authorizing the disclosure of returns and return information of a person who is a party to the tax proceeding, section 6103(h)(4) generally limits the disclosure of returns and return information of persons who are not parties to the proceeding (third parties). These third parties have important privacy interests in limiting the disclosure of their returns or return information in tax proceedings to which they are not parties and in which their tax liability is not at issue. Congress provided a very simple explanation of why it decided to limit third-party returns and return information disclosures:

While the committee decided to maintain the present rules pertaining to the disclosure of returns and return information of the taxpayer whose civil and criminal liability is at issue, restrictions were imposed in certain instances at the pre-trial and trial levels with respect to the use of third-party returns, where, after comparing the minimal benefits derived from the standpoint of tax administration to the potential abuse of privacy, the committee concluded that the particular disclosure involved was unwarranted.

S. REP. NO. 94-938, at 324-25 (1976), 1976-3 C.B. (Vol. 3) 362-63. Thus, returns and return information of third parties may be disclosed under the second clause of section 6103(h)(4)(A), and the more restrictive rules of section 6103(h)(4)(B), (C), and (D).

Section 6103(h)(4) provides that returns and return information may be disclosed in judicial and administrative tax proceedings if:

1. the taxpayer is a party to the tax proceeding, or the tax proceeding arose out of, or in connection with, determining the taxpayer's civil or criminal liability, or the collection of the taxpayer's civil liability, in respect of any tax imposed under the Code (section 6103(h)(4)(A));
2. the treatment of an item reflected on the return is directly related to the resolution of an issue in the tax proceeding (section 6103(h)(4)(B) – the “item” test);

**Note:** Chief Counsel Notices 2006-003 and 2006-006 clarify the authority to disclose third-party returns and return information as pattern evidence in specific situations. Chief Counsel Notices 2006-003 and 2006-006 have not yet been incorporated into the CCDM. See Section D, below.

3. the return or return information directly relates to a transactional relationship between a person who is a party to the proceeding and the taxpayer whose return or return information would be disclosed which directly affects the resolution of an issue in the proceeding (section 6103(h)(4)(C) – the “transactional relationship” test); or

4. the disclosure is authorized by order of a court pursuant to 18 U.S.C. § 3500 or Rule 16 of the Federal Rules of Criminal Procedure, the court being authorized in the issuance of the order to give due consideration to congressional policy favoring the confidentiality of returns and return information as set forth in the Code (section 6103(h)(4)(D)).

## B. Definitions

To apply properly the section 6103(h)(4) rules, an understanding of the terms listed below is important.

1. “**Third-party returns and return information**” mean returns and return information filed with, or received, prepared, or collected by, the IRS with respect to the liability or possible liability under the Code of a taxpayer (or a group of specific taxpayers) who are not parties to the proceeding. A third-party return is a return that is filed with the IRS by, on behalf of, or with respect to, a person who is not a party to the tax proceeding. Third-party return information is return information, as defined in section 6103(b)(2), with respect to a person who is not a party to the tax proceeding. Documents that consist of returns or return information retain their character as section 6103-protected returns or return information even if they do not identify the taxpayer, or if data that can identify the taxpayer is redacted. Church of Scientology v. United States, 484 U.S. 9 (1987). Copies of tax returns, or information derived from tax returns, retained by the taxpayer are not returns or return information as defined in section 6103(b)(2); their character as returns or return information is determined at the time the material is first collected or received by the IRS. Copying a tax return, or return information, of one taxpayer for use in a proceeding pertaining to another taxpayer does not make it the return or return information of the second taxpayer; the material remains the return or return information of the first taxpayer.

Example: Employer A files a Form W-2, Wage and Tax Statement, with respect to employee B. The Form W-2 relates to employee B’s income tax liability or potential liability under the Code. Employer A is required to file the Form W-2 pursuant to section 6051 and is liable for penalties under section 6722 if the form is not filed. Because the filed Form W-2 relates to liability or potential liability under the Code of both A and B, it is the return of both A and B, and would not be a third-party return in a tax administration proceeding involving the tax liability of either A or B.



Example: The IRS serves a summons on a bank “In the matter of Taxpayer C.” The information received from the bank is C’s return information, not the bank’s return information. Furthermore, if the records provided by the bank include records of account-holders other than C, the provided material is the return information of C. In a tax proceeding involving the liability of C, the information received from the bank is not third-party return information.

Example: The IRS serves a Tax Court subpoena on D in the case of E v. Comm’r. The information received from D is collected with regard to the liability or possible liability of E under the Code and is thus E’s return information. The information received from D is not third-party return information with regard to the tax proceeding of E v. Comm’r.

Example: In examining Taxpayer F, a copy of Taxpayer G’s Form 1040 from IRS files is placed in Taxpayer F’s file. Taxpayer G’s return does not become Taxpayer F’s return information. Similarly, if a copy of the revenue agent’s report from Taxpayer G’s file is placed in Taxpayer F’s file, G’s revenue agent’s report obtained from IRS files does not become F’s return information. Both G’s tax return and the revenue agent’s report prepared in G’s examination are third-party return information with respect to any tax proceeding relating to F because the information was filed with or prepared by the IRS with regard to the liability or possible liability of G (not F) under the Code. (Deleting the identifying information from the return or the report does not change their character as the return and return information of G.)

Example: Taxpayer H files a Form 1040. In examining taxpayer I, the IRS summons from taxpayer H a copy of H’s Form 1040. The copy of H’s return received in response to the summons *in the matter of I* is I’s return information because it was collected with regard to the liability or possible liability of I under the Code. The original Form 1040 that H filed with the IRS remains H’s return.

2. “**Judicial proceeding pertaining to tax administration**” means any judicial proceeding in which a person’s liability or collection of that liability under the internal revenue laws, related statutes, or tax conventions is determined, or any judicial proceeding arising out of or in connection with a determination, to which the United States, the IRS, the Commissioner of Internal Revenue, an IRS or DOJ employee in his or her official capacity, or an IRS or DOJ employee in his or her

individual capacity where DOJ has agreed to represent or provide representation to the employee, is a party.<sup>36</sup>

Examples include, but are not limited to, suits for tax refunds filed in district court or the United States Court of Federal Claims, any action filed in the United States Tax Court, criminal prosecutions under the internal revenue laws and related statutes, suits to foreclose tax liens, quiet title actions, summons enforcement lawsuits, and lawsuits for unauthorized collection actions or unauthorized disclosures. In addition, a lawsuit under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, or the Privacy Act of 1974, 5 U.S.C. § 552a, involving returns or return information, is a judicial proceeding pertaining to tax administration for purposes of section 6103(h)(4). Additionally, lawsuits for alleged constitutional violations (so-called Bivens suits, after Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971), lawsuits under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671, and other lawsuits arising out of the IRS's examination, collection, or other enforcement activities under the Code are judicial proceedings pertaining to tax administration.

3. **“Administrative proceeding pertaining to tax administration”** means any procedure or other action arising out of or in connection with a determination of a person's liability or potential liability, or in connection with the collection of that person's liability, under the internal revenue laws or related statutes and tax conventions to which the United States is a party, and in which a person, whose liability or potential liability, or collection of that person's liability, is or may be at issue, is given notice and an opportunity to present information to the IRS.
  - (i) This term includes any procedural steps that are a part of a larger action or procedure.
  - (ii) Examples of administrative proceedings pertaining to tax administration include, but are not limited to, examinations of returns, administrative appeals, refund claims, requests for private letter rulings, requests for certificates of release or discharge, administrative review of jeopardy and termination assessments, collection matters, requests for pre-filing

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<sup>36</sup> Whether a statute is "related" to the internal revenue laws within the meaning of section 6103(b)(4) depends on the nature and purpose of the statute and the facts and circumstances in which the statute is being enforced or administered. These statutes cannot be considered related in all situations but only when being enforced by IRS or DOJ personnel in matters arising out of or in connection with the enforcement of Title 26. For a more complete discussion of related statute determinations, see *generally* Chapter 7.

agreements, requests for interest abatement, requests for innocent spouse relief, offers in compromise, trust fund recovery penalty proceedings, collection due process proceedings, alternative dispute resolution proceedings, requests for advance pricing agreements, criminal investigations and Federal Deposit Insurance Corporation receivership proceedings where the IRS has a tax claim.

- (iii) The term does not include matters of general application, such as hearings on regulations or comments on forms.

In First W. Gov't Sec, Inc.. v. United States, 578 F. Supp. 212, 217-18 (D. Colo. 1984), *aff'd*, 796 F.2d 356 (10th Cir. 1986), and in Nevins v. United States, No. 84-4147, 1987 WL 47316, at \*3 (D. Kan. Aug. 26, 1987), audits were found to be administrative tax proceedings for purposes of the statute. See also Abelein v. United States, 323 F.3d 1210, 1214-15 (9th Cir. 2003) (by statute – I.R.C. § 6223 – TEFRA audits are administrative tax proceedings); Young v. Burks, 849 F. 2d 610 (table cite), No. 84-1805, 1988 WL 62396, at \*3 (6th Cir. June 21, 1988); Niemela v. United States, No. Civ. 90-10110-WD, 1992 WL 314040, at \*3 (D. Mass. Aug. 4, 1992), *aff'd in part on other grounds, vacated in part on other grounds*, 995 F.2d 1061 (table cite), 1993 WL 198171 (1st Cir. June 11, 1993), *cert. denied*, 510 U.S. 948 (1993); Ungaro v. Desert Palace, Inc., No. CV S 88-838 RDF, 1989 WL 199264, at \*4 (D. Nev. Nov. 17, 1989) (criminal investigation and placement of lien or levy is administrative tax proceeding). By contrast, in Mallas v. United States, 993 F.2d 1111, 1122 (4th Cir. 1993), an audit was held *not* to be an administrative proceeding described in section 6103(h)(4).

4. **“Disclosure in the proceeding”** means a disclosure of returns or return information made to a court (including a court reporter or stenographer), a mediator or arbitrator, or to a party to the proceeding under the practices and procedures generally applicable to the proceeding, and subject to any rules governing the proceeding. This includes disclosures in court during a trial, disclosures in formal or informal discovery (including depositions), disclosures in settlement negotiations, disclosures in mediation or arbitration, disclosures in an application for a search warrant, or disclosures to the taxpayer in a 30-day letter issued in accordance with Treas. Reg. § 601.105(c)(2), a notice of deficiency issued under section 6212, or a notice of decision or determination letter issued by an IRS Appeals office. For disclosures when interviewing third-party witnesses, disclosures to interpreters, or other disclosures to obtain information outside of the proceeding, see Treas. Reg. §§ 301.6103(k)(6)-1 (internal revenue

employees and TIGTA employees) and 301.6103(h)(2)-1(b)(1)(i), (ii) (Department of Justice officers and employees).

### **C. I.R.C. § 6103(h)(4)(A)**

Section 6103(h)(4)(A) authorizes the disclosure of returns and return information in a tax proceeding if either the taxpayer is a party to the tax proceeding or the tax proceeding arose out of or in connection with determining the taxpayer's liability or collection of taxes owed by the taxpayer under the Code. See United States v. Mangan, 575 F.2d 32, 40 (2d Cir.), *cert. denied*, 439 U.S. 931 (1978); Bowers v. J&M Disc. Towing, No. 06-299 JB/RHS, 2007 WL 967161, at \*4-5 (D.N.M. Feb. 28, 2007). See also Plotkin v. United States, 465 Fed. App'x. 828, 833-34 (11th Cir. 2012) (Where compliance with IRS-related conditions of probation in a criminal tax case required the defendant to file and pay all taxes, the court held that the IRS's disclosure of the defendant's return information to his probation officers was authorized by section 6103(h)(4)(A) upon finding that the probation revocation proceedings were an extension of the defendant's criminal proceeding for tax crimes.)

The second clause of section 6103(h)(4)(A) ("or the proceeding arose out of . . .") and similar language in section 6103(h)(2)(A) were added in 1978 because there was some uncertainty as to whether the item and transactional relationships tests of section 6103(h)(4)(B) and (C) were broad enough to cover disclosures in summons enforcement proceedings (in which the taxpayer was not a party) and nominee and transferee liability cases. See H.R. REP. NO. 95-1800, at 293 (1978), 1978-3 C.B. (Vol. 1) 627.

### **D. Disclosures of Third-Party Returns and Return Information – I.R.C. § 6103(h)(4)(B) and (C)**

#### **1. I.R.C. § 6103(h)(4)(B) – The "Item" Test**

Under section 6103(h)(4)(B), the returns and return information of a third party may be disclosed if the treatment of an item on the third party's return is directly related to the resolution of an issue in the tax proceeding.

The legislative history of the "item" test provides, as examples, that the returns of subchapter S corporations, partnerships, estates, and trusts may reflect the treatment of certain items which directly relate to the resolution of the taxpayer's liability because of *some relationship* of the taxpayer, such as shareholder, partner, or beneficiary, with the corporation, partnership, estate, or trust. See S. REP. NO. 94-938, at 325 (1976), 1976-3 C.B. (Vol. 3) 363 (emphasis added). In these examples, the item becomes directly related by operation of a provision of the Code (for example, the passthrough of the relevant items from a partnership to a partner). United States v. N. Trust Co., 210 F. Supp. 2d 955, 957 (N.D. Ill.

2001) (item test “[d]oes not require any transactional nexus” because “[s]uch a requirement would make one of the other statutory exceptions, permitting disclosure if ‘return information directly relates to a *transactional relationship* between a person who is a party to a proceeding and the taxpayer,’ superfluous”) (quoting section 6103(h)(4)(C)).

Section 6103(h)(4)(B) authorizes disclosure of third-party returns and return information where the item on the third party’s return or return information directly relates to the elements for defending or proving the civil cause of action or crime at issue in the tax proceeding. For example, criminal violations of unauthorized inspections of returns or return information by federal employees are brought by the government against the employee under section 7213A. In order to prove one of the elements of unlawful inspection under section 7213A, it is necessary for the government to disclose those items from the taxpayer’s return that were unlawfully inspected by the federal employee. Section 6103(h)(4)(B) authorizes disclosure of the taxpayer’s return in the 7213A proceeding because the existence of the return is necessary to prove one of the elements of the crime of unlawful access under section 7213A, *i.e.*, unlawful inspection of taxpayer’s return information. In this type of case, the necessary nexus between the defendant and the third party is established when the defendant allegedly inspects the third party’s return or return information without authorization.

Chief Counsel Notice 2006-003 clarified the authority for disclosure of third-party returns and return information in tax shelter matters. In the course of tax shelter investigations, the IRS frequently obtains return information of multiple investors in the same, or substantially similar, promotions. Such information may be pattern evidence that demonstrates a consistent lack of a bona fide business purpose among the investors. Pursuant to the item test under 6103(h)(4)(B), where the return information of multiple investors demonstrates such a pattern, that return information may be disclosed in a tax proceeding pertaining to any investor in that (or a substantially similar) promotion so long as the information directly relates to the resolution of an issue in the proceeding. For these purposes, a shelter promotion is “substantially similar” if it is the same transaction promoted by the same promoter. The same transaction promoted by a different promoter, and a different transaction promoted by the same promoter, do not meet this definition of substantially similar.

When considering disclosures of third-party return information as pattern evidence, consideration should also be given to other methods of proof that do not involve disclosures of the third-party information, such as summaries or compilations. If disclosure of the third-party information is determined to be necessary, Chief Counsel employees should disclose only those portions of returns, or return information, as are directly related

to resolving an issue in the proceeding. In accordance with Chief Counsel Notice 2002-028, which has been incorporated into CCDM 33.1.2, identifying information of the third parties should be redacted.

**Note:** The disclosure authority described in Chief Counsel Notice 2006-003 (and the Q & A Chief Counsel Notice 2006-006) applies also to disclosures to the Department of Justice pursuant to 6103(h)(2)(B) and to further disclosures by the Department of Justice pursuant to 6103(h)(4)(B).

## **2. I.R.C. § 6103(h)(4)(C) – The “Transactional Relationship” Test**

Under section 6103(h)(4)(C), the returns or return information of a third party may be disclosed if the third party’s returns or return information directly relates to a transactional relationship between the third party and the taxpayer whose liability is at issue, and the third party’s returns or return information pertaining to that transaction directly affects the resolution of an issue in the tax administration proceeding.

The legislative history of the “transactional relationship” test provides, as an example, that the treatment of a third-party buyer’s return regarding his purchase of a business would directly relate to the seller’s tax liability resulting from the sale of the business. See S. REP. NO. 94-938, at 325 (1976), 1976-3 C.B. (Vol. 3) 363. In this example, the buyer’s treatment of the purchase on his or her return would also satisfy the item test of section 6103(h)(4)(B). This example demonstrates that both the item and transactional relationship tests may be met under the same facts. On the other hand, the buyer’s treatment of business expenses incurred after the buyer’s purchase of the business would not directly relate to the seller’s treatment of the sale and would not satisfy either the item or transactional relationship test.

Desert Valley Painting & Drywall, Inc. v. United States, 829 F.Supp.2d 931, 939 (D. Nev. 2011) (The court explained that the employment tax treatment of a third party/company’s workers appeared to directly relate to the tax treatment of those workers by plaintiffs arising out of the contractual relationship between the company and plaintiffs, and such treatment directly related to the resolution of the tax issue in the case. Therefore, the court stated that section 6103(a) did not preclude the discovery of relevant return information relating to the tax treatment of the company’s workers.)

## **3. Key Factor**

The key factor in determining whose return information is at issue is not whose tax liability may be affected by the data, but rather whose tax

liability is under investigation by the IRS for which the information is first obtained, received, or generated by the IRS. See Martin v. IRS, 857 F.2d 722, 726 (10th Cir. 1988).

**Note:** The mere fact that opposing counsel requests third-party returns or return information does not create an issue to be resolved such that the requirements of 6103(h)(4)(B) or (C) are met to authorize disclosure to opposing counsel. Nevertheless, in appropriate circumstances, disclosure of such information may be made *in camera* to allow the court to determine whether the material meets the requirements for disclosure pursuant to either 6103(h)(4)(B) or (C).

### **E. Similarly Situated Taxpayers**

The legislative history also provides that the returns and return information of merely similarly situated but “unrelated” third-party taxpayers does not meet either the item or the transactional relationship test. Congress provided explicit examples to illustrate this point:

The return reflecting the compensation paid to an individual by an employer other than the taxpayer whose liability is at issue would not meet either the item or transaction tests . . . in a reasonable compensation case. Thus, for example, the reflection on a corporate return of the compensation paid its president would not represent an item the treatment of which was relevant to the liability of an unrelated corporation with respect to the deduction it claims for the salary it paid its president. In section 482 cases (involving the reallocation of profits and losses among related companies), where it is sometimes necessary to determine the prices paid for certain services and products at arms-length between unrelated companies, the return or return information of a company which was unrelated to the taxpayer company would not be disclosable under either the item or transaction tests.

S. REP. NO. 94-938, at 325-26 (1976), 1976-3 C.B. (Vol. 3) 363-64.

In In re United States, 669 F.3d 1333, 1338 (Fed. Cir. 2012), the Federal Circuit held, in a case of first impression for the court, that the IRS cannot be required to disclose return information of unrelated but similarly situated third party taxpayers pursuant to the “item test” of section 6103(h)(4)(B). At issue was liability for excise taxes arising from use of certain chemicals in overseas manufacturing of imported products; taxpayer sought information regarding the IRS contractor’s testing for these chemicals in other taxpayers’ similar products. In its holding, the Federal Circuit explained that the treatment of an item on a third party’s return is not directly related to the resolution of an issue as required by section 6103(h)(4)(B) when the only link between the third party and the

taxpayer is the treatment of a similar item on the return. The Federal Circuit noted that the requirement that information be “directly related” is much narrower than when a court assesses if evidence is relevant and that nothing in the statute suggests that Congress intended the court to focus on the relevance of the return information to an issue in the proceeding. In reaching its decision, the Federal Circuit cited favorably *Vons Cos. Inc. v. United States*, 51 Fed. Cl. 1 (2001).

In *Vons Cos. Inc. v. United States*, 51 Fed. Cl. 1 (2001), a taxpayer sought, through discovery, unredacted technical advice memoranda (TAMs) and private letter rulings (PLRs) purportedly addressing the same legal issue raised in the taxpayer’s litigation. The taxpayer argued that section 6103(h)(4)(B), the item test, authorized disclosure of the information. The court, however, concluded that section 6103(h)(4)(B) did not authorize disclosure of the requested records and rejected a construction of section 6103(h)(4) allowing for disclosure of return information of a third party solely on the basis that the party to the proceeding and the third party are, or were, similarly situated. The court pointed out that the language establishing what is “relevant evidence” under the Federal Rules of Evidence is quite different and certainly much broader than the “directly related” language in section 6103(h)(4)(B). See also *3K Partners v. Comm’r*, 133 T.C. 112 (2009) (petitioner denied discovery of tax opinion letters issued to other taxpayers in similar transactions; letters were not relevant and were third-party return information protected from disclosure by section 6103).

For a further discussion of this issue, see *generally* OFFICE OF TAX POLICY, U.S. DEPARTMENT OF TREASURY, REPORT TO THE CONGRESS ON SCOPE AND USE OF TAXPAYER CONFIDENTIALITY AND DISCLOSURE PROVISIONS, VOL. I: STUDY OF GENERAL PROVISIONS 47-50 (2000). This report is available on the Internet at the Department of the Treasury web site: <http://www.treasury.gov/resource-center/tax-policy/Documents/confide.pdf>.

## **F. Impeachment of Witnesses**

The legislative history of section 6103 states explicitly that returns and return information of a third-party witness cannot be used to impeach the credibility of the witness unless the item or transactional relationship test is otherwise met. “Only such part or parts of the third party’s tax return or return information which reflects the item or transaction will be subject to disclosure both before and in a tax proceeding. Thus, the return of a third-party witness could not be introduced in a tax proceeding for the purposes of discrediting that witness except on the item and transaction grounds stated above.” S. REP. NO. 94-938, at 326 (1976), 1976-3 C.B. (Vol. 3) at 364. See also *Ryan v. United States*, No. CIV. A. AW-97-3548, 1998 WL 919881, at \*2-3 (D. Md. July 30, 1998) (purpose of prosecutor’s questions to plaintiff/witness was not only to impeach, but also to provide evidence to jury in criminal trial of plaintiff/witness’s role in the illegal scheme, and, therefore, met the transactional relationship test), *aff’d*, 181 F.3d 90 (4th Cir. 1999) (table cite). Note that if the witness is a party to the proceeding, then the



witness/party's returns and return information may be disclosed in that proceeding pursuant to I.R.C. § 6103(h)(4)(A).

### **G. Disclosure Limited to Necessary Part or Parts**

In addition to prohibiting the disclosure of the returns and return information of unrelated third-party taxpayers, the legislative history explains that, even if the taxpayer is related, transactionally or otherwise, the returns and return information that can be disclosed is strictly limited to only the returns and return information meeting the tests. S. REP. NO. 94-938, at 326 (1976), 1976-3 C.B. (Vol. 3) 364. See Guarantee Mut. Life Ins. Co. v. United States, Civ. No. 77-0-407, 1978 WL 4574, at \*2 (D. Neb. Aug. 28, 1978). *But see* Conklin v. United States, 61 F.3d 915 (table cite), No. 95-1013, 1995 WL 452498, at \*1 (10th Cir. July 31, 1995) (allowing the Service to introduce the entire return under section 6103(h)(4), even if only one part of the return was relevant, based on the plain language of the statute).

**Note:** In Chief Counsel Notice 2002-028, Counsel issued guidance on a related issue: when to disclose information identifying third parties in privilege logs and other similar documents. Counsel should carefully consider privilege logs and similar documents identifying third parties who may be involved in transactions with the taxpayer in order to determine whether the identity of the third party is essential to the matter before the court. If the identity of the third party is not essential, the identifying information should be redacted. In this way, disclosure of otherwise statutorily authorized information regarding third parties is limited to only when the disclosure is essential to the matter before the court. Redaction may be done in a manner that protects the third-party identities from public release while retaining the information for use by counsel and the court.

### **H. I.R.C. § 6103(h)(4) Compared to I.R.C. § 6103(h)(2)**

Note that the section 6103(h)(4) test is slightly different from, and stricter than, the test in section 6103(h)(2). Congress chose the more general "is or may" language authorizing disclosures to DOJ pursuant to section 6103(h)(2). The difference between subsections (h)(2) and (h)(4) is that under (h)(2), the returns and return information transferred to DOJ need only have the potential for meeting the tests under (h)(4) for disclosure in a tax proceeding. See Davidson v. Brady, 559 F. Supp. 456, 462 (W.D. Mich. 1983), *aff'd on other grounds*, 732 F.2d 552 (6th Cir. 1984). Also note, however, that under section 6103(h)(4), the "item" and "transactional relationship" tests do not require that the third-party return information be *necessary* to, or dispositive of, the resolution of issues in the tax proceeding, only that it directly affect resolution of any of those issues. See First W. Gov't Sec., Inc. v. United States, 578 F. Supp. 212, 217-18 (D. Colo. 1984), *aff'd*, 796 F.2d 356 (10th Cir. 1986).

## I. Meaning of “Directly Related”

1. Beresford v. United States, 123 F.R.D. 232, 234-35 (E.D. Mich. 1988) (select portions of third-party tax data that IRS had relied upon in its valuation of taxpayer/party’s stock, which valuation was squarely at issue in the taxpayer/party’s tax refund suit, satisfied the requirements of section 6104(h)(4)(B)).
2. United States v. Cathcart, No. C-07-4762 PJH (JCS), 2009 WL 482220, at \*5 (N.D. Cal. Feb. 25, 2009) (defendant assessed promoter penalties under sections 6700 and 6701 sought information about abatement of understatement penalties with respect to investors in his transaction as support for the defense of lack of scienter, found to meet section 6103(h)(4)(B) requirements).
3. Christoph v. United States, No. CV495-88, 1995 WL 847618, at \*1 (S.D. Ga. Dec. 12, 1995) (at issue in ex-husband’s tax deficiency proceeding was deductibility of a payment made by the taxpayer/ex-husband to his ex-wife; court held that the third-party (ex-wife’s) return information (including ex-wife’s tax protest letter, factual notes of the agent handling the ex-wife’s case, and portions of the ex-wife’s tax return which demonstrate the extent to which she did or did not treat the payment at issue as alimony income) showing her treatment, for tax purposes, of the payment in question directly related to the deductibility issue in the ex-husband’s tax proceeding), *vacated on other grounds*, 1996 WL 182130 (S.D. Ga. Jan. 30, 1996).
4. Guarantee Mut. Life Ins. Co. v. United States, Civ. No. 77-0-407, 1978 WL 4574, at \*1-2 (D. Neb. Aug. 28, 1978) (where the issue centers on an individual’s status as employee or independent contractor, portions of his return indicating that status may be disclosed in the employer’s proceeding).
5. Lebaron v. United States, 794 F. Supp. 947, 950-52 (C.D. Cal. 1992) (third party/parishioner’s tax treatment as business expense deductions of payments she made to her church was directly related to resolution of an issue in a summons enforcement tax proceeding to which the church was a party, *i.e.*, whether information sought in the summons was necessary to IRS’s investigation of the church’s tax exempt status).
6. United States v. N. Trust Co., 210 F. Supp. 2d 955, 958-57 (N.D. Ill. 2001) (in an action to recover tax refunds, the court found that section 6103(h)(4)(B) authorized disclosure of third parties’ tax returns showing whether the third parties claimed ownership of tax advantaged mutual fund shares (which defendant had ‘loaned’ to the third parties, who

subsequently sold the shares) with respect to which defendant had claimed ownership-based tax refunds).

7. Shell Petroleum, Inc. v. United States, 46 Fed. Cl. 719, 722-25 (2000) (In refund suit based on the section 29 credit for production of oil from tar sands, the court granted plaintiff's motion for in camera review of the section 43 certificates filed by third-party taxpayers, which would reveal the oil production methods used by the third parties. Since one requirement for the section 29 credit is that the technology for which the credit is claimed was not widely available it, Shell wanted the certificates to inferentially support its assertion that the technology it used was not used by others. The court, interpreting "directly related" as a concept akin to admissibility, held that plaintiff showed that the information may fall within section 6103(h)(4)(B)). *But see In re United States, supra.*
8. Tavery v. United States, 32 F.3d 1423, 1429 (10th Cir. 1994) (third party/wife's tax information directly related to resolution of the issue of her husband's eligibility for court-appointed counsel in a judicial tax proceeding to which she was not a party).
9. Texture Source, Inc. v. U.S., --- F.Supp.2d ---, 2012 WL 947059, at \*6 (D. Nev. Feb. 6, 2012) (in a case involving the employment status of workers, court held that, in light of the contractual relationship between third party and plaintiffs, return information relating to employment tax treatment of third party's workers appeared to directly relate to the tax treatment of plaintiffs' workers, and thus consistent with section 6103(h)(4)(C), was directly related to the resolution of the issue in the proceeding)
10. United States v. Tsanas, 572 F.2d 340, 348 (2d Cir. 1978) (court's refusal to subpoena corporate return that would not directly affect resolution of individual's tax evasion case, "as required by the recently enacted 26 U.S.C. s 6103(h)(4)(B) or (C)," was not incorrect).

#### **J. Additional Cases Involving The "Item" and "Transactional Relationship" Tests**

1. Balanced Fin. Mgmt. v. Fay, 662 F. Supp. 100, 105-06 (D. Utah 1987) (information released in letters to tax shelter investors was not considered promoter/plaintiff's return information; regardless, investor/taxpayers were properly notified that their claims for deductions or credits as they related to the tax shelter would be disallowed).

2. Confidential Informant 92-95-932X v. United States, 45 Fed. Cl. 556, 559 (2000) (in suit by confidential informant against United States to enforce informant's contract with United States, limited third-party tax information that would resolve issue of award amount owed to confidential informant may be disclosed to DOJ under section 6103(h)(2)(B) and in the tax administration proceeding under section 6103(h)(4)(B)).
3. Davidson v. Brady, 559 F. Supp. 456, 460-62 (W.D. Mich. 1983), *aff'd on other grounds*, 732 F.2d 552 (6th Cir. 1984) (in the case of business dealings between taxpayers where the financial rights and obligations of one taxpayer related to the financial rights and obligations of the other taxpayer, disclosure made during a separate judicial tax proceeding of return information was authorized under section 6103(h)(4)(C)).
4. Estate of Stein v. United States, Civ. No. 79-0-198, 1981 WL 1807, at \*1-2 (D. Neb. Jan. 16, 1981) (to establish whether a gift was made in contemplation of death, the court ruled that the return information related to the donor/donee relationship and disclosure to the Department of Justice was authorized under section 6103(h)(2)(C); the court declined to determine, at that time, whether redisclosure by the Department of Justice was authorized under section 6103(h)(4)(C)).
5. First W. Gov't Sec., Inc. v. United States, 578 F. Supp. 212, 217-18 (D. Colo. 1984), *aff'd*, 796 F.2d 356 (10th Cir. 1986) (to the extent the Revenue Agent Report (RAR) contained a dealer-broker's return information, his customer-investors were considered parties in the tax administration proceeding, and disclosure that certain losses which the investors claimed through the dealer-broker had been denied, was authorized under section 6103(h)(4)(C)).
6. Guarantee Mut. Life Ins. Co. v. United States, Civ. No. 77-0-407, 1978 WL 4574, at \*2 (D. Neb. Aug. 28, 1978) (in employer/employee situation, disclosure of the employee's return information to establish the nature of the employment relationship was authorized as it directly affected resolution of the issue of whether the employer/plaintiff was subject to the withholding requirements).
7. Heimark v. United States, 14 Cl. Ct. 643, 647-49 (1988) (in a trust fund recovery penalty case, only return and return information that related to the transactional relationship between the plaintiff and the corporation for which the plaintiff failed to pay over withholding taxes was subject to disclosure under section 6103(h)(4)(C); the court denied the plaintiff's production requests for the return information of taxpayers not involved in the litigation proceedings).

8. Hostetler v. Yungbluth, No. 77-1929-Civ-NCR, 1977 WL 1297, at \*1 (S.D. Fla. Sept. 30, 1977) (disclosure of taxpayer's return information to Department of Justice authorized under section 6103(h)(2)(C) in summons enforcement case even though taxpayer was not entitled to be a party to the proceedings). Hostetler was decided under the original version of section 6103(h)(2), in which section 6103(h)(2)(A) only authorized disclosure of returns and return information of a taxpayer who "is or may be" a party to the proceeding. The court relied on the transactional relationship test of section 6103(h)(2)(C) as authorization for the disclosure. See part V.C., above, regarding section 6103(h)(4)(A).
9. Khan v. United States ex rel. Internal Revenue Serv., 548 F.3d 549 (7th Cir. 2008), *rev'g*, 537 F. Supp. 2d 944 (N.D. Ill. 2008) (district court's grant of petition to quash summons reversed per Treas. Reg. § 301.7602-1(c)(1). Interplay between sections 6103(h)(4) and 7602 (pertaining to referrals to DOJ relating to "any person"))).
10. Mallas v. United States, 993 F.2d 1111, 1122 (4th Cir. 1993) (Revenue Agent Reports (RARs) that included outdated information about promoters' shelter-related convictions for tax evasion sent to tax shelter investors found to be unauthorized disclosures under section 6103(h)(4)(C)).
11. Mid-South Music Corp. v. United States, 818 F.2d 536, 538-39 (6th Cir. 1987) (letters to tax shelter investors stating disallowed deductions are return information of the investors and were properly disclosed to the investors pursuant to 6103(h)(4)(A)).
12. Morgan v. United States, Civ. Action No. 91-M-379, 1991 U.S. Dist. LEXIS 12882, at \*2 (D. Colo. Aug. 30, 1991) (information on payments made to the plaintiff by an exempt organization released in a Revenue Agent Report was not considered return information; however, the court found disclosure authorized based on evidence of a transactional relationship between plaintiff and the taxpayer under examination), *aff'd*, 953 F.2d 1391 (table cite), 1992 WL 14934 (10th Cir. Jan. 30, 1992).
13. Nevins v. United States, No. 84-4147, 1987 WL 47316, at \*3 (D. Kan. Aug. 26, 1987) (Nevins and Rinke were arrested together by DEA for attempting to purchase marijuana, a simultaneous search of Rinke's home produced a ledger recording drug sales by the two; IRS conducted a civil investigation of Rinke and eventually issued a Revenue Agent Report containing references to Nevins' drug sales activities and arrest. Assuming, without discussion, that the

information was Nevins' return information, the court determined that the disclosure to Rinke was authorized under section 6103(h)(4)(B) and (C)).

14. Solargistic Corp. v. United States, No. 87 C 9460, 1989 WL 134505, at \*1-5 (N.D. Ill. Oct. 11, 1989) (letters to tax shelter investors notified them that their expected deductions would be disallowed in light of their investments in the plaintiff's tax shelter promotion; court held that the IRS review of the tax shelter constituted an administrative proceeding and the tax liabilities of the investors were affected by the IRS's evaluation of the validity of the tax shelter; disclosure was authorized under section 6103(h)(4)(C)), *aff'd*, 921 F.2d 729 (7th Cir. 1991).

#### **K. Special Rule for Disclosure in Federal Criminal Tax Cases**

Section 6103(h)(4)(D) contains an additional basis for disclosure in federal criminal tax cases. Under this provision, a court can order disclosure of third-party tax data pursuant to 18 U.S.C. § 3500 or Fed. R. Crim. P. 16 after giving due consideration to congressional policy favoring the confidentiality of returns and return information.

**Note:** The impairment determination in section 6103(h)(4) does not apply in these circumstances. See Paragraph M, below.

**Note:** Exculpatory evidence the disclosure of which is required as a constitutional matter is not subject to the statutory restrictions of section 6103(h)(4). Nevertheless, care should be exercised to disclose on this basis only the returns or return information (or portions thereof) that meet the constitutional requirements. Submit the material for *in camera* review if there is any question.

For discussions of the applicability of section 6103(h)(4)(D), see U.S. v. Prokop, No. 2:09-cr-00022, 2012 WL 475543, at \*4 (D.Nev. Feb. 14, 2012) (finding that the standards described in Rule 16 had been met, the court ordered disclosure, pursuant to section 6103(h)(4)(D), of third party audit files, including no-change audits, of taxpayers who purchased defendant's alleged fraudulent tax product. The court reasoned that the government had knowledge of and access to the audit files and the audit files were material to preparing defense. The court also concluded that the audit files were discoverable under Brady v. Maryland, 373 U.S. 83 (1963)); United States v. Fuentes-Montijo, 74 F.3d 1247 (table cite), Nos. 94-10453, 94-10469, 1996 WL 21616, at \*4 (9th Cir. Jan. 22, 1996) (in appeal from the district court's conviction of defendant for the possession of and intent to distribute cocaine, affirmed quashing of defendant's subpoena to IRS for confidential tax records of informants; requested information was of marginal relevance and did not outweigh the congressional policy favoring nondisclosure); United States v. Lloyd, 992 F.2d 348, 350-52 (D.C. Cir. 1993) (circuit court

remanded denial of defendant's request for a court order to compel production of taxpayer returns because district court decision was based on an overly-narrow conception of the materiality requirement under section 6103(h)(4)(D)); United States v. Dawes, Nos. 88-10002-01, 90-10036-01, 88-10002-02, 1990 WL 171074, at \*2-3 (D. Kan. Oct. 15, 1990) (section 6103(h)(4)(D) does not address a prosecutor's duty under Brady to disclose exculpatory evidence); United States v. Recognition Equip., 720 F. Supp. 13, 14 (D.D.C. 1989) (court relied on the determination in Robertson that section 6103(h)(4) presupposes that the specified Federal Prosecutor is already in possession of the return information before disclosure can be authorized under subsection (h)(4)(D) to vacate its previous Order for Disclosure); United States v. Robertson, 634 F. Supp. 1020, 1026-29 (E.D. Cal. 1986) (IRS did not disclose all the requested return information to the AUSA and thus, section 6103(h)(4)(D) does not require the court to order disclosure to defendant pursuant to Rule 16), *aff'd mem.*, 815 F.2d 714 (9th Cir. 1987); *but see* United States v. Smith, No. 4:06-CR-00333 GTE, 2007 WL 4166219, at \*1 (E.D. Ark. Nov. 20, 2007) (court ordered disclosure to defendant of complete third-party examination files based on defendant's assertion they potentially contain Brady material; court neither reviewed the material *in camera* nor determined that it actually contained Brady material.).

#### **L. Freedom of Information Act Lawsuits**

Section 6103(h)(4) does not authorize disclosure of third-party returns or return information to a plaintiff in a lawsuit brought under the FOIA. Chamberlain v. Kurtz, 589 F.2d 827, 837-38 (5th Cir.), *cert. denied*, 444 U.S. 842 (1979). *Cf.* Aloe Vera of Am., Inc. v. United States, No. CV99-1794PHXJAT, 2002 WL 1484463, at \*2 (D. Ariz. May 10, 2002) (same rationale for discovery disclosures of returns and return information of unrelated third parties to plaintiffs in an unauthorized disclosure lawsuit) (subsequent history omitted). Third-party returns and return information are exempt from disclosure under exemption 3 of the FOIA, 5 U.S.C. § 552(b)(3), in conjunction with section 6103(a). Access to third-party returns and return information by a FOIA requester is available if the provisions of section 6103(c) or 6103(e) have been met, and if no FOIA exemptions apply. *See generally* Chapter 9 for further discussion on disclosure of returns and return information in response to a FOIA request.

#### **M. Confidential Informants and Impairment Determination**

The government is not authorized to disclose information in a tax administration proceeding under section 6103(h)(4)(A), (B), or (C) if "the Secretary determines" disclosure would identify a confidential informant or seriously impair a civil or criminal tax investigation (the "impairment determination"). I.R.C. § 6103(h)(4); *see* Confidential Informant 92-95-932X v. United States, 45 Fed. Cl. 556, 556-59 (2000) (identity of confidential informant protected from disclosure to taxpayer in context of suit by the confidential informant against United States to enforce informant's contract with United States governing payment of award in exchange

for information leading to collection of taxes from taxpayer). For a listing of persons who have the authority to make the section 6103(h)(4) impairment determination, see I.R.S. Deleg. Order 11-2 (Rev. 17), IRM 1.2.49.3, Exhibit 1.2.49-2, *available at* <http://publish.no.irs.gov/cat12.cgi?request=CAT1&catnum=39618>.

## **VI. I.R.C. § 6103(h) AND I.R.C. § 6103(i) INTERPLAY**

Under section 6103(h), returns and return information disclosed to DOJ attorneys may be used and subsequently disclosed by those attorneys only for use in proceedings pertaining to tax administration. DOJ attorneys seeking returns and return information for federal nontax criminal purposes must follow the procedures outlined in section 6103(i). See United States v. Mangan, 575 F.2d 32, 37-41 (2d Cir. 1978); United States v. Recognition Equip., 720 F. Supp. 13, 14 (D.D.C. 1989). For a discussion of section 6103(i), see *generally* Chapter 5.

An exception to this rule is found at Treas. Reg. § 301.6103(h)(2)-1. This regulation anticipates situations where a referred criminal tax investigation may involve tax aspects of transactions which are also criminal violations of nontax laws, and that the very impetus for the commission of the tax crime is often the commission of nontax criminal offenses. The regulation, therefore, provides for disclosure of returns and return information in a joint criminal tax/nontax investigation if the nontax criminal aspects arise out of the particular facts and circumstances giving rise to the tax administration portion of the case (*e.g.*, a joint IRS/FBI investigation involving tax and bankruptcy fraud).

The regulation contains a number of specific requirements. First, the nontax violation must involve the "enforcement of a specific federal *criminal statute* other than one" involving tax administration. Second, the tax portion of the investigation must have been duly authorized by the Tax Division of DOJ at the request of the Secretary of the Treasury. Finally, the regulation requires that if the tax administration portion is terminated, DOJ cannot use returns or taxpayer return information on the nontax portion of the matter without first obtaining a court order as required by section 6103(i)(1). For a further discussion of Treas. Reg. § 301.6103(h)(2)-1, see IRM 11.3.22.14.2.

## **VII. DISCLOSURES TO THE INTERNAL REVENUE SERVICE OVERSIGHT BOARD**

Section 6103(h)(6) addresses access to returns and return information by members of the Internal Revenue Service Oversight Board, which was established pursuant to section 1101 of the Internal Revenue Service Restructuring and Reform Act of 1998 (RRA 98), Pub. L. No. 105-206, 112 Stat. 685, 691-97. This Board is composed of the Secretary of the Treasury (or the Deputy Secretary if the Secretary so designates), the Commissioner of Internal Revenue, and seven members (six individuals who are not otherwise government employees and one individual who is a full-time government employee or representative of employees) who are appointed by the President with Senate confirmation. The Board oversees the Service in its administration, management, conduct, direction, supervision, execution, and application of the tax laws.



Under section 6103(h)(6), as a general rule, no returns or return information may be disclosed to any Presidential appointee to the Board, or to employees or detailees of the Board by reason of their service with the Board. The sole exception to this rule is when the Commissioner of Internal Revenue or the Treasury Inspector General for Tax Administration: (1) prepares the report or other matter for the Oversight Board to assist it in carrying out its duties; and (2) determines that certain returns or return information need to be included in the report or other matter to enable the Board to carry out its duties.

Section 6103(h)(6) also provides that Service officers and employees must report to the Secretary of the Treasury, the Treasury Inspector General for Tax Administration, and the Joint Committee on Taxation any request they receive from any presidential appointee to the Board, or from any employee or detailee of the Board, for returns and return information that is not authorized to be disclosed under section 6103(h)(6), or any contact they receive from any individual on the Board relating to a specific taxpayer.

## CHAPTER 4

### TAX ADMINISTRATION INVESTIGATIVE DISCLOSURES AND DISCLOSURES TO CONTRACTORS I.R.C. § 6103(k)(6) AND (n)

#### I. I.R.C. § 6103(k)(6): INVESTIGATIVE DISCLOSURES FOR TAX ADMINISTRATION PURPOSES

##### A. In General

IRS, Chief Counsel, and Office of the Inspector General for Tax Administration (TIGTA) officers and employees are specifically authorized by section 6103(k)(6) and Treas. Reg. § 301.6103(k)(6)-1 to disclose return information to the extent that disclosure is necessary to obtain information which is not otherwise reasonably available with respect to the correct determination of tax, liability for tax, or the amount to be collected, or with respect to the enforcement of any other provision of the Code.

Thus, IRS, Chief Counsel and TIGTA officers and employees may disclose return information, of any taxpayer, to the extent necessary to obtain information relating to their official duties or to accomplish properly any activity connected with those official duties relating to any examination, administrative appeal, collection activity, administrative, civil or criminal investigation, enforcement activity, ruling, negotiated agreement, prefiling activity, or other proceeding or offense under the internal revenue laws or related statutes, or in preparation for any proceeding described in section 6103(h)(2) (or investigation which may result in such a proceeding). Treas. Reg. § 301.6103(k)(6)-1(a)(1).

The Treasury regulation lists the types of activities covered by section 6103(k)(6) as including (but not limited to):

1. Establishing or verifying the correctness or completeness of any return or return information;
2. Determining the responsibility for filing a return, for making a return if none has been made, or for performing any acts as may be required by law concerning those matters;
3. Establishing or verifying the liability (or possible liability) of any person, or the liability (or possible liability) at law or in equity of any transferee or fiduciary of any person, for any tax, penalty, interest, fine, forfeiture, or other imposition or offense under the internal revenue laws or related statutes or the amount thereof for collection;
4. Establishing or verifying misconduct (or possible misconduct) or other activity proscribed by the internal revenue laws or related statutes;

5. Obtaining the services of persons having special knowledge or technical skills (such as, but not limited to, knowledge of particular facts and circumstances relevant to a correct determination of a liability described in paragraph 3, above, or skills relating to handwriting analysis, photographic development, sound recording enhancement, or voice identification) or having recognized expertise in matters involving the valuation of property if relevant to proper performance of official duties described in Treas. Reg. § 301.6103(k)(6)-1;
6. Establishing or verifying the financial status or condition and location of the taxpayer against whom collection activity is or may be directed, to locate assets in which the taxpayer has an interest, to ascertain the amount of any liability described in paragraph 3, above, for collection, or otherwise to apply the provisions of the Code relating to establishment of liens against such assets, or levy, seizure, or sale on or of the assets to satisfy any such liability;
7. Preparing for any proceeding described in section 6103(h)(2) or conducting an investigation which may result in such a proceeding; or
8. Obtaining, verifying, or establishing information concerned with making determinations regarding a taxpayer's liability under the Code, including, but not limited to, the administrative appeals process and any ruling, negotiated agreement, or prefiling process.

Treas. Reg. § 301.6103(k)(6)-1(a)(1).

## B. Definitions

1. **“Disclosure of return information to the extent necessary”** means a disclosure of return information which an internal revenue or TIGTA employee, based on the facts and circumstances at the time of the disclosure, reasonably believes is necessary to obtain information to perform properly the employee's official duties, or to accomplish properly the activities connected with carrying out those official duties. Treas. Reg. § 301.6103(k)(6)-1(c)(1).

**Note:** The term “necessary” in this context *does not* mean essential or indispensable, but rather appropriate and helpful in obtaining the information sought. “Necessary” in this context does not refer to the necessity of conducting an investigation or the appropriateness of the means or methods chosen to conduct the investigation. Section 6103(k)(6) does not limit or restrict internal revenue or TIGTA officers and employees with respect to the decision to initiate or how to conduct an investigation. See Treas. Reg. § 301.6103(k)(6)-1(c)(1), and examples therein.

Disclosures under section 6103(k)(6) may not be made indiscriminately or solely for the benefit of the recipient or as part of a negotiated *quid pro quo* arrangement. Treas. Reg. § 301.6103(k)(6)-1(c)(1). For example, section 6103(k)(6) does not authorize the disclosure of evidence of criminal misconduct compiled by IRS employees to state or local law enforcement agencies, either in return for information from the state or local law enforcement agencies, or simply to assist the state or local law enforcement authorities in the investigation or prosecution of criminal activity.

2. **“Disclosure of return information to accomplish properly an activity connected with official duties”** means a disclosure of return information to carry out a function associated with official duties generally consistent with established practices and procedures. Treas. Reg. § 301.6103(k)(6)-1(c)(2).
3. **“Information not otherwise reasonably available”** means information that an internal revenue or TIGTA employee reasonably believes, under the facts and circumstances at the time of a disclosure, cannot be obtained in a sufficiently accurate or probative form, or in a timely manner, and without impairing the proper performance of the employee’s official duties, without making the disclosure. Treas. Reg. § 301.6103(k)(6)-1(c)(3).

This definition does not require or create the presumption or expectation that an internal revenue or TIGTA employee must seek information from a taxpayer or authorized representative prior to contacting a third-party witness in an investigation.

**Note:** An internal revenue or TIGTA employee may make a disclosure to a third-party witness to corroborate information provided by a taxpayer. Treas. Reg. § 301.6103(k)(6)-1(c)(3).

4. **“Internal revenue employee”** means, for purposes of section 6103(k)(6), an officer or employee of the IRS or Office of Chief Counsel for the IRS, or an officer or employee of a federal agency responsible for administering and enforcing the taxes under Chapters 32 (Part III of Subchapter D), 51, 52, or 53 of the Code, or investigating tax refund check fraud under 18 U.S.C. § 510. Treas. Reg. § 301.6103(k)(6)-1(c)(4).

### C. Liens and Levies

Section 6103(k)(6) permits the disclosure of return information by an IRS employee "in connection with . . . official duties relating to any . . . collection activity . . . ."

As the case law evolved, some courts distinguished between those cases where the underlying lien or levy was valid and those where it was not. In those cases in which the courts held the disclosures improper, the court reasoned that if the underlying lien or levy was invalid, the disclosures made in attempting to collect the tax were also invalid. The IRS's position is that the validity of the underlying lien or levy is not relevant to the disclosure of return information pursuant to section 6103(k)(6) to further the IRS's collection efforts. See Treas. Reg. § 301.6103(k)(6)-1(c)(2) (section 6103(k)(6) permits "a disclosure of return information to carry out a function associated with official duties generally consistent with established practices and procedures"). Accordingly, the validity of the lien does not affect the propriety of the disclosure.

The Courts of Appeals for the Third, Fifth, Ninth, and Tenth Circuits have adopted the IRS's position. However, the Eighth Circuit in Rorex v. Traynor, 771 F.2d 383, 386 (8th Cir. 1985), has ruled that if the underlying lien is invalid, the disclosures made in the lien violate section 6103(a). Rorex was decided before Congress enacted section 7433, which created a specific remedy for reckless and/or intentional improper collection activity;<sup>37</sup> the other circuit court cases were decided after the enactment of section 7433. For more information, see *generally* Chapter 1, Part II.

Sometimes the return information that the plaintiff alleges to have been improperly disclosed is already in the public record. The making public of this return information can occur in several ways. For example, the return information may appear in a notice of tax lien filed with the county recorder, or it may appear in the posted notice of seizure or public sale, or entered as evidence during a judicial tax proceeding. The IRS's position is that once return information is properly placed in the public record in a tax administration proceeding, it is no longer confidential and section 6103 no longer applies. There is a split of authority among the courts as to this "public record exception." The courts that have ruled otherwise hold that the only exceptions to the

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<sup>37</sup> In 1998, as part of the IRS Restructuring and Reform Act, Pub. L. No. 105-206, § 3102(a)(1)(A), Congress amended section 7433 to include recovery for negligent unauthorized collection activities. Prior to the 1998 amendment, as the Third Circuit had noted in Venen v. United States, 38 F.3d 100, 105-07 (3d Cir. 1994), Congress had addressed reckless or intentional improper collection activity when it enacted section 7433. At the time Venen was rendered, Congress had not addressed merely negligent collection activity and the court was not going to permit the plaintiff to seek redress for such activity under section 7431. The amendment buttresses the IRS's position that section 7433, not section 7431, is intended to address challenges to the validity of liens or levies.

confidentiality of return information are those explicitly stated in Title 26, and that there is no statutory exception in section 6103 for return information that has been made a matter of public record. See *generally* Chapter 2 for a further discussion of the public record issue.

### **Liens and Levies Case Law**

1. Chisum v. United States, No. CIV 90-0549 PHX CAM, 1991 WL 322976, at \*2-3 (D. Ariz. Dec. 10, 1991) (the IRS was authorized pursuant to section 6103(k)(6) to disclose return information by filing a notice of federal tax lien in the county recorder's office, by mailing a notice of sealed bid sale, and by publishing a notice of sealed bid sale in several newspapers, because the disclosures were attempts to collect an alleged tax deficiency), *aff'd*, 19 F.3d 26 (table cite), 1994 WL 19020 (9th Cir. Jan. 24, 1994).
2. Coplin v. United States, No. L89-30027 CA, 1991 WL 22804, at \*4 (W.D. Mich. Jan. 3, 1991) (information disclosed by the establishment of a lien is not wrongfully disclosed information; disclosure of the same information in an attempt to satisfy the lien is not a wrongful disclosure, either), *aff'd*, 952 F.2d 403 (table cite), 1991 WL 270831 (6th Cir. Dec. 17, 1991) (per curiam).
3. Cuda v. United States, No. 5:90-CV-17, 1991 WL 80842, at \*3 (W.D. Mich. Apr. 2, 1991) (section 6103(k)(6) authorizes disclosure of return information to the extent necessary to obtain information not otherwise readily available to collect outstanding tax liability; court determined the disclosures were necessary because the only way to discover whether individuals had assets belonging to the plaintiffs was to serve them with notices of levy), *aff'd*, 953 F.3d 644 (table cite), 1992 WL 16923 (6th Cir. Feb. 3, 1992).
4. Egbert v. United States, 752 F. Supp. 1010, 1016-17 (D. Wyo. 1990) (section 6103(k)(6) provides for the disclosure of return information for the purposes of tax administration; however, the court did not determine whether the plaintiff was entitled to recovery pursuant to section 6103 because the court determined it lacked jurisdiction and, therefore, dismissed the wrongful disclosure claim), *aff'd*, 940 F.2d 1539 (table cite), 1991 WL 150859 (10th Cir. Aug. 7, 1991).
5. Elias v. United States, No. CV 90-0432-WJR(JRX), 1990 WL 264722, at \*3-5 (C.D. Cal. Dec. 21, 1990) (after comprehensive discussion of section 6103(k)(6) case law and congressional intent, court found that disclosures contained in summonses, liens, and levies were authorized by section 6103(k)(6)), *aff'd*, 974 F.2d 1341 (table cite), 1992 WL 214538 (9th Cir. Sept. 2, 1992).

6. Farr v. United States, 990 F.2d 451, 455 (9th Cir. 1993) (the information disclosed in the notice of levy was necessary to the IRS's collection activity, and thus fell squarely within the exemption under section 6103(k)(6)).
7. Glass v. United States, 480 F. Supp. 2d 162, 165-66 (D.D.C. 2007) (citing Koerner v. United States, see paragraph 9, below, the court noted that "the filing of a notice of lien is patently a tax collection activity," and thus disclosure was lawful under section 6103(k)(6)).
8. Hodges v. United States, No. 11-13981, 2012 WL 1867293, at \*3 (E.D. Mich. May 22, 2012) (even where levies at issue are procedurally defective, any disclosures made in connection with those levies do not violate I.R.C. § 6103).
9. Huff v. United States, 10 F.3d 1440, 1447 (9th Cir. 1993) (citing Farr v. United States, above, the court held that levy notices fall squarely within the exemption under section 6103(k)(6) despite the possible procedural lapses involving the actual levy).
10. Koerner v. United States, 471 F. Supp. 2d 125, 127-28 (D.D.C. 2007) (notice of federal tax lien authorized by section 6103(k)(6) regulations because it is necessary to tax collection activity; section 7433 provides the exclusive remedy for recovering damages from IRS collection activity, including damages which resulted from unauthorized disclosures that occurred in connection with collection efforts; court lacks jurisdiction to hear claim pursuant to section 7431).
11. Lutz v. United States, 919 F.2d 738 (table cite), No. 90-5226, 1990 WL 193066, at \*3-4 n.2 (6th Cir. Dec. 6, 1990) (per curiam) (plaintiff alleged that the IRS made unauthorized disclosures of the plaintiff's name, tax period, and type and amount of taxes in serving a notice of levy on the plaintiff's employer and a notice of federal tax lien with the clerk of the court; court cited to section 6103(k)(6) and the applicable regulations in concluding the unauthorized disclosure claim was without merit).
12. Maisano v. United States, 908 F.2d 408, 410 (9th Cir. 1990) (plaintiff alleged that the filing of two tax liens and notices of levy violated the confidentiality requirements of section 6103; court found the disclosure necessary in obtaining correct determination of tax, liability for tax, or the amount to be collected under section 6103(k)(6)).
13. Mann v. United States, 204 F.3d 1012, 1016-20 (10th Cir. 2000) (in a decision which distinguished the Tenth Circuit's prior decision in Chandler v. United States, 687 F. Supp. 1515 (D. Utah 1988), *aff'd per*

*curiam*, 887 F.2d 1397 (10th Cir. 1989), the court noted that Chandler had been decided prior to the passage of section 7433, and that if Chandler were to bring suit today, it would be under section 7433, not section 7431; the court followed the reasoning of Venen, see paragraph 18, below, and Wilkerson, see paragraph 19, below, to hold that where section 6103(k)(6) permits the issuance of levies and the filings of liens, it is irrelevant as to whether there is a procedural defect in the collection activity; the disclosure is permitted; “sections 6103 and 7431 address improper disclosure of return information and not improper collection activity”).

14. Mettenbrink v. United States, No. CV89-L-378, 1991 WL 82837, at \*6-8 (D. Neb. Apr. 8, 1991) (the court distinguished the case from Rorex, see paragraph 14, below, finding the levies, although premature, were lawful because plaintiff did owe taxes and section 6103(k)(6) and the corresponding regulations permitted the disclosures).
15. Rorex v. Traynor, 771 F.2d 383, 386 (8th Cir. 1985) (“a disclosure in pursuance of an unlawful levy violates the confidentiality requirements of section 6103(a) and is not authorized under section 6103(k)(6)”; case was decided before Congress enacted section 7433, which created a specific remedy for reckless and/or intentional improper collection activity).
16. Schrambling Accountancy Corp. v. United States, 937 F.2d 1485, 1488-90 (9th Cir. 1991) (lien on file at the recorder’s office in California is a public record; therefore, it is no longer confidential and may be disclosed again without regard to section 6103), *rev’g*, 689 F. Supp. 1001 (N.D. Cal. 1988) and Allen v. United States, No. C-89-20250 (N.D. Cal. Jan. 3, 1990).
17. Spence v. United States, 114 F.3d 1198 (table cite), No. 96-2196, 1997 WL 314836, at \*3-4 (10th Cir. Jun. 12, 1997) (that summonses were issued to taxpayer’s tenants for their canceled checks where taxpayer owed no liability was irrelevant to a determination of whether the disclosure of return information violated section 6103).
18. Timmerman v. Swenson, Civ. 4-78-547, 1979 WL 1446, at \*2-3 (D. Minn. Aug. 27, 1979) (section 6103(k)(6) authorized the disclosure of the information contained in the levy, and the service of levy on the wrong bank resulted solely from a ministerial error; the court further stated that this error did not violate any standard of care or duty legally owed to these plaintiffs and was, therefore, not negligent).
19. Venen v. United States, 38 F.3d 100, 105-07 (3d Cir. 1994) (after discussing cases that have considered this premise, the court sided



with those cases holding that the validity of the underlying levy is not relevant, reasoning that Congress enacted sections 6103 and 7431 to regulate information handling).

20. Wilkerson v. United States, 67 F.3d 112, 116-17 (5th Cir. 1995) (the validity of the underlying levy was not relevant; as long as the disclosures were necessary to collect the outstanding tax liability, they were authorized by section 6103(k)(6); court acknowledged the split among the circuits on the question of whether the underlying lien/levy was invalid and elected to follow Venen and Farr rather than Rorex).
21. Whittington v. United States, Civ. No. 07-2135(RJL), \_\_\_ F. Supp. 2d \_\_\_, 2012 WL 2114970, at \*2 n.6 (D.D.C. June 11, 2012) (filing tax lien is a lawful disclosure under section 6103(k)(6)).

#### **D. Investigative Form Letters**

Investigative form letters are powerful tools for obtaining information related to examination, collection, and criminal investigation activity, especially in cases in which the taxpayer is uncooperative. A typical case would involve an examination or criminal investigation in which no return has been filed and/or undeposited cash receipts are suspected, and the IRS seeks to determine the amount of cash payments from persons who are known or likely to be customers of the taxpayer.

Generally, few problems are encountered when form letters are sent by examination or collection employees. For example, the court found no unauthorized disclosures where a taxpayer failed to cooperate, and a tax auditor sent form letters to the taxpayer's customers informing recipients that the plaintiff was under examination and requested copies of canceled checks and invoices concerning purchases from the plaintiff. Fostvedt v. United States, 824 F. Supp. 978, 983 (D. Colo. 1993) ("We are confident no investigation could ever proceed without disclosure of such minimal, 'nonsensitive' facts as the taxpayer's name, tax number, and the reason for the letter of inquiry."), *aff'd*, 16 F.3d 416 (table cite), 1994 WL 7109 (10th Cir. Jan. 13, 1994).

Most of the cases litigated have concerned letters sent by Criminal Investigation (CI) (formerly known as the Criminal Investigation Division (CID)). Taxpayers and courts seem to be particularly offended when the IRS reveals in writing the fact that the taxpayer is under "criminal investigation." Courts have often questioned whether it was necessary under section 6103(k)(6) to disclose the fact of criminal investigation in order to obtain the information sought.

IRM 9.3.1.3.3, which addresses "circular letters," proscribes the use of the words "criminal investigation" in the return address, text, or signature block of circular letters. The Treasury regulations provide that internal revenue and TIGTA

employees may disclose, as part of the official investigation, his or her affiliation with the IRS or TIGTA through the use of letterhead when corresponding with witnesses or other third parties. Nevertheless, in the interest of being circumspect and avoiding adverse decisions, consideration should be given to using generic letterhead without the inclusion of “criminal investigation.” Although the text of IRM 9.3.1.3.3 does not explicitly say so, by extension, the words “criminal investigation” should not be used on the return address of the envelope in which the letter is sent, nor on any return envelope that may be enclosed for the recipient's convenience in responding.

The IRM also requires that any circular letters be approved by the Special Agent in Charge (SAC) prior to sending. (The Supervisory Special Agent may approve circular letters if ten or less are to be issued.) Failure to obtain SAC approval has been pointed to by courts as evidence of a lack of good faith. See Barrett v. United States, 51 F.3d 475, 479-80 (5th Cir. 1995) (special agent's failure to obtain manager's approval negated government's assertion of good faith affirmative defense).

**Note:** Do not use the words "Criminal Investigation" anywhere within circular letters (or, by extension, upon any envelope enclosed with or used to send circular letters).

### **Investigative Form Letter Case Law**

**Note:** As discussed below, only three circuits (the Fifth in Barrett; the Ninth in Schachter; and, the Eighth in Diamond and May) have ruled on the issue of the disclosure of the fact of criminal investigation in investigative form letters.

1. Barrett v. United States, 51 F.3d 475, 478-80 (5th Cir. 1995) (“circular letters” sent to patients of a prominent plastic surgeon to determine the amount of money paid to the surgeon disclosed the fact that the surgeon was under investigation by the CID; Fifth Circuit found it was not necessary to reveal the fact of criminal investigation in letters sent to patients of a surgeon to determine the amount of money paid to the surgeon, and that the agent did not act in good faith in sending the letters, where the letters disclosed that the plaintiff was under criminal investigation, contrary to the then-existing IRM).
2. Cryer v. United States, 554 F. Supp. 2d 642, 644-45 (W.D. La. 2008) (letters sent in grand jury investigation did not disclose “return information”; failure to state a claim under section 7431 because allegations were “devoid of detail,” and even if allegations were sufficient, investigative disclosures were authorized by section 6103(k)(6)).

3. Diamond v. United States, 944 F.2d 431, 435 (8th Cir. 1991) (court found it was not necessary for special agent to disclose the fact of criminal investigation with a signature block that read, "Special Agent, Criminal Investigation Division" in "circular letters" sent to patients of plaintiff-doctor, but affirmed the district court's grant of the government's motion for summary judgment based on a good faith but erroneous interpretation of section 6103 by the IRS, since the IRM at the time advised including the title, "Special Agent, Criminal Investigation Division" in the signature block of "circular letters").
4. DiAndre v. United States, 968 F.2d 1049, 1053 (10th Cir. 1992) (where a special agent sent "circular letters" to the plaintiff's customers requesting information on all payments made to the taxpayer, court found that disclosure of nonsensitive public information such as a business address to aid in identification was appropriate and necessary and did not violate section 6103).
5. May v. United States, 141 F.3d 1169 (table cite), No. 97-1694, 1998 WL 71545 (8th Cir. Feb. 23, 1998) (per curiam) (following the precedent established in Diamond, above, court held that "circular letters" containing "Criminal Investigation Division" in the signature block, pursuant to the then-existing IRM instructions, was a violation of section 6103 but that the government did so in good faith, noting the Eighth Circuit decision in Diamond had not been published at the time that the letters were sent), *aff'g* 1995 WL 761107 (W.D. Mo. Oct. 5, 1995).
6. Rhodes v. United States, 903 F. Supp. 819, 820-24 (M.D. Pa. 1995) (declining to follow the Fifth Circuit in Barrett and the Eighth Circuit in Diamond, the court determined that the special agent had not made unauthorized disclosures by sending "circular letters" to customers of the taxpayer).
7. Schachter v. United States, 77 F.3d 490 (table cite), Nos. 94-16726, 94-16788, 1996 WL 56164, at \*1-2 (9th Cir. Feb. 8, 1996) (court concluded that defendant was not liable under good faith safe harbor for disclosures made in "circular letters" then in conformance with the IRM, sent by a special agent to customers of the plaintiffs, which disclosed the fact of criminal investigation, and did not address whether the disclosures were authorized under section 6103(k)(6)).
8. Simpson v. United States, CIV A. No. 91-30102 LAC, 1993 WL 478850, at \*4, \*5 n.3 (N.D. Fla. July 13, 1993) (court held that disclosures identifying the plaintiff as the subject of a tax liability investigation contained in "circular letters" sent to customers were necessary to obtain information not otherwise reasonably available

about the plaintiff's sources of income, and were authorized under section 6103(k)(6); although not affecting the outcome, the court in a footnote said it doubted the government's argument that some letters sent were not circular letters within the meaning of the IRM because they were sent to *known* rather than *likely* customers).

## **E. In-Person Investigative Disclosures**

In-person investigative disclosures are permitted under section 6103(k)(6). The Treasury regulation specifically provides that IRS, Chief Counsel and TIGTA officers and employees may identify themselves, their organizational affiliation and the nature of the investigation when making oral, written or electronic communications with third-party witnesses.

Internal revenue and TIGTA employees may identify themselves, their organizational affiliation (*e.g.*, Internal Revenue Service (IRS), Criminal Investigation (CI) or TIGTA, Office of Investigations (OI)), and the nature of their investigation, when making an oral, written, or electronic contact with a third party witness. Permitted disclosures include, but are not limited to, the use and presentation of any identification media (such as a Federal agency badge, credential, or business card) or the use of an information document request, summons, or correspondence on Federal agency letterhead or which bears a return address or signature block that reveals affiliation with the Federal agency.

Treas. Reg. § 301.6103(k)(6)-1(a)(3).

## **In-Person Investigative Disclosure Case Law**

1. Gandy v. United States, No. 6:96CV730, 1999 WL 112527, at \*3-5 (E.D. Tex. Jan. 15, 1999) (court found that special agents who identified themselves to third-party witnesses by displaying credentials, and by asking for information pertaining to the identified taxpayer, disclosed that the taxpayer is under criminal investigation; however, the disclosures resulted from a good faith, but erroneous interpretation of section 6103; on taxpayer's appeal, the Fifth Circuit affirmed that the special agents had acted in good faith because the IRM in effect at the time did not prohibit the oral disclosure of the special agents' affiliation with CID, and rejected the taxpayer's argument that the IRM provision pertaining to circular letters should apply to all disclosures; and, in dicta, the Fifth Circuit acknowledged that special agents are authorized to display their badges and credentials identifying them as CID agents when interviewing a third-party witness (and implicitly, that the agent would be able to disclose orally that he was an agent for CID)), *aff'd*, 234 F.3d 281, 286-87 (5th Cir. 2000).

2. Heller v. Plave, 657 F. Supp. 95, 99 (S.D. Fla. 1987) (court found that a special agent who revealed that a grand jury had been impaneled, that the taxpayer would be indicted, that the case involved tax evasion, that criminal prosecution was recommended, that the taxpayer would go to jail, that the taxpayer was an attorney who charged exorbitant fees, that the taxpayer had charged one client higher fees than another client for the same service, and that the taxpayer was a despicable human being had made unnecessary disclosures and violated section 6103(k)(6)).
3. Jones v. United States, 97 F.3d 1121, 1124-25 (8th Cir. 1996) (disclosure by a special agent to a confidential informant of an impending search of a taxpayer's premises pursuant to a warrant, where the special agent believed the disclosure was necessary for the confidential informant's safety "did not fall into any of the exceptions to the general rule against disclosure contained in 26 U.S.C. § 6103(c)-(o)").
4. Kemlon Products & Development Co. v. United States, 638 F.2d 1315, 1321-23 (5th Cir. 1981) (when a taxpayer sought to enjoin the IRS from proceeding with a meeting with taxpayer's major customer for purpose of determining the value of certain patents, court held that the IRS could not be enjoined because (1) there was no showing of irreparable harm, and (2) there was no showing that the government could not prevail on the lawfulness of the disclosure pursuant to section 6103(k)(6)), *modified on other grounds*, 646 F.2d 223 (5th Cir. 1981).
5. Malis v. United States, No. CV 83-7767 (CBM), 1986 WL 15721, at \*3, \*6-7 (C.D. Cal. Dec. 17, 1986) (where special agent made statements to third-party witnesses that revealed, among other things, the fact of investigation, that the investigation involved tax evasion, that the taxpayer was involved in a tax scam concerning abusive horse tax shelters, that the taxpayer was intimidating witnesses, that the taxpayer was going to jail, and that the special agent was "out to get him," court concluded that the disclosures were in the form of statements which in themselves did not seek information, and that, although the witnesses had some information about the plaintiff's business affairs and insurance policies, it was more reasonable for the special agent to have gone first to the insurance company officers rather than speaking with an employee; consequently, the court concluded that disclosures were unnecessary under section 6103(k)(6), and the court further found that the conduct of the agent was willful or in reckless disregard of the rights of another and awarded punitive damages).
6. Payne v. United States, 91 F. Supp. 2d 1014, 1020-21 (S.D. Tex. 1999) (district court determined that the United States was liable, in

part, because the special agent had introduced himself to third-party witnesses as a special agent of CID conducting a criminal investigation and had issued summonses to the plaintiff's clients despite the plaintiff's assurances that he would supply the information pertaining to the investigation to the special agent), *rev'd & rem'd*, 289 F.3d 377 (5th Cir. 2002) (directed district court to consider the effect of the Fifth Circuit's decision in Gandy, as well as to determine whether there were any unauthorized disclosures in the summons issued to third parties).

7. Pflum v. United States, No. 99-4170-SAC, 2007 WL 1651290, at \*7 (D. Kan. June 6, 2007) (revealing criminal nature of investigation was appropriate and helpful, therefore necessary, within the meaning of section 6103(k)(6)).
8. Roebuck v. United States, No. 5:98-CV-384-BO(3), 1999 WL 501003, at \*3-4 (E.D.N.C. June 8, 1999) (court determined that financial information was not otherwise reasonably available and had to be obtained from third parties; the special agent had acted appropriately by introducing herself as a CID agent with the IRS conducting an investigation of the taxpayer, and that to not introduce herself as a CID agent would be misleading to the witnesses and could cause confusion and allegations of misrepresentation), *aff'd*, 1999 WL 1128884 (4th Cir. Nov. 23, 1999).
9. Rodgers v. Hyatt, 697 F.2d 899, 904 (10th Cir. 1983) (statements made by a Chief, CID, during a meeting on a wholly-unrelated matter with a third party regarding rumors that a taxpayer was dealing in stolen oil, were merely rumors and gossip and were not disclosures necessary to secure information under section 6103(k)(6)).
10. Snider v. United States, 468 F.3d 500, 507-09 (8th Cir. 2006), *nonacq.*, I.R.B. 2007-30 (July 23, 2007) (government failed to demonstrate that disclosure of identities of targets of a criminal investigation was necessary to obtain information sought, therefore disclosure not authorized by section 6103(k)(6); one unauthorized disclosure to two people constitutes two unauthorized disclosures). Action on decision (disagreeing with both holdings) is available at: <http://www.irs.gov/pub/irs-aod/aod200703.pdf>.

## II. DISCLOSURES TO CONTRACTORS

### A. Background

Treas. Reg. § 301.6103(k)(6)-1(a)(1)(v) provides authority to make investigative disclosures of return information for the purposes of:

Obtaining the services of persons having special knowledge or technical skills (such as, but not limited to, knowledge of particular facts and circumstances relevant to a correct determination of a liability described in paragraph (a)(1)(iii) of this section . . .) or having recognized expertise in matters involving the valuation of property if relevant to proper performance of duties described in this paragraph.

See *also* IRM 11.3.21.4.1 and 11.3.24.1. Section 6103(n) and its implementing regulations authorize the IRS and its Office of Chief Counsel, as well as authorized recipients of returns and return information at a state tax agency, the Social Security Administration, or the Department of Justice, to disclose returns and return information to any person to the extent necessary in connection with obtaining services for tax administration purposes.

Persons who receive return information under section 6103(k)(6) are not subject to restrictions on redisclosure. See IRM 11.3.21.5. Persons who receive information under section 6103(n) are specifically covered by the disclosure laws (section 6103(a)(3)) and are subject to criminal and civil sanctions for unauthorized disclosures. See I.R.C. §§ 6103(a)(3), 7213(a)(1), 7213A(a)(1)(B), and 7431(a)(2).

## **B. Regulations<sup>38</sup>**

1. Treas. Reg. § 301.6103(n)-1 specifically describes limitations on contractor disclosures, including the use and treatment by the contractor of the information disclosed.
2. Treas. Reg. § 301.6103(n)-1(b) provides that disclosures must be necessary to perform the contract. Disclosures are necessary only if the contract provisions cannot be reasonably, properly, or economically carried out without the disclosures. Disclosures should be limited to information actually needed by the contractor to perform the contract.

**Note:** Before disclosures are made, one should consider whether the contractor needs the entire document (or information collection), or whether redactions would be appropriate, or whether "dummy information" would suffice.

3. Treas. Reg. § 301.6103(n)-1(d) requires the contractor to provide written notice to his, her, or its officers or employees of the following proscriptions:

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<sup>38</sup> See *also* IRM 11.3.24.2.

- a. Returns or return information disclosed to the officer or employee can be used only for a purpose and to the extent authorized by the general rule in Treas. Reg. § 301.6103(n)-1.
- b. Further inspection of any returns or return information for an unauthorized purpose constitutes a misdemeanor, punishable upon conviction by a fine of as much as \$1,000, or imprisonment for as long as 1 year, or both, together with costs of prosecution.
- c. Further disclosure of any returns or return information for an unauthorized purpose constitutes a felony, punishable upon conviction by a fine of as much as \$5,000, or imprisonment for as long as 5 years, or both, together with the costs of prosecution.
- d. Any unauthorized further inspection or disclosure of returns or return information may also result in an award of civil damages against any person who is not an officer or employee of the United States in an amount not less than \$1,000 for each act of unauthorized inspection or disclosure or the sum of actual damages sustained by the plaintiff as a result of the unauthorized disclosure or inspection as well as an award of costs and reasonable attorneys fees.
- e. If the person is an officer or employee of the United States, a conviction for an offense referenced in paragraph b or c, above, (Treas. Reg. § 301.6103(n)-1(d)(2)-(3)) shall result in dismissal from office or discharge from employment.

4. Treas. Reg. § 301.6103(n)-1(e) provides that:

- a. Contractors and their officers and employees must comply with all applicable conditions and requirements that the IRS may prescribe to protect the confidentiality of returns and return information.
- b. Any contract shall provide (or be amended to provide) that the contractor and its officers and employees shall comply with all applicable conditions and requirements for protecting confidentiality prescribed by the IRS by regulation, published rules or procedures, or written communication to the contractor.
- c. The IRS has the authority to determine whether a contractor meets the prescribed requirements and conditions. If the IRS determines that the contractor does not do so, the IRS may take



any actions deemed necessary to ensure that the conditions or requirements are met. Actions may include terminating or suspending any obligations under a contract with the IRS, suspending disclosures by the IRS otherwise authorized under the contract, and, if the IRS determines that a contractor for either a state tax agency, the Social Security Administration, or the Department of Justice is not in compliance with all applicable conditions, suspension of disclosures to those agencies until the IRS is satisfied that the conditions or requirements are or will be met.

### **C. Comparison of I.R.C. § 6103(k)(6) and I.R.C. § 6103(n) Disclosure Authorities**

Both subsections (k)(6) and (n) permit the IRS or TIGTA to obtain services for tax administration purposes. Only subsection (n) mentions contracting for these services, or puts any limits on the use of the information by the person to whom disclosure is made.

Although the IRS has the authority under section 6103(k)(6) to disclose taxpayers' information to expert witnesses for analysis, the IRS has generally opted to use its authority under section 6103(n) out of concern for the confidentiality of taxpayer information. Since section 6103(k)(6) authorizes disclosures for investigative purposes without imposing redisclosure restrictions and penalties, taxpayers' privacy interests are better served when disclosures are made pursuant to subsection (n). See *also* IRM 11.3.21.4 (statutory safeguard and Privacy Act provisions apply to (n) contractors).

The IRS generally does not enter into agreements with taxpayers regarding its duties to safeguard information obtained during an investigation, or its obligations to prosecute persons suspected of unauthorized disclosures. These issues are covered by disclosure prohibitions against officers and employees of the IRS and any contractors. When a taxpayer expresses concern about the fact that his or her information is being disclosed to someone outside the IRS, if there is a contract, IRS employees point out section 6103(n) and the provisions of the contract.

The most common situation raising this taxpayer concern about the type and quantity of return information being disclosed is where the IRS seeks valuation or expert witness services. This frequently occurs during the course of an examination of a taxpayer whose financial transactions are of an unusual or very complex nature, and IRS employees lack the expertise to understand or correctly evaluate them. For the outside expert to provide information of value, he or she must first be provided with substantial amounts of sensitive financial (and sometimes trade secret) information about the taxpayer under examination. In

these situations, the expert should be under contract, so that the restrictions and sanctions of section 6103(n) apply.

Disclosures necessary in connection with preliminary inquiries to the prospective contractee (for conflicts of interest, to ascertain availability and length of time needed to perform services) can be made under section 6103(k)(6). See Treas. Reg. § 301.6103(k)(6)-1(a)(1)(v). See also United States v. Charles Schwab Corp., No. C-91-1975-MHP, 1991 U.S. Dist. LEXIS 21752 (N.D. Cal. Aug. 23, 1991). In Schwab, during the course of an audit, IRS requested various documents upon which taxpayer relied for certain entries on its tax return. In a summons enforcement hearing to obtain the documents, taxpayer admitted that the IRS had the right to obtain the documents for the audit, and that the IRS had the right to disclose them to a hired expert. The taxpayer objected to the alleged absence of disclosure restrictions on the expert, and argued that the only authority by which the IRS could make disclosures to an expert was section 6103(k)(6), which provided no redisclosure consequences. The taxpayer contended section 6103(n) was inapplicable to expert services contracts, since the IRS had then not yet promulgated regulations to implement the 1990 amendment that clarified that experts were covered. The IRS argued that it had always interpreted section 6103(n) to apply to contracted experts, that the legislative history of the 1990 amendment itself indicated Congress did not intend a suggestion that experts had heretofore not been covered, and that the statute was self-implementing, requiring no regulations. The court enforced the summons.

## CHAPTER 5

### DISCLOSURES FOR NONTAX CRIMINAL PURPOSES

#### I.R.C. § 6103(i)

#### I. INTRODUCTION

Tax information plays a significant role in the discovery and prosecution of violations of nontax federal criminal law. It has proved especially useful in investigations and prosecutions of financial crimes. Before 1976, federal law enforcement agencies had relatively convenient access to this information. By the mid-1970s, however, critics noted a growing congressional concern about the use of tax information for purposes unrelated to tax administration. Critics also questioned whether access by law enforcement agencies inappropriately took advantage of the fact that taxpayers, under threat of criminal penalties, submit information about themselves to the IRS.

Congress ultimately decided that federal law enforcement officials should not have easier access to information about a taxpayer maintained by the IRS than they would have if they sought to compel the production of that information from the taxpayer himself. With this in mind, Congress enacted section 6103(i), which establishes the general rule that a federal agency enforcing a nontax criminal law must obtain court approval to obtain a return or return information submitted by the taxpayer or his or her representative. The court approval procedure is not required to obtain return information obtained from a source other than the taxpayer (or representative).

#### II. I.R.C. § 6103(i)(1): ALL TAX INFORMATION

- A. Federal agencies may obtain tax information for use in nontax criminal investigations pursuant to an *ex parte* order of a federal district court judge or magistrate. I.R.C. § 6103(i)(1); Treas. Reg. § 301.6103(i)-1.
- B. The *ex parte* court order may be obtained only upon application authorized by the Attorney General, Deputy Attorney General, Associate Attorney General, any Assistant Attorneys General, any United States Attorney, any special prosecutor appointed under 28 U.S.C. § 593, or any attorney in charge of a criminal division organized crime strike force established pursuant to 28 U.S.C. § 510. The application can also be authorized by someone officially acting in the absence of a named official (e.g., an Acting Assistant Attorney General). See United States v. Bledsoe, 674 F.2d 647, 670 (8th Cir.1982), *cert. denied*, Phillips v. United States, 459 U.S. 1040 (1982) (properly designated acting officials may request information under section 6103(i)). The authority to authorize the application cannot be delegated. Thus, Assistant United States Attorneys may not authorize applications for *ex parte* orders.

**Note:** While section 6103(i)(1)(B) requires a named official to authorize each application, there is no requirement that the official actually *sign* the application. The best evidence, of course, of the required authorization is the

signature of the named official on the application. Nevertheless, it may be possible to design alternative methods of ensuring proper authorization. For example, documentation could be secured to indicate that each application not signed by a United States Attorney was, in fact, personally reviewed and authorized by the United States Attorney in each case. The *United States Attorneys' Manual* suggests that this personal review can be demonstrated by having the authorizing official provide a written summary of the facts of the case, and the specific reasons why a disclosure is, or may be, relevant to the proceeding or investigation as part of the application. See U.S. Dep't of Justice, *United States Attorneys' Manual* 9-13.900 (Oct. 2007), which is included in the Appendix to this Guide. A Tax Disclosure Form is available by clicking on the link to "Criminal Resource Manual at 537" at the following web address:

[http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/crm00505.htm#505](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00505.htm#505) by opening the link to "Criminal Resource Manual at 537." This Tax Disclosure Form is included in the Appendix to this Guide. While such written reference to case specific data is the recommended best practice, if this is not a viable option, you may consider other procedures, such as, for example, (1) changing the language of the local § 6103(i) order application to specifically indicate that the authorizing official has "personally reviewed and authorized" the application; (2) ask that the authorizing official retain written documentation demonstrating his or her specific authorization of each application; or (3) ask that the authorizing official send a letter to the area director documenting his or her practice of personally reviewing and authorizing each application before submission to the court.

The application must establish: (1) reasonable cause to believe that a federal nontax criminal violation has occurred; (2) reasonable cause to believe that returns or return information is or may be relevant to a matter relating to the commission of the crime; and, (3) that the information sought will be used exclusively for the federal criminal investigation or proceeding concerning such crime *and* cannot reasonably be obtained, under the circumstances, from any other source. See United States v. Praetorius, 451 F. Supp. 371, 372 (E.D. N.Y. 1978). The courts are expected to review documents and balance investigative need with the taxpayer's privacy interests. See *id.* at 373; United States v. Barnes, 604 F.2d 121, 147 (2d Cir. 1979) (large amounts of "miscellaneous" income on return relevant to drug conspiracy case), *cert. denied*, 446 U.S. 907 (1980). An *ex parte* order may properly authorize disclosure of joint returns and return information where the request for the order sought information regarding a joint filer for the years joint returns were filed. See Bolin v. United States, No. Civ.A.1:99CV335-MHS, 1999 WL 1270979, at \*2 (N.D. Ga. Nov. 16, 1999).

A federal district court judge or magistrate may *not* on his or her own motion initiate an order directing production of returns or return information under section 6103(i). See United States v. Lochmondy, 890 F.2d 817, 823-24 (6th

Cir. 1989); see also United States v. Recognition Equip., Inc., 720 F. Supp. 13, 14 (D.D.C. 1989) (“Under section 6103(i)(1)(B) only specified Federal prosecutors, including United States attorneys, may authorize an application to this Court for an order for the disclosure of tax returns or return information.”).

Because the *ex parte* order process is in fact *ex parte*, a defendant does not have a right to notification, hearing on the application, or disclosure of the information on which the judge or magistrate acted. See Barnes, 604 F.2d at 147; United States v. DiLorenzo, No. S1 94 Cr. 303 (AGS), 1995 WL 169003, at \*8-9 (S.D.N.Y. Apr. 10, 1995).

The section 6103(i)(1) *ex parte* order process may *not* be used to *obtain* returns or return information for use in a civil proceeding, including a civil forfeiture proceeding. See United States v. \$57,303.00 in United States Currency, 737 F. Supp. 1041, 1042-43 (C.D. Ill. 1990) (“Congress distinguished between criminal investigations or proceedings and civil forfeiture actions when drafting these disclosure provisions.”); see the Dep’t of Justice Criminal Tax Manual at: <http://www.justice.gov/tax/readingroom/2008ctm/CTM%20Chapter%2042.htm> Nevertheless, returns or return information obtained for legitimate criminal purposes may subsequently be disclosed in a civil forfeiture proceeding following the requirements set forth in section 6103(i)(4). See Section V and Chapter 7.

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2. the taxable period(s) for which the information is sought;
3. the statutory authority under which the criminal investigation or proceeding is being conducted; and
4. the reason why disclosure is or may be relevant to the investigation or proceeding.

B. Requests under section 6103(i)(2) seeking only taxpayers' addresses do not comply with the section. The section contemplates requests for return information in addition to taxpayers' addresses.

#### **IV. RETURN INFORMATION CONCERNING POSSIBLE CRIMINAL/TERRORIST ACTIVITIES OR EMERGENCY CIRCUMSTANCES**

##### **A. General Rule**

In general, section 6103(i)(3)(A) provides that return information (other than taxpayer return information) that may constitute evidence of a nontax federal crime may be disclosed in writing to the extent necessary to apprise the head of the federal agency charged with enforcing the laws to which the crime relates. Treas. Reg. § 301.6103(i)-1; see In re Grand Jury Investigation, 688 F.2d 1068, 1071 (6th Cir. 1982) (oral disclosure of fact of pending tax investigation not violative of section 6103(i)(3)(A)); see *also* United States v. President, 591 F. Supp. 1313, 1317 (N.D. Ill. 1984) (disclosure to Department of Labor). The statute does not require that the information be conclusive, but the information should sufficiently identify the specific criminal act or event to which it relates.

Section 6103(i)(3)(A)(ii) specifies that a taxpayer's identity may be disclosed if there is return information, *other than* taxpayer return information, which may constitute evidence of a violation of a nontax criminal law.

##### **B. Emergency Situations**

Section 6103(i)(3)(B) provides that return information, including taxpayer return information, may be disclosed to the extent necessary to apprise appropriate officers or employees of federal *and* state law enforcement agencies of circumstances involving an imminent danger of death or physical injury to any individual. Return information, including taxpayer return information, may also be disclosed to apprise officers or employees of a federal law enforcement agency of the imminent flight of any individual from federal prosecution. For disclosures of returns and return information to locate fugitives from justice, see Section VI.

**Note:** This section and section 6103(i)(7)(A)(ii) are the only provisions under section 6103(i) that authorize disclosures to *states* for nontax criminal law enforcement purposes.

### **C. Terrorist Activities**

Section 6103(i)(3)(C) provides that return information other than taxpayer return information that may be related to a terrorist incident, threat, or activity may be disclosed in writing to the extent necessary to apprise the heads of the appropriate federal law enforcement agencies responsible for investigating or responding to the terrorist incident, threat, or activity. The agency head may disclose the return information to the agency's officers or employees to the extent necessary to investigate or respond to the terrorist incident, threat, or activity.

Returns and taxpayer return information may also be disclosed to the Attorney General under section 6103(i)(3)(C)(ii) to the extent necessary for, and solely for use in preparing, an application under section 6103(i)(7)(D) for an *ex parte* disclosure (as authorized by the Commissioner). For purposes of sections 6103(i)(3)(C)(iii) and (i)(7)(D), taxpayer identity information is not treated as taxpayer return information.

### **D. Referral Procedures**

See IRM 11.3.28, Disclosure to Federal Agencies for Administration of Nontax Criminal Laws.

## **V. I.R.C. § 6103(i)(4): USE OF RETURNS AND RETURN INFORMATION IN JUDICIAL OR ADMINISTRATIVE PROCEEDINGS PERTAINING TO FEDERAL NONTAX CRIMINAL MATTERS**

- A. Any return or return information furnished pursuant to sections 6103(i)(1) or 7(C) may be used as evidence in a judicial or administrative proceeding relating to a federal nontax crime or related civil forfeiture, provided a few requirements are first met: (1) the court determines that the information is probative of the commission of the crime or (2) the court directs the disclosure pursuant to 18 U.S.C. § 3500 (the Jencks Act) or Fed. R. Crim. P. 16.
- B. Courts have denied defense counsels' attempts in nontax criminal prosecutions to compel disclosure by the IRS of third-party returns or return information on the theory that access to and use of the information can occur only if the United States has previously obtained such information under sections 6103(i)(1), (2), or (3)(A). See United States v. Lochmondy, 890 F.2d 817, 823-24 (6th Cir. 1989); see also United States v. Jackson, 850 F. Supp. 1481, 1504 (D. Kan. 1994).

- C. Returns and return information shall not be admitted into evidence if the Secretary determines and notifies the Attorney General, the Attorney General's delegate, or a federal agency head that doing so would identify a confidential informant or seriously impair a civil or criminal tax investigation. I.R.C. § 6103(i)(4)(C).

#### **VI. I.R.C. § 6103(i)(5): DISCLOSURE OF RETURNS AND RETURN INFORMATION TO LOCATE FUGITIVES FROM JUSTICE**

- A. Returns and return information may be disclosed to officers and employees of a federal agency for the sole purpose of locating a fugitive who has committed a federal felony only upon the grant of an *ex parte* order by a federal district court judge or magistrate. The extent of the disclosure will be governed by the language of the order.
- B. Only those persons named in section 6103(i)(1)(B) may authorize an application for *ex parte* order under this section.
- C. The application must indicate:
  - 1. a federal felony arrest warrant has been issued and the taxpayer is a fugitive from justice;
  - 2. the return or return information is sought exclusively for locating the taxpayer/fugitive; and
  - 3. there is reasonable cause to believe information will help locate the fugitive.

#### **VII. I.R.C. § 6103(i)(6): CONFIDENTIAL INFORMANTS; IMPAIRMENT**

Returns or return information shall not be disclosed under sections 6103(i)(1), (2), (3)(A) or (C), (5), (7), or (8) if the IRS determines and, where applicable, certifies to the court that issued a disclosure order, that it would identify a confidential informant or seriously impair a civil or criminal tax case.

**Note:** This limitation does not apply in the context of emergency disclosures under section 6103(i)(3)(B) to apprise federal and state officials of circumstances involving imminent danger of death or physical safety.

In the case of court ordered disclosures in a judicial proceeding under section 6103(i)(4)(A), the impairment determination is made pursuant to section 6103(i)(4)(C).



## VIII. I.R.C. § 6103(i)(7): DISCLOSURE UPON REQUEST FOR INFORMATION RELATING TO TERRORIST ACTIVITIES

### A. Law Enforcement Agencies

Returns and return information other than taxpayer return information may be disclosed, upon written request, to officers and employees of a federal law enforcement agency who are personally and directly engaged in the response to or investigation of any terrorist incident, threat, or activity. For purposes of section 6103(i)(7)(A), a taxpayer's identity is not treated as taxpayer return information.

The request to the Secretary must:

1. be made by any federal law enforcement agency head, or delegate, involved in the response to or investigation of any terrorist incident, threat, or activity; and
2. set forth the specific reason(s) why the disclosure may be relevant to the response to or investigation of any terrorist incident, threat, or activity.

**Note:** The use of the tax information is limited to the officers and employees to whom the information is disclosed.

The head of the relevant federal law enforcement agency may disclose, with certain limitations, to state or local law enforcement agencies only if they are part of a team that includes the federal agency responding to or investigating any terrorist incident, threat, or activity.

### B. Intelligence Agencies

Pursuant to section 6103(i)(7)(B), returns and return information other than taxpayer return information may be disclosed upon written request to those officers and employees of the Department of Justice, the Department of the Treasury, and other federal intelligence agencies who are personally and directly engaged in the collection or analysis of intelligence and counterintelligence information or investigation concerning any terrorist incident, threat, or activity solely for their use in such investigation, collection or analysis.

The request must:

1. be made by a Department of Justice or Department of the Treasury officer or employee or the Director of the United States Secret Service who is responsible for the collection and analysis of intelligence and

counterintelligence information concerning any terrorist incident, threat, or activity; and

2. set forth the specific reason(s) why such disclosure may be relevant to a terrorist incident, threat, or activity.

For purposes of section 6103(i)(7)(B), a taxpayer's identity is not treated as taxpayer return information.

### **C. *Ex Parte* Orders**

Sections 6103(i)(7)(C) and (D) authorize disclosure of returns and return information to officers and employees of any federal law enforcement or federal intelligence agency who are personally and directly engaged in any investigation, response to, or analysis of intelligence and counterintelligence information concerning any terrorist incident, threat, or activity upon the grant of an *ex parte* order for such disclosure by a federal judge or magistrate. Under section 6103(i)(7)(C), the Attorney General, Deputy Attorney General, the Associate Attorney General, any Assistant Attorney General or any United States Attorney may authorize the application for the *ex parte* order. Such authority is non-delegable.

To be granted, the *ex parte* application must demonstrate:

1. there is reasonable cause to believe, based upon information believed to be reliable, that the return or return information may be relevant to a matter relating to such terrorist incident, threat, or activity; and
2. the return or return information is sought exclusively for use in a federal investigation, analysis, or proceeding concerning any terrorist incident, threat, or activity.

Section 6103(i)(7)(D) allows the IRS to initiate a request for an *ex parte* order under section 6103(i)(7)(C). In addition, section 6103(i)(3)(C)(ii) authorizes the IRS to disclose information to the Department of Justice to apply for the *ex parte* order. To be granted, the application must demonstrate the same requirements as necessary for an application authorized under section 6103(i)(7)(C).

Information authorized for disclosure pursuant to an *ex parte* request initiated by the IRS under section 6103(i)(7)(D) may be disclosed only to the extent necessary to apprise the head of the appropriate federal agency responsible for investigating or responding to a terrorist incident, threat, or activity, and can be used solely in a *federal* investigation, analysis or proceeding concerning the same.

## **IX. I.R.C. § 6103(i)(8): DISCLOSURE OF RETURNS OR RETURN INFORMATION TO THE COMPTROLLER GENERAL**

### **A. Audits**

Under certain circumstances, returns or return information may be disclosed to officers and employees of the Government Accountability Office (GAO) upon written request or by the Comptroller General personally for purposes of conducting audits of the IRS or the Bureau of Alcohol, Tobacco, Firearms & Explosives, the Department of Justice, the Tax and Trade Bureau, the Department of the Treasury or audits of a program or activity of a federal agency that involves the use of returns or return information.

### **B. Joint Committee on Taxation Notification**

These audits may be conducted only if the Joint Committee on Taxation is notified of GAO's intention to audit and does not disapprove within 30 days after receiving the notice. I.R.C. § 6103(i)(8)(C); see *also* IRM 11.3.23, Disclosure to the Government Accountability Office.

## **X. I.R.C. § 6103(l)(15): DISCLOSURE OF FORM 8300 INFORMATION ON CASH TRANSACTIONS**

Section 6050I requires trades or businesses, other than financial institutions, to report cash transactions of more than \$10,000 to the Service. These transactions are reported on Form 8300. Section 6103(l)(15) authorizes the disclosure of information from returns filed under section 6050I (*i.e.*, Form 8300) to federal, state, local or foreign government agencies, under the same terms and conditions applying to the disclosures of Currency Transaction Reports (FinCEN Form 104 37683N) filed by financial institutions under the Bank Secrecy Act, Pub. L. No. 91-508, 84 Stat. 1114 (1970) (codified at scattered sections of 12, 18, and 31 U.S.C), *amended by* Pub. L. No. 107-56, 115 Stat. 327 (2001). See IRM 9.3.1.4.3.1.1. See *generally* Chapter 7. Any disclosures of information from the Form 8300 made pursuant to section 6103(l)(15) cannot be used by the recipients for the purpose of the administration of any tax law.

Section 365 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (the "USA Patriot Act"), Pub. L. No. 107-56, 115 Stat. 272, 333-35, added section 5331 to the Bank Secrecy Act. It requires any person who is engaged in a trade or business and who, in the course of the trade or business, receives more than \$10,000 in coins or currency in one transaction or in related transactions, to file a report with the Financial Crimes Enforcement Network (FinCEN) of the Department of the Treasury. This is the same information collected by the IRS under I.R.C. § 6050I on Form 8300 that is return information subject to section 6103 limitations. The information collected by FinCEN under Title 31 is not return information protected from disclosure by section 6103. Therefore, to the extent federal, state, local or foreign government agencies can access

this information from FinCEN, rather than the IRS, they would not need to rely on the authority in section 6103(l)(15).

## **XI. REPORTING VIOLATIONS OF NONTAX CRIMES NOT INVOLVING RETURNS OR RETURN INFORMATION**

Occasionally, IRS employees observe nontax crimes during official duty hours, or in their official capacities receive information relating to nontax crimes, which do not involve returns or return information. IRM 11.3.34, Disclosure for Nontax Criminal Violations, describes procedures for employees to inform federal, state, and local law enforcement authorities of the facts necessary to advise them of possible violations of nontax criminal laws in these circumstances.

## **XII. INTERPLAY BETWEEN I.R.C. § 6103(h) AND I.R.C. § 6103(i)**

*See generally* Chapter 3 for a discussion of the interplay between sections 6103(h) and (i), and Treas. Regs. §§ 301.6103(h)(2)-1 and 301.6103(i)-1.

## CHAPTER 6

### DISCLOSURE OF RETURNS AND RETURN INFORMATION IN BANKRUPTCY CASES

#### I. GENERAL DISCLOSURE CONCEPTS

##### A. General Rule – Confidentiality

The general rule regarding disclosure of returns and return information is found in I.R.C. § 6103(a), which provides that:

Returns and return information shall be confidential, and except as authorized by this title--

(1) no officer or employee of the United States,

. . . .

shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or employee or otherwise under the provisions of this section.

Thus, returns and return information are to be kept confidential unless disclosure is permitted by some specific provision of the Code. See Church of Scientology of Cal. v. IRS, 484 U.S. 9, 12 (1987). The unauthorized disclosure of returns or return information may result in civil damages against the United States (I.R.C. § 7431) and/or criminal penalties against the individual who disclosed the information (I.R.C. § 7213). See Nowicki v. Comm'r, 262 F.3d 1162, 1163 (11th Cir. 2001). See *generally* Chapter 2, Part I.

##### B. Definition of "Return" and "Return Information"

Generally, a "return" is the actual form filed by the taxpayer, including supporting schedules, a claim for refund, and any information return filed by a third party with respect to the taxpayer. I.R.C. § 6103(b)(1). "Return information" is defined, generally, as the taxpayer's identity (*e.g.*, name, address, and taxpayer identification number); the nature, source or amount of the taxpayer's income, assets, or liabilities; whether or not the taxpayer's return is being or will be investigated; and any other data received by, recorded by, prepared by, furnished to or collected by the Secretary with respect to a return or with respect to the determination of the existence (or possible existence) of liability under the Code. I.R.C. § 6103(b)(2). The distinction between "return" and "return information" is significant, because in some situations the statute permits disclosure of one, but not the other. See *generally* Chapter 2, Part I.

### C. When Does a Bankruptcy Case Involve Tax Administration?

There are significant differences in the disclosure rules depending on whether a case pertains to "tax administration." If a bankruptcy case pertains to tax administration, disclosures of the debtor's tax information are permitted, under the rules of section 6103(h), to DOJ or in the judicial proceeding. Such disclosures typically do not require the debtor's consent. However, if a bankruptcy case does *not* involve tax administration, the debtor's tax information generally can only be disclosed: (1) to the debtor; (2) with the debtor's consent; (3) to the Chapter 7 or 11 trustee; or (4) in a criminal proceeding pursuant to section 6103(i). Thus, it is important to determine whether a particular bankruptcy case pertains to tax administration.<sup>39</sup>

The Code broadly defines "tax administration," in section 6103(b)(4), to include, among other activities:

the administration, management, conduct, direction, and supervision of the execution and application of the internal revenue laws or related statutes<sup>[40]</sup> (or equivalent laws and statutes of a State) and tax conventions to which the United States is a party . . . [including] assessment, collection, enforcement [and] litigation . . . functions under such laws, statutes or conventions.

Not every bankruptcy case qualifies as a tax administration proceeding. Unlike Tax Court or refund proceedings, where the cause of action *per se* involves tax administration, bankruptcy cases are multi-party actions that may or may not involve the resolution of tax claims or the application of internal revenue laws. In addition, the mere existence of a tax liability of the debtor or the mere potential for IRS involvement does not turn a bankruptcy case into a tax administration proceeding. Rather, it is necessary that there be some nexus between the bankruptcy case and the application of the internal revenue laws in the proceeding to make the bankruptcy case a tax administration proceeding.

It is not uncommon for a debtor to be under audit at the time a petition is filed, or for the bankruptcy petition to trigger an audit of the debtor in large bankruptcy cases. The IRS's examination of the debtor, as a taxpayer, is a tax administration proceeding, but that does not automatically make the bankruptcy

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<sup>39</sup> Chief Counsel Notice 2010-009, entitled "Disclosures of Returns and Return Information in Bankruptcy Cases," advises Chief Counsel employees on the scope of disclosures under section 6103(h) of returns and return information, collectively "tax information," that may be made to DOJ in bankruptcy cases. Chief Counsel Notice 2010-009 has not yet been incorporated into Part 34 of the CCDM.

<sup>40</sup> Bankruptcy provisions would be "related statutes" to the extent they are utilized in determining the validity or amount of the IRS's tax claim. See *generally* Chapter 5 for information on making a related statute determination.

case a tax administration proceeding. In general, a bankruptcy case pertains to tax administration if the bankruptcy court's involvement is needed to determine a matter pertaining to assessment or collection of tax, or is otherwise needed to enforce the internal revenue laws.<sup>41</sup> When that nexus is established will depend upon the facts of the bankruptcy case.

Due to pre-petition events, some bankruptcy cases may pertain to tax administration immediately upon the filing of the petition. Other bankruptcy cases may become tax administration proceedings after the petition is filed. The following are non-exclusive examples:

**Examples:**

- If the debtor lists the IRS as a creditor in the petition (or in an attached schedule of liabilities), disclosures under section 6103(h) would be permitted at the commencement of the case. By virtue of the debtor's putting the tax in issue and the government's participating in the case, the proceeding becomes one pertaining to tax administration.
- If the IRS has a current Notice of Federal Tax Lien filed against the debtor's property prior to the petition's filing, the IRS has a tax interest in the bankruptcy case from the moment the petition is filed.
- If the debtor files a plan of reorganization that lists the IRS as a creditor, the filing of the plan is a trigger that similarly puts a tax matter at issue, and the bankruptcy case will be a proceeding pertaining to tax administration if the IRS participates.
- If no tax liability is listed in the debtor's schedules, but the IRS files a proof of claim or request for payment of administrative expenses, the case would become a proceeding pertaining to tax administration upon the filing of the proof of claim or request. By filing the proof of claim or request, the IRS has formally appeared in the case and put the tax matter in issue.
- If the IRS takes any formal action in a bankruptcy case, the case would become a proceeding pertaining to tax administration upon the IRS's filing of the appropriate formal action (unless an earlier triggering event has occurred). Examples of such formal actions include filing a motion to compel the filing of a tax return, a motion to lift the automatic stay, a claim for administrative expenses, an objection to the disclosure statement, or a complaint or answer in an adversary proceeding.

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<sup>41</sup> The Bankruptcy Court has broad authority to determine the amount or legality of the IRS's tax claims, whether such tax shall be allowed, and the validity of any federal tax liens. See, e.g., B.C. §§ 502(a), 505(a), and 545.

- If the Bankruptcy Code permits the debtor to operate the debtor's business post-petition, or the court authorizes the trustee to operate the debtor's business post-petition, the debtor will accrue employment taxes and other continuing tax and reporting obligations. These liabilities are subject to the court's supervisory authority.<sup>42</sup> Such operations make the bankruptcy case a proceeding pertaining to tax administration; this would permit the IRS to disclose information relating to the debtor's (or the estate's) post-petition tax compliance to the officials responsible for supervising such compliance (notwithstanding the absence of a formal claim). Where the Bankruptcy Code permits the debtor to continue operating the business, the filing of the petition is the triggering event; otherwise, the triggering event is the bankruptcy court's order authorizing the debtor to continue operating the business.

#### **D. Proper Scope of Authorized Disclosures**

The rules for disclosures in tax administration proceedings were structured for traditional judicial tax proceedings, where the United States and the taxpayer are the only parties and tax issues are the predominate, if not the sole, reason for the proceeding, *i.e.*, Tax Court and refund cases. The rules in section 6103(h) are not well suited to a bankruptcy case, which is a multi-party proceeding that often involves nontax issues as well as tax claims. For example, under the literal terms of section 6103(h)(4)(A), the debtor's return or return information could be disclosed to a creditor who has filed a proof of claim, even if the information has no relation to the government's tax claim, since the statute only requires that the taxpayer be a party to the proceeding. This type of disclosure is at odds with the objective of section 6103 to limit disclosures that have no relationship to tax administration. In bankruptcy proceedings, attorneys should consider the rules of evidence and other rules governing discovery and disclosure-related matters.

Accordingly, disclosures under section 6103(h) in bankruptcy cases should be limited to information pertaining to the tax matter that is at issue. For example, if the debtor owes no pre-petition tax liabilities, and the only reason a case pertains to tax administration is because the United States Trustee is monitoring employment tax payments, disclosure should be limited to information concerning post-petition employment taxes. The IRS should not in this situation discuss with creditors the tax consequences of a proposed plan of reorganization

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<sup>42</sup> See B.C. § 704(a)(8); Fed. R. Bankr. P. 2015(a)(3). Chapter 11 bankruptcies contemplate that the debtor will engage in some sort of business. *But see Toibb v. Radloff*, 501 U.S. 157, 160-66 (1991) (individual without business can reorganize under Chapter 11), *rev'g In re Toibb*, 902 F.2d 14 (8th Cir. 1990). B.C. § 1108 authorizes the trustee (or debtor in possession) to operate the debtor's business. In a Chapter 7, the court may authorize the trustee to operate the debtor's business for a limited period. B.C. § 721. In a Chapter 13, the business of the debtor, if any, may also be continued. B.C. § 1304.



unless the debtor consents.<sup>43</sup> (However, see below, Part IV.F., for examples of authorized disclosures to creditors.)

## II. STATUTORY FRAMEWORK: DISCLOSURES AUTHORIZED IN BANKRUPTCY CASES

Section 6103 sets forth several interrelated rules that provide the basic legal framework for resolving disclosure issues in the bankruptcy context. These disclosure rules, discussed in detail hereafter, may be summarized as follows:

**Disclosures to the Debtor** – Debtors are entitled to their returns and, if disclosure would not seriously impair federal tax administration, their return information. I.R.C. § 6103(e)(1), (e)(7). In Chapter 7 and 11 cases involving an individual debtor (where I.R.C. § 1398 applies), the IRS may disclose the returns filed by the trustee on behalf of the bankruptcy estate to the debtor. I.R.C. § 6103(e)(5)(B); IRM 11.3.2.4.12(8).

**Disclosures Upon Consent** – The IRS shall disclose the debtor's returns and, absent an impairment determination, may disclose the debtor's return information to the debtor, and to any other person with the debtor's written consent. I.R.C. § 6103(e)(1), (e)(6), (e)(7), (c). In addition, the debtor and trustees who are authorized to receive returns under I.R.C. § 6103(e)(1), (4), or (5), may consent to the disclosure of the debtor's returns and return information to third parties if the requirements of Treas. Reg. § 301.6103(c)-1 are met. See Treas. Reg. § 301.6103(c)-1(e)(4).

**Disclosures in Judicial Proceedings Pertaining to Tax Administration** – If the bankruptcy case pertains to tax administration, the IRS may disclose the debtor's returns and return information to the court, the trustee, the United States Trustee, or other creditors. I.R.C. § 6103(h)(4). While the statute does not include any limitation on the party to the proceeding's returns and return information that may be disclosed under section 6103(h)(4)(A), a good rule of thumb is to disclose only the debtor's returns and return information pertaining to the tax matter at issue in the bankruptcy case. Third-party return information may also be disclosed in the proceeding subject to the item or transaction tests, including the "directly related" threshold pursuant to section 6103(h)(4)(B) and (C).

**Disclosures to Trustees in Chapter 7 and 11 Cases Involving an Individual Debtor** – In an individual's Chapter 7 or 11 case (where I.R.C. § 1398 applies),

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<sup>43</sup> Throughout this Chapter, references are made to disclosures by the IRS during the course of a bankruptcy case pertaining to tax administration. Such disclosures are not directly made by the IRS. Instead, the IRS makes such disclosures to DOJ for its disclosure, as required, in the course of the bankruptcy case.

the trustee may be required to file a return for the estate of the debtor. This is a separate return than that filed by the debtor. In these cases, the trustee may receive, upon written request, copies of any return filed by the debtor for the year in which the petition was filed and for all prior years. I.R.C. § 6103(e)(5)(A); IRM 11.3.2.4.12(6).

In an involuntary case, no disclosure of the debtor's return to the trustee shall be made until an order for relief has been entered by the court having jurisdiction, unless the court finds that such disclosure is appropriate for purposes of determining whether an order for relief should be entered. I.R.C. § 6103(e)(5)(C); IRM 11.3.2.4.12(7).

**Disclosures to Appointed Trustees with a Material Interest in Debtor's**

**Return Information** – Where a trustee has been appointed in a Chapter 7 or 11 bankruptcy or receivership case, the IRS may disclose to the trustee, upon written request, the debtor's returns for the current year and for the years prior to the one in which the petition is filed. I.R.C. § 6103(e)(4); IRM 11.3.2.4.12(9).

Section 6103(e)(4) permits disclosures to bankruptcy trustees only if the trustee has a "material interest" in the debtor's return information. Material interest is generally defined as a financial or monetary interest. Material interest is not limited to the trustee's responsibility to file a return on behalf of the bankruptcy estate. Section 6103(e)(4) does not *generally* permit disclosures to the United States Trustee or the standing Chapter 13 trustee. Such disclosures may, however, be permitted in the context of a judicial proceeding if the bankruptcy case pertains to tax administration. IRM 11.3.2.4.12(9).

**Disclosure of the Bankruptcy Estate's Returns** – Upon written request, the trustee may obtain the returns of the bankruptcy estate. I.R.C. § 6103(e)(1)(E).

**Disclosure of Return Information** – A trustee who may obtain returns under section 6103(e)(1)(E), (4) or (5) may also obtain return information without written request, unless such disclosure would seriously impair federal tax administration. I.R.C. § 6103(e)(7).

**Disclosures to DOJ** – The IRS may disclose returns or return information to DOJ (including an IRS attorney acting in a SAUSA capacity) for use in a tax administration proceeding, so long as the tax matter has been referred to DOJ. I.R.C. § 6103(h)(2), (3).

**Disclosures to DOJ Before a Referral is Made** – The IRS may communicate with DOJ before a referral is made when the Office of Chief Counsel determines that consultation with DOJ on a limited issue or issues is necessary, but these occurrences should be infrequent. For example, the IRS may communicate with DOJ before a referral on whether DOJ would support a proposed motion in a particular proceeding. These types of consultations with DOJ require that disclosures are necessary for purposes of tax administration and that the scope

of return or return information to be disclosed be no more than that authorized in section 6103(h)(2). The internal determination to consult with DOJ before a referral must be documented in the case file and approved by the same level of authority that would authorize a referral.

Notwithstanding the above exceptions permitting disclosure, return information need not be disclosed if the IRS determines that the disclosure would seriously impair federal tax administration. I.R.C. § 6103(c), (e)(7). Similarly, in the context of a bankruptcy proceeding that pertains to tax administration, the disclosure of returns or return information shall not be made if the disclosure would identify a confidential informant or seriously impair a civil or criminal tax investigation. I.R.C. § 6103(h)(4).

**Note: Debtor's Duty to Provide Federal Tax Returns** – The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Pub. L. 109-8, 199 Stat. 23 (effective for cases filed on or after Oct. 17, 2005), requires the debtor to provide copies of returns or transcripts to various entities within the bankruptcy case. The IRS has existing procedures, which comply with section 6103, for debtors to obtain returns or return information to satisfy their obligations under the BAPCPA and show what has been filed with the IRS. The debtor may fulfill its obligation by supplying tax transcripts. Tax transcripts are available to the debtor at no cost by calling the IRS's toll-free customer service number (1-800-829-1040) or by submitting a Form 4506-T to the IRS. In addition, the debtor can also request a copy of his or her filed income tax returns by submitting a Form 4506 to the IRS. There is a fee for each requested return. If the IRS cannot disclose the debtor's returns to the trustee upon the trustee's request (typically, Chapter 13 bankruptcies), the IRS may disclose the returns or transcripts to the trustee if the debtor consents to such disclosure.<sup>44</sup> I.R.C. § 6103(c).

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<sup>44</sup> B.C. § 521(e)(2)(A) requires the debtor to provide to the trustee a copy of his or her federal income tax return (or, at the election of the debtor, a transcript of such return) for the most recent tax year ending before the commencement of the case. B.C. § 521(f) requires that the debtor provide copies of any federal income tax returns, or transcripts of those returns, filed by the debtor for post-petition periods, and copies of any returns/transcripts for certain pre-petition periods that were filed post-petition, to the court and parties in the bankruptcy proceeding, if requested. B.C. § 1308 requires that Chapter 13 debtors file with the IRS before the first meeting of creditors copies of federal income tax returns for taxable periods ending within four years of the bankruptcy petition. In order to ascertain whether Chapter 13 debtors have complied with their filing obligations under section 1308, Chapter 13 trustees may ask the debtors for copies of transcripts of such returns. Although trustees may wish to verify that the returns provided by the debtor were actually filed with the IRS, Congress did not amend section 6103 as part of the BAPCPA. In such instances, the debtor may consent to the IRS's disclosure of return information to the trustee.

**A. To Debtor and Other Persons with a Material Interest – I.R.C. § 6103(e)(1)**

Section 6103(e)(1) provides that, upon written request, an individual's "return" shall be open to inspection by or disclosure to that individual. A corporation's return is generally available upon written request to, among others, persons with authority to act for the corporation. I.R.C. § 6103(e)(1)(D). A person's "return information" may also be disclosed to that person, unless the IRS determines the disclosure will seriously impair federal tax administration. I.R.C. § 6103(e)(7). Under section 6103(e)(1)(B), a tax return filed jointly may be disclosed to either spouse with respect to whom the return is filed. Section 6103(e)(7) permits return information with respect to such jointly filed return to be disclosed to either spouse (unless it is determined that disclosure would seriously impair federal tax administration). Thus, in a joint return situation, disclosures to the debtor's spouse (whether or not the spouse is also a debtor) are permitted. Information with respect to the jointly filed return may also be disclosed in the bankruptcy case pursuant to section 6103(h)(4).

**B. To Authorized Representative or Designee – I.R.C. § 6103(e)(6) and (c)**

A taxpayer may authorize another person to receive his or her returns or return information through a power of attorney. I.R.C. § 6103(e)(6) and (7). The IRS's standard power of attorney form (Form 2848) contains language authorizing disclosure. An authorization for purposes of tax administration made by power of attorney does not require a separate writing, nor does it require receipt within 120 days of the date the authorization was signed and dated by the taxpayer as does a consent made pursuant to section 6103(c) as described below. See Appendix for a copy of Form 2848.

The taxpayer may also designate in a separate written request a person to receive his returns or return information. I.R.C. § 6103(c). This "general purpose consent" must: (1) pertain solely to the authorized disclosure; (2) be signed and dated by the taxpayer; (3) contain the taxpayer's identity information as set forth in section 6103(b)(6); (4) provide the identity of the person to whom disclosure is to be made; (5) provide the type of return or return information to be disclosed; and (6) indicate the taxable years involved. Treas. Reg. § 301.6103(c)-1(a).<sup>45</sup> A disclosure consent must be received by the IRS within 120 days of the date the consent was signed and dated by the taxpayer. Treas. Reg. § 301.6103(c)-1(b)(2). Form 8821 (Tax Information Authorization) has been designed to meet the requirements of section 6103(c). See IRM 11.3.3.1.1. See *also* Appendix for a copy of Form 8821.

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<sup>45</sup> The requirements with respect to consents are somewhat more lenient where the taxpayer requests another person to make an inquiry for tax-related information or assistance on the taxpayer's behalf. See Treas. Reg. § 301.6103(c)-1(b).

In addition, in a bankruptcy case involving the debtor's tax liabilities, the IRS may disclose to the debtor's attorney of record the debtor's return information, which is relevant to the resolution of those tax matters affected by the proceeding. See IRM 11.3.3.1.6(4). An attorney becomes the debtor's attorney of record by filing the bankruptcy petition or otherwise entering an appearance in the bankruptcy case.

Where the debtor's attorney requests that the IRS discuss the debtor's return or return information with an accountant or other expert retained by the attorney, disclosure is not authorized unless the debtor has signed a power of attorney (Form 2848), specifically giving the attorney authority to designate another individual to receive the information, or unless the accountant or other expert has a separate written authorization from the debtor.

### **C. To Trustee in Individual Chapter 7 or 11 Cases – I.R.C. § 6103(e)(5) and (e)(1)(E)**

Section 6103(e)(5)(A) provides for disclosure of returns to bankruptcy trustees,<sup>46</sup> upon written request, in cases under Chapters 7 and 11 where the debtor is an individual. IRM 11.3.2.4.12(9). In such cases, pursuant to section 1398, a separate taxable bankruptcy estate is created. The estate succeeds to various tax attributes of the debtor. I.R.C. § 1398(g). In these cases, disclosure is necessary so that the trustee may determine carryovers to the estate and carry back deductions to the preceding years of the debtor. See S. REP. NO. 96-1035, at 31-32 (1980). Under section 6103(e)(5)(A), returns of the debtor for the taxable year in which the case commences or any preceding taxable year may be disclosed to the trustee upon the trustee's written request. Also, any return of the bankruptcy estate is open to inspection by the debtor upon the debtor's written request. I.R.C. § 6103(e)(5)(B).

A special rule applies in involuntary cases where the bankruptcy case is commenced involuntarily by petitioning creditors against an alleged debtor. In such cases, there is no debtor until the bankruptcy court enters an order for relief. Therefore, there is a period between the time that the petitioning creditors file the petition and the court, if warranted, enters its order for relief. No disclosures may be made to the trustee until the order for relief has been entered, unless the court finds that such disclosure is appropriate for purposes of determining whether an order for relief should be entered. I.R.C. § 6103(e)(5)(C); IRM 11.3.2.4.12(7).

Upon written request, the trustee may also obtain the returns of the bankruptcy estate. I.R.C. § 6103(e)(1)(E). Section 6103(e)(7) provides that return information of any taxpayer may be open to inspection by or disclosure to any

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<sup>46</sup> The trustee's attorney may also access the debtor's returns, assuming there is a written authorization allowing access to returns, such as a power of attorney. I.R.C. § 6103(e)(6). Being the trustee's attorney of record is not sufficient.

person authorized by subsection (e) to inspect any return of such taxpayer, unless it is determined that disclosure would seriously impair federal tax administration. Note that paragraph (5) allows disclosure of the debtor's returns only for certain years. Implicit in paragraph (7) is a corresponding temporal limitation, *i.e.*, only return information of the debtor that is related to the years for which the trustee can obtain returns can be disclosed. (Note that there is no temporal limitation on the returns and return information of the bankruptcy *estate* under section 6103(e)(1)(E) and (e)(7).)

Disclosures of returns pursuant to paragraphs (e)(1)(E) and (5) also require a written request. In contrast, a written request is not required for the disclosure of return information under paragraph (e)(7). Although disclosure of return information cannot be made if it is determined that disclosure would seriously impair federal tax administration, the disclosure of returns is not subject to such limitation. Note, however, that disclosures made under section 6103(e) do not depend on whether the proceeding involves tax administration, or if the disclosures have a tax administration purpose. Disclosures of return information should not be made pursuant to section 6103(e) where disclosure would seriously impair federal tax administration.

#### **D. To Appointed Trustee with a Material Interest – I.R.C. § 6103(e)(4)**

Section 6103(e)(4) applies to Chapter 7 or 11 bankruptcy or receivership cases where a trustee is appointed and the debtor is the person with respect to whom the return is filed; in other words, where section 1398 is inapplicable and no separate taxable entity is created. That section allows disclosure, upon written request, to the trustee or receiver (if substantially all of the debtor's property is in the hands of a receiver) of the debtor's current and prior years' returns, but only if the IRS finds that the trustee or receiver in his fiduciary capacity has a material interest, which would be affected by the information contained therein. A material interest is generally defined as any monetary or financial interest.

With a material interest, the trustee would also have access to the debtor's return information pursuant to section 6103(e)(7) (unless disclosure would seriously impair federal tax administration). As indicated above, while a written request is needed before a return may be disclosed, a written request is unnecessary in order for return information to be disclosed, and disclosure does not require a tax administration purpose. In addition, unlike section 6103(e)(5), there is no temporal limitation on the return information that can be disclosed pursuant to section 6103(e)(4).

In the bankruptcy context, section 6103(e)(4) generally applies to Chapter 7 or 11 trustees who have a fiduciary responsibility for filing tax returns of the debtor, and not to the United States Trustee or the standing Chapter 13 trustee.

**E. To the Department of Justice in Tax Administration Cases –  
I.R.C. § 6103(h)(2)-(3)**

DOJ represents the IRS in tax matters arising before the bankruptcy court. Disclosures to DOJ for use in bankruptcy matters, to the extent that the bankruptcy case involves tax administration, are governed by subsections 6103(h)(2) and (3). Section 6103(h)(2) provides in pertinent part as follows:

In a matter involving tax administration, a return or return information shall be open to inspection by or disclosure to officers and employees of DOJ (including United States attorneys) personally and directly engaged in, and solely for their use in, a proceeding before . . . any Federal . . . court, but only if–

(A) the taxpayer is or may be a party to the proceeding, or the proceeding arose out of, or in connection with, determining the taxpayer's civil or criminal liability, or the collection of such civil liability, in respect of any tax imposed under this title;

(B) the treatment of an item reflected on such return is or may be related to the resolution of an issue in the proceeding . . . ; or

(C) such return or return information relates or may relate to a transactional relationship between a person who is or may be a party to the proceeding and the taxpayer which affects, or may affect, the resolution of an issue in such proceeding . . . .<sup>[47]</sup>

A bankruptcy case pertains to tax administration if the bankruptcy court's involvement is or may be needed to determine a matter pertaining to assessment or collection of tax, or is otherwise needed to enforce the internal revenue laws. I.R.C. § 6103(b)(4). When that nexus is established will depend on the facts of the bankruptcy case.

As a general rule, before any disclosures may be made to DOJ in a bankruptcy case that pertains to tax administration, the matter must be referred to DOJ for

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<sup>47</sup> The "item" and "transaction" tests for disclosure of third-party returns or return information are discussed in Part II.F and at greater length in Chapter 3.

their representation or advice. I.R.C. § 6103(h)(3)(A).<sup>48</sup> A referral for disclosure purposes includes any formal request to DOJ for defense, prosecution, or other affirmative action with respect to a case. I.R.C. §§ 7401 and 7602(d).

Thus, for example, where the IRS has filed a proof of claim in the bankruptcy case, it becomes a matter involving tax administration, and, upon referral, section 6103 allows disclosures of the debtor's returns and return information to DOJ. If the bankruptcy is a tax administration case, then disclosures of returns and return information may be made to DOJ, to the extent authorized by section 6103(h)(2)(A)-(C), after a referral determination (that is, DOJ's assistance is necessary, *i.e.*, appropriate and helpful.)

Due to pre-petition events, some bankruptcy cases may pertain to tax administration immediately upon the filing of the petition. For example, when the IRS has a current notice of lien filed against the debtor's property prior to the petition's filing, or if the trustee or debtor-in-possession is permitted to operate a business post-petition. This example relates to tax administration only for post-petition incurred employment taxes and other reporting or filing obligations. If the IRS chooses not to pursue its interests in the case, no referral to DOJ for representation or advice would be appropriate and no disclosures of returns or return information to DOJ should be made. Examples of where the IRS might choose not to pursue its interests in a case include Chapter 7 no-asset bankruptcies and bankruptcies involving non-dischargeable tax debts.

Some bankruptcy cases may become tax administration proceedings after the petition is filed. For example, the debtor may object to the IRS's proof of claim, or a trustee may initiate an avoidance action against the IRS. Alternatively, the IRS may determine that it is necessary to file a proof of claim, request payment of administrative expenses, or take some action in the case to invoke the jurisdiction of the bankruptcy court only after the petition has been filed. For example, the IRS may file a motion to extend the bar date, lift the automatic stay, or object to a proposed plan. Each of these actions subjects the IRS to the bankruptcy court's jurisdiction and makes the bankruptcy case a tax administration proceeding.

In general, the Office of Chief Counsel requests DOJ's representation or input when it is necessary to protect the Service's interests in a bankruptcy case.<sup>49</sup>

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<sup>48</sup> Section 6103(h)(3)(A) describes IRS-initiated referrals, which are used in most tax administration cases. It is possible, however, for DOJ to initiate a referral, pursuant to section 6103(h)(3)(B). This form of referral requires a written request for the returns or return information from the Attorney General, Deputy Attorney General, or Assistant Attorney General. The written request for information must also state the need for the disclosure. DOJ-initiated referrals are extremely rare, and still require that the case pertain to tax administration.

<sup>49</sup> The Office of Chief Counsel has previously determined that the Insolvency Unit may have direct referral authority to send smaller bankruptcy matters to DOJ for their representation. See IRM 34.3.1.1.7.



Using the same definition that the Service applies to investigatory disclosures, the term necessary “does not mean essential or indispensable, but rather appropriate and helpful . . . .” Treas. Reg. § 301.6103(k)(6)-1(c)(1). As previously noted, the IRS may communicate with DOJ before a referral determination (the Office of Chief Counsel determines that consultation with DOJ on a limited issue or issues is necessary), but these occurrences should be infrequent.<sup>50</sup> For example, the IRS may consult with DOJ before a referral determination on whether DOJ would support a proposed motion in a particular proceeding. These types of consultations with DOJ require that disclosures are necessary for purposes of tax administration and that the scope of returns and return information to be disclosed be no more than that authorized in section 6103(h)(2). Such requests still require that the bankruptcy be a tax administration proceeding and that the internal determination to consult with DOJ before a referral determination be documented in the case file and approved by the same level of authority that would authorize a referral.<sup>51</sup> See IRM 11.3.22.12.2. Such consultations are not a blanket authorization to consult with DOJ informally throughout the duration of the bankruptcy.

Once a referral has been made, attorneys should consider the rules of evidence and other rules governing discovery and disclosure-related matters, as well as what information might assist DOJ in the handling of a matter involving tax administration, to determine the extent of the debtor’s return or return information that is appropriate and helpful to the resolution of the matter. For example, any of the debtor’s returns or return information that is related to and helpful in resolving the issues or liabilities that the IRS has chosen to pursue in the proceeding, including related tax year information as may arise from carryovers or carrybacks, may be disclosed to DOJ. The returns and return information of a person other than the debtor may also be disclosed to DOJ if it satisfies the item or transaction tests provided in section 6103(h)(2)(B)-(C).

**Note: SAUSA Activities** – Generally, only DOJ has authority to represent the United States in the U.S. courts (except the Tax Court). 28 U.S.C. § 516. However, in most federal districts, the U.S. Attorney has designated one or more field attorneys as Special Assistant United States Attorneys (SAUSAs). SAUSAs are permitted to perform a number of tasks involving bankruptcy cases. The types of matters that may be handled by SAUSAs are described at IRM 34.11.1.

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<sup>50</sup> See General Explanation of the Tax Reform Act of 1976, H.R. 10612, Pub. Law 94-455 (JCS-33-76) (J. Comm. Print 1976).

<sup>51</sup> For most bankruptcy cases, Deleg. Order 11-2 (Rev. 17), IRM 1.2.49, assigns the referral authority in the Office of Chief Counsel to the Associate Chief Counsel or Division Counsel. This authority may be redelegated to Counsel attorneys directly involved in the matter to be referred.

For disclosure purposes, a field attorney acting in his or her capacity as a SAUSA is treated like a DOJ attorney, since he or she is acting as the designee of DOJ. Thus, since disclosures to DOJ are generally permitted only if the IRS "has referred the case to DOJ" (I.R.C. § 6103(h)(3)(A)), a field attorney acting as a SAUSA may access return or return information with respect to a bankruptcy case only after the case has been referred. Short form referral letters have been authorized for matters that may be handled by SAUSAs. The short form letters generally request the U.S. Attorney to open a case in the name of the SAUSA.

#### **F. In Bankruptcy Cases Pertaining to Tax Administration – I.R.C. § 6103(h)(4)**

Section 6103(h)(4)(A) provides rules under which a debtor's returns and return information may be disclosed in federal judicial and administrative proceedings pertaining to tax administration. That section provides, in pertinent part, that:

A return or return information may be disclosed in a Federal . . . judicial or administrative proceeding pertaining to tax administration, but only—

- (A) [if] the taxpayer is a party to the proceeding, or the proceeding arose out of, or in connection with, determining the taxpayer's civil or criminal liability, or the collection of such civil liability, in respect of any tax imposed under this title[.]

Section 6103(h)(4) does not specify to whom information may be disclosed, it merely says "in" the proceeding. Disclosure "in the proceeding" means a disclosure of returns or return information made to a court (including a court reporter or stenographer), a mediator or arbitrator, or to a party to the proceeding under the practices and procedures generally applicable to such proceeding, and subject to any rules governing such proceeding. For example, in particular situations section 6103(h)(4) may authorize disclosures to the court, Chapter 7 or 11 Trustee, the United States Trustee, the standing Chapter 13 trustee, a creditor or the creditors' committee, among others. See examples at Part IV.

A literal interpretation of section 6103(h)(4)(A) permits the disclosure of all the debtor's returns and return information to the court or to any party to the proceeding. But this type of disclosure is at odds with the objective of section 6103 to limit disclosures that have no relationship to tax administration. Accordingly, after a proper referral to DOJ is made, attorneys should disclose only the debtor's returns and return information that pertain to the tax matter at issue in the case. For an extensive discussion of when a bankruptcy case pertains to tax administration, and the scope of the information that may be disclosed, see above Part I. C. and D. For a discussion of the rules relating to disclosure of third-party returns or return information pursuant to the item and transaction tests of section

6103(h)(4)(B) and (C), see above Part II. See also Chapter 3 for a fuller discussion of section 6103(h)(4)(A), (B) and (C).

## **G. Matters of Public Record**

As explained more fully in Chapter 2, neither section 6103 nor any other provision of the Code contains any express exception authorizing publication of returns or return information that has become a matter of public record in connection with tax administration. Although this “public record” exception has not been universally accepted, the IRS has determined that disclosure of returns or return information is permitted where taken directly from the public record of a judicial tax proceeding or made publicly accessible as a result of enforcement activities under the Code. IRM 11.3.11.13. To ensure accurate reporting of public record information, the information disclosed should be drawn *directly* from the public source document, e.g., an indictment, affidavit, or pleading. Note that the “public record” exception does not apply to information that has appeared only in a newspaper.

The same principles apply in bankruptcy cases. Return or return information once disclosed, which is filed with the bankruptcy court, becomes a matter of public record and open to examination. B.C. § 107(b).<sup>52</sup>

## **H. Disclosure Authority: Delegation Order 11-2**

The authority to permit disclosure of returns or return information under section 6103, and the authority to permit testimony or the production of documents, is delegated to selected IRS personnel under Delegation Order 11-2. See IRM 11.3.35.2. Delegation Order 11-2, as well as any pertinent local delegation order, should be consulted if there is any question concerning the authority of particular employees, including Counsel attorneys, to make particular disclosures.<sup>53</sup>

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<sup>52</sup> Except as provided in B.C. § 107(b) and (c), papers filed in a bankruptcy proceeding and the dockets of a bankruptcy court are public records, open to examination by an entity at reasonable times without charge. B.C. § 107(a). On request of a party in interest, or upon its own motion, a bankruptcy court may protect trade secrets or confidential research, development or commercial information. B.C. § 107(b). The court may also protect a person against scandalous or defamatory matters contained in a paper filed with the court. *Id.*

<sup>53</sup> The authority to disclose returns and return information under section 6103(h)(1), (h)(4), and (k)(6) is not delegated because the provisions themselves permit officers and employees of the IRS and Office of Chief Counsel to disclose such information. Deleg. Order 11-2 (Rev. 17), IRM 1.2.49 (second full paragraph).

### III. EVIDENCE OF CRIMINAL VIOLATIONS

While handling a bankruptcy case, an IRS or Chief Counsel employee may obtain or develop information that indicates that a federal criminal offense may have been committed. The information may indicate a tax offense under Title 26 and/or a nontax offense, including, among others, bankruptcy fraud under 18 U.S.C. § 157 or money laundering under 18 U.S.C. §§ 1956-57. The evidence may implicate the debtor, the trustee, a third party or a representative in the proceeding. In these situations, questions arise as to the proper use of the information in civil proceedings, authority to refer the information for criminal investigation, and the proper persons to whom to make the referral.

#### A. Disclosure in the Civil Proceeding

The debtor's returns and return information and, under certain circumstances, the returns and return information of third parties, may be disclosed in a civil proceeding (including a bankruptcy case), even if it indicates a violation of a nontax criminal provision, as long as it directly relates to the tax administration purpose in the proceeding. For example, the debtor may be concealing assets, which would indicate a violation of 18 U.S.C. § 152 (concealment of assets, false oaths and claims, bribery). This information could be disclosed to DOJ in order to commence a civil proceeding as part of the bankruptcy case to bring the assets into the bankruptcy estate. I.R.C. § 6103(h)(2), (4). The information may be disclosed in the civil proceeding by the IRS or DOJ (or a SAUSA) to the bankruptcy court, the trustee, or the United States Trustee, pursuant to section 6103(h)(4). In addition, such information may be disclosed to the Chapter 7 or 11 trustee pursuant to section 6103(e). Similarly, evidence that the trustee has committed negligent or illegal acts may properly be disclosed as part of the civil proceeding to the United States Trustee who has oversight responsibility.

In turn, the above information may be referred by the judge, the Chapter 7 or 11 trustee, the United States Trustee, or the United States Attorney for criminal investigation of possible bankruptcy fraud or other violations, pursuant to their authority under 18 U.S.C. § 3057 and 28 U.S.C. § 586(a)(3)(F).<sup>54</sup>

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<sup>54</sup> Pursuant to 18 U.S.C. § 3057, any judge, receiver, or trustee having reasonable grounds for believing that a violation of the bankruptcy fraud provisions has been committed or that an investigation should be had in connection therewith, must report to the appropriate U.S. Attorney all the facts and circumstances of the case, the names of the witnesses, and the offense or offenses believed to have been committed. In addition, when the United States Trustee considers it to be appropriate, he or she may notify the appropriate U.S. Attorney of matters which relate to the occurrence of any action which may constitute a crime under the laws of the United States. 28 U.S.C § 586(a)(3)(F).

## B. Referral for Use in a Criminal Investigation

For disclosure purposes, a criminal investigation or prosecution arising from fraud committed during a bankruptcy case is a *separate* proceeding from the civil bankruptcy case (just as a criminal tax fraud prosecution is separate from the civil determination of a taxpayer's tax liability). The IRS's ability to disclose returns or return information for purposes of a criminal prosecution is explicitly regulated by section 6103 and must be justified separately from the civil case referral.

If an IRS employee discovers, in a bankruptcy case, evidence of a potential tax offense under Title 26, a nontax offense under the money laundering provisions, information that may be of interest in anti-terrorism efforts, or any other violation within the IRS's jurisdiction, the matter of potential criminal liability should be referred to Criminal Investigation. If Criminal Investigation determines that the evidence involves a violation of Title 26, the matter may be referred to DOJ for prosecution (after administrative investigation) or grand jury investigation, following the normal referral path for criminal tax cases. Section 6103(h)(2)-(4) permits disclosure of the information for purposes of a Title 26 investigation and prosecution.

Moreover, the section 6103(h) regulations *also* permit information that has been disclosed for a criminal tax investigation or prosecution to be used for the investigation or prosecution of a *nontax* criminal offense (such as bankruptcy fraud), provided:

such [nontax] matter involves or arises out of the particular facts and circumstances giving rise to the [tax] proceeding (or investigation) . . . and further provided the tax portion of such proceeding has been duly authorized by or on behalf of the Assistant Attorney General for the Tax Division of the Department of Justice, pursuant to the request of the [Commissioner] . . . .

Treas. Reg. § 301.6103(h)(2)-1(a)(2). However, the regulations also provide that, if the tax administration portion of the proceeding or investigation is later terminated, *e.g.*, DOJ drops the Title 26 charges, returns and "taxpayer return information" (*i.e.*, return information that came from the taxpayer or the taxpayer's representative), cannot be used subsequently in the nontax investigation or prosecution without an *ex parte* court order under section 6103(i)(1). Note that the U.S. Attorney may rely on the tax information in his possession to complete the application for the *ex parte* order. Treas. Reg. § 301.6103(h)(2)-1(a)(2)(ii). Information other than returns and taxpayer return information can still be used by DOJ after dropping the Title 26 charges.

If the evidence shows *only* a violation of a *nontax* criminal statute, such as bankruptcy fraud (or if, after investigation, Criminal Investigation determines the evidence shows only a nontax criminal violation), the matter may be disclosed to

DOJ only under the procedures authorized in section 6103(i). These alternative disclosure routes are depicted in summary form in the chart found at the end of this chapter. See Chapter 5, for more information pertaining to disclosures of returns and return information for nontax criminal matters.

## **IV. EXAMPLES**

### **A. Debtor's Attorney**

Example 1 - Individual A files a petition in bankruptcy, listing Individual B as the attorney of record. The government has not filed a proof of claim or been named as a defendant in an adversary proceeding or a party to a contested matter. The IRS has made a pre-petition levy and B wants to negotiate a cash collateral agreement and/or obtain turnover of the property without incurring unnecessary litigation expenses. The IRS may discuss A's return information with B. I.R.C. § 6103(e)(6); IRM 11.3.3.1.6 (4). Reference: Part II.B.

### **B. Bankruptcy Court**

Example 2 - The debtor is operating a business and has failed to file pre-petition employment tax returns. SBSE Area Counsel has reason to believe, based on the business and/or other activities of the debtor, that the debtor has employment tax liabilities. The debtor's disclosure statement fails to list any employment tax liabilities. The IRS may make a referral to DOJ and ask that DOJ object to the adequacy of the disclosure statement. The case becomes one pertaining to tax administration at the time of the IRS's objection. Upon objection, the IRS could disclose the debtor's return information in the objection or in any subsequent proceedings pertaining to the objection. I.R.C. § 6103(h)(2) and 6103(h)(4). Reference: Parts I.C., I.D., II.F.

Example 3 - The Chapter 7 debtor files an adversary proceeding seeking a determination that his 2003-2006 income taxes are dischargeable. See B.C. §§ 507(a)(8); 523(a)(1)(B)(i). The taxes will not be discharged because the debtor did not file returns. B.C. § 523(a)(1)(B)(i). The IRS may disclose this during the bankruptcy case. I.R.C. § 6103(h)(4). Reference: Parts I.C., I.D., II.F.

Example 4 - The debtor files a petition under Chapter 13, owing no pre-petition taxes. The bankruptcy court confirms the debtor's Chapter 13 plan. After confirmation, the debtor incurs tax liabilities that are not paid. The IRS may disclose this information to the court in a proof of claim filed pursuant to section 1305 of the Bankruptcy Code, a motion to dismiss or convert the case, or other appropriate pleading. I.R.C. § 6103(h)(4). Reference: Parts I.C., I.D., II.F.

### **C. 341 Meeting**

Example 5 - The United States Trustee convenes and presides over a first meeting of the debtor's creditors. B.C. § 341; Fed. R. Bankr. P. 2003. This first meeting of creditors is held shortly after the petition is filed, typically before the IRS has filed its proof of claim for pre-petition taxes. During this meeting, the debtor is examined under oath by interested creditors. The purpose of the examination is to enable creditors and the trustee to determine the assets and liabilities of a debtor. An IRS employee may attend this meeting to elicit information concerning outstanding tax liabilities and to discern whether there are persons potentially responsible for unpaid trust fund taxes pursuant to the section 6672 penalty. If the IRS is listed as a creditor in the debtor's schedules, the IRS employee may disclose in the 341 meeting return information which will assist in the examination of the debtor. I.R.C. § 6103(h)(4). Reference: Parts I.C., II.F.

### **D. United States Trustee**

Example 6 - In a Chapter 11 case, the debtor-in-possession has failed to file post-petition employment tax returns or deposit post-petition employment taxes. An IRS employee may disclose this information to the United States Trustee, or the IRS may verify this information at the United States Trustee's request. I.R.C. § 6103(h)(4). In addition, the IRS may disclose this information to the court in a request for payment of administrative expenses, in a motion to convert or dismiss, or other appropriate pleading. The information may also be discussed at any hearing held on such motion. Reference: Parts I.C., I.D., II.F.

Example 7 - The IRS learns that the debtor has property interests that he has not disclosed to the bankruptcy court (or has committed some other act that may constitute bankruptcy fraud). If the bankruptcy case pertains to tax administration (e.g., the IRS has filed a proof of claim and made a referral to DOJ), this information may be disclosed to the court and to the United States Trustee in order to assist in collecting the IRS's claim. I.R.C. § 6103(h)(4). If the case does not pertain to tax administration, the procedures in section 6103(i) must be followed in order to make any disclosures.

### **E. Trustee for the Case**

Example 8 - Several creditors file an involuntary petition in bankruptcy against the debtor, an individual. The court has not yet entered an order for relief. The IRS has information indicating that debtor is insolvent (*i.e.*, generally not paying debts as they come due), which is relevant to determining whether the court should grant an order for relief. B.C. § 303(h). No trustee has been appointed. The case does not pertain to tax administration. Creditors subpoena the IRS records for use at the court hearing. The IRS should oppose the subpoena on

the basis that section 6103(e)(5)(C) and (e)(7) only permits disclosures to the trustee, not to creditors. Reference: Part II.C.

Example 9 - In a Chapter 7 "no-asset" liquidation case, the debtor, an individual, has no outstanding tax liabilities, and the IRS has not filed a proof of claim. The debtor, a calendar year taxpayer, filed his petition in bankruptcy on November 1, 2008, and subsequently moved from the residence listed on the petition. In July 2010, the trustee asks the IRS for the debtor's latest address. This address would come from the debtor's 2009 return. The address cannot be disclosed because it is return information from a year subsequent to the commencement of the case. I.R.C. § 6103(e)(5). Reference: Part II.C.

Example 10 - In attempting to recover a fraudulent transfer, the trustee requests the debtor's return for a year prior to the filing of the petition to see how a transaction was treated. Upon written request, the return may be disclosed to the trustee. I.R.C. § 6103(e)(4), (5). Reference: Parts II.C., II.D.

Example 11 - The IRS has knowledge of a pre-petition transfer of property without adequate consideration from the debtor to her daughter. The bankruptcy case is a Chapter 7 "no-asset" liquidation case in which the IRS has not filed a proof of claim. If the transferred property were an asset of the estate, the IRS would have priority over some of the debtor's other creditors, and could thus obtain a portion of any proceeds of sale. The IRS may disclose the transfer to the trustee, so that the trustee could commence an action to bring the property into the bankruptcy estate for administration. I.R.C. § 6103(e)(5), (7). Reference: Part II.C.

Example 12 - The trustee in a Chapter 13 bankruptcy requests that the IRS verify that the returns provided by the debtor were actually filed with the IRS. Absent the debtor's consent made pursuant to section 6103(c), the IRS cannot disclose the requested information to the trustee. I.R.C. § 6103(c). Reference: Part II.D.

## **F. Creditors**

Example 13 - A creditor (or the creditors' committee) or interested party in the bankruptcy case seeks to contest the amount or priority of the IRS's claim. After the contested matter has been commenced, the creditor may obtain the debtor's return information to contest the amount or priority of the IRS's claim pursuant to section 6103(h)(4) (unless disclosure would identify a confidential informant or seriously impair a civil or criminal tax investigation). Although it would be unusual for a creditor to object to the claim of another creditor, B.C. § 502(b) would permit such an objection. Reference: Parts I.C., I.D., II.F.

Example 14 - A previously uninvolved creditor wants information about the debtor's tax situation in considering the debtor's request for fresh financing. Since the creditor is not yet a party or party in interest to the proceeding, the creditor



could not obtain the information pursuant to section 6103(h)(4). However, the creditor may obtain the information by securing a written consent from the debtor for release of the information. I.R.C. § 6103(c). Reference: Parts I.C., I.D., II.F.

Example 15 - A creditor wants to obtain general information concerning the existence or amount of a federal tax claim, the filing date for the Notice of Federal Tax Lien, or the date of the assessment. If the IRS has filed a claim, and the creditor is a party to the proceeding, this information would be available under section 6103(h)(4). This information is in the public record (the date of assessment is on the Notice of Federal Tax Lien), and may be disclosed. In addition, the IRS may disclose the fact that no claim has been filed. However, to the extent a claim has not yet been filed, and the case does not otherwise pertain to federal tax administration, the IRS would be prohibited from disclosing whether a claim will or will not be filed or its other intentions with respect to the debtor. Reference: Parts I.C., I.D., II.F., II.G.

Example 16 - The attorney for the creditors' committee inquires about the status of negotiations between debtor and the IRS concerning a shortfall in payments to debtor's pension plan, which forms the basis for the IRS's proof of claim. The attorney also inquires as to the IRS's position with respect to a proposed plan of reorganization as it relates to the IRS's claim. This information may be disclosed under section 6103(h)(4). Reference: Parts I.C., I.D., II.F.

Example 17 - As part of a plan of reorganization, the debtor will transfer the bulk of her property to a liquidating trust for the benefit of creditors. The attorneys for the creditors' committee wish to know the IRS's position with respect to: (1) the tax consequences to the debtor or the estate of the transfer; and (2) the taxation of the liquidating trust. Absent the debtor's consent, the tax consequences of the transfer, *i.e.*, whether and to what extent the debtor or the estate recognizes gain or loss, should not be discussed with the creditors' committee's attorneys unless and until the IRS takes some formal action in the case regarding the transfer, *i.e.*, objecting to the plan and/or attempting to have an escrow or reserve set aside for any resulting tax. Because a trust's returns and return information may be disclosed to any beneficiary (if the IRS determines that the beneficiary has a material interest that will be affected by the information), the creditors could discuss with the IRS the taxation of the liquidating trust. I.R.C. § 6103(e)(1)(F)(ii), (e)(7). (Further, this would not prevent the IRS from discussing such matters with the debtor, nor would it prevent the debtor from making a ruling request regarding the tax consequences of the transaction.) Reference: Parts I.C., I.D., II.B., II.F.

Example 18 - The IRS possesses a large income tax refund that is scheduled as an asset of the debtor. The IRS is not otherwise involved in the bankruptcy case. Another federal agency has a claim against the debtor. The case does not pertain to tax administration and disclosure of this information to the other agency would not be permitted under section 6103(h)(4). However, because the

schedule of assets is in the public record, the IRS may notify the agency that the schedule lists the tax refund as an asset of the estate. See discussion, above and Chapter 2, concerning matters of public record. The IRS would not, however, be able to disclose any information from its administrative file, such as information that may confirm the existence or amount of the claim for refund. The other agency may inform the IRS of such claim and ask that the IRS freeze the refund so it is available for administrative offset (assuming that relief from the automatic stay is obtained or the stay is no longer in effect). In response to the request, the IRS, without confirming the existence or amount of refund if not reflected in the public record, will freeze any refund that might be owing. See I.R.C. §§ 6103(l)(10), 6402(d). Reference: Part II.G.

## **G. Department of Justice**

Example 19 - The United States Attorney, representing the Department of Defense, wants access to a Chapter 7 debtor's returns in order to develop information on which to base an objection to discharge. The debtor has timely filed all employment tax returns, and is not otherwise delinquent in any tax obligations. Disclosure is not permitted because the case does not involve tax administration. Reference: Parts I.C., I.D., II.E.

Example 20 - The debtor is currently under audit. The IRS may advise DOJ that the debtor is under audit if each of the following conditions is met: (a) the bankruptcy pertains to tax administration; and (b) an appropriate referral has been made. The audit information disclosed should be relevant to the tax administration aspects of the bankruptcy case. Reference: Parts I.C., I.D., II.E.

Example 21 - A debtor who recently filed for bankruptcy is currently under examination. The audit is not going to be resolved by the bar date for filing proofs of claim. The IRS should determine whether a motion to extend the bar date should be filed. Upon deciding to seek an extension, a referral should be made to request DOJ's representation. After the referral, the disclosure of items of returns and return information necessary, *i.e.*, helpful and appropriate, to support the motion may be made (*e.g.*, a description of the complexity of the audit or the involvement of the listed transaction). Reference: Parts I.C., I.D., II.E.

Example 22 - A DOJ attorney is aware of the bankruptcy filing by a highly visible individual. The DOJ attorney calls the IRS and asks what the IRS plans to do in the case. Although there is an ongoing audit, the agent believes that an agreement will be reached with respect to most issues. Such information cannot be disclosed to DOJ attorney unless and until the IRS determines that it will be filing a motion or a proof of claim in the bankruptcy. Reference: Parts I.C., I.D., II.E.

Example 23 - A corporate debtor with 150 related entities, only some of which are part of the consolidated group, files for bankruptcy. The debtors agree to a

stipulation that will allow the federal government to negotiate a combined proof of claim from the IRS for the entire consolidated group, since all are severally liable for the liabilities. The request for stipulation makes the bankruptcy case a tax administration proceeding even though the IRS has not yet filed a claim. If the IRS determines that DOJ's representation is necessary, a referral may be made so as to allow DOJ to negotiate with the debtor on the IRS's behalf. The returns and return information of related entities outside the consolidated group may be disclosed to DOJ so long as such information is necessary to fulfill the purpose of the referral and meets the requirements of section 6103(h)(2)(B)-(C). Reference: Parts I.C., I.D., II.E.

## **H. Criminal Violations**

Example 24 - The IRS is aware, from a prior schedule of assets filed in a Tax Court case or in a Collection Information Statement, that the debtor has omitted assets from the bankruptcy schedules. The IRS has filed a proof of claim, and would benefit from having the assets included in the debtor's estate. This information may be disclosed in the bankruptcy case in order to obtain the return of the assets to the bankruptcy estate. I.R.C. § 6103(h)(4). In addition, to the extent that omitting the assets constitutes both a crime under Title 26 and the bankruptcy fraud provisions, disclosure could be made in connection with a criminal tax referral as a tax administration matter. I.R.C. § 6103(h)(2); Treas. Reg. § 301.6103(h)(2)-1(a)(2). Reference: Parts I.C., I.D., II.E., II.F., II.G., III.B.

Example 25 - The facts are the same as in Example 24, except the debtor is in full compliance with the tax laws and the case is not otherwise a tax administration proceeding. Disclosure to the United States Attorney of information regarding the omitted assets is not permitted under section 6103(h)(2). The result should be the same even if the IRS is monitoring the taxpayer for post-petition tax compliance. Disclosure under these circumstances would only be permitted under section 6103(i). However, if the debtor's schedule of assets is in the record in the Tax Court proceeding, the "public record exception" may permit disclosure. See discussion, above and Chapter 2, concerning matters of public record. Reference: Parts I.C., I.D., II.E., II.G., III.A and B.

## **I. Debtor's Employees/Customers**

Example 26 - The debtor's employees may be interested in the debtor's continued financial health, or, at the very least, in obtaining wage payments. To the extent that the employees are creditors, *e.g.*, with respect to wages, disclosure could be premised on section 6103(c) (consent) or (h)(4) (tax administration). The same rules would apply to the debtor's customers, to the extent that the customer is a

creditor, e.g., with respect to undelivered goods.<sup>55</sup> In addition, the “public record exception” may permit certain disclosures to customers or employees, such as the amount of the IRS's claim. Further, if the employees also are one-percent shareholders, information may be available under section 6103(e)(1)(D)(iii) and (e)(7). Reference: Parts I.C., I.D., II.B., II.F., II.G.

## **J. Debtor's Spouse**

Example 27 - In a Chapter 13 case, the IRS has filed a proof of claim with respect to tax due on a jointly filed return. The husband and wife are separated, and only one spouse has filed for bankruptcy. The debtor spouse has asserted that the non-debtor spouse forged her signature on the joint return. Returns and return information with respect to the jointly filed returns would be available to either spouse under section 6103(e). Also, returns and return information with respect to the jointly filed returns could be introduced in the bankruptcy proceeding under section 6103(h)(4). The determination that the bankruptcy case is a tax administration proceeding may also permit disclosure of returns and return information relating solely to the non-debtor spouse's separate return years, if it meets the "item" or "transaction" tests in section 6103(h)(4)(B) or (C). Reference: Parts I.C., I.D., II.A., II.F.

Example 28 - Husband and wife file separate income tax returns. Husband files for bankruptcy under Chapter 7. The trustee seeks wife's returns to assist in determining what property is in the estate. Wife's separately filed returns may not be disclosed without her consent (unless otherwise authorized under section 6103(h)(4)(B)-(C)). Reference: Parts II.A., II.B.

## **K. Significant Bankruptcy/Insolvency Case Program under CCDM 34.3.1.3**

Example 29 - As a result of reviewing a plan of reorganization in a Chapter 11 bankruptcy, pursuant to CCDM 34.3.1.3.4, an Associate Chief Counsel's office provides oral and written advice to Counsel and the IRS regarding the validity of a purported asset sale. Counsel also determines that certain statements made in the disclosure statement regarding the tax consequences of the plan are objectionable. The IRS may disclose this information in an objection to the disclosure statement filed with the court, and that same information may be discussed at any subsequent proceeding regarding the objection.<sup>56</sup> Reference: Parts I.C., I.D., II.A., II.B., II.F.

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<sup>55</sup> Disclosure in this situation may also be permissible under section 6103(k)(2) where a federal tax lien is filed.

<sup>56</sup> If the IRS does not file an objection in the bankruptcy case, disclosure of the objections would not be permitted in the bankruptcy case pursuant to section 6103(h)(4). However, the IRS could discuss the plan and the IRS's objections with the debtor or with the debtor's attorney of record. IRM 11.3.3.1.6.(4). The information could also be discussed with creditors or the court pursuant to a written consent executed by the debtor pursuant to section 6103(c).

## **L. Third-Party Return Information**

Example 30 - A plan of reorganization attempts to designate payments to trust fund taxes. The responsible officers have significant unpaid tax liabilities from other businesses or unpaid 1040 liabilities. The information pertaining to responsible officers is third-party return information. Such information cannot be disclosed because the third-party return information is not directly related to the resolution of an issue in the proceeding nor is such information directly related to a transactional relationship between a person who is a party to the proceeding and the taxpayer which directly affects the resolution of an issue in the proceeding. See I.R.C. § 6103(h)(4)(B) and (C). As such, the IRS cannot disclose these other liabilities in its objection to the plan. Reference: Parts I.C., I.D., II.F.

Example 31 - The trustee, in attempting to recover a fraudulent transfer, requests the debtor's principals' returns to see how a transaction was treated. If the case pertains to tax administration, information in the debtor's principals' returns will arguably meet the item or transaction tests if it is directly related to the resolution of an issue in the proceeding. If the transfer does not impair the IRS's ability to collect the tax, the information should not be disclosed because it is not directly related to resolving the matter. If the proceeding does not otherwise pertain to tax administration, the third-party returns and return information may not be disclosed. Reference: Parts I.C., I.D., II.F.

Example 32 - The principal of a Chapter 11 debtor proposes in the plan that his individual income tax refund be applied to corporate debts. These refunds are not available because the section 6672 penalty has been assessed or because the individual owes past income tax liabilities. This information may be disclosed to DOJ and in bankruptcy court. I.R.C. § 6103(h)(2) and (4)(C). Reference: Parts I.C., I.D., II.F.

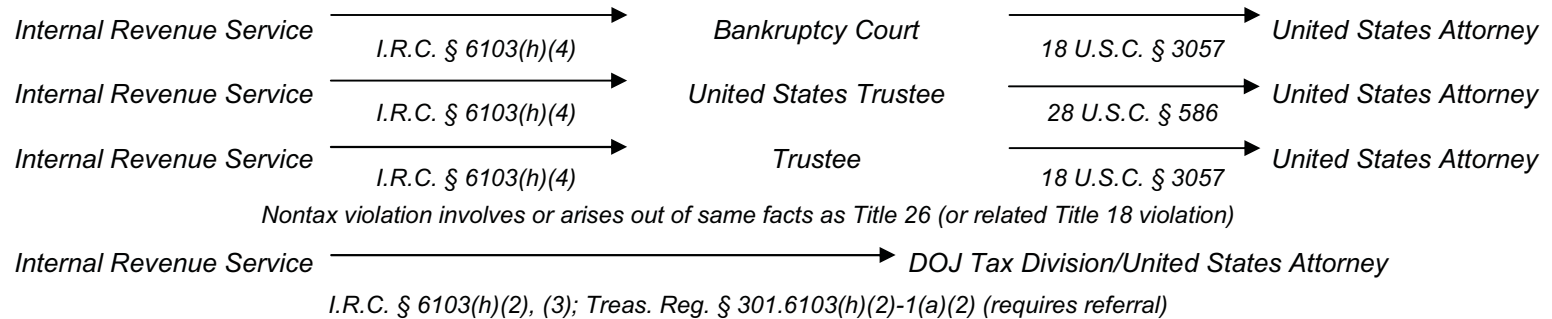
Example 33 - The trustee seeks to prove that an entity related to the debtor is the alter ego of the debtor, in order to bring its assets into the estate. The trustee seeks to obtain the non-debtor entity's returns (or to determine whether the entity did not file returns) in order to prove the relationship. In a tax administration case, the existence of the alter ego relationship establishes the requisite "transactional relationship." The information may be disclosed under section 6103(h)(4)(C), if it bears on the IRS's tax claim and directly affects the resolution of an issue in the proceeding. Reference: Parts I.C., I.D., II.F.

Example 34 - The basis for the IRS's proof of claim is the debtor's erroneous treatment of certain individuals as independent contractors rather than employees. The IRS has computed the debtor's liability for withheld income and FICA taxes under section 3509. The debtor seeks to obtain credit for the amount of income and self employment tax paid by those employees, to reduce the IRS's claim. While there is a transactional relationship between the debtor and those

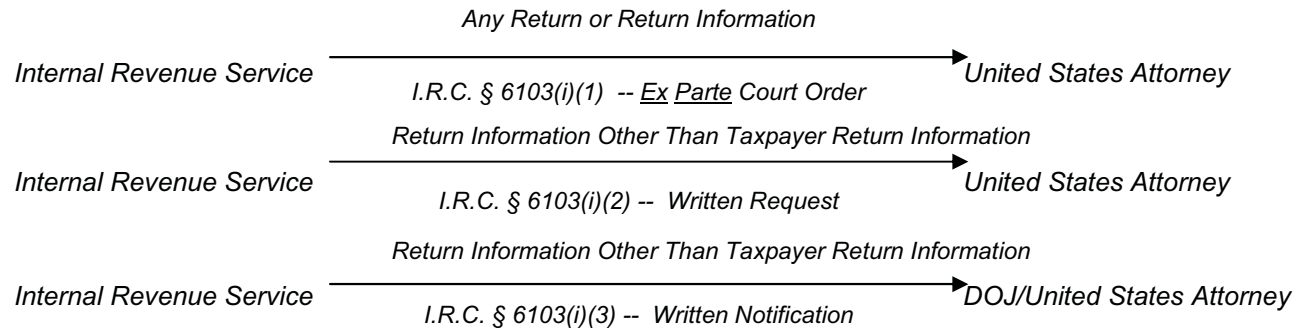
individuals, the amount of tax reported by individual employees is not relevant (and the employer does not get credit for such taxes) because an employer whose liability is determined under section 3509 is not entitled to recover from the employee any tax so determined. Thus, the individuals' returns and return information may not be disclosed. However, to the extent that the information is directly related to resolving whether the individuals are employees or independent contractors, such information may be disclosed. See Guar. Mut. Life Co. v. United States, Civ. No. 77-0-407, 1978 WL 4574 (D. Neb. Aug. 28, 1978); Cory Pools v. United States, 213 Ct. Cl. 751, 751-52 (1977); L.A.S. Enters., Inc. v. United States, 213 Ct. Cl. 698, 699-700 (1977). Reference: Parts I.C., I.D., II.F.

## Disclosure of Returns and Return Information Indicating Possible Nontax Criminal Violations

### I. Tax Administration Cases\*



### II. Nontax Administration Cases



### III. Any Case (Tax or Nontax) Where a Trustee Has Been Appointed



\* In general, a bankruptcy case pertains to tax administration if the bankruptcy court's involvement is needed to determine a matter pertaining to assessment or collection of tax, or is otherwise needed to enforce the internal revenue laws.

## CHAPTER 7

### BANK SECRECY ACT, MONEY LAUNDERING, FORFEITURE AND RETURN INFORMATION

#### I. TITLE 31 – BANK SECRECY ACT

##### A. Introduction

The Bank Secrecy Act (BSA) was enacted by Congress in 1970 to address law enforcement officials' concerns regarding the unavailability of foreign and domestic bank records of customers who were suspected of being engaged in activities entailing criminal or civil liability. See Pub. L. No. 91-508, 84 Stat. 1114 (1970) (codified at scattered sections of 12, 18, and 31 U.S.C), *amended by* Pub. L. No. 107-56, 115 Stat. 327 (2001).

The basic purpose of the BSA is to require certain reports or records that have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings. 31 U.S.C. § 5311. Regulations were promulgated under the BSA to require, for example, that each financial institution, other than a casino, shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to the financial institution that involves a transaction in currency of more than \$10,000. 31 C.F.R. § 103.22. These reports must be filed with the IRS. 31 C.F.R. § 103.27(a)(4). These reporting requirements are generally implemented through the use of Currency Transaction Reports (CTRs), FinCEN Form 104. The BSA and its implementing regulations contain several other reporting requirements, all of which are intended to prevent and/or uncover various financial crimes.

Information evidencing the fact of a payment, receipt, or transfer of currency in amounts over \$10,000 has tax implications for all parties to the transaction. Depending on the particular circumstances, this information could disclose: (1) the nature, source, or amount of the taxpayer's income; (2) his payments or receipts; (3) his assets or liabilities; or (4) data received by the IRS with respect to the determination of the possible existence of liability under Title 26. Of course, if the information was collected by the IRS in administering the internal revenue laws, it would be protected from disclosure by section 6103 because these items are specifically listed in the definition of return information in section 6103(b)(2).

The BSA legislative reports stressed how the recordkeeping and reporting requirements of the BSA would address a wide range of law enforcement investigatory and regulatory concerns. H. R. REP. NO. 91-975 (1970); S. REP. NO. 91-1139 (1970). In its discussion of Treasury's authority to prescribe recordkeeping requirements for owners of foreign bank accounts, the Senate



Report stated that "*the Secretary would not be limited to the narrower objectives of the Internal Revenue Code, but rather the objectives spelled out*" in the Currency and Foreign Transactions Reporting section of the Act. S. REP. NO. 91-1139, at 9 (emphasis added). Congress never intended for the BSA to be primarily a tax enforcement tool; rather, it sought to enact expansive legislation to aid the enforcement of numerous federal laws including the internal revenue laws. See Cal. Bankers Ass'n v. Schultz, 416 U.S. 21 (1974).

## **B. Title 31 and Title 26**

When it enacted section 6103 in 1976, Congress acknowledged that the primary responsibility of the IRS is the enforcement of the internal revenue laws. The BSA was an existing statutory scheme that Congress evidently did not consider in drafting section 6103. Nor was the BSA considered when section 6103 was revised in 1982 to streamline access procedures for nontax federal criminal cases found in section 6103(i), which provides for disclosures to federal officers or employees for administration of federal laws not relating to tax administration. See Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 356(a), 96 Stat. 324, 641-45 (1982); section 358(a) of 96 Stat. at 646-47; section 358(b)(1) of 96 Stat. at 648; section 358(b)(2) of 96 Stat. at 648. See *also* Chapter 5 for additional information on section 6103(i). Nevertheless, Treasury delegated primary investigative jurisdiction for possible criminal violations of the BSA to the IRS. 31 C.F.R. § 103.56(c)(2); Treas. Dir. 15-41 (Dec. 1, 1992). Disclosure issues can, and often do, arise when IRS agents attempt to fulfill their obligations under both the BSA and the Code.<sup>57</sup>

Pursuant to section 6103(h)(1), returns and return information shall, without written request, be open to inspection by or disclosure to officers and employees of the Department of Treasury (including IRS employees) whose official duties require such inspection or disclosure for tax administration purposes. See *generally* Chapter 3. When seeking to access returns or return information while conducting a BSA investigation, which is not a tax administration purpose, the IRS agent must be treated as if he or she were an employee of another federal agency, and must rely on some other authority in section 6103 to obtain the information. Generally, where special agents are assisting other agencies in nontax criminal investigations, no disclosures can be made to those special agents unless section 6103(i) procedures are followed. See *generally* Chapter 5.

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<sup>57</sup> Whereas Criminal Investigation (CI) has been responsible for most BSA enforcement activities delegated to the IRS, in April 2003, Small Business/Self Employed (SBSE) was given responsibility for Foreign Bank and Financial Accounts Reports (FBAR) civil penalty enforcement. The same disclosure analysis applies whether CI or SBSE is conducting enforcement, bearing in mind that disclosure authority for nontax criminal investigations under section 6103(i) will not be available to SBSE when enforcing a *civil* penalty only.

Therefore, if an IRS employee is working on a nontax criminal investigation with another agency (for example, a Title 31 case with the Drug Enforcement Agency), the IRS employee would not be able to obtain necessary returns or return information unless the agency under whose auspices the investigation is being conducted first complied with section 6103(i). Similarly, if the IRS employee had obtained returns or return information while previously working a criminal tax case, the employee could not disclose that information during the nontax administration investigation unless the other agency first complied with section 6103(i).

### **C. Related Statute Determination**

Given the close relationship between money laundering and tax evasion, there are some investigations involving *both* Title 26 and Title 31 offenses. Section 6103(b)(4) defines “tax administration” as encompassing the administration, management, conduct, direction, and supervision of the internal revenue laws and related statutes. A joint Title 26 and Title 31 investigation is a tax administration investigation, subject to the disclosure provisions of section 6103.

IRS procedures found in the IRM specifically address situations where special agents, operating under the authority granted by the Deputy Assistant Secretary for Terrorist Financing and Financial Crimes to investigate certain Title 31 matters, discovered that a Title 31 violation may have been committed as part of a pattern of violating the internal revenue laws. The IRM provides that, if an appropriate IRS official makes that determination *in writing*, the Title 31 investigation is considered to be tax administration under the “related statute” portion of the definition of tax administration.

Whether or not the BSA or any other statute is “related” to the internal revenue laws within the meaning of section 6103(b)(4) depends on the nature and purpose of the statute and the facts and circumstances in which the statute is being enforced or administered. These statutes cannot be considered related in all situations, but only when being enforced by IRS personnel in matters arising out of or in connection with the enforcement of Title 26.<sup>58</sup>

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<sup>58</sup> IRM 9.3.1.4.3.1.1.2 reads in relevant part as follows:

- (1) Returns and return information may be used or disclosed to initiate or conduct a money laundering investigation if the investigation is considered for tax administration purposes according to 26 U.S.C. § 6103(b)(4). When investigating potential money laundering or Bank Secrecy Act (BSA) violations, the key test (related statute test) is whether, under the facts and circumstances of the particular case, the money laundering and BSA provisions are considered related to the administration of the Internal Revenue laws.
- (2) The related statute determination is within the good faith judgment of the SAC [Special Agent in Charge]. This determination is also (continued on next page)

To the extent that a BSA violation is committed in contravention of the internal revenue laws, the BSA can be considered a related statute, even though the IRS may not choose to pursue the Title 26 connection. Furthermore, the character of the Title 31 violation, *i.e.*, that it is tax related, is unaffected by whatever action the IRS takes or chooses not to take on the Title 26 case.

#### **D. Effect of the Related Statute Determination**

A determination that a Title 31 investigation meets the related statute test involving tax administration authorizes IRS employees to access returns or return information in conducting an investigation. That determination does not, however, give IRS employees carte blanche authority to disclose returns or return information. Subsequent disclosures may be made only if authorized by section 6103. For example, returns or return information obtained by an IRS employee during the related statute Title 31 tax administration investigation may be disclosed to Department of Justice (DOJ) as part of that investigation only if the disclosure is consistent with sections 6103(h)(2) and (h)(3).

In short, the IRS and DOJ, in a Title 31 related statute investigation, are subject to the same disclosure rules that apply to disclosures during a pure Title 26

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- known as the "related statute call." The SAC will make such determination in memorandum form with his or her signature for placement in the administrative investigative file. Returns and return information cannot be used to evaluate information related to a money laundering investigation to determine whether a related statute call should be made.
- (3) The factors to be considered are whether the offense:
    - a. was committed in furtherance of a violation of the Internal Revenue laws, or
    - b. is part of a pattern of violations of the Internal Revenue laws.
  - (4) Once the related statute determination is made by the SAC, all the information received, collected, and developed by the IRS, in that investigation, is protected from disclosure under 26 U.S.C. § 6103 regardless of whether or not a formal tax investigation is opened and/or the ultimate determination with respect to any potential Title 26 charges.
  - (5) Once the related statute determination is made, 26 U.S.C. § 6103(h)(1) allows for the disclosure of returns and return information to Treasury Department employees whose official duties require inspection or disclosure for tax administration purposes.  

. . . .
  - (9) It is not necessary to establish a Title 26 violation or a numbered Title 26 investigation to meet the related statute test. However, if subsequent to a related statute determination, the investigation is not expanded to include Title 26, then an *ex parte* court order must be obtained to utilize the return and return information.

criminal tax case. If the IRS discloses returns or return information as part of a referred Title 31 tax administration investigation, DOJ can further disclose that information only in accordance with section 6103(h) and Treas. Reg. § 301.6103(h)(2)-1.<sup>59</sup>

If there are no possible Title 26 violations, Title 31 could not be a statute related to tax administration for section 6103 purposes and any subsequent disclosures could only proceed in accordance with section 6103(i). The decision regarding whether a Title 31 investigation involves tax administration is to be made by the IRS, not by other agencies (including DOJ). If the IRS does not make that determination, returns or return information may not be disclosed to the IRS employee during the course of that Title 31 investigation, nor may disclosures be made by the IRS to DOJ or any other federal agency, except in accordance with section 6103(i).

There are two practical effects of a related statute determination. One is that it permits the IRS employee conducting the investigation to access returns or return information under section 6103(h)(1) when the employee has a legitimate tax administration need for the information. The second is that information collected or generated in that investigation after the related statute call has been made is protected by section 6103.<sup>60</sup>

#### **E. When Does Information Gathered in a Title 31 Investigation Become Return Information?**

Data collected by IRS personnel pursuant to their enforcement responsibilities under the BSA in a "pure" Title 31 investigation is not return information under section 6103. In a "pure" Title 31 investigation, i.e., where no Title 26 related statute determination has been made, the information is subject to the disclosure rules found at 31 U.S.C. § 5319, 31 C.F.R. § 103.53, and Treasury's Financial Crimes Enforcement Network (FinCEN) Re-Dissemination Guidelines for Bank Secrecy Act Information. See IRM Exhibit 4.26.14-2 for the 2004 version of the Guidelines. As previously noted, although Congress recognized the usefulness of BSA information in enforcing internal revenue laws, it never intended for BSA

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<sup>59</sup> Even if a related statute call has been made, that does not authorize the IRS or DOJ to disclose information to other agencies involved in the nontax aspects of a BSA or money laundering investigation, absent a section 6103(i) order. The regulations permitting the use of return or return information in joint tax/nontax grand jury investigations require that the tax portion of the proceeding be authorized by the Assistant Attorney General (Tax Division). Treas. Reg. § 301.6103(h)(2)-1(a)(2)(ii). Money laundering and BSA investigations generally are not authorized by the Tax Division, even where a related statute call has been made.

<sup>60</sup> Although there are no cases addressing the related statute determination, there are cases suggesting that a money laundering charge, standing alone, is not "tax administration." See United States v. Hobbs, 991 F.2d 569, 573 (9th Cir. 1993); United States v. Callahan, 981 F.2d 491, 494 n.3 (11th Cir. 1993), *cert. denied*, 508 U.S. 976 (1993).

information to be used solely for this purpose. It follows that, when the IRS is carrying out responsibilities delegated to it by the Deputy Assistant Secretary for Terrorist Financing and Financial Crimes, every piece of data collected pursuant to a BSA investigation does not become "return information" simply because one of the Act's purposes is related to tax administration.

The IRS's BSA enforcement role must be viewed as distinct from its primary role of enforcing the internal revenue laws. When the IRS is operating strictly within the parameters of responsibility assigned to it by the BSA, the data collected is not considered return information and is not subject to the disclosure provisions of section 6103.

When Title 31 has been determined to be a statute related to tax administration for section 6103 purposes, the entirety of the information is covered by section 6103 because it was received by the Secretary for the purpose of determining some individual's liability or potential liability under the Code. Courts interpret the term "return information" broadly. See I.R.C. § 6103(b)(4). Specifically, "return information" includes targets of IRS tax investigations and any information gathered by the IRS with regard to the target's liability *or possible liability* under the Code. See *generally* Chapter 2. Once information is deemed "return information," it may be disclosed only under the provisions of section 6103.

The definition of "return information" comprises information collected by the IRS when it is focusing on a particular activity and attempting to evaluate the tax consequences of the individuals or entities involved in the activity, as well as:

summaries of the case, memoranda of interviews with witnesses, assorted agency workpapers dealing with the computation of . . . taxes, reports by different agents who have worked on the case, and letters or memoranda from one Service official to another dealing with different aspects of the case.

Chamberlain v. Kurtz, 589 F.2d 827, 840 (5th Cir.), *cert. denied*, 444 U.S. 842 (1979). Therefore, all information obtained by IRS personnel during the course of their official duties to investigate liability *or possible liability* under the internal revenue laws is return information. See I.R.C. § 6103(b)(2)(A).

It may not always be easy to separate pure BSA data from Title 26 return information, and there is no case law to provide guidance on this point. However, two things are clear: (1) courts have given an expansive definition to the term "return information"; and (2) the predicate for a related statute investigation is that the matter at issue is part of a scheme to evade the internal revenue laws.

Using the related statute call as a touchstone, information received or generated by the IRS pursuant to its enforcement responsibilities under the BSA—and the

BSA only—is not return information as defined in section 6103(b)(2), and is not subject to the disclosure rules of section 6103. If a related statute call is subsequently made, all of the information, including investigatory information received or generated in the BSA investigation prior to the related statute call, is return information as defined in section 6103(b)(2) and is subject to the disclosure rules of section 6103, regardless of whether a formal tax case is opened. See *generally* IRM 9.3.1.4.3.1.1.2.

## II. TITLE 18 MONEY LAUNDERING OFFENSES

In addition to Title 31 investigations, IRS special agents also have the authority to conduct money laundering investigations under 18 U.S.C. §§ 1956 and 1957, pursuant to the authority granted to them by Treasury Directive 15-42 (Jan. 21, 2002). Under this Directive, the Deputy Assistant Secretary for Terrorist Financing and Financial Crimes has delegated to the IRS investigatory, seizure, and forfeiture authority for violations of these sections discovered during the course of Title 26 or BSA investigations. The IRS may also seize property pertaining to these violations, if the agency with investigatory authority, *e.g.*, the FBI, is not present to make the seizure. In such cases, the IRS must turn over the property to that agency/bureau.

Title 18, section 1956 deals with laundering of monetary instruments and section 1957 pertains to engaging in monetary transactions in criminally derived property. Generally, neither of these sections is primarily concerned with violations of the internal revenue laws. Rather, 18 U.S.C. §§ 1956 and 1957 investigations are part of a larger effort to hinder the flow of illegally acquired money. Therefore, if a special agent working on a money laundering investigation wants to access returns or return information, either a related statute determination must be made or the agent must follow the procedures set forth in sections 6103(i)(1), or (i)(2).<sup>61</sup>

Similar to Title 31 investigations, the special agent may access returns or return information under the authority of section 6103(h)(1) only if conducting a tax administration investigation. The one exception to this rule is for investigations conducted pursuant to 18 U.S.C. § 1956(a)(1)(A)(ii). This section was designed to cover transactions conducted to facilitate violations of sections 7201 and 7206 of the Code. In short, 18 U.S.C. § 1956(a)(1)(A)(ii) requires that a transaction be conducted with the intent to facilitate tax evasion and that the funds involved represent the

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<sup>5</sup> In multi-agency money laundering investigations, an *ex parte* order under section 6103(i)(1) must be obtained to disclose returns or return information to other agencies involved in the investigation, even where a related statute call has been made. This is because Treas. Reg. § 301.6103(h)(2)-1(a)(2)(ii), which permits the use of returns or return information in joint tax/nontax grand jury investigations, requires that the tax portion of the proceeding be authorized by the Assistant Attorney General (Tax Division), which is not done in IRS money laundering investigations where a related statute determination is made, except with respect to 18 U.S.C. § 1956(a)(1)(A)(ii).

proceeds of "specified unlawful activities," including racketeering and foreign drug operations. See S. REP. NO. 99-433, at 11-12 (1986).

Given the relationship between 18 U.S.C. § 1956(a)(1)(A)(ii) and tax evasion, investigations conducted pursuant to this section are *per se* tax administration and returns or return information can always be accessed pursuant to section 6103(h)(1). By the same token, information received or generated during the section 1956(a)(1)(A)(ii) investigation is return information protected by section 6103. See *generally* IRM 9.3.1.4.3.1.1.2.

### **III. CIVIL FORFEITURES**

Whether returns or return information may be disclosed to DOJ to further its efforts to effect civil forfeitures depends, primarily, on whether the forfeiture relates to tax administration.

#### **A. Civil Forfeitures under 18 U.S.C. § 981**

Congress enacted 18 U.S.C. § 981 to provide a means for the government to seize and bring an action for the forfeiture of property involved in transactions that violate the currency transactions reporting requirements of 31 U.S.C. §§ 5313 and 5324 and the money laundering provisions of 18 U.S.C. §§ 1956 and 1957.

Like BSA and money laundering matters, a civil forfeiture under 18 U.S.C. § 981 is a matter pertaining to tax administration only if the IRS makes the appropriate related statute determination. If such determination is made, a special agent working on the 18 U.S.C. § 981 forfeiture could access returns or return information under section 6103(h)(1). The IRS also could disclose returns or return information to DOJ in preparation for the judicial or administrative tax administration forfeiture proceeding if the matter was properly referred, pursuant to section 6103(h)(3)(A), and if the disclosure otherwise complied with the provisions of section 6103(h)(2). Disclosures in any subsequent administrative or judicial tax administration forfeiture proceeding would be subject to section 6103(h)(4). See *generally* Chapter 3.

Disclosures of returns or return information to DOJ for an 18 U.S.C. § 981 forfeiture are not limited to situations where there has been a criminal referral of a related statute BSA or money laundering investigation. These disclosures can also be made for an 18 U.S.C. § 981 forfeiture before, or in lieu of, the criminal referral if: (1) a related statute call has first been made; (2) the forfeiture case has been properly referred pursuant to section 6103(h)(3)(A); and, (3) the requirements of section 6103(h)(2) are followed.

Section 6103(h)(2), which sets forth the criteria for disclosures to DOJ, and section 6103(h)(4), which sets forth the criteria for disclosure in the proceeding

itself, are closely related. Sections 6103(h)(2)(A) and (h)(4)(A) permit the disclosure of returns or return information if:

the taxpayer is a party to the proceeding, or the proceeding arose out of, or in connection with, determining the taxpayer's civil or criminal liability, or the collection of such civil liability, in respect of any tax imposed under [Title 26].

I.R.C. § 6103(h)(2)(A) and (h)(4)(A).

The first part of these sections ("the taxpayer is a party to the proceeding") does not apply in civil forfeiture matters since the forfeiture proceeding is an *in rem* action, and reflects the legal fiction that the property itself is the party that facilitated the crime. See Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 680, *reh'g denied*, 417 U.S. 977 (1974). However, the second part of the above-quoted language of sections 6103(h)(2)(A) and (h)(4)(A) forms the basis for disclosure because the related statute civil forfeiture proceeding, by definition, "arise[s] out of or in connection with" determining the taxpayer's liability, or collecting civil liability, with respect to Title 26 taxes. That is, the IRS predicates the disclosure on an institutional determination that the underlying Title 31 and/or Title 18 violation relates to tax administration because the violation was committed either in furtherance of, or as part of, a pattern to violate the internal revenue laws.

Under sections 6103(h)(2) and (h)(4), the strongest case for disclosure can be made in those situations where the claimant and/or taxpayer challenges the seizure or forfeiture. It may also be possible to rely on sections 6103(h)(2)(B) or (C) and 6103(h)(4)(B) or (C), which permit disclosures of returns or return information of third-party taxpayers who have the requisite relationship with the person who is a party to the proceeding.

## **B. Disclosures in Nontax Administration Cases under I.R.C. § 6103(i)**

Section 6103(i)(1) does not permit disclosure of returns or return information solely for the purpose of a nontax civil forfeiture. See U.S. Dep't of Justice, *United States Attorneys' Manual*, 9-13.900 (Oct. 2007) available at <http://www.justice.gov/tax/readingroom/2001ctm/02ctax.htm>; Chapter 5. Nevertheless, if information is properly obtained by DOJ or any other federal agency under section 6103(i)(1), (i)(2), or (i)(3), it may be disclosed subsequently for civil forfeiture purposes under section 6103(i)(4), which explicitly authorizes disclosures in "any judicial or administrative proceeding pertaining to enforcement of a specifically designated Federal criminal statute *or related civil forfeiture* (not involving tax administration)." (emphasis added). See also United States v. \$57,303.00 in United States Currency, 737 F. Supp. 1041, 1042-43 (C.D. Ill. 1990) (*dicta*); H.R. REP. NO. 97-760, at 675 (1982) (Conf. Rep.); 128 Cong. Rec. 17635-42 (1982) (remarks of Sen. Nunn).



### C. Forfeitures under 21 U.S.C. § 881

Most drug-related forfeitures take place pursuant to 21 U.S.C. § 881. This statute generally provides for forfeitures of controlled substances and other materials involved in drug offenses, assets exchanged for drugs or traceable to the exchange, and assets used or intended to be used to facilitate drug offenses. The authority to permit disclosures of returns or return information in civil forfeitures under this provision was specifically addressed during the consideration of the 1982 amendments to section 6103(i)(4). See Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324.

It is possible that the use of returns or return information in a 21 U.S.C. § 881 forfeiture proceeding could arise in the context of a referred BSA or money laundering matter for which a related statute call was made. That is, DOJ may wish to forfeit money or other property under 21 U.S.C. § 881 in lieu of, or in conjunction with, criminal prosecution of an individual involved in drug trafficking operations under Title 31 and/or Title 18.

There is scant support for the position that section 6103(h) authorizes the use or disclosure of returns or return information in a 21 U.S.C. § 881 forfeiture proceeding related to tax administration. Disclosures of returns or return information in a referred tax administration case may be made to DOJ employees "personally and directly engaged in, and solely for their use in" proceedings (including preparation for such proceedings) and investigations in matters "involving tax administration." I.R.C. § 6103(h)(2); Treas. Reg. § 301.6103(h)(2)-1. A civil forfeiture under 21 U.S.C. § 881 of property facilitating or intended for use in illegal activities involving controlled substances is not a matter pertaining to tax administration.

Treas. Reg. § 301.6103(h)(2)-1 addresses situations where a referred criminal tax administration investigation may involve violations of tax and nontax laws. Often, the very impetus for committing the tax crime is the commission of nontax criminal offenses. The regulation, therefore, provides for disclosure of returns or return information in a joint criminal tax/nontax investigation if the nontax criminal aspects arise out of the particular facts and circumstances giving rise to the tax administration portion of the case.

A civil forfeiture under 21 U.S.C. § 881, however, is not authorized by Treas. Reg. § 301.6103(h)(2)-1. First, the regulation involves the "enforcement of a specific Federal *criminal statute* other than one" involving tax administration (emphasis added). A civil forfeiture under 21 U.S.C. § 881 does not meet this criterion. Second, the regulation requires that the tax portion of the investigation be duly authorized by the Tax Division of DOJ, the information be used directly in connection with the tax administration proceeding, and the nontax use be confined to the tax administration proceeding. A separate civil forfeiture under 21 U.S.C. § 881 would not meet this portion of the regulation either. Finally, the regulation requires that, if the tax administration aspect is

terminated, DOJ cannot use returns or return information in the nontax portion of the matter unless it first obtains a court order as required by section 6103(i)(1). As discussed above, section 6103(i)(1) does not provide disclosure authority for a civil forfeiture.

#### **IV. I.R.C. § 6050I DISCLOSURES**

Section 6050I supplements the reporting requirements of the BSA under Title 31. It requires that an information return (Form 8300, “Report of Cash Payments Over \$10,000 Received in a Trade or Business”) be made by any person engaged in a trade or business who receives, in the course of that trade or business, cash in excess of \$10,000 in one transaction (or two or more related transactions). Although the type of information reported under section 6050I is very similar to that reported under the BSA, and would be similarly useful in criminal enforcement activities, the reasons for the reporting requirements are different. The purpose of information reported under the BSA is to aid law enforcement personnel in tracing the movement of currency. By contrast, section 6050I was enacted as a supplementary method of information reporting for tax administration purposes, both civil and criminal. H.R. REP. NO. 98-861, at 987-89 (1984) (Conf. Rep.); 1984-3 C.B. (Vol. 2) 241-43.

Although information reported under the BSA (e.g., FinCEN Form 104, “Currency Transaction Reports”) may be disclosed to agencies pursuant to Treasury guidelines, information reported under section 6050I is subject to the disclosure restrictions of section 6103. In 1988, Congress added a subsection to section 6103(i) to permit disclosure of these returns to federal agencies. This was the first provision of the Code permitting the release of a return for nontax criminal enforcement purposes outside of the court-order mechanism of section 6103(i). The provision expired in November 1992. In 1996, the Taxpayer Bill of Rights 2, Pub. L. No. 104-168, § 1206, 110 Stat. 1452, 1472-73, was enacted and contained a new section 6103(l)(15), which permanently extended the rules for disclosing Form 8300 information. Moreover, section 6103(l)(15) permits disclosures, upon written request, not only to federal agencies, but also to state, local, and foreign agencies, and for civil, criminal, and regulatory purposes. Generally, Form 8300 information can now be disclosed in the same manner as information reported under the BSA.

Note that section 365 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (the “USA Patriot Act”), Pub. L. No. 107-56, 115 Stat. 272, 333-35, added section 5331 to the BSA. Title 31 section 5331 requires any person who is engaged in a trade or business and who in the course of the trade or business receives more than \$10,000 in coins or currency in one transaction or related transactions, to file a report with Treasury. Although the information collected by FinCEN under Title 31 is not return or return information protected by section 6103 (with the exception of Forms 8300 filed by clerks of Federal or State criminal courts), this is the same information collected by the IRS under section 6050I. As such, to the extent federal, state, local or foreign government agencies can obtain this information from FinCEN instead of the IRS, they would not need to rely on section 6103(l)(15), but would be subject to FinCEN’s re-dissemination guidelines noted in Section I.E, above.

## CHAPTER 8

### FEDERAL/STATE EXCHANGE PROGRAM I.R.C. § 6103(d) AND (p)(8)

#### I. INTRODUCTION

State and certain qualifying city tax agencies may receive tax information from the IRS for state tax administration reasons pursuant to section 6103(d)(1). State employees receiving federal tax information under section 6103(d)(1) are barred by section 6103(a) from unlawful disclosure of this information and subject to civil and criminal penalties under section 7431 for the unauthorized disclosure of the tax information so received. States are required to adequately safeguard the tax information received under sections 6103(d) and 6103(p)(4).

States that require their citizens to submit federal tax information to meet state filing requirements must also enact satisfactory confidentiality laws protecting the information as a precondition of receiving tax information from the IRS. I.R.C. § 6103(p)(8).

Disclosures pursuant to section 6103(d) have been upheld as constitutional. Taylor v. United States, 106 F.3d 833, 837 (8th Cir. 1997), *aff'g* 915 F. Supp. 1015 (N.D. Iowa 1996); Loomis v. IRS, No. H-80-226, 1981 WL 1767, at \*2-3 (D. Conn. Mar. 17, 1981).

#### II. DISCLOSURE PURSUANT TO I.R.C. § 6103(d)

Under section 6103(d)(1), tax information with respect to specified taxes shall be open to inspection by, or disclosure to, state agencies, bodies, or commissions, or their legal representatives, charged under the laws of the state with tax administration responsibilities.

"State" is defined to include any of the 50 states, the District of Columbia, and certain territories. I.R.C. § 6103(b)(5)(A). In addition, municipalities, including regional income tax agencies, with populations in excess of 250,000 (as determined under the most recent decennial United States census data available) that impose a tax on income or wages and with which the IRS has entered into an agreement regarding disclosure are treated as states. I.R.C. § 6103(b)(5).

Section 6103(d)(1) requires a written request from state tax officials as a precondition to disclosure. Because most state agencies are interested in continuing disclosure, the statutory request requirement is normally met by means of a basic agreement between the IRS and the state tax agency, and an implementing agreement between the IRS and state officials. The agreements not only provide for IRS disclosure, but also for a mutual exchange of information to increase tax revenues and taxpayer compliance, and

to reduce expenditures in tax administration. See Policy Statement 1-35, IRM 1.2.19.1.5.<sup>62</sup>

If an agreement has not been entered into between the IRS and a state tax agency, the state agency may request federal tax data on a case-by-case basis. Disclosure Officers serve as liaisons between the IRS and the state agencies requesting federal tax information.

### **A. Basic Agreement**

IRM exhibit 11.3.32-1 provides the format of the basic agreement between the IRS and state tax agencies. The basic agreement requires approval by the Commissioner and the head of the state tax agency.

### **B. Implementing Agreement**

The implementing agreement is entered into after the basic agreement has been executed. The implementing agreement supplements the basic agreement by specifying the detailed working arrangements and items to be exchanged, including tolerances and criteria for selecting those items. IRM 11.3.32.6. It must be signed by the Governmental Liaison and Disclosure Area Manager and the head of the state tax agency. IRM 11.3.32.6.1(5). Disclosures on a continuing basis may be made only in accordance with provisions of the implementing agreement. See *id.*

States may still obtain federal tax information not included in the implementing agreement. Requests for access may be made by the head of the state tax agency on a case-by-case basis. Case-by-case disclosures trigger the same rules and use limitations as those made under standing basic and implementing agreements. IRM 11.3.32.13.

### **C. Restrictions**

The federal tax data furnished to state tax agencies pursuant to section 6103(d)(1) is limited to taxes imposed by the specific Code chapters described in section 6103(d)(1). Further, certain information, such as grand jury information without a valid Rule 6(e) order, may not be disclosed at all. IRM 11.3.32.17(1). Other information, such as information from confidential sources, must be

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<sup>62</sup> Policy Statement 1-35 reads as follows:

Formal agreements for the exchange of tax information with State tax authorities will be entered into by the Commissioner when such agreements are in the interest of good tax administration. In order to maximize the effectiveness of these formal agreements they will be supplemented with implementing agreements. Tax information provided by the Service to State tax authorities will be restricted to the authorities' justified needs and uses of the information.

referred to the National Office for review before disclosure. IRM 11.3.32.17(2). Only federal tax data needed for a valid state tax administration purpose and which will actually be used for that purpose ("need and use") may be disclosed to state tax agencies by the IRS. IRM 11.3.32.4.

Redisclosure by state tax agency officers and employees is limited to:

1. Other state tax agency employees;
2. State tax agency's legal representatives;
3. State tax agency's contractors for the purpose of obtaining certain tax administration services under section 6103(d)(1) and (n);
4. State auditors to the extent authorized by section 6103(d)(2);
5. Judicial and administrative tax administration proceedings to the extent authorized by section 6103(h)(4). See IRM 11.3.32.19.

For purposes of section 6103(d), tax administration includes personnel investigations of state tax agency employees or prospective employees. Smith v. United States, 964 F.2d 630, 632 (7th Cir. 1992) (implicit recognition that compliance with tax filing requirements by state tax employee was state tax administration), *cert. denied*, 506 U.S. 1067 (1993); Rueckert v. IRS, 775 F.2d 208, 212 (7th Cir. 1985) (state tax administration includes enforcement of state tax agency personnel rules). See also IRM 11.3.32.12.

Inspection is permitted upon written request of the head of the state agency, body or commission and then only to those representatives designated in the written request. Disclosure cannot be made to the governor or any person not an employee or legal representative or contractor pursuant to section 6103(n) of the tax agency, body or commission.

Requests for disclosure must be in writing. I.R.C. § 6103(d)(1); Smith, 964 F.2d at 632; Huckaby v. Dep't of Treasury, 794 F.2d 1041, 1046-47 (5th Cir. 1986). See also McQueen v. United States, 5 F. Supp.2d 473, 487-88 (S.D. Tex. 1998) (in a section 7431 unauthorized disclosure case, court determined a disclosure made pursuant to a Federal-State agreement was authorized).

The basic and implementing agreements meet the "written request" requirement of the statute. Taylor v. United States, 106 F.3d 833, 835-36 (8th Cir. 1997) ("There is no indication in the text of the I.R.C.'s confidentiality and disclosure statute that Congress intended to require an individualized request in order to satisfy the strictures of § 6103 relevant to disclosure to state tax officials."), *aff'g* 915 F. Supp. 1015 (N.D. Iowa 1996); Long v. United States, 972 F.2d 1174,

1179-80 (10th Cir. 1992); Smith, 964 F.2d at 635-36; Stone v. Comm'r, 76 T.C. Memo. 1998-314, 1998 WL 547043, at \*2-3.

Disclosure of tax information is not authorized if it would identify a confidential informant or seriously impair a civil or criminal tax investigation.  
I.R.C. § 6103(d)(1).

Disclosures pursuant to basic and implementing agreements have been challenged and upheld in a number of courts: Taylor, 106 F.3d at 835-36; Long, 972 F.2d at 1179-80; Smith, 964 F.2d at 635-36; White v. Comm'r, 537 F. Supp. 679, 684 (D. Colo. 1982).

Subsection 6103(d)(2) provides that tax information obtained by a state agency under subsection 6103(d)(1) may be disclosed to a state audit agency charged under the laws of the state with the responsibility of auditing state revenues and programs. The disclosure may be made only to the extent necessary in making an audit of the section 6103(d)(1) agency.

### **III. TERMINATION OF DISCLOSURE – I.R.C. § 6103(p)(7)**

Section 6103(p)(7) and Treas. Reg. § 301.6103(p)(7)-1 contain procedures describing how the IRS may terminate disclosure of federal tax information to a state tax agency after a determination by the IRS that the agency made an unauthorized disclosure of federal tax information or that it does not maintain adequate procedures for safeguarding the information. The regulation also establishes a high-level administrative review procedure wherein a state tax agency can appeal the determination.

The regulations also provide that, upon so notifying the state tax agency, if the IRS determines that federal tax administration would otherwise be seriously impaired, the IRS may suspend further disclosure of federal tax information pending a final determination, despite the possible detrimental impact of that action upon the state's tax system.

### **IV. RELEASE OF TAX DATA IN ELECTRONIC FORM**

Programs for providing state tax agencies with tax return information in electronic format are intended to minimize the need for state tax personnel to inspect or obtain copies of federal tax returns and related records as well as minimizing the impact on Service resources. Electronic extracts are provided to each state tax agency pursuant to written agreements. Any agreement for providing electronic extracts to state tax officials must be coordinated through the Governmental Liaison Data Exchange Program (GLDEP). See IRM 11.3.32.11 and IRM 11.4.2.

## **V. TAX RETURN PREPARERS – I.R.C. § 6103(k)(5)**

Under section 6103(k)(5), taxpayer identity information with respect to an income tax return preparer, and whether the preparer has been assessed a penalty under sections 6694, 6695 and 7216, may be furnished to agencies, bodies or commissions charged under state or local law with licensing, registration or regulation of income tax return preparers. Information may be disclosed only upon the written request of the head of those agencies, bodies or commissions. The written request must designate the officers or employees to whom information is to be disclosed. Disclosures are subject to "need and use" restrictions similar to the restrictions imposed under section 6103(d)(1) and IRM 11.3.32.4. See IRM 11.3.32.15.

Note that disclosures under section 6103(k)(5) to local agencies regulating tax return preparers are not limited to municipalities with populations in excess of 250,000 that impose a tax on wages or income.

## **VI. I.R.C. § 6103(p)(8)**

Section 6103(p)(8) provides that the IRS can make no disclosure under section 6103(d) to a state which requires the inclusion of federal tax information in its tax returns (so-called "wraparound information") unless the state has first enacted provisions of law guaranteeing the confidentiality of wraparound information. IRM 11.3.32.14.

The IRS has taken the view that section 6103(p)(8) does not require states to enact confidentiality laws that mirror section 6103. In re Grand Jury Empanelled January 21, 1981, 535 F. Supp. 537, 542 n.4 (D.N.J. 1982) ("Subsection (p)(8) leaves the states free to devise their own form of disclosure protection. The federal provision thus is not an Act of Congress purporting to indirectly provide a particular form of privilege for state tax returns containing federal return information."). However, the IRS has long insisted that the provisions of law guaranteeing the confidentiality of wraparound information fulfill certain minimum requirements:

- A. All wraparound information required to be attached to or reflected on a state tax return must be treated as confidential;
- B. Confidentiality must extend to wraparound information provided in connection with *any* state tax return, regardless of whether the return pertains to income tax or to other tax liabilities;
- C. The confidentiality provisions must impose sanctions for a violation of the guaranteed confidentiality, and the sanctions must include a criminal sanction of at least a misdemeanor; and
- D. The sanctions must apply to past and present state tax agency officers and employees. In addition, any other state employees who receive wraparound information in their official capacity (e.g., employees of the Attorney General's

office or city prosecutors) as contemplated by section 6103(p)(8)(B) must be subject to the sanctions.

**Note:** Section 6103(p)(8)(B) provides that the confidentiality required by section 6103(p)(8)(A) does not preclude disclosure of wraparound information to officers or employees of the state if disclosure is specifically authorized by state law. Intrastate disclosures of wraparound information can be made pursuant to the criteria outlined above. See IRM 11.3.32.25. Intrastate disclosures can also be made if:

1. The disclosure is authorized by state law;
2. The disclosure is for the purpose of the administration of state tax laws, and not for nontax uses; and
3. The recipient state has adequate provisions of law to protect the confidentiality of the wraparound information.

## **VII. RESOURCE MATERIAL ON THE FEDERAL/STATE EXCHANGE PROGRAM**

See IRM 11.3.32.



## CHAPTER 9

### FREEDOM OF INFORMATION ACT

#### I. INTRODUCTION

Look for “Notes” in **bold** throughout this chapter intended to give practical tips when addressing a Freedom of Information Act (FOIA) request.

**Note:** For more detailed information concerning FOIA and an explanation of the exemptions, consult the Department of Justice (DOJ) FOIA Reference Guide at [www.usdoj.gov/04foia/04\\_3.html](http://www.usdoj.gov/04foia/04_3.html).

Congress enacted the Freedom of Information Act in 1966 with the intent that any person should have access to identifiable records without having to demonstrate a need or reason. The burden of proof for withholding information was placed on the government. The Act also broadened the scope of information available to the public and provided judicial remedies for those wrongfully denied information. Because some government agencies responded slowly and reluctantly to the law, a number of procedural and substantive changes in the law were enacted in 1974. Those amendments narrowed the scope of certain exemptions and broadened certain procedural provisions relating to time limits, segregability, and *in camera* inspection by the courts.

In 1986, after several years of consideration, Congress amended two areas of FOIA: access to law enforcement records and fee charges and circumstances for fee waivers. In 1996, the "Electronic Freedom of Information Act Amendments of 1996 (EFOIA)," P.L. No. 104-231, 110 Stat. 3048, specifically addressed electronic records issues and contained several provisions changing the timing of agency responses to FOIA requests. The amendments brought electronic records within the scope of FOIA. Congress made no substantive changes to FOIA exemptions, but did alter provisions covering several distinct subject areas. The amendments, except as otherwise noted, became effective March 31, 1997. The Department of Treasury regulations implementing the EFOIA are located at 31 C.F.R. Part 1, Subpart A. The IRS regulations are published as the Statement of Procedural Rules, Treas. Reg. § 601.702.

In 2002, Congress added subsection (E) to 5 U.S.C. § 552(a)(3), which provides

An agency, or part of an agency, that is an element of the intelligence community (as that term is defined in section 3(4) of the National Security Act of 1949 (50 U.S.C. § 401a(4)) shall not make any record available under this paragraph to –

- (i) any government entity, other than a state, territory, commonwealth, or district of the United States, or any subdivision thereof; or
- (ii) a representative of a government entity described in clause (i).

This section was added to prevent foreign governments from seeking information from the United States intelligence agencies, or from using a United States resident as a representative to seek records on any foreign government's behalf. Given the availability of exemption 1, which protects information pertaining to, *inter alia*, national security interests, the new provision would prevent the intelligence agencies from wasting resources defending a FOIA action brought by a foreign government, or the representative, and thereby risking disclosure of the very information to be protected through the use of affidavits or motions defending the assertion of the exemption. This limitation pertains only to intelligence agencies designated by 50 U.S.C. § 401a(4), which currently does not include the IRS.

In December 2007, Congress enacted the "Openness Promotes Effectiveness in Our National Government Act of 2007," Pub. L. No. 110-175, 121 Stat. 2524, commonly referred to as the "OPEN Government Act of 2007." The OPEN Government Act amended FOIA to address a broad range of procedural issues affecting FOIA administration. The new amendments significantly revised FOIA provisions pertaining to the recovery of attorney fees and litigation costs. Section 4 of the Act amended 5 U.S.C. § 552(a)(4)(E) by adding two new elements to the attorney fees provisions of FOIA. The new provision re-defined the circumstances under which a FOIA plaintiff can be deemed to have "substantially prevailed" to circumstances where the complainant obtained relief through either "(i) a judicial order, or an enforceable written agreement or consent decree; or (ii) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial." The 2007 amendments also revised the method by which attorney fees and costs are paid to FOIA plaintiffs. Rather than being paid from the Claims and Judgment Fund of the United States Treasury, FOIA was revised to provide for the fees and costs to be paid "only from funds annually appropriated for any authorized purpose for the Federal agency against which a claim or judgment has been rendered."

The OPEN Government Act of 2007 also added two provisions to FOIA that address time limits for complying with requests and the agency consequences for failing to respond in a timely manner. These provisions, which were effective for requests filed on or after December 31, 2008, provide that the time period for responding to a request commences on the "date on which the request is first received by the appropriate component of the agency, but in any event not later than ten days after the request is first received by any component of the agency" that is designated in the agency's regulations to receive requests. Where the agency fails to comply with the time limits, the new provisions provide that the agency shall not assess search fees for those requesters to whom such fees would otherwise apply.

On October 28, 2009, Congress enacted the OPEN FOIA Act of 2009, Pub. L. No. 111-83, 123 Stat. 2142, 2184 (section 564 of the Department of Homeland Security Appropriations Act, 2010). Prior to the enactment of the OPEN FOIA Act of 2009, exemption 3 authorized the withholding of information "specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A)

requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3) (2006).

The OPEN FOIA Act of 2009 amended exemption 3 by adding a new requirement that any statute "enacted after the date of enactment of the OPEN FOIA Act of 2009" must "specifically cite to this paragraph." Thus, the text of exemption 3 now reads as follows:

(b) This section does not apply to matters that are—

(3) specifically exempted from disclosure by statute (other than section 552b of this title), if that statute— (A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and (B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.

5 U.S.C. § 552(b)(3).

## II. INFORMATION AVAILABLE

### A. Agency Records

FOIA applies only to records held by *executive branch* administrative agencies and independent regulatory agencies of the federal government. Records held by Congress or the federal courts are not subject to FOIA. See Mayo v. Gov't Printing Office, 9 F.3d 1450, 1451 (9th Cir. 1993) (GPO, an arm of Congress, not subject to FOIA); Dow Jones v. Dep't of Justice, 917 F.2d 571, 574 (D.C. Cir. 1990) (Congress not subject to FOIA); Warth v. Dep't of Justice, 595 F.2d 521, 523 (9th Cir. 1979) (federal courts not subject to FOIA).

All agency records in the possession and control of these entities must be released upon request unless the information falls within one of the Act's nine specific exemptions or three special law enforcement exclusions. In Dep't of Justice v. Tax Analysts, 492 U.S. 136, 146 (1989), the Supreme Court held that the Department of Justice must make available copies of U.S. district court decisions it receives in the course of litigating tax cases. These records were considered agency records because they were included in agency files and used in official business (*e.g.*, consideration of appeal), even though they were also publicly available from the courts, and were required to be disclosed in full because no exemption applied to withhold them.

A record that is not owned by the agency or over which the agency has no control is not an agency record. See, *e.g.*, Gallant v. NLRB, 26 F.3d 168, 172 (D.C. Cir. 1994) (letters written on agency time by Board member seeking renomination were not agency records when the letters had not been integrated

into agency files); Gilmore v. Dep't of Energy, 4 F. Supp. 2d 912, 922 (N.D. Cal. 1998) (holding that software owned by a corporation and in which the Department of Energy had a non-exclusive license for use was not an agency record subject to FOIA because DOE lacked sufficient control over the software).

Agency records are subject to public disclosure under FOIA. 5 U.S.C. § 552(a). The EFOIA amendments added the definition of the term "record" to include "any information that would be an agency record subject to the requirements of [FOIA] when maintained by an agency in any format, including an electronic format." 5 U.S.C. § 552(f)(2).

## **B. Electronic Records**

### **1. Readily Reproducible Electronic Format**

The Act requires that an agency "provide the record in any form or format requested . . . if the record is readily reproducible by the agency in that form or format." 5 U.S.C. § 552(a)(3)(B). Moreover, the agency is directed to "make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of [FOIA]." 5 U.S.C. § 552(a)(3)(B).<sup>63</sup> These provisions require agencies to honor a requester's specified choice among existing forms of a requested record (assuming there are no exceptional difficulties in reproducing an existing record) and to make "reasonable efforts" to disclose a record in a different form or format when that is requested. Treas. Reg. § 601.702(c)(2)(i) defines "readily reproducible," with respect to electronic format as

a record or records that can be downloaded or transferred intact to a floppy disk, computer disk (CD), tape, or other electronic medium using equipment currently in use by the office or offices processing the request. Even though some records may initially be readily reproducible, the need to segregate exempt from nonexempt records may cause the releasable material to be not readily reproducible.

### **2. "Reasonable Efforts" Search**

"[A]n agency shall make reasonable efforts to search for [responsive] records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated

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<sup>63</sup> In 2002, Congress passed the E-Government Act of 2002, Pub. L. 107-347 (Dec. 17, 2002), which directed the Office of Management and Budget (OMB) to set forth a strategy to make the federal government more responsive to the citizenry electronically. An example of an E-Government-type initiative is the IRS's Free Filing electronic program. The E-Government Act reaffirms the notion that electronic records need to be reproduced for disclosure, to the extent they are not exempt.

information system." 5 U.S.C. § 552(a)(3)(C). This provision promotes electronic database searches and encourages agencies to expend new efforts in order to comply with the electronic search requirements of particular FOIA requests. Thus, searches for records maintained in electronic format "may require the application of [computer] codes, queries, or other minor forms of programming to retrieve the requested records." Treas. Reg. § 601.702(c)(2)(iii).

### **C. Section 552(a)(1) Material - Published Information**

Certain information must be published in the Federal Register. 5 U.S.C. § 552(a)(1). This includes:

1. The organizational structure of the agency and procedures for obtaining information under the Act;
2. Statements describing the functions of the agency and all formal and informal procedures;
3. Rules of procedure, see Treas. Reg. § 601.101 *et seq.*, descriptions of forms (but not the forms themselves) available or the places at which forms may be obtained, and instructions describing all papers, reports, and examinations;
4. Rules of general applicability and statements of general policy or interpretations of general applicability; and
5. Amendments, revisions, or repeals of 1- 4, above.

### **D. Section 552(a)(2) Material - Guidance**

Certain information must be made available for public inspection and copying unless promptly published and offered for sale. 5 U.S.C. § 552(a)(2). This includes:

1. Final opinions and orders made in the adjudication of cases;
2. Statements of policy and interpretations not published in the Federal Register;
3. Administrative staff manuals and instructions to staff that affect a member of the public, *e.g.*, Internal Revenue Manual, including the Chief Counsel Directives Manual available at [www.irs.gov/foia/index.html](http://www.irs.gov/foia/index.html);

4. Agency records that have been, or the agency expects to be, the subject of repetitive requests; and
5. A quarterly (or more frequent) index of material referred to in 1 - 4, above.

For records created on or after November 1, 1996, each agency must make these records available by "computer telecommunications," *i.e.*, on the Service's Internet web site at [www.irs.gov](http://www.irs.gov).

### III. SECTION 552(a)(3) REQUESTS - ADMINISTRATIVE PROCESS

Certain information not otherwise available under 5 U.S.C. § 552(a)(1) or (2) must be made available upon a request which reasonably describes the records sought and comports with the IRS's regulations. FOIA was enacted to facilitate public access to government records. John Doe Agency v. John Doe Corp., 493 U.S. 146, 151 (1989). It was designed "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." Dep't of Air Force v. Rose, 425 U.S. 352, 361 (1976).

**Note:** A number of courts have held that a FOIA requester's right of access is independent of any discovery rights in litigation. Morgan v. Dep't of Justice, 923 F.2d 195, 198 (D.C. Cir. 1991); United States v. U.S. District Court (DeLorean), 717 F.2d 478, 480 (9th Cir. 1983). Accordingly, there should not be any blanket denials of requests for records made during the pendency of litigation. Each record or category of records must be evaluated to determine which exemptions, if any, may apply to withhold records. See IRM 11.3.13.7.1. Chief Counsel attorneys should provide recommendations to disclosure officers as to what exemptions may apply. Sometimes in the context of tax litigation, taxpayers request a continuance or stay of the proceeding pending the processing of a FOIA request or appeal. Although a taxpayer may have exercised his statutory right to request information through FOIA, the fact that the FOIA process may remain incomplete is no basis for a continuance or stay. Renegotiation Bd. v. Bannerkraft Clothing Co., 415 U.S. 1, 20-21 (1974). A related issue is a petitioner's request or motion for an order by the court to compel the release of agency records under FOIA. The Tax Court has no jurisdiction under FOIA; rather, jurisdiction is conferred on U.S. district courts. See 5 U.S.C. § 552(a)(4)(B). In the district courts, the Department of Justice attorney should object to the motion on the basis that FOIA has its own judicial remedies and a FOIA requester should not be permitted to invent new remedies beyond those created by Congress.

An attorney who has made an appearance in Tax Court does not, on that basis, have authority to make a FOIA request for the petitioner's tax records. The appearance only authorizes representation as to matters properly before the court for the existing litigation and only provides access to the petitioner's tax records within the procedures applicable to

the litigation. If the attorney makes a FOIA request for the petitioner's tax records, the attorney must demonstrate independent authority to access those records, such as through a properly completed and timely filed Form 8821, Tax Information Authorization, or Form 2848, Power of Attorney and Declaration of Representative. Similarly, appearance of an attorney in any court on behalf of a client does not, in itself, authorize FOIA disclosure of any records to the attorney.

**Note: Glomarization** – The (c)(1) and (c)(2) exclusions, discussed at Part V, permit the agency, in certain limited circumstances, to deny that records exist when responsive records do, in fact, exist. In other instances, based on the wording of the request, the agency may “neither confirm nor deny” the existence of responsive records. The term “glommarization” is taken from the cases concerning the Glomar Explorer. See Phillippi v. CIA, 655 F.2d 1325 (D.C. Cir. 1981) and Military Audit Project v. Casey, 656 F.2d 724 (D.C. Cir. 1981). The Glomar Explorer Project was a classified Central Intelligence Agency project supposedly undertaken to raise a sunken Soviet submarine from the ocean floor. Its original cover story was that it was a dredging project locating manganese nodules on the ocean floor. When the manganese mining cover was blown, the story was switched to the Soviet submarine recovery story, which was never confirmed by the CIA. Speculation was that the submarine story was a fallback cover for an even bigger, more secret project. The D.C. Circuit held that, even if certain facts had been publicized about the project, those facts did not result in a waiver of applicable FOIA exemptions. The court reasoned “the line between what may be revealed and what must be concealed is itself capable of conveying information . . . .” 655 F.2d at 1330. The court also noted that “[t]here might be much left to hide, and if there is not, that itself may be worth hiding.” *Id.* at 1331.

Based on the rationale and holdings in the Glomar Explorer cases, agencies can, if necessary, respond in a manner to avoid revealing confidential information based on the confirmation of knowledge already available to the requester. For example, if a taxpayer believes that one of five people was a confidential informant, and structures a FOIA request so that to supply information about four of the five would reveal the fifth to be the confidential informant, the IRS can glomarize its response, *i.e.*, neither confirm nor deny the existence of any information responsive to the request, rather than assert exemption 7(D) and reveal the very information it is attempting to protect.

Because glomarization is not a FOIA exemption, in addition to neither confirming nor denying the existence of the records, the IRS must assert an exemption that would be applicable if the records did exist. For example, if the request seeks tax records pertaining to a third party, the

IRS would assert exemption 3, in conjunction with section 6103(a), to the extent responsive records exist. See Vazquez v. Dep't of Justice, 746 F. Supp. 2d 117, 122 (D.D.C. 2011) ("The Court finds that DOJ justified its Glomar response by showing how a substantive response to plaintiff's FOIA request could cause harm addressed by exemption 2. It therefore follows that DOJ properly invoked FOIA exemption 2 to justify withholding any such information, if it exists.").

Consistency in the use of this approach is very important. For example, if the IRS claims there are "no records" when there are not any records when circumstances would permit the use of an exclusion, but "neither confirms nor denies" only when records exist, requesters will soon be able to determine when the IRS is protecting records and when there are no records to protect.

If a Chief Counsel employee believes that certain information subject to a FOIA request should be glomarized, he or she should discuss the matter with his or her manager and the local disclosure officer.

## **A. Request**

### **1. In General**

FOIA requests are made in writing and are generally processed by the Disclosure Office having jurisdiction over the requested records, *i.e.*, an Area or Territory Office, Campus, Compliance Center, Computing Center, or in the National Office. Treas. Reg. § 601.702(h)(1). Requesters should submit their requests to the Disclosure Office located closest to their residence. An updated list of Disclosure Offices to which FOIA requests should be mailed is found at the following website:  
<http://www.irs.gov/foia/article/0,,id=120681,00.html>.

Under Treas. Reg. § 601.702(h), Counsel records other than records in the National Office of the Office of Chief Counsel are included within the jurisdiction of the local Disclosure Office. Records under the control of the National Office of the Office of Chief Counsel fall under the jurisdiction of the Director, Office of Governmental Liaison and Disclosure.

**Note:** If a FOIA request is submitted directly to a Chief Counsel office, the request should be forwarded to the local Disclosure Office for processing.

The Act requires that the request "reasonably describe" the desired records. 5 U.S.C. § 552(a)(3)(A)(i). This means that members of the agency's staff familiar with the subject area of the request could locate the



record without imposing an undue burden on the agency. Treas. Reg. § 601.702(c)(5); IRM 11.3.13.5.

An agency has no duty to conduct research or create records not already in existence at the time the request is made in order to fulfill the request. See Schoenman v. FBI, No. 04-2202 (CKK), 2009 WL 763065, at \*17-18 (D.D.C. March 19, 2009) (rejecting plaintiff's request for search slips, created by agency after date-of-search cut-off date, holding that "FOIA 'does not obligate agencies to create or retain documents; it only obligates them to provide access to those which it in fact has created or retained.'"); Klinge v. IRS, 906 F. Supp. 434, 436 (W.D. Mich. 1995) (citing NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975)); Reeves v. United States, 74 A.F.T.R.2d 94-7208 (E.D. Cal. Nov. 16, 1994), *aff'd*, 108 F.3d 338 (table cite), 1997 WL 74348 (9th Cir. Feb. 20, 1997). Nevertheless, agencies are obligated to conduct reasonable searches of electronic records and automated databases to identify responsive information that may be extracted and produced to the requester, in either electronic or hard copy format. 5 U.S.C. § 552(a)(3)(B), (C).

The reason for making a request, the requester's intended use of the information, or the requester's unique knowledge about the information, have no bearing on the entitlement to records. Persons who make frivolous or unsupported tax avoidance arguments, convicted felons, writers, and scholars all have equal access to agency records. Dep't of Justice v. Julian, 486 U.S. 1, 13-14 (1988). Whether requested records are to be made available turns on the applicability of the exemptions vis-à-vis any member of the public, regardless of the particular requester's identity.

**Note:** FOIA-based privacy exemptions should not be asserted to protect the identity of the person who is the requester (absent the application of another exemption).

**Note:** Congress has amended FOIA to exclude foreign governments, or their representatives, as permissible requesters for records maintained by United States intelligence agencies. See I, Introduction, above.

## 2. Searches

An agency has a duty to conduct a reasonable search for responsive records. Zemansky v. EPA, 767 F.2d 569, 571-73 (9th Cir. 1985) (reasonableness of search depends on facts of the case). The search must be "reasonably calculated to uncover all relevant documents." Weisberg v. Dep't of Justice, 705 F.2d 1344, 1351 (D.C. Cir. 1983). Thus, the legal standard for evaluating a search is not whether responsive material might conceivably exist, but whether the search for records was

adequate. Oglesby v. Dep't of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990); Schoenman v. FBI, No. 04-2202 (CKK), 2009 WL 763065, at \*10-18 (D.D.C. March 19, 2009) (failure to locate documents the requester asserts 'must exist' does not make search unreasonable); Flowers v. IRS, 307 F. Supp. 2d 60, 70-72 (D.D.C. 2004) (requester's reason for wanting documents does not create basis for discovery regarding search that court has determined was reasonable); Murphy v. IRS, 79 F. Supp. 2d 1180, 1185-86 (D. Haw. 1999) (IRS conducted reasonable search in light of fact that requester gave no indication of the records sought or the offices to be searched). Judicial evaluation of the reasonableness of a search is based on what the agency knew at the conclusion of the search rather than what the agency believed at its inception, *i.e.*, if, in conducting the search where responsive records are reasonably likely to be found, it appears to the agency that there may be other responsive records in other files, then those files should be searched as well. Campbell v. Dep't of Justice, 164 F.3d 20, 28 (D.C. Cir. 1998). See also CareToLive v. FDA, 631 F.3d 336, 342-43 (6th Cir. 2011) (FOIA search was reasonable without requiring agency to search computer servers for deleted electronic materials, given no evidence of agency bad faith).

The IRS generally uses the date of receipt of a FOIA request as the cut-off date for purposes of searching for responsive documents. The date may be moved to the date the search begins if the search is delayed. See IRM 11.3.13.6.3(13). Documents that might otherwise be responsive, but which were created after the FOIA request is received, are not subject to that request. This cut-off date was approved in Vento v. IRS, 714 F.Supp 2d 137, 144-45 (D.D.C. 2010). Similarly, in Schoenman v. FBI, 2009 WL 763065 at \*17-18 (D.D.C. Mar. 19, 2009), a cut-off of the date the agency sent acknowledgement of the FOIA request and began the search has been approved. However, courts have disapproved other cut-off dates. McGehee v. CIA, 697 F.2d 1095, 1102 (D.C. Cir. 1983) (date-of-request cut-off disapproved); Public Citizen v. Dep't. of State, 276 F.3d 634, 642-44 (D.C. Cir. 2002) (date of request cut-off disapproved).

### **3. Time for Responding**

The agency has 20 working days in which to respond to the request. The 20-day period commences on the date on which the request is first received by the appropriate component of the agency, but in any event not later than 10 days after the request is first received by any component of the agency that is designated in the agency's regulations to receive requests. The appropriate component to receive FOIA requests is the Office of Disclosure, Governmental Liaison and Disclosure. FOIA requests received in any other office should be forwarded promptly. The 20-day period cannot be tolled by the agency except (i) that the agency may make one request to the requester for information and toll the 20-day

period while it is awaiting such information that it has reasonably requested from the requester; or (ii) if necessary to clarify with the requester issues regarding fee assessment. In either case, the agency's receipt of the requestor's response to the agency's request for information or clarification ends the tolling period. 5 U.S.C. § 552(a)(6)(A)(ii).

In exceptional circumstances, the Act allows an extension not to exceed 10 more working days in which to respond. 5 U.S.C. § 552(a)(6)(B)(i).

Where FOIA requests cannot be processed in 30 working days (the original 20-working-day period, plus one 10-working-day extension), the Act requires the agency to notify the requester and provide him with an opportunity "to limit the scope of the request" and/or "to arrange with the agency an alternative time frame for processing the request or a modified request." 5 U.S.C. § 552(a)(6)(B)(i), (ii). This provides a basis for agencies and FOIA requesters to reach agreement on the timing of agency responses in cases in which the circumstances of the particular request, rather than a more general agency backlog, cause difficulty in meeting FOIA's time limits. To aid the requester, the agency is required to make available its FOIA Public Liaison to assist in the resolution of any disputes between the requester and the agency. 5 U.S.C. § 552(a)(6)(B)(ii).

The OPEN Government Act of 2007 added new section (7) to 5 U.S.C. § 552(a). Section (a)(7) requires the agency to establish a system to assign an individualized tracking number for each request that will take longer than 10 days to process. The agency is required to provide the assigned tracking number to the requester and to establish a telephone number or Internet site that will provide information about the status of the request to the requester. 5 U.S.C. § 552(a)(7)(A), (B).

**Note:** Chief Counsel employees should inform the local disclosure officer as soon as possible if the volume of, or need to compile or retrieve, responsive records would require an extension.

The statute requires agencies to promulgate regulations to provide for expedited processing in cases where a requester demonstrates a "compelling need." 5 U.S.C. § 552(a)(6)(E). The IRS regulations define "compelling need" as:

(A) Circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual;

(B) An urgency to inform the public concerning actual or alleged Federal Government activity, if made by a person primarily engaged in disseminating information . . . ;

(C) The loss of substantial due process rights.

Treas. Reg. § 601.702(c)(6)(i). The regulations further require the requester to provide a certified statement explaining the nature of the compelling need to expedite the request. Treas. Reg. § 601.702(c)(6)(ii). Within 10 calendar days after the date of the compelling need request, the disclosure office will decide, based solely on the information provided by the requester, whether to grant expedited processing, and must notify the requester of its decision. Treas. Reg. § 610.702(c)(6)(iv). Once expedited processing is granted, the agency must give priority to that FOIA requester and process the requested records for disclosure "as soon as practicable." 5 U.S.C. § 552(a)(6)(E)(iii). The denial of request for expedited treatment may be appealed. Treas. Reg. § 601.702(c)(6)(v). The appeal must be given "expeditious consideration." 5 U.S.C. § 552(a)(6)(E)(ii)(II).

**Note:** The Disclosure Officer, or his or her delegate, will make the determination of whether the request meets the criteria for expedited treatment.

If the IRS fails to respond to a request within the statutory time period, a requester may proceed to court without filing an administrative appeal. 5 U.S.C. § 552(a)(6)(C)(i); Treas. Reg. § 601.702(c)(13).

#### **4. Denying Access to Responsive Information**

The Act provides that any reasonably segregable portion of a record is to be provided after deletion of the exempt portions. Information that is otherwise nonexempt may be withheld only if it is "inextricably intertwined" with the exempt information. Mays v. DEA, 234 F.3d 1324, 1327 (D.C. Cir. 2000); Neufeld v. IRS, 646 F.2d 661, 666 (D.C. Cir. 1981). An agency is not required to segregate in a manner that leaves only essentially meaningless words and phrases.

The Act has two provisions regarding the agency's obligation to specify to a FOIA requester the amount of information that is denied in response to a request. First, when information is deleted from a record that is disclosed in part, the amount of information deleted must be indicated on the released portion of the record, unless including that indication would harm an interest protected by the applicable exemption. 5 U.S.C. § 552(b). In addition, if technically feasible, the amount of the information deleted must be indicated at the place in the record where the deletion is made.

5 U.S.C. § 552(b). Second, where entire records or entire pages of records are withheld, the agency must make a reasonable effort to estimate the volume of records withheld and provide an estimate to the person making the request unless providing the information would harm an interest protected by an applicable exemption. 5 U.S.C. § 552(a)(6)(F).

**Note:** Chief Counsel attorneys who make exemption recommendations to the Disclosure Office should generally highlight the portions recommended to be withheld. The local Disclosure Office staff usually performs the mechanics of “redacting” the indicated portion if they agree with the attorneys’ recommendations. If the attorneys and the Disclosure Office staff cannot agree on the appropriate redactions and exemptions, the matter will be resolved through the reconciliation procedures in the CCDM and IRM.

## **B. Appeal**

If the agency denies any portion of the request within the 20-working-day period, the requester may send an appeal letter to the Chief, Appeals. If the agency fails to respond within the 20-day period, the requester may file a suit in district court without first pursuing an administrative appeal. On the other hand, if a denial of the request is made at any time before a lawsuit is filed, the requester must submit an administrative appeal before filing suit in district court. See Taylor v. Appleton, 30 F.3d 1365, 1367 (11th Cir. 1994); Oglesby v. Dep’t of the Army, 920 F.2d 57, 63 (D.C. Cir. 1990); Chandler v. IRS, No. 90-35501, 927 F.2d 608 (table cite), 1991 WL 27804 (9th Cir. Mar. 5, 1991).

The agency is required to respond to an appeal within 20 working days after its receipt. Should the agency fail to respond within the 20-day period, the requester may file suit. Requesters have a choice of venue: where the records are located, where the requester lives or has his or her principal place of business, or in the U.S. District Court for the District of Columbia. If the agency denies the appeal in whole or in part, it must inform the requester of the right to seek judicial review, and the requester may then file suit.

## **IV. EXEMPTIONS<sup>64</sup>**

Government agencies may refuse to disclose information if it falls within one or more of nine specified exemptions or two special law enforcement exclusions (rarely applicable to IRS).<sup>65</sup> See 5 U.S.C. § 552(b), (c). Although certain exemptions (e.g., exemption 3)

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<sup>64</sup> Additional discussion of the exemptions most common to Chief Counsel Advice and their background file documents can be found at Chapter 13, II-D and E.

<sup>65</sup> A third exclusion (5 U.S.C. § 552(c)(3)) applies *only* to the FBI.

mandate the nondisclosure of information once the agency determines the exemption applies to that information, other exemptions (e.g., exemption 5) permit the agency to exercise its discretion to disclose information that may be technically exempt. These exemptions are generally known as discretionary exemptions.

The Service's Policy Statement 11-13 (April 23, 2004), provides, in pertinent part, as follows:

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 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.

In Chief Counsel Notice 2005-005, the Office provided instructions as to the manner in which this discretion is to be exercised for Counsel records. Chief Counsel Notice 2005-005 has been incorporated into CCDM 33.1.3.2.2(8) and 30.11.1.6. Please consult Procedure and Administration, Branches 6 and 7, as needed, for guidance in specific cases.

**Note:** *All applicable exemptions* should be asserted at one time rather than piecemeal. That way, should a record lose one exemption, perhaps through the passage of time, other exemptions may be available to withhold all or portions of the record if programmatic and policy reasons so require. For example, if at the time of the request the IRS is conducting an audit of the requester/taxpayer, a number of exemptions would be available to withhold information in order to avoid interference with the ongoing investigation. (E.g., exemptions 7(A), 3 in conjunction with section 6103(e)(7), and - where applicable - 5.) If the audit were concluded at the time the requester litigates the denial of records, exemption 7(A) would no longer be applicable; however, the other exemptions may remain available to protect information that the government seeks to withhold for tax administration reasons. It behooves the IRS or Counsel office to assert and defend all possible exemptions initially and avoid a ruling that the government waived the exemption by failing to assert it. See Maydak v. Dep't of Justice, 218 F.3d 760, 767-69 (D.C. Cir. 2000) (court of appeals refused to permit agency to assert other exemptions when exemption 7(A) lost applicability due to conclusion of investigation), *cert. denied*, 533 U.S. 950 (2001).

## A. Exemption 1

This exemption pertains to classified records concerning national defense and foreign policy. The IRS seldom invokes this exemption. Where the IRS has invoked the exemption, it has involved treaty-related matters.<sup>66</sup>

## B. Exemption 2

Exemption 2 covers matters "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2). Exemption 2 has previously been interpreted by the courts as encompassing two different categories of information, generally referred to as "Low 2" and "High 2" information. However, the Supreme Court recently held that "Low 2 is all of 2 (and that High 2 is not 2 at all)." Milner v. Navy, 131 S. Ct. 1259, 1265 (2011).

"Low 2" information is defined, generally, as information that relates to trivial administrative matters of no genuine public interest such as "file numbers, initials, signature and mail routing stamps, references to interagency transfers, and data processing references." Scherer v. Kelley, 584 F.2d 170, 175-76 (7th Cir. 1978). "High 2" information was defined, generally, as predominantly internal documents the disclosure of which would risk circumvention of law. See, e.g., Schiller v. NLRB, 964 F.2d 1205, 1207 (D.C.Cir.1992); Crooker v. BATF, 670 F.2d 1051, 1055-63 (D.C. Cir. 1981).

In defining the scope of exemption 2, the Senate and House Reports provided conflicting views. The Senate Report stated that the exemption relates only to the internal personnel rules and practices of an agency. Examples of these may be rules as to personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave and the like. S. REP. NO. 89-813 (1965). The House Report, however, stated that the exemption applies to "[o]perating rules, guidelines, and manuals of procedure for government investigators, or examiners . . . but this exemption would not cover all matters of internal management such as employee relations and working conditions and routine administrative procedures which are withheld under the present law." H.R. REP. No. 89-1497, at 10 (1966).

The Supreme Court ruled that the statutory language takes precedence over the legislative history. See Milner, 131 S. Ct. at 1267 ("the more fundamental point is what we said before: Legislative history, for those who take it into account, is meant to clear up ambiguity, not create it . . . When presented, on the one hand, with clear statutory language and, on the other, with dueling committee reports,

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<sup>66</sup> Tax or other information obtained from a foreign government as the result of a tax treaty or convention is protected by section 6105. See Chap. 13, Pt II. Section 6105 provides that as a general rule "[t]ax convention information shall not be disclosed." It is an exemption 3 statute.

we must choose the language.”) As a result, exemption 2 only encompasses records relating to issues of employee relations and human resources, and only those limited to agency internal interest. For records for which the “high 2” exemption previously would have been asserted, the IRS will generally be able to assert exemption 7E, discussed below.

### C. Exemption 3

Exemption 3 requires agencies to withhold information "specifically exempted from disclosure by statute (other than the FOIA), provided that such statute (A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and (B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph." 5 U.S.C. § 552(b)(3) (2009). Section 6103 of the Code is the type of statute to which subsection 3 of FOIA applies. Church of Scientology of California v. IRS, 484 U.S. 9, 11 (1987); Chamberlain v. Kurtz, 589 F.2d 827, 843 (5th Cir.), *cert. denied*, 444 U.S. 842 (1979). Under section 6103(a), returns and return information "shall be confidential" and can be disclosed only as authorized by Title 26.

**Note:** Sections 7213, 7213A, and 7431 of the Code, respectively, set forth criminal and civil penalties for unauthorized disclosure of return information. They are not cited as exemption 3 statutes. (See discussion of sections 7213, 7213A, and 7431 in Chapter 1.)

DIF Scores, used to select returns for examination, are withheld pursuant to exemption 3 in conjunction with the final flush language of section 6103(b)(2). See Gillin v. IRS, 980 F.2d 819, 822 (1st Cir. 1992); Long v. IRS, 891 F.2d 222, 224 (9th Cir. 1989). Exemption 7(E) may also be asserted to withhold DIF scores.

Under appropriate circumstances, section 6103(e) can authorize access to returns and return information. Section 6103(e)(7) prohibits disclosure unless the Secretary or appropriate delegate determines that disclosure would not seriously impair federal tax administration. When exemption 3 in conjunction with section 6103(e)(7) is asserted to withhold records or information pertaining to tax law enforcement, exemption 7(A) may also apply.

Section 6103(h)(4) does not authorize disclosure of third-party returns or return information responsive to a FOIA request. The FOIA requester must provide disclosure authorization pursuant to section 6103(c) from the third-party taxpayer. Chamberlain v. Kurtz, 589 F.2d at 837-38; Safeway, Inc. v. IRS, No. C 05-3182 SBA, 2006 WL 3041079, at \*7-8 (N.D. Cal. Oct. 24, 2006). The IRS cannot provide identity or contact information of any third-party taxpayer for use by the requester to obtain such consent. The IRS is not responsible for obtaining



disclosure consents. Goulding v. IRS, No. 94-C-5113, 1996 WL 715544, at \*3 (N.D. Ill. Dec. 9, 1996).

Exemption 3 statutes cited by the Service in response to FOIA requests include:

1. Rule 6(e) of the Federal Rules of Criminal Procedure. Fund for Constitutional Gov't v. Nat'l Archives & Records Serv., 656 F.2d 856, 867 (D.C. Cir. 1981). This provision, promulgated under the authority of 18 U.S.C. §§ 3771-3772, mandates the secrecy of grand jury proceedings. The rule prohibits the disclosure of records that contain information generated during the course of any grand jury investigation. *Cf. Senate of P.R. v. Dep't of Justice*, 823 F.2d 574, 584 (D.C. Cir. 1987) (agency must establish nexus between release of the records and the revelation of the grand jury process).
2. 31 U.S.C. § 5319 establishes that reports required to be filed under the Bank Secrecy Act (e.g., CTRs, CMIRs, and FBARs) are specifically exempt under FOIA. Small v. IRS, 820 F. Supp. 163, 166 (D.N.J. 1992). See also Cuban v. Securities and Exchange Commission, 795 F.Supp.2d 43, 61-63 (D.D.C. 2011) (SARS are expressly exempt from disclosure under the FOIA pursuant to 31 U.S.C. § 5319. The court stated that it “cannot overlook the importance of protecting information in the suspicious activity reports, especially when it is explicit in the statute that the information should not be disclosed.”)
3. The National Defense Authorization Act, Pub. L. No. 104-201 § 821, 110 Stat. 2609 (1997), was established by Congress as an exemption 3 statute prohibiting agencies from releasing certain contractor proposals under FOIA. This statute was designed to alleviate the administrative burden upon agencies processing requests for contractor proposals under exemption 4.
4. Section 6103(e)(7) protects information the disclosure of which would seriously impair federal tax administration. Pacific Fisheries, Inc. v. United States, 395 F. App'x 438, 440 (9th Cir. 2010) (documents IRS provided to the Russian government to aid in Russia's tax investigation were exempt from disclosure pursuant to FOIA exemption 3 in conjunction with section 6103(e)(7) upon establishing that disclosure would seriously impair federal tax administration). Shanahan v. IRS, 672 F.3d 1142, 1149-50 (9th Cir. 2012) (IRS demonstrated that release of the documents would impair tax administration).
5. Section 6105 protects tax convention information (discussed more fully in Chapter 13, Part II) and meets the criteria for an exemption 3 statute. Pacific Fisheries, Inc., 395 Fed. App'x at 440; Tax Analysts v. IRS, 217 F. Supp. 2d 23, 26-28 (D.D.C. 2002).

6. 5 U.S.C. § 7114(b)(4)(C) protects guidance, advice, counsel, or training provided for management officials or supervisors relating to collective bargaining. Dubin v. Dep't of the Treasury, 555 F. Supp. 408 (N.D. Ga. 1981), *aff'd mem.*, 697 F.2d 1093 (11th Cir. 1983).
7. Cuban v. Securities and Exchange Commission, 795 F.Supp.2d 43, 61-63 (D.D.C. 2011). In a motion for reconsideration of the district court's grant of partial granted summary judgment, the government first raised FOIA exemption 3(A) to prevent the disclosure of suspicious activity reports (SARS). SARS are expressly exempt from disclosure under the FOIA. 31 U.S.C. § 5319. On reconsideration, the court held that "the [government] has not waived raising Exemption 3(A)" by failing to raise the exemption prior to the motion for reconsideration. The court also stated that it "cannot overlook the importance of protecting information in the suspicious activity reports, especially when it is explicit in the statute that the information should not be disclosed."

#### **D. Exemption 4**

Exemption 4 protects from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). This exemption applies to trade secrets such as processes, formulas, manufacturing plans, and chemical compositions. See Appleton v. FDA, 451 F. Supp. 2d 129, 148 & n.8 (D.D.C. 2006) (rejecting plaintiff's argument that trade secret requires "sole showing of 'innovation or substantial effort,'" and emphasizing that trade secret applies to information that constitutes the "end product of either innovation or substantial effort" (quoting Pub. Citizen Health Research Grp. v. FDA, 704 F.2d 1280, 1288 (D.C. Cir. 1983))). See also Yamamoto v. IRS, No. 83-2160, slip op. at 2 (D.D.C. November 16, 1983) (exemption 4 protects as a trade secret a report on the computation of the "standard mileage rate" prepared by a private company for IRS use). The exemption also applies to commercial or financial information such as corporate sales data, salaries and bonuses of industry personnel, and bids received by corporations in the course of their acquisitions.

Commercial and financial information other than trade secrets can be withheld from disclosure *only* if it is privileged or confidential and it must be obtained by the government from a "person." See Hearnes v. IRS, No. 77-225 C (3), 1979 WL 1428, at \*5 (E.D. Mo. July 2, 1979) (private commercial and financial information of persons or organizations other than the plaintiff appropriately withheld pursuant to exemption 4). Simply because the information concerns matters occurring during a commercial operation does not alone make the information commercial information. See, e.g., Chicago Tribune Co. v. FAA, No. 97 C 2363, 1998 WL 242611, at \*1-3 (N.D. Ill. May 7, 1998) (information on

nature and frequency of in-flight emergencies not commercial information for purposes of exemption 4).

Courts have defined "confidential" information as that which, if disclosed, would be likely to (1) harm the competitive position of the person who supplied it, or (2) impair the government's ability to obtain similar information in the future. Nat'l Parks and Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974). See, e.g., Fox News Network, LLC v. Dep't of the Treasury, 739 F. Supp. 2d 515, 564-65 (S.D.N.Y. 2010) (district court upheld Treasury's withholding of bank account information of entities that received TARP funds pursuant to exemption 4 upon finding that Treasury needs to be able to maintain the confidentiality of sensitive banking records to ensure that it will continue to have an effective working relationship with banks and similar entities).

Information obtained from a "person" includes data supplied by corporations and partnerships as well as individual citizens. It does not apply to records generated by the government such as government-prepared records based on government information. (The information may be exempt under one prong of exemption 5.) In Critical Mass Energy Project v. NRC, 975 F.2d 871, 878 (D.C. Cir. 1992) (*en banc*), *cert. denied*, 507 U.S. 984 (1993), the D.C. Circuit limited the National Parks submitter's "harm" test to those situations wherein the submitter was required to submit the information to the agency. Where the purported proprietary information is voluntarily submitted, the test is less stringent: whether the submitter ordinarily places the information into the marketplace. See AGS Computers v. IRS, No. 92-2714, slip op. at 13 (D.N.J. Sept. 16, 1993) (applying Critical Mass, confidential information voluntarily submitted by a company suspended by the IRS from serving as an electronic filer, as part of its appeal of the suspension, was protected by exemption 4). If the submitter does not ordinarily publicize the information, then it is exempt. In these cases, the submitter need not demonstrate to the agency the competitive harm likely to befall the submitter if the information is disclosed.

If information in the file is determined to be business-submitter information, the IRS must provide written notice to the submitter in accordance with Treas. Reg. § 601.702(g)(4) before disclosing information in response to a FOIA request.

## **E. Exemption 5**

Exemption 5 protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5). Deliberative process privilege material, confidential attorney-client communications, and attorney-work product records are not generally available to parties in litigation with the government, see Fed. R. Civ. P. 26(b)(1) and 26(b)(3); therefore the records are protected from disclosure by exemption 5. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975). See also Schell v. Dep't of Health & Human Servs., 843 F.2d 933,

939 (6th Cir. 1988) (“This language contemplates that the public will not be entitled to government documents which a private party could not discover in litigation with the agency.”); Parke, Davis & Co. v. Califano, 623 F.2d 1, 5 (6th Cir. 1980) (exemption 5 interpreted as preserving to the agencies recognized evidentiary privileges such as the attorney-client and deliberative process privileges and the work-product doctrine).

### **1. Deliberative process privilege**

The deliberative process privilege protects material reflective of the predecisional deliberative processes of government agencies, *i.e.*, internal agency records containing the opinions, deliberations, and recommendations rendered by governmental officials in connection with their official duties. See, *e.g.*, NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1975); Renegotiation Bd. v. Grumman Aircraft, 421 U.S. 168, 188 (1975); EPA v. Mink, 410 U.S. 73, 87-88 (1973). The primary purposes of the privilege are protecting the integrity of the decision making process and preventing the “disrobing of an agency decision-maker’s judgment.” Russell v. Dep’t of the Air Force, 682 F.2d 1045, 1049 (D.C. Cir. 1982). Specifically, three policy purposes have been held to constitute the basis for the deliberative process privilege: (1) to encourage frank, open discussions on matters of policy between subordinates and superiors; (2) to protect against the premature disclosure of proposed policies before they are finally adopted; and (3) to protect the public from confusion that might result from the disclosure of reasons and rationales that were not the ultimate ground for the agency action. Russell, 682 F.2d at 1048. See *also* NLRB v. Sears, Roebuck & Co., 421 U.S. at 150-51 (underlying policy considerations of the deliberative process privilege are to promote frank expression and discussion among those responsible for making the determinations that enable the government to operate, and to shield from disclosure the thought processes of executive and administrative personnel); Adamowicz v. IRS, 402 F. App’x. 648, 652-653 (2d Cir. 2010) (“The documents at issue reflect the consultative process underlying IRS decisions . . . and are therefore entitled to the same protection as other important agency decisions. The fact that the deliberative materials at issue were generated by a low-level official . . . and not circulated or considered by a final decision maker does not alter this conclusion.”).

Agencies generally may not withhold facts under the deliberative process privilege unless they are inextricably intertwined with otherwise deliberative matter, or so selectively culled from a larger universe of facts so as to reveal the deliberation itself. Montrose Chem. Corp. v. Train, 491 F.2d 63, 71 (D.C. Cir. 1974).

To the extent an otherwise predecisional and deliberative record is expressly adopted by an agency decision maker, then the deliberative process privilege is no longer available to resist production.

[I]f an agency chooses expressly to adopt or incorporate by reference an intra-agency memorandum previously covered by exemption 5 in what would otherwise be a final opinion, that memorandum may only be withheld on the ground that it falls within the coverage of some exemption other than exemption 5.

NLRB v. Sears, Roebuck & Co., 421 U.S. at 161.

A district court held that the Service waived the deliberative process privilege for the portion of an internal draft document read aloud by an IRS attorney at a meeting with oil industry representatives. Shell Oil Co. v. IRS, 772 F. Supp. 202, 210-11 (D. Del. 1991). The court did uphold the Service's assertion of the deliberative process privilege for the unread portion of the record.

## **2. Attorney-client privilege**

The attorney-client privilege protects "confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice." Mead Data Central, Inc. v. Dep't of Air Force, 566 F.2d 242, 252 (D.C. Cir. 1977). The privilege also applies to agency counsel who provide guidance to the agency. See In re Lindsay, 148 F.3d 1100, 1104 (D.C. Cir. 1998); Tax Analysts v. IRS, 117 F.3d 607, 618 (D.C. Cir. 1997) (FSA case). See *also* Judicial Watch, Inc. v. DHS, et al., 736 F. Supp. 2d 202, 209 (D.D.C. 2010) (e-mail messages between a DHS special agent and a DHS OIG attorney seeking confidential legal advice regarding the way in which a government witness entered into the United States clearly fall within the protections afforded by the attorney-client privilege).

The privilege extends not only to facts divulged by a client to his attorney in confidence, but also to opinions rendered by an attorney to his client based upon those facts. In Tax Analysts v. IRS, the court distinguished between legal conclusions based upon facts provided by a taxpayer, which were not privileged as confidential attorney-client communications, and those governmental source facts which reflect on the "scope, direction, or emphasis of audit activity," which are. Tax Analysts, 117 F.3d at 619-20. Unlike the work-product doctrine, it is not limited to the litigation context. Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 864 (D.C. Cir. 1980). The attorney-client privilege protects confidential inter-attorney communications as well as confidential attorney-

client communications. Green v. IRS, 556 F. Supp. 79, 85-86 (N.D. Ind. 1982), *aff'd mem.*, 734 F.2d 18 (7th Cir. 1984).

### 3. Work-product doctrine

The work-product doctrine protects records and other memoranda prepared by, or on behalf of, an attorney in contemplation of litigation. Hickman v. Taylor, 329 U.S. 495, 509-10 (1947). See also Fed. R. Civ. Proc. 26(b)(3). The rationale is to protect the adversarial trial process by insulating the attorney's preparation from scrutiny; it ordinarily arises when some articulable claim, which is likely to lead to litigation, has arisen. Coastal States, 617 F.2d at 865. It is not limited to civil proceedings, but extends to administrative and criminal proceedings as well. Martin v. Office of Special Counsel, 819 F.2d 1181, 1187-88 (D.C. Cir. 1987) (applying Privacy Act, 5 U.S.C. § 552a(d)(5)). Litigation need not have actually commenced so long as there is some articulable claim likely to lead to litigation. Coastal States, 617 F.2d at 864; Delaney, Migdail, & Young v. IRS, 826 F.2d 124, 127 (D.C. Cir. 1987) (although the record must be, fully or in principal part, "prepared in contemplation of litigation," litigation need not have been commenced, so long as there are specific claims identified that make litigation probable); Tax Analysts v. IRS, 152 F. Supp. 2d 1, 19 (D.D.C. 2001) (record prepared to determine whether a particular case should be submitted for litigation meets threshold for privilege). Nevertheless, the mere fact that it is conceivable that litigation may occur at some future time is not sufficient to protect records generated by attorneys as attorney work product. Senate of P.R. v. Dep't of Justice, 823 F.2d 574, 587 (D.C. Cir. 1987).

The doctrine also applies to records prepared by a non-attorney working under an attorney's supervision. In the discovery context, Federal Rule of Civil Procedure 26(b)(3) provides that work product includes material prepared in anticipation of litigation or for trial by or for another party or its representative. The work-product doctrine encompassed in FOIA exemption 5 follows this position. Shackett v. U.S., 339 F.Supp.2d 1092, 1094-95 (S.D. Cal. Aug 24, 2004) (special agent's report prepared in context of grand jury investigation for use by DOJ attorney withheld in full); Exxon Corp. v. FTC, 466 F. Supp. 1088, 1099 (D.D.C. 1978) (economist's report protected), *aff'd*, 663 F.2d 120 (D.C. Cir. 1980). Factual material is protected as well. United States v. Weber Aircraft Corp., 465 U.S. 792, 800 (1984). Moreover, the work product doctrine continues to protect records even after the litigation to which they are related is over. FTC v. Grolier, Inc., 462 U.S. 19, 28 (1983).

#### 4. Settlement Negotiations Privilege

Some courts have recognized a privilege for documents generated in the course of settlement negotiations with a third party. See, e.g., Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc., 332 F.3d 976, 983 (6th Cir. 2003) (“any communications made in furtherance of settlement are privileged”). However, communications reflecting negotiations between the government and an adverse party, which are of necessity exchanged between the parties, have been held not to constitute “intra-agency” memoranda under exemption 5 of FOIA. County of Madison v. Dep’t of Justice, 641 F.2d 1036, 1040-41 (1st Cir. 1981); Center for Auto Safety v. Dep’t of Justice, 576 F. Supp. 739, 747-49 (D.D.C. 1983). Cf. Childers v. Slater, No. 97-853 (RMU/JMF), 1998 U.S. Dist. LEXIS 11882, at \*16 (D.D.C. May 18, 1998) (non-FOIA case refusing to recognize a privilege for settlement negotiations); Norwood v. FAA, 580 F. Supp. 994, 1002-03 (W.D. Tenn. 1984) (same). Some courts, however, have recognized that settlement negotiations can be impeded by such a result. County of Madison v. Dep’t of Justice, 641 F.2d at 1040; Center for Auto Safety v. Dep’t of Justice, 576 F. Supp. at 746 n.18. Cf. Childers, 1998 U.S. Dist. LEXIS 22882, at \*16 (non-FOIA case limiting interrogatory to permit only a limited intrusion into the government’s settlement process); *but cf.* Bennett v. La Pere, 112 F.R.D. 136, 138-41 (D.R.I. 1986) (in a non-FOIA case, court ordered disclosure of settlement negotiation documents to a non-settling codefendant).

#### F. Exemption 6

Exemption 6 protects “personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6).

1. Exemption 6 requires a court to balance the right of privacy of affected individuals against the right of the public to be informed. In Dep’t of State v. Ray, 502 U.S. 164, 177-78 (1991), the Supreme Court upheld the withholding of the names and home addresses of repatriated Haitian refugees interviewed by U.S. officials regarding the conditions of their repatriation. The Court reasoned that release of identities would significantly invade their privacy interests and that the public interest was served by the release of the edited interview summaries. Moreover, disclosure of the persons’ names and addresses would not have shed any additional light on government activities. *Id.* (citing Dep’t of Justice v. Reporters Comm., 489 U.S. 749, 773 (1989)). See also FLRA v. Dep’t of Defense, 510 U.S. 487, 499 (1994) (vindication of policies behind federal labor statute irrelevant in FOIA where disclosure of employee names and addresses would not provide insight into how the government operates); Berger v. IRS, 288 F. App’x

829, 832-33 (3d Cir. 2008) (revenue officer's privacy interest in her time records, even if slight, outweighed public interest in those records, so as to preclude disclosure where disclosure would not have contributed to public understanding of IRS operations, but would only have served to satisfy requesting taxpayers' narrow interest in knowing how officer investigated their particular case).

2. The phrase "similar files" as used in exemption 6 has been given a broad interpretation. In Dep't of State v. Washington Post, 456 U.S. 595, 602 (1982), the Supreme Court stated that Congress intended exemption 6 to cover "detailed government records on an individual which can be identified as applying to that individual" rather than just "a narrow class of files containing only a discrete kind of personal information."
3. The majority rule is that death extinguishes the decedent's privacy rights recognizable under exemption 6 (as well as exemption 7(C)), but does not extinguish all privacy interests under either exemption. See Nat'l Archives and Records v. Favish, 541 U.S. 157, 170 (2004) (FOIA recognizes surviving family members' right to personal privacy with respect to their close relative's death-scene images); Prison Legal News v. EOUSA, 628 F.3d 1243, 1248-50 (10th Cir. 2011) (citing to Favish, family of a murdered prisoner had privacy rights supporting withholding audio and video recordings of the murder scene; fact that recordings were partially played in open court during murder trial did not negate family's rights); Accuracy in Media, Inc. v. Nat'l Park Serv., 194 F.3d 120, 123 (D.C. Cir. 1999) (whether the privacy interest inheres in the decedent's survivors or posthumously in the subject of the records, the privacy interest survives death such that scene-of-death and autopsy photographs of Vincent Foster, former Deputy White House Counsel, were exempt from disclosure under exemption 7(C)); Reiter v. DEA, No. 97-5246, 1998 WL 202247, at \*1 (D.C. Cir. Mar. 3, 1998) (*per curiam*) (although the privacy interest of the deceased may be "reduced," the privacy interest should be protected under exemption 7(C) unless outweighed by the public interest in disclosure); New York Times, Inc. v. NASA, 782 F. Supp. 628, 631-32 (D.D.C. 1991) (sustaining a privacy claim under FOIA exemption 6 with respect to an audiotape of the Space Shuttle Challenger astronauts' last words, because "[e]xposure to the voice of a beloved family member immediately prior to that family member's death . . . would cause the Challenger families pain" and inflict "a disruption [to] their peace of mind every time a portion of the tape is played within their hearing").



## **G. Exemption 7**

Exemption 7 exempts from disclosure records or information compiled for law enforcement purposes, but only to the extent that the production of such records:

(A) could reasonably be expected to interfere with enforcement proceedings; (B) would deprive a person of a right to a fair trial or an impartial adjudication; (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy; (D) could reasonably be expected to disclose the identity of a confidential source, including a state, local or foreign agency or authority or any private institution, which furnished information on a confidential basis, and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by the confidential source; (E) would disclose techniques and procedures for law enforcement investigations or prosecutions or would disclose guidelines for law enforcement investigations or prosecutions if disclosure could reasonably be expected to risk circumvention of the law; or, (F) could reasonably be expected to endanger the life or physical safety of any individual.

5 U.S.C. § 552(b)(7).

This exemption allows – but does not require – withholding of records or information, not generally whole files, "compiled for law enforcement purposes," but only to the extent that the production of the records would cause one of the six specifically enumerated harms described above. This threshold requirement encompasses records generated out of civil and criminal judicial and administrative enforcement proceedings, or used in investigations (such as manuals, guidelines and instructions to staff). Case law has established that criminal tax investigations, audits, collection activities, consideration of tax exemption applications, church examinations, conduct investigations, and litigation are "law enforcement purposes" within the meaning of exemption 7. See, e.g., Becker v. IRS, 34 F.3d 398, 407 (7th Cir. 1994) (investigating potential illegal tax protestor activity); Church of Scientology Int'l v. IRS, 995 F.2d 916, 919 (9th Cir. 1993) (enforcing the provisions of the federal tax code that relate to qualification for exempt status); Lewis v. IRS, 823 F.2d 375, 379-80 (9th Cir. 1987) (criminal investigation). Records reflecting illegal actions may be withheld if they meet the requirements for one or more exemptions. ACLU v. Dep't of Defense, 628 F.3d 612, 622 (D.C. Cir. 2011).

### **1. Exemption 7(A)**

Determining the applicability of exemption 7(A) requires a two-step analysis: (1) whether a law enforcement proceeding is pending or

prospective, and (2) whether release of information could reasonably be expected to cause some articulable harm. See NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 239-40 (1978) (government must show how release of records "would interfere with a pending enforcement proceeding"); Manna v. Dep't of Justice, 51 F.3d 1158, 1164-65 (3d Cir.) (holding that government must show how release of records would interfere with a pending enforcement proceeding, and noting that "disclosure of FBI reports could result in a chilling effect upon potential cooperators and witnesses in organized crime enforcement investigations"), *cert. denied*, 516 U.S. 975 (1995). This means that when there is a concrete prospect of ongoing enforcement proceedings, records or portions of records may be withheld if disclosure of information might impede the investigation or harm the government's case in that particular proceeding or, under certain circumstances, would impede the government's ability to investigate generally. See Ctr. For Nat'l Sec. Studies v. Dep't of Justice, 331 F.3d 918, 929-30 (D.C. Cir. 2003) (holding that the "disclosure of detainees' names could reasonably be expected to interfere with the ongoing terrorism investigation" and reasoning that such disclosure could negatively impact the government's investigation going forward because "a potential witness or informant may be much less likely to come forward and cooperate with the investigation if he believes his name will be made public"), *cert. denied*, 540 U.S. 1104 (2004).

Grounds for the nondisclosure of these records that have been repeatedly upheld by the courts include the potential impairment of the law enforcement effort caused by disclosure of: (1) evidence; (2) witnesses; (3) prospective testimony; (4) the reliance placed by the government upon the evidence; (5) the transactions being investigated; (6) the direction of the investigation; (7) government strategy; (8) confidential informants; (9) the scope and limits of the government's investigation; (10) prospective new defendants; (11) materials protected by the Jencks Act; (12) attorney work product; (13) the methods of surveillance; and (14) subjects of surveillance. Title Guarantee Co. v. NLRB, 534 F.2d 484, 491 (2d Cir.), *cert. denied*, 429 U.S. 834 (1976); Kanter v. IRS, 433 F. Supp. 812, 822 n.18 (N.D. Ill. 1977).

The Supreme Court has stated that nondisclosure may also be appropriate when the release of requested information would give the requester earlier and greater access to the government's case than he would otherwise have. NLRB v. Robbins Tire, 437 U.S. at 238-39.

When exemption 7(A) is asserted to withhold records or information pertaining to tax law enforcement (that is, return information), exemption 3 in conjunction with section 6103(e)(7) may also apply. Shanahan v. IRS, 672 F.3d 1142, 1149-50 (9th Cir. 2012) (IRS demonstrated that release of

the documents would both impair tax administration and interfere with a pending investigation).

## **2. Exemption 7(B)**

This exemption provides for withholding if disclosure of the records "would deprive a person of a right to a fair trial or impartial adjudication." 5 U.S.C. § 552(b)(7)(B). This is primarily a protection against prejudicial publicity in civil or criminal trials. This exemption has rarely, if ever, been used by the IRS.

## **3. Exemption 7(C)**

Exemption 7(C) protects from disclosure records or information compiled for law enforcement purposes whose disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C).

Reliance on cases interpreting exemption 6 is proper in constructing the 7(C) exemption. See Dep't of Justice v. Reporter's Comm., 489 U.S. 749, 768 (1989) (wherein Court notes that the discussion of exemption 6 in Dep't of Air Force v. Rose, 425 U.S. 352 (1976), was applicable to current case interpreting exemption 7(C)). The exemption, however, does not apply to corporations or other entities. See FCC v. AT&T, 131 S. Ct. 1177, 1185 (2011) ("We reject the argument that because 'person' is defined for purposes of FOIA to include a corporation, the phrase 'personal privacy' in exemption 7(C) reaches corporations as well. The protection in FOIA against disclosure of law enforcement information on the ground that it would constitute an unwarranted invasion of personal privacy does not extend to corporations."). The individuals whose interests are protected by clause (C) clearly include the subject of the investigation and "any (other) person mentioned in the requested file." See Attorney General's 1974 FOI Amdts. Mem. at 9. Thus, agencies have successfully asserted exemption 7(C) to protect the identities of law enforcement personnel and third parties who cooperate in investigations. May v. IRS, 85 F. Supp.2d 939, 947 (W.D. Mo. 1999).

In Reporters Committee—considered the seminal exemption 7(C) case—the Supreme Court held that whether disclosure is "warranted" within the meaning of the exemption turns upon the nature of the requested record and its relationship to FOIA's central purpose of exposing to public scrutiny official information that sheds light on an agency's performance of its statutory duties. Although neither the legislative history nor the explicit terms of FOIA specify what information about an individual implicates a privacy interest, the statute generally is read to include information about an individual which he could reasonably seek to withhold from the public

at large because of its intimacy or its possible adverse effects upon himself or his family. See Attorney General's 1974 FOI Amdts. Mem. at 9. As the Supreme Court noted in Reporters Committee, 489 U.S. at 763, "privacy encompass[es] the individual's control of information concerning his or her person."

#### **4. Exemption 7(D)**

Exemption 7(D) exempts material the production of which could reasonably be expected to disclose the identity of a confidential source, including a state, local, or foreign agency or authority, or any private institution which furnished information on a confidential basis, and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by the confidential source.

The first part of this provision, concerning the identity of confidential sources, applies to any type of law enforcement record, civil or criminal. The term "confidential source" refers not only to paid informants but also to any person who provides information "under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred." S. REP. NO. 93-1200, at 13 (1974). Even if the requester has independent knowledge of the confidential source's identity, exemption 7(D) applies. See Cleary v. FBI, 811 F.2d 421, 423 (8th Cir. 1987); Amuso v. Dep't of Justice, 600 F. Supp. 2d 78, 97-100 (D.D.C. 2009).

In most circumstances, it would be proper to withhold the names, addresses, and other identifying information regarding citizens who submit complaints or reports indicating possible violations of law. Of course, a source can be confidential with respect to some items of information he provides, even if he furnishes other information on an open basis; the test, for purposes of this provision, is whether he is a confidential source with respect to the particular information requested, not whether all connections between him and the agency are entirely unknown. Attorney General's 1974 FOI Amdts. Mem. at 10.

Early case law interpreted "sources" to include local, state, and foreign law enforcement agencies (those whose primary function is the prevention or investigation of violations of criminal statutes, or the apprehension of alleged criminals) which provide information to an agency in confidence. Lesar v. Dep't of Justice, 636 F.2d 472, 489-90 (D.C. Cir. 1980); Keeney v. FBI, 630 F.2d 114, 119 (2d Cir. 1980); Church of Scientology v. Dep't of Justice, 612 F.2d 417, 427-28 (9th Cir. 1979). This was eventually

codified by the 1986 FOIA amendments. See S. REP. NO. 93-1200 (1974).

The second clause of exemption 7(D) deals with information provided by a confidential source. With respect to civil matters, the information may not be withheld on the basis of exemption 7(D), except to the extent that its disclosure would reveal the identity of the confidential source. By contrast, with respect to criminal investigations conducted by a "criminal law enforcement authority" (e.g., Criminal Investigation or TIGTA) and lawful national security intelligence investigations conducted by any agency, any information provided by a confidential source is, by that fact alone, exempt. Hearnes v. IRS, No. 77-225 C (3), 1979 WL 1428, at \*7 (E.D. Mo. July 2, 1979).

### **5. Exemption 7(E)**

Exemption 7(E) protects records to the extent that release "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions, if such disclosure could reasonably be expected to risk circumvention of law." It has been applied to protect DIF scores, Peyton v. Reno, No. 98-1457 (SS), 2000 WL 141282, at \*1 (D.D.C. Jan. 6, 2000); Small v. IRS, 820 F. Supp. 163, 166 (D.N.J. 1992), and tolerance and investigative criteria, O'Connor v. IRS, 698 F. Supp. 204, 205 (D. Nev. 1988). In Mayer-Brown v. IRS, 562 F.3d 1190 (D.C. Cir. 2009), with a discussion of the meaning of the exemption requirement that disclosure "could reasonably be expected to risk circumvention of the law," the court upheld the withholding of settlement criteria and Appeals Settlement Guidelines pursuant to exemption 7E. That general information about law enforcement techniques or guidelines is public knowledge does not prevent assertion of this exemption to withhold details of an agency's specific use of certain techniques or the application of particular guidelines. See New York Civil Liberties Union v. Dep't of Homeland Security, 771 F. Supp. 2d 289, 291-293 (S.D.N.Y. 2011).

When exemption 7(E) is asserted to withhold records or information pertaining to tax law enforcement (*i.e.*, return information), exemption 3 in conjunction with section 6103(e)(7) may also apply.

### **6. Exemption 7(F)**

Exemption 7(F) exempts material the disclosure of which could reasonably be expected to "endanger the life or physical safety of any individual." It might apply, for example, to information that would reveal the identity of undercover agents (state or federal) working on matters such as narcotics, organized crime, terrorism, or espionage. Clarkson v. IRS, Civ. No. 8:88-

3036-3K, 1990 U.S. Dist. LEXIS 6887, at \*9 (D.S.C. May 2, 1990), *aff'd*, 935 F.2d 1285 (table cite), 1991 WL 106190 (4th Cir. June 20, 1991) (*per curiam*). The exemption, however, is not limited to law enforcement personnel. The 1986 FOIA amendments broadened the scope of the exemption to encompass danger to any person. See Amuso v. Dep't of Justice, 600 F. Supp. 2d at 101-02 (explaining that “[w]hile courts generally have applied exemption 7(F) to protect law enforcement personnel or other specified third parties, by its terms, the exemption is not so limited; it may be invoked to protect ‘any individual’ reasonably at risk of harm.”).

For a discussion of FOIA exemptions 8 and 9, not usually asserted by the IRS, see the DOJ FOIA Reference Book at the link given at the beginning of this chapter.

## V. STATUTORY EXCLUSIONS

In addition to the changes to the law enforcement provisions of exemption 7, the 1986 amendments to the Act added subsection (c) to FOIA to expand the ability of criminal law enforcement agencies to protect certain information. Where the requester, a subject of a criminal investigation, is unaware of the investigation, and acknowledging the existence of records in response to that person's request would result in an exemption (7)(A)-type interference, the agency may treat the records as not subject to the Act, for as long as those circumstances exist. 5 U.S.C. § 552(c)(1). To the extent an agency maintains informant records under the informant's name and a request is made for them, the records may also be treated as not subject to the Act unless the informant's status as an informant has been officially confirmed. 5 U.S.C. § 552(c)(2).

These exclusions rarely apply to IRS records. If disclosure personnel processing a FOIA request or administrative appeal have responsive records to which an exclusion would apply, they should promptly contact Branch 6 or 7 of Procedure and Administration to discuss it and coordinate an appropriate response. Litigation of such a case also requires special handling. See Islamic Shura Council of Southern California, et al. v. FBI, 779 F. Supp. 2d 1114, 1120-1125 (S.D. Cal. 2011).

## VI. RECOVERABLE FEES

Permissible fees fall into three categories: search, review, and duplication. Agencies do not charge requesters (other than commercial users) for the first 100 pages of duplication or the first two hours of search. 5 U.S.C. § 552(a)(4)(A). Under the Service's regulations, individual (as compared to corporate or other institutional) requesters are not charged search fees for requests for records retrieved by identifiers that are covered by the Privacy Act. Treas. Reg. § 601.702(f)(3)(iv)(C). The Act permits agencies to recoup the direct costs of editing records made available for release under FOIA, but only from requesters seeking information for their own commercial interests. However, the OPEN Government Act of 2007 placed restrictions on an

agency's ability to collect certain fees if the agency fails to respond to a FOIA request within the statutory time frame. "An agency shall not assess search fees (or in the case of a requester described under clause [552(a)(4)(A)(ii)(II)], duplication fees) under this subparagraph if the agency fails to comply with any time limit under paragraph (6), if no unusual or exceptional circumstances (as those terms are defined for purposes of paragraphs (6)(B) and (C), respectively) apply to the processing of the request." 5 U.S.C. § 552(a)(4)(A)(viii). Conversely, for those requests for which unusual or exceptional circumstances do exist, agencies may assess appropriate fees.

Documents may be provided without charge or at a reduced charge where the agency determines it is in the public interest to do so. "Public interest" means that the nonexempt records are likely to contribute significantly to the public's understanding of the operations or activities of the government and are not primarily in the commercial interest of the requester.

**Note:** Indigence is not a basis for a waiver or reduction of fees. The determination of any fee waiver is made by the local Disclosure Officer.

## **VII. LITIGATION CONSIDERATIONS**

### **A. General**

The Associate Chief Counsel, Procedure and Administration (P&A) is responsible for coordinating all aspects of litigation arising under FOIA, 5 U.S.C. § 552. Any complaint alleging jurisdiction in part under FOIA and in part under one or more other statutes or theories falling under the aegis of another Office of Chief Counsel function must be coordinated with P&A Branches 6 and 7. See CCDM 37.2.2 for information pertaining to FOIA litigation.

### **B. Procedures Upon Receipt of a FOIA Complaint**

Upon receipt by any component of the Office of Chief Counsel of a copy of a complaint that alleges jurisdiction under FOIA, in whole or in part, the complaint should be sent to the Technical Services Support Branch (e-mail to "TSS4510") for case opening. FOIA provides 30 days for an agency to answer; therefore the complaint should also be e-mailed to the Chiefs of P&A Branches 6 and 7 for assignment. The P&A Branch 6 or 7 attorney assigned to the case will prepare a defense letter to assist the Department of Justice Tax Division in defending the Service.

### **C. Coordination**

After the P&A attorney has provided the Tax Division with the defense letter, declarations necessary to support a motion for summary judgment or other dispositive motion, and, if necessary, copies of the records at issue in a format suitable for *in camera* submission, the P&A attorney is responsible for furnishing

any additional assistance requested by the Tax Division. This responsibility may include obtaining additional declarations, furnishing or updating background information, enlarging upon a defense, preparing a court-ordered Vaughn Index (see Section VII.E., below), answering interrogatories or other requests for discovery, assessing a settlement proposal, or assessing a request for attorney fees and court costs. See CCDM 37.2.2.4.

#### **D. Declarations**

FOIA litigation is usually resolved on motions to dismiss or for summary judgment. Such motions must be supported by one or more declarations setting forth the actions the agency has taken to fulfill its obligations under FOIA to search for and make available (subject to applicable exemptions) the requested documents. Where documents have been withheld in whole or in part, a declaration will be needed to describe the withheld material and the applicability of each asserted exemption to that material.

#### **E. Vaughn Index**

Under FOIA, the defendant agency bears the burden of sustaining its action of withholding records. See 5 U.S.C. § 552(a)(4)(B). See also Brady-Lunny v. Massey, 185 F. Supp. 2d 928, 931 (C.D. Ill. 2002) (“Since the Government is the party refusing to produce the documents, it bears the burden of showing that the documents are not subject to disclosure.”). The Court of Appeals for the District of Columbia Circuit first required a formal index of withheld documents, now commonly referred to as a “Vaughn Index.” See Vaughn v. Rosen, 484 F.2d 820, 827 (D.C. Cir. 1973). A Vaughn Index is not required merely because a requester (or plaintiff) asks for it; an Index is required only when a court hearing or FOIA complaint, orders it. A motion for an order for an Index should be opposed as premature if the agency has not yet had an opportunity to justify its assertion of various exemptions, in particular exemption 7(A). See Int’l Union of Elevator Constructors v. Dep’t of Labor, 747 F. Supp. 2d 976, 981-82 (N.D. Ill. Oct. 12, 2010).

A Vaughn Index is an itemized index, correlating each withheld document (or portion thereof) with a specific FOIA exemption and the relevant part of the agency’s nondisclosure justification. Vaughn v. Rosen, 484 F.2d at 827. The Index is intended to allow the court to make a rational decision about whether the withheld material must be produced without actually viewing the documents themselves and to produce a record that will render its decision capable of meaningful review on appeal. See King v. Dep’t of Justice, 830 F.2d 210, 219 (D.C. Cir. 1987). There is no predetermined format for a Vaughn Index. An appropriately detailed and non-conclusory declaration describing the documents withheld in whole or in part and explaining the applicability of the asserted exemptions will usually meet this requirement. The declaration should also note, when applicable, that nonexempt portions of the document(s) could not



reasonably be segregated from exempt material. Such a declaration is often composed for purposes of a dispositive motion, and can make a separate Vaughn Index unnecessary.

## **F. Discovery**

Discovery in FOIA litigation is rarely appropriate. A well-crafted and complete declaration describing the search efforts and explaining how those efforts were calculated to locate responsive records, will usually provide the information necessary for a court to determine whether a search was reasonable. Discovery regarding the withheld documents is inappropriate because release of the withheld material in response to a discovery demand will eliminate the agency's FOIA exemption assertions.

## **G. Fees and Costs**

FOIA authorizes an award of fees and costs to a plaintiff that “substantially prevails” in litigation. In 2007, Congress revised the eligibility criteria. To be deemed to have substantially prevailed, the plaintiff must have obtained relief through either (i) a judicial order, or an enforceable written agreement or consent decree; or (ii) a voluntary or unilateral change in position by the agency, if the plaintiff's claim is not insubstantial. A stipulation approved by the court can be a judicial order. See Judicial Watch, Inc. v. Dep't of Justice, 774 F. Supp. 2d 225, 227-230 (D.D.C. Mar. 31, 2011). If a plaintiff is eligible for an award of costs and fees, the court must then consider whether the plaintiff is entitled. Four non-exclusive factors are considered to determine eligibility: (1) the public benefit derived from the case; (2) the commercial benefit to the plaintiff; (3) the nature of the plaintiff's interest in the records; and (4) whether the government has a reasonable basis for withholding the requested information. *Id.* at 230-232; United Am. Fin., Inc. v. Potter, 770 F. Supp. 2d 252, 255-58 (D.D.C. 2011). For a brief recitation of the history and applicability of FOIA costs and fee provisions, see Brayton v. U.S. Trade Representative, 641 F.3d 521, 524-26 (D.C. Cir. 2011).

## CHAPTER 10

### LITIGATION PRIVILEGES

#### I. INTRODUCTION

This chapter provides a brief overview of the privileges most commonly invoked by the IRS in disclosure and privacy actions and discusses certain procedural issues associated with the claim of executive privilege. For more information about litigation privileges, consult with Branches 6 & 7 of the Office of the Associate Chief Counsel (Procedure & Administration). See *generally* Chapter 9, Freedom of Information Act, for a further discussion of privileges.

The government may refuse to provide litigants with access to documents and may refuse to provide information through other means such as deposition or trial testimony on three grounds:

1. Statutes such as I.R.C. § 6103, the Privacy Act of 1974, 5 U.S.C. § 552a, and the Bank Secrecy Act, Pub. L. No. 91-508, 84 Stat. 1114 (1970) (codified at 12, 18, and 31 U.S.C.), *amended by* Pub. L. No. 107-56, 115 Stat. 327 (2001), which allow or require specified material to be kept confidential;
2. Evidentiary privileges available to any litigant, such as the attorney-client privilege and work product doctrine, and other generally available objections such as relevancy; and
3. Certain privileges available only to the government – the so-called governmental privileges. For a listing of the governmental privileges, see *Ass'n for Women in Science v. Califano*, 566 F.2d 339, 343 (D.C. Cir. 1977).

#### II. STATUTORY PRIVILEGES

##### A. I.R.C. § 6103

The scope of documents and information subject to section 6103, and the circumstances under which section 6103 makes disclosure of such documents and information unlawful, are discussed at length elsewhere in this book. We note, however, that notwithstanding the limitations of section 6103, upon issuance of a court order by the presiding judge in a federal or state criminal proceeding, the Service will disclose to the attorney for the government, pursuant to the constitutional doctrine announced in *Brady v. Maryland*, 373 U.S. 83 (1963), returns and/or return information that may be determined to be exculpatory. If the attorney for the government does not believe that disclosure of a particular return or item of return information is required under the Constitution, the attorney can offer to submit the information to the court *in camera* for a determination as to whether the information is exculpatory evidence required to be disclosed to the defendant.

## **B. Privacy Act of 1974, 5 U.S.C. § 552a**

As a general rule, the Privacy Act, 5 U.S.C. § 552a, is not a statutory privilege. In Laxalt v. McClatchy, 809 F.2d 885, 890 (D.C. Cir. 1987), the D.C. Circuit noted that, “[w]here the actual content of the record has the potential to cause harm to the affected party, a court supervising discovery should consider this factor in determining how to exercise its traditional authority to limit discovery.”

In accordance with Henthorn v. United States, 931 F.2d 29, 30 (9th Cir. 1991), the Service will disclose, in response to a criminal defendant's discovery request, "exculpatory" information found in personnel or other Privacy Act covered files of the investigating agents.

## **C. Bank Secrecy Act, 31 U.S.C. § 5319**

If Title 31 documents or information are sought in discovery, you should refer to the Re-dissemination Guidelines for Bank Secrecy Act Information, issued November 28, 2007, by the Director of the Financial Crimes Enforcement Network. These guidelines are presently being incorporated into the IRM. See IRM Exhibit 4.26.14-2 for the 2004 version of the Guidelines. See *generally* Chapter 7 for additional information on the Bank Secrecy Act.

# **III. TYPES OF EVIDENTIARY PRIVILEGES**

## **A. Attorney-Client Privilege**

“The attorney-client privilege protects confidential communications made between clients and their attorneys when the communications are for the purpose of securing legal advice or services. It ‘is one of the oldest recognized privileges for confidential communications.’” In re Lindsey, 158 F.3d 1263, 1267-68 (D.C. Cir. 1998), *cert. denied sub nom.*, Office of the President v. Office of Indep. Counsel, 525 U.S. 996 (1998) (quoting Swidler & Berlin v. United States, 524 U.S. 399, 403 (1998)). Its purpose is to ensure that clients’ confidences to their attorneys will be protected, thereby encouraging clients to be open and honest in their communications with their attorneys. This confidentiality is deemed essential to the adversary system underlying our judicial process. That process is dependent upon sound legal advice and advocacy. These interests are, in turn, fostered by attorneys being fully informed by their clients. The attorney-client privilege reflects society’s judgment that promotion of trust and honesty within the relationship is more important than the burden it potentially places on the discovery of truth.

“The [attorney-client] privilege also protects communications from attorneys to their clients if the communications ‘rest on confidential information obtained from the client.’” Tax Analysts v. IRS, 117 F.3d 607, 618 (D.C. Cir. 1997) (quoting In

re Sealed Case, 737 F.2d 94, 99 (D.C. Cir. 1984)). The documents at issue in Tax Analysts were Field Service Advice Memoranda (FSAs) issued by the national office of the Office of Chief Counsel in response to requests from field personnel. The court found that they contained no “confidential communications” where the factual information in the documents was obtained from taxpayers and did not contain confidential information concerning the agency. *Id.* at 619. Moreover, the court found that the legal analysis contained in FSAs was not subject to the attorney-client privilege because it was in the nature of a body of working law. The court held that the attorney-client privilege would apply only to particular portions of FSAs containing confidential information transmitted by field personnel regarding the scope, direction, or emphasis of audit activity. Tax Analysts, 117 F.3d at 619-20.

Communications between a client organization and its in-house counsel regarding business decisions must be distinguished from communications between a client organization and its in-house counsel regarding legal advice. United States v. Chevron Corp. No. C-94-1885 SBA, 1996 WL 264769, at \*3 (N.D. Cal. Mar. 13, 1996). The privilege only applies if the “*primary purpose* of each document was the production of legal advice.” *Id.* “If the document was prepared for purposes of simultaneous review by legal and nonlegal personnel, it cannot be said that the primary purpose of the document is to secure legal advice.” *Id.* (quoting United States v. IBM Corp., 66 F.R.D. 206, 213 (S.D.N.Y. 1974)). Communications between the attorneys and non-attorneys “who have been engaged to assist the attorney in providing legal advice” may also be protected by the privilege. United States v. Richey, 632 F.3d 559, 566 (9th Cir. 2011) (“If the advice sought is not legal advice, but, for example, accounting advice from an accountant, then the privilege does not exist.”).

The attorney-client privilege is not limited to communications made in the context of litigation. Coastal States Gas Corp. v. Dep’t of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980). Attorney and client are not “mutually exclusive classes.” Mead Data Cent., Inc. v. Air Force, 566 F.2d 242, 253 n.21 (D.C. Cir. 1977). An attorney can seek legal advice from another attorney with the assurance that the private communication from his client will not be subject to disclosure. *Id.* The privilege is not lost when the communications are circulated among members of an organization who have the authority to act on behalf of the organization concerning the subject matter of the communication. *Id.* at 253 n.23. The attorney-client privilege protects attorney-client communications where the specifics of the communication are confidential, even though the underlying subject matter is known to others. Upjohn Co. v. United States, 449 U.S. 383, 395-96 (1981).

The attorney-client privilege has been narrowly construed. It will cover those situations only where disclosure might not have been made absent the privilege. Fisher v. United States, 425 U.S. 391, 403 (1976). A fundamental prerequisite is that confidentiality of the client communication must have existed at the time it

was made and that it remains at the time of the privilege claim. Thus, where it is anticipated that the information communicated will be made "public" (*i.e.*, in a court filing or to an agency, such as in the filing of a tax return), then the necessary expectation of confidentiality does not exist and the attorney-client privilege will not attach. United States v. Lawless, 709 F.2d 485, 487-488 (7th Cir. 1983).

Although recognizing that the attorney-client privilege clearly does extend to confidential communications with attorneys within the government, the D.C. Circuit has held that a government attorney may not invoke the attorney-client privilege to shield information related to criminal misconduct from disclosure to a grand jury. In re Lindsey, 158 F.3d at 1272-78.

## **B. Work Product Doctrine**

The work product doctrine protects documents and other memoranda prepared in and in anticipation of litigation. Hickman v. Taylor, 329 U.S. 495, 510-12 (1947). Since its purpose is to protect the adversary trial process by insulating the attorney's preparation from scrutiny, the work product doctrine does not attach until "some articulable claim, likely to lead to litigation," has arisen. Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 865 (D.C. Cir. 1980).

The doctrine has a broad sweep:

1. Litigation need not have actually commenced, so long as specific claims have been identified which make litigation probable. Kent Corp. v. NLRB, 530 F.2d 612, 623 (5th Cir. 1976), *cert. denied*, 429 U.S. 920 (1976). Even documents prepared when the identity of the prospective litigation opponent was unknown can suffice to come within the doctrine. Delaney, Migdail & Young, Chtd. v. IRS, 826 F.2d 124, 127 (D.C. Cir. 1987) ("[The] plaintiff here is not trying to ascertain the agency's view of the law in order to comply or to advise clients on how to comply; it is seeking the agency's attorneys' assessment of the program's legal vulnerabilities in order to make sure it does not miss anything in crafting its legal case against the program."). The mere fact that it is conceivable that litigation may occur at some future time will not be sufficient to protect documents generated by attorneys as work product. Senate of P.R. v. Dep't of Justice, 823 F.2d 574, 586-87 (D.C. Cir. 1987). The work product doctrine has also been held to attach to a law enforcement investigation where the investigation is "based upon a specific wrongdoing and represent[s] an attempt to garner evidence and to build a case against the suspected wrongdoer." Safecard Servs., Inc. v. SEC, 926 F.2d 1197, 1202 (D.C. Cir. 1991).

Even where a document is prepared for two or more disparate purposes, so long as litigation was a major factor in the decision to

create it, then the work product doctrine will attach. The majority rule is that documents should be deemed prepared “in anticipation of litigation” if “in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.” 8 Charles Alan Wright, et al., *FED. PRACTICE & PROCEDURE* § 2024 (3d ed. 2010); *accord United States v. Roxworthy*, 457 F.3d 590, 593 (6th Cir. 2006), *nonacq.*, I.R.B. 2007-40 (Oct. 1, 2007) (Service will continue to aggressively seek the enforcement of summonses, challenging unjustified assertions of the work product doctrine in all appropriate cases) (Action on Decision is available at: <http://www.irs.gov/pub/irs-aod/aod200704.pdf>); *United States v. Adlman*, 134 F.3d 1194, 1202-03 (2d Cir. 1998); *Nat’l Union Fire Ins. Co. v. Murray Sheet Metal Co., Inc.*, 967 F.2d 980, 984 (4th Cir. 1992); *Senate of P.R. v. Dep’t of Justice*, 823 F.2d at 586 n.42; *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 401 (8th Cir. 1986), *cert. denied*, 484 U.S. 917 (1987); *Binks Mfg. Co. v. Nat’l Presto Indus., Inc.*, 709 F.2d 1109, 1118-19 (7th Cir. 1983); *In re Grand Jury Proceedings*, 604 F.2d 798, 803 (3d Cir. 1979). The minority view limits the applicability of the work product doctrine to documents prepared “primarily” to assist in litigation. *See, e.g., United States v. El Paso Co.*, 682 F.2d 530, 543-44 (5th Cir. 1982), *cert. denied*, 466 U.S. 944 (1984).

Note that “documents that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation’ are not protected.” *Pac. Gas and Elec. Co. v. United States*, 69 Fed. Cl. 784, 798-99 (Fed. Cl. 2006) (quoting *Adlman*, 134 F.3d at 1202). Thus, documents prepared in the agency’s ordinary course of business, *e.g.*, review of a proposed statutory notice of deficiency or a draft summons, without more, may not be accorded protection. Similarly, documents that are required to be created to comply with the law are not protected by the work product doctrine. *United States v. Richey*, 632 F.3d 559, 567-568 (9th Cir. 2011); *In re Raytheon Sec. Litig.*, 218 F.R.D. 354, 359 (D. Mass. 2003). *But see United States v. Deloitte LLP*, 610 F.3d 129, 137-39 (D.C. Cir. 2010). In *United States v. Textron, Inc. and Subsidiaries*, 577 F.3d 21, 29-31 (1st Cir. 2009) (en banc), *cert. denied*, 130 S. Ct. 3320 (2010), the First Circuit concluded that tax accrual workpapers are indisputably prepared to support a company’s financial statement filings and to gain independent auditor approval, and that these are purposes or functions that are compelled by public requirements unrelated to litigation and arise in the ordinary course of business for a public company. The First Circuit further concluded that the workpapers are not prepared for “use” in possible litigation and would not serve any useful purpose for Textron in conducting any litigation, if it arose.

The work product doctrine has also been held to cover documents relating to possible settlements of litigation, as well as the final decision to terminate litigation. Cities Serv. Co. v. FTC, 627 F. Supp. 827, 832 (D.D.C. 1984), *aff'd*, 778 F.2d 889 (D.C. Cir. 1985) (table cite).

2. Rule 26(b)(3)(A) of the Federal Rules of Civil Procedure allows the work product doctrine to be used to protect documents prepared “by or for another party or its representative (including the other party’s attorney, consultant, surety, indemnitor, insurer, or agent).” FED. R. CIV. P. 26(b)(3)(A). Not only do documents prepared by agency attorneys who are responsible for the litigation of a case that is being defended or prosecuted by DOJ qualify for the doctrine, but also documents prepared by an attorney not employed as a litigator. Cook v. Watt, 597 F. Supp. 545, 548 (D. Alaska 1983). Moreover, courts have recognized that documents prepared by non-attorneys who are supervised by attorneys may also qualify for protection as work product. Shacket v. United States, 339 F. Supp. 2d 1092, 1094-96 (S.D. Cal. 2004) (protecting from disclosure a special agent’s report used to summarize and analyze evidence and to recommend prosecution of defendant).
3. The work product doctrine has been held to persist where the information has been shared with a party holding some common interest with the agency. United States v. American Tel. and Tel. Co., 642 F.2d 1285, 1299-1300 (D.C. Cir. 1980).
4. Factual information is fully entitled to work product protection. Tax Analysts v. IRS, 117 F.3d 607, 620 (D.C. Cir. 1997); Martin v. Office of Special Counsel, 819 F.2d 1181, 1187 (D.C. Cir. 1987); A. Michael’s Piano, Inc. v. FTC, 18 F.3d 138, 147 (2nd Cir. 1994), *cert. denied*, 513 U.S. 1015 (1994).
5. The termination of litigation does not vitiate the protection for material otherwise properly categorized as work product. FTC v. Grolier, Inc., 462 U.S. 19, 26-28 (1983).
6. FED. R. CIV. P. 26(b)(2)(B) says that expert witnesses who provide a written report must disclose “the facts or data considered by the witness in forming them.” “There is a split of authority, however, regarding whether amended Rule 26(a)(2)(B) – which requires that testifying experts produce all information considered by them in forming their opinion – trumps Rule 26(b)(3), which protects attorney work product.” In re Teleglobe Commc’n Corp., 392 B.R. 561, 574 (Bankr. D. Del. 2008). The Courts of Appeals in the Fourth Circuit, Sixth Circuit, and Federal Circuit have required that experts disclose all information provided to them regardless of whether that information

would otherwise be protected by the work product doctrine. See Elm Grove Coal Co. v. Dir., Office of Workers' Comp. Programs, 480 F.3d 278, 301 (4th Cir. 2007); Reg'l Airport Auth. of Louisville v. LFG, LLC, 460 F.3d 697, 717 (6th Cir. 2006); In re Pioneer Hi-Bred Int'l, Inc., 238 F.3d 1370, 1375 (Fed. Cir. 2001). The Third Circuit has held that information given to an expert witness need not be disclosed if that information is protected by the work product doctrine. In re Cendant Corp. Sec. Litig., 343 F.3d 658, 665 (3d Cir. 2003). While the First and Fifth Circuits have not ruled on this matter, several district courts have addressed the issue. See TV-3, Inc. v. Royal Ins. Co. of Am., 194 F.R.D. 585, 589 (S.D. Miss. 2000); and Nexus Products Co. v. CVS New York, Inc., 188 F.R.D. 7, 9 (D. Mass. 1999).

7. The work product doctrine has two aspects. First is the "core work product," or trial preparation material, which is virtually inviolate, and encompasses the mental impressions, conclusions, and legal theories of the attorney. Hickman, 329 U.S. at 509-10 (denial of production would cause hardship or injustice). The second aspect is the more factual information, such as witness statements, which may be subject to disclosure for good cause shown. Guilford Nat'l Bank v. Southern Ry, 297 F.2d 921 (4th Cir. 1962) (good cause requires an inquiry into the importance of and need for the materials as well as alternative sources for securing the same information.)

### **C. Other Less Frequently Asserted Privileges**

In drafting Article V of the Federal Rules of Evidence, the House Committee on the Judiciary initially identified nine specific privileges that the federal courts must recognize: required reports, lawyer-client, psychotherapist-patient, husband-wife, communications to a clergyman, political vote, trade secrets, secrets of state and other official information, and identity of informer. H.R. REP. NO. 93-650, at 7-8 (1975), *reprinted in* 1974 U.S.C.C.A.N. 7075, 7082-83. Ultimately, however, Rule 501 provides for courts to evolve privileges as necessary. Trammel v. United States, 445 U.S. 40, 47 (1980).

In Fed. Open Mkt. Comm. v. Merrill, 443 U.S. 340, 356-57 (1979), the Supreme Court recognized a privilege based upon FED. R. CIV. P. 26(c)(7), that provides that "for good cause shown . . . a trade secret or other confidential research, development or commercial information" is protected from discovery. The rule has been amended and is now FED. R. CIV. P. 26(c)(1)(G).

Rule 408 of the Federal Rules of Evidence generally prohibits the introduction of evidence of compromise and offers to compromise claims when offered to prove liability for, the invalidity of, or amount of a claim in a civil action. See FED. R. EVID. 408. While most courts have not recognized a formal settlement privilege, the Court of Appeals for the Sixth Circuit expressly recognized a civil discovery



privilege protecting communications in the course of settlement negotiations. See Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc., 332 F.3d 976, 981 (6th Cir. 2003) (“[A]ny communications made in furtherance of settlement are privileged.”). The court reasoned that the public interest in furthering judicial efficiency through settlement of claims, coupled with the exclusion of such evidence by Rule 408, and the fact that parties to settlement negotiations often make statements that would belie their litigation position all supported recognition of a settlement privilege. Goodyear, 322 F. 3d 976. To date, no other court of appeals has adopted the Goodyear approach or recognized a formal settlement negotiations privilege. The D.C. Circuit was provided with an opportunity but declined to rule on the basis that, in light of the facts and circumstances before it, such a decision would be premature. In re Subpoena Duces Tecum Issued to Commodity Futures Trading Comm’n, 439 F.3d 740, 754 (D.C. Cir. 2006).

On its face, Rule 408 is not a discovery rule. It only limits the admissibility of some, but not all, evidence of events that occur during the course of settlement negotiations. See FED. R. EVID. 408. Moreover, Rule 408 provides for the admissibility of evidence relating to settlement negotiations for specific purposes. See FED. R. EVID. 408(b) (permitting the introduction of evidence of compromise and offers to compromise to prove a witness's bias or prejudice, negate a contention of undue delay, or to prove an effort to obstruct a criminal investigation). The only prohibited use of such evidence is to prove or disprove liability or the amount of a claim “or to impeach through a prior inconsistent statement or contradiction.” *Id.* at 408(a).

Rule 501 authorizes federal courts to define new privileges in light of “reason and experience.” FED. R. EVID. 501. Nonetheless, the Supreme Court has frequently warned that the ability to create new privileges should be used sparingly. Generally, the public has “a right to every man's evidence” and that “any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule.” Jaffe v. Redmond, 518 U.S. 1, 9 (1996) (citing United States v. Bryan, 339 U.S. 323, 331 (1950)).

Many courts have rejected the existence of a settlement privilege. See In re Subpoena Issued to Commodity Futures Trading Comm'n, 370 F. Supp. 2d 201, 211-12 (D.D.C. 2005); Computer Assocs. Int'l, Inc. v. Am. Fundware, Inc., 831 F. Supp. 1516, 1531 (D.Colo. 1993) (Rule 408 is “not a broad discovery privilege”); accord NAACP Legal Defense and Educ. Fund, Inc. v. U.S. Dep't of Justice, 612 F. Supp. 1143, 1146 (D.D.C. 1985). See also In re Gen. Motors Corp. Engine Interchange Litig., 594 F.2d 1106, 1124 (7th Cir. 1979) (finding “no convincing basis” for the proposition that “the conduct of settlement negotiations is protected from examination by some form of privilege”); Alcan Int'l, Ltd. v. S.A. Day Mfg. Co., 179 F.R.D. 403, 405 (W.D.N.Y. 1998) (noting that Rule 408 does not limit the discovery of evidence); JZ Buckingham Invs., LLC v. United States, 78 Fed. Cl. 15, 22-23 (2007) (citing In re Subpoena favorably and disagreeing with Goodyear). Some courts have taken a middle-ground position and held that settlement-

negotiation materials may not be disclosed absent a showing greater than that required for ordinary discovery under Rule 26. See, e.g., Bottaro v. Hatton Assocs., 96 F.R.D. 158, 160 (E.D.N.Y. 1982) (requiring a “particularized showing”).

## **D. Governmental Privileges**

### **1. State Secrets Privilege**

The state secrets privilege encompasses matters the disclosure of which would harm national security or the conduct of our foreign relations. The privilege has long been recognized as common law and was upheld by the Supreme Court in United States v. Reynolds, 345 U.S. 1 (1953). Although the Reynolds Court expressly relied only on the common law, part of that opinion and opinions in other cases suggest that the privilege has a constitutional basis founded on the President’s duties in the areas of national security and foreign affairs. See Reynolds, 345 U.S. at 6 n.9; United States v. Nixon, 418 U.S. 683, 708 (1974). In the context of the Service, the state secrets privilege is rarely invoked; when it has been invoked, it has been with respect to treaty negotiation-related information and documents. See Xerox Corp. v. United States, 12 Cl. Ct. 93 (1987) (upholding government’s assertion of state secrets privilege because production would impair the government’s ability to deal with the tax authorities of foreign governments).

To invoke the state secrets privilege successfully, the government needs to satisfy the court that “there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged.” Reynolds, 345 U.S. at 10. Once it is established that state secrets are involved, “the privilege is absolute.” *Id.* at 10. The litigant’s need is relevant only to establish how closely the court will examine the validity of the assertion of the privilege. See *generally* Trulock v. Wen Ho Lee, 66 F. App’x 472, 475-76 (4th Cir. 2003) (discussing the basis for privilege and the circumstances under which invocation of privilege will force dismissal of the case).

### **2. Deliberative Process Privilege**

The government may also assert a privilege to protect opinions, recommendations, and advice generated in the process of formulating policies and making decisions—the so-called “deliberative process” of the government. (As discussed below, courts sometimes use the more general term “executive privilege” interchangeably with “deliberative process” or “governmental” privilege.) The deliberative process privilege rests in part on the same need for uninhibited communication that underlies the attorney-client privilege. The underlying premise of the privilege is that frank and open discussions within the government will be

stifled if disclosure of policy materials is compelled in litigation. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150-51 (1975). The district court in Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318 (D.D.C. 1966), *aff'd on opinion below*, 384 F.2d 979 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 952 (1967), cited “another policy of equal vitality and scope”:

The judiciary, the courts declare, is not authorized “to probe the mental processes” of an executive or administrative officer. This salutary rule forecloses investigation into the methods by which a decision is reached, the matters considered, the contributing influences, or the role played by the work of others—results demanded by exigencies of the most imperative character. No judge could tolerate an inquisition into the elements comprising his decision—indeed, “[s]uch an examination of a judge would be destructive of judicial responsibility”—and by the same token “the integrity of administrative process must be equally respected.”

40 F.R.D. at 325-26 (footnotes omitted) (quoting United States v. Morgan, 313 U.S. 409, 422 (1941)). *Cf.* Nixon, 418 U.S. at 705-06 (finding that the privilege for presidential communications is supported both by the need for confidential communication within the government and the separation of powers under the Constitution but not reaching the issue of whether there is a constitutional basis for privileged communications between lower-ranking officials).

The deliberative process privilege focuses on more than the adoption of agency policies. Judicial Watch, Inc. v. Clinton, 880 F. Supp. 1, 13 (D.D.C. 1995) (in addressing the deliberative process privilege, parties should not exalt semantics over substance). The privilege is intended to protect the deliberative process and, thereby, the quality of agency decisions. Sierra Club v. Dep’t of Interior, 384 F. Supp. 2d 1, 15 (D.D.C. 2004). *See also* NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149, (1975) (the deliberative process privilege shelters “documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which government decisions and policies are formulated”); Casad v. Dep’t of Health and Human Servs., 301 F.3d 1247, 1251 (10th Cir. 2002) (noting that the deliberative process privilege is intended to “enhance the quality of agency decisions by protecting open and frank discussion among those who make them within the Government”); California Native Plant Soc’y v. EPA, 251 F.R.D. 408, 412 (N.D. Cal. 2008) (“[t]he privilege protects the decision making process at large, and a document need not lead to a specific decision, let alone a final decision, in order to be protected”). To properly claim the privilege, an agency is not required to demonstrate a specific final decision, but simply establish what deliberative process was involved and the role played by the contested evidence in the course of that process. Lurie v. Dep’t of the Army, 970 F. Supp. 19, 33 (D.D.C. 1997).

See also Judicial Watch, Inc. v. Export-Import Bank, 108 F. Supp. 2d 19, 35 (D.D.C. 2000) (citing Formaldehyde Inst. v. Dep't of Health & Human Servs., 889 F.2d 1118, 1123 (D.C. Cir. 1989)).

The deliberative process privilege does not protect material if disclosure would not hinder the government's decision-making processes. For example, factual material is not privileged, unless it is inextricably intertwined with policy recommendations, EPA v. Mink, 410 U.S. 73, 87-8 (1973), or selectively chosen so as to reflect the deliberative process itself, Mead Data Cent., Inc. v. Air Force, 566 F.2d 242, 256 (D.C. Cir. 1977). Thus, analytical portions, but not the entirety, of revenue agent reports, special agent reports, Appeals' case memos, etc., may typically fall within the deliberative process privilege. A document embodying an outcome of the decision-making process (the decision itself) is not privileged, even though it may have originally been drafted as a recommendation. For example, a memorandum containing a recommendation of a subordinate to a superior, which includes an "approved" line that has been signed, is no longer privileged under the deliberative process privilege. Also not privileged is a document that has been incorporated by reference in a final agency document. In contrast, where a subordinate provides a superior with a memorandum recommending a decision, and the superior renders a written decision consistent with the recommendation but does not attribute the reasons for the decision to the subordinate's memorandum, the superior's action does not vitiate the deliberative process privilege for the recommendatory memorandum. See, e.g., Sears, 421 U.S. at 155-58. Generally, drafts of documents are protected from disclosure under the deliberative process privilege. Arthur Anderson & Co. v. IRS, 679 F.2d 254, 257-58 (D.C. Cir. 1982).

Unlike the state secrets privilege, the deliberative process privilege is not absolute. In determining whether to recognize the privilege, a court must balance the public interest in protecting the information with the litigant's need for it. The court may weigh factors such as the relevance of the information sought, its availability elsewhere, the nature of the case, the degree to which disclosure would hinder the government's ability to hold frank discussions about contemplated policy, and the extent to which protective orders may ameliorate any potential harm caused by disclosure.

### 3. Informant Privilege

The informant privilege allows the government to withhold the identities of persons who furnish information about violations of law to officers charged with law enforcement. See, e.g., Roviaro v. United States, 353 U.S. 53, 59 (1957). The rationale for the informant privilege has been explained as follows:

[I]t has been the experience of law enforcement officers that the prospective informer will usually condition cooperation on an assurance of anonymity, fearing that if disclosure is made, physical harm or other undesirable consequences may be visited upon him or his family. By withholding the identity of the informer, the government profits in that the continued value of informants placed in strategic positions is protected, and other persons are encouraged to cooperate in the administration of justice.

United States v. Tucker, 380 F.2d 206, 213 (2d Cir. 1967). The privilege belongs to the government, not the informant. Roviaro, 353 U.S. at 59. Moreover, only the identity of the informant is privileged. *Id.* at 60. The information the informant provides may not be withheld unless its disclosure would reveal the informant's identity. *Id.*

In Dep't of Justice v. Landano, 508 U.S. 165, 181 (1993), a case under FOIA, the Supreme Court held that the government is not entitled to a presumption that all sources supplying information to the FBI in the course of a criminal investigation are confidential sources within the meaning of exemption 7(D) of FOIA.<sup>67</sup> On the other hand, the court held that exemption 7(D) is not limited only to those sources whom the FBI promised complete secrecy; the exemption would also encompass those sources who furnished information with the understanding that the "FBI would not divulge the communications except to the extent the Bureau thought necessary for law enforcement purposes[.]" such as testimony. *Id.* at 174. Moreover, confidentiality may be implied by the particular factual circumstances, such as whether the informer is paid, and the type and nature of contact between the informer and agency.

Like the deliberative process privilege, the informant privilege is qualified. The government must show that its interest in effective law enforcement outweighs the litigant's need for the information. Rovario, 353 U.S. at 60-61. Where the disclosure of an informer's identity, or of the contents of his communication (where it would reveal the informer's identity), is relevant

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<sup>67</sup> Exemption 7(D) of FOIA, 5 U.S.C. § 552(b)(7)(D), provides protection for records or information compiled for law enforcement purposes that could reasonably be expected to disclose the identity of a confidential source.

and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. *Id.* The privilege may expire when the need for secrecy ceases to exist, but this does not necessarily mean when the identity of the informer has become known to the party seeking disclosure. United States v. Tejeda, 974 F.2d 210, 217 (1st Cir. 1992); United States v. Tenorio-Angel, 756 F.2d 1505, 1509-11 (11th Cir. 1985); United States v. Aguirre, 716 F.2d 293, 300 (5th Cir. 1983).

#### **4. Investigatory Files Privilege**

Investigatory files compiled for law enforcement purposes are privileged. See, e.g., Friedman v. Bache Halsey Stuart Shields, Inc., 738 F.2d 1336, 1342-43 (D.C. Cir. 1984); United States ex rel. Burroughs v. DeNardi Corp., 167 F.R.D. 680, 687 (S.D. Cal. 1996). The privilege is rooted in the need to minimize disclosure of documents whose revelation might impair the necessary functioning of a department of the executive branch. "The argument . . . that law enforcement operations cannot be effective if conducted in full public view is analogous to that made on behalf of intra-agency deliberations." Black v. Sheraton, 564 F.2d 531, 542 (D.C. Cir. 1977). The privilege is necessary to protect the law enforcement process. Disclosure of investigatory files would undercut the government's efforts to prosecute criminals by disclosing investigative techniques, forewarning suspects of the investigation, deterring witnesses from coming forward, and prematurely revealing the facts of the government's case. In addition, disclosure could prejudice the rights of those under investigation.

The investigatory files privilege is qualified and thus may be overcome if a litigant's need is sufficiently justified. Friedman, 738 F.2d at 1342-43. In Friedman, the court of appeals quoted with approval Frankenhauser v. Rizzo, 59 F.R.D. 339, 344 (E.D. Pa. 1973), as setting forth the factors to be considered in weighing the litigant's need:

- (1) the extent to which disclosure will thwart governmental processes by discouraging citizens from giving the government information;
- (2) the impact upon persons who have given information of having their identities disclosed;
- (3) the degree to which governmental self-evaluation and consequent program improvement will be chilled by disclosure;
- (4) whether the information sought is factual data or evaluating summary;
- (5) whether the party seeking discovery is an actual or potential defendant in any criminal proceeding either pending or reasonably likely to follow from the incident in question;
- (6) whether the police investigation has been completed;
- (7) whether any intradepartmental disciplinary proceedings have arisen or may arise from the investigation;
- (8) whether the plaintiff's suit is non-frivolous

and brought in good faith; (9) whether the information sought is available through other discovery or from other sources; and (10) the importance of the information sought to the plaintiff's case.

Friedman, 738 F.2d at 1342-43 (quoting Frankenhauser, 59 F.R.D. at 344).

Generally, once an investigation is closed the files are no longer privileged. Jabara v. Kelley, 75 F.R.D. 475, 494 (E.D. Mich. 1977). If the investigation is not formally closed but there is no intention to use the information gathered for a criminal prosecution, then the court must address whether the files are still privileged because “[a]fter the expiration of a reasonable period of time, the privilege is lost.” *Id.* The privilege can be extended to cover related investigations. For example, if charges are pending against additional defendants. Solar Servs., Inc. v. United States, 142 F.3d 1033, 1040 (7th Cir. 1998). The privilege may still apply if the government is considering additional charges against the original defendants. Seized Prop. Recovery Corp. v. Customs & Border Patrol, 502 F. Supp. 2d 50, 62 (D.D.C. 2007). The privilege may still apply if release of the files would affect investigations by other agencies. Cudzich v. ICE, 886 F. Supp. 101, 106-07 (D.D.C. 1995). Of course, information contained in the files that is covered by another privilege may still be withheld.

## **5. How to Claim Governmental Privileges**

### **a. Who Must Claim Governmental Privileges?**

The procedural requirements for proper assertion of governmental privilege differ depending on the forum in which the discovery arises. Where there are no established procedures in any given forum, or the procedures appear to be unclear, the IRS generally will “informally” assert the privilege in response to a document production request through the Chief Counsel trial attorney (in the Tax Court), or the DOJ trial counsel (in the federal district courts or the Court of Federal Claims). Chief Counsel attorneys should conduct a review of the responsive records and make a determination whether one or more privileges should be claimed; a privilege log reflecting such determination should be prepared and made available to opposing counsel.

In the Court of Federal Claims, the issue of who must assert the deliberative process privilege has been settled. In United States v. Reynolds, 345 U.S. 1, 8 n.20 (1953), *aff'd on other grounds*, 426 U.S. 394 (1976), the Supreme Court held the executive privilege “is not to be lightly invoked. There must be a formal claim of privilege,

lodged by the head of the department which has control over the matter, after personal consideration by that officer.”

But the particular government privilege at issue in Reynolds was the state secrets privilege, and not the deliberative process privilege. Some courts have confined Reynolds to its facts, finding that a less burdensome process may be invoked for assertions of the deliberative process privilege. In Landry v. FDIC, 204 F.3d 1125 (D.C. Cir. 2000), *cert denied*, 531 U.S. 924 (2000), the D.C. Circuit noted that, when asserting the deliberative process privilege, the declaration could be provided by a senior level official other than the agency head. Citing Landry, the Federal Circuit drew a distinction between the state secrets privilege and the deliberative process privilege, accepting the privilege’s assertion by a senior level official who has expertise in privileges, who is not directly responsible for or involved in the substantive tax litigation, and who operated under criteria established by the agency head. Marriott Int’l Resorts, L.P. v. United States, 437 F.3d 1302, 1306-09 (Fed. Cir. 2006).

Attorneys who are assigned cases that are in the Court of Federal Claims, and in other circuit or district courts that require this formal “agency head” process, should look to Delegation Order No. 30-4 (formerly D.O. 220), in which the Commissioner has delegated the authority to claim executive privilege (except for the state secrets privilege) to the Deputy Associate Chief Counsel (Procedure & Administration) in preparing the necessary declaration. See IRM 1.2.53.5.

Not all circuits have spoken to the issue of who must assert the deliberative process privilege. Litigation Guideline Memorandum TL-98 (Oct. 7, 1992), “In re: Guidelines and Procedures for Asserting the Deliberative Process Privilege in Federal Civil Tax Litigation,” 1992 WL 1355874, identifies the varying requirements in the circuits for assertion of the deliberative process privilege. Chief Counsel attorneys whose cases raise this issue should research carefully the requirements in their forums. Currently, only the Ninth Circuit appears to require the formal assertion by the agency head and, accordingly, Delegation Order No. 30-4 should be followed in the Ninth Circuit. Kerr v. U.S. District Court for the Northern District of California, 511 F.2d 192 (9th Cir. 1975), *aff’d on other grounds*, 426 U.S. 394 (1976). Conversely, the Fifth Circuit appears to accept assertion of the deliberative process privilege by an official lower than an executive to whom authority was specifically delegated under established guidelines. In Branch v. Phillips Petroleum Co. v. EEOC, 638 F.2d 873 (5th Cir. 1981), the court



held that the Reynolds requirements were met when the Director of the EEOC's regional office asserted the privilege. In courts within the Fifth Circuit as well as any other district courts that follow the Branch approach, a declaration prepared for the signature of either Chief of Branch 6 or 7 in Procedure & Administration should suffice. In United States v. O'Neill, 619 F.2d 222 (3d Cir. 1980), the Third Circuit did not allow the deliberative process privilege to stand when it was orally invoked by the city's trial counsel because there had been no showing that the head of the city's Police Department had conducted the personal review of the documents that must precede assertion of the privilege. But the court specifically did not decide whether the privilege could ever be claimed by trial counsel.

#### **b. Timing of an Executive Privilege Declaration**

In those circuits that require the "agency head" process, when exactly does that obligation arise? As noted above, our practice is to not file a declaration formally asserting the privilege until after opposing counsel files a motion to compel. The rationale is that it is "unduly burdensome and impractical – and contrary to the spirit of cooperative discovery – to require a formal assertion of the privilege (with a supporting declaration or affidavit) in response to a mere discovery request, before issues of relevance and scope have even been discussed among the parties, much less resolved." Fidelity Int'l Currency Advisor A Fund, LLC v. United States, Nos. 05-40151 and 06-40130, slip op. at 4 n.3 (D. Mass. May 4, 2007). See also In re Sealed Case, 121 F.3d 729 (D.C. Cir. 1997) (the White House did not have an obligation to formally invoke its privileges in advance of a motion to compel).

The issue of timeliness of the assertion of the privilege is related to the argument that the privilege is waived. In other words, opposing counsel will contend that the agency has effectively waived the executive privilege because it has failed to follow the procedural rules, even though no timing is specifically stated in the rules. In Tuite v. Henry, 98 F.3d 1411, 1416 (D.C. Cir. 1996), the D.C. Circuit reasoned that:

Common sense and the purpose of the rule dictate that the "subject to" language of Rule 45(c)(2)(B) does not mandate that the full description required by Rule 45(d)(2) be provided at the time the initial objection is asserted. Although Rule 45(d)(2) does not contain a specific time limit within which objecting parties must supply the requisite privilege log, the Advisory Committee Notes indicate that the purpose of the Rule "is to provide a party whose discovery is constrained by

a claim of privilege . . . with information sufficient to evaluate such a claim and to resist if it seems unjustified.” FED. R. CIV. P. 45(d)(2) advisory committee’s note. Consistent with this purpose, the responsibility rests with the district court to ensure that the information required under the Rule is provided to the requesting party within a reasonable time, such that the claiming party has adequate opportunity to evaluate fully the subpoenaed documents and the requesting party has ample opportunity to contest that claim. District courts must then take account of the information provided under Rule 45(d)(2) in ruling on a motion to comply.

Moreover, the D.C. Circuit has recognized that because the “executive privilege exists to aid the governmental decision-making process, a waiver should not be lightly inferred.” In re Sealed Case, 121 F.3d at 741 (quoting SCM Corp. v. United States, 82 Cust. Ct. 351, 473 F. Supp. 791, 796 (1979)).

When the party asserting the privilege informs the requester that it believes the withheld documents are privileged, the asserting party satisfies Rule 45(c)(2)(B) and Rule 45(d)(2) of the Federal Rules of Civil Procedure, which together require that “a party objecting to a subpoena on the basis of privilege must both (1) object to the subpoena and (2) state the claim of privilege within [the stipulated period] of service.” 98 F.3d at 1417. See also In re Sealed Case, 856 F.2d 268, 272 n. 3 (D.C. Cir. 1988) (where government’s claim of privilege is well taken, remedy for any undue delay is not waiver but fees and sanctions under Rule 37).

When trial counsel informs the requesting party that the agency is asserting a privilege, the requesting party generally is not prejudiced by any alleged delay in the agency formally invoking its privileges. *Id.* at 741-42.

In Pac. Gas & Elec. v. United States, 70 Fed. Cl. 128 (2006) (PG&E I), the Court of Federal Claims ruled that affidavits executed by Department of Energy officials in response to plaintiff’s motion to compel failed to follow the procedural requirements necessary to invoke the deliberative process privilege, in part because it concluded the affidavits executed after receipt of the motion were untimely. After receiving the government’s motion for reconsideration, the court ordered the government to submit *ex parte* affidavits for review *in camera*. Following the *in camera* review, in Pac. Gas & Elec. v. United States, 71 Fed. Cl. 205 (2006) (PG&E II), the court opined that the *ex parte* affidavits provided a “precise and certain” description of the particular harm that would

flow from release of the document and ordered the government to provide the affidavits to plaintiff. Plaintiff was thereby given an opportunity to review the government's assertions and, if still unsatisfied, could move to compel release if plaintiff could demonstrate that its evidentiary need outweighed the harm from disclosure. *Id.* at 210.

To date, no circuits have adopted the PG&E I case. Another judge in the same court held that affidavits executed after a privilege log had been provided to the plaintiff, but before a motion to compel, were still timely filed. Huntleigh USA Corp v. United States, 71 Fed. Cl. 726 (2006), relying in part on In re Sealed Case, 121 F.3d 729 (D.C. Cir. 1997).

### **c. Preparation of a Declaration Claiming Executive Privilege**

See CCDM 35.4.6.

### **d. Claiming Executive Privilege in Depositions**

Federal courts generally have recognized that the deliberative process privilege applies to testimony as well as documents. See, e.g., North Pacifica, LLC v. City of Pacifica, 274 F. Supp. 2d 1118, 1121 n.1 (N.D. Cal. 2003) (ruling on pre-trial motion to prevent witness testimony about certain topics based on deliberative process privilege); Newport Pac., Inc., v. Cnty. of San Diego, 200 F.R.D. 628, 637-38 (S.D. Cal. 2001) (ruling on motion for protective order to prohibit certain deposition testimony on the basis of the deliberative process privilege).

Note that Rule 26(b)(5)(A), which relates to the assertion of privileges in response to discovery requests, provides: "When a party withholds information otherwise discoverable by claiming that the information is privileged . . ." Thus, nothing in the plain language of the Rule distinguishes between testimony and documentary evidence. Rather, it refers to *information*.

A question has arisen whether the government must follow the formal protocol established for asserting the deliberative process privilege for documents when opposing a motion to compel a witness's deposition testimony. The following cases suggest that it does not.

In the absence of prior knowledge of the questions to be asked, the head of an agency cannot know whether a particular question will call for a privileged answer. Scott v. PPG Indus., Inc., 142 F.R.D.

291 (N.D. W. Va. 1992). In Scott, the government attorney instructed a witness not to answer because the question called for a privileged response. PPG argued in its motion that the privilege was inapplicable because it was improperly invoked. In support of its argument, PPG cited Resident Advisory Bd. v. Rizzo, 97 F.R.D. 749 (E.D. Pa. 1983), for the proposition that the deliberative process privilege must be invoked by the agency head, and not by the government's litigation attorney. The court aptly recognized that the problem with relying on Rizzo was that, like most of the cases analyzing the deliberative process privilege, the Rizzo court ruled on the release of *documents*, rather than *testimony*. In ruling for the government, the court opined, "Even if the requirement that the agency head consider allegedly privileged material and personally invoke the privilege makes sense with regard to documents, it is ludicrous to suggest that the agency head rather than the litigation attorney should be required to invoke the deliberative process privilege in a deposition." 142 F.R.D. at 293-94.

Likewise, in Startzell v. City of Philadelphia, No. 05-05287, 2006 WL 2945226, at \*2 (E.D. Pa. Oct. 13, 2006), the plaintiffs claimed that the deliberative process privilege only prevented the discovery of documents and was inapplicable to their motion to compel deposition testimony. The court flatly rejected that contention, (citing NLRB v. Bldg. & Constr. Trade Council, No. 88-3495, 1989 U.S. App. LEXIS 9411, at \*2 (3d Cir. Apr. 6, 1989) (applying the deliberative process privilege in the deposition context)) and Cipolla v. Cnty. of Rensselaer, No. 99-CV-1813, 2001 U.S. Dist. LEXIS 16150 (N.D.N.Y. Oct. 10, 2001) (applying the deliberative process to protect deposition transcripts detailing the thought process behind the district attorney's decision to prosecute). The court also rejected the plaintiffs' assertion that the privilege must be raised in writing. "It is sufficient for the attorney for the city to assert the privilege at Ms. Marcus' deposition and in the Respondent's responsive motion. The manner of asserting the privilege is not an issue here." *Id.*

In Eugene Burger Mgmt. Corp. v. Dep't of Hous. and Urban Dev., 192 F.R.D. 1 (D.D.C. 1999), the Assistant United States Attorney objected to several questions on the basis of deliberative process. The U.S. Magistrate Judge did not condemn the manner in which the privilege was raised, but simply evaluated claims of privilege on a question-by-question basis. The only question was whether the privilege was appropriate based on the questions asked. *See Id.* at 8-11.

**Note:** When the government seeks to protect oral testimony during the course of a deposition, the government attorney must be prepared to invoke appropriate privileges at appropriate times. Almost all IRS testimony authorizations prohibit witnesses from testifying as to privileged material and direct the witness to follow the advice of government counsel. Still, it is incumbent upon the government attorney to assert the privilege as well as instruct the witness not to answer the question. See Treas. Reg. § 301.9000-1 *et seq.* and Chapter 12, below.

The court in Cobell v. Norton, 213 F.R.D. 1 (D.D.C. 2003), applied a different approach for the application of privilege. The court cited to the Scott case when ruling on the plaintiffs' motion to compel deposition testimony over defense objections based on deliberative process when it recognized the impossibility of following the procedural protocols to invoke the privilege during the course of deposition testimony. *Id.* at 9. But rather than adopt Scott's conclusion that it is sufficient for an agency attorney to invoke the privilege during a deposition, the court adopted a procedure first suggested in In re "Agent Orange" Product Liability Litigation, 97 F.R.D. 427 (E.D.N.Y. 1983). Accordingly, it ordered that, if the government asserted the deliberative process privilege in response to a deposition question, then the plaintiff's had "seven days to submit to the Special Master or Special Master-Monitor, as appropriate, a copy of the unanswered questions, together with a detailed statement setting out the reasons why they require answers to these questions, and provide a copy of the statement and unanswered questions to defendants." *Id.* Then:

Seven days after this submission, defendants will be required to submit to the Special Master or Special Master-Monitor an affidavit that meets the requirements for formal invocation of the deliberative process privilege, and provide a copy to plaintiffs. At the same time that they file this affidavit, defendants will be required to file under seal with the Special Master or Special Master-Monitor a detailed summary of the responses that the witness would have provided if defendants had not asserted the deliberative process privilege. The Special Master or Special Master-Monitor will then make a decision or recommendation as to the applicability of the privilege to the deposition testimony for which it is being asserted. His decision or recommendation will be subject to review by this Court as appropriate, upon objections made by either party.

*Id.* at 9-10 (footnote omitted). The Cobell case, like Agent Orange, was a long-pending, multi-party litigation involving highly complex subject matter. Each case had sitting special masters to handle ongoing discovery disputes. The process adopted by the judges in each case, certainly within their discretion, appears to have been adopted in efforts to instill some order over the subject matters at issue. Accordingly, this process insured that the parties on each side truly believed they needed answers to specific questions or needed to protect information in response to specific questions before seeking further court intervention.

In McCormac v. Dep't of the Treasury, 2007 WL 1412281 (D.N.J. May 14, 2007), a case that arose in the context of a motion for protective order seeking to limit the subjects about which the witness would testify, the court found that “[t]here has been no showing by Defendants that the testimony sought by Plaintiffs . . . is pre-decisional or that the information is deliberative in nature containing opinions, recommendations, or advice about agency policies.” *Id.* at \*8 (internal quotations deleted). Thus, the McCormac court was not convinced the subject matters proffered for questioning called for answers covered by the privilege.

In Export-Import Bank of the U.S. v. Asia Pulp & Paper Co., Ltd., 232 F.R.D. 103 (S.D.N.Y. 2005), during the course of a deposition of a government witness, the Assistant United States Attorney raised objections to a number of questions on the basis of the attorney-client and deliberative process privileges. Ruling on Asia Pulp’s motion to compel deposition testimony, the court held that the government had a “good faith basis for its objections,” because the testimony sought concerned documents the court had ruled irrelevant earlier in the opinion. *Id.* at 109, 111. In addition, Asia Pulp requested that the court compel the State Department “to produce a sworn statement by a senior official justifying its invocation of the deliberative process privilege.” The court summarily rejected the request, holding, “Documents disclosing the internal deliberations and opinions of the State Department staff have no more relevance to APP than deliberative documents prepared by Ex-Im’s staff . . . .” *Id.* at 112.

The Court of Federal Claims granted a Tax Division motion for protective order prohibiting deposition testimony of three individuals involved in drafting certain Treasury regulations. Evergreen Trading, LLC v. United States, 75 Fed. Cl. 730 (Fed. Cl. 2007), (citing Bankers Trust N.Y. Corp. v. United States, 225 F.3d 1368 (Fed. Cir. 2000)). The court ruled that the personal views and intentions of the drafters were irrelevant to the plaintiffs’ challenge

to the validity of those regulations. *Id.* at 730-31. To the extent plaintiffs seek a witness's personal opinions or recommendations about the subject matter at issue, the government should make the argument that such views are similarly irrelevant, and thus the manner in which the privilege is invoked should not matter. *Id.*

## CHAPTER 11

### PART I: PERSONNEL AND CLAIMANT REPRESENTATIVE MATTERS I.R.C. § 6103(l)(4)

#### I. INTRODUCTION

Section 6103(l)(4) controls access to returns and return information for personnel and claimant representative (*i.e.*, practitioner) related matters. Section 6103(l)(4)(A) provides standards under which employees or former employees of the Treasury Department and practitioners under Circular 230, or their representatives, may access returns and return information in those matters, and section 6103(l)(4)(B) outlines standards under which Treasury Department employees may access returns and return information to represent the agency in these matters. Section 6103(l)(4) is the exclusive authority for disclosing returns and return information in these contexts. NTEU v. FLRA, 791 F.2d 183, 187 (D.C. Cir. 1986).

Personnel matters include disciplinary and adverse actions, other personnel decisions and litigation proceedings arising out of or flowing from personnel actions or decisions (*e.g.*, Equal Employment Opportunity discrimination matters, Merit Systems Protection Board matters, Merit Systems Review Board proceedings, and unfair labor practice allegations under 5 U.S.C. § 7116(a)(1)). Matters arising under section 330 of Title 31 (Circular 230) involve the rights of persons (*e.g.*, registered tax return preparers, enrolled agents, enrolled actuaries, enrolled retirement plan agents, attorneys, or accountants) who practice before the IRS in representing and assisting taxpayers. They are referred to generally as "claimant representative matters." See 31 U.S.C. § 330.

#### II. ACCESS BY EMPLOYEES, FORMER EMPLOYEES, PRACTITIONERS, AND AUTHORIZED LEGAL REPRESENTATIVES

Section 6103(l)(4)(A) authorizes the disclosure of returns and return information:

- A. to the subject of a personnel related action or proceeding, to any person whose rights are or may be affected by an administrative action or proceeding under 31 U.S.C. § 330, or to their authorized legal representatives;
- B. upon written request;
- C. if the appropriate agency delegate determines that disclosure may be relevant and material to the matter at issue. Within the Office of Chief Counsel, Delegation Order 11-2 delegates this authority to, *inter alia*, the Associate Chief and Division Counsels and permits redelegation to supervisors and Chief Counsel attorneys directly involved in the matter. I.R.S. Deleg. Order 11-2, IRM 1.2.49.3.



Any returns and return information disclosed under this section carries with it a restriction limiting use to the particular action or proceeding for which an individual requests and receives access. In addition, disclosures of returns and return information pursuant to section 6103(l)(4)(A) must be accounted for in accordance with section 6103(p)(3). IRM 11.3.20.9.1(8).

“Authorized legal representative” refers to any person designated by an employee or practitioner, for whom access to returns and return information is requested and approved; such persons must sign a letter, among other things, to acknowledge his or her awareness of the disclosure ramifications and penalties associated with accessing confidential returns and return information. IRM 11.3.20.9.1(2). In a personnel matter where the NTEU represents an employee or former employee, an NTEU representative (including an NTEU attorney) cannot access returns and return information in connection with the representation simply by virtue of NTEU’s status as the exclusive bargaining representative by dint of a negotiated agreement. The employee must designate, in writing, the NTEU representative as that person’s representative before he or she may make a written request for access to returns and return information on behalf of the employee. Simply entering an appearance as the authorized representative of the subject of a proceeding, without a specific written request by the representative for access to returns and return information in connection with the proceeding, will not satisfy section 6103(l)(4)(A). NTEU's statutory right of access to information under 5 U.S.C. § 7114 does not supersede section 6103. See NTEU v. FLRA, 791 F.2d 183, 187 (D.C. Cir. 1986). Similarly, the union's right of access does not automatically supersede the confidentiality of records provided by the Privacy Act. (See further discussion in Chapter 11, Part II, paragraph A, subparagraph 3.)

### **III. ACCESS BY DEPARTMENT OF TREASURY EMPLOYEES**

General Legal Services attorneys and IRS labor relations specialists gain access to returns and return information for use in personnel related matters under section 6103(l)(4)(B). Unlike the "relevancy and materiality" predicate for access pursuant to section 6103(l)(4)(A), the prerequisite to access and use under this section is necessity "to advance or protect the interests of the United States." There is no written request requirement and no accounting for disclosure is required.

### **IV. MISCELLANEOUS**

- A.** The "for use" language in both subsections of section 6103(l)(4) contemplates redisclosures by the authorized recipients consistent with the purpose for which the returns and return information were disclosed, e.g., to an administrative law judge, to a court, to an arbitrator, to Department of Justice attorneys to the extent they serve as the IRS's attorneys in a judicial personnel proceeding, and to witnesses in the context of testimony preparation and in the proceeding.

In addition, Department of Treasury employees are authorized to disclose returns and return information for the purpose of obtaining, verifying, or

establishing other information that is or may be relevant and material to investigations of personnel or claimant matters. See Treas. Reg. § 301.6103(k)(6)-1(b).

- B.** Although section 6103(l)(4) permits disclosure of returns and return information under the circumstances set forth in the provision, it is the Service's additional practice to sanitize records containing third party returns and return information by redacting identifying information before providing them, together with a coded key, to subjects and their legal representatives, thereby affording those taxpayers greater privacy protection. See, e.g., IRM 11.3.20.9.1(5)b.
- C.** IRS employees, including NTEU officials, subpoenaed by claimants to testify in personnel actions or proceedings, e.g., at Federal Labor Relations Authority hearings, are required to secure an authorization to testify pursuant to Treas. Reg. § 301.9000-3. See *generally* Chapter 12.

## **V. REPORTING POSSIBLE ETHICAL VIOLATIONS**

Sometimes during the course of a taxpayer's dealings with the Service, an IRS employee comes upon information he or she believes demonstrates possible professional misconduct on the part of an attorney representing the taxpayer. A question arises as to whether the employee may report the representative and the facts and circumstances underlying the possible professional misconduct to the appropriate authorities. Any information learned in these situations is the taxpayer's return information and appropriate disclosure authority must be found in section 6103.

Disclosure of information other than returns or return information is governed solely by the Privacy Act.

CCDM 31.4.1.4(5) advises Chief Counsel employees that issues involving sanctions or ethics must be formally coordinated with the Office of Chief Counsel, Procedure & Administration. The Associate Chief Counsel (Procedure & Administration) is the sanctions officer for tax litigation matters; sanctions officer approval of such matters is required by the Executive Order on Civil Justice Reform.

### **A. Office of Professional Responsibility**

After coordinating with and obtaining the approval of the Associate Chief Counsel (Procedure & Administration), a Chief Counsel employee may disclose to the IRS Office of Professional Responsibility information evidencing possible misconduct on the part of a practitioner subject to Circular 230 representing a taxpayer, including the return information of that taxpayer, pursuant to section 6103(h)(1) and 5 U.S.C. § 552a(b)(1) ("need to know" in the course of tax administration duties). Kenny v. U.S., No. 10-4432, 2012 WL 2945683, (3rd. Cir. 2012) (OPR personnel have access to returns and return information under 6103(h)(1) and (l)(4) as part of tax administration duties

pertaining to a proceeding under 31 USC 330. Please consult Procedure and Administration, Branches 1 and 2, as needed, for guidance. Other IRS employees may make a direct referral to the Office of Professional Responsibility, after obtaining their manager's approval, by submitting a Form 8484.

## **B. U.S. Tax Court**

In the context of a Tax Court proceeding, Tax Court Rule 202 authorizes the court to perform bar disciplinary functions. Therefore, the IRS should report potential ethical violations directly to the Tax Court. However, before the IRS reports ethical violations to the Tax Court pursuant to section 6103(h)(4)(A), the matter must be referred to the Counsel Sanctions Officer. See CCDM 35.10.2.2.3(3). The disciplinary process, as it relates to an attorney's possible misconduct before the court, constitutes tax administration as defined in section 6103(b)(4). To the extent returns or return information are involved, they may be disclosed pursuant to section 6103(h)(4)(A). Cf. McLarty v. United States, 741 F. Supp. 751, 755 (D. Minn. 1990) (stating that disclosure to DOJ and court of *pro hac vice* applicant's 1982-85 federal tax returns and return information is not authorized by section 6103(h)(4) because "under no circumstances could a *pro hac vice* hearing be deemed a matter of tax administration" pertaining to the applicant).

## **C. State Bar**

There is no authority for disclosure of returns and return information to state bar authorities, absent consent from the taxpayer(s) involved. Information developed during a Treasury Inspector General for Tax Administration (TIGTA) investigation into the propriety of attorneys' conduct may constitute the returns and return information of the taxpayers represented by the attorneys and/or the attorneys themselves. For example, information gathered by TIGTA with regard to the possible violation of section 7212 (interference with the administration of the internal revenue laws) is the target's return information because section 7212 is part of Title 26. O'Connor v. United States, 698 F. Supp. 204, 206 (D. Nev. 1988), *aff'd*, 935 F.2d 275 (9th Cir. 1991) (Freedom of Information Act case). Information pertaining to potential violations of section 7213 (unauthorized disclosure of returns and return information) and 7214 (employee misconduct) is also deemed the target's return information. See *generally* Conn v. United States, No. C-91-20192JW (PVT), 1991 WL 333707, at \*1 (N.D. Cal. Dec. 10, 1991) (motion to quash subpoena served on revenue agent).

## **PART II: PRIVACY ACT**

### **I. INTRODUCTION**

The purpose of the Privacy Act of 1974, 5 U.S.C. § 552a, is to balance the government's need to maintain information about individuals with the rights of those individuals to be protected against unwarranted invasions of their privacy stemming from the collection, maintenance, use, and disclosure of their personal information. Its provisions seek to accomplish four basic policy objectives:

- A. Restrict disclosure of personally identifiable records maintained by federal agencies;
- B. Grant individuals the right of access to records about themselves maintained by federal agencies;
- C. Grant individuals the right to seek amendment of records about themselves maintained by federal agencies if the individuals show the records are not accurate, timely, relevant, or complete; and
- D. Establish a code of fair information practices that requires federal agencies to comply with statutory standards for collection, maintenance, and dissemination of records.

The Act's roots are founded in the aftermath of Watergate, the tremendous growth in information technology, and a concomitant increase in the nature and amount of information collected by federal agencies. But even Congress recognized that tax records have a special sensitivity that needed to be addressed. That came two years later with the overhaul of section 6103 by the Tax Reform Act of 1976. Pub. L. No. 94-455, 90 Stat. 1520 (1976) (Tax Reform Act codified at scattered sections of 7, 26, and 46 U.S.C.).

The Office of Management and Budget (OMB) has statutory authority for promulgating agency-wide guidance under the Privacy Act. 5 U.S.C. § 552a(v). The latest comprehensive guidance from OMB is Circular No. A-130, Transmittal Memorandum No. 4 (Nov. 28, 2000). Appendix I to Circular A-108 continues in effect the guidance OMB initially issued to interpret the Privacy Act at 40 Fed. Reg. 28,948-78 (July 9, 1975), and Final Guidance for Interpreting the Provisions of Public Law 100-503, the Computer Matching and Privacy Protection Act of 1988, at 54 Fed. Reg. 25,818-29 (June 19, 1989).

## II. DEFINITIONS

The Privacy Act applies only to "records" about "individuals" that are "maintained" by federal "agencies" in "systems of records."

- A. An "**individual**" is a citizen of the United States or an alien lawfully admitted for permanent residence. 5 U.S.C. § 552a(a)(2). It does not include corporations. St. Michael's Convalescent Hosp. v. California, 643 F.2d 1369, 1373 (9th Cir. 1981). Deceased individuals have no Privacy Act rights, nor do executors or next-of-kin on behalf of the estate. OMB Guidelines, 40 Fed. Reg. 28,949, 28,951 (July 9, 1975); Crumpton v. United States, 843 F. Supp. 751, 756 (D.D.C. 1994), *aff'd on other grounds sub nom. Crumpton v. Stone*, 59 F.3d 1400 (D.C. Cir. 1995). For more on privacy issues surrounding decedents, see *generally* FOIA exemption 6 in Chapter 9. Privacy Act rights are personal to the individual and they cannot be asserted derivatively by others. See, e.g., Parks v. IRS, 618 F.2d 677, 684-85 (10th Cir. 1980) (union lacks standing to sue for damages to its members); Sirmans v. Caldera, 27 F. Supp. 2d 248, 250 (D.D.C. 1998) (plaintiffs "may not object to the Army's failure to correct the records of other officers"). *But see National Fed'n of Fed. Emps. v. Greenberg*, 789 F. Supp. 430, 433 (D.D.C. 1992) (union had standing because members whose interests union sought to represent would have standing if they sued individually), *vacated & remanded on other grounds*, 983 F.2d 286 (D.C. Cir. 1993). Note, however, that the Act specifically provides that parents of a minor or the legal guardians of an incompetent individual may act on their behalf. 5 U.S.C. § 552a(h).

OMB takes the position that the term "individual" does not include individuals acting in an entrepreneurial capacity. 40 Fed. Reg. at 28,951. The courts, however, have split on this issue. *Compare Shermco Indus., Inc. v. United States Air Force*, 452 F. Supp. 306, 314-15 (N.D. Tex. 1978) (agreeing with OMB), *rev'd & remanded on other grounds*, 613 F.2d 1314 (5th Cir. 1980), *with Henke v. Dep't of Commerce*, Civ. No. 94-189 TAF, 1995 WL 904918, at \*2 (D.D.C. May 26, 1995) (rejecting OMB rationale), *vacated & remanded on other grounds*, 83 F.3d 1453 (D.C. Cir. 1996). To provide maximum protection to individuals, the IRS has determined that it will not rely upon the entrepreneurial distinction.

- B. "**Maintain**" includes not only retention, but also the collection, use, and dissemination of a record. 5 U.S.C. § 552a(a)(3).
- C. A "**record**" is any item or collection of information about an individual that is maintained by an agency and contains that individual's name or other identifying particular (e.g., social security number). 5 U.S.C. § 552a(a)(4). Records need not be limited to paper. Voiceprints, fingerprints, photographs, and videotapes are records. *Id.*

D. A "**system of records**" is a group of records under the control of an agency from which information is retrieved by the name of the individual or by some other identifying particular assigned to the individual. 5 U.S.C. § 552a(a)(5). According to the Department of Justice, this technical definition of system of records is "perhaps the single most important Privacy Act concept, because [with certain exceptions] it makes coverage under the Act dependent upon the method of *retrieval* of a record rather than its substantive content." U.S. Dep't of Justice, Overview of the Privacy Act of 1974, Chapter 7, Section 5 comment, paragraph 6, <http://www.justice.gov/opcl/1974definitions.htm#system> (Dec. 2010). The focus is on the actual practice of the agency, not on the capacity or capability of a computer program. Henke v. Dep't of Commerce, 83 F.3d 1453, at 1456 n.1. See also, York v. McHugh, \_\_\_ F. Supp. 2d \_\_\_, 2012 WL 1014503, (D.D.C. 2012) (an employee's medical information included in a shared drive accessible by other employees in the unit were not records in a system of records because the agency did not in practice retrieve the records by reference to individual identifiers); Paige v. DEA, 665 F.3d 1355, 1360-61 (D.C. Cir. 2012) (video of agent's accidental discharge of weapon appeared on the internet. *Citing Henke*, 83 F.3d at 1460, court found video was not in a system of records, nor retrieved by individual identifier, at time of release so no Privacy Act violation occurred).

An IRS database containing an abstraction of information from two existing Privacy Act systems of records did not create a new, illegal system of records because it could be "accessed only by the same users, and only for the same purposes," as those published in the Federal Register for the original systems of records. Pippinger v. Rubin, 129 F.3d 519, 526 (10th Cir. 1997). Information obtained by an IRS public affairs officer attending an open court proceeding is not retrieved from a system of records; thus, issuing a press release based upon that information does not violate the Privacy Act. Rice v. United States, 166 F.3d 1088, 1092 n.4 (10th Cir.), *cert. denied*, 528 U.S. 993 (1999).

In addition to IRS systems of records, there are Department-wide systems of records administered by the Department of the Treasury and government-wide systems of records administered by the Office of Personnel Management, Office of Government Ethics, Equal Employment Opportunity Commission, Merit Systems Protection Board, Department of Labor, General Services Administration, and Federal Retirement Thrift Investment Board. The most recent IRS and government-wide systems of records notices can be found at the websites noted at the end of this chapter.

**Note:** Where information about individual "A" is in a record pertaining to individual "B" that is retrieved from a system of records by B's name or individual identifier, B is entitled to access to the entire record, including the information about A, unless a statutory exemption applies. Voelker v.

IRS, 646 F.2d 332, 334 (8th Cir. 1981) ("a federal agency does not have discretion to withhold information contained in a requesting individual's record on the ground that the information does not pertain to that individual"), *rev'g* 489 F. Supp. 40 (E.D. Mo. 1980); Topuridze v. United States Info. Agency, 772 F. Supp. 662, 665-66 (D.D.C. 1991) (same). *But see* DePlanche v. Califano, 549 F. Supp. 685, 696-99 (W.D. Mich. 1982) (requester was denied access to information about his estranged children located in a file retrieved by his social security number because the record requested was not "about him" or "pertaining to him"); Nolan v. Dep't of Justice, No. 89-A-2035, 1991 WL 36547, at \*10 (D. Colo. 1991) (government was correct in determining that names of FBI agents and support staff fell outside scope of the Privacy Act because identities of FBI agents and personnel do not constitute a record about plaintiff). Note that individual A is not entitled to Privacy Act access to any of the records retrieved by the name of individual B (unless B consents to the disclosure) even though A is mentioned in the record. Sussman v. United States Marshals Serv., 494 F.3d 1106, 1121 (D.C. Cir. 2007) (parties have "access only to their own records, not to all information pertaining to them that happens to be contained in a system of records. For an assemblage of data to qualify as one of [plaintiff's] records, it must not only contain his name or other identifying particulars but also be "about" him. That is, it must actually describe him in some way.") (internal quotations omitted); Aquirre v. S.E.C., 671 F. Supp. 2d 113, 121 (D.D.C. 2009) (same).

- E. "**Routine use**" is the disclosure of a record outside the agency that maintains the record for a purpose that is compatible with the purpose for which it was collected. 5 U.S.C. § 552a(a)(7). Routine uses must be published in the Federal Register as part of the system of records notice. A published routine use authorizes disclosure of the information, but does not require it.
- F. "**Disclosure**" is not defined in the statute. See Pilon v. Dep't of Justice, 73 F.3d 1111, 1117-26 (D.D.C. 1996) (thorough discussion of the definition of "disclose"). Courts have interpreted the term to mean "the imparting of information which in itself has meaning and which was previously unknown to the person to whom it is imparted." Sullivan v. United States Postal Serv., 944 F. Supp. 191, 196 (W.D.N.Y. 1996); King v. Califano, 471 F. Supp. 180, 181 (D.D.C. 1979); Harper v. United States, 423 F. Supp. 192, 197 (D.S.C. 1976). Disclosure includes any means of communication – oral, written, electronic, or mechanical.
- G. All federal agencies are covered by the Privacy Act. Federal courts, Congress, and the Government Accountability Office are not. Likewise, state and local agencies, with one exception discussed below, are not covered. Private organizations are not covered, but if a private organization enters into a contract with a federal agency to operate a system of records, the organization is covered by the Act regarding the operation of the system.

### III. PRIVACY ACT PROVISIONS

#### A. No Disclosure Without Authority

The Privacy Act establishes the general rule that no record maintained in a system of records may be disclosed without the written consent of the individual to whom the record pertains. 5 U.S.C. § 552a(b). Nevertheless, there are twelve statutory exceptions. Some of the more significant are disclosures:

1. To employees of the agency that maintains the record who have a need for the record in the performance of their official duties. 5 U.S.C. § 552a(b)(1). For IRS purposes, "agency" includes the Department of Treasury and all of its constituent bureaus. For a discussion of "need-to-know," see Pippinger v. Rubin, 129 F.3d 519, 529-30 (10th Cir. 1997). See also Doe v. Dep't of Justice, 660 F. Supp. 2d 31, 47-49 (D.D.C. 2009) (disclosure to senior supervisors and to security personnel of basis for revoking employee's security clearance is authorized).
2. Required by the Freedom of Information Act (FOIA). 5 U.S.C. § 552a(b)(2). An actual FOIA request must be received by the agency before an assertion can be made that the FOIA requires disclosure; without a request, FOIA disclosure requirements are not invoked. Bartel v. FAA, 725 F.2d 1403, 1411-13 (D.C. Cir. 1984), *reh'g en banc denied*, No. 82-2473 (D.C. Cir. Mar. 23, 1984), *on remand*, 617 F. Supp. 190 (D.D.C. 1985). See also 5 U.S.C. § 552a(t).
3. For a routine use. 5 U.S.C. § 552a(b)(3). Routine uses for each system of records are published in the Federal Register. For all systems of records containing tax returns or return information, section 6103 is the authorizing routine use.
  - a. The Privacy Act defines a routine use as "the use of [a] record for a purpose which is compatible with the purpose for which it is collected." 5 U.S.C. § 552a(a)(7). By its terms, the Act sets forth two requirements for a proper routine use disclosure: (1) Federal Register publication, thereby providing constructive notice to the public; and (2) compatibility. See, e.g., Britt v. Naval Investigative Serv., 886 F.2d 544, 547-50 (3d Cir. 1989). In Covert v. Harrington, 876 F.2d 751, 754-56 (9th Cir. 1989), *aff'g* 667 F. Supp. 730 (E.D. Wash. 1987), the court added a third requirement: actual notice to the individual of the routine use at the time information was collected from the individual, pursuant to 5 U.S.C. § 552a(e)(3)(C). Accord United States Postal Serv. v. Nat'l Ass'n of Letter Carriers, 9 F.3d 138, 146



(D.C. Cir. 1993) (“[a]lthough the statute itself does not provide, in so many terms, that an agency’s failure to provide employees with actual notice of its routine uses would prevent a disclosure from qualifying as a ‘routine use,’ that conclusion seems implicit in the structure and purpose of the Act”). See *also* Stafford v. SSA, 437 F. Supp. 2d 1113, 1118-22 (N.D. Cal. 2006); Doe v. Dep’t of Justice, 660 F. Supp. 2d 31, 47-49 (D.D.C. 2009). The Privacy Act Notice on various tax and personnel forms or their instructions provides such actual notice.

- b. Compatibility encompasses (1) functionally equivalent uses, and (2) other uses that are necessary and proper. OMB Guidelines, 51 Fed. Reg. 18,982, 18,985 (May 23, 1986). In NLRB v. USPS, 660 F.3d 65, 71 (1st Cir. 2011) the union representing postal workers sought psychological test records used as part of the application and eligibility determination for a specific job. A USPS routine use authorized disclosure of personnel records to the union “[a]s required by applicable law ... when needed by that organization to perform its duties as the collective bargaining representative of [the USPS] employees in an appropriate bargaining unit.” Relying on the holding in Detroit Edison Co. v. NLRB, 440 U.S. 301 (1979), that the NLRA does not require unconditional disclosure of psychological aptitude test scores, USPS asserted that it did not have authority to provide the test scores and required the union to provide disclosure consent from each employee. The union filed an unfair labor practice complaint. NLRB held for the union, and petitioned the First circuit for enforcement of its ruling. The Circuit denied the NLRB’s enforcement petition, noted that the duty of an employer to provide information relevant to the union’s duties, and the manner of such disclosure, turns on the circumstances of the particular case, and remanded with an order requiring NLRB to conduct a balancing between the union’s right of access and the individual employees’ right of privacy in their psychological test results.
- c. Courts have, on occasion, refused to recognize broad categorical routine uses. The court in Krohn v. Dep’t of Justice, No. 78-1536 (D.D.C. Mar. 19, 1984), *vacated in part on other grounds* (D.D.C. Nov. 29, 1984), invalidated a routine use permitting “dissemination of records during appropriate legal proceedings.” The court concluded that the routine use was overly broad and could encompass any disclosure in a judicial context. In response to Krohn, OPM suggested a routine use intended to ensure that the government meets the compatibility standard. The three components of the routine use are: (1) that

the agency is a party in interest (not a disinterested third party); (2) the records are relevant and necessary to the litigation; and (3) not otherwise privileged. If the requirements of the OPM routine use above are not met, discovery should be opposed. The IRS systems of records notices include this routine use as appropriate. See *also* paragraph 6 below pertaining to disclosures pursuant to a court order.

- d. In the IRS context, the court in Pippinger v. Rubin, 129 F.3d at 532, found that disclosure of disciplinary records in an MSPB proceeding was authorized by a routine use even though documents were culled from two separate systems of records and maintained in a new database. The court held that the database did not constitute a new system of records and that routine uses applicable to each of the two source systems of records authorized the disclosures because they were compatible with the purpose for which the records were created.
4. To domestic federal and local law enforcement agencies upon the written request of the head of the agency. 5 U.S.C. § 552a(b)(7). Although a limited delegation to a supervisory position is permissible, the request cannot be made at the working level. Law enforcement may be civil, criminal, or administrative. Requests must identify the subject individual(s) and the information sought. "Fishing expeditions" for individuals meeting stated criteria are not permitted. See OMB Guidelines, 40 Fed. Reg. 28,494, 28,955 (July 9, 1975).
5. To Congress, its committees, joint committees, and subcommittees, and its investigative arm, the Government Accountability Office. 5 U.S.C. § 552a(b)(9) and (10). The exception does not extend to individual legislators, whether acting on their own behalf or on behalf of a constituent. Responses to inquiries on behalf of constituents, however, can be furnished with the constituent's consent. See *generally* Chapter 2, Part III.
6. Pursuant to a federal, state or local court order. 5 U.S.C. § 552a(b)(11). This only applies to judicial proceedings, not administrative tribunals (*i.e.*, orders of ALJs and MSPB do not qualify). Summonses and subpoenas are not orders under this provision, unless they are actually signed by a judge or magistrate. Distinguishing between court orders and subpoenas, the court in Doe v. DiGenova, 779 F.2d 74, 84-85 (D.C. Cir. 1985), held that the court order exception to the nondisclosure rule did not apply to routine subpoenas unendorsed by a court order. The same court later held that the Veterans Administration could not rely upon a routine use that permitted disclosures to comply with grand jury subpoenas because

that use, standing alone, was incompatible with the purposes for which the information had been collected. Doe v. Stephens, 851 F.2d 1457, 1466-67 (D.C. Cir. 1988). Compare with routine use for judicial purpose, above.

**Note:** Returns or return information cannot be disclosed pursuant to a court order except to the extent such disclosure is authorized by Title 26 or under the Constitution (e.g., a “Brady order”). No provision of Title 26 authorizes disclosure in response to a subpoena. Thus, returns and return information of individuals (which are also Privacy Act covered) cannot be disclosed pursuant to a court order under this provision unless such disclosure is authorized in Title 26.

## **B. Accounting for Disclosures**

Each federal agency must keep an accounting of disclosures so that an individual can be informed about disclosures made, trace information to be corrected, and ensure compliance with the Privacy Act. 5 U.S.C. § 552a(c). This requirement is not absolute. Accountings need not be made for intra-agency disclosures, FOIA-required disclosures, and when certain Privacy Act exemptions are invoked in systems of records notices to shield “accounting of disclosures” records from production to the subject thereof pursuant to subsection (c)(3). See 5 U.S.C. § 552a(j) and (k). Moreover, Code section 6103(p)(3)(A) exempts from accounting requirements certain disclosure of tax return information.

## **C. Access and Amendment**

Generally, individuals have the right to seek access to records about themselves contained in a system of records. 5 U.S.C. § 552a(d)(1). They may also request amendment of a record about themselves they believe is not accurate, relevant, timely, or complete. 5 U.S.C. § 552a(d)(2). Agencies are required to promulgate rules to carry out the access and amendment provisions of the Act. 5 U.S.C. § 552a(f). The IRS access and amendment rules are covered by the Department of Treasury Privacy Act regulations found at 31 C.F.R. §§ 1.20 – 1.36 and App. B.

Individual rights of access to, and amendment of, certain IRS records contained in systems of records are either limited or completely exempted by statute, regulation, or published systems notices. For example, section 6103 supersedes the general access provisions of the Privacy Act if the records sought consist of returns or return information. Lake v. Rubin, 162 F.3d 113, 115-16 (D.C. Cir. 1998), *cert. denied*, 526 U.S. 1070 (1999). Thus, the access provisions of the Privacy Act apply only to nontax records maintained in systems of records by the

IRS. In addition, Treasury regulations list all the IRS systems of records that it has exempted from various provisions of the Privacy Act. See 31 C.F.R. § 1.36.

Likewise, records pertaining to the determination, collection, and payment of federal taxes are not subject to amendment under the Act. I.R.C. § 7852(e); 31 C.F.R. § 1.27(f)(4). See also Gardner v. United States, 213 F.3d 735, 741 n.5 (D.C. Cir. 2000), *cert. denied*, 531 U.S. 1153 (2001); Weiss v. Sawyer, 28 F. Supp. 2d 1221, 1228 (W.D. Okla. 1997); O'Connor v. United States, 669 F. Supp. 317, 323 (D. Nev. 1987), *aff'd*, 935 F.2d 275 (9th Cir. 1991), *cert. denied*, 502 U.S. 1104 (1992); Schlabach v. IRS, No. CV-09-298-FVS, 2010 WL 3789074, at \* 2, (E.D. Wash. 2010). Section 7852(e) also provides that the provisions of subsection (g) of the Act do not apply to determinations of liability under Title 26. Subsection (g) consists of all of the civil action provisions under the Act. Most courts have observed that section 7852(e) deprives them of jurisdiction to decide all Privacy Act issues relating to the determination of tax liability. See, e.g., McMillen v. Dep't of Treasury, 960 F.2d 187, 188 (1st Cir. 1991) (Act does not waive sovereign immunity "directly or indirectly" if the lawsuit relates to the determination of the existence or possible existence of liability (or the amount thereof) of any person for any tax) (*dicta*); Mallas v. Kolak, 721 F. Supp. 748, 754 (M.D.N.C. 1989) ("section 7852(e) acts to supersede causes of action brought under section 552a(g) if the lawsuit relates directly or indirectly to the determination of the existence or possible existence of an individual's federal tax liability"), *aff'd on other grounds*, 54 F.3d 773 (4th Cir. 1995). More recently, however, the Circuit Court for the District of Columbia opined that section 7852(e) prohibits civil litigation pertaining only to amendment of tax records and actions for damages – as opposed to actions for injunctive relief – for failure to provide access to records covered by the Privacy Act. Lake v. Rubin, 162 F.3d at 115. The Lake court ultimately held, however, that the general access provisions of the Privacy Act are superseded by section 6103, and that the plaintiff's reliance upon the Privacy Act to compel disclosure of tax information was misplaced.

One provision of the Privacy Act bars access to all "information compiled in reasonable anticipation of a civil action or proceeding." 5 U.S.C. § 552a(d)(5). Privacy Act subsection (d)(5) is sometimes overlooked because it is not located with the other exemptions in sections (j) and (k). This provision reflects Congress's intent to exclude civil litigation files from access under subsection (d)(1). See 120 Cong. Rec. 36,959-60 (1974), *reprinted in* Source Book at 936-38, available at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/LH\\_privacy\\_act-1974.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/LH_privacy_act-1974.pdf). This provision is designed to protect attorney work product, and (parallel to F.R.C. P. 26(b)(3)) the statutory language does not limit the exemption to the work product of lawyers and their staff. Hernandez v. Alexander, 671 F.2d 402, 408 (10th Cir. 1982); Varville v. Rubin, No. CIV 3: 96CV00629 AVC, 1998 WL 681438, at \*4 (D. Conn. Aug. 18, 1998); Smierka v. United States, 447 F. Supp. 221, 227-28 (D.D.C. 1978). This provision does not require the head of the agency to publish a special notice of exemption to trigger

its use. The exemption does not require that litigation ever actually occur, and the exemption applies even after it becomes apparent that no litigation will ever occur. The determining factor as to the applicability of this exemption is whether *at the time the record was created* there was reasonable anticipation of a civil action or proceeding.

Both access and amendment rights are limited by other exemptions in the Privacy Act. See 5 U.S.C. § 552a(j) and (k). Subsection (j) of the Privacy Act permits the head of an agency to exempt systems of records pertaining to criminal investigation and enforcement from the access and amendment provisions of the Act, so long as the records are maintained by a component of the agency which “performs as its principal function any activity pertaining to the enforcement of criminal laws.” 5 U.S.C. § 552a(j)(2). Subsection (k) lists the “specific exemptions” that any agency, or component thereof, may utilize to bar access to or amendment of records pertaining to, *inter alia*, national security, civil law enforcement investigations, and federal employment or contracting suitability, eligibility or qualifications. 5 U.S.C. § 552a(k)(2). To be effective, exemptions declared by agency heads must be published in a system of records notice along with a statement of the reasons the system is exempt from any provision of the Privacy Act. The IRS publication of notices of exempt systems is in the Treasury Regulations at 31 C.F.R. § 1.36.

Note that publication of exempt systems of records “does not remove that entire filing system from the requirements of the Act; rather . . . documents qualify for exemption only if they constitute law enforcement records within the meaning of the statute.” Doe v. FBI, 936 F.2d 1346, 1353 (D.C. Cir. 1991). Moreover, these exemptions travel with the records (any copies of a (j) or (k) exempt record are also exempt) and remain applicable forever. *Id.* at 1356. This means that a record that is exempt in one system of records retains that exemption wherever the record is found. See *also* 31 C.F.R. § 1.36(g).

Section (t) of the Privacy Act provides that FOIA exemptions may not be invoked to deny access otherwise required by the Privacy Act, and that Privacy Act exemptions may not be invoked to deny disclosure otherwise required by the FOIA. In other words, information that an agency is *required* to disclose pursuant to a FOIA request may not be withheld on the basis of a Privacy Act exemption. Where the agency has discretion under FOIA to withhold information, however, it is a violation of the Privacy Act to disclose that information if the Privacy Act requires it to be withheld.

The following decision template may be helpful in determining whether the IRS should disclose information in response to an individual’s request for records about himself (a “first party” request):

*Is the information exempt from disclosure pursuant to a Privacy Act exemption?*

*No. Disclose.*

*Yes. Is the information exempt from disclosure pursuant to a FOIA exemption?*

*No. Disclose and state in the response letter that, although exempt from disclosure under the Privacy Act, the disclosure is made pursuant to FOIA.*

*Yes. Withhold the information and cite both the Privacy Act and FOIA exemptions in the response letter.*

Even though the Privacy Act permits access to and amendment of nontax records, it may not be used to collaterally attack final agency decisions. The Privacy Act was not "intended to permit an individual collaterally to attack information in records pertaining to him which has already been the subject of or for which adequate judicial review is available." OMB Guidelines, 40 Fed. Reg. 28,949, 28,969 (July 9, 1975). See also, e.g., Reinbold v. Evers, 187 F.3d 348, 360 (4th Cir. 1999) ("The Privacy Act does not permit an individual to force an agency to 'rewrite history, changing the record in Orwellian fashion to pretend that it reached some other conclusion.' Further, the Privacy Act does not allow a court to alter records that accurately reflect an administrative decision, nor the opinions behind that administrative decision, no matter how contestable the conclusions may be.") (internal citation and footnote omitted); Subh v. Dep't of Army, No. 1:10cv433 (LMB/TRG), 2010 WL 4961613, at \*4 (E.D. Va. 2010) ("The Privacy Act plainly does not exist to allow applicants to obtain such a 'do-over' of their security forms in the guise of an administrative 'correction.'"); Pellerin v. Veterans Admin., 790 F.2d 1553, 1555 (11th Cir. 1986) (Veterans Administration disability benefits determinations may not be collaterally challenged using the Privacy Act); Houlihan v. Office of Pers. Mgmt., 909 F.2d 383, 385 (9th Cir. 1990) (plaintiff cannot bring an accuracy-related Privacy Act claim to challenge a determination made pursuant to the Civil Service Reform Act); Hobbs v. United States, No. H-96-4260, 1999 WL 132432, at \*8 (S.D. Tex. Jan. 22, 1999) (discharged IRS employee collaterally estopped from using Privacy Act amendment claim to challenge agency personnel decision after MSPB decision), *aff'd on other grounds*, 209 F.3d 408 (5th Cir. 2000); Lyon v. United States, 94 F.R.D. 69, 72 (W.D. Okla. 1982) (Federal Employees Compensation Act is exclusive method for determining federal employee on-the-job injury compensation; cannot compel amendment of compensation determinations to a different amount); Bashaw v. Dep't of Treasury, 468 F. Supp. 1195, 1196 (E.D. Wis. 1979) (Chief Counsel employee's sex discrimination claim falls under Civil Rights Act; may not seek amendment under Privacy Act of decision by agency to deny claim).

## **D. Relevance and Necessity**

Agencies may maintain only as much information about an individual as is relevant and necessary to accomplish an agency purpose required under a statute or executive order. 5 U.S.C. § 552a(e)(1). Either the statute or the executive order must expressly authorize the maintenance of the records, or maintenance of the records must be necessary to accomplish the purpose of the statute or executive order. Civil and criminal investigatory records maintained in systems of records may be exempted from this requirement pursuant to 5 U.S.C. § 552a(j) or (k) because it is not always possible for law enforcement agencies (or components) to determine the relevance and necessity of information at the moment it is collected.

## **E. Collecting Information Directly from Individual**

Each agency that maintains a system of records shall “collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual’s rights, benefits, and privileges under Federal programs.” 5 U.S.C. § 552a(e)(2). The OMB Guidelines state that agencies should consider various factors in determining whether it is practicable to collect information from the subject individual, including whether information can be obtained only from a third party, the relative costs of obtaining the information from the subject or from a third party, the risk of obtaining inaccurate information from the third party, and the need to verify with a third party information obtained from the subject. 40 Fed. Reg. 28,949, 28,961 (July 9, 1975).

### **1. Tax Records**

The IRS has exempted the investigatory records of Criminal Investigation from this requirement as permitted by 5 U.S.C. § 552a(j)(2). On the other hand, Examination and Collection records are not exempt from this provision, but, consistent with the factors identified by OMB, it is expected that some information in these records will be obtained from third parties before contacting the taxpayer about the matter. The known cases addressing this requirement arise in the federal employment context (discussed below), but nevertheless provide some guidance on courts’ views of the tension between ensuring that the subject individual is contacted first, whenever practicable, and ensuring that an investigation is conducted in a manner most likely to obtain true and accurate information.

### **2. Employment Records**

Courts have approved contacting a third party before contacting the employee in certain circumstances. For example, in Brune v. IRS, 861 F.2d 1284, 1287-88 (D.C. Cir. 1988), a group manager contacted

taxpayers to confirm a revenue agent's visits prior to questioning the revenue agent about "inordinately numerous and lengthy visits." The court held that this was acceptable where "an investigator reasonably concludes . . . that contacting the suspect first would not, in all likelihood, make it unnecessary thereafter to contact third parties but would entail some risk of compromising such further inquiry." The court expressed concern that the revenue agent was in a position to coerce taxpayers whose returns he was examining into altering their testimony regarding the visits. Consistent with Brune, two other decisions have upheld the IRS practice of contacting taxpayers before interviewing agents who were under internal investigation. Alexander v. IRS, Civ. A. No. 86-0414-LFO, 1987 WL 13958, at \*6-7 (D.D.C. June 30, 1987); Merola v. Dep't of the Treasury, No. 83-3323, slip op. at 5-9 (D.D.C. Oct. 24, 1986).

Where an employee's ability to alter evidence or coerce a witness is virtually nonexistent, the employee should be contacted before third parties. Waters v. Thornburgh, 888 F.2d 870, 873-74 (D.C. Cir. 1989). Also, that an employee might be distressed, embarrassed, or angered by questions about his conduct does not, standing alone, override the general requirement that the employee be contacted first. Dong v. Smithsonian Inst., 943 F. Supp. 69, 73-74 (D.D.C. 1996), *rev'd on other grounds*, 125 F.3d 877 (D.C. Cir. 1997), *cert. denied*, 524 U.S. 922 (1998). Reviewing the agency's own file of documents completed and provided by the employee may be sufficient collection "from the subject individual". Darst v. SSA, 172 F.3d 1065, 1068 (8th Cir. 1999) (SSA employee's application for SSA benefits reviewed); Olivares v. NASA, 882 F. Supp. 1545, 1549-50 (D. Md. 1995), *aff'd*, 103 F.3d 119, No. 95-2343, 1996 WL 690065, at \*2 (4th Cir. Dec. 3, 1996) (multiple Forms 171 provided by employee, with signed authorizations for agency to investigate any information on the form), *cert. denied*, 522 U.S. 814 (1997). When an investigator determines that obtaining information from the subject individual is not practicable, the reasons for the determination should be articulated in writing.

### **3. EEO Records**

In the context of equal employment opportunity complaints, it is important to keep in mind who is the "subject" of the record. The subject of the record created during EEO counseling (or "pre-complaint" counseling) conducted pursuant to 29 C.F.R. § 1614.105, is the complainant. These records are maintained in the system "Treasury/IRS 36.001, Appeals, Grievances, and Complaints", and are retrieved by the identity of the complainant. Complaint records at the Treasury Regional Complaint Center are also retrieved by the identity of the complainant. When an inquiry is made into whether discipline of the employee whose actions were the basis of the EEO complaint is appropriate, the subject of this



inquiry is the alleged wrongdoing employee. These records are maintained in the General Personnel and Payroll system of records (IRS 36.003), and are retrieved by the identity of the alleged wrongdoer. Neither of these systems is exempt from Privacy Act access by the subject of the record, but the applicability of 5 U.S.C. § 552a(d)(5) should be considered if a request for access is received from the subject employee.

## F. Notice Requirements

The Privacy Act requires each agency that maintains a system of records to inform each individual requested to supply information:

1. The authority which authorizes the solicitation of the information, and whether providing the information is voluntary or mandatory;
2. The principal purpose(s) for which the information is intended to be used;
3. The routine uses which may be made of the information; and
4. The effects, if any, on the individual of not providing all or any part of the requested information.

5 U.S.C. § 552a(e)(3). The notice requirement does not extend to individuals solicited for information as witnesses. OMB Guidelines, 40 Fed. Reg. 28,949, 28,961 (July 9, 1975). *But see Saunders v. Schweiker*, 508 F. Supp. 305, 309 (W.D.N.Y. 1981) (plain language of subsection (e)(3) “does not in any way distinguish between first-party and third-party contacts”). The IRS has exempted its Criminal Investigation systems of records from this requirement, as authorized by 5 U.S.C. § 552a(j)(2).

The various inquiries made of individuals by the IRS in the course of tax administration are basically part of a single process. Rather than include the identical notice information in numerous forms or letters, the IRS has adopted an "umbrella" approach. A universal Privacy Act notice is included in the Form 1040/1040A/1040EZ instruction packages. Even though the universal notice is legally adequate for subsequent inquiries, the IRS makes available an additional notice, Notice 609. Notice 609 is distributed to taxpayers subject to collection activity or taxpayers whose returns are selected for examination. Case law has embraced these notices as satisfying the requirements of subsection (e)(3). *See, e.g., United States v. Bressler*, 772 F.2d 287, 292-93 (7th Cir. 1985), *cert. denied*, 474 U.S. 1082 (1986); *United States v. Wilber*, 696 F.2d 79, 80 (8th Cir. 1982); *United States v. Annunziato*, 643 F.2d 676, 678 (9th Cir.), *cert. denied*, 452 U.S. 966 (1981).

Taxpayers have attempted to quash summonses and indictments, suppress evidence, and otherwise collaterally attack IRS enforcement activities by claiming that the IRS failed to provide a Privacy Act notice. Courts have universally rejected this argument. See, e.g., United States v. McAnlis, 721 F.2d 334, 337 (11th Cir. 1983); United States v. Berney, 713 F.2d 568, 572 (10th Cir. 1983); Hernandez v. United States, No. CV-10-MC-9181, 2010 WL 5292339, at \*3 (D. Or. 2010).<sup>68</sup>

### **G. Accuracy, Relevance, Timeliness, and Completeness**

When records collected about an individual are to be used in making a determination about that individual, or are to be disseminated to another person (other than an agency and other than pursuant to any of the provisions of subsection (b)(2)), the Privacy Act obligates the IRS to make reasonable efforts to ensure that the records are "accurate, relevant, timely, and complete" at that time. 5 U.S.C. § 552a(e)(5) and (6). Perfect records are not required by subsection (e)(5); instead, "reasonableness" is the standard. See Johnston v. Horne, 875 F.2d 1415, 1421-22 (9th Cir. 1989). Likewise, subsection (e)(6) requires agencies to make reasonable efforts to review records before they are disseminated. NTEU v. IRS, 601 F. Supp. 1268, 1272 (D.D.C. 1985). Note that violations of section (e)(5) and (e)(7) can occur even if records are not in a system of records, but damages are available only if the plaintiff can demonstrate an adverse effect. Gerlich v. DOJ, 828 F. Supp. 2d 284, 287 (D.D.C. 2011) (court also addressed issues of spoliation applicable to records destroyed prior to related investigation or litigation, but arguably not in compliance with Federal Records Act).

### **H. First Amendment Rights**

Records that reflect the exercise of an individual's First Amendment rights may be maintained by an agency only if (1) a statute specifically authorizes maintenance; (2) the individual consents to maintenance; or (3) the records are pertinent to and within the scope of an authorized law enforcement activity. 5 U.S.C. § 552a(e)(7).

Agencies cannot exempt themselves from this requirement. Law enforcement includes civil and criminal investigations, administrative, regulatory, or judicial proceedings, and information gathering. Courts that have considered the issue have said that information on the exercise of First Amendment rights need not be in a system of records to be covered. See, e.g., Gerlich v. DOJ, 828 F. Supp. 2d

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<sup>68</sup> This principle of law is so accepted that several appellate decisions rejecting efforts to quash summonses on Privacy Act grounds are unpublished. See Theuring v. United States, 178 F.3d 1296 (table cite), No. 98-3378, 1999 WL 220135, at \*2 (6th Cir. Mar. 18, 1999); United States v. Harris, 172 F.3d 54 (table cite), No. 98-3117, 1998 WL 870351, at \*2 (7th Cir. Dec. 11, 1998); United States v. Koziol, 79 F.3d 1155 (table cite), No. 94-35981, 1996 WL 102582, at \*1 (9th Cir. Mar. 6, 1996).

284, 287 (D.D.C. 2011) (violations of section (e)(5) and (e)(7) can occur even if records are not in a system of records, but damages are available only if plaintiff can demonstrate an adverse effect; court also addressed issues of spoliation applicable to records destroyed prior to related investigation or litigation, but arguably not in compliance with Federal Records Act). Maydak v. United States, 363 F.3d 512, 516 (D.C. Cir. 2004), *aff'd in part and vacated in part on other grounds* by 630 F.3d 166 (D.C. Cir. 2010); MacPherson v. IRS, 803 F.2d 479, 481 (9th Cir. 1986); Clarkson v. IRS, 678 F.2d 1368, 1372-77 (11th Cir. 1982), *appeal after remand*, 811 F.2d 1396 (11th Cir.), *cert. denied*, 481 U.S. 1031 (1987); Albright v. United States, 631 F.2d 915, 918-21 (D.C. Cir. 1980), *related proceedings*, 732 F.2d 181 (D.C. Cir. 1984).

### **I. Legal Process: Notice to Individual of Disclosure**

Agencies must "make reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compulsory legal process when such process becomes a matter of public record." 5 U.S.C. § 552a(e)(8). This notice is not advance notice, but must be made to the last known address of the individual within five working days after the disclosure is made. This provision applies to:

1. disclosures made pursuant to subpoenas or summonses;
2. disclosures made pursuant to an "order of a court of competent jurisdiction" under 5 U.S.C. § 552a(b)(11) (but note that notice of disclosures made pursuant to a sealed order should not be provided until after the order has been unsealed by the court); and
3. disclosures of tax returns and return information pursuant to a section 6103(i) *ex parte* order.

This provision does not apply to disclosures made pursuant to a written request by, or with the written consent of, the individual to whom the record pertains.

**Note:** The IRS has exempted its Criminal Investigation systems of records from this provision of the Privacy Act.

### **J. Civil Remedies**

The Act provides that an individual may seek judicial review over four types of actions: (1) refusal to grant access; (2) refusal to correct or amend a record; (3) failure to maintain a record with accuracy, relevance, timeliness, or completeness; or (4) failure to comply with any of the other provisions of the Privacy Act. 5 U.S.C. § 552a(g)(1). The right of action created by the Act is limited to actions against federal agencies, and not against employees of the agencies. Further, to prevail, the plaintiff needs to demonstrate that disclosure

actually occurred. York v. McHugh, No. 09-075, \_\_\_ F. Supp. 2d \_\_\_, 2012 WL 1014503 (D.D.C. Mar. 27, 2012).

The right of action carries a two-year statute of limitations from the date on which the cause of action arises. The only exception to the rule is where an agency has materially and willfully misrepresented any information required by the Privacy Act to be disclosed *and* that misrepresented information is material to establishing the agency's liability to the individual about whom the information relates, in which case the statute of limitations is two years after discovery by the individual of the misrepresentation. 5 U.S.C. § 552a(g)(5).

The Act provides a detailed scheme of exclusive judicial remedies (injunctive or monetary relief), depending on the nature of the violation. Under principles of sovereign immunity, remedies not provided for in the Act are not available. There is no right to trial by jury. Damages are not available for mental or emotional distress. FAA v. Cooper, 132 S.Ct. 1441 (2012) (In 5 - 3 opinion, using sovereign immunity analysis, Court held that Privacy Act does not authorize damages for mental or emotional distress; statutory minimum of \$1,000 is available only if plaintiff demonstrates pecuniary loss).

Remember, section 7852(e) provides that the provisions of subsection (g) of the Privacy Act do not apply to determinations of liability under Title 26. See Section III.C.3, above.

## **K. Criminal Penalties**

The Act also provides for criminal penalties against: (1) any agency employee who makes a disclosure knowing it to violate the Act or who maintains a system of records without meeting the notice and publication requirements of section (e)(4); (2) a section (m)(1) contractor (or contractor's employee) who violates the Act; or (3) any person who willfully obtains an individual's records from an agency under false pretenses. 5 U.S.C. § 552a(i).

Only one criminal case under the Privacy Act has ever been reported: United States v. Trabert, 978 F. Supp. 1368 (D. Colo. 1997). In Trabert, the defendant provided patient name and address information to a university hospital at the request of an Army medical center doctor. He was acquitted of the charge of unauthorized disclosure of records because the government did not prove willfulness.

## **L. Government Contractors**

The Privacy Act provides that a government contractor that operates a system of records for a federal agency is subject to the same Privacy Act limitations as the federal agency with respect to the system of records. 5 U.S.C. § 552a(m)(1).

The agency is then required to enforce the recordkeeping and disclosure restrictions of the Act upon the contractor and its employees.

This provision does not authorize disclosure of records to contractors. The authority must otherwise exist; e.g., routine uses. Where routine use authority does exist, then it is necessary to determine whether the contractor is operating a system of records to accomplish an agency function.

This provision does not extend to every government contractor who has access to Privacy Act covered records. The contract must call for the contractor to "operate a system of records" to accomplish an agency function. OMB Guidance states that the statutory language was "intended to limit the scope of the coverage to those systems actually taking the place of a federal system which, but for the contract, would have been performed by an agency and covered by the Privacy Act." OMB Guidelines, 40 Fed. Reg. 28,949, 28,976 (July 9, 1975).

#### **M. Social Security Number (Privacy Act § 7, Uncodified)**

This is the only provision of the Act that extends beyond the federal government to also include state and local governments. Section 7(a)(1) of the Privacy Act, see 5 U.S.C. § 552a note (Disclosure of Social Security Number), provides that it is "unlawful for any federal, state, or local government agency to deny any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his or her social security number."

Notwithstanding the seemingly simple mandate above, it does not apply to disclosures required by federal statute and by federal, state, or local government agencies maintaining systems of records in existence and operating before January 1, 1975, if the disclosure was required under statute or regulation adopted prior to that date for the purpose of verifying an identity. See Section 7(a)(2)(A)-(B). Also, 42 U.S.C. § 405(c)(2)(C)(i) and (iv) (2000), enacted by the Tax Reform Act of 1976 (Pub. L. No. 94-455, section 1211), expressly exempts state agencies from this restriction to the extent that SSNs are used "in the administration of any tax, general public assistance, driver's license, or motor vehicle registration law within its jurisdiction." See, e.g., Stoianoff v. Dep't of Motor Vehicles, 12 Fed. App'x 33, 35 (2d Cir. 2001) (finding that plaintiff's Privacy Act claim fails because section 405(c)(2)(C)(i) "expressly authorizes states to require the disclosures of social security numbers in the administration of driver's license programs" and further provides that "any federal law that conflicts with this section is 'null, void, and of no effect'"), *cert. denied*, 534 U.S. 954 (2001).

Interestingly, although section 7 of the Privacy Act regulates state and local governments, the Ninth Circuit has held that individuals have a private cause of action only against federal agencies. Sutton v. Providence St. Joseph Med. Ctr., 192 F.3d 826, 844 (9th Cir. 1999) (private entity cannot be sued under the

Privacy Act); Dittman v. California, 191 F.3d 1020, 1026 (9th Cir. 1999) (“The civil remedy provisions of the statute do not apply against private individuals, state agencies, private entities, or state and local officials” (citing Unt v. Aerospace Corp., 765 F.2d 1440, 1447 (9th Cir. 1985))), *cert. denied*, 530 U.S. 1261 (2000). In contrast, the Eleventh Circuit rejected Dittman and specifically found that a private remedy against state governments for violations of section 7 exists via the Civil Rights Act, 42 U.S.C. § 1983. See Schwier v. Cox, 340 F.3d 1284, 1289-90 (11th Cir. 2003); see also Greidinger v. Davis, 988 F.2d 1344, 1348-54 (4th Cir. 1993) (sustaining citizen’s claim, based upon Equal Protection Clause of the 14th Amendment, that Virginia law requiring publication of prospective voter’s social security number violated section 7 of the Privacy Act).

When an agency requests an individual to disclose his or her social security number, it must state whether compliance with the request is mandatory or voluntary. The agency must also name the authority that authorizes solicitation of the number. In general, the authority for requiring the use of SSNs for tax administration purposes is section 6109. Also, the agency must state the intended use of the information. Any penalties or other effects of failure or refusal to provide the social security number must also be stated. These requirements are in addition to the general notice requirements of the Privacy Act at 5 U.S.C. § 552a(e)(3), noted above.

Notices requesting information and disclosure of SSNs not related to tax administration are also subject to the Privacy Act (*e.g.*, requests to IRS employees for administrative and personnel purposes). In these cases, the information requested is so varied that particularized notices are used. The Privacy Act Notice should be included in the form. Generally, Executive Order 9397, Numbering System for Federal Accounts Relating to Individual Persons, is the authority for soliciting social security numbers for personnel-related matters. See Exec. Order No. 9397, 5 C.F.R., 1943 Supp., 2.6, as revised by Exec. Order No. 13478 (73 FR 70239, Nov. 20, 2008).

#### **N. Requests or Demands for Production of Records Maintained in Systems of Records or Testimony from a System of Records**

This section of the Privacy Act chapter is limited to IRS records maintained in systems of records *not* containing tax information, *e.g.*, personnel records. For a more complete discussion of testimony authorizations, see *generally* Chapter 12.

Typically, the IRS receives subpoenas for personnel records of a current or former employee for use in a nontax proceeding to which the IRS is not a party. To determine whether the information may be produced, first consider whether the records are maintained in a Privacy Act system of records. For example, compare payroll records (retrieved by individual name) with vacancy announcement records (retrieved by vacancy announcement number, not by applicant's name). Only the former is covered by the Privacy Act. In fact,

identical information may be in different records that are afforded different status under the Privacy Act, depending on the manner in which the records are stored and retrieved.

Assuming that the record or information requested is kept in a system of records, locate the current notice of the system of records, as published in the Federal Register. Note that a system notice can be amended without full republication; be sure to check for this. The most recent compilation of IRS SORNs can be found at <http://edocket.access.gpo.gov/2008/pdf/E8-4430.pdf>; 73 Fed. Reg. 13,284 (Mar. 12, 2008). The Privacy Act serves as an absolute statutory bar to the production of subpoenaed records or the giving of testimony unless: (1) a consent to disclosure is obtained pursuant to 5 U.S.C. § 552a(b); (2) the disclosure is required by FOIA, see 5 U.S.C. § 552a(b)(2); or (3) the IRS exercises its discretionary authority to disclose the records or information in accordance with its published routine uses. Remember, published routine uses are discretionary, not mandatory.

If the IRS refuses to produce the subpoenaed records or testimony, the party issuing the subpoena may seek to compel production. If the court orders production, disclosure is permitted by subsection (b)(11) ("order of a court of competent jurisdiction"). See *generally Doe v. DiGenova*, 779 F.2d 74, 84-85 (D.C. Cir. 1985).<sup>69</sup>

This issue is also discussed in Litigation Guideline Memorandum DL-3, "Disclosure of Personnel Records (Other Than Tax Information) Pursuant to Subpoena." See 1991 IRS LGM LEXIS 27 (Sept. 12, 1991).

#### **IV. MISCELLANEOUS CONSIDERATIONS**

##### **A. Private Supervisory Notes**

"Private supervisory notes" are notes maintained by supervisors as "memory joggers" to assist with preparing appraisals of subordinate employees. By contract, the IRS and Counsel have agreed that private supervisory notes will be shared with the affected employee. Therefore, although case law to the contrary exists, the IRS considers private supervisory notes as part of the system of records "Treasury/IRS 36.003 - General Personnel and Payroll," and copies of any notes must be provided to the employee upon request.

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<sup>69</sup> As noted above, this section pertains only to nontax information maintained in Privacy Act systems of records. If the subpoenaed records or information ordered disclosed constitute or contain tax return(s) or return information, then the court order also must satisfy the requirements of section 6103.

## **B. Employment Recommendations for Current or Former Subordinate Employees**

Most employment records are located in the system "Treasury/IRS 36.003, General Personnel and Payroll Records." See Routine Use (1) ("Provide information to a prospective employer of an IRS employee or former IRS employee"). If relying on records from a different system of records, determine whether there is a published routine use authorizing disclosure for this purpose. Remember also that the routine use authorizes, but does not require, disclosure.

Information divulged from personal opinion stated from memory (and not derived from a Privacy Act record) is not a disclosure of a record from a system of records within the meaning of the Privacy Act. Krowitz v. Dep't of Agric., 641 F. Supp. 1536, 1544-45 (W.D. Mich. 1986), *aff'd*, 826 F.2d 1063 (6th Cir. 1987), *cert. denied*, 484 U.S. 1009 (1988); King v. Califano, 471 F. Supp. at 181. See also Doe v. Dep't of Veterans Affairs, 519 F.3d 456, 463 (8th Cir. 2008) (relying on Olberding v. Dep't of Defense, 709 F.2d 621 (8th Cir. 1983), the Eighth Circuit held that disclosing information from "personal knowledge and memories" is not a violation of the Privacy Act, even if the same information is found in a system of records), *cert. denied*, 129 S. Ct. 1032 (2009); Armstrong v. Geithner, 608 F.3d 854, 860 (D.C. Cir. 2010) (no Privacy Act violation when agency employee discloses information from her own complaint of unauthorized access, observation, office "rumor mill," and speculation, since she did not obtain any information from agency records); J.Q. Doe v. Dep't of the Treasury, 706 F.Supp.2d 1 (D.D.C. 2009) (no Privacy Act violation when agency employee disclosed information from personal observation, even if such information is also contained in a record that employee neither created nor reviewed). *But see* Wilborn v. HHS, 49 F.3d 597, 601 (9th Cir. 1995) (person involved in the creation of the record, or who makes a decision based on the information in the record, who discloses information from memory violates the Privacy Act), *abrogated on other grounds by* Doe v. Chao, 540 U.S. 614, 618 (2004); Pilon v. U.S. Dep't of Justice, 73 F.3d 1111, 1118 (D.C. Cir. 1996) (same); Bartel v. FAA, 725 F.2d at 1408-11 (same, quoted in Pilon).

## **C. Criminal Tax Trials**

Two Ninth Circuit opinions establish the requirement that, upon request by a criminal defendant, the government has an obligation to search its own files for exculpatory material including evidence affecting the credibility of its proposed witnesses and to provide that material to counsel for the defendant. United States v. Jennings, 960 F.2d 1488, 1490-91 (9th Cir. 1992); United States v. Henthorn, 931 F.2d 29, 30 (9th Cir. 1991). For government employee witnesses, this includes a review of their personnel files. Jennings allows for review of government files for potentially exculpatory material by various government employees other than the Assistant United States Attorney assigned to the case. In Kyles v. Whitley, 514 U.S. 419 (1995), the Court noted that the prosecutor was



responsible for ensuring that exculpatory material was provided to the defense. See United States v. Lacy, 896 F.2d 982, 985 (N.D. Cal. 1995) (overruling of Jennings recognized). Jennings makes clear that this requirement is based upon the constitutional underpinnings of the Fifth Amendment as set forth in Brady v. Maryland, 373 U.S. 83 (1963). This requirement to review for, and provide to the defense, exculpatory material overrides any Privacy Act considerations.

## V. LINKS TO OTHER RESOURCES

IRS Privacy Act Systems of Records:

<http://edocket.access.gpo.gov/2008/pdf/E8-4430.pdf> (check for amendments)

Government wide systems of records:

<http://www.defenselink.mil/privacy/govwide/>

Department of Justice, Office of Privacy & Civil Liberties, Overview of the Privacy Act of 1974:

<http://www.justice.gov/opcl/1974privacyact-overview.htm>

Treasury Directive 25-04:

<http://www.treasury.gov/about/role-of-treasury/orders-directives/Pages/td25-04.aspx>

Treasury Department Privacy Act Handbook, TDP 25-04:

<http://www.treasury.gov/FOIA/Documents/tdp25-04.pdf>

## CHAPTER 12

### TESTIMONY AUTHORIZATION

#### I. INTRODUCTION

IRS employees, including current and former employees of the Service, Office of Chief Counsel, and IRS contractors, may not testify about or produce official IRS records or information in response to a request or demand from outside the IRS without prior authorization.

Treas. Reg. §§ 301.9000-1 to 301.9000-7 establish procedures to be followed by current and former employees and contractors of the IRS who receive requests for disclosure of IRS records or information. The ultimate decision to disclose Service records or information belongs to the authorized official with delegated authority to authorize testimony or disclosure of IRS records or information. Thus, the general rule is that when an authority outside the IRS seeks to depose an IRS employee or contractor or requests that IRS records be produced by the government, disclosure is not permitted absent authorization from the Commissioner or the Commissioner's delegate in accordance with Treas. Reg. § 301.9000-3(a).

IRM 11.3.35 also provides detailed instructions and procedures concerning authorization of testimony and the production of documents.

#### II. TESTIMONY AUTHORIZATION

##### A. Statutory/Regulatory Structure

Under the General Housekeeping Statute, 5 U.S.C. § 301, heads of executive or military departments may prescribe regulations for, among other things, the custody, use, and preservation of their records, papers, and property. Many departments and agencies have promulgated regulations under this statute for the disclosure of their official records and information. Generally, these are termed Touhy regulations, after the Supreme Court's decision in United States ex rel. Touhy v. Ragen, 340 U.S. 462 (1951). In Touhy, the Supreme Court held that an agency employee could not be held in contempt for refusing to disclose agency records or information when following the instructions of his or her supervisor regarding the disclosure.

The Service's Touhy regulations concerning the production of written records by, and the oral testimony of, employees of the IRS are found at Treas. Reg. §§ 301.9000-1 to 301.9000-7. With limited exceptions, current and former IRS employees and contractors may not testify or disclose IRS records or information to any court or governmental agency, the Congress, or to a committee or subcommittee of the Congress, without express authority from the appropriate authorizing official. An IRS employee who violates the regulations may be

subject to administrative discipline, up to and including dismissal from employment. Treas. Reg. § 301.9000-4(h). Current and former IRS contractors that violate the regulations may be subject to applicable contractual sanctions and/or criminal penalties. *Id.*

## 1. General Rule

Except as otherwise provided in the regulations, when a request or demand for IRS records or information is made, no current or former IRS officer, employee or contractor shall testify or disclose IRS records or information to any court, administrative agency or other authority, or to the Congress, or to a committee or subcommittee of the Congress without a testimony authorization. Treas. Reg. § 301.9000-3(a).

## 2. Definitions

- a. **“IRS records or information”** means any material (including copies thereof) contained in the files (including paper, electronic or other media files) of the IRS, any information relating to material contained in the files of the IRS, or any information acquired by an IRS officer or employee, while an IRS officer or employee, as a part of the performance of official duties or because of that IRS officer or employee’s official status with respect to the administration of the internal revenue laws or any other laws administered by or concerning the IRS. IRS records or information includes, but is not limited to, returns and return information as those terms are defined in section 6103(b)(1) and (2) of the Code, tax convention information as defined in section 6105, information gathered during Bank Secrecy Act and money laundering investigations, and personnel records and other information pertaining to IRS officers and employees. IRS records and information also includes information received, generated or collected by an IRS contractor pursuant to the contractor’s contract or agreement with the IRS. The term does not include records or information obtained by IRS officers and employees while under the direction and control of the United States Attorney’s Office during the conduct of a federal grand jury investigation, but does include records or information obtained during the administrative stage of a criminal investigation (before the initiation of the grand jury), obtained from IRS files (such as transcripts or tax returns), or subsequently obtained by the IRS for use in a civil investigation. Treas. Reg. § 301.9000-1(a).
- b. **“IRS officers and employees”** means all officers and employees of the United States appointed by, employed by, or

subject to the directions, instructions, or orders of the Commissioner or IRS Chief Counsel and also includes former officers and employees. Treas. Reg. § 301.9000-1(b).

- c. **“IRS contractor”** means any person, including the person’s current and former employees, maintaining IRS records or information pursuant to a contract or agreement with the IRS, and also includes former contractors. Treas. Reg. § 301.9000-1(c).
- d. A **“request”** is any request for testimony of an IRS officer, employee or contractor or for production of IRS records or information, oral or written, by any person, which is not a demand. Treas. Reg. § 301.9000-1(d).
- e. A **“demand”** is any subpoena or other order of any court, administrative agency or other authority, or the Congress, or a committee or subcommittee of the Congress, and any notice of deposition (either upon oral examination or written questions), request for admissions, request for production of documents or things, written interrogatories to parties, or other notice of, request for, or service for discovery in a matter before any court, administrative agency or other authority. Treas. Reg. § 301.9000-1(e).
- f. An **“IRS matter”** is any matter before any court, administrative agency or other authority in which the United States, the Commissioner, the IRS, or any IRS officer or employee acting in an official capacity, or any IRS officer or employee (including an officer or employee of IRS Chief Counsel’s office) in his or her individual capacity if DOJ or the IRS has agreed to represent or provide representation to the IRS officer or employee, is a party and that is directly related to official business of the IRS or to any law administered by or concerning the IRS, including, but not limited to, judicial and administrative proceedings described in section 6103(h)(4) and (l)(4). Treas. Reg. § 301.9000-1(f).
- g. An **“IRS congressional matter”** is any matter before the Congress, or a committee or subcommittee of the Congress, that is related to the administration of the internal revenue laws or any other laws administered by or concerning the IRS, or to IRS records or information. Treas. Reg. § 301.9000-1(g).
- h. A **“non-IRS matter”** is any matter that is not an IRS matter or an IRS congressional matter. Treas. Reg. § 301.9000-1(h).

- i. A “**testimony authorization**” is a written instruction, or oral instruction memorialized in writing within a reasonable period, by an authorizing official that sets forth the scope of and limitations on proposed testimony and/or disclosure of IRS records or information issued in response to a request or demand for IRS records or information. A testimony authorization may grant or deny authorization to testify or disclose IRS records or information and may make an authorization effective only upon the occurrence of a precedent condition, such as the receipt of a consent complying with the provisions of section 6103(c). Treas. Reg. § 301.9000-1(i).
- j. An “**authorizing official**” is a person with delegated authority to authorize testimony and the disclosure of IRS records or information. Treas. Reg. § 301.9000-1(j).

### 3. Procedures in Event of a Request or Demand

- a. Notification of the disclosure officer: Except for requests or demands in United States Tax Court cases, in personnel, labor relations, government contract, IRS congressional matters, in matters related to informant claims or the rules of Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971), or the Federal Tort Claims Act (FTCA), an IRS officer, employee or contractor who receives a request or demand for IRS records or information for which a testimony authorization is or may be required shall notify promptly the disclosure officer servicing the IRS officer’s, employee’s or contractor’s geographic area. The IRS officer, employee or contractor shall await instructions from the authorizing official concerning the response to the request or demand. Treas. Reg. § 301.9000-4(b).
- b. Requests or demands in United States Tax Court cases: An IRS officer, employee or contractor who receives a request or demand for IRS records or information on behalf of a petitioner in a United States Tax Court case shall notify promptly the IRS Chief Counsel attorney assigned to the case. The IRS Chief Counsel attorney shall notify promptly the authorizing official. The IRS officer, employee or contractor who received the request or demand shall await instructions from the authorizing official. Treas. Reg. § 301.9000-4(c).

- c. Requests or demands in personnel, labor relations, government contract, Bivens or FTCA matters, or matters related to informant claims: An IRS officer, employee or contractor who receives a request or demand, on behalf of an appellant, grievant, complainant or representative, for IRS records or information involving informant claims shall promptly contact the Public Contracts & Technology Law Branch in Washington, DC. For all other matters involving personnel, labor relations, government contracts, Bivens or FTCA matters, promptly notify the IRS Associate Chief Counsel (General Legal Services (GLS)) attorney assigned to the case. If no IRS Associate Chief Counsel (GLS) attorney is assigned to the case, the IRS officer, employee or contractor shall notify promptly the IRS Associate Chief Counsel (GLS) attorney servicing the geographic area. The IRS Associate Chief Counsel (GLS) attorney shall notify promptly the authorizing official. The IRS officer, employee or contractor who received the request or demand shall await instructions from the authorizing official. Treas. Reg. § 301.9000-4(d).
- d. Requests or demands in IRS congressional matters: An IRS officer, employee or contractor who receives a request or demand in an IRS congressional matter shall notify promptly the IRS Office of Legislative Affairs. The IRS officer, employee or contractor who received the request or demand shall await instructions from the authorizing official. Treas. Reg. § 301.9000-4(e).

## **B. Testimony Authorization Not Required**

A testimony authorization is not required:

1. To respond to a request or demand for IRS records or information by an attorney or other government representative regarding an IRS matter;
2. To respond solely in writing, under the direction of an attorney or other representative of the government, to requests and demands in IRS matters, including, but not limited to, admissions, document production, and written interrogatories to parties;
3. To respond to a request or demand issued to a former IRS officer, employee or contractor for expert or opinion testimony if the testimony involves general knowledge (such as information contained in published procedures of the IRS or the IRS Office of Chief Counsel)

gained while the former IRS officer, employee or contractor was employed or under contract with the IRS; or

4. If a more specific procedure established by the Commissioner governs disclosure of IRS records or information. These procedures include, but are not limited to, those relating to: procedures pursuant to Treas. Reg. § 601.702(d); Freedom of Information Act requests pursuant to 5 U.S.C. § 552; Privacy Act requests pursuant to 5 U.S.C. § 552a; disclosures to state tax agencies pursuant to section 6103(d); and disclosures to DOJ pursuant to an *ex parte* order under section 6103(i)(1). Treas. Reg. § 301.9000-3(b). It is sometimes possible for an opposing party to examine an IRS employee or contractor as a witness even if the person does not have a prior written authorization. The government trial attorney must agree to call the IRS employee as a government witness for which no authorization is needed. Under general adversarial rules the taxpayer will then be entitled to cross-examine the witness. This procedure is discretionary with the government trial attorney, however, and it will be utilized only rarely.

### **III. VALIDITY AND SCOPE OF TREAS. REG. § 301.9000**

#### **A. Validity of Treas. Reg. §§ 301.9000-1 to 301.9000-7**

Federal employees following instructions issued in conformity with Touhy regulations are protected from contempt citations. The Supreme Court specifically recognized the authority of agency heads to restrict testimony of their subordinates by regulations similar to Treas. Reg. §§ 301.9000-1 to 301.9000-7. United States ex rel. Touhy v. Ragen, 340 U.S. 462, 467-69 (1951); Boske v. Comingore, 177 U.S. 459, 469-70 (1900). In Touhy, the Supreme Court held that a DOJ officer properly refused to obey a subpoena pursuant to the Attorney General's instructions under Disclosure or Use of Confidential Records and Information, 11 Fed. Reg. 4920 (May 2, 1946). Much earlier, the Supreme Court in Boske reversed a contempt citation issued to a collector of Internal Revenue for failing to produce copies of a distiller's report in his possession. Because the regulation concerning submission of records to the courts vested discretion in the Secretary of the Treasury and was lawful, the subordinate was not held in contempt.

#### **B. Scope of Authority to Withhold Information**

##### **1. Generally**

The General Housekeeping statute, 5 U.S.C. § 301, expressly provides "[t]his section does not authorize withholding information from the public or limiting the availability of records to the public." In addition, the Service's

regulations provide “[n]othing in these regulations creates a separate privilege or basis to withhold IRS records or information.” Treas. Reg. § 301.9000-4(i). Generally, there must be a separate statutory or common law privilege applicable to the records sought and/or a sound policy reason for refusing to permit the testimony of a particular employee or class of employees. See Part VI, below. Moreover, consistent with Justice Frankfurter's concurring opinion in Touhy, the protection of the regulations has been limited to protecting subordinate employees from orders of contempt because they followed the instructions of their superiors. See, e.g., Orange Env't, Inc. v. Cnty of Orange, 145 F.R.D. 320, 322 (S.D.N.Y. 1992); Milton Hirsch, “‘The Voice Of Adjuration’: The Sixth Amendment Right to Compulsory Process Fifty Years After United States ex rel. Touhy v. Ragen,” 30 Fla. St. U.L. Rev. 81, 104-09 (2002).

5 U.S.C. § 301 allows an agency to prohibit employees from responding to subpoenas to preserve the agency's privileges and other lawful interests, but it does not create any privileges or protections independent of those found elsewhere in law. Carter v. High Country Mercantile, Inc., No. 08-0835-CV-W-ODS, 2009 U.S. Dist. LEXIS 65619, at \*11 (W.D. Mo. July 28, 2009). An agency's decision, made pursuant to agency regulations, to provide or not provide agency records or to permit or deny employee testimony in litigation not involving the agency is an "agency action" subject to judicial review under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701 to 706. EPA v. Gen. Elec. Co., 197 F.3d 592, 598 (2d Cir. 1999). While the Second Circuit initially adopted the APA's arbitrary and capricious standard, on reconsideration it vacated the relevant portion of its decision and reserved the question for the future. EPA v. Gen. Elec. Co., 212 F.3d 689, 689-90 (2d Cir. 2000).

Other Circuits have generally looked to two sources for the appropriate standard when reviewing an agency's refusal to comply with discovery demands, those established by the APA and those found in the Federal Rules of Civil Procedure. When applying the standards for review established by the APA, a court can overturn an agency's action restricting employee testimony if the action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. See Davis Enters. v. EPA, 877 F.2d 1181, 1186 (3d Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990). Those courts that look to the standard established by the Federal Rules of Civil Procedure, balance the interests favoring disclosure against the interests asserted against disclosure in an attempt to ensure that the unique interests of the government are adequately considered. See SEC v. Chakrapani, No. 09 Civ. 325 (RJS) and No. 09 Civ. 1043 (RJS), 2010 U.S. Dist. LEXIS 65337, at \*29 (S.D.N.Y. June 28, 2010). The question of which standard a court should apply is unsettled. The Fourth, Seventh and Eleventh Circuits review the agency's decision under the APA's arbitrary and capricious standard because the APA contains the waiver of



sovereign immunity that allows review of the decision at all. See COMSAT Corp. v. NSF, 190 F.3d 369, 272 (4th Cir. 1999); Edwards v. Dep't of Justice, 43 F.3d 312, 314-16 (7th Cir. 1994); Barnett v. Ill. State Bd. of Educ., No. 02 C 2401, 2002 U.S. Dist. LEXIS 12908, at \*5, n.1 (N.D. Ill. July 2, 2002); Moore v. Armour Pharm. Co., 927 F.2d 1194 (11th Cir. 1991). The D.C. and Ninth Circuits look to the Federal Rules of Civil Procedure for their review of discovery disputes. See Linder v. Calero-Portocarrero, 251 F.3d 178, 181-82 (D.C. Cir. 2001); Exxon Shipping Co. v. Dep't of the Interior, 34 F.3d 774, 779-80 (9th Cir. 1994).

## **2. State Court Actions**

Based on sovereign immunity and the Supremacy Clause of the Constitution, the Service need not comply with a state court subpoena for testimony or records. In the event the Service receives a state court subpoena and decides not to comply, it should consider asking DOJ to remove the case to federal court to have the subpoena quashed. The Service should decide as quickly as possible to allow sufficient time to coordinate the removal effort with the local U.S. Attorney's office.

### **a. Sovereign Immunity**

The federal government's sovereign immunity extends, in cases where the government has not consented to be subject to an action, to legal proceedings where the government is named, or where the net effect of the judgment would be to restrain the government from acting or to force it to act:

Even though the government is not a party to the underlying action, the nature of the subpoena proceeding against a federal employee to compel him to testify about information obtained in his official capacity is inherently that of an action against the United States because such a proceeding "interfere[s] with the public administration" and compels the federal agency to act in a manner different from that in which the agency would ordinarily choose to exercise its public function. Dugan v. Rank, 83 S. Ct. 999 (1963). The subpoena proceedings *fall within the protection of sovereign immunity* even though they are technically against the federal employee and not against the sovereign.

Boron Oil Co. v. Downie, 873 F.2d 67, 70-71 (4th Cir. 1989) (emphasis added). A federal court's jurisdiction upon removal under 28 U.S.C. § 1442(a)(1) is derivative of the state court

jurisdiction. Thus, if a state court lacks jurisdiction to compel a federal employee to testify or produce documents, a federal court can acquire no jurisdiction to enforce a state court subpoena or order upon removal.

Case law strongly supports the proposition that the doctrine of sovereign immunity prevents a state court from exercising jurisdiction over United States government agency refusals to permit employee testimony. In Boron Oil, the Fourth Circuit found that a state court did not have jurisdiction to compel an EPA employee to "testify contrary to EPA instructions," nor did it have jurisdiction to review and set aside the agency's decision or its regulations promulgated pursuant to 5 U.S.C. § 301. *Id.* at 70. See also United States v. Williams, 170 F.3d 431, 433 (4th Cir. 1999) (an order of a state court seeking to compel a federal official to comply with a state court subpoena is "an action against the United States, subject to the governmental privilege of sovereign immunity") (quoting Smith v. Cromer, 159 F.3d 875, 879 (4th Cir. 1998)); Elko Cnty. Grand Jury v. Siminoe, 109 F.3d 554, 556 (9th Cir. 1997), *cert. denied*, 522 U.S. 1027 (1997) (state grand jury lacked jurisdiction not only to compel a federal employee to testify, but also to determine the validity of USDA's Touhy regulations); Edwards, 43 F.3d at 317 ("the cases involving section 1442(a) removals of state subpoena proceedings against unwilling federal officers have held that sovereign immunity bars the enforcement of the subpoena"); Hyde v. Stoner, No. 11-C- 4556, 2012 WL 689268, at \*2, (N.D. Ill., March 2, 2012 (state court lacked jurisdiction to compel testimony of EPA official in violation of agency regulations; sovereign immunity prohibits state courts from enforcing subpoenas against unwilling federal officers).

## **b. Supremacy Clause**

A separate basis for opposing subpoenas or orders to comply with discovery issued by state courts is the Supremacy Clause of the United States Constitution, art. VI, cl. 2. Federal law provides the only means through which access to federal documents may be sought and granted. See United States v. McLeod, 385 F.2d 734, 751-52 (5th Cir. 1967) (Supremacy Clause dictates that a state grand jury be enjoined from investigating federal agencies and enforcing subpoenas against federal employees); United States v. Kaufman, 980 F. Supp. 1247, 1251-52 (S.D. Fl. 1997) (subpoena issued by state bar to federal judge concerning investigation of defense attorney in ongoing federal criminal matter over which judge was presiding violated Supremacy Clause).

### c. Removal

In the event that a motion to quash or motion for protective order based upon sovereign immunity or the Supremacy Clause is refused by the state court, a Notice of Removal of Civil Subpoena under 28 U.S.C. § 1442(a)(1) should be filed. In some jurisdictions, the U.S. Attorney's Office automatically files the notice of removal in federal district court and files a Notice of Filing of Notice of Removal of Civil Subpoena to the United States District Court in the state court. Removal is authorized by 28 U.S.C. § 1442, which provides in relevant part:

(a) A civil action or criminal prosecution commenced in a State court against any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

The filing of a notice of removal in federal court and the filing in the state court of a notice of filing "shall effect the removal" of the subpoena from the state court to the United States District Court, "and the State court shall proceed no further unless and until the [matter] is remanded." 28 U.S.C. § 1446(d). The Supreme Court has held that "the right of removal is absolute for conduct performed under color of federal office, and has insisted that the policy favoring removal 'should not be frustrated by a narrow, grudging interpretation of [28 U.S.C.] § 1442(a)(1).'" Arizona v. Manypenny, 451 U.S. 232, 242 (1981) (quoting Willingham v. Morgan, 395 U.S. 402, 407 (1969)).

## **IV. WHO DETERMINES WHETHER TO AUTHORIZE TESTIMONY**

### **A. Delegation Order 11-2 – Cases Other than Tax Court Cases**

Delegation Order 11-2, dated June 15, 2004, identifies IRS and Chief Counsel officials who may authorize disclosures of returns and return information that are confidential pursuant to section 6103, but which may nonetheless be disclosed pursuant to exceptions as provided by the Code. I.R.S. Deleg. Order 11-2 (Rev. 17), IRM 1.2.49. It also contains tables that identify IRS and Chief Counsel officials who may authorize (*i.e.*, approve or deny) testimony and production of *any* documents when requested or demanded by any subpoena, notice of oral deposition, notice of written interrogatory, or other order of a court, administrative agency, or other authority, pursuant to Treas. Reg. §§ 301.9000-1 to 301.9000-7. These tables also identify the IRS and Chief Counsel employees who are to prepare testimony authorization documents and should be used in conjunction with IRM 11.3.35, Requests and Demands for Testimony and Production of Documents.

### **B. General Counsel Order No. 4 – Tax Court Cases**

General Counsel Order No. 4 delegates to the Chief Counsel the authority to determine whether to permit testimony and production of records in response to a request, subpoena, or other order of the Tax Court. I.R.S. Gen. Couns. Order No. 4 (Jan. 19, 2001); *see also* IRM 11.3.35.6(5). This authority has been redelegated to the Area Counsel. *See* IRM 11.3.35.6(6).

## **V. COLLECTING THE NECESSARY INFORMATION**

Generally, in preparing an authorization for a present or former IRS employee or contractor to testify or produce records in response to a request or demand for records or information, it will be necessary to ascertain the following facts in addition to the caption of the litigation, the nature of the litigation, and the court (or deposition) location:

- A. the return date of the request or demand;
- B. the name, title, and post-of-duty of the IRS employee or contractor upon whom the request or demand was made;
- C. on whose behalf and by whom the request or demand was served;
- D. the nature of the testimony or documents subject to the request or demand;
- E. whether the request or demand would require the disclosure of information that would identify, or tend to identify, a confidential informant, tax treaty (convention) information, or would require the release of other sensitive information;

- F. in the case of tax information, whether the party requesting or demanding the information is entitled to it under any of the provisions of section 6103;
- G. whether the request or demand would require the disclosure of information that would seriously impair federal tax administration;
- H. whether there is an open civil or criminal tax investigation and, if so, the IRS function that has jurisdiction over the investigation;
- I. the availability or feasibility of producing the information or testimony sought, *i.e.*, time limits and volume or format of documents;
- J. whether a declaration by an IRS officer, employee, or contractor under penalty of perjury pursuant to 28 U.S.C. § 1746 would suffice in lieu of deposition or trial testimony;
- K. whether deposition or trial testimony is necessary in a situation in which IRS records may be authenticated under applicable rules of evidence and procedure; and
- L. whether IRS records or information are available from other sources.

IRM 11.3.35.10(1); 11.3.35.12(1) and (2).

## **VI. DETERMINING WHETHER EMPLOYEES SHOULD BE ALLOWED TO TESTIFY AND WHAT RECORDS MAY BE DISCLOSED**

### **A. Statutory Considerations**

The Code, principally through section 6103, governs all disclosures of returns and return information. If it is apparent from the content of the request or demand that section 6103 would not permit disclosure of the desired information, the individual who served the request or demand should be contacted in an effort to get it withdrawn. In addition, section 6110 pertains to the disclosure of written determinations (rulings, determination letters, technical advice memoranda, and Chief Counsel advice) and related background file documents. Section 6104 requires disclosure of certain information concerning exempt organizations and pension plans. Section 4424 governs the disclosure of wagering tax information. Section 6105 governs the disclosure of tax convention information.

The Privacy Act, 5 U.S.C. § 552a, also dictates the extent of permissible disclosure of IRS records maintained and accessed by an individual's name or personal identifier, other than returns and return information (*e.g.*, personnel records). The routine use (5 U.S.C. § 552a(b)(3)) and court order (5 U.S.C.

§ 552a(b)(11)) provisions of the Privacy Act are consulted most frequently in connection with requests or demands for testimony or production of these (nontax) IRS records. See Chapter 11.

## **B. Confidential Sources**

Information that would directly or indirectly reveal the identity of a person who supplied information to the government under express assurances of confidentiality or in circumstances from which those assurances may reasonably be inferred may be protected by what is commonly referred to as the "informant privilege." Information withheld from disclosure pursuant to this privilege is broader than, and not to be confused with, information relating to the term "confidential informant" as defined in the Criminal Investigation section of the IRM. See IRM 9.4.2.5.

Although originally applied in the context of criminal proceedings, see Roviaro v. United States, 353 U.S. 53 (1957), this privilege is also applicable in civil cases. Westinghouse Elec. Corp. v. City of Burlington, Vt., 351 F.2d 762, 769-70 (D.C. Cir. 1965). See also Holman v. Cayce, 873 F.2d 944, 946-47 (6th Cir. 1989) (where the informant was neither a witness nor an active participant in the conduct which gave rise to the civil cause of action, the party seeking to compel disclosure of the identity of a confidential government informant shoulders a formidable burden in establishing a justification for overriding the privilege); Dole v. Local 1942, IBEW, 870 F.2d 368, 372-73 (7th Cir. 1989) (the privilege will not yield to permit a mere fishing expedition, nor upon bare speculation that the information may possibly prove useful). A court will look to the particular circumstances, including balancing the public interest in effective law enforcement with the public interest in disclosing the identity of anyone whose testimony would be relevant and helpful or is essential to a fair determination of a case, to determine whether the privilege should be applied. See McCray v. Illinois, 386 U.S. 300, 312-14 (1967); United States v. Panton, 846 F.2d 1335, 1336 (11th Cir. 1988).

The IRS will consider dismissing a case or will take sanctions rather than revealing the identity of an informant. Section 7623 and Treas. Reg. § 301.7623-1, which provide for rewards for information relating to violations of internal revenue laws, provide that no unauthorized person shall be advised of the identity of the informant. CCDM 35.4.6.3.3.1(5) states that the IRS will not reveal the identity of confidential informants without their consent. In criminal investigations, IRM 9.4.2.5.9 provides for maximum security and disclosure of the identity of informants only to authorized persons.

## **C. Investigatory Files Privilege**

The law enforcement investigatory files privilege is a qualified common law privilege to prevent "the harm to law enforcement efforts which might arise from

public disclosure of . . . investigatory files." Raphael v. Aetna Cas. and Sur. Co., 744 F. Supp. 71, 74 (S.D.N.Y. 1990) (quoting Black v. Sheraton Corp., 564 F.2d 531, 541 (D.C. Cir. 1977)). Law Enforcement Manual (LEM) material containing tolerances and criteria (e.g., dollar amount limitation on prosecution or collection) may be subject to this privilege. If a request or demand seeks LEM material, the classifying function must decide if the material is still LEM material. If not, it should be declassified and produced, unless subject to another privilege or statutory bar to production. If, however, the function decides to resist production, the privilege should be invoked. If a court ultimately orders production, the classifying function should decide whether to produce with an appropriate protective order. See United States v. Moriarty, No. 67-C-244, 1969 U.S. Dist. LEXIS 12657, at \*1 (E.D. Wis. Jan. 3, 1969). If, however, the decision is made not to produce the LEM material in spite of the court order, the Service must consider dismissing the case or taking sanctions.

#### **D. Other Privileges**

United States v. Elsass, No. 2:10-cv-00336, 2012 WL 1409624 (S.D. Ohio, April 23, 2012). A motion for protective order is appropriate when employees are being asked about their personal views with respect to policy matters because such personal views are irrelevant to the underlying issue of whether taxpayers were in violation of the tax law. Moreover, the deliberative process privilege protects communications that are part of the decision-making process of a governmental agency. See Chapter 10.

#### **E. Subpoenas for Depositions of High-Ranking Officials**

Generally, the Service should move to quash subpoenas for deposition of high-ranking officials on grounds that the discovery sought would be burdensome and oppressive.

1. As a general principle, a party can conduct the deposition of any other person who possesses information relevant to a claim or defense. Fed. R. Civ. P. 26(b)(1). The Supreme Court approved an exception to this rule as it applies to high-ranking public officials in United States v. Morgan, 313 U.S. 409, 422 (1941). The Morgan doctrine recognizes that, left unprotected, high-ranking government officials would be inundated with discovery obligations involving scores of cases where the public official would have little or no personal knowledge of material facts. Left unchecked, the litigation-related burdens placed upon them would render their time remaining for government service significantly diluted or completely consumed. Morgan has come to stand for the notion that, as for high-ranking government officials, their thought processes and discretionary acts will not be subject to later inspection under the spotlight of deposition.

Decision makers essentially enjoy a mental process privilege. In re United States (Reno), 197 F.3d 310, 313-14 (8th Cir. 1999); United States v. 11,950 Acres of Land (In re FDIC), 58 F.3d 1055, 1060 (5th Cir. 1995); In re United States (Kessler), 985 F.2d 510, 512-13 (11th Cir. 1993), *cert. denied*, 510 U.S. 989 (1993); Simplex Time Recorder Co. v. Sec'y of Labor, 766 F.2d 575, 586 (D.C. Cir. 1985); Kyle Eng'g Co. v. Kleppe, 600 F.2d 226, 231-32 (9th Cir. 1979). This limited immunity from discovery is justified on the grounds that these officials must be allowed the freedom to perform their duties without the constant interference of the discovery process.

2. Courts may permit depositions when a high-ranking official has relevant, first-hand knowledge of factual matters material to the lawsuit or when there are adequate grounds, not apparent in the administrative record, to suspect bad faith or improper behavior of the decision maker. *See, e.g.*, Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420-21 (1971) (subsequent history omitted); Alexander v. FBI, 186 F.R.D. 1, 5 (D.D.C. 1998); Sokaogon Chippewa Cmty. v. Babbitt, 929 F. Supp. 1165, 1176 (W.D. Wis. 1996); Cmty. Fed. Savings & Loan v. Fed. Home Loan Bank Bd., 96 F.R.D. 619, 621 (D.D.C. 1983).
3. There is a split in the circuits concerning whether government officials may seek mandamus to compel a district court judge to withdraw an order permitting deposition testimony or must first find themselves in contempt for failing to comply with such an order and seeking an immediate appeal thereof. *Compare* In re United States (Reno), 197 F.3d at 313-14 and 11,950 Acres of Land (In re FDIC), 58 F.3d at 1060 (mandamus available), *with* In re Kessler, 100 F.3d 1015, 1017-18 (D.C. Cir. 1996) (order compelling deposition not final, and thus court lacks jurisdiction to consider agency official's petition for mandamus).

## **F. Expert Witnesses**

Requests for IRS employees as expert witnesses will normally be denied in cases in which neither the IRS nor its employees are a party, or in cases not arising from IRS actions, unless the IRS has an interest in the issue and the outcome of the litigation. *See* 5 C.F.R. § 2635.805; IRM 11.3.35.11(11). Note, however, that *former* employees need not obtain a testimony authorization for expert or opinion testimony if the testimony involves general knowledge (such as information contained in published procedures of the IRS or the IRS Office of Chief Counsel) gained while the former IRS officer, employee or contractor was employed or under contract with the IRS. Treas. Reg. § 301.9000-3(b).



## **G. Agency Resources, Impartiality, etc.**

Although it is not entirely accurate to say that the Service may deny a discovery request solely on the basis of administrative burden or limited agency resources, there is a line of cases holding that a party seeking discovery from an agency (that is not a party to its lawsuit) must comply with the procedures set forth in that agency's regulations. When a requester does not comply, it is perfectly appropriate for an agency to cite to the burden of lending its human and other resources to private litigation in which it has no vital interest, and it is likely that the agency would prevail in a lawsuit brought under the APA challenging its decision to resist discovery. In these cases, much of how to approach a court depends on the precise posture of a discovery request – whether it comes from a state or federal court; whether it is an informal request or pursuant to a subpoena; or whether the issue arises on a motion to compel, an APA lawsuit or an order of contempt.

If the Service routinely permits employees to testify in private litigation, less time will be available for them to perform official duties. Several agencies have successfully argued that particular employees should not have to testify in private litigation because of these "resource" considerations. In Moore v. Armour Pharm. Co., 927 F.2d 1194, 1197-98 (11th Cir. 1991), the court upheld the Center for Disease Control's decision not to let a researcher testify because the agency had received so many requests relating to AIDS litigation that it simply could not grant all the requests and simultaneously carry on its governmental functions. Likewise, in Davis Enters. v. EPA, 877 F.2d 1181, 1186-87 (3d Cir. 1989), the court upheld the EPA's refusal to provide an employee as a fact witness in a lawsuit concerning liability for an underground gasoline spill based in part on the agency's argument that compliance with a subpoena would put a strain on agency resources.

Assuming the court has jurisdiction, resource limitations most likely cannot be the sole basis upon which to resist discovery requests. Although "[t]he policy behind prohibition of testimony is to conserve governmental resources where the United States is not a party to a suit, and to minimize governmental involvement in controversial matters unrelated to official business," Reynolds Metals Co. v. Crowther, 572 F. Supp. 288, 290 (D. Mass. 1982), an agency's Touhy regulations do not, by themselves, create a substantive basis upon which to refuse discovery requests. An agency's decision not to authorize an employee's testimony or production of documents on the sole basis of conservation of agency resources is evaluated against how well a plaintiff demonstrates the necessity of the information sought from the government, see, e.g., Wade v. Singer Co., 130 F.R.D. 89, 92 (N.D. Ill. 1990), and whether the plaintiff cannot obtain the information sought through alternative means, such as certified documents.

## **VII. PREPARING AND COORDINATING THE AUTHORIZATION**

### **A. Preparing the Authorization**

Based on the facts developed and legal considerations noted above, a written authorization should be prepared setting forth the scope of the proposed authorization, even if authority is denied. To the extent possible, it should be specific as to the extent and limitations upon disclosure, including, as necessary, names, tax periods, and classes of tax or returns. It should also include the operative facts upon which the authorization is premised (*i.e.*, a description of the testimony and production sought, and the nature of the testimony and production authorized). Unless otherwise approved, the authorization instructions should expressly prohibit testimony concerning the following matters, where applicable: (1) unrelated third-party returns and return information; (2) information that would tend to identify a confidential informant; (3) wagering tax information as defined in section 4424; (4) tax convention information as defined in section 6105; and (5) grand jury information subject to Federal Rules of Criminal Procedure 6(e). See CCDM Exhibit 34.12.1-32 and Appendix, for examples of testimony authorizations for current employees. See Appendix for an example of a testimony authorization for former employees.

Refer to Delegation Order 11-2 and its Exhibit 1.2.49-2 for determination as to which function is responsible for preparing and authorizing testimony or production of documents. I.R.S. Deleg. Order 11-2 (Rev. 17), IRM 1.2.49.3.

### **B. Coordinating the Authorization**

#### **1. Cases Referred to DOJ**

For cases referred to DOJ, coordination entails soliciting the recommendation of the Chief Counsel attorney assigned to the case, discussions with the DOJ attorney handling the case, and with the disclosure officer servicing the IRS officer's or employee's geographic area. The nature and extent of the coordination is determined on a case-by-case basis.

#### **2. Other Cases**

Chief Counsel attorneys are primarily expected to assure the accuracy of the facts as developed and determine whether the proposed authorization is legally sound. In certain cases, it is necessary to coordinate with DOJ or the Office of the U.S. Attorney where a motion to quash and/or motion for protective order may be sought or if the employee upon whom the request or demand was made may require legal assistance and guidance in court or at deposition. In cases where legal assistance and guidance is necessary or helpful, Chief Counsel and DOJ attorneys should agree in

advance which agency is best suited, under the circumstances of the case, to accompany the employee.

## VIII. COURT ORDERS AND CONTEMPT

### A. Court Orders to Disclose

1. Section 6103 governs disclosure of returns and return information. With one notable exception, see paragraph 2 below, it provides the exclusive means for gaining access to federal tax information. Lake v. Rubin, 162 F.3d 113, 115-16 (D.C. Cir. 1998), *cert. denied*, 526 U.S. 1070 (1999); Cheek v. IRS, 703 F.2d 271, 271-72 (7th Cir. 1983). Section 6103 does authorize certain court-ordered disclosures. See I.R.C. § 6103(h)(4)(D), (i)(1)(A), (i)(4)(A)(ii), (i)(5)(A), and (i)(7)(C). Nevertheless, section 6103 does not provide for disclosure beyond that specifically provided for in Title 26 and does not permit a court to create judicial exceptions to the general prohibition against disclosure established by the statute. Olsen v. Egger, 594 F. Supp. 644, 647 (S.D.N.Y. 1984); Dowd v. Calabrese, 101 F.R.D. 427, 438-39 (D.D.C. 1984).
2. In all criminal cases, the government is under a constitutional obligation to disclose, upon the defendant's request, exculpatory evidence material to either guilt or punishment. Brady v. Maryland, 373 U.S. 83, 87-88 (1963). This includes evidence that may be used to impeach a government witness. Giglio v. United States, 405 U.S. 150, 153-55 (1972). Returns and return information constituting exculpatory evidence existing in the government's files used for purposes of prosecuting a federal tax administration crime may be disclosed in a criminal tax proceeding pursuant to a constitutional obligation to disclose it to a criminal defendant. As a result, the IRS generally complies with Brady-type court orders requiring disclosure. IRM 11.3.35.14. In these situations, the United States should request the court to conduct an *in camera* review of any third-party return information prior to disclosure to defendant. If, after *in camera* review, the court rules that the Constitution requires information to be provided to the defendant, the United States should request a protective order that also imposes upon the parties conditions restricting the use of the information solely to the instant case, and preventing dissemination by any person in any manner outside the instant proceeding. For sample language of an appropriate protective order, see United States v. Moriarty, No. 67-C-244, 1969 U.S. Dist. LEXIS 12657, at \*1 (E.D. Wis. Jan. 3, 1969).

## **B. Court-Ordered Consents to Disclose**

When the court orders a taxpayer to consent to the disclosure of tax information, those consents will generally be accepted by the IRS, subject to the normal limitations and restrictions of section 6103(c). See Chapter 2.

## **C. Contempt**

Consult Procedure and Administration (P&A), Branches 6 or 7 in any case in which an employee's refusal to testify or produce records results or may result in an order to show cause or an order of contempt. P&A is responsible for coordination with DOJ in these matters. CCDM 34.9.1.5.

## CHAPTER 13

### PART I: PUBLIC INSPECTION OF WRITTEN DETERMINATIONS I.R.C. § 6110

**Note:** This chapter is intended to provide the legal framework, not the procedures, for processing section 6110 material. Instructions for processing section 6110 material are on the Office of Chief Counsel website and in CCDM 37.1.1.

#### I. BACKGROUND

Historically, the National Office of the IRS provides written advice to taxpayers on the treatment of specific transactions, generally known as private letter rulings (PLRs). The first several revenue procedures issued by the IRS each year, published in the Internal Revenue Bulletin, contain detailed instructions on how a taxpayer is to submit requests to the IRS for PLRs and other written advice, such as technical advice memoranda (TAMs) or determination letters.

In the early 1970s, two separate United States Courts of Appeals determined that PLRs were subject to the Freedom of Information Act (FOIA) and had to be disclosed, thereby rejecting the government's argument that these written products were tax returns protected by FOIA exemption 3 in conjunction with section 6103 as then written. The two courts differed, however, in their treatment of TAMs. The D.C. Circuit ruled that TAMs were a part of a tax return and therefore exempt from disclosure under FOIA, Tax Analysts & Advocates v. IRS, 505 F.2d 350, 355 (D.C. Cir. 1974), whereas the Sixth Circuit ruled that TAMs should be open to inspection under FOIA. Fruehauf Corp. v. IRS, 522 F.2d 284, 290 (6th Cir. 1975), *judgment vacated by IRS v. Fruehauf Corp.*, 429 U.S. 1085 (1975), *aff'd*, 566 F.2d 574 (6th Cir. 1977) (for reconsideration in light of the Tax Reform Act of 1976).

One of the primary arguments raised by the plaintiffs in both cases was that the IRS was developing a secret body of law that was available to only a few practitioners. Generally, requests for PLRs were submitted by accounting firms or law firms on behalf of their clients. When the PLR was issued, the firm would retain a copy for historical purposes, thereby developing a library of issued determinations. This allowed the firm to have insight into the IRS's interpretation of the law on a particular matter, as demonstrated by the legal analyses within the PLRs or TAMs. These documents and the insights they provided were not available to the general public, small firms or sole practitioners. Another argument was that, because the entire process was secret, there may have been third parties attempting to influence the IRS's determinations to obtain outcomes favorable to the taxpayer. See General Explanation of the Tax Reform Act of 1976, H.R. 10612, Pub. L. No. 94-455 (JCS-33-76) (J. Comm. Print 1976).

In December 1974, the IRS issued proposed procedural rules that were intended to make PLRs and TAMs open to public inspection. The proposed rules set up a framework whereby the full text version, including taxpayer identifying information but excluding trade

secrets and matters pertaining to national defense or foreign policy, would be open to public inspection. *Id.* at 303. The proposed rules were not implemented because of substantial public comments against the notion as well as comments from DOJ indicating that the rules might be contrary to other principles of law.

In 1976, when the proposed section 6110 legislation was considered by Congress, the debate centered primarily on the relationship between the necessity to protect taxpayer privacy and the need for openness in government, *i.e.*, to eliminate the perceived development of a secret body of law and to assure that there was no undue influence being used in the PLR process. See generally *Public Inspection of IRS Private Letter Rulings, Hearing Before the Subcomm. on Admin. of the Internal Revenue Code of the Comm. on Fin. United States Senate, 94th Cong. 5 (1975)* (remarks of Sen. Haskell). The balance reached by Congress was to make written determinations (*i.e.*, PLRs, TAMs, and determination letters) available to the public, but only after the taxpayer to whom it pertained was notified of the IRS's intent to disclose the document:

Before any written determination requested after October 26, 1976, is made available for public inspection, any person who receives a ruling or determination letter or to whom a technical advice memorandum pertains must be personally notified in writing that public disclosure is about to occur . . . . Such person will then have 60 days within which to discuss with the IRS the information to be made available for public inspection and to bring a suit to restrain disclosure . . . . Such 60-day period will start on the date the IRS actually mails a notice to the person to whom the determination pertains.

General Explanation of the Tax Reform Act of 1976, H.R. 10612, Pub. L. 94-455 (JCS-33-76), at 305-06 (J. Comm. Print 1976).

In 1997, the D.C. Circuit held that Field Service Advice Memoranda (FSAs), even though they preceded the field office's decision in a particular taxpayer's case, contributed to the development of the agency's legal position on the matter, and as such, were statements of the agency's policy. Accordingly, FSAs were not protected from disclosure by either the deliberative process or attorney-client privilege. Tax Analysts v. IRS, 117 F.3d 607, 617-20 (D.C. Cir. 1997).

Once again, in response to a Tax Analysts suit, the 105th Congress was faced with the same competing interests as the 94th Congress was faced with in 1975 and 1976: balancing the public's right to know against the individual taxpayer's right to privacy.<sup>70</sup>

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<sup>70</sup> Section 6110 of the Code, as amended by section 3509 of the Internal Revenue Service Restructuring and Reform Act of 1998, provides for the public inspection of National Office Chief Counsel advice or instruction to field IRS or field Counsel offices. Section 6110, as amended, resulted in the disclosure of a number of Counsel work products then being produced or as may be produced in the future, such as Field Service Advice (FSAs), Service Center Advice (SCAs), Technical Assistance (to the field), Litigation Guideline Memoranda (LGMs), (continued on next page)

The conferees keenly recognized that the taxpayer's right to privacy was extremely important: "[T]he 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." Bill Archer et al., Conference Report on H.R. 2676, Internal Revenue Service Restructuring and Reform Act of 1998, H.R. Rep No. 105-599, at 299 (1998). The conferees also recognized that, because the Chief Counsel Advice (CCA) documents were subject to FOIA, there exists

no mechanism by which taxpayers [could] participate in the administrative process of redacting their private information from such documents or to resolve disagreements in court . . . . [But] [t]here 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.

*Id.* By amending section 6110 to include CCA within the scope of that section, Congress struck a balance "designed to protect taxpayer privacy while allowing the public inspection of these documents . . . ." *Id.*

Section 3509 of Pub. L. No. 105-206, 112 Stat. 685, 771-74 (1998) expanded section 6110 to cover CCA, which includes FSAs, litigation guideline memoranda (LGMs), service center advice (SCAs), tax litigation bulletins, criminal tax bulletins, general litigation bulletins, and any other written advice prepared by any National Office Chief Counsel component and issued to Counsel or IRS field office employees that conveys a legal interpretation or Counsel position or policy with respect to a revenue provision. (A transition rule for certain CCA issued between 1986 and the October 22, 1998, effective date was also set forth in section 3509, Pub. L. No. 105-206, 112 Stat. 685, 771-74 (1998).)

In December 2003, the D.C. Circuit ruled in Tax Analysts v. IRS, 350 F.3d 100, 104 (D.C. Cir. 2003), that letters denying tax-exempt status issued to certain organizations applying for that status, and the letters revoking the tax-exempt status of existing exempt organizations, were "written determinations" within the meaning of section 6110(b)(1)(A).<sup>71</sup>

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and various Bulletins. For purposes of section 6110, as amended, these work products will be defined as Chief Counsel Advice (CCAs).

Because there is no third-party input into the CCA process, the concern for undue influence, as expressed by Senator Haskell with respect to the private letter ruling process, is absent. Therefore, the balance is between the general public's right to know how the agency conducts its business versus the taxpayer's right to privacy and confidentiality of its returns and return information.

<sup>71</sup> The Service had declined to make these letter rulings available for public inspection because they fell within the exclusion of section 6110(l)(1), which provides that "this section shall not apply to any matter to which section 6104 . . . applies." Because section 6104 (continued on next page)

In 2006, the D.C. Circuit held in Tax Analysts v. IRS, 495 F.3d 676, 681 (D.C. Cir. 2007), that e-mails written by National Office attorneys containing interpretations of revenue provisions and transmitted to field IRS or Counsel employees also constituted written determinations subject to the public inspection requirements of section 6110(i).

## II. GENERAL CONCEPTS

### A. General Rule - Public Inspection

The general rule concerning the public inspection of written determinations is set forth in section 6110(a), which provides:

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.

I.R.C. § 6110(a).

### B. Definitions

1. “**Written determination**” means a ruling, determination letter, technical advice memorandum, or CCA (including e-mail CCA).  
I.R.C. § 6110(b)(1)(A). *Except* that a written determination does *not* include any matter pertaining to an advanced pricing agreement, a closing agreement entered into pursuant to section 7121, or the background information pertaining to an advanced pricing agreement or closing agreement. I.R.C. §§ 6110(b)(1)(B), 6103(b)(2)(C), (D).
2. “**Reference Written Determination**” is any written determination which the Commissioner determines has significant reference value. For example, any written determination that the Commissioner decides to be the basis for a published revenue ruling is a reference written

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addressed the manner in which tax exemption matters were to be disclosed (or not), the Service had promulgated Treas. Reg. §§ 301.6104(a)-1(i) and 301.6110-1(a) to the effect that denial and revocation letter rulings were not subject to the public inspection provisions of either section 6104 or section 6110.

Until the Tax Analysts decision, the letter rulings were treated as the confidential return information of the organizations to which they related and were exempt from public access under section 6103 and FOIA exemption 3. The D.C. Circuit decision invalidated those particular paragraphs of the regulations, thereby requiring that the IRS make the EO letters available for public inspection pursuant to section 6110.



determination *until* the revenue ruling is made obsolete, revoked, superseded, or otherwise held to have no effect.

3. “**Background file document**” includes the request for the written determination, any written material submitted in support of the request or supplemental material submitted in support of the request, and any communication, written or otherwise, between the IRS and persons outside the IRS in connection with the written determination before issuance; *except* for communications between the IRS and DOJ relating to a pending civil or criminal case or criminal investigation. I.R.C. § 6110(b)(2).

**Note:** Documents in the written determination file that do not meet the definition of “background file document” retain their identity as confidential return information. I.R.C. § 6103(b)(2)(B). For example, drafts of the document, any e-mail or notes of a telephone call between the National Office attorney and the examining revenue agent about the transaction and the effect on another tax year would remain confidential return information (because it is information collected with respect to the taxpayer’s potential liability) because it is not available for public inspection under section 6110.

4. “**CCA**” is any written advice or instruction, under whatever name or designation, prepared by any National Office component of the Office of Chief Counsel which—

(a) is issued to field or service center employees and

(b) conveys:

- (i) any legal interpretation of a revenue provision;
- (ii) any IRS or Chief Counsel position or policy with regard to a revenue provision; or,
- (iii) any interpretation of state law, foreign law, or other federal law relating to the assessment or collection of any liability under a revenue provision. I.R.C. § 6110(i)(1)(A).

**Note:** For purposes of determining the authorship of CCA, all Associate Offices and the Chief Counsel Division Counsel Headquarters Office is considered National Office.

5. “**Revenue provision**” means any existing or former internal revenue law, regulation, revenue ruling, revenue procedure, or other published or unpublished guidance, or tax treaty, either in general or as applied to specific taxpayers. I.R.C. § 6110(i)(1)(B).
6. “**Taxpayer-specific Chief Counsel advice**” means a CCA written pertaining to a specific taxpayer or group of specific taxpayers. I.R.C. § 6110(i)(4)(B). Even if the written determination does not name the taxpayer, if the facts are derived from and describe a specific taxpayer’s case, it is a taxpayer-specific CCA.<sup>72</sup>
7. “**Nontaxpayer-specific Chief Counsel advice**” means a CCA not pertaining to any specific taxpayer or group of specific taxpayers, but rather, addresses a general issue. I.R.C. § 6110(i)(4)(A).

### C. Timing of Disclosures

Generally, written determinations are available for public inspection between 75 and 90 days after the written determination was issued to the recipient. I.R.C. § 6110(g).

With respect to PLRs, TAMs, and taxpayer-specific CCA, the time period begins after the notice of intent to disclose is mailed to the taxpayer. I.R.C. § 6110(i)(4)(B). Nontaxpayer-specific CCA must be made available for public inspection within 60 days after issuance. I.R.C. § 6110(i)(4)(A)(ii).

**Note:** There is no need to send a notice to the taxpayer if the decision is to withhold the taxpayer-specific CCA from public disclosure because it is exempt in its entirety, *e.g.*, a document subject to the attorney work product doctrine.

Where an action has been brought to either restrain or compel disclosure, the written determination will be made available for public inspection within 30 days after the court order is final. I.R.C. § 6110(g)(1)(B). The court may order an extension or postponement if necessary. I.R.C. § 6110(g)(2).

The public availability of a written determination may be postponed for up to 90 days at the written request of the party, or the party’s representative, to whom the written determination pertains if a relevant transaction is not complete at the time the written determination is issued. I.R.C. § 6110(g)(3). If the transaction is not final after the additional 90 days, the person to whom the written determination pertains may obtain (up to) an additional 180 days delay in

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<sup>72</sup> Note however, that for purposes of email CCA only, if the CCA contains only the identifying details (*e.g.*, names, TINs, tax years, dollar amounts) we routinely redact, then the email is not treated as taxpayer-specific.

availability, but only if the person can establish that good cause exists for the additional delay. The fact that the transaction in question was not completed by the end of the initial 90-day delay is not, by itself, good cause for the additional delay. I.R.C. § 6110(g)(4).

**Examples:**

1. A corporate taxpayer finds itself the possible target of a hostile takeover. The taxpayer enters into merger negotiations with a “white knight” corporation to obtain a more favorable treatment for the stockholders. Because written determinations are sanitized to prevent a member of the general public (not an “insider” *i.e.*, someone familiar with the taxpayer) from identifying the taxpayer if release of the written determination could allow the hostile corporation to identify the taxpayer and any potential weaknesses in the transaction with the “white knight” corporation, the hostile corporation could use the information to interfere with the negotiations and/or the merger transaction. Using the same facts, if the taxpayer could be identified by the public through the disclosure of the redacted written determination, release of the IRS’s advice might tip off investors, affect the stock market prices and trigger questions of insider trading. Either of these possibilities would constitute “good cause” for an additional 180-day delay because they would interfere with the completion of the transaction.
2. “Good cause” is *not* shown if the person to whom the written determination pertains asks for a reconsideration of an adverse determination and requests delay of disclosure pending the reconsideration; if the person to whom the written determination pertains requests delay of disclosure pending the outcome of litigation; or, if the person to whom a written determination pertains requests an additional delay solely on the basis that the transaction is not yet completed.

**Special Rules:**

1. The IRS is not required to make available for public inspection any written determination or background file document of any matter which is the subject of a civil fraud or criminal investigation or jeopardy or termination assessment until after the action relating to the written determination is completed, or—
2. Any written determination or 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's or partner's taxable year under section 706.

Note, however, the IRS will make available for public inspection these items upon written request after the date the written determination would have been available for public inspection but for these provisions. I.R.C. § 6110(g)(5).

#### **D. Exemptions from Disclosure – Other than Chief Counsel Advice**

Written determinations or background file documents, other than CCA, are sanitized or redacted according to the standards set forth in section 6110(c)(1)-(7).

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 third-party contact described in section 6110(d)(1)) must be redacted. Identifying details are those items of information which would permit a member of the public to identify the person with information that is publicly available, *e.g.*, through LEXIS or Westlaw, Internet or other search vehicles, court-filed documents, documents filed with other agencies such as the SEC and available for public inspection (*e.g.*, 10-K filings), state corporate databases, state tax rolls, *etc.*;
2. Any information designated by Executive Order to remain secret in the interest of national security or foreign policy;
3. Any information specifically exempt from disclosure by any statute other than Title 26;
4. Trade secrets, commercial or financial information obtained from a person and privileged or confidential;
5. Information which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy;
6. Information related to the examination, operation, or regulation of a financial institution;
7. Geological or geophysical data concerning wells.

The information designated in these paragraphs parallel FOIA exemptions (1)-(4), (6), (8) and (9). *Id.*

### **E. Exemptions from Disclosure – Chief Counsel Advice**

The conference report on H.R. 2676, Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685 (1998), added special rules for redactions from CCA to section 6110 at paragraph (i)(2). Although the amendment kept intact the provisions of section 6110(c)(1), pertaining to the deletion of identifying details, it specifically provided that all of the FOIA exemptions set forth in 5 U.S.C. § 552(b) and (c) apply to CCA. Accordingly, several additional FOIA exemptions are available to withhold information in CCA from release to the public.

For a detailed explanation of these exemptions, see Chapter 9.

## **III. DISPUTES RELATING TO DISCLOSURE**

### **A. Request for Additional Deletions**

#### **1. Administrative Remedies**

Treasury Reg. § 301.6110-5(b)(1), drafted to implement section 6110(f)(2)(B), permits a person to whom a written determination pertains, or to whom a background file document relates, to request that additional information be withheld from the document scheduled for release to the public. These administrative provisions to restrain disclosure are also available to a successor, or other person authorized to act on behalf of the taxpayer or any individual who has a direct interest in maintaining the confidentiality of the written determination or background file document.

Requests for additional deletions are addressed to the Chief, Disclosure & Litigation Support Branch, Legal Processing Division of Procedure and Administration. The request should identify the additional information to be withheld and provide a reason for the additional deletions. Generally, the branch paralegal will contact the attorney who authored the written determination for his or her recommendation as to whether the additional deletions are necessary.

**Note:** Third-party contacts, as described in section 6110(d), cannot request deletion of their identities.<sup>73</sup>

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<sup>73</sup> The legislative history of section 6110, when it was enacted in 1976, describes congressional concerns that third parties were influencing the IRS's decisions with respect to the PLRs. Accordingly, they added subsection (d) to section 6110 so the IRS would identify any contacts by third parties so the public would be aware of them.

## **2. Judicial Remedies**

If the IRS denies a request for additional deletions (whether in whole or in part), the person to whom a written determination pertains or background file relates (or successor, or other person authorized by law to act on behalf of such person), or that has a direct interest in maintaining the confidentiality of the written determination or background file document may file a petition in U.S. Tax Court to restrain disclosure.

I.R.C. § 6110(f)(3)(A). These proceedings are referred to as Disclosure Actions and the rules concerning these actions are found in Title XXII of the Tax Court's Rules of Practice and Procedure. The Tax Court identifies these cases by adding a "D" to the docket number. The petition must be filed within 60 days of the mailing of the notice of intention to disclose.

I.R.C. § 6110(f)(3)(A) (flush language). The petition may be filed anonymously. I.R.C. § 6110(f)(3)(A). The Tax Court may provide for proceedings or portions of hearings, testimony, evidence, and reports may be closed to the public in order to preserve the anonymity or privacy of any person. I.R.C. § 6110(f)(6).

The IRS must notify any person to whom a written determination or background file document pertains (unless that individual is the petitioner) of the filing of the petition to restrain disclosure within 15 days of receipt of the petition. That individual may intervene in any proceeding pertaining to the petition—anononymously, if so desired. I.R.C. § 6110(f)(3)(A).

If the requester has not received a response to a properly submitted request within 180 days, the requester may seek the judicial remedy described above. I.R.C. § 6110(g)(4).

## **3. Intervention**

If a proceeding is commenced with respect to any written determination or background file document, the Secretary shall, within 15 days after notice of the petition 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. Any person to whom such determination or background file document pertains may intervene in the proceeding—anononymously, 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. I.R.C. § 6110(f)(4)(B).

## **B. Request for Additional Disclosures**

### **1. Administrative Remedies**

Treasury regulations describe the administrative remedies available to any person seeking additional disclosure of any written determination or background file document. Treas. Reg. § 301.6110-5(d)(1). Requests for additional disclosure are to be addressed to: Internal Revenue Service, Attention: CC:PA:T, Ben Franklin Station, Post Office Box 7604, Washington, DC 20044. If the request is solely for the identity, *i.e.*, name, address and Taxpayer Identification Number of the person to whom the written determination pertains, the IRS will inform the requester that the information will not be disclosed.

### **2. Judicial Remedies**

Once the requester seeking additional disclosure has exhausted the administrative remedies, that individual can file a petition in Tax Court or file a complaint in the U.S. District Court for the District of Columbia requesting an order to compel disclosure of additional information in the written determination or background file document. I.R.C. § 6110(f)(4).

**Note:** No petition or complaint may be filed under section 6110(f)(4) to seek the identity of a third-party contact. These actions must be brought pursuant to section 6110(d)(3).

## **C. Judicial Remedies for Violations of I.R.C. § 6110**

If the IRS fails to make the appropriate redactions to a written determination under section 6110(c), fails to provide a notice of intention to disclose required by section 6110(i)(4)(B), or fails to follow the timing requirements of section 6110(g), the recipient of a written determination or any person identified in the written determination may bring suit in the United States Court of Federal Claims. I.R.C. § 6110(j)(1).

This provision is the exclusive remedy for violations of section 6110 provisions. I.R.C. § 6110(j)(1)(B).

If the court determines that an IRS officer or employee willfully or intentionally failed to delete material, or failed to provide timely notice or act in accordance with the timing requirements of section 6110(g), the United States will be liable for the actual damages or, at the least, statutory damages of \$1000 as well as attorneys fees and costs of the action. I.R.C. § 6110(j)(2).

## IV. SPECIAL PROVISIONS

### A. Precedent

Documents made available for public inspection pursuant to section 6110 are *not* to be used or cited as precedent. I.R.C. § 6110(k)(3). Consequently, Counsel attorneys authoring written determinations should refrain from citing to previously released written determinations as support for their position.

### B. Items Not Covered by I.R.C. § 6110

Section 6110 does not apply to any matter to which sections 6104 or 6105 apply. The framework of section 6104 sets forth specific methods for the public to inspect certain documents related to the entities described therein. I.R.C. § 6110(l)(1). The documents available for public inspection under section 6104 are not covered by section 6110. Any matter involving tax convention information, as defined by section 6105, is not covered by section 6110. *Id.*<sup>74</sup>

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<sup>74</sup> In Tax Analysts v. IRS, 350 F.3d 100 (D.C. Cir. 2003), the D.C. Circuit held invalid portions of the section 6104 and 6110 regulations that excluded from public inspection under both statutes written determinations denying or revoking tax exemption. Accordingly, the provisions of section 6110 do apply to those matters.



## PART II: CONFIDENTIALITY OF INFORMATION ARISING UNDER TREATY OBLIGATIONS – I.R.C. § 6105

### I. BACKGROUND

Historically, the IRS took the approach that information received from a foreign country concerning the tax liability of a taxpayer was protected by FOIA exemption 3 in conjunction with a tax treaty between the United States and the foreign government. Exemption 3 protects information that is specifically exempted from disclosure by statute, provided that the statute "requires withholding in such a manner so as to leave no discretion on the issue, or establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3). The IRS argued that a tax treaty stood on equal footing with a statute, such that its secrecy clauses—which bar specific information from disclosure—qualified under exemption 3.

Under the United States Constitution, Senate-ratified treaties have the same status as statutory law. See Whitney v. Robertson, 124 U.S. 190, 194 (1888) ("By the constitution, a treaty is placed on the same footing, and made of like obligation, with an act of legislation . . . . When the two relate, to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either."); Pub. Citizen v. U.S. Trade Representative, 804 F. Supp. 385, 388 (D.D.C. 1992) ("[T]he GATT and its subsequent modifications were not Senate-ratified treaties, and they therefore did not have the status of statutory law.") (citing Suramerica de Aleaciones Laminadas. v. United States, 966 F. 2d 660, 668 (Fed. Cir. 1992)).

Although there was no case law holding that a treaty qualifies as a statute for FOIA exemption 3 purposes, there was a sound basis in law for concluding that a treaty can qualify. As noted by the Supreme Court in Whitney, "[b]oth [senate-ratified treaty and statute] are declared by that instrument [constitution] to be the supreme law of the land, and no superior efficacy is given to either over the other." Whitney 124 U.S. at 194.

### II. STATUTORY FRAMEWORK

In 2000, the Consolidated Appropriations Act, FY-2001, Pub. L. No. 106-554, § 304(b)(1), 114 Stat. 2763, 2763A-633 to 2763A-634, added section 6105 to the Code. Section 6105 provides, as a general rule, that "[t]ax convention information shall not be disclosed."

#### A. Definitions

1. The term "**tax convention information**" means any
  - (a) agreement entered into with the competent authority of one or more foreign governments pursuant to a tax convention;

- (b) application for relief under a tax convention;
- (c) background information related to the agreement or application;
- (d) document implementing the agreement; and
- (e) other information exchanged pursuant to a tax convention which is treated as confidential or secret under the tax convention.

2. The term “**tax convention**” means any income tax or gift and estate tax convention, or any other convention or bilateral agreement (including multilateral conventions and agreements and any agreement with a possession of the United States) providing for the avoidance of double taxation, the prevention of fiscal evasion, nondiscrimination with respect to taxes, the exchange of tax relevant information with the United States, or mutual assistance in tax matters.

I.R.C. § 6105(c)(1)-(2).

## **B. Exception**

The general rule of confidentiality does not apply to the disclosure of tax convention information to persons or authorities (including courts and administrative bodies) which are entitled to disclosure pursuant to a tax convention, to any generally applicable procedural rules regarding applications for relief under a tax convention, and to the disclosure of tax convention information on the same terms as return information may be disclosed under paragraph (3)(C) or (7) of section 6103(i). However, in the case of tax convention information provided by a foreign government, no disclosure may be made without the written consent of the foreign government, or, after consultation with each other party to the tax convention (when the tax convention information is not relating to a particular taxpayer) to ensure that disclosure would not impair tax administration. I.R.C. § 6105(b).

## **C. Case Law**

Because the statute is relatively new, there are few cases interpreting the provision. In *Tax Analysts v. IRS*, 152 F. Supp. 2d 1, 10 (D.D.C. 2001), *aff'd in part, rev'd & remanded on other grounds*, 294 F.3d 71 (D.C. Cir. 2002), the district court held that an entire document written by the Office of Chief Counsel with respect to a specific taxpayer, based on information obtained from a tax convention partner, was exempt from disclosure under section 6105, and did not need to be parsed to separate the hornbook law from the taxpayer-specific information. Relying on legislative history, the court reasoned that Congress had

intended to exempt the entire document under section 6105. The court noted that the section was added to the Code when the Tax Analysts “FSA” case was still pending in the district court after remand from the D.C. Circuit’s opinion in Tax Analysts v. IRS, 117 F.3d 607 (D.C. Cir. 1997). The court stated “Congress expressed its clear intent that regardless of their exemption status under section 6103, FSAs are fully exempt under section 6105 if they qualify as tax convention information.” 152 F. Supp. 2d at 12. Consequently, written determinations will be withheld from public inspection and exempt from section 6110 when they constitute tax convention information.

In Pacific Fisheries, Inc. v. IRS, No. C04-2436JLR, 2009 U.S. Dist. LEXIS 38495 (W.D. Wash. 2009), *aff’d*, 395 F. App’x 438 (9th Cir. 2010), the district court held that a declaration from an attorney in the Office of Chief Counsel along with a supplemental declaration from the IRS Director of Treaty Administration and International Coordination provided an “adequate factual basis from which it could decide whether disclosure would seriously impair federal tax administration.” *Id.* In the case, the company Pacific Fisheries, Inc. sought documents which the IRS used as the basis for third-party summonses later withdrawn. The summonses were issued at the request of the Russian government (pursuant to a tax convention between the United States and Russia) to aid a Russian investigation of a Pacific Fisheries employee. The IRS withheld documents pursuant to FOIA exemption (b)(3) in conjunction with 6105(a).

The court also held that confidentiality under the tax convention extends to the information provided to Russia by the IRS. The court agreed with the argument from the IRS that, “[F]rom the statutory definition and legislative history it is clear that communications that *relate to and reflect on* information received from Russia are encompassed within the definition of tax convention information. *Id.* at \*14 (emphasis added).

In Erika A. Kellerhals, P.C. v. IRS, Civ. No. 2009-90, 2011 U.S. Dist. LEXIS 113156 (D.V.I. Sept. 30, 2011), the district court held that drafts of the working agreement between the United States and the U.S. Virgin Islands, requests for exchange of information, and requests made under the working agreement all qualified as tax convention information under section 6105, and thus, were exempt from disclosure under FOIA. The district court noted that the items were described in section 6105(c)(1)(E) based on a declaration by a Service employee stating that the documents had been treated as confidential by both parties and that tax administration would be impaired if they were disclosed. *Id.* The district court also noted that the Service was not required to identify which specific subsection of section 6105 was applicable to the documents when the documents were submitted for an *in camera* review. *Id.*

**PART III: PUBLICITY OF INFORMATION REQUIRED  
FROM CERTAIN EXEMPT ORGANIZATIONS – I.R.C. § 6104**

**I. BACKGROUND**

With the passage of the Revenue Act of 1950, Congress required that certain tax exempt educational and charitable organizations annually file information to be made available to the public. See Pub. L. No 81-814, ch. 994, 64 Stat. 906 (1950) (amended by 65 Stat. 124 and 66 Stat 820). In 1958, Congress amended section 6104 to include these organizations' applications for tax exempt status, as well as annual returns reflecting the organizations' gross income, expenses, disbursements for charitable purpose, accumulations of income and a balance sheet. See Technical Amendments Act of 1958, Pub. L. No. 85-866, § 75(a), 72 Stat. 1606, 1660-61. In 2000, Congress amended section 6104 to require publicity of certain information filed by political organizations granted exempt status under section 527. See Pub. L. No. 106-230, § 1(b)(1)(A)(i)-(vi), 114 Stat. 477, 78.

**II. STATUTORY PROVISIONS**

**A. In General**

The application filed by any organization exempt from taxation under section 501(a) or a political organization exempt from taxation under section 527, for any taxable year, or any papers submitted in support of an application for exempt status, and any letter or other document issued by the Service granting the qualified or exempt status are open to public inspection.

I.R.C. § 6104(a)(1)(A). In addition, any application filed with respect to the qualification of a pension, profit sharing, or stock bonus plan under sections 401(a) or 403(a), an individual retirement account described in section 408(a), or an individual retirement annuity described in section 408(b), any application filed with respect to the exemption from tax under section 501(a) of an organization forming part of a plan or account are open to public inspection.

I.R.C. § 6104(a)(1)(B). Any inspection under section 6104 may be made as provided by regulations. See Treas. Reg. § 301.6104(a)-1.

Information not open to public inspection includes information from which the compensation (including deferred compensation) of any individual may be ascertained. Moreover, at the request of the organization submitting any supporting papers, the IRS will withhold from public inspection any information which relates to any trade secret, patent, process, style of work, or apparatus of the organization, if public disclosure of the information would adversely affect the organization. In addition, the IRS will withhold from public inspection any information contained in supporting papers if public disclosure would adversely affect the national defense. Treas. Reg. § 301.6104(a)-5(a)(2).

There are some exceptions from the disclosure requirements. If an organization is not a private foundation (within the meaning of section 509(a)) or a political organization exempt from taxation under section 527, the name or address of any contributor to the organization is not disclosed. If an organization is described in section 501(d), no partnership returns or names may be disclosed. I.R.C. § 6104(d)(3)(A).

Committees of Congress, as described in section 6103(f), can inspect the application for exemption of any section 501(c) or (d) organization or notice of status of any exempt section 527 political organization, and any qualified plan as well as any other papers which relate to the application. I.R.C. §§ 6103(f), 6104(a)(2).

Information concerning exempt political organizations is available on the Internet at <http://www.irs.gov/charities/political> or <http://www.guidestar.org>, or can be inspected in person. The available information consists of:

1. A list of all political organizations which file a notice with the Secretary under section 527(i); and
2. The name, address, electronic mailing address, custodian of records, and contact person for the organization.

Information must be made available no later than five business days after the IRS receives a notice from a political organization under section 527(i). I.R.C. § 6104(a)(3).

Individuals may also make a request to inspect copies of annual returns, reports, and exempt status application materials, or materials will be provided to the requester without charge other than a reasonable fee for any reproduction and mailing costs. The request may be made in person at the organization's principal, regional or district office, or in writing. I.R.C. § 6104(d)(1)(B).

## **B. Definitions**

1. “**Exempt status application materials**” include the application for recognition of exemption under section 501 and any papers submitted in support of the application, along with any letter or other document issued by the IRS with respect to the application. I.R.C. § 6104(d)(5).
2. “**Notice materials**” mean the notice of status filed under section 527(i) and any papers submitted in support of the notice and any letter or other document issued by the IRS with respect to the notice. I.R.C. § 6104(d)(6).

### **C. Disclosure of Reports by Internal Revenue Service**

Any report filed by an organization under section 527(j) (relating to required disclosure of expenditures and contributions) must be made available to the public at whatever times and in whatever places as the Secretary may prescribe by regulation. Treas. Reg. § 301.6104(a)-(1). Section 6104 indicates that such documents are available for public inspection at the national office of the Internal Revenue Service. Copies of such documents are open to public inspection at the appropriate field office of the Internal Revenue Service. I.R.C. § 6104(a)(1)(A), 6104(d)(6).

### **D. Disclosures to State Officials**

Section 6104(c) governs when the IRS may disclose to the appropriate state officials (usually the Attorney General) certain information about organizations described in section 501(c)(3), organizations that have applied for recognition as organizations described in section 501(c)(3), and certain other exempt organizations.

The Service is authorized to disclose information about certain proposed revocations and proposed denials before an administrative appeal has been made and a final revocation or denial has been issued. For those organizations that have received a determination letter stating that they are described in section 501(c)(3), the Service may disclose a proposed revocation (before any administrative appeal) to an appropriate state official. The Service is also authorized to disclose final revocations and final denials issued after any administrative appeal has been concluded for any section 501(c)(3) organization.

Under the authority of section 6104(c)(2)(D) the IRS may disclose returns or return information of any section 501(c)(3) organization to appropriate state officials on its own initiative (regardless of whether it has initiated an examination) if it determines that the information may be evidence of noncompliance with state laws under the jurisdiction of the appropriate state officer. Thus, if the IRS believes these conditions are met, it may, for example, disclose to appropriate state officers a proposed revocation of exemption for a section 501(c)(3) organization that does not have a determination letter. All disclosures authorized under section 6104(c) may be made only if the state receiving the information is following applicable disclosure, recordkeeping and safeguard procedures.

## **III. INTERRELATION OF I.R.C. §§ 6104 AND 6110**

See Part I, above.

## CHAPTER 14

### DISCLOSURE GUIDE FOR TAX-EXEMPT BOND EXAMINATIONS

#### I. GENERAL DISCLOSURE CONCEPTS

##### A. Is Information Relating to Compliance with the Bond Provisions Return Information?

Information collected or received by the IRS relating to compliance with the tax-exempt bond provisions involves the liability or potential liability of specific persons under the Code. As such, it is return information protected by section 6103. The Code does not contain any exceptions to the confidentiality of returns and return information that are specific to tax-exempt bond matters. Rather, various other disclosure provisions discussed in detail elsewhere in this handbook, and as specific to tax-exempt bonds in this chapter, allow for disclosure in the tax-exempt bond arena as necessary.

##### B. Whose Return Information Is It?

The next critical step in any disclosure analysis is determining, with respect to any item of information, whose return information it is. This is because persons can generally access their own return information, while access to the return information of others is strictly limited. Generally, the determination focuses on whose liability under the Code is at issue when the information is collected. Thus, information collected during the examination of taxpayer A is taxpayer A's return information, even if it is collected from a third party. I.R.C. § 6103(b)(3).

The same principles apply with respect to a group of taxpayers. If an investigation is of a specifically targeted group of taxpayers, the information collected becomes the return information of each person in the group. Then, as the Service develops information and issues unique to each taxpayer, that latter information is the return information solely of the specific taxpayer. The bond area, involving the potential liability of bondholders, issuers, conduit borrowers, and others, is susceptible to this "taxpayer group" type of analysis.<sup>75</sup>

After commencement of a bond examination, the IRS collects information regarding the taxability of interest on the bonds generally, without regard to the consequences to a particular bondholder. Technical advice may be requested, and the IRS may attempt to settle with the issuer. Information collected during these steps is the return information of both the issuer and bondholders. If

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<sup>75</sup> For purposes of this chapter, we assume the reader is familiar with the concepts and definitions of bondholder, issuer, trustee, conduit borrower, bond counsel, underwriter, letter of credit provider, and other terms related to tax-exempt bonds. I.R.C. § 150.

settlement discussions are unavailing, the IRS may progress to the point of issuing notices of deficiency to bondholders. A bondholder's notice of deficiency, and any other information generated during the examination of an individual bondholder, will be the return information solely of the affected bondholder (not the issuer or any other bondholder). Similarly, if the IRS determines that there is a potential for application of a section 6700 (promoting abusive tax shelters) penalty against the issuer, information collected thereafter relating to the penalty would be solely the issuer's information. See I.R.C. § 6700.

Likewise, information generated during the examination of a conduit borrower is the conduit borrower's return information. Even if there is some relationship to a bond matter, the information remains the conduit borrower's return information so long as the information pertains to some aspect of the conduit borrower's liability under the Code. For example, tax-exempt bond proceeds may have been used in an unrelated trade or business of a section 501(c)(3) organization. Even though there is some relationship to a bond matter, the information collected during the organization's examination related to whether the organization has unrelated business taxable income would be the section 501(c)(3) organization's return information. After a separate bond examination is opened (which would occur after bond issues are identified in the conduit borrower's examination), however, information gathered under the auspices of the *bond* examination would be the issuer's and bondholders' return information.

Depending on the facts of the case, issuers, conduit borrowers and others associated with the bond issuance may have liability under section 6700. Information collected during an investigation for potential application of the section 6700 penalty would be the return information of the subject or subjects of the section 6700 examination.

While it is critical to determine the "owner" of return information for purposes of disclosure, it does not necessarily mean that the Service cannot provide access to a third party. It merely means that one or more subsections of section 6103 must authorize the disclosure of the information, as discussed below.

## II. AUTHORIZED DISCLOSURES

Other chapters discuss at length the various exceptions to the general rule of confidentiality, many of which may be implicated or available in the tax-exempt bond arena.

Section 6103(e)(1)(A) provides that, upon written request, an individual's "return" shall be open to inspection by or disclosure to that individual. A corporation's return is generally available upon written request to, among others, persons with authority designated by resolution of its board of directors or other similar governing body to act for the corporation. I.R.C. § 6103(e)(1)(D); see *generally* IRM 11.3.2.4.3. A person's "return information" may also be disclosed to that person, pursuant to section



6103(e)(7), unless the IRS determines the disclosure will seriously impair federal tax administration. See Chapter 2.

IRM 11.3.32, Disclosure to States for Tax Administration Purposes, provides that returns and return information of a taxpayer, including a state or local government, may be disclosed to any state agency, body or commission, or its legal representative charged under the laws of the state with the responsibility for administration of any state tax law. IRM 11.3.32.3. Generally, verification that the requester is an appropriate government official, for example, the Director of Taxation, will be sufficient to indicate entitlement to returns and return information.

A taxpayer may authorize another person to receive returns or return information through a power of attorney. I.R.C. § 6103(e)(6), (7). See generally Chapter 2, Part III. The taxpayer may also designate a person to receive returns or return information through a "waiver" or "consent." I.R.C. § 6103(c); see Appendix for sample disclosure consents for bond matters. See generally Chapter 2, Part III.

An IRS employee may disclose return information (but not the return) in connection with official duties relating to an audit, collection activity, or civil or criminal tax investigation, to the extent such disclosure is necessary in obtaining information which is not otherwise reasonably available, with respect to the correct determination of tax, liability for tax or the amount to be collected under Title 26. I.R.C. § 6103(k)(6). Disclosures under section 6103(k)(6) may be made only in situations and under conditions as prescribed in regulations. See Chapter 4.

Section 6103(h)(4) provides that a return or return information may be disclosed in a federal judicial or administrative proceeding pertaining to tax administration in three situations:

- (A) if the taxpayer is a party to the proceeding, or the proceeding arose out of, or in connection with, determining the taxpayer's civil or criminal liability, or the collection of such civil liability, in respect of any tax imposed under [the Code];
- (B) if the treatment of an item reflected on the taxpayer's return is directly related to the resolution of an issue in the proceeding; or
- (C) if the return or return information directly relates to a transactional relationship between a person who is a party to the proceeding and the taxpayer which directly affects the resolution of an issue in the proceeding[.]

See Chapter 3.

As discussed below, the transactional relationship that exists among the bondholders, issuer, trustee, and conduit borrower may provide a basis for disclosure under section

6103(h)(4)(B) and/or (C), depending on what issues must be resolved in the proceeding.

The definition of return information excludes statistical studies and other compilations of data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer. I.R.C. § 6103(b)(2). This does not mean that the IRS can disclose information from a bond examination even if identifying information is redacted. Information retains its status as return information even if the identifiers are deleted. See Church of Scientology of Cal. v. IRS, 484 U.S. 9, 15 (1987). The IRS may disclose amalgamations of data, *e.g.*, that it is examining particular classes of cases or particular types of abuses, so long as the individual issuances being looked at cannot be identified. In addition, non-identifiable statistical data (such as that compiled in the Statistics of Income Bulletin) may be disclosed.

### **III. APPLICATION OF SECTION 6103 TO BOND PROGRAM**

#### **A. Bond Examination**

A Revenue Agent opens a bond examination on 1993 County A general revenue bonds. May the IRS disclose return information relating to whether interest on the bonds is tax exempt to the issuer, the bondholders, or the trustee?

The IRS could discuss whether interest on the bonds is exempt from tax with the issuer and any bondholder because it is their own return information. In addition, the information could be discussed with the representatives of the issuer or bondholders, but only if a valid power of attorney is filed with the IRS.

As a general rule, absent the issuer's consent, the information could not be discussed with the trustee. Disclosure of discrete items of return information to the trustee would nevertheless be permitted if the disclosure were necessary to obtain information that is not otherwise reasonably available (*e.g.*, a bondholder list). I.R.C. § 6103(k)(6). As discussed in section III.E., below, if the trustee must file Forms 1099, the Service could disclose to the trustee information necessary to perform those responsibilities.

#### **B. Bond Issue Involving Conduit Borrower**

A Revenue Agent examines a bond issue, the proceeds of which were loaned to a taxable organization to build a low income housing project.

##### **1. May the IRS disclose return information relating to whether interest on the bonds is tax exempt to the issuer, the bondholders, the trustee, or the conduit borrower?**

Information relating to whether the interest on the bonds is tax exempt may be disclosed to the issuer and bondholders.

Disclosures to the conduit borrower in this situation are much more restricted. As noted above, the IRS can disclose information regarding the bonds to obtain information that is not otherwise reasonably available. I.R.C. § 6103(k)(6). The conduit borrower, for example, may have information regarding bond compliance. Tax information may be disclosed in connection with the bond examination to the conduit borrower, or to any other person involved in the bond issuance, in the same manner and under the same rules as other third party investigative inquiries.

Section 6103(k)(6) would *not* authorize the IRS to discuss wide-ranging bond issues with the conduit borrower. Consent from the issuer is required to make any disclosures to the conduit borrower beyond those minimal disclosures authorized by section 6103(k)(6). For example, if it becomes clear that the conduit borrower wants to participate in the examination, the issuer's consent to disclosure must be obtained.

Sample consents permitting disclosures of bond examination information to the conduit borrower and conduit borrower's counsel are in the Appendix. All persons that will be involved in meetings, discussions, or correspondence with IRS personnel concerning the bond matter should be listed in the consent as appointees. In addition, no disclosures should be made to any representative of the conduit borrower, or to the conduit borrower's counsel, unless they are listed in the consent. For additional information on consents, including the requirements for oral consents, see Chapter 2, Part III.

Disclosures to the trustee would ordinarily be predicated on section 6103(k)(6) (investigative purposes) or section 6103(c) (consent).

## **2. May the conduit borrower be notified of the referral of an issue for technical advice?**

A conduit borrower may be notified of the referral of an issue for technical advice only with the consent of the issuer. I.R.C. § 6103(c).

### **C. Revocation of Exempt Status**

While examining a tax-exempt hospital, a revenue agent discovers that the hospital's earnings inure to its staff physicians. The IRS determines that the hospital is no longer exempt from tax under section 501(c)(3). The revenue agent also discovers that the hospital facilities were constructed with the proceeds of a tax-exempt bond issue. As such, the bonds are no longer tax-exempt. The IRS decides to issue notices of deficiency to the bondholders.

**1. What can the IRS disclose to the issuer or bondholders concerning the hospital's examination?**

The IRS could disclose the fact of revocation to the issuer or bondholders. The fact of revocation being the linchpin to the tax liability regarding the bonds, it is the issuer's and bondholders' return information (as well as the hospital's). Moreover, the fact that contributions to the organization are no longer deductible is published in the Cumulative Bulletin. This disclosure is authorized by section 7428. On the other hand, other information concerning the hospital's examination should not, in most circumstances, be disclosed.

**2. What can the IRS disclose to the hospital concerning the bonds?**

Without consent, the IRS should not disclose information about the bond examination to the hospital, although it certainly could inquire of the hospital about the bonds, to the extent necessary, under section 6103(k)(6). If specifically asked by the hospital about the bonds, the IRS could state the general legal principle that the revocation of an organization's exemption would also render the bonds taxable.

**D. Bond Examination Arising out of Conduit Borrower Examination with Common Issues**

While examining a section 501(c)(3) organization, a revenue agent discovers that the organization borrowed the proceeds of a tax-exempt bond issue for use in the construction of a multi-purpose center. The bonds are purportedly qualified section 501(c)(3) bonds. Based on concerns about the private activity limitations of sections 141 and 145, the revenue agent opens a separate bond examination to develop the bond issues. The revenue agent also has concerns about the unrelated business taxable income (UBIT) implications for the organization, as well as the potential application of section 150(b)(3).

This is perhaps the most difficult area to analyze because of the overlapping issues and the two possibly simultaneous examinations. From a disclosure standpoint, it is critical to segregate which information came from which examination. In addition, because the third party information disclosure rules of section 6103(h)(4)(B) and (C) are implicated, the relevance of each item of data to each examination must be carefully scrutinized. The basic rules are summarized as follows:

- In the bond examination, information from the bond examination relating to whether the interest on the bonds is tax-exempt may be disclosed to the issuer and bondholders. See I.R.C. § 6103(e), (h)(4)(A).

- In the conduit borrower's examination, information from the conduit borrower's examination relating to the UBIT issue and other information relating to the organization's section 501(c)(3) status may be disclosed to the conduit borrower. See I.R.C. § 6103(e), (h)(4)(A).
- In the bond examination, the conduit borrower must obtain the issuer's consent (see sample consents in the Appendix) to discuss issues related to the taxability of the bond interest. As a general matter, the issuer's consent should be filled out to permit disclosures to the conduit borrower, the conduit borrower's representative, and other persons participating in the bond examination.
- In the conduit borrower's examination, no consent is necessary to disclose factual information to the conduit borrower that relates to the conduit borrower's UBIT liability, even if the information originated in the bond examination. See I.R.C. § 6103(h)(4)(B), (C).
- In the bond examination, information from the conduit borrower's examination relating to whether interest on the bonds is tax-exempt may be disclosed to the issuer. See I.R.C. § 6103(h)(4)(B), (C).<sup>76</sup>

#### **E. Disclosure to Trustee (or Other Person Paying Interest) that Bond Interest is Taxable**

Under section 6049, generally, a person making payments of taxable interest is required to send Forms 1099 to the interest recipients. This would include payments of municipal bond interest if the IRS determines that the bond interest is not exempt from tax. Thus, at a minimum, it will be necessary to inform the trustee or other person making the interest payments to the beneficial owners of the bonds of the IRS's determination. Because it is the interest payor's responsibility to file Forms 1099 with the IRS and to send the forms to the bondholders, the information triggering the requirement to file--the fact that interest on the bonds is no longer exempt -- is the interest payor's return information (as well as the issuer's and bondholders'), and may be disclosed to the trustee or other interest payor under section 6103(e).

#### **F. Disclosures to Issuer or Bondholders of Settlements with Individual Bondholders**

Any settlement reached with an individual bondholder is that bondholder's return information, and may not be disclosed to the issuer or other bondholders. Factual information collected during an individual bondholder's audit, which

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<sup>76</sup> We have assumed that the issuer has no interest in the conduit borrower's potential UBIT liability. To the extent that liability may arise in discussions where the issuer or its representatives may be present, however, consent from the conduit borrower should be obtained.

relates to the bond issue, could be disclosed to the issuer under section 6103(h)(4)(B) and/or (C), assuming the issuer's examination is ongoing and the information directly relates to an issue to be resolved in the issuer's examination.

#### **G. Bond Counsel**

Bond counsel would have the same right to returns or return information as their client under section 6103(e)(6) and (7), if they have a power of attorney (Form 2848) or section 6103(c) consent (Form 8821).

#### **H. Underwriter, Letter of Credit Provider**

Bond examination data may be disclosed to the underwriter or letter of credit provider if the disclosure is necessary to obtain information that is not otherwise reasonably available pursuant to section 6103(k)(6), or with the issuer's consent, section 6103(c).

#### **I. Securities and Exchange Commission and State Oversight Authorities**

Section 6103(k)(6) can justify limited disclosures to obtain information from any person, including a state bond oversight authority or the Securities and Exchange Commission (SEC). Disclosures to these authorities can also be premised on the issuer's consent, pursuant to section 6103(c).

As discussed above, information does not lose its character as return information merely because identifying information is deleted. As such, no disclosure to the SEC or a state bond oversight authority could be predicated on a "redacted" fact pattern. On the other hand, amalgamated information about the types and classes of cases the IRS is looking into, as well as statistical information, may be disclosed to any person as long as it does not directly or indirectly identify a particular taxpayer.

## **CHAPTER 15**

### **APPENDICES**

<b>APPENDIX-1</b>	CONSENT TO DISCLOSURE OF TAX INFORMATION
<b>APPENDIX-2</b>	CONSENT TO DISCLOSURE OF RETURN INFORMATION
<b>APPENDIX-3</b>	TESTIMONY REPORT AND AUTHORIZATION
<b>APPENDIX-4</b>	POWER OF ATTORNEY AND DECLARATION OF REPRESENTATIVE
<b>APPENDIX-5</b>	TAX INFORMATION AUTHORIZATION
<b>APPENDIX-6</b>	TAX DISCLOSURES
<b>APPENDIX-7</b>	CURRENT IRS EMPLOYEE TESTIMONY AUTHORIZATION
<b>APPENDIX-8</b>	FORMER IRS EMPLOYEE TESTIMONY AUTHORIZATION
<b>APPENDIX-9</b>	BOND EXAMINATION – CONSENTS
<b>APPENDIX-10</b>	LINKS

**APPENDIX-1  
CONSENT TO DISCLOSURE OF TAX INFORMATION**

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**Consent to Disclosure of Tax Information**

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I authorize the Internal Revenue Service to disclose returns and return information, as those terms are defined in section 6103(b) of the Internal Revenue Code, for the tax year(s) listed below to the Citizen Advocacy Panel (CAP) located in the district of \_\_\_\_\_ . I am aware that the CAP will use the returns and return information in connection with its duties to identify systemic problems within the Internal Revenue Service and make recommendations for change. I understand that the CAP has no authority to take any action to resolve my individual problem. The CAP *may* refer my individual problem to the Taxpayer Advocate's office for resolution by the Internal Revenue Service. I also authorize the Internal Revenue Service to release returns and return information to the CAP regarding the resolution of my individual problem.

*NOTE: Generally, CAP meetings are required by the Federal Advisory Committee Act (FACA) to be open to the public. Your returns and return information may be disclosed "TO THE PUBLIC." Almost all individuals who serve as members of the CAP are not Internal Revenue Service employees and are not bound by the provisions of the Internal Revenue Code which prohibit the disclosure of tax information. The Internal Revenue Service is not responsible for tax information once it has been disclosed to the CAP in compliance with this consent.*

I am aware that without this authorization the Internal Revenue Code makes my returns and return information confidential and prohibits the disclosure to the CAP of those returns and return information.

I certify that I have the authority to execute this consent to disclosure of tax information on behalf of the taxpayer.

Individual Taxpayer Consent		Entity (Business) Consent	
Taxpayer(s)		Name of Taxpayer Entity	
		Employer Identification Number	
Social Security Numbers		Address of Taxpayer Entity	
Address			
		Daytime Telephone Number	
Daytime telephone number		Tax Year(s)/Period(s) Waived	
Tax year(s) Waived		Type of Tax/Form Number	
Type of Tax/Form Number			
Taxpayer(s) Signature	Date	Individual Executing Consent	Date
	Date	Consent (signature)	Date



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## Privacy Act Notice

The Privacy Act of 1974 says that when we ask you for information, we must first tell you our legal right to ask for the information, why we are asking for it, and how it will be used. We must also tell you what could happen if you do not provide it and whether or not you must respond under the law.

This notice applies to tax returns and any papers filed with them. It also applies to any questions we need to ask you so we can complete, correct, or process your return; figure your tax; and collect tax, interest, or penalties.

Our legal right to ask for information is Internal Revenue Code sections 6001, 6011, and 6012(a) and their regulations. They say that you must file a return or statement with us for any tax you are liable for. Your response is mandatory under these sections. Code section 6109 and its regulations say that you must show your social security number on what you file. You must also fill in all parts of the tax form that apply to you. This is so we know who you are, and can process your return and papers. You do not have to check the boxes for Presidential Election Campaign Fund.

We ask for tax return information to carry out the U.S. tax laws. We need it to figure and collect the right amount of tax. We may give the information to the Department of Justice and to other Federal agencies, as provided by law. We may also give it to cities, states, the District of Columbia, and U.S. commonwealths or possessions to carry out their tax laws. And we may give it to certain foreign governments under tax treaties they have with the United States.

If you do not file a return, do not give us the information we ask for, or provide fraudulent information, the law says that we may have to charge you penalties and, in certain cases, subject you to criminal prosecution. We may also have to disallow the exemptions, exclusions, credits, deductions, or adjustments shown on your tax return. This could make your tax higher or delay any refund. Interest may also be charged.

Please keep this notice with your records. You may want to refer to it if we ask you for other information. If you have questions about the rules for filing and giving information, please call or visit any Internal Revenue Service office.

## APPENDIX-2 CONSENT TO DISCLOSURE OF RETURN INFORMATION

OMB NO. 1545-1856

### Consent To Disclosure of Return Information

Note: Prior to completing this Form, please be sure that  
you have reviewed the terms of this agreement.

This consent is valid only if the IRS designates me as unsuitable for employment AND the IRS must report its decision to the Office of Personnel Management (OPM). The IRS must report to OPM the reason for my rejection if the IRS has determined that I am not suitable for employment in any position with the Service. If the IRS' rejection of my application is based upon my prior compliance with the tax laws, this consent will permit the IRS to disclose to OPM the return information listed below. Additionally, if I choose to challenge this rejection before the Merit Systems Protection Board (MSPB), this consent will permit the IRS to disclose the return information described below to the MSPB for related proceedings.

#### I. TAXPAYER INFORMATION (Please type or print)

Taxpayer Name		Social Security Number (SSN)
Address		Daytime Phone
Name and address shown on last three (3) returns Indicated an NIR for a non return year (If different from above)		
Tax Year	Name	City/State
Tax Year	Name	City/State
Tax Year	Name	City/State
Spouse's name SSN and address as shown on last (3) returns if filed jointly Indicated an N/R for a non return year		
Tax Year	Name	Spouse's SSN (if Known)
Tax Year	Name	Spouse's SSN (if Known)
Tax Year	Name	Spouse's SSN (if Known)

#### II. DESIGNATION OF RECIPIENT

I designate that the IRS may release my personal income tax returns and return information to:

U.S. Office of Personnel Management, Investigation Service	Merit Systems Protection
1900 E St., NW Room 5416	Board 1615 M St., NW
Washington, DC 20415-4000	Washington, DC 20419

#### III. AUTHORIZATION TO DISCLOSE

I authorize the IRS to release to my designees any returns or return information in IRS possession that provides evidence on the following:

1. Whether I failed to file a Federal income tax return for any of the last three years for which filing of a return might have been required. (The "last three years" means the three tax years preceding the date on which the IRS receives this signed consent. If the filing date for the most recent required return has not yet lapsed [i.e., signed consent submitted between January 1 and April 15], then the "last three years" means the three tax years preceding the year for which returns are currently being processed and filed.)
2. Whether any of the returns identified in #1 above were filed more than 45 days after the filing due date (determined with regard to any extension(s) of the time for filing).
3. Whether I failed to pay any tax, penalty, or interest liability during the current or last three calendar years within 45 days of the date of which the IRS gave notice of the amount due and request for payment.
4. Whether I am presently or was previously under investigation by the IRS for a possible criminal tax offense.

Date: \_\_\_\_\_ Signature: \_\_\_\_\_

(INVALID UNLESS DATED AND SIGNED BY THE TAXPAYER AUTHORIZING DISCLOSURE OF TAX RETURN INFORMATION  
AND RECEIVED BY IRS WITHIN 60 DAYS OF THE DATE ABOVE.)

**Privacy Act and Paperwork Reduction Act Notices -**

The Service's authority for requesting this information is 5 U.S.C. § 301, and the authority for requesting your social security number is Executive Order 93-97. While providing this information is voluntary, failure to supply all or part of the information requested may result in rejection of your employment application. By providing the information herein and by signing this consent to disclose, authorize the Internal Revenue Service (IRS) to release my return information to the designated recipients. My returns and return information for the last three years will be reviewed in the evaluation of my suitability for appointment or employment with the IRS. This consent is made pursuant to 26 U.S.C. § 6103(c), which permits the release of returns and return information, which would otherwise be confidential, to my designee. This consent is considered part of my application for employment with the Service and is subject to the Privacy Act of 1974, 5 U.S.C. § 552a.

We ask for the information on this form in order to carry out the mission of the Internal Revenue Service. We need the information to process your application for employment with the Internal Revenue Service. You are not required to provide the information requested on a form that is subject to the Paperwork Reduction Act unless the form displays a valid OMB control number. Generally, tax returns and return information are confidential, as required by I.R.C. § 6103.

The time needed to complete this form will vary depending upon the individual circumstances. The estimated average time is 10 minutes per response. If you have comments concerning the accuracy of this estimate or suggestions for making this form simpler, we would be happy to hear from you. You can write to the Tax Products Coordinating Committee, Western Area Distribution Center, Rancho Cordova, CA 95743-0001.

For IRS Use Only	
Has applicat filled and paid their tax returns on a timely basis for years stated in part 1? <input type="checkbox"/> Yes <input type="checkbox"/> No	Intelligence Interest <input type="checkbox"/> Yes <input type="checkbox"/> No
Remarks:	
<b>Requesting Office</b>	
Location of Office (Be specific)	
Full Name	
Title	Date

## APPENDIX-3 TESTIMONY REPORT AND AUTHORIZATION

Testimony Report and Authorization		
Part I—Testimony Report		
1. Title of Case		2. Docket Number
4. Received by		3. Type of Case <input type="checkbox"/> Civil <input type="checkbox"/> Criminal <input type="checkbox"/> Bankruptcy <input type="checkbox"/> Summons Enforcement <input type="checkbox"/> Other
Date		6. By
5. Subpoena/Request Served on Behalf of		7. Subpoena/Request Calls for
8. Testimony/Production Date and Time		9. Court Location
10. Is subpoenaed/requested information available? <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> In part <input type="checkbox"/> Undetermined		11. Any confidential informants or sensitivity? <input type="checkbox"/> Yes <input type="checkbox"/> No
12. Any open Civil or Criminal Case? <input type="checkbox"/> Yes <input type="checkbox"/> No		13. Would disclosure seriously impair Federal tax administration? <input type="checkbox"/> Yes <input type="checkbox"/> No
14. <input type="checkbox"/> Explanation of efforts to have subpoena withdrawn or		<input type="checkbox"/> Reason appearance recommended
15. Additional Comments		
16. <input type="checkbox"/> Testimony Recommended		17. Disclosure Officer (Signature)
		Date
18. Basis for Authorization <input type="checkbox"/> Securing a written authorization under IRC 6103(c) and Income Tax Regulation 301.6103(c)-1 <input type="checkbox"/> Upon an oral authorization statement in open court <input type="checkbox"/> Documentation on file <input type="checkbox"/> IRC 6103(e) <input type="checkbox"/> Other basis:		
19. Concurrence obtained from Counselor (Name and/or Signature)		Date

Form 9993 (8-98)  
Prev. issued as 500-5-858(2-84)

Catalog Number 92418Y

Department of the Treasury - Internal Revenue Service

Authorization on Reverse

**Part II--Testimony Authorization**

1. To (Employee(s) Subpoenaed/Requested)	2. Title(s)	3. Post(s) of Duty
4. The above employee(s) is/are authorized to <input type="checkbox"/> a. Appear <input type="checkbox"/> b. Testify <input type="checkbox"/> c. Produce records	At	
	On	

**Special Instructions**

Testimony should not be given concerning:

- Information which may tend to identify a confidential informant
- An unrelated third party
- Wagering tax information as defined in IRC 4424
- Tax treaty information
- Secret grand jury information

5. Testimony limitations/additional instructions

Within 5 workdays, submit a report to the Disclosure Officer regarding your appearance and what was disclosed or other disposition.

6. You  will  will not be accompanied by government counsel.

7. Signature of Official Authorizing Testimony	Date
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# APPENDIX-4 POWER OF ATTORNEY AND DECLARATION OF REPRESENTATIVE

Form **2848**  
(Rev. March 2012)  
Department of the Treasury  
Internal Revenue Service

## Power of Attorney and Declaration of Representative

▶ Type or print. ▶ See the separate instructions.

OMB No. 1545-0150

**For IRS Use Only**

Received by:

Name \_\_\_\_\_

Telephone \_\_\_\_\_

Function \_\_\_\_\_

Date / /

**Part I Power of Attorney**

**Caution:** A separate Form 2848 should be completed for each taxpayer. Form 2848 will not be honored for any purpose other than representation before the IRS.

**1 Taxpayer information.** Taxpayer must sign and date this form on page 2, line 7.

Taxpayer name and address	Taxpayer identification number(s)
	Daytime telephone number
	Plan number (if applicable)

hereby appoints the following representative(s) as attorney(s)-in-fact:

**2 Representative(s) must sign and date this form on page 2, Part II.**

Name and address	CAF No. _____ PTIN _____ Telephone No. _____ Fax No. _____
Check if to be sent notices and communications <input type="checkbox"/>	Check if new: Address <input type="checkbox"/> Telephone No. <input type="checkbox"/> Fax No. <input type="checkbox"/>
Name and address	CAF No. _____ PTIN _____ Telephone No. _____ Fax No. _____
Check if to be sent notices and communications <input type="checkbox"/>	Check if new: Address <input type="checkbox"/> Telephone No. <input type="checkbox"/> Fax No. <input type="checkbox"/>
Name and address	CAF No. _____ PTIN _____ Telephone No. _____ Fax No. _____
	Check if new: Address <input type="checkbox"/> Telephone No. <input type="checkbox"/> Fax No. <input type="checkbox"/>

to represent the taxpayer before the Internal Revenue Service for the following matters:

**3 Matters**

Description of Matter (Income, Employment, Payroll, Excise, Estate, Gift, Whistleblower, Practitioner Discipline, PLR, FOIA, Civil Penalty, etc.) (see instructions for line 3)	Tax Form Number (1040, 941, 720, etc.) (if applicable)	Year(s) or Period(s) (if applicable) (see instructions for line 3)

**4 Specific use not recorded on Centralized Authorization File (CAF).** If the power of attorney is for a specific use not recorded on CAF, check this box. See the instructions for Line 4. **Specific Uses Not Recorded on CAF**

**5 Acts authorized.** Unless otherwise provided below, the representatives generally are authorized to receive and inspect confidential tax information and to perform any and all acts that I can perform with respect to the tax matters described on line 3, for example, the authority to sign any agreements, consents, or other documents. The representative(s), however, is (are) not authorized to receive or negotiate any amounts paid to the client in connection with this representation (including refunds by either electronic means or paper checks). Additionally, unless the appropriate box(es) below are checked, the representative(s) is (are) not authorized to execute a request for disclosure of tax returns or return information to a third party, substitute another representative or add additional representatives, or sign certain tax returns.

Disclosure to third parties;  Substitute or add representative(s);  Signing a return; \_\_\_\_\_

Other acts authorized: \_\_\_\_\_ (see instructions for more information)

**Exceptions.** An unenrolled return preparer cannot sign any document for a taxpayer and may only represent taxpayers in limited situations. An enrolled actuary may only represent taxpayers to the extent provided in section 10.3(d) of Treasury Department Circular No. 230 (Circular 230). An enrolled retirement plan agent may only represent taxpayers to the extent provided in section 10.3(e) of Circular 230. A registered tax return preparer may only represent taxpayers to the extent provided in section 10.3(f) of Circular 230. See the line 5 instructions for restrictions on tax matters partners. In most cases, the student practitioner's (level k) authority is limited (for example, they may only practice under the supervision of another practitioner).

List any specific deletions to the acts otherwise authorized in this power of attorney: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**6 Retention/revocation of prior power(s) of attorney.** The filing of this power of attorney automatically revokes all earlier power(s) of attorney on file with the Internal Revenue Service for the same matters and years or periods covered by this document. If you **do not want** to revoke a prior power of attorney, check here  **YOU MUST ATTACH A COPY OF ANY POWER OF ATTORNEY YOU WANT TO REMAIN IN EFFECT.**

**7 Signature of taxpayer.** If a tax matter concerns a year in which a joint return was filed, the husband and wife must each file a separate power of attorney even if the same representative(s) is (are) being appointed. If signed by a corporate officer, partner, guardian, tax matters partner, executor, receiver, administrator, or trustee on behalf of the taxpayer, I certify that I have the authority to execute this form on behalf of the taxpayer.

**▶ IF NOT SIGNED AND DATED, THIS POWER OF ATTORNEY WILL BE RETURNED TO THE TAXPAYER.**

Signature	Date	Title (if applicable)
Print Name	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> PIN Number	Print name of taxpayer from line 1 if other than individual

**Part II Declaration of Representative**

Under penalties of perjury, I declare that:

- I am not currently under suspension or disbarment from practice before the Internal Revenue Service;
- I am aware of regulations contained in Circular 230 (31 CFR, Part 10), as amended, concerning practice before the Internal Revenue Service;
- I am authorized to represent the taxpayer identified in Part I for the matter(s) specified there; and
- I am one of the following:
  - a Attorney—a member in good standing of the bar of the highest court of the jurisdiction shown below.
  - b Certified Public Accountant—duly qualified to practice as a certified public accountant in the jurisdiction shown below.
  - c Enrolled Agent—enrolled as an agent under the requirements of Circular 230.
  - d Officer—a bona fide officer of the taxpayer's organization.
  - e Full-Time Employee—a full-time employee of the taxpayer.
  - f Family Member—a member of the taxpayer's immediate family (for example, spouse, parent, child, grandparent, grandchild, step-parent, step-child, brother, or sister).
  - g Enrolled Actuary—enrolled as an actuary by the Joint Board for the Enrollment of Actuaries under 29 U.S.C. 1242 (the authority to practice before the Internal Revenue Service is limited by section 10.3(d) of Circular 230).
  - h Unenrolled Return Preparer—Your authority to practice before the Internal Revenue Service is limited. You must have been eligible to sign the return under examination and have signed the return. **See Notice 2011-6 and Special rules for registered tax return preparers and unenrolled return preparers in the instructions.**
  - i Registered Tax Return Preparer—registered as a tax return preparer under the requirements of section 10.4 of Circular 230. Your authority to practice before the Internal Revenue Service is limited. You must have been eligible to sign the return under examination and have signed the return. **See Notice 2011-6 and Special rules for registered tax return preparers and unenrolled return preparers in the instructions.**
  - k Student Attorney or CPA—receives permission to practice before the IRS by virtue of his/her status as a law, business, or accounting student working in LITC or STCP under section 10.7(d) of Circular 230. See instructions for Part II for additional information and requirements.
  - r Enrolled Retirement Plan Agent—enrolled as a retirement plan agent under the requirements of Circular 230 (the authority to practice before the Internal Revenue Service is limited by section 10.3(e)).

**▶ IF THIS DECLARATION OF REPRESENTATIVE IS NOT SIGNED AND DATED, THE POWER OF ATTORNEY WILL BE RETURNED. REPRESENTATIVES MUST SIGN IN THE ORDER LISTED IN LINE 2 ABOVE.** See the instructions for Part II.

**Note:** For designations d-f, enter your title, position, or relationship to the taxpayer in the "Licensing jurisdiction" column. See the instructions for Part II for more information.

Designation— Insert above letter (a-r)	Licensing jurisdiction (state) or other licensing authority (if applicable)	Bar, license, certification, registration, or enrollment number (if applicable). See instructions for Part II for more information.	Signature	Date

# APPENDIX-5 TAX INFORMATION AUTHORIZATION

Form **8821**  
(Rev. October 2011)  
Department of the Treasury  
Internal Revenue Service

## Tax Information Authorization

▶ **Do not sign this form unless all applicable lines have been completed.**  
▶ **Do not use this form to request a copy or transcript of your tax return.**  
Instead, use Form 4506 or Form 4506-T.

OMB No. 1545-1166  
**For IRS Use Only**

Received by:  
Name \_\_\_\_\_  
Telephone \_\_\_\_\_  
Function \_\_\_\_\_  
Date \_\_\_\_\_

**1 Taxpayer information.** Taxpayer(s) must sign and date this form on line 7.

Taxpayer name(s) and address (type or print)	Taxpayer identification number
	Daytime telephone number
	Plan number (if applicable)

**2 Appointee.** If you wish to name more than one appointee, attach a list to this form.

Name and address	CAF No. _____ PTIN _____ Telephone No. _____ Fax No. _____ Check if new: Address <input type="checkbox"/> Telephone No. <input type="checkbox"/> Fax No. <input type="checkbox"/>
------------------	---

**3 Tax matters.** The appointee is authorized to inspect and/or receive confidential tax information in any office of the IRS for the tax matters listed on this line. Do not use Form 8821 to request copies of tax returns.

(a) Type of Tax (Income, Employment, Excise, etc.) or Civil Penalty	(b) Tax Form Number (1040, 941, 720, etc.)	(c) Year(s) or Period(s) (see the instructions for line 3)	(d) Specific Tax Matters (see instr.)

**4 Specific use not recorded on Centralized Authorization File (CAF).** If the tax information authorization is for a specific use not recorded on CAF, check this box. See the instructions on page 4. If you check this box, skip lines 5 and 6 . . . ▶

- 5 Disclosure of tax information** (you must check a box on line 5a or 5b unless the box on line 4 is checked):
- a If you want copies of tax information, notices, and other written communications sent to the appointee on an ongoing basis, check this box . . . . . ▶
- Note.** Appointees will no longer receive forms, publications and other related materials with the notices.
- b If you do not want any copies of notices or communications sent to your appointee, check this box . . . . . ▶

**6 Retention/revocation of tax information authorizations.** This tax information authorization automatically revokes all prior authorizations for the same tax matters you listed on line 3 above unless you checked the box on line 4. If you do not want to revoke a prior tax information authorization, you must attach a copy of any authorizations you want to remain in effect and check this box . . . . . ▶

To revoke this tax information authorization, see the instructions on page 4.

**7 Signature of taxpayer(s).** If a tax matter applies to a joint return, **either** husband or wife must sign. If signed by a corporate officer, partner, guardian, executor, receiver, administrator, trustee, or party other than the taxpayer, I certify that I have the authority to execute this form with respect to the tax matters/periods on line 3 above.

▶ **IF NOT SIGNED AND DATED, THIS TAX INFORMATION AUTHORIZATION WILL BE RETURNED.**

▶ **DO NOT SIGN THIS FORM IF IT IS BLANK OR INCOMPLETE.**

Signature	Date
Print Name	Title (if applicable)
<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> PIN number for electronic signature	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> PIN number for electronic signature



**General Instructions**

Section references are to the Internal Revenue Code unless otherwise noted.

**What's New**

- Each individual and/or entity must now file and sign a separate Form 8821.
- Appointees will no longer receive inserts, such as forms, publications, and other related materials, with notices.
- The IRS has created a page on IRS.gov for information about Form 8821 and its instructions at [www.irs.gov/form8821](http://www.irs.gov/form8821). Information about any future developments affecting Form 8821 (such as legislation enacted after we release it) will be posted on this page.

**Purpose of Form**

Form 8821 authorizes any individual, corporation, firm, organization, or partnership you designate to inspect and/or receive your confidential information in any office of the IRS for the type of tax and the years or periods you list on Form 8821. You may file your own tax information authorization without using Form 8821, but it must include all the information that is requested on Form 8821.

Form 8821 does not authorize your appointee to advocate your position with respect to the federal tax laws; to execute waivers, consents, or closing agreements; or to otherwise represent you before the IRS. If you want to authorize an individual to represent you, use Form 2848, Power of Attorney and Declaration of Representative.

Use Form 4506, Request for Copy of Tax Return, to get a copy of your tax return.

Use Form 4506-T, Request for Transcript of Tax Return, to order: (a) transcript of tax account information and (b) Form W-2 and Form 1099 series information.

Use Form 56, Notice Concerning Fiduciary Relationship, to notify the IRS of the existence of a fiduciary relationship. A fiduciary (trustee, executor, administrator, receiver, or guardian) stands in the position of a taxpayer and acts as the taxpayer. Therefore, a fiduciary does not act as an appointee and should not file Form 8821. If a fiduciary wishes to authorize an appointee to inspect and/or receive confidential tax information on behalf of the fiduciary, Form 8821 must be filed and signed by the fiduciary acting in the position of the taxpayer.

**When To File**

Form 8821 must be received by the IRS within 120 days of the date it was signed and dated by the taxpayer.

**Where To File Chart**

IF you live in . . .	THEN use this address . . .	Fax Number*
Alabama, Arkansas, Connecticut, Delaware, District of Columbia, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, or West Virginia	Internal Revenue Service Memphis Accounts Management Center PO Box 268, Stop 8423 Memphis, TN 38101-0268	901-546-4115
Alaska, Arizona, California, Colorado, Hawaii, Idaho, Iowa, Kansas, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, Wisconsin, or Wyoming	Internal Revenue Service 1973 N. Rulon White Blvd. MS 6737 Ogden, UT 84404	801-620-4249
All APO and FPO addresses, American Samoa, nonpermanent residents of Guam or the Virgin Islands**, Puerto Rico (or if excluding income under section 933), a foreign country, U.S. citizens and those filing Form 2555, 2555-EZ, or 4563.	Internal Revenue Service International CAF 2970 Market St. MS 3-E08.123 Philadelphia, PA 19104	267-941-1017

\*These numbers may change without notice.

\*\*Permanent residents of Guam should use Department of Taxation, Government of Guam, P.O. Box 23607, GMF, GU 96921; permanent residents of the Virgin Islands should use: V.I. Bureau of Internal Revenue, 9601 Estate Thomas Charlotte Amalie, St. Thomas, V.I. 00802.

## Where To File

Generally, mail or fax Form 8821 directly to the IRS. See the *Where To File Chart*, above. Exceptions are listed below.

If Form 8821 is for a specific tax matter, mail or fax it to the office handling that matter. For more information, see the instructions for line 4.

Your appointee may be able to file Form 8821 electronically with the IRS from the IRS website. For more information, go to [www.irs.gov](http://www.irs.gov). Under the *Tax Professionals* tab, click on *e-services—Online Tools for Tax Professionals*. If you complete Form 8821 for electronic signature authorization, do not file a Form 8821 with the IRS. Instead, give it to your appointee, who will retain the document.

## Revocation of an Existing Tax Information Authorization

If you want to revoke an existing tax information authorization and do not want to name a new appointee, send a copy of the previously executed tax information authorization to the IRS, using the *Where To File Chart*, above. The copy of the tax information authorization must have a current signature and date of the taxpayer under the original signature on line 7. Write "REVOKE" across the top of Form 8821.

If you do not have a copy of the tax information authorization you want to revoke, send a statement to the IRS. In the statement, indicate that the authority of the appointee is revoked, list the name and address of each recognized appointee whose authority is revoked, list the tax matters and periods, and sign and date the statement. If you are completely revoking the authority of the appointee, state "remove all years/periods" instead of listing the specific tax matters, years, or periods on the form.

To revoke a specific use tax information authorization, send the tax information authorization or statement of revocation to the IRS office handling your case, using the above instructions.

## Taxpayer Identification Numbers (TINs)

TINs are used to identify taxpayer information with corresponding tax returns. It is important that you furnish correct names, social security numbers (SSNs), individual taxpayer identification numbers (ITINs), or employer identification numbers (EINs) so that the IRS can respond to your request.

## Partnership Items

Sections 6221-6234 authorize a Tax Matters Partner to perform certain acts on behalf of an affected partnership. Rules governing the use of Form 8821 do not replace any provisions of these sections.

## Appointee Address Change

If the appointee's address has changed, a new Form 8821 is not required. The appointee can send a written notification that includes the new information and their signature to the location where the Form 8821 was filed.

## Specific Instructions

### Line 1. Taxpayer Information

**Individuals.** Enter your name, TIN, and your street address in the space provided. Do not enter your

appointee's address or post office box. If a return is a joint return, the appointee(s) identified will only be authorized for you. Your spouse or former spouse must submit a separate Form 8821 to designate an appointee.

**Corporations, partnerships, or associations.** Enter the name, EIN, and business address.

**Employee plan or exempt organization.** Enter the name, address, and EIN or SSN of the plan sponsor or exempt organization, and the plan name and three-digit plan number. If the plan's trust is under examination then see the instructions relating to trust.

**Trust.** Enter the name, title, and address of the trustee, and the name and EIN of the trust.

**Estate.** Enter the name and address of the estate. If the estate does not have an identification number, enter the decedent's SSN or ITIN.

### Line 2. Appointee

Enter your appointee's full name. Use the identical full name on all submissions and correspondence. Enter the nine-digit CAF number for each appointee. If an appointee has a CAF number for any previously filed Form 8821 or power of attorney (Form 2848), use that number. If a CAF number has not been assigned, enter "NONE," and the IRS will issue one directly to your appointee. The IRS does not assign CAF numbers to requests for employee plans and exempt organizations.

If you want to name more than one appointee, indicate so on this line and attach a list of appointees to Form 8821. If more than one appointee is listed, notices and correspondence will only be sent to the first two appointees.

Check the appropriate box to indicate if either the address, telephone number, or fax number is new since a CAF number was assigned.

### Line 3. Matters

Enter the type of tax, the tax form number, the years or periods, and the specific matter. Enter "Not applicable," in any of the columns that do not apply.

For example, you may list "Income, 1040" for calendar year "2006" and "Excise, 720" for "2006" (this covers all quarters in 2006). For multiple years or a series of inclusive periods, including quarterly periods, you may list 2004 through (thru or a hyphen) 2006. For example, "2004 thru 2006" or "2nd 2005-3rd 2006." For fiscal years, enter the ending year and month, using the YYYYMM format. Do not use a general reference such as "All years," "All periods," or "All taxes." Any tax information authorization with a general reference will be returned.

You may list the current year or period and any tax years or periods that have already ended as of the date you sign the tax information authorization. However, you may include on a tax information authorization only future tax periods that end no later than 3 years after the date the tax information authorization is received by the IRS. The 3 future periods are determined starting after December 31 of the year the tax information authorization is received by the IRS. You must enter the type of tax, the tax form number, and the future year(s) or period(s). Only tax forms directly related to the taxpayer may be listed on Line 3. If the matter relates to estate tax, enter the date of the decedent's death instead of the year or period.

In **column (d)**, enter any specific information you want the IRS to provide. Examples of column (d) information are: lien information, a balance due amount, a specific tax schedule, or a tax liability.

For requests regarding Form 8802, Application for United States Residency Certification, enter "Form 8802" in column (d) and check the specific use box on line 4. Also, enter the appointee's information as instructed on Form 8802.

**Note.** If the taxpayer is subject to penalties related to an individual retirement account (IRA) (for example, a penalty for excess contributions) enter, "IRA civil penalty" on line 3, column a.

#### Line 4. Specific Use Not Recorded on CAF

Generally, the IRS records all tax information authorizations on the CAF system. However, authorizations relating to a specific issue are not recorded.

Check the box on line 4 if Form 8821 is filed for any of the following reasons: (a) requests to disclose information to loan companies or educational institutions, (b) requests to disclose information to federal or state agency investigators for background checks, (c) application for EIN, or (d) claims filed on Form 843, Claim for Refund and Request for Abatement. If you check the box on line 4, your appointee should mail or fax Form 8821 to the IRS office handling the matter. Otherwise, your appointee should bring a copy of Form 8821 to each appointment to inspect or receive information. A specific-use tax information authorization will not revoke any prior tax information authorizations.

#### Line 6. Retention/Revocation of Tax Information Authorizations

Check the box on this line and attach a copy of the tax information authorization you do not want to revoke. The filing of Form 8821 will not revoke any Form 2848 that is in effect.

#### Line 7. Signature of Taxpayer(s)

**Individuals.** You must sign and date the authorization. If a joint return has been filed, your spouse must execute his or her own authorization on a separate Form 8821 to designate an appointee.

**Corporations.** Generally, Form 8821 can be signed by: (a) an officer having legal authority to bind the corporation, (b) any person designated by the board of directors or other governing body, (c) any officer or employee on written request by any principal officer and attested to by the secretary or other officer, and (d) any other person authorized to access information under section 6103(e).

**Partnerships.** Generally, Form 8821 can be signed by any person who was a member of the partnership during any part of the tax period covered by Form 8821. See *Partnership Items*, above.

**Employee Plan.** If the plan is listed as the taxpayer on Line 1, a duly authorized individual having authority to bind the taxpayer must sign and that individual's exact title must be entered.

If the trust is the taxpayer, listed on Line 1, a trustee having the authority to bind the trust must sign with the title of trustee entered. A Form 56 (Notice Concerning Fiduciary Relationship) must also be completed to identify the current trustee.

**Estate.** If there is more than one executor, only one co-executor having the authority to bind the estate is required to sign. See Regulations section 601.503(d).

**All others.** See section 6103(e) if the taxpayer has died, is insolvent, is a dissolved corporation, or if a trustee, guardian, executor, receiver, or administrator is acting for the taxpayer.

#### Privacy Act and Paperwork Reduction Act Notice

We ask for the information on this form to carry out the Internal Revenue laws of the United States. Form 8821 authorizes the IRS to disclose your confidential tax information to the person you appoint. This form is provided for your convenience and its use is voluntary. The information is used by the IRS to determine what confidential tax information your appointee can inspect and/or receive. Section 6103(c) and its regulations require you to provide this information if you want to designate an appointee to inspect and/or receive your confidential tax information. Under section 6109, you must disclose your identification number. If you do not provide all the information requested on this form, we may not be able to honor the authorization. Providing false or fraudulent information may subject you to penalties.

We may disclose this information to the Department of Justice for civil or criminal litigation, and to cities, states, the District of Columbia, and U.S. commonwealths and possessions for use in administering their tax laws. We may also disclose this information to other countries under a tax treaty, to federal and state agencies to enforce federal nontax criminal laws, or to federal law enforcement and intelligence agencies to combat terrorism.

You are not required to provide the information requested on a form that is subject to the Paperwork Reduction Act unless the form displays a valid OMB control number. Books or records relating to a form or its instructions must be retained as long as their contents may become material in the administration of any Internal Revenue law.

The time needed to complete and file this form will vary depending on individual circumstances. The estimated average time is: **Recordkeeping**, 6 min.; **Learning about the law or the form**, 12 min.; **Preparing the form**, 24 min.; **Copying and sending the form to the IRS**, 20 min.

If you have comments concerning the accuracy of these time estimates or suggestions for making Form 8821 simpler, we would be happy to hear from you. You can write to Internal Revenue Service, Tax Products Coordinating Committee, SE:W:CAR:MP:T:M:S, 1111 Constitution Ave. NW, IR-6526, Washington, DC 20224. **Do not** send Form 8821 to this address. Instead, see the *Where To File Chart*, earlier.

## APPENDIX-6 TAX DISCLOSURES

**Tax Disclosure**  
 26 U.S.C. § 6103(i)(1) & (2)  
 USAM 9-13.900

Policy and Statutory Enforcement Unit  
 Office of Enforcement Operations  
 Criminal Division  
 U.S. Department of Justice  
 E-mail: PSEU@usdoj.gov  
 Phone: (202) 305-4022  
 Fax: (202) 305-0567

Last updated: 12/2011

Date of Submission:

Date Response Requested/Required:

If Required in Less than Two Weeks, Please Explain Why:

If Required in Less than 48 Hours, Please Call PSEU Before Submitting This Request.

Trial Attorney:  Phone:   
 Section: SELECT DOJ: CRM/SECTION  Fax:   
 E-mail:

Name of Taxpayer	Address	SSN/EIN	Taxable Period(s)
<input type="button" value="Add Another Taxpayer"/>			

Date of intended prosecution:

Please Indicate if This Matter Concerns:  OCDEF or  Forfeiture

Statute(s) Violated (list statute and description):  
*(box will expand to fit text)*

Brief Summary/Facts of the Case:  
*(box will expand to fit text)*

Specific Reason(s) Why a Disclosure Is, or May Be, Relevant to the Proceeding or Investigation:  
(box will expand to fit text)

Prior Related Request(s) Submitted to PSLU, if any:  
(box will expand to fit text)

---

**Name of Authorizing Section Chief (name can be typed)**

\*In submitting this form/request to PSLU, the responsible Trial Attorney is certifying that the Section Chief or other appropriate supervisor has authorized making the request prior to submission.

\*Please attach any supplemental documentation to the e-mail request.

Submit by E-mail

Print Form

**APPENDIX-7  
CURRENT IRS EMPLOYEE TESTIMONY AUTHORIZATION**

Office of Chief Counsel  
Internal Revenue Service

## Memorandum

CC:PA:B06:XXXXXX  
DL-XXXXXXXX

date:

to: XXXXXXXXXXXX  
Revenue Agent  
IRS

[provide function/post of duty information]

from: [appropriate delegated authority as provided for in Delegation Order 11-2 and its Exhibit table]

---

subject: Testimony Authorization in re:  
XXXXXXXX. v. Internal Revenue Service, Civil No. XXXXXXXXXXXXXXXX

In connection with the above-captioned matter, Counsel for the Plaintiffs has served XXXXXXXXXXXXXXXXXXXXXXXX with a Notice (or subpoena) to appear at a [insert appropriate information here—for example: deposition scheduled to begin March 11, 2011, at 1:30 p.m. and continue to March 14, 2011 at 10:00 a.m. at the offices of [name, address of cite of deposition or place of trial].

You are to testify in your official capacity as an Internal Revenue Service employee, specifically with respect to your involvement with [provide a description of the matter employee was involved with that gave rise to the testimony].

Pursuant to Delegation Order 11-2 and 26 C.F.R. 301.9000-1, you are authorized to appear and give testimony, under the guidance of Government counsel, subject to the limitations listed below.

**Unless prohibited in the next section, you may:**

- Testify as to facts of which you have personal knowledge in your official capacity during the period of time that you were employed in [insert appropriate information here—for example: the Atlanta field office of IRS, Criminal Investigation regarding the Federal grand jury investigation in which Plaintiffs

were the subject and during the period of time that Plaintiffs' FOIA requests have been under consideration by the Service].

**You may not:**

- Produce any privileged documents or records of the Internal Revenue Service;
- Testify as to facts of which you have no personal knowledge;
- Testify regarding the thought processes of agency personnel or answer hypothetical questions;
- Speculate as to matters of which you have no sure knowledge;
- Testify in response to general questions concerning the positions, policies, procedures, or records of the Internal Revenue Service that are not relevant to the proceeding or reasonably calculated to lead to the discovery of admissible evidence;
- Testify as to other cases or other matters of official business not relevant to the proceeding or reasonably calculated to lead to the discovery of admissible evidence;
- Disclose any information that is protected by the attorney-client privilege, the attorney work product doctrine or the executive privilege, except, and only to the extent, these protections are waived by this authorization;
- Disclose any returns or return information of any taxpayer who is not a party to this matter;
- Disclose information that may tend to identify a confidential informant, if any;
- Disclose tax convention information, if any.

If for any reason the dates and/or times of this testimony are changed, this authorization shall remain valid until the testimony is canceled or completed, provided there is no material change as to the nature of your testimony.

Inquiries concerning the matter should be directed to Department of Justice, Tax Division Attorney XXXX at 202-XXX-XXXX. You may also contact Procedure and Administration, Attorney XXXXX at (202) XXX-XXXX if you have further questions.

**APPENDIX-8  
FORMER IRS EMPLOYEE TESTIMONY AUTHORIZATION**



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

Mr. XXXXX  
(Address)

In re: *United States of America v . ....*

Dear Mr. XXXXX:

It is our understanding that the taxpayer in the above-referenced federal criminal tax case has requested your testimony and that such testimony is scheduled for July 9, 2009 continuing into July 10, 2009, if necessary.

Pursuant to 31 C.F.R., § 1.8-1, 12, 26 C.F.R. § 301.9000-1, as a former IRS employee, you are authorized to appear and give testimony, under the guidance of Government counsel, subject to the limitations listed below.

With respect to the deposition on oral examination, unless prohibited in the next section, you may testify as to facts within your personal knowledge concerning:

- Matters you were involved with or observed while working as a [*Special Agent with IRS Criminal Investigation... on the investigation involving...which resulted in the prosecution of .... In the case of...???*] or whatever is appropriate here.

You may not:

- Testify as to facts not within your personal knowledge.
- Testify in response to hypothetical questions.
- Testify in response to general questions concerning the current or former positions, policies, procedures, or records of the Internal Revenue Service.
- Testify as to matters of official business not relevant to the proceeding or reasonably calculated to lead to the discovery of admissible evidence.



- Disclose any information that is protected by the attorney-client privilege, the attorney work product doctrine, or deliberative process privilege, except and only to the extent waived by this authorization.
- Disclose returns or return information of any unrelated third party taxpayer (i.e., a taxpayer not a party to this proceeding) except as may be authorized by I.R.C. § 6103(h)(4).
- Disclose information that may tend to identify a confidential informant, if any.
- Disclose information subject to I.R.C. § 6105, if any.
- Disclose information that is secret pursuant to Fed. R. Crim. P. 6(e), if any.

You may not:

- Provide, produce, permit inspection of, or otherwise make available, any documents that you obtained while employed by the IRS.

If for any reason the date, time, or location of your testimony is changed, this authorization shall remain valid until the testimony is canceled or completed, provided there is no material change in the facts related to the disclosure/ nondisclosure of requested information in this lawsuit.

Inquiries concerning this matter may be directed to [office of CC:CT Area Counsel responsible for signing this authorization].

Sincerely,

[this should be signed by the  
appropriate official delegated  
authority by Delegation Order 11-2]

**APPENDIX-9  
BOND EXAMINATION - CONSENTS**

I authorize the Internal Revenue Service to disclose to the representatives of **ABC Hospital** and **DEF Law Firm** appearing on the attached list, any of the returns and return information, as those terms are defined in section 6103(b) of the Internal Revenue Code, of XYZ County Health Facilities Development Authority relating to the \$47,000,000 XYZ County Health Facilities Development Authority Hospital Revenue Bonds Series 1996.

I am aware that without this authorization, the returns and return information of XYZ County Health Facilities Development Authority are confidential and are protected by law under the Internal Revenue Code.

I certify that I am authorized by law to bind XYZ County Health Facilities Development Authority and that I have authority to execute this consent to disclose tax information on the Authority's behalf.

Taxpayer Name XYZ County Health Facilities  
Development Authority

Address: 444 Muni Way  
City, State 12345

Employer Identification No. 12-3456789

Name and Title of Corporate  
Officer or Authorized Person: Sigmund Issuer, President

Signature of Corporate  
Officer or Authorized Person: /s/

Date: xx/xx/20xx

Treasury regulations require that the consent must be received by the Internal Revenue Service within sixty days after signing by the taxpayer.

## Tax Information Authorization

OMB No. 1545-0045  
For IRS Use Only

Received by:  
 Name \_\_\_\_\_  
 Telephone: \_\_\_\_\_  
 Function \_\_\_\_\_  
 Date \_\_\_\_/\_\_\_\_/\_\_\_\_

▶ IF THIS AUTHORIZATION IS NOT SIGNED AND DATED, IT WILL BE RETURNED.

**1 Taxpayer information.**

Taxpayer name(s) and address (please type or print)  <b>City of X</b> <b>123 Municipal Plaza</b> <b>X, State 99999</b>	Social security number(s) _____ _____ _____	Employer identification number  <b>12-2456789</b>
	Daytime telephone number ( 000 ) 867-5309	Plan number (if applicable)

**2 Appointee.**

Name and address (please type or print)	CAF No. _____ Telephone No. (____) _____ Fax No. (____) _____ Check if new: Address <input type="checkbox"/> Telephone No. <input type="checkbox"/>
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**3 Tax matters.** The appointee is authorized to inspect and/or receive confidential tax information in any office of the IRS for the tax matters listed on this line.

(a) Type of Tax (Income, Employment, Excise, etc.)	(b) Tax Form Number (1040, 941, 720, etc.)	(c) Year(s) or Period(s)	(d) Specific Tax Matters (see instr.)
<b>Revenue Bonds</b>	<b>1040</b>	<b>1999</b>	<b>(XYZ Project)</b>

**4 Specific use not recorded on Centralized Authorization File (CAF).** If the tax information authorization is for a specific use not recorded on CAF, check this box. (See the instructions on page 2.)   
 If you checked this box, skip lines 5 and 6.

**5 Disclosure of tax information** (you must check the box on line 5a or b unless the box on line 4 is checked):  
 a If you want copies of tax information, notices, and other written communications sent to the appointee on an ongoing basis, check this box   
 b If you do not want any copies of notices or communications sent to your appointee, check this box

**6 Retention/revocation of tax information authorizations.** This tax information authorization automatically revokes all prior authorizations for the same tax matters you listed above on line 3 unless you checked the box on line 4. If you do not want to revoke a prior tax information authorization, you MUST attach a copy of any authorizations you want to remain in effect AND check this box   
 To revoke this tax information authorization, see the instructions on page 2.

**7 Signature of taxpayer(s).** If a tax matter applies to a joint return, either husband or wife must sign. If signed by a corporate officer, partner, guardian, executor, receiver, administrator, trustee, or party other than the taxpayer, I certify that I have the authority to execute this form with respect to the tax matters/periods covered.

Signature _____ Date _____ <b>Mary Issuer</b> <span style="float: right;"><b>Mayor</b></span>	Signature _____ Date _____ _____
Print Name _____ Title (if applicable) _____	Print Name _____ Title (if applicable) _____

### General Instructions

Section references are to the Internal Revenue Code unless otherwise noted.

**Purpose of form.** Form 8821 authorizes any individual, corporation, firm, organization, or partnership you designate to inspect and/or receive your confidential information in any office of the IRS for the type of tax and the years or periods you list on this form. You may file your own tax information authorization without using Form 8821, but it must include all the information that is requested on the form.

Form 8821 does not authorize your appointee to advocate your position with respect to the Federal tax laws; to execute waivers, consents, or closing agreements; or to otherwise represent you before the IRS. If you want to authorize an individual to represent you, use Form 2848, Power of Attorney and Declaration of Representative.

Use Form 56, Notice Concerning Fiduciary Relationship, to notify the IRS of the existence of a fiduciary relationship. A fiduciary (trustee, executor, administrator, receiver, or guardian) stands in the position of a taxpayer and acts as the taxpayer. Therefore, a fiduciary does not act as an appointee and should not file Form 8821. If a fiduciary wishes to authorize an appointee to inspect and/or receive confidential tax information on behalf of the fiduciary, Form 8821 must be filed and signed by the fiduciary acting in the position of the taxpayer.

**Taxpayer identification numbers (TINs).** TINs are used to identify taxpayer information with corresponding tax returns. It is important that you furnish correct names, social security numbers (SSNs), individual taxpayer identification numbers (ITINs), or employer identification numbers (EINs) so that the IRS can respond to your request.

**APPENDIX-10  
LINKS**

General Counsel Order No. 4, Delegation of Authority to Chief Counsel (CCDM 30.2.2-6)	<a href="http://www.irs.gov/irm/part30/irm_30-002-002.html#d0e512">http://www.irs.gov/irm/part30/irm_30-002-002.html#d0e512</a>
Delegation Order 11-2 (Formerly Delegation Order 156, Rev. 17)	<a href="#">Internal Revenue Manual - 1.2.49 Delegation of Authorities for Communications, Liaison and Disclosure Activities</a>
Delegation Order 30-4 (Formerly Delegation Order 220, Rev. 3)	<a href="#">Internal Revenue Manual - 1.2.53 Delegation of Authorities for Chief Counsel Activities</a>
IRM 1.2.2, Servicewide Policies and Authorities, Delegations of Authority	<a href="http://publish.no.irs.gov/cat12.cgi?request=CAT1&amp;catnum=73276">http://publish.no.irs.gov/cat12.cgi?request=CAT1&amp;catnum=73276</a> <a href="#">Q</a>
IRM Chapter 11	<a href="http://www.irs.gov/irm/part11/index.html">http://www.irs.gov/irm/part11/index.html</a>
IRS Privacy Act Systems of Records	<a href="http://edocket.access.gpo.gov/2008/pdf/E8-4430.pdf">http://edocket.access.gpo.gov/2008/pdf/E8-4430.pdf</a>
Government Wide Systems of Records	<a href="http://www.defenselink.mil/privacy/govwide/">http://www.defenselink.mil/privacy/govwide/</a>
Department of Justice, Office of Privacy & Civil Liberties, Overview of the Privacy Act of 1974	<a href="http://www.justice.gov/opcl/1974privacyact-overview.htm">http://www.justice.gov/opcl/1974privacyact-overview.htm</a>
Treasury Directive 25-04	<a href="http://www.treasury.gov/about/role-of-treasury/orders-directives/Pages/td25-04.aspx">http://www.treasury.gov/about/role-of-treasury/orders-directives/Pages/td25-04.aspx</a>
Treasury Department Privacy Act Handbook, TDP 25-04	<a href="http://www.treasury.gov/FOIA/Documents/tdp25-04.pdf">http://www.treasury.gov/FOIA/Documents/tdp25-04.pdf</a>