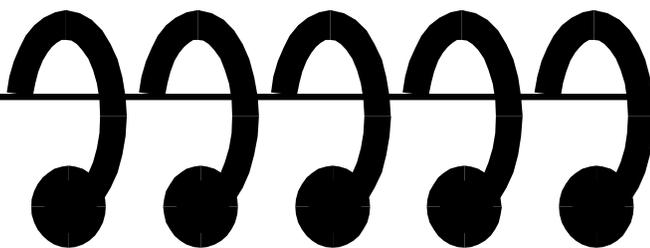


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Litigation)**



Disclosure Litigation Reference Book

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To the Reader:

This reference book covers the primary disclosure laws that affect the Internal Revenue Service (I.R.C. § 6103, the Freedom of Information Act (FOIA), and the Privacy Act of 1974), and related statutes. Together, these laws represent efforts by the Congress to strike a balance between a citizen's expectations of privacy and an open government. Guidance on legal matters concerning these disclosure laws is provided by the Office of Assistant Chief Counsel (Disclosure Litigation). This office is also responsible for defending litigation filed pursuant to I.R.C. § 6103, the FOIA, and the Privacy Act of 1974.

This reference book will be used at the June 2000 course "Disclosure Training for Chief Counsel Attorneys"; we hope that this material will also prove to be a useful reference tool for your office. We welcome your comments and suggestions for improvement.


JOHN B. CUMMINGS
Assistant Chief Counsel
(Disclosure Litigation)

N.B. Attorneys in the Office of Chief Counsel (Disclosure Litigation) prepared this textbook for training purposes only. Disclosure laws turn on factual nuances, and factual variations may make significant differences in providing the correct legal advice. This reference book is intended only as a reference; it may not used or cited as authority for setting or sustaining a legal position.

**Disclosure Litigation Reference Book
Table of Contents**

Introduction	Letter to Readers	i
Chapter 1	Part I: History and Overview, I.R.C. § 6103	1-1
	Part II: Civil Sanctions, I.R.C. § 7431	1-21
	Part III: Criminal Sanctions, I.R.C. § 7213, 7213A	1-55
Chapter 2	Part I: Definitions, I.R.C. § 6103(b)	2-1
	Part II: Disclosures to Persons with a Material Interest, I.R.C. § 6103(e)	2-13
	Part III: Disclosures Pursuant to Taxpayer’s Consent, I.R.C. § 6103(c)	2-23
	Part IV: Disclosure of Public Record Information	2-29
Chapter 3	Tax Administration Disclosures, I.R.C. § 6103(h)	3-1
Chapter 4	Tax Administration Investigative Disclosures, I.R.C. § 6103(k)(6)	4-1
Chapter 5	Disclosure for Nontax Criminal Purposes – In General	5-1
Chapter 6	Bankruptcy and Bankruptcy Fraud	6-1
Chapter 7	Currency Transactions/Money Laundering/Forfeiture	7-1
Chapter 8	FedState, I.R.C. § 6103(d)	8-1
Chapter 9	FOIA, 5 U.S.C. § 552	9-1
Chapter 10	Privileges	10-1
Chapter 11	Part I: Personnel Matters, I.R.C. § 6103(l)(4)	11-1
	Part II: The Privacy Act of 1974, 5 U.S.C. § 552a	11-7
Chapter 12	Testimony Authorizations	12-1
Chapter 13	Right to Financial Privacy Act	13-1
Chapter 14	Disclosures in Tax Exempt Bond Transactions	14-1

CHAPTER 1

PART I: I.R.C. § 6103 -- HISTORY AND OVERVIEW

OBJECTIVES

At the end of this chapter, you will be able to:

1. describe the historical development of the disclosure laws so that you understand the concepts forming the basis of I.R.C. § 6103; and
2. identify the major provisions of I.R.C. § 6103.

I. HISTORY OF TAX CONFIDENTIALITY LAWS ¹

A. Introduction

Except for a few periods in our history, tax information generally has not been available to the public—its 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 rules regarding disclosure were essentially left to the Executive branch.

By the mid-1970's, 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 total revision of section 6103, which was enacted as part of the Tax Reform Act of 1976. There, Congress eliminated Executive discretion regarding what information could be disclosed to which Federal and State agencies. Under this second approach, Congress established a new statutory scheme in which tax information was confidential and not subject to disclosure except to the extent explicitly provided by the Internal Revenue Code. Although there have been many amendments to

¹ Much of the information in this chapter was taken from "Report on Administrative Procedures of the Internal Revenue Service to the Administrative Conference of the United States," S. Document 266, 94th Cong., 2d Sess., 821-1028 (October 1975); Zaritsky, "Legislative History of Tax Return Confidentiality: Section 6103 of the Internal Revenue Code of 1954 and Its Predecessors," U.S. Congressional Research Service, Library of Congress, D.C.: 74-211A (1974); Janssen, "Income Tax Snooping Through History," Wall Street Journal, May 6, 1970, at 18; and Rogovin, "Privacy and Income Tax Returns," The Washington Post, October 13, 1974, at C4.

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 1862,² when tax information was posted on courthouse doors and sometime 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.³ The Revenue Act of 1870 confirmed this directive.⁴ 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.⁵

² Act of July 1, 1862, 12 Stat. 432. 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.

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

³ Treasury Decision (April 5, 1870).

⁴ Act of July 14, 1870, 16 Stat. 256, 259.

⁵ Income Tax Act of August 15, 1894, ch. 349, 28 Stat. 509.

In 1895, the Supreme Court declared the 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 1909,⁶ 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.⁷ The 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 seems to have been that paragraph six of the 1909 legislation was intended to make corporate tax returns "public records" which

⁶ Act of August 5, 1909, 36 Stat. 11,116.

⁷ Section 38 of the legislation read 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 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).

were open to public inspection.⁸ It was believed by many 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 view, held by a minority, 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.⁹

While 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 inadequate draftsmanship. Others thought the failure lay in 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.

The 1910 legislation, which appropriated funds for the necessary classifying, indexing, and processing of corporate returns, also stated:¹⁰

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.

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

⁸ "The truth is, however, that the intention was to provide complete publicity of the returns made by these corporations." Comments of Mr. Fitzgerald, 45 Cong. Rec. 4137 (1910).

⁹ "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." Comments of Mr. Smith, 45 Cong. Rec. 4136 (1910).

¹⁰ Act of June 17, 1910, 36 Stat. 468, 494.

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 was the notion of the 1909 Act 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. The history of tax information confidentiality may be traced to the Civil War Income Tax Act of 1862, when tax information was posted on courthouse doors and sometime 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.

2. Revenue Act of 1913

Even though the statute seemed to have two rather inconsistent threads, Congress wove both of them into the Tariff Act of 1913.¹¹ In pertinent part, it provided:

G.(d)1 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.

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.

3. 1913 to 1976

The enactment of each revenue act subsequent to 1913 was, at least through 1934, accompanied by debate on the question of whether or not individual and corporate returns should be made fully public. Two main arguments were made in favor of making tax returns public:

¹¹ Tariff Act of 1913, ch. 16, 38 Stat. 114.

(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 the former President Benjamin Harrison who, before the Union League Club of Chicago in 1898, stated:¹²

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.

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 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.

Secretary Mellon later observed that:¹³

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.

The proponents of full disclosure had a limited victory in 1924. The Revenue Act of 1924 provided that the Commissioner would:¹⁴

¹² Rogovin, Privacy and Income Tax Returns, The Washington Post (Oct. 13, 1974), at C4.

¹³ Hearings on Revenue Revision 1925 Before the House Ways and Means Comm., 69th Cong., 1st Sess. 8-9 (1925).

¹⁴ Act of June 2, 1924, ch. 234, 43 Stat. 253, 293.

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.¹⁵

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.¹⁶ 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.¹⁷

In 1934, after a widely publicized income tax evasion scandal, those favoring publicity obtained enactment of another form of limited disclosure. The Revenue Act of 1934 contained provision for the mandatory filing of a so-called "pink slip" with the taxpayer's return.¹⁸ The pink slip, to be filed with the return, 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.¹⁹

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 open to inspection only 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

¹⁵ 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.

¹⁶ U.S. v. Dickey, 268 U.S. 378 (1925).

¹⁷ Act of Feb. 26, 1926, ch. 27, 44 Stat. 9, 52.

¹⁸ Act of May 10, 1934, ch. 277, 48 Stat. 680, 698.

¹⁹ Act of April 19, 1935, ch. 74, 49 Stat. 158.

available to federal agencies.²⁰ The 1930's saw a new technique of more general access being granted to specific agencies as well as to congressional committees. The 1940's, 1950's, and 1960's 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 diverse history on disclosure reveals the existence of a statute which, 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 committed discretion to the President, and an agency headed by his designee, it was not surprising that the power was exercised toward expanding the use of information. Indeed, it would have been unrealistic to assume that the President could have been expected to resist agency arguments for more information on which to base important decisions, even though such information might not be necessary and might well be used for many purposes other than that apparently intended.

E. Developments in the 1970's

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

During 1973, two subcommittees of the House of Representatives held hearings regarding the Department of Agriculture's need for the tax data disclosed by the two executive orders.²² During these hearings, sentiments against the orders were expressed. Officers of the Department of Justice testified that the two

²⁰ T.D. 2961, 2 C.B. 249 (Jan. 7, 1920)

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

²² 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., 1st Sess. (1973).

orders were prototypes of future orders opening other tax returns to inspection by other agencies. Responding to the adverse sentiment expressed in these two hearings, the President revoked both orders on March 21, 1974.

The concern over tax return confidentiality that remained after revocation of the two orders was increased by disclosures made in hearings of both the Senate Select Committee on Presidential Campaign Activities (Watergate Committee) and the House Judiciary Committee investigating the possible impeachment of President Nixon. The Watergate Committee's hearings revealed that former White House counsel John Dean had sought from the IRS political information on so-called "enemies." Furthermore, it was disclosed to that committee that the White House actually was supplied information on 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's impeachment inquiry also revealed 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:²³

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.

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 on the proper restrictions which should be placed on the disclosure of federal income tax information. This report was issued on June 9, 1976, and suggested major changes in the distribution of tax data to the Department of Justice for both tax and nontax law enforcement, distribution of tax data to the states and to local governments, and transfer of information to the President and the executive agencies. It also recommended more severe penalties for wrongful disclosure of tax data. The commission did not recommend a general denial of tax data to nontax federal agencies.

On June 10, 1976, the Senate Finance Committee issued its report on H.R. 10612, the Tax Reform Act of 1976, in which it proposed substantial revisions in

²³ Report on the impeachment of Richard M. Nixon, President of the United States, H.R. Rep. No. 93-1305 at 3 (1974).

the rules governing tax return confidentiality.²⁴ The Finance Committee's proposal dealt with the same general issues as had the Privacy Protection Study Commission's report, 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 of 1976.

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

A. Congressional Philosophy behind the 1976 Amendments to Section 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 recognized that citizens reasonably expected that the tax information they were required to supply to the IRS would be kept private. If the IRS abused that reasonable expectation of privacy, the 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 purposes. 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 felt 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 limited situations, as delineated by the Internal Revenue Code, where disclosure is warranted. In each area of allowable disclosure, Congress attempted to balance the particular office or agency's need for the information involved with the citizen's right to privacy, as well as the impact of the disclosure upon the continuation of compliance with the voluntary tax assessment system.²⁵ In short, Congress undertook direct responsibility for determining the types and manner of permissible disclosures.

²⁴ S. Rep. No. 94-938 at 315-349, 1976-3 C.B. (Vol. 3) 353-387.

²⁵ Staff of Joint Committee on Taxation, 94th Cong., General Explanation of the Tax Reform Act of 1976, 313-316 (Comm. Print 1976), 1976-3 C.B. (Vol. 2) 325-328.

B. Structure of Tax Information Confidentiality Provisions

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

- The general rule of I.R.C. § 6103(a) making tax returns and tax return information confidential except as expressly authorized in the Internal Revenue Code. Definitions of key terms, such as return and return information, are contained in I.R.C. § 6103(b).
- The exceptions to the general rule detailing permissible disclosures—I.R.C. §§ 6103(c)–6103(o).
- Technical, administrative, and physical safeguard provisions to prevent the recipients of tax information from using or disclosing the information in an unauthorized manner, and accounting, recordkeeping and reporting requirements that detail what disclosures are made for what purposes to assist in Congressional oversight. I.R.C. § 6103(p).
- Criminal penalties, including a felony for the willful unauthorized disclosure of tax information, a misdemeanor for the unauthorized inspection of tax information,²⁶ and a civil cause of action for the taxpayer whose information has been disclosed in a manner not authorized by section 6103. I.R.C. §§ 7213 (criminal penalty for unauthorized disclosure), 7213A (criminal penalty for unauthorized inspection), 7431 (civil damages provision).

C. Summary of Permissible Disclosures

1. Disclosures to taxpayer's designees (consent) - section 6103(c).
2. Disclosures to state tax officials - section 6103(d).
3. Disclosures to the taxpayer and other persons having a material interest - section 6103(e).
4. Disclosures to committees of Congress - section 6103(f).
5. Disclosures to the President and White House - section 6103(g).
6. Disclosures to federal employees for tax administration purposes - section 6103(h).

²⁶ In addition, the unauthorized access of tax information in government computer files is a felony under 18 U.S.C. § 1030(a)(2)(B).

7. Disclosures to federal employees for nontax law enforcement purposes - section 6103(i).
8. Disclosures for statistical purposes - section 6103(j).
9. Disclosures for certain miscellaneous tax administration purposes - section 6103(k).
10. Disclosures for purposes other than tax administration - section 6103(l).
11. Disclosures of taxpayer identity information - section 6103(m).
12. Disclosures to contractors for tax administration purposes - section 6103(n).
13. Disclosures with respect to wagering excise taxes - section 6103(o).

D. Many of these areas will be covered in detail during your training session. Below is a brief survey of the remaining areas.

1. Congress

While the Congress, particularly its tax writing committees, requires access to tax information in certain instances in order to carry out its legislative responsibilities, it was decided that the Congress could continue to meet these responsibilities under more restrictive disclosure rules than those provided under pre-1976 law.

The Ways and Means, and Finance committees, as well as the Joint Committee on Taxation, can have access upon the written request of the respective chairman or the Chief of Staff of the Joint Committee on Taxation. The nontax committees are to be furnished tax 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 behalf of the committee for disclosure of the information.

On a related matter, 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/her.

Members of Congress in their individual capacity are entitled to no greater access to tax information than any other person inquiring about the tax affairs of a third party. Disclosure of tax 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 tax information is protected from disclosure unless a written request or authorization is obtained from the taxpayer. Chapter 4 of the Disclosure of Official Information Handbook, IRM 1.3.4, contains further instructions concerning disclosures in response to congressional inquiries.

2. White House

Disclosure of tax information can be made to the President and/or to certain named employees of the White House upon the written request of the President, signed by him personally. A request is to 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 Congress felt that the White House should report to the Congress regarding the disclosures of tax information made to it. Consequently, quarterly reporting requirements were imposed upon the White House. Similar requirements were also provided with respect to tax checks made by other federal agencies.

3. Nontax Civil Cases

Section 6103 generally prohibits the disclosure of tax information to the Justice Department or other enforcement agencies in nontax civil cases.

4. General Accounting Office (GAO)

Section 6103 authorizes the GAO to inspect tax information to the extent necessary in conducting an audit of the IRS or the Bureau of Alcohol, Tobacco and Firearms required by section 117 of the Budget and Accounting Procedures Act of 1950. Congress intended that the GAO examine tax 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. It was not intended that the GAO would superimpose its judgment upon that of the IRS in specific tax cases.

Section 6103 allows the GAO to have access to tax information in the possession of any federal agency when the GAO is auditing a program or activity of the agency which involves the use of tax information. Furthermore, under certain circumstances, the GAO is permitted access to tax information that a federal agency could have requested for nontax administration purposes.

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

Section 6103 also authorizes the GAO to review and evaluate the compliance by federal and state agencies that have received tax information from the IRS with the requirements regarding the use and safeguarding of tax information.

Finally, the GAO may have access to tax information when it audits IRS operations as the agent of the tax writing committees.

5. Inspector General

In enacting the Internal Revenue Service Restructuring and Reform Act of 1998, Congress conferred upon the new Office of Treasury Inspector General for Tax Administration (TIGTA), all the investigatory duties and responsibilities of the Office of the Chief Inspector. Pursuant to I.R.C. § 6103(h)(1), TIGTA officers and employees whose official tax administration duties require access to returns and return information may access returns and return information, the same access was accorded to officers and employees of the Office of the Chief Inspector. No written notice of intent to access is required for the TIGTA to obtain information.

6. Statistical Use

Congress recognized the importance of tax information for other federal agencies' statistical and research functions. Since there did not appear to be any real likelihood that the use of tax 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 the taxpayers whose tax information is used, Congress decided that the use of tax information should be available for statistical use by certain agencies other than the IRS. The primary recipient of tax information under this provision is the Census Bureau.

7. Inspection on a General Basis

Section 6103 permits limited disclosures on a general basis to a number of agencies in certain situations where the tax information is 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, and refund offsets for child support cases and federal debt collection purposes. Additionally, the Internal Revenue Service Restructuring and Reform Act of 1998 amended IRC 6103(l) by adding section 6103(l)(17) which requires the IRS to disclose section 6103 protected records to officers and employees of NARA, upon written request of the Archivist of the United States, for purposes of the appraisal of such records for destruction or retention.

8. Miscellaneous Disclosures

Congress decided that it was necessary to allow the disclosure of tax information in certain miscellaneous situations. In many of these situations, disclosure was permitted under prior law. Other areas, primarily associated with the disclosure of mailing addresses, relate generally to debt collection issues.

9. Recordkeeping

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

In addition to the record keeping requirements imposed on the IRS, section 6103 provides that each federal and state agency that receives tax information is required to maintain a standardized system of permanent records on the use and disclosure of that information. Maintaining such records is a prerequisite to obtaining and continuing to receive tax information.

10. Safeguards

Congress decided that although it is necessary to permit the disclosure of tax information to other federal and state agencies in certain situations for purposes other than the administration of the federal tax laws, no such disclosure should be made unless the recipient agency complies with a comprehensive system of administrative, technical, and physical safeguards designed to protect the confidentiality of the tax information and to make certain that the information is not used for purposes other than the purposes for which it was disclosed.

Section 6103 provides that no tax information may be furnished by the IRS to another agency (including commissions, states, etc.) unless the other agency establishes procedures satisfactory to the IRS for safeguarding the tax information it receives. Disclosure of tax information to other agencies is conditioned on the recipient agency maintaining a

secure place for storing the information, restricting access to the information to people to whom disclosure can be made under the law, providing other safeguards necessary to keeping the information confidential, and returning or destroying the information when the agency is finished with it. The IRS is to review, on a regular basis, safeguards established by other agencies.

If there are any unauthorized disclosures by employees of the other agency, disclosure of tax information to that agency may be discontinued until the IRS is satisfied that adequate protective measures have been taken 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 tax 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 tax information is disclosed for purposes other than the administration of the federal tax laws, Congress believed that it must review very closely the use of tax information and the extent to which taxpayer privacy is being protected. In order to permit that review, Congress decided to require that the IRS make certain comprehensive annual reports to the Joint Committee on Taxation as to the use of tax information.

Specifically, section 6103 requires the IRS to make a confidential report to the Joint Committee each year on all requests (and the reasons therefor) received for disclosure of tax information. The report is to include, as a separate section to be publicly disclosed, a listing of all agencies receiving tax information, the number of cases in which disclosure was made to them during the year, and the general purposes for which the requests were made. In addition, the IRS is required to file a quarterly report with the tax committees regarding procedures and safeguards followed by recipients of tax information.

12. Enforcement

Congress decided 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 a prohibition against disclosure against present and former officers and employees of the United States, as well as certain other designated individuals.

Congress amended section 7213 to make a criminal violation of the disclosure rules a felony, with a fine up to \$5,000, and up to five years imprisonment. United States v. Richey, 924 F.2d 857 (9th Cir. 1991); see In re Seper (United Liquor Company v. Gard), 705 F.2d 1499 (9th Cir. 1983); Reporters Committee for Freedom of the Press v. American Telephone and Telegraph Company, 593 F.2d 1030 (D.C. Cir. 1978), cert. denied, 440 U.S. 949 (1979). In 1996, Congress amended 18 U.S.C. § 1030(a)(2) to make the unauthorized access of government computers a felony. This provision would include the unauthorized access of tax information in government computer files. In 1997, Congress enacted I.R.C. § 7213A to specifically make the unauthorized inspection of tax information a misdemeanor.

Congress also enacted what is now section 7431 and established a civil remedy for any taxpayer damaged by an unlawful disclosure of tax information.²⁷ Liability extends to actual damages plus court costs. Punitive damages are also authorized in situations where the unlawful disclosure is willful or is the result of gross negligence. Because of the difficulty in establishing in monetary terms the damages sustained by a taxpayer as the result of the invasion of privacy caused by an unlawful disclosure of tax information, section 7431 provides that these damages are, in no event, to be less than liquidated damages of \$1,000 for each disclosure.

²⁷ The civil damage provision originally permitted the wronged party to bring an action against the federal employee who made the disclosure (section 7217). In 1982, Congress changed the law by repealing section 7217, and enacting section 7431. Under this provision, the civil action resulting from a disclosure made by a federal employee could be brought against the United States, rather than against the employee. Individuals other than federal employees who can be sued under this provision (including, for example, IRS contractors and state tax officials) can be held liable for damages in their individual capacity.

Congress did not intend that a disclosure of returns or return information made pursuant to a good faith, but erroneous interpretation of the confidentiality rules would constitute an actionable disclosure. Instead, disclosures that would give rise to civil liability are limited to those situations where the unauthorized disclosure results from a willful or negligent failure of the person to comply with the law.

13. Miscellaneous Disclosure Authority

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 Internal Revenue Code. Examples of other sections of the Code which regulate the disclosure of tax information in certain circumstances include:

- section 274(h)(6) Caribbean Basin exchange agreements
- section 4424 Wagering tax information
- section 6104 Exempt organizations and employee plans information
- section 6108 Statistical studies
- section 6110 Written determinations (letter rulings, determination letters, technical advice memoranda, and Chief Counsel Advice)
- section 6323(f) Notice of lien
- section 7461 Publicity of Tax Court proceedings

Swierkowski v. United States, 620 F. Supp. 149 (E.D. Cal. 1985), aff'd without opinion, 800 F.2d 1145 (9th Cir. 1986), cert. denied, 479 U.S. 1093 (1986); O'Donnell v. United States, 56 A.F.T.R. 2d 5462, 85-1 USTC ¶9379 (S.D. Fla. 1985) (disclosures authorized by section 3402 and regulations thereunder); Messinger v. United States, 769 F. Supp. 935 (D. Md. 1991) (disclosures authorized by section 3406); Chandler v. United States, 71A A.F.T.R.2d 93-4559, 91-2 USTC ¶ 50,460 (W.D. Wash. 1991) and Tweedy v. United States, 70 A.F.T.R.2d 6062, 93-1 USTC ¶ 50,024 (D. Idaho 1992), aff'd [by Circuit on section 6103(k)(6) grounds], 74 A.F.T.R.2d 5003 (9th Cir. 1994) (disclosures authorized by sections 6331 and 6323).

III. SECTION 3802 OF THE IRS RESTRUCTURING AND REFORM ACT

Section 3802 of the IRS Restructuring and Reform Act mandated that the Treasury Department and the Joint Committee on Taxation conduct studies on the provisions regarding taxpayer confidentiality. The studies are to examine the present protections for taxpayer privacy, any need for third parties to use tax information, whether publicizing persons who are legally required to file tax returns but do not do so would achieve greater levels of voluntary compliance, and the interrelationship between the Freedom of Information Act and section 6103. The Joint Committee published its study on January 28, 2000. Staff of the Joint Committee on Taxation, 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 (Comm. Print 2000) (<http://www.house.gov/jct/pubs00.html>). This is the first comprehensive review of the disclosure provisions since the 1976 amendments. The Joint Committee study generally endorsed the structure and approach of the current statute. The Treasury study is expected in the summer.

IV. CONCLUSION

A distinguishing characteristic and, indeed, one of the strengths of American tax administration, is the self-assessment feature of the system. We, as employees of the Office of Chief Counsel of 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 clear. By the single act of filing a tax return, a record is created and also a trust. We are responsible for maintaining both. Probably there is no other government agency which has 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 which 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 which 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 providing legal advice on disclosure.

CHAPTER 1

PART II: CIVIL DAMAGES FOR UNAUTHORIZED DISCLOSURES

OBJECTIVES

At the end of this chapter, you will be able to:

1. recognize the situations which give rise to I.R.C. § 7431 litigation; and
2. give advice whether a complaint alleging jurisdiction under § 7431 should survive summary dismissal.

I. INTRODUCTION

In subsequent chapters, consideration is given to the nature of tax information, the identity of the taxpayer and the circumstances under which tax information may be disclosed. This portion of Chapter 1 considers the civil remedy available to a taxpayer for the unauthorized disclosure of tax information.

A. I.R.C. § 7431

The statute - In 1982, I.R.C. § 7431 replaced I.R.C. § 7217. (See Compro-Tax, Inc. et al. v. IRS, et al., 1999 U.S. Dist. LEXIS 5972, 83 AFTR2d ¶ 2410 (S.D. Tex. 4/9/99) (where magistrate judge recommended dismissal of suit brought under repealed § 7217. Court did not read § 7217 claim as a § 7431 claim and advised plaintiffs to amend complaint.)) The purpose of this amendment was to substitute the United States, rather than the individual employees, as the defendant in an unauthorized disclosure action. See discussion of proper party defendant, infra. In 1996, I.R.C. § 7431 was amended by the Taxpayer Browsing Protection Act to make civil damages available for the unauthorized inspection of returns and return information. The Act also added subsection 7431(e) which provides for notification to the taxpayer when any person is criminally charged by indictment or information with inspection or disclosure of a taxpayer's return or return information in violation of I.R.C. § 7213(a), I.R.C. § 7213A, or 18 U.S.C. § 1030(a)(2)(B). The essential elements of I.R.C. § 7431 are set forth below.

- 1. I.R.C. § 7431(a)(1):** If any officer or employee of the United States knowingly, or by reason of negligence, inspects or discloses any return or return information with respect to a taxpayer in violation of section 6103, such taxpayer may bring a civil action for damages against the United States in a district court of the United States.

2. I.R.C. § 7431(b): No liability shall arise under this section with respect to any inspection or disclosure which results from a good faith, but erroneous, interpretation of section 6103, or which is requested by the taxpayer.

3. I.R.C. § 7431(c): In any action brought under subsection (a), upon a finding of liability on the part of the defendant, the defendant shall be liable to the plaintiff in an amount equal to the sum of--

(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,

(3) in the case of a plaintiff which is described in section 7430(c)(4)(A)(ii), 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).

4. I.R.C. § 7431(d): Notwithstanding any other provision of law, an action to enforce any liability created under this section may be brought, without regard to the amount in controversy, at any time within two years after the date of discovery by the plaintiff of the unauthorized inspection or disclosure.

5. I.R.C. § 7431(e): If any person is criminally charged by indictment or information with the inspection or disclosure of a taxpayer's return or return information in violation of -

(1) paragraph (1) or (2) of section 7213(a),

(2) section 7213A(a), or

(3) subparagraph (B) of section 1030(a)(2) of Title 18, United States Code,

the Secretary shall notify such taxpayer as soon as practicable of such inspection or disclosure.

B. Elements of an I.R.C. § 7431 action

1. An unauthorized inspection or disclosure of return information;
2. The inspection or disclosure was made knowingly or by reason of negligence; and
3. The inspection or disclosure violated I.R.C. § 6103.

C. Case law

1. Flippo v. United States, 670 F. Supp. 638, 641 (W.D.N.C. 1987), aff'd mem., 849 F.2d 604 (4th Cir. 1988) (table case).
2. Christensen v. United States, 733 F. Supp. 844, 848 (D.N.J. 1990), aff'd, 925 F.2d 416 (3d Cir. 1991) (table case).
3. Weiner v. IRS, 789 F. Supp. 655, 656 (S.D.N.Y. 1992), aff'd, 986 F.2d 12 (2d Cir. 1993).
4. Wilkerson v. United States, 67 F.3d 12 (5th Cir. 1995) (§ 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 § 6103).
5. Sharer v. United States, 1999 U.S. Dist. LEXIS 2439, 99-1 U.S.T.C. ¶ 50,316, 83 AFTR2d ¶ 1331 (E.D. Cal. 2/10/99) (plaintiff bears burden of proving there was an unauthorized disclosure of return information.)
6. Tobin v. Troutman et al., 1999 U.S. Dist. LEXIS 9669, 99-2 U.S.T.C. ¶ 50,628, 83 AFTR2d ¶ 2951 (W.D. Ky. 6/8/99). Plaintiff failed to state a claim under § 7431 where the information allegedly inspected was retained copies of the taxpayer's returns and workpapers in the taxpayer's home. The court determined that the information was not return

information because it had not been received by the IRS. Citing Stokwitz v. U.S., 831 F.2d 893 (9th Cir. 1987).

D. Good faith but erroneous interpretation defense under I.R.C. § 7431(b)

1. The United States is not liable under I.R.C. § 7431 for unauthorized disclosures of returns or return information which are the result of a good faith, but erroneous, interpretation of I.R.C. § 6103. Good faith is generally judged by an objective standard--whether a reasonable Service employee would have known of rights provided and of the agency's applicable regulations and internal rules. 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 government has officially adopted the position that good faith is an affirmative defense which must be pled by the government (and not negated by the taxpayer.)

a. Bad faith must be pled.

(1) Davidson v Brady, 732 F.2d 552, 553-54 (6th Cir. 1984)

(2) Fostvedt v. United States, 16 F.3d 416 (10th Cir. 1994), aff'g 824 F. Supp. 978, 984 (D. Colo. 1993)

b. Good faith is an affirmative defense.

(1) McDonald v. United States, 102 F.3d 1009 (9th Cir. 1996)

(2) Jones v. United States, 97 F.3d 1121 (8th Cir. 1996)

(3) Hrubec v. National R.R. Passenger Corp., 981 F.2d 962, 964 (7th Cir. 1992)

(4) Sinicki v. United States, 1998 U.S. Dist. LEXIS 2015 (S.D.N.Y. 1998)

(5) Sharer v. United States, 1999 U.S. Dist. LEXIS 2439, 99-1 U.S.T.C. ¶ 50,316, 83 AFTR2d ¶ 1331 (E.D. Cal. 2/10/99) (government bears burden of proving revenue agent acted in good faith.)

2. Case law

- a. Barrett v. United States, 51 F.3d 475 (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 I.R.C. § 6103 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. But see May v. United States, 1995 WL 761107, 95-2 U.S.T.C. ¶ 50,605 (W.D. Mo. Oct. 5, 1995), aff'd 1998 U.S. App. LEXIS 2833; 98-1 U.S. Tax Cas. (CCH) ¶ 50,220 (8th Cir. 1998) (since letters conformed to IRM provisions, disclosures fell within safe harbor of the I.R.C. § 7431(b) good faith provision).
- b. Coplin v. United States, 91-1 U.S.T.C. ¶ 50,035 (W.D. Mich. 1991), aff'd, 952 F.2d 403 (6th Cir. 1991) (table case), cert. denied, 112 S. Ct. 2943 (1992). The court cited to Harlow v. Fitzgerald, 457 U.S. 800 (1982) in enunciating an objective good faith standard to determine whether the Revenue Officer had acted in good faith. The court determined that the Revenue Officer reasonably believed that she was permitted by I.R.C. § 6103 to disclose lien information to collect delinquent taxes and accordingly no liability existed.
- c. Davidson v. Brady, 732 F.2d 552 (6th Cir. 1984). I.R.C. § 7217 action in which court employed an objective good faith standard.
- d. Diamond v. United States, 944 F.2d 431 (8th Cir. 1991), reh'g denied, 1991 U.S. App. LEXIS 25773 (8th Cir. Oct. 30, 1991). The court determined that although it was improper for the Special Agent to identify himself as an employee of the Criminal Investigation Division in the circular letters that he sent to Dr. Diamond's patients, no liability existed because he had followed the IRM.
- e. Huckaby v. United States, 794 F.2d 1041 (5th Cir. 1986), reh'g denied, clarified 804 F.2d 297 (5th Cir. 1986). Revenue Officer disclosed return information based upon taxpayer's oral consent. The court found that I.R.C. § 6103(c) requires a written consent and because the statute and regulations were clear, the Revenue Officer's failure to follow them could not be a good faith, but erroneous, interpretation of I.R.C. § 6103.

f. Gandy v. United States, No. 6:96cv730 (E.D. Tex. January 15, 1999), appeal docketed No. 99-40205 (5th Cir. Feb 23, 1999). The district court concluded that the special agent had made unauthorized disclosure in context of in-person interviews by identifying himself as a CID agent, but liability did not attach because the agent acted in good faith belief that IRM and § 6103 permitted the disclosure.

g. Agbanc v. United States, No. 87-383 (D. Ariz. Dec. 20, 1988). Error by Revenue Agent in sending out wrong report did not occur as a result of a good faith, but erroneous, interpretation of I.R.C. § 6103, but as a result of negligence.

h. Balanced Financial Management, Inc. v. Fay, 662 F. Supp. 100 (D. Utah 1987). Prefiling notification letters issued in compliance with Revenue Procedure were sent in good faith.

i. Datamatic Services Corp. v. United States, 88-1 U.S.T.C. ¶ 9163 (N.D. Cal. 1987). Because prefiling notification letters followed Revenue Procedure, good faith defense was available.

j. Husby v. United States, 672 F. Supp. 442 (N.D. Cal. 1987). The Service admitted error in its deficiency assessment against plaintiff and its subsequent collection activities, but contended that disclosures were the result of honest mistakes. Court found that good faith defense is not a general good faith defense, and that it only applies to good faith, but erroneous, interpretations of I.R.C. § 6103.

k. Ingham v. United States, 167 F.3d 1240 (9th Cir. 1999) without deciding whether disclosing to ex-husband in a whipsaw context that former wife had filed a refund was authorized by § 6103(h)(4), the court determined that the government was protected by good faith defense because the IRM instructed the agents that such disclosure was permitted.

l. Johnson v. Sawyer, 640 F. Supp. 1126 (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. Failure to follow these established procedures supported court's finding of bad faith.

m. Jones v. United States, 954 F. Supp. 191 (D. Neb. 1997), 81 A.F.T.R.2d 98-802, 97-1 USTC ¶ 50,489, after remand from 97 F.3d 1121 (8th Cir. 1996), reversing 898 F. Supp. 1360 (D. Neb. 1995) (finding that a Special Agent who failed to consult either the

Internal Revenue Manual or the statute before making a disclosure to a confidential informant that a search warrant was to be executed the following day at the taxpayers' place of business failed to establish a good faith but erroneous interpretation of the statute.)

n. LeBaron v. United States, 794 F. Supp. 947 (C.D. Cal. 1992). The court cited to Huckaby in applying an objective good faith standard. The court found nothing in the statute, case law, or Service policies or regulations to suggest that the Service personnel who made the disclosure had interpreted I.R.C. § 6103 in an objectively unreasonable manner.

o. McLarty v. United States, 741 F. Supp. 751 (D. Minn. 1990) (subsequent history omitted). The court initially adopted a test that contained both objective and subjective components in judging a good faith defense. Following the decision in Diamond, the court issued a subsequent opinion in which it adopted an objective standard (i.e., did the wrongful disclosure of the plaintiff's return information violate a clearly established statutory right of which a reasonable person would have known). The court found that the Service agent and AUSA were presumed to know as a general matter that it is improper to disclose return information. Accordingly, the taxpayer's motion for summary judgment with respect to the good faith defense was subsequently granted. McLarty v. United States, No. 3-89-538 (D. Minn. Dec. 10, 1991).

p. Rhodes v. United States, 903 F. Supp. 819 (M.D. Pa. 1995). Upon reconsideration, the court rejected the Fifth and Eighth Circuits' reasoning in Barrett and Diamond, *supra*, respectively, that the disclosure of the fact of criminal investigation was not "necessary" to obtain information sought. Court fashioned its own objective standard: "Would a reasonable agent, under the circumstances of the case and knowing that disclosures 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?"

q. Rorex v. Traynor, 771 F.2d 383 (8th Cir. 1985). The taxpayers entered into an installment payment plan, which was subsequently disallowed by Revenue Officer's manager. The Revenue Officer failed to notify taxpayers of disallowance and served a notice of levy on the taxpayers' bank. The court, using an objective standard, found that a reasonable person would have known that he was violating the taxpayers' rights under I.R.C. § 6103.

r. Ryan v. United States, 82 AFTR2d 7454, 99-1 USTC ¶ 50,126 (D. Md.1998) (although court determined that disclosure was permitted under § 6103(h)(4), because it was a close matter, the court also held that the disclosure was made with the good faith belief that 6103 permitted it.)

s. Rubel v. United States, 89-1 U.S.T.C. ¶ 9149 (W.D.N.C. 1988). Government officials acted in good faith in issuing press release.

t. William E. Schrambling Accountancy Corp. v. United States, 689 F. Supp. 1001 (N.D. Cal. 1988), rev'd, 937 F.2d 1485 (9th Cir. 1991), cert. denied, 112 S. Ct. 956 (1992). Revenue Officer should have been aware that taxpayer was entitled to a final notice and demand. Court applied Huckaby and found that the Revenue Officer did not act in good faith.

u. Schachter v. United States, 77 F.3d 490 (9th Cir. 1996). Circular letters were sent to present and former customers of taxpayers' company. The IRM in effect at the time of the disclosures recommended that special agents state that the taxpayer was "under investigation." The IRM also instructed special agents to identify themselves in personal interviews by showing their badge and credentials. Court found, based on these provisions, that a reasonable special agent would not have known that he should not have disclosed that taxpayer was under investigation. Thus, agent and Service acted in good faith and were not liable under I.R.C. § 7431.

v. Smith v. United States, 703 F. Supp. 1344 (C.D. Ill. 1989), aff'd in part & rev'd in part, 964 F.2d 630 (7th Cir. 1992), cert. denied, 113 S. Ct. 1015 (1993). District Director's disclosures to Illinois Department of Revenue did not follow Implementing Agreement and I.R.C. § 6103(d); moreover, the District Director was "no stranger to the disclosure provisions." Using the objective standard in Huckaby, the court found a lack of good faith and held for plaintiff. On appeal, the Seventh Circuit reversed the district court, holding that the Agreement on Coordination satisfied I.R.C. § 6103(d)'s written request requirement. The court therefore did not address the good faith issue.

w. Traxler v. United States, 88-2 U.S.T.C. ¶ 9627 (E.D. Cal. 1988). The court found that even if deficiency assessment was found to be unauthorized, there would be no liability because of the good faith exception and compliance with I.R.C. § 6103(k)(6).

E. Damages for unauthorized disclosure -- I.R.C. § 7431(c)

1. The statute provides two alternative damage computations. Plaintiff may recover the greater of--

a. statutory damages of \$1,000 for each act of unauthorized inspection or disclosure, or

b. the sum of actual damages plus, in the case of a willful inspection or disclosure or a disclosure that is the result of gross negligence, punitive damages, plus the costs of the action.

2. Statutory damages

a. 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.

b. Case law

(1) Rorex v. Traynor, 771 F.2d 383, 385 (8th Cir. 1985). Although levy contained multiple items of return information, the court awarded only \$1,000.

(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.

(3) Marré v. United States, 92-2 U.S.T.C. ¶ 50,398 (S.D. Tex. 1992). The court stated that it would not carve up a single communication into multiple disclosures. In addition, the disclosure of the same information to the same person on multiple occasions did not result in multiple disclosures.

(4) Smith v. United States, 730 F. Supp. 948, 954 (C.D. Ill. 1990) (subsequent history omitted). Although a memorandum discussing four separate tax years was disclosed to two people (at one time), the court found only one act of disclosure.

c. An act of disclosure is determined by the number of persons initially provided information by the Service; 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) Mallas v. United States, 92-2 U.S.T.C. ¶ 50,376 (M.D.N.C. 1992), aff'd, 993 F.2d 1111 (4th Cir. 1993). The district court and the circuit court held that the disclosure to two named persons in one letter constituted two disclosures.

(2) Johnson v. Sawyer, 640 F. Supp. 1126, 1136 (S.D. Tex. 1986) (subsequent history omitted). The court determined that damages for unauthorized disclosures in a press release are determined by the number of media outlets that were sent the document, not the number of media persons who may have actually read the release. The court stated that "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)."

(3) Miller v. United States, 66 F.3d 220 (9th Cir. 1995), cert. den., 116, S. Ct. 1317 (1996). Service employee made unauthorized disclosures to a newspaper reporter. Taxpayer argued that district court erred in limiting the damages under I.R.C. § 7431 to \$1,000 since the disclosure to the reporter was tantamount to disclosing information to an entire audience. Circuit court affirmed and noted that "in modern era of mass communication, strong public policy concerns exist for not allowing this form of second party dissemination to be actionable." Court held that disclosure to person(s) likely to publish the information is relevant only in determining degree of negligence or recklessness involved, not number of disclosures.

(4) Smith v. United States, 730 F. Supp. 948, 954 (C.D. Ill. 1990) (subsequent history omitted). A memorandum to two people at one time was only one act of disclosure.

(5) Barrett v. United States, 917 F. Supp. 493 (S.D. Tex. 1995), aff'd, 100 F.3d 35 (5th Cir. Tex. 1996). Fifth Circuit found that the Service violated Barrett's rights and that he was entitled to damages. On remand, the district court

found that Barrett was entitled to receive statutory damages in the amount of \$260,000.00, based on the 260 patients who received circular letters from the Service.

3. Actual damages are rarely recovered due to the difficulty in establishing damages based upon the disclosure of tax information.

a. Wilkerson v. United States, No. 3:92 CV 78 (E.D. Tex. May 16, 1994), rev'd, 67 F.3d 112 (5th Cir. 1995). The district court awarded plaintiff \$229,547.19 based primarily upon the value of her business, "which was effectively destroyed by the unauthorized disclosures" in levies. Several customers testified that they ceased doing business with plaintiff as a result of the levies. However, the damages awarded by the district court under I.R.C. § 7431 were completely reversed on other grounds by the Fifth Circuit on appeal. The Fifth Circuit held no I.R.C. § 7431 liability and, thus, no damages.

b. But see Payne v. United States, No. H-93-1738 (S.D. Tex. Final order entered 12/13/99), appeal recommended. Here, the district court determined in its findings of fact and conclusions of law entered March 19, 1999, that the United States was liable to the plaintiff, a lawyer, in excess of \$1.5 million for the loss of income to his firm resulting from the disclosure of the fact of a criminal investigation. The district court found the United States liable because the special agent had introduced himself as a special agent of the Criminal Investigation Division conducting a criminal investigation and 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. The court concluded that the plaintiff had presented evidence to demonstrate that the drop in income of his firm resulted from the disclosures. The court further found that the special agent had acted egregiously, entitling the plaintiff to an award of punitive damages, because the special agent asked individuals who knew the plaintiff if the plaintiff was involved with drugs and because the special agent came to plaintiff's place of business without an appointment for the initial interview.

c. But see Jones v. IRS, 9 F.Supp.2d 1119 (D. Neb. 1998). Common law elements of causation must be proven to recover actual damages under § 7431. That is, plaintiff must demonstrate that but for the disclosure the harm would not have occurred and that 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.

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

(1) At the trial court level in Rorex v. Traynor, the taxpayers were awarded \$15,000 each for emotional suffering. However, the Eighth Circuit found that plaintiffs had produced no evidence of emotional distress other than personal embarrassment. The court did not believe that "hurt feelings alone constitute actual damages compensable under the statute." 771 F.2d 383, 387-88 (8th Cir. 1985).

(2) In Wilkerson, the district court also awarded \$20,000 for emotional distress. This award was also overturned by the Fifth Circuit on appeal.

(3) Jones v. United States, 9 F. Supp. 2d 1119, 1149 (D. Neb. 1998). The court found that the plaintiffs entitled to emotional distress damages when the plaintiffs demonstrated out of pocket damages.

(4) Schipper v. United States, 98-2 USTC ¶ 50,825, 82 AFTR2d 98-6821 E.D. N.Y. 1998) The United States was found 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. The District Court found that the plaintiff was able to recover for physiological symptoms she suffered as a result of the humiliation of having coworkers aware of her difficulties with the unlawful levies.

(5) Cases under the Privacy Act are also instructive, because the Privacy Act has a similar damages provision. In Hudson v. Reno, 130 F.3d 1193 (6th Cir. 1997), Fitzpatrick v. IRS, 665 F.2d 327 (11th Cir. 1982), Houston v. Dep't of Treasury, 494 F. Supp. 24 (D.D.C. 1979) and Dimura v. FBI, 823 F. Supp. 45 (D. Mass. 1993), the courts held that actual damages were limited to out-of-pocket loss. In Johnson v. IRS, 700 F.2d 971 (5th Cir. 1983), the court held that actual damages included pain and suffering. Cf. Albright v. United States, 732 F.2d 181 (D.C. Cir. 1984)

(stating in dicta that non-economic injuries or damages other than out-of-pocket expenses could qualify as "actual damages" under Privacy Act § 552a(g)(4)). Actual damages under other federal statutes are also interpreted both ways.

(6) The Supreme Court's opinions relating to the waiver of sovereign immunity in two cases interpreting other statutes may be instructive. In U.S. v. Nordic Village, Inc., 503 U.S. 30 (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. 503 U.S. at 33-34; see also Lane v. Pena, 518 U.S. 187, 192 (1996) (Merchant marine cadet who was discharged from academy in violation of Rehabilitation Act cannot recover monetary damages from government because 1986 Amendments to the Act did not provide for monetary damages against federal agencies.). "Legislative history has no bearing on the point... [T]he 'unequivocal expression' of elimination of sovereign immunity that we insist upon is an expression in the statutory text. If clarity does not exist there, it cannot be supplied by a committee report." Nordic Village, 503 U.S. at 37, and Lane, 518 U.S. at 193.

d. It is interesting to note that I.R.C. § 7433, which provides for civil damages for unauthorized collection activity and which was added to the Code in 1988, provides for "actual, direct economic damages" plus the costs of the action.

4. Can punitive damages be awarded in the absence of an award of actual damages?

a. These cases answer in the negative:

(1) Barrett v. United States, 917 F. Supp. 493 (S.D. Texas 1995), aff'd 100 F.3d 35, (5th Cir. Tex. 1996). Court denied punitive damages for two reasons: (1) Disclosures were not willful or grossly negligent; and (2) statutory language of I.R.C. § 7431(c) precludes award of punitive damages in case where actual damages have not been shown, which is consistent with the common law tort rule.

(2) William E. Schrambling Accountancy Corp. v. United States, 689 F. Supp 1001, 1008 (N.D. Cal. 1988), rev'd on other grounds, 937 F.2d 1485 (9th Cir. 1991), cert. denied, 112 S. Ct. 956 (1992). Punitive damages are not available unless plaintiff proves actual damage.

(3) Marré v. United States, 92-2 U.S.T.C. ¶ 50,398 at 85,318 n.3 (S.D. Tex. 1992), aff'd, 38 F.3d 823 (5th Cir. 1994). The district court stated: "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." On appeal, the taxpayer contended that the plain language of the statute permits recovery of punitive damages in the absence of actual damages so long as the punitive damages exceed the statutory damages. The Fifth Circuit left the statutory interpretation claim undecided because it was convinced that the evidence was not sufficient to support a punitive damages award; the special agent's conduct was not so egregious to warrant such an award.

(4) Smith v. United States, 730 F. Supp. 948, 954-55 (C.D. Ill. 1990), rev'd on other grounds, 964 F.2d 630 (7th Cir. 1992), cert. denied, 113 S. Ct. 1015 (1993). The court held that it could not award punitive damages in the absence of actual damages. The court also criticized the decisions in Malis and Mid-South Music, infra, for awarding punitive damages in addition to statutory damages.

b. Other court decisions have answered in the affirmative:

(1) Mallas v. United States, 993 F.2d 1111 (4th Cir. 1993). The Fourth Circuit, in reversing the district court, held that a taxpayer may recover punitive damages instead of statutory damages, but may not recover punitive damages in addition to statutory damages. Thus, a taxpayer may recover punitive damages even if the actual damages are zero, provided the punitive damages exceed the statutory damages. Upon remand for a determination of whether plaintiff was entitled to punitive damages, the district court held that plaintiff was not entitled because he failed to show that the Service acted willfully or with gross negligence. The Fourth Circuit affirmed this determination. See 54 F.3d 773 (4th Cir. 1995) (table cite). (Although this opinion was

designated as "Not for Publication," it is reproduced at 95-1 U.S.T.C. ¶ 50,294).

(2) Mid-South Music Corp. v. United States, 85-2 U.S.T.C. ¶ 9782 at 90 (M.D. Tenn. 1985), rev'd, 818 F.2d 536 (6th Cir. 1987). District court imposed \$174,000 in statutory damages, plus \$1,000 in punitive damages.

(3) Malis v. United States, 87-1 U.S.T.C. ¶ 9212 at 87,352-53 (C.D. Cal. 1986). Court awarded punitive damages of \$2,000 per disclosure in addition to statutory damages of \$1,000 per disclosure. The court relied on the district court's decision in Mid-South Music, which was subsequently reversed by the Sixth Circuit.

F. Attorneys' fees in I.R.C. § 7431 actions

1. Section 3101 of the IRS Restructuring and Reform Act of 1998, Pub. L. 105-206 (July 22, 1998) amended I.R.C. § 7431(c) to provide for recovery for: "(2) the cost of the action, plus (3) in the case of a plaintiff which is described in section 7430(c)(4)(A)(ii), 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))." This removed any doubt whether the phrase "the costs of the action," which appeared in the prior version of § 7431(c)(2), was intended to include attorneys fees. This provision went into effect 180 days after passage of the statute for attorneys fees incurred by the plaintiff in prosecuting a § 7431 suit if plaintiff is the prevailing party against the United States. It would appear, then, that attorneys fees could be recovered by a plaintiff whose cause of action accrued prior to the effective date, if plaintiff brought suit in a timely fashion and was the prevailing party against the United States and the fees were incurred after January 22, 1999.

2. Case law under prior provision

a. Huckaby v. United States, 804 F.2d 297 (5th Cir. 1986).

b. Marré v. United States, 92-2 U.S.T.C. ¶ 50,398 at 85,318 (S.D. Tex. 1992).

c. Smith v. United States, 735 F. Supp. 1396, 1400 (C.D. Ill. 1990) (subsequent history omitted).

d. William E. Schrambling Accountancy Corp. v. United States, 689 F. Supp. 1001, 1008 (N.D. Cal. 1988) (subsequent history omitted).

e. Mallas v. United States, 876 F. Supp. 86 (M.D.N.C. 1994).

3. The Eighth Circuit held that where the underlying proceeding was unrelated to a civil tax proceeding, I.R.C. § 7430 was inapplicable. McLarty v. United States, 6 F.3d 545, 548 (8th Cir. 1993).

4. To be considered the prevailing party under I.R.C. § 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). This provision was not changed by the RRA.

- a. Huckaby v. United States, 804 F.2d 297, 298 (5th Cir. 1986).
- b. Mallas v. United States, 876 F. Supp. 86 (M.D.N.C. 1994) (subsequent history omitted).
- c. McLarty v. United States, 92-2 U.S.T.C. ¶ 50,395 at 85,306 (D. Minn. 1992) (subsequent history omitted).
- d. Smith v. United States, 735 F. Supp. 1396, 1400 (C.D. Ill. 1990) (subsequent history omitted).
- e. Wilkerson v. United States, 67 F.3d 112, 120 (5th Cir. 1995).

G. Other issues in I.R.C. § 7431 actions

1. The United States is the only proper party defendant for unauthorized disclosures by U.S. employees. However, the unauthorized disclosure must be made by an individual who is a current employee at the time of the disclosure. See Payne v. United States, 1998 U.S. Dist. LEXIS 2822; 98-1 U.S. Tax Cas. (CCH) P50,256 (S.D. Tex. 1998) (" . . . 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".)

2. Case law

(a) Hrubec v. National Railroad Passenger Corp., 49 F.3d 1269 (7th Cir. 1995). Private citizens who never had lawful access to tax return information could not be liable for unauthorized disclosure. Statute meant to limit disclosures by persons who get tax returns in public business--Service employees, state employees to whom Service makes authorized disclosures, and private persons who obtain return information with "no strings attached." The statute does not forbid disclosures when information comes from other sources.

(b) Coplin v. United States, 91-1 U.S.T.C. ¶ 50,035 (W.D. Mich. 1991), aff'd, 952 F.2d 403 (6th Cir. 1991) (table case), cert. denied, 504 U.S. 974 (1992).

(c) Diamond v. United States, 944 F.2d 431 (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.

(d) Flippo v. United States, No. ST-C-86-145 (W.D.N.C. May 14, 1987), aff'd mem., 849 F.2d 604 (4th Cir. 1988). Plaintiff's attempt to name a revenue agent as a defendant rejected.

(e) Norris v. Commissioner, 76 AFTR2d ¶ 95-5227 (W.D. Mo. 1995). Since plaintiff did not sue the United States, she did not state a claim under I.R.C. § 7431; see also Stewart v. United States, 75 AFTR2d ¶ 95-838 (S.D. Ohio 1995).

(f) Amoco Corp. v. Commissioner, 1998 U.S. LEXIS 4409; 98-1 U.S.T.C. (CCH) ¶ 50,250 (employees of Amtrak are not employees of the United States for purposes of § 7431).

(g) Henkell v. United States, No. S-96-2228, No. S-97-0017, 1998 WL 41565 at 8 (E.D. Cal. January 9, 1998) (By its express language, § 7431 authorizes suit only against the United States and not against individual employees.)

(h) Hassell v. United States et al., 1999 U.S. Dist. LEXIS 8997, 99-2 U.S.T.C. ¶ 50,671, 83 AFTR2d ¶ 2843 (N.D. Tex. 1999) (even assuming that IRS employees did make unauthorized disclosures of plaintiff's tax return information, the claim is against the United States, not individual employees).

2. A complaint filed pursuant to I.R.C. § 7431 must be specific.

a. The complaint must allege the circumstances surrounding the inspection or disclosure, the items of tax information inspected or disclosed, the dates of inspection or disclosure, to whom such items were disclosed, and other items sufficient to alert the defendant as to the information alleged to have been inspected or disclosed. Absent such information, a motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) has been successfully advanced. The court, however, generally provides the plaintiff an opportunity to amend the complaint.

b. Case law

(1) Flippo v. United States, No. ST-C-86-145 (W.D.N.C. May 14, 1987), aff'd mem., 849 F.2d 604 (4th Cir. 1988). Plaintiff failed to identify the information disclosed, the dates of the alleged disclosures, etc. The court noted that without such information, the Service would be engaged in constant guessing games as to the disclosures and possible

exceptions to I.R.C. § 6103 that might authorize the disclosure.

(2) Stephens v. United States, No. 85-218 (N.D. Tex. Dec. 6, 1985), aff'd, No. 86-1063 (5th Cir. 1987). The plaintiff alleged that government agents disclosed his tax returns to "thousands and millions" of people and requested \$400,000,000.00 in damages. The court dismissed the complaint.

(3) Bleavins v. United States, 1991 U.S. Dist. LEXIS 20975 (C.D. Ill. Jan. 18, 1991), aff'd, 998 F.2d 1017 (7th Cir. 1993 (table case)). Plaintiff alleged that U.S. employees and agents willfully disclosed return information to third parties. The complaint did not allege to whom the information was disclosed or the items of information disclosed. The court dismissed the action without prejudice, providing plaintiff 20 days to file an amended complaint.

(4) Colton v. IRS, 1989 U.S. Dist. Lexis 12021 (D. Nev. Apr. 4, 1989). The court dismissed the complaint because it contained mere legal conclusions, not factual allegations.

(5) Young v. Boyle, No. 82-72653 (E.D. Mich. Oct. 20, 1983). I.R.C. § 7217 case. Court granted plaintiffs leave to amend complaint so as to specifically allege the violations of I.R.C. § 6103, including a specific claim of by whom and to whom the disclosures were made.

(6) Soghomonian et al. v. United States et al., 1999 U.S. Dist. LEXIS 20307, 2000-1 U.S.T.C. ¶ 50,146 (E.D. Cal. 12/21/99) (plaintiffs' claim premised on disclosure in collection activities subject to dismissal where complaint failed to allege the "specific taxpayer information allegedly disclosed, the timing of such alleged disclosures," and other pertinent information and where exclusive remedy for unauthorized collections practices would be § 7433).

3. I.R.C. § 7431 lawsuits are not subject to jury trials.

a. The United States as a sovereign is immune from suits, unless it expressly consents to be sued. Only where Congress has waived the sovereign's right to be sued and has affirmatively and unambiguously granted the right to trial by jury is a plaintiff entitled to a jury trial. Lehman v. Nakshian, 453 U.S. 156 (1981). See also United States v. Testan, 424 U.S. 392, 399 (1976) (“the plaintiff has a right to a trial by jury only where that right is one of the terms of [the government’s] consent to be sued.”)

b. Under I.R.C. § 7431, Congress has waived the sovereign's right to be sued for the unauthorized inspection or disclosure of information. However, the statute is silent regarding a jury trial. All courts that have considered whether a plaintiff is entitled to a jury trial pursuant to I.R.C. § 7431 have unanimously found that there is no such entitlement.

c. Carbo v. United States, 1998 U.S. Dist. LEXIS 18533, 82 AFTR2d ¶ 7290 (W.D. La. 1998) (because statute is detailed as to how damages are recovered, lack of jury trial provision indicates that Congress did not confer that right.)

d. See also Information Resources Inc., v. United States, 996 F.2d 780, 783 (5th Cir. 1993) (no jury trials available under § 7432 and § 7433 which contain similar language to § 7431).

c. Case law

(1) Chandler v. United States, 687 F. Supp. 1515 (D. Utah 1987), aff'd per curiam, 887 F.2d 1397 (10th Cir. 1989).

(2) Christensen v. United States, 733 F. Supp. 844 (D.N.J. 1990), aff'd, 925 F.2d 416 (3d Cir. 1991) (table case).

(3) Flippo v. United States, No. ST-C-86-145 (W.D.N.C. May 14, 1987), aff'd, 849 F.2d 604 (4th Cir. 1988) (table case).

(4) Hellwarth v. United States, No. CA 3-84-0102-G (N.D. Tex. June 27, 1985), aff'd, No. 85-1466 (5th Cir. May 2, 1986).

(5) Agbanc v. United States, 678 F. Supp. 804 (D. Ariz. 1988).

(6) Barrett v. United States, Civ. No. H-83-6929 (S.D. Tex. Feb. 16, 1988) (subsequent history omitted).

(7) Baruch Investments v. United States, Civ. No. 84-F--2132 (D. Colo. June 6, 1985).

(8) Harrison v. United States, No. C-88-1226-S (M.D.N.C. Dec. 6, 1989), aff'd per curiam, 1990 U.S. App. LEXIS 18192 (4th Cir. Oct. 16, 1990).

(9) Morgan v. United States, No. 86-C-207 (E.D. Wis. May 28, 1987).

(10) Retirement Care Associates v. United States, 3 F.Supp.2d 1434 (N.D. Ga. 1998) (Plaintiffs not entitled to jury trial under either §§ 7431 or 7433).

(11) Rubel v. United States, 89-1 U.S.T.C. ¶ 9149 (W.D.N.C. 1988).

(12) Wilford Simpson v. United States, No. 91-30102 (N.D. Fla. July 17, 1991).

(13) Western Guardrail and Supply of Oklahoma v. United States, No. 89-C-164B (N.D. Okla. March 12, 1990).

4. I.R.C. § 7431 is the exclusive remedy for alleged improper disclosure of return information. Courts should not fashion other forms of equitable relief. Note, however, that for alleged unauthorized inspection of return information through the use of a computer, a remedy is also available under 18 U.S.C. § 1030(g).

a. United States v. Mangan, 575 F.2d 32 (2d Cir.), cert. denied, 439 U.S. 931 (1978). In dicta, the court suggests that I.R.C. § 7431 and 7213 are exclusive and therefore the exclusionary rule (suppression of evidence) is not available to redress alleged wrongful disclosures. See also United States v. Michaelian, 803 F.2d 1042 (9th Cir. 1986); United States v. Claiborne, 765 F.2d 784 (9th Cir. 1985), cert. denied, 475 U.S. 1120 (1986); Marvin v. United States, 732 F.2d 669 (8th Cir. 1984); United States v. Barnes, 604 F.2d 121 (2d Cir. 1979), cert. denied, 446 U.S. 907 (1980); Estate of Stein v. United States, 47 A.F.T.R.2d 81-1311 (D. Neb. 1981).

b. But see United States v. Chemical Bank, 593 F.2d 451 (2d Cir. 1979) (suggestion in dicta that suppression of evidence may be available for an I.R.C. § 6103 violation); United States v. Lavin, 604 F. Supp. 350 (E.D. Pa. 1985) (relying on Chemical Bank to set aside portions of an affidavit supporting a search warrant application because of unauthorized disclosure).

c. In re Grand Jury, No. 85-536 (D. Mass. Feb. 22, 1983). The court concluded that quashing of a grand jury subpoena on the grounds of a I.R.C. § 6103 violation is not a proper remedy in the face of I.R.C. § 7431.

d. Schipper v. United States, 82 AFTR2d 98-6821, 98-2 USTC ¶ 50,825 (E.D.N.Y. 1998) The United States was found 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.

e. In Trahan v. Regan, 718 F.2d 449 (D.C. Cir. 1983) (subsequent history omitted), the D.C. Circuit held that declaratory judgment relief was available to declare contemplated disclosures illegal and that, if declared illegal, injunctive relief could be granted to enjoin the contemplated disclosures.

f. No Bivens constitutional tort remedy lies for improper disclosure of returns or return information. Malis v. United States, 87-1 U.S.T.C. ¶ 87,348 (C.D. Cal. 1986).

g. Conditional summons enforcement. In a slight twist on the exclusivity argument, the Fifth Circuit in United States v. Texas Heart, 755 F.2d 469 (5th Cir. 1985), held that it was appropriate for a district court to determine whether I.R.C. § 6103 was violated and, if so, to condition summons enforcement on compliance with that section. Subsequently, in United States v. Barrett, 837 F.2d 1341 (5th Cir. 1988), cert. denied, 109 S. Ct. 3264 (1989), reh'g denied, 110 S. Ct. 223 (1989), the en banc court overruled Texas Heart, and the Fifth Circuit indicated that conditional summons enforcement was inappropriate.

Meanwhile, the Ninth Circuit in United States v. Author Services, 804 F.2d 1520 (9th Cir. 1986), held that even though the 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 I.R.C. § 6103). Author Services relied on Texas Heart. In United States v. Zolin, 809 F.2d 1411 (9th Cir. 1987), the Ninth Circuit followed Author Services. On June 21, 1989, an equally divided Supreme Court let stand the Ninth Circuit's conditional summons enforcement. United States v. Zolin, 491 U.S. 554 (1989).

Hence, there is a split in the circuits on the issue of conditional enforcement.

h. Plaintiffs have also attempted to assert Federal Tort Claims Act (FTCA) claims in addition to claims under I.R.C. § 7431. In Johnson v. Sawyer, 47 F.3d 716 (5th Cir. 1995), the Fifth Circuit, en banc, overruled a prior panel decision by holding that recovery for violation of the federal statute (I.R.C. § 7217, predecessor of I.R.C. § 7431) was not available under the FTCA merely on the basis of the general state doctrine of negligence per se. The court stated that a relevant duty must be found in state law apart from the federal statute or regulation and state negligence per se. See Brown v. United States, 653 F.2d 196, 201 (5th Cir. 1981) ("liability of the United States under the Act [FTCA] arises only when the law of the state would impose it."). Citing numerous cases addressing the FTCA's applicability, the court explained that liability under the FTCA arises only if the federal employee as a private person or entity would owe a duty under state law to the injured party in a nonfederal context.

i. Sinicki v. United States, 1998 U.S. Dist. LEXIS 2015 (S.D.N.Y. 1998) (plaintiff may pursue action for wrongful disclosure under both the Privacy Act and section 7431).

j. Berridge v. Heiser, 993 F. Supp. 1136 (S.D. Ohio 1997). The court held that plaintiffs had erroneously brought their suit under the Privacy Act, and that section 7431 is the exclusive remedy by which to bring a cause of action for the improper disclosure of return information.

5. I.R.C. § 7433 provides for civil damages for unauthorized collection activity occurring after November 10, 1988.

a. Case law

(1) Elias v. United States, 91-1 U.S.T.C. ¶ 50,040, aff'd mem., 974 F.2d 1341 (9th Cir. 1992). The district court stated that a taxpayer may not use I.R.C. § 7431 to challenge the merits of the assessment. The court also indicated in a footnote that it is reasonable to assume that Congress did not intend for I.R.C. § 7431 damage suits to be maintained in situations arising from collection activities, given enactment of I.R.C. § 7433.

(2) Wilford Simpson v. United States, 91-2 U.S.T.C. ¶ 50,504 (N.D. Fla. 1991). Although the court found that the disclosures in various liens and levies were authorized by I.R.C. § 6103(k)(6), it observed in a footnote that I.R.C. § 7433(a) applied to one of the levy claims, and I.R.C. § 7433(a) precluded any I.R.C. § 7431 liability.

(3) Gleason v. Cheskaty, 76 A.F.T.R.2d ¶ 95-5161 (D. Idaho 1995). Damages claims brought under §§ 7432 and 7433 were dismissed because taxpayers had not exhausted administrative remedies. Court rejected taxpayer's argument that there were no administrative remedies to exhaust. Citing Shaw v. United States, 20 F.3d 182, 183 (5th Cir. 1994), the district court stated that "where an action pursuant to Sections 7432 and 7433 is filed after January 30, 1992, the administrative procedures set forth in 26 C.F.R. section 301.7433.1 must be exhausted."

(4) Soghomonian et al v. United States, et al., 1999 U.S. Dist. LEXIS 20307, 2000-1 U.S.T.C. ¶ 50,146 (E.D. Cal. 12/21/99) (plaintiff failed to state a claim when brought claim for unauthorized disclosures through filing of Notice of Federal Tax Lien. § 7433 is the exclusive remedy.)

(5) Mann v. United States, 2000 U.S. App. LEXIS 2487 (10th Cir. 2/18/00) (§ 7433 provides taxpayers a remedy for unauthorized collection activities.)

6. Courts are split on whether the validity of the underlying levy affects or precipitates an unauthorized disclosure under I.R.C. § 7431.

a. One line of cases holds that "whether a disclosure is authorized under I.R.C. § 6103 is in no way dependent upon the validity of the underlying summons, lien, or levy." Elias, supra.

(1) Venen v. United States, 38 F.3d 100 (3rd Cir. 1994), amended 94 T.N.T. 220-14 (3rd Cir. 1994). Court stated it 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."

(2) Wilkerson v. United States, 67 F.3d 112, 117 (5th Cir. 1995), rev'g in part, No. 3:92CV78 (E.D. Texas May 16, 1994). Fifth Circuit joined Venen court, holding that Congress had enacted separate and distinct provisions concerning collection activities (I.R.C. §§ 7426, 7433), and information handling (I.R.C. § 7431), and "[t]hese two bodies of law must remain distinct." Court cautioned, however, that its opinion should not be construed to hold that *every* claim of wrongful levy will fail to give rise to a claim of wrongful disclosure. Rather, absent additional evidence, proof of only a wrongful levy is "legally insufficient" to support a claim for wrongful disclosure.

(3) Huff v. United States, 10 F.3d 1440 (9th Cir. 1993), cert. denied, 512 U.S. 1219 (1994) (possible procedural lapses in collection process will not render disclosures that are necessary to collection wrongful); Farr v. United States, 990 F.2d 451 (9th Cir. 1993), cert. denied 510 U.S. 1023 (1993) (where disclosures were necessary to collection procedures, fact that collection procedures may have been defective does not make disclosures wrongful); see also Las Vegas Airlines, Inc. v. United States, 1998 U.S. Dist. LEXIS 4284; 98-1 U.S. Tax Cas. (CCH) P50,306 (Nevada 1998). Bleavins v. United States, 807 F. Supp. 487 (C.D. Ill. 1993), aff'd, 998 F.2d 1016 (7th Cir. 1993) ("[I.R.C.] § 7431 does not apply to disputed merits of an assessment"); Tomlinson v. United States, 1991 WL 338328 (W.D. Wash. 1991), aff'd, 977 F.2d 591 (9th Cir. 1992) (validity of lien irrelevant); Flippo v. United States, 670 F. Supp. 638 (W.D.N.C. 1987), aff'd without published opinion, 849 F.2d 604 (4th Cir. 1988) (permissible to disclose information under mistaken impression that taxes are due).

(4) Spence v. United States, 1997 U.S. App. LEXIS 14056; 97-1 U.S. Tax Cas. (CCH) ¶ 50,485 (10th Cir. 1997) (unpublished opinion). ("Neither the plain language of the statute or the Treasury regulations authorize this court to look behind the summons to determine whether they were

properly issued; §§ 7431 and 6103 address improper disclosure, not improper summons.")

(5) McAdams v. United States, No. 3:95-621, 1996 U.S. Dist. LEXIS 5364, at *7 (W.D. La. Mar. 28, 1996). In the face of plaintiff's challenge that the revenue agent's investigative disclosure during an audit resulted in an invalid assessment, the court found that the principle enunciated in Wilkerson, supra, "that the propriety of the underlying actions is irrelevant to the propriety of the disclosure at issue, controls here."

(6) Mann v. United States, 2000 U.S. App. LEXIS 2487 (10th Cir. 2/18/00). 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 § 7433, and that if Chandler were to bring suit today, it would be under § 7433, not § 7431. The court followed the reasoning of Venen and Wilkerson to hold that where § 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."

b. Another line of cases does consider the validity of the levy to be relevant to and/or determinative of unauthorized disclosures under I.R.C. § 7431.

(1) Rorex v. Traynor, 771 F.2d 383, 386 (8th Cir. 1985). Court concluded that a "disclosure in pursuance of an unlawful levy violates the confidentiality requirement of [I.R.C.] § 6103(a) and is not authorized under § 6103(k)(6)."

(2) Maisano v. United States, 908 F.2d 408 (9th Cir. 1990) (although did not specifically link the two, court considered validity of the underlying tax liens and levies before finding Service authorized to disclose under I.R.C. § 6103); William E. Schrambling Accountancy Corp. v. United States, 689 F. Supp. 1001, 1006 (N.D. Cal. 1988), rev'd on other grounds, 937 F.2d 1485 (9th Cir. 1991) (following Rorex rule that improper notice of levy is basis for liability under I.R.C. § 7431); Husby v. United States, 672 F. Supp. 442, 445

(N.D. Cal. 1987) (followed Rorex; found that disclosures made pursuant to a levy which resulted from a computer error did not fall under "good faith" exception since no interpretation of I.R.C. § 6103 was involved).

(3) Cf. Schipper v. United States, 82 AFTR2d 98-6821, 98-2 USTC ¶ 50,825 (E.D.N.Y. 1998) The United States was found 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 here occurred in the context of a failed collection of a tax refund, not the collection of a tax liability.

7. Statute of Limitations

a. I.R.C. § 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.

b. Case law

(1) Amcor Capital Corp. v. United States, 1995 WL 515690, 95-2 U.S.T.C. ¶ 50,395 (C.D. Cal. June 13, 1995), aff'd 1997 U.S. App. LEXIS 725, 97-2 USTC (CCH) ¶ 50,512 (9th Cir. Cal. 1997). Court held fourth claim in complaint 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. See also Bailey v. United States, 1994 WL 575453, 94-2 U.S.T.C. ¶ 50,534 (N.D. Tex. July 13, 1994).

(2) Carlson v. United States, 76 A.F.T.R.2d ¶ 95-5438 (D. Haw. 1995). Plaintiff filed his action on Dec. 8, 1994. The Certificate of Assessments and Payments demonstrated that the administrative levies made against him resulted in payments made to the Service in 1989 and 1990. Accordingly, plaintiff had notice of the alleged wrongful disclosures more than two years prior to the filing of his action, and his claim was outside the limitations period.

(3) Darby v. Jensen, 75 A.F.T.R.2d ¶ 95-918 (D. Colo. 1995). Plaintiff's claims related to disputes with the Service regarding his exemptions and tax withholding for 1989. While plaintiff did not give dates on which he was informed by both his employer and the Service of the limitation on his exemptions, he stated that his response to the Service's letter was mailed on March 22, 1991. Clearly, the court said, he knew about the disclosure by that date. His complaint, filed March 10, 1994, was outside the two year statute of limitations

(4) Fraser v. Mathews, Civ. 85-1559T (W.D. N.Y. April 28, 1986), aff'd, 805 F.2d 390 (2d Cir. 1986) (table case). Claims under I.R.C. § 7217 were barred because plaintiff "failed" to commence action within two years of when he knew or should have known of the claims. Relief under I.R.C. § 7431 was likewise unavailable, because complained of actions occurred in March 1982, prior to the effective date of I.R.C. § 7431.

(5) Gandy v. United States, No. 6:96CV730 (E.D. Tex. Oct. 10, 1998) appeal docketed No. 99-40205 (5th Cir. 2/23/99) (plaintiff became aware that circular letters were sent to clients in September 1990, but suit was filed in August 1996 and therefore the § 7431 claim with respect to those letters was barred.)

(6) Hobbs v. United States, 1997 U.S. Dist. LEXIS 19230, 97-2 U.S.T.C. ¶ 50,965 (S.D. Tex 11/3/97) appeal pending, No. 99-20273 (5th Cir. 1999) (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 barred.)

(7) Manning v. Pagani, No. C-89-657-G (M.D.N.C. Sept. 13, 1982). On the face of the pleadings, plaintiff's claim was clearly time barred. I.R.C. § 7217 case.

(8) Pack v. United States, No. 90-1002-LKK-PAN, 1991 U.S. Dist. LEXIS 15523 (E.D. Cal. Oct. 11, 1991). Lawsuit was filed August 2, 1990. Although plaintiff alleged that he had learned of April 1987, May 1987 and June 1988 disclosures within the last two years, he did not submit any admissible evidence to show that he discovered the

disclosures within two years before August 2, 1990. Accordingly, the claims were time barred.

(9) William E. Schrambling Accountancy Corp. v. United States, 689 F. Supp. 1001, 1008 (N.D. Cal. 1988) (subsequent history omitted). Lawsuit filed Nov. 19, 1986. Claims regarding levies prior to Nov. 19, 1984, were barred by the statute of limitations.

(10) Wilford Simpson v. United States, 91-2 U.S.T.C. ¶ 50,504 (N.D. Fla. 1991). Alleged disclosures occurred in 1985, 1986 and 1987 in Notices of Federal Tax Lien. Lawsuit was filed in January 1990. Plaintiff admitted that he knew or should have known of the disclosures shortly after the Notices were filed. Therefore, the claims were barred by the statute of limitations.

8. In certain cases, courts have granted a limited stay of discovery.

a. Diamond v. United States, No. 86-86-D-1 (S.D. Iowa Feb. 12, 1988) (subsequent history omitted). The court issued a limited stay of discovery in the I.R.C. § 7431 case inasmuch as there was a potential criminal prosecution of the plaintiff Diamond pending.

b. McQueen v. United States, No. H-91-329 (S.D. Tex. June 7, 1991). The court granted an unlimited stay of discovery, pending the resolution of the criminal investigation.

c. Lancon v. United States, No. H-92-3499 (S.D. Tex. Nov. 15, 1993). The court "administratively closed" the I.R.C. § 7431 action until the conclusion of criminal proceedings involving the Service employee who made the unauthorized disclosure.

9. Does a cause of action under I.R.C. § 7431 survive death of the plaintiff such that a plaintiff's estate may be substituted for the plaintiff?

a. No. In Shapiro v. Smith, 87-1 U.S.T.C. ¶ 9159 (S.D. Ohio 1986), the court held that the 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.

b. Yes. In Karp v. United States, 847 F. Supp. 140 (N.D. Cal. 1993) (subsequent history omitted), the court held that Marcia Karp, administrator for the estate of David Karp could be substituted as plaintiff for the late Mr. Karp. The court rejected the

government's argument that an I.R.C. § 7431 case was in the nature of a personal tort action, which was not intended to survive plaintiff's death. Rather, the court viewed it as a property interest that should survive death. It noted that the statute provided for actual damages, an indication that property rights were to be taken into account.

10. Standing to sue under I.R.C. § 7431

a. Ryan v. United States, 74 F.3d 1161 (11th Cir. 1996). Criminal defendant brought civil action against U.S. claiming unauthorized release of "return information." The claim concerned the leak to a reporter and an editor of three prosecution memoranda which contained summaries of trial witness statements. The trial court made the factual finding that the memoranda were attorney work product, not return information. The appeals court noted that the statutory definition of "return information" confines it to information that has passed through the Service--not information collected by the U.S. Attorney's Office, even with the assistance of the Service. The released information, moreover, did not concern, or derive from, Ryan's tax returns but concerned, *inter alia*, the tax status of other persons. Therefore the court held that Ryan lacked standing to object to dissemination of the information. See also Baskin v. United States, 135 F.3d 338 5th Cir. 1998). The court affirmed dismissal of action for civil damages under I.R.C. § 7431 on the basis that an IRS special agent's possession and transfer of data to the Houston police while on temporary assignment to the grand jury did not make the data disclosed "return information" for purposes of § 6103.

b. Brown v. United States, 755 F. Supp. 285 (N.D. Cal. 1990). The court held that plaintiff did not have a cause of action for disclosure on a Notice of Levy to plaintiff's employer regarding her former husband's liability. The court indicated that it was not plaintiff's return information, but that of her husband, and under the statute and Haywood, *infra*, there had been no wrongful disclosure of her return information.

c. Haywood v. United States, 642 F. Supp. 188 (D. Kan. 1986). Notice sent to taxpayer's employer revealed husband's tax liability, not plaintiff's.

d. Kaiawe v. Dep't of Treasury, No. 95-00166HG, 1995 U.S. Dist. LEXIS 9277 (D. Haw. June 21, 1995). Plaintiff lacked standing to assert wrongful disclosure and wrongful collection claims pursuant

to I.R.C. §§ 7431 and 7433 of corporate taxpayer, notwithstanding plaintiff's status as president and sole shareholder of corporate taxpayer. No evidence was presented that plaintiff was taxpayer's alter ego or that he had personally suffered any injury.

e. Newberry v. United States, 86-2 U.S.T.C. ¶ 9569 (E.D. Ark. 1986). Plaintiff alleged that Service received information unlawfully. This resulted in a failure to state a claim under I.R.C. § 7431, because an I.R.C. § 7431 action only lies for the improper disclosure of returns or return information.

f. Rogers v. United States, 76 AFTR2d ¶ 95-5619 (S.D. Cal. 1995). The court rejected the government's argument that plaintiff did not have standing to bring a wrongful disclosure claim. The argument was based on the incorrect assumption that plaintiff was asserting that the tax return information of a third party was wrongfully disclosed which, the court pointed out, plaintiff would not have standing to assert. The court said that it read the complaint to clearly assert that plaintiff's own tax return information was disclosed.

g. Janet Simpson v. United States, 92-1 U.S.T.C. ¶ 50,077 (N.D. Fla. 1991), aff'd mem., 986 F.2d 507 (11th Cir. 1992), cert. denied, 113 S. Ct. 3042 (1993). In a companion case to Wilford Simpson v. United States, No. 91-30102 (N.D. Fla, filed Apr. 8, 1991) brought by Wilford's wife and sons, plaintiffs alleged that the circular letters sent to Wilford's clients improperly disclosed their return information. The letters requested payment history of Wilford Simpson, his company, Ellis Ag, Inc., or payments made to plaintiffs. The court dismissed the case on the grounds that plaintiffs lacked standing and therefore had failed to state a claim upon which relief could be granted.

h. Soghomonian v. United States, 1999 U.S. Dist. LEXIS 20307, 2000-1 U.S.T.C. ¶ 50,146 (E.D. Cal. 12/21/99). Wife of taxpayer complainant does not have standing under § 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.

H. Sections other than I.R.C. § 6103 may authorize the disclosure of tax information.

1. I.R.C. § 6103(a) provides that tax information is confidential -- and may not be disclosed "except as otherwise provided by" Title 26. Case law supports the conclusion that I.R.C. § 6103 is not the sole source of authority for the disclosure of returns and return information. For example, in Messinger v. United States, 769 F. Supp. 935 (D. Md. 1991), the court noted that under § 3406(c)(1), the Service is authorized to release return information to financial institutions in order to notify them of the necessity to deduct interest and dividends for payees who are underreporting when certain conditions occur. The court concluded that "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." 769 F. Supp at 938.

Similarly, in O'Donnell v. United States, 85-1 USTC ¶ 9379 (S.D. Fla. 1985), the court determined that the Service had not violated § 6103 by disclosing to plaintiff's employer that plaintiff had filed a defective certificate of exemptions. The district court reasoned that "§ 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." 85-1 USTC at 88,003. The court further reasoned that § 3402 requires an employer to withhold taxes from wages in accordance with procedures promulgated by the Secretary. See § 3402(m) and Treasury Reg. 31.3402(f)(2)-1(g)(5). The court observed that inasmuch as the procedures provide that the Service will notify the employer when the certificate is defective, it is evident that the Service cannot so notify the employer without disclosing the employee's return information. 85-1 USTC at 88,003.

I.R.C. § 9706(f)(1) provides that a mine operator can, within 30 days of receipt of an assignment of a UMWA beneficiary, "request from the Commissioner of the Social Security detailed information as to the work history of the beneficiary and the basis of the assignment." If § 9706(f)(1) permits the mine operator to request the wage information of the assigned beneficiaries from the SSA, it perforce 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 the two subsections ((g) and (f) of § 9706 in concert gives the implication that Congress had a distinct reason for allowing and limiting the disclosure of beneficiaries' wage information in order to effectuate the Act.

2. Case law

a. Wiemerslage v. United States, 633 F. Supp. 718 (N.D. Ill. 1986), aff'd, 838 F.2d 899 (7th Cir. 1988). District court found that the use of a "lock box" by the Service (*i.e.*, a bank which collected certain 1040-ES forms and payments) was authorized by I.R.C. §§ 6103(n) and 6302(c). The district court found that I.R.C. § 6302(c) permits the Service to utilize federal depositories to collect various taxes. The Court of Appeals did not reach the I.R.C. § 6302(c) issue. It relied solely on the authority of I.R.C. § 6103(n).

b. Swierkowski v. United States, 620 F. Supp. 149 (E.D. Cal. 1985), aff'd mem., 800 F.2d 1145 (9th Cir. 1986), cert. denied, 479 U.S. 1093 (1987). The court held that I.R.C. §§ 3402(m) and (n) authorize the promulgation of regulations relating to claims for withholding allowances and for exemptions from withholding. 26 C.F.R. § 31.3402(f)(2)(g)(5) instructs the Service to furnish an employer with information such as an employee's status, withholding allowances, etc.

c. Van Skiver v. United States, 1990 U.S. Dist. LEXIS 1114 (D. Kan. Jan. 31, 1990), aff'd, 952 F.2d 1241 (10th Cir. 1991), cert. denied, 506 U.S. 828 (1992). The court held that filing of proper Notices of Federal Tax Lien and issuing of levies were authorized under Title 26. The court found that as a matter of law disclosures to effectuate such liens or levies did not violate I.R.C. § 6103.

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CHAPTER 1

PART III: CRIMINAL LIABILITY FOR WILLFUL UNAUTHORIZED INSPECTION AND DISCLOSURE

OBJECTIVES

At the end of this chapter, you will be able to:

1. identify the elements of an I.R.C. § 7213A offense;
2. identify the elements of an I.R.C. § 7213 offense; and
3. determine whether the elements of the offense have been established in a particular case.

I. I.R.C. § 7213A -- UNAUTHORIZED ACCESSES (UNAX)

A. "Browsing" was the term formerly 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 Service now refers to such activity as unauthorized access, or UNAX. UNAX typically arises in the context of Service employees accessing taxpayer accounts on an automated database such as the Integrated Data Retrieval System (IDRS) without a tax administration purpose.

1. On April 4, 1995, Senator John Glenn introduced S. 670, 104th Cong., 1st Sess. (1995), "The Taxpayer Browsing Protection Act." This bill was intended to make the willful, unauthorized *inspection* of any return or return information a misdemeanor punishable upon conviction by up to a year in prison, or a fine in any amount not exceeding \$1,000, or both, together with the costs of prosecution. Congress ultimately passed a similar bill which President Clinton signed into law on August 5, 1997. The Taxpayer Browsing Protection Act, Pub. L. No. 105-35, § 2(a), 111 Stat. 1104 - 1106 (1997), amended part I of subchapter A of chapter 75 by adding section 7213A:

a. I.R.C. § 7213A(a)(1) makes it unlawful for any officer or employee of the United States, or any person described in § 6103(n) or officer or employee of such person, to willfully inspect, except as authorized in Title 26, any return or return information.

b. I.R.C. § 7213A(a)(2), relating to state and other employees who acquired returns or return information under certain provisions of

I.R.C. § 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(a) -- To sustain a conviction under I.R.C. § 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 I.R.C. § 6103(n), or a state or other employee described in I.R.C. § 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.

1. Persons Covered

a. I.R.C. § 7213A(a)(1) expressly applies to "(A) any officer or employee of the United States, or (B) any person described in section 6103(n) or an officer or employee of any such person."

b. The persons described in I.R.C. § 6103(n) are persons, including any person described in I.R.C. § 7513(a)(1), who are authorized by regulation to receive returns and return information "to the extent necessary in connection with the processing, storage, transmission, and reproduction of such returns and return information, the programming, maintenance, repair, testing, and procurement of equipment, and the providing of other services, for purposes of tax administration." I.R.C. § 6103(n).

c. The persons described in I.R.C. § 7213A(a)(2) are state and other employees who "willfully inspect, except as authorized in this title, any return or return information acquired by such person, or another person under a provision of section 6103 referred to in section 7213(a)(2)."

2. Inspected

a. I.R.C. § 7213A does not define "inspect," or any variant of that term, but specifically refers to the definitional section at I.R.C. § 6103(b)(7). I.R.C. § 6103(b)(7) states that the "terms 'inspected' and 'inspection' mean any examination of a return or return information."

CHAPTER 2

PART I: DEFINITIONS

OBJECTIVES

At the end of Part I of Chapter 2, you will be able to:

1. define "returns," "return information," "disclosure," and "tax administration," for purposes of I.R.C. § 6103;
2. determine if statutorily-protected information has been "disclosed" within the meaning of section 6103(b)(8), and identify the protected information disclosed, whose information it is, to whom it was (or is contemplated being) disclosed, and for what purpose(s); and
3. apply the definitions to factual situations and determine whether section 6103 is implicated.

I. SECTION 6103 -- WHAT IS PROTECTED

A. Focus inquiries

1. Are we dealing with statutorily-protected information?
 - a. If so, what kind (i.e., "returns," "return information," or "taxpayer return information") and whose?
2. Will we be making/are we making/did we make statutorily protected information known?
 - a. If so, to whom, how, and for what purpose(s)?

B. Information protected by statute

1. "Returns" are: **(I.R.C. § 6103(b)(1))**
 - a. 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;

b. which are required by, provided for, or permitted by Title 26; and,

c. which are filed with the Secretary by, on behalf of, or with respect to any person.

(1) "Secretary" means Secretary of the Treasury or his delegate. (I.R.C. § 7701(a)(11)(B)).

(2) Copies of returns retained by the taxpayer are NOT protected by section 6103. See, e.g. Stokwitz v. U.S. Department of Navy, 831 F.2d 893 (9th Cir. 1987), cert. denied, 485 U.S. 1033 (1988); Office of Legal Counsel Opinion 79-30, May 11, 1979; S. Rep. No. 94-938, 94th Cong., 2d Sess. 331, 1976-3 C.B. 369 (1976) ("By this amendment, the Committee does not [intend] to limit the right of an agency (or other party) to obtain returns and return information from the taxpayer through discovery."); Hrubec v. National Railroad Passenger Corp., 1994 WL 27882 (N.D. Ill. January 31, 1994, aff'd, 49 F.3d 1269 (7th Cir. 1995) (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. Section 6103 should not be construed as a general prohibition against the release of tax information by any party.).

(3) "Fifth Amendment" returns with jurat crossed out are NOT "returns" (I.R.C. § 7203).

2. "Return information" is: (I.R.C. § 6103(b)(2))

a. taxpayer's identity (name of person with respect to whom a return is filed, the person's mailing address, and taxpayer identifying number (SSN or EIN), or a combination thereof). (I.R.C. §§ 6103(b)(6) and (b)(9)); OR

b. 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

c. whether the return was, is being, or will be examined or subject to other investigation or processing; OR

- d. any part of any written determination or background file document which is not open to public inspection under I.R.C. § 6110; OR
- e. any other data; AND
- f. which is received by, recorded by, prepared by, furnished to, collected by the IRS; AND
- g. with respect to a return OR with respect to the determination of the existence or possible existence of liability or the amount of liability;
- h. of any "person" (see I.R.C. § 7701(a)(1));
- i. under Title 26;
- j. for any tax, penalty, interest, fine, forfeiture, or other imposition or offense.

(1) "The term 'return information' is broad and includes any information gathered by the IRS with regard to a taxpayer's liability under the Internal Revenue Code." Dowd v. Calabrese, 101 F.R.D. 427, 437-38 (D.D.C. 1984).

(2) "The [Tax Reform Act of 1976] defines returns and return information in the broadest way." United States v. Barrett, 837 F.2d 1341 (5th Cir. 1988), cert. denied, 492 U.S. 926, reh'g denied, 493 U.S. 883 (1989).

(3) Taxpayer information obtained or prepared by the IRS is "return information" regardless of the person with respect to whom it was obtained or prepared. An RAR containing information about the criminal conviction of two shelter promoters was the "return information" of those promoters because (and even though) the RAR was "prepared by" the Service "with respect to" the investors' liabilities. Mallas v. United States, 993 F.2d 1111 (4th Cir. 1993).

(4) But see, Tax Analysts v. Internal Revenue Service, 117 F.3d 607 (D.C. Cir. 1997). The D.C. Circuit Court of Appeals rejected the Service's position that Field Service Advice (FSA) memoranda are return information in their entirety because they are prepared with regard to specific taxpayer

cases, ruling that legal analysis contained in the FSAs' were not encompassed within the definition of return information; Kamman v. Internal Revenue Service, 56 F.3d 46 (9th Cir. 1995) (holding that, in this FOIA suit, the Government had failed to carry its burden of proof in claiming that appraisals obtained by the Service of property seized from a taxpayer were return information, the court noted that because the appraisals were done after the taxpayer pled guilty to tax fraud, the appraisals were not related to the taxpayer's return or liability).

(5) Section 521 of Title V of the "Ticket to Work and Work Incentives Improvement Act of 1999," Pub. L. No. 106-170, (effective date December 17, 1999), amended section 6103 to provide that advance pricing agreements (APAs) and related background information are confidential return information under section 6103. 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 Service in connection with an APA, regardless of when such communication is prepared or received. Protection is not limited to agreements actually executed; it would include material received and generated in the APA process that does not result in an executed agreement.

(6) Information concerning potential non-tax Title 26 infractions (e.g., I.R.C. §§ 7213, 7214) is "return information" of the person(s) being investigated. See O'Connor v. Internal Revenue Service, 698 F. Supp. 204 (D. Nev. 1988), aff'd without op., 935 F.2d 275 (9th Cir. 1991); Conn v. United States, 92-1 U.S. Tax Cas. (CCH) ¶ 50,123 (N.D. Cal. 1991); Church of Scientology of California v. Internal Revenue Service, Civ. No. 90-3290-R (C.D. Cal., Dec. 28, 1990); Laxalt v. McClatchy, Misc. No. 860051 (D.D.C. 1987); United States v. Hornung, No. 85-270-R (W.D. Okla. 1986)(subsequent history omitted).

(7) Protest "Fifth Amendment" returns with crossed-out jurats are "return information."

(8) Information the Department of Justice generates or obtains as part of a referred tax case: case law indicating such information is return information, e.g., Tigar & Buffone v. Department of Justice, 590 F.

Supp. 1012 (D.D.C. 1984); United States v. Bacheler, 611 F.2d 443 (3d Cir. 1979) (In referred tax case, Justice acts as Secretary's "agent.") However, in a recent decision the 11th Circuit found that certain information the Department of Justice generated independently of the IRS as part of a criminal tax case was not return information. See Ryan v. United States, 74 F.3d 1161 (11th Cir. 1996) (statutory definition of return information confines it to information that has passed through the IRS, therefore prosecutor's memoranda distilled from statements of trial witnesses in criminal tax case were not return information); see also Baskin v. United States, 135 F.3d 338 (5th Cir. 1998) (IRS special agent's possession and transfer of data to Houston police officers (which data had been collected by a grand jury investigating non-tax crimes), did not make that data return information).

(9) Statistical compilations or other amalgamations which do not directly or indirectly identify a particular taxpayer are excluded from coverage by the statute's very terms.

(10) Return information from which identifiers (e.g., name, TIN, zip code) have been deleted is still protected information. 26 U.S.C. § 6103(b)(6)(taxpayer identity defined); Church of Scientology of California v. Internal Revenue Service, 484 U.S. 9 (1987). The statute is more than an identity test. Id.; Long v. Internal Revenue Service, 891 F.2d 222 (9th Cir. 1989) (Even after deletion of taxpayer identifying information, TCMP checksheets containing reported and corrected return line item data were "return information.")

(11) In an unauthorized disclosure suit brought by Y, the court concluded that, in a proceeding to determine whether X was a "return preparer" within the meaning of I.R.C. § 7701(a)(36)(A), the entire returns, including Y's return, of the individuals who were partners in an entity for which X prepared the returns and K-1s, were properly admitted not as X's return information, but under the "item" or "transaction" test of section 6103(h)(4)(B) and (C). Mindell v. United States, 693 F. Supp. 847 (C.D. Cal. 1988).

3. "Taxpayer return information" (I.R.C. § 6103(b)(3)) 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."

- a. Item taken directly from a return is "taxpayer return information."
- b. Distinction is significant only in the context of disclosures for nontax federal criminal matters, I.R.C. § 6103(i).

4. "Tax administration" means: (I.R.C. § 6103(b)(4))

- a. administration, management, conduct, direction, and supervision;
- b. of the execution and application of the internal revenue laws and related statutes (or equivalent laws of a state);
- c. and tax conventions to which the United States is a party;
- d. development and formulation of Federal tax policy relating to existing internal revenue laws and related statutes;
- e. and includes assessment, collection, enforcement, litigation, publication, and statistical gathering;
- f. under the internal revenue laws and related statutes.

(1) Planned murder for hire of a Revenue Agent for the purpose of ending or interrupting an audit was intended to obstruct the Internal Revenue Service's lawful enforcement efforts. Consequently, disclosure of return information in connection with state criminal conspiracy investigation and trial was for tax administration purposes. Sanders v. State, 469 A.2d 476 (Md. App. 1984), cert. denied, 474 A.2d 1345 (Md.1984). But see United States v. Sumpter, 133 F.R.D. 580 (D. Neb. 1990) (making threatening letter to IRS agent is probably not tax administration since 18 U.S.C. § 876, under which taxpayer is charged, applies to any person, not just IRS employees).

(2) State tax administration authorized disclosure of return information in context of conduct inquiry designed to ensure

the integrity of the tax system. Rueckert v. Internal Revenue Service, 775 F.2d 208 (7th Cir. 1985).

(3) Use of 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 (2d Cir. 1978), cert. denied, 439 U.S. 931 (1978).

(a) Meaning of tax administration is sweeping. Id. See Tavery v. United States, 32 F.3d 1423 (10th Cir. 1994) (broad interpretation encompasses potential contempt proceeding against minister in connection with enforcement proceeding regarding the tax exempt status of the minister's church).

(b) Conspiracy to defraud IRS, prosecuted pursuant to 18 U.S.C. § 371, was tax administration since underlying fraud involved Title 26.

(4) Attempt during a criminal tax investigation to bribe a Special Agent in violation of Title 18 involved "tax administration." Id.

(5) District Director's disclosure to state tax officials of state's Fed State Exchange Program liaison official's tax delinquencies was not improper. Although the state had not specifically requested the employee's return information, the disclosure did not violate the written request requirement prior to the exchange of tax information between the state and the IRS. The Standing Agreement on Coordination between the state and the IRS not only satisfied the written request requirement but explicitly contemplated disclosure of information relating to the taxpayer's tax delinquencies and failure to file returns. Furthermore, the taxpayer's position as fed/state liaison, through whom disclosure normally would have been reported, made the usual safeguards difficult to implement. Smith v. United States, 964 F.2d 630 (7th Cir. 1992), cert. denied, 506 U.S. 1067 (1993).

(6) "Tax administration" includes enforcement and litigation functions under the internal revenue laws, including summons enforcement proceeding. LeBaron v. United States, 794 F. Supp. 947 (C.D. Cal. 1992).

(7) An audit is an administrative proceeding for purposes of section 6103. First Western Government Securities v. United States, 796 F.2d 356 (10th Cir. 1986); Agbanc v. United States, No. 87-383 (D. Ariz. Dec. 20, 1988); Datamatic Services Corp. v. United States, 88-1 U.S.T.C. ¶ 9163 (N.D. Cal. 1987); Balanced Financial Management, Inc. v. Fay, 662 F. Supp. 100 (D. Utah 1987); Nevins v. United States, 88-1 U.S.T.C. ¶ 9199 (D. Kan. 1987). But see, Mallas v. United States, 993 F.2d 1111 (4th Cir. 1993) (An audit is NOT an administrative proceeding for purposes of section 6103).

(8) A pro hac vice hearing for an attorney who would be representing a taxpayer was not a matter pertaining to tax administration for purposes of section 6103. McLarty v. United States, 741 F. Supp. 751 (D. Minn. 1990), summary judgment granted, on reconsideration, 784 F. Supp. 1401 (D. Minn. 1991).

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

5. "Disclosure" is the: (I.R.C. § 6103(b)(8))

- a. Making known**
- b. to any person**
- c. in any manner whatever**
- d. a return or return information.**

(1) There is no "making known" of return information if the recipient already has knowledge of the information. Brown v. United States, 755 F. Supp. 285 (N.D. Cal. 1990); Elias v. United States, 91-1 U.S. Tax Cas. (CCH) ¶ 87,169 (C.D. Cal. 1990); Haywood v. United States, 642 F. Supp. 188 (D. Kan. 1986).

(2) 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 accorded the protection of section 6103. See Chapter 2, Part IV.

II. SECTION 6103 -- WHOSE INFORMATION IS PROTECTED

In the previous section, we particularly focused on what is "return information," and what is a "disclosure." In this portion, we focus on identifying who is the taxpayer, a necessary determination before deciding whether the return information can be disclosed.

A. Section 6103 of the Code permits disclosure only as "authorized by [Title 26]." Prior to 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 employer's tax liability and the employee's tax liability. See Tanoue v. Internal Revenue Service, 904 F. Supp. 1161 (D. Hawaii 1995) (plaintiff's statements to Service pursuant to Service's investigation of possible tax liability of third party taxpayer constituted the return information of the third party taxpayer).

Other examples include W-2's or 60501's (returns relating to cash received in a trade or business).

2. Although information supplied by one taxpayer with respect to his/her own tax liability often affects the liability of another taxpayer, such information does not automatically become disclosable to a second taxpayer merely because of its possible effect.

a. Martin v. Internal Revenue Service, 857 F.2d 722 (10th Cir. 1988). Partner/shareholder not entitled to disclosure of protests filed by co-partners/co-shareholders in response to IRS proposed adjustments to copartners/co-shareholders' individual tax liabilities stemming from IRS audit of partnership/subchapter S corporation. (Martin was a Freedom of Information Act case.)

b. Solargistic Corporation and Geodesco, Inc. v. United States, 89-2 U.S. Tax Cas. (CCH) ¶ 9610 (N.D. Ill. 1989), aff'd, 921 F.2d 729 (7th Cir. 1991). 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.

c. See also Mid-South Music Corp. v. Internal Revenue Service, 818 F.2d 536 (6th Cir. 1987) and First Western Government Securities v. Internal Revenue Service, 796 F.2d 356 (10th Cir. 1986), which address the status of information relating to or affecting the possible liability of more than one person.

d. Disclosure of husband's return information to wife's employer did not constitute a disclosure of the wife's return information. Haywood v. United States, 642 F. Supp. 188, 192 (D. Kan. 1986).

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, supra 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. Martin, Id.

C. Market Segment Agreements

1. The standard, pro-forma agreement available to all members of the market segment is publicly available.

2. The fact that a particular member of the market segment has entered into an agreement with the Service is the return information of that member, and is disclosable only as authorized by Title 26.

CHAPTER 2

PART II: DISCLOSURE TO PERSONS WITH A MATERIAL INTEREST

OBJECTIVES

At the end of Part II of Chapter 2, you will be able to:

1. identify those persons who have a "material interest" for disclosure purposes; and
2. determine when the disclosure of a taxpayer's return information would seriously impair Federal tax administration.

I. DISCLOSURES TO PERSONS WITH A MATERIAL INTEREST

I.R.C. § 6103(e); Chapter 2 of IRM 1.3, Disclosure of Official Information Handbook (Disclosures to Persons with a Material Interest); see also Chapter 40 of IRM 1.3, Disclosure of Official Information Handbook (100% Penalty Assessment -- now Trust Fund Recovery Penalty -- Disclosures); Form 4506 – Request for Tax Return or Return Transcript.

A. Upon written request, returns shall be made available to the following persons:

1. Individual returns

- a. The individual who filed the return

Example-- Mr. and Mrs. Boggs filed separate returns for 1995. Mrs. Boggs files a written request for Mr. Boggs' 1995 return. Mrs. Boggs may only receive her own 1995 return upon requesting it.

- b. The child of the individual to the extent necessary to comply with I.R.C. § 1(g) (and for tax years beginning before December 31, 1997, but not thereafter, I.R.C. § 59(j)).

Example--Carl Yaz, 13 year old son of the Yazs', files a separate return. To determine his applicable tax rate for his 1990 tax return pursuant to I.R.C. § 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," i.e., normally the entire return would not be available to Carl because

normally the entire return would not be "necessary" for Carl's purposes.

2. Joint returns

- a. 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. Since a joint return was filed in 1996, Alice may receive a copy of that return. She may not, however, receive a copy of Ted's 1997 return; nor may the Service confirm whether or not Ted filed a return for that year; nor may the Service supply or confirm Ted's tax filing status for that year.

3. Partnership returns

- a. 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. Since A was a partner of the ABC partnership for a part of the period covered by the return, A may receive a copy of the return.

Example--The ABC partnership utilizes a fiscal year beginning July 1, 1996, and ending June 30, 1997. B became a partner on October 30, 1997, and submits a written request for a copy of ABC's 1996 return. Since B was not a member of the ABC partnership for any part of the period covered by the 1996 return, B may not receive a copy.

Note: The partnership return includes the Schedules K-1.

4. Corporation and subsidiary returns

- a. Any person designated by resolution of the corporation's board of directors.

b. Any corporate officer or employee if a written request has been submitted by a principal officer and attested to by any other corporate officer.

c. Any corporate officer authorized by the corporation in accordance with applicable State law to legally bind the corporation.

d. 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, A owned 10% of the outstanding stock of Bosox, Inc. A sold his stock to B on October 30, 1997. A submits a request for a copy of Bosox Inc.'s 1997 tax return on November 1, 1997. Since A was not a shareholder of record on the date of his request, he may not receive a copy of the corporate return.

(1) A former shareholder of an existing company could not compel the Service to produce technical advice memoranda relating to the company for use in shareholders' 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. Kirk v. First National Bank of Columbus, 76-2 U.S.T.C. (CCH) ¶ 9639, 38 A.F.T.R.2d (RIA) 5718 (N.D. Ga. 1976).

(b) The requestor must be a shareholder of record. The shareholder 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. Since Helpless' customers are the equitable owners, Helpless may not have access to Rocketman's tax return.

(c) I.R.C. § 6103(a) restricts a 1% shareholder from making a further disclosure of the corporate return; further disclosure could subject the 1% shareholder to criminal

penalties under I.R.C. § 7213(a)(5), and to a civil damages action under I.R.C. § 7431.

(d) Any member of a consolidated return group may receive a copy of the entire consolidated return for any period in which it was a member.

Example--P files a consolidated return for Corporation A, B, C, and D. Each member of the consolidated group may receive a copy of the consolidated return as long as it was a member of the consolidated group for the period covered by the return. *Yorkshire v. Internal Revenue Service*, 829 F. Supp. 1198 (C.D. Cal. 1993), aff'd, 26 F.3d 942 (9th Cir. 1994).

e. Any shareholder of a Subchapter S corporation who was a shareholder during any part of the period covered by the return.

f. Any person authorized by state law to act on behalf of a dissolved corporation or any person who has been determined to have a material interest which will be affected by information contained in the dissolved corporation's tax return. See *McAdams v. United States*, 96-1 U.S.T.C. (CCH) ¶ 50269 (W.D. La. 1996).

5. Estate returns and decedent's returns

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

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

Example--*Williams v. Commissioner*, 523 F. Supp. 89 (E.D. Mo. 1981). Notwithstanding the taxpayer's illegitimate status, she was an heir under the law of the situs state.

6. Trust returns

a. Any trustee.

b. Any beneficiary, if it has been determined that the beneficiary has a material interest which will be affected by information contained in the return.

1. Interplay between I.R.C. §§ 6103(e) and 6104 when dealing with beneficiaries of a pension plan.

Example--Service position set forth in Nichols v. Board of Trustees, 725 F. Supp. 568 (D.D.C. 1989) is that access is governed solely by I.R.C. § 6104. Contrary result reached in Duncan V. Northern Alaska Carpenters Retirement Fund, et al., No. MS90-273, 1991 U.S. Dist. LEXIS 4269 (W.D. Wash., January 10, 1991). (Access governed by I.R.C. § 6103(e)(1)(F)).

7. Returns of incompetent taxpayers -- The committee, trustee, or guardian of the incompetent taxpayer's estate.

Example-- A return is filed on behalf of 5 year old Philip Protege, a successful child actor who resides in California. Upon receiving notice that Philip's tax return for 1997 is under examination, Philip's father seeks to discuss his son's examination with the revenue agent assigned to Philip's case. If, under California law, Philip's father is the guardian of Philip's estate, the revenue agent may discuss the examination with Philip's father. Additionally, I.R.C. § 6103(k)(6) may authorize disclosures to be made to Philip's father.

8. Returns of a debtor in a bankruptcy case -- See materials in Chapter 6, Bankruptcy.

9. Attorney in fact

a. Upon written request, a duly authorized attorney in fact may inspect the return of any person described in I.R.C. § 6103(e) if the attorney in fact is authorized in writing by such person(s) to inspect the return.

b. 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.

c. In the context of a Tax Court proceeding, a power of attorney or tax information authorization is not required. See Treas. Reg. § 601.509.

d. 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.

10. I.R.C. § 6103(e)(7) -- Any person who is authorized to inspect a return may also inspect return information related thereto, without written request, unless a determination has been made that disclosure would seriously impair Federal tax administration.

Example--Mr. Dent submits a written request to the Service 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 District Director 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 and direction of the Service's investigation. Since an impairment determination has been made, Mr. Dent may not have access to this item of his return information, i.e., the witness statement.

11. I.R.C. §§ 6103(e)(8) and (e)(9) -- The Taxpayer Bill of Rights 2 (TBOR2), P.L. No. 104-168, 110 Stat. 1452, 1459-60 and 1466 (1996), amended I.R.C. § 6103(e) by adding new paragraphs (8) and (9), respectively.

a. Paragraph (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 spouse(s)), the Service must disclose, in writing, certain information about the Service's collection activities with respect to the joint liability assessed against both former spouses, to one of the former spouses, or to such 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 Service must disclose, in writing, in response to a written request, under paragraph 8, is

(1) whether the Service has attempted to collect the deficiency from the other former spouse;

(2) the amount, if any, collected from the other former spouse;

(3) the current collection status (e.g., TDA, installment agreement, suspended; and,

(4) if suspended, the reason (e.g., unable to locate, hardship).

Paragraph (8) does not require (or permit) disclosure to one former spouse, or to such former spouse's authorized representative, of personal information about the other former spouse, such as the other former spouse's:

location or telephone number; nor any information about the other former spouse's employment, income, or assets; nor the income level at which a currently not collectible account will be reactivated.

b. Overlap between disclosures permitted under section 6103(e)(1)(B) in conjunction with section 6103(e)(7), and disclosures, in writing, mandated under section 6103(e)(8).

To the extent a written request by one former spouse, or by such former spouse's authorized representative, does not specifically invoke paragraph (8), I.R.C. §§ 6103(e)(1)(B) in conjunction with (e)(7) would authorize release of the same collection related information that is available to a former spouse, or to such former spouse's authorized representative, upon written request, under paragraph (8).

Note that disclosures authorized under subsection (e)(7) are not required to be made or requested in writing; they are not limited to, but routinely include, the 4 items of collection related information released pursuant to a written request under paragraph 8; and they are subject to a determination by the Service that disclosure would seriously impair Federal tax administration. Routinely, the Service declines to release personal information about one former spouse to the other former spouse under (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 5183.4 (5-22-96), General Procedural Guidelines.

Example--Husband and Wife are married and file a joint return in 1996; however, by 1997, they were divorced and filing separately. In 1998, the Service examines Husband and Wife's 1996 tax return

and determine that the taxpayers had underreported their income. A statutory notice was issued to the taxpayers. Wife wants to know what amount, if any, of the deficiency the Service has collected from Husband. The Wife has a number of options for requesting this collection information.

The wife, or her authorized representative, could make a written request, expressly stated as being a request under section 6103(e)(8). This would constitute a request under paragraph (8), to which the Service must respond in writing. The written request, presumably, would take the form of a letter to the local disclosure office. However, any such request, in writing, by the former spouse, or by the former spouse's authorized representative, would be adequate, e.g., a handwritten request handed to a Collection officer in an interview context. A formal FOIA request by the former spouse, or by the former spouse's authorized representative, also would be adequate but is not a requirement.

Alternatively, the wife, or her authorized representative, could make a written request (that does not specifically reference paragraph 8), or telephone or "walk into" the local disclosure office (which would want to be satisfied as to identity before processing the request) and make a request, or make a request orally in an interview context, e.g., with a Collection officer, or, file a FOIA request. Disclosure in each of these request scenarios would be authorized under section 6103(e)(1)(B) in conjunction with (e)(7).

In the case of a written request by a former spouse, or by a former spouse's representative, to which the Service is authorized to respond under section (e)(7), as well as required to respond to, in writing, under (e)(8), note that more information, potentially, may be disclosed under (e)(7) than under (e)(8).

c. Paragraph (9), Disclosure of Certain Information Where More Than One Person Liable for Penalty for Failure to Collect and Pay Over Tax. Section 6672 of the Internal Revenue Code 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 such 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.

Subsection (e)(9) allows a person determined to be liable for the Trust Fund Recovery Penalty under I.R.C. § 6672, and such person's authorized representative, to obtain, pursuant to a written request, the following information:

- (1) The name of any other person determined to be liable for such penalty;
- (2) Whether the Service has attempted to collect such penalty from any other liable person;
- (3) The current collection status (e.g., notice, TDA, installment agreement, suspended, and if suspended, the reason); and,
- (4) The amount, if any, collected from each individual assessed the penalty.

Information that can **not** be disclosed in response to a request pursuant to (e)(9) includes the following:

- (1) The liable person's location or telephone number;
- (2) Information about any individual whom the Service did not assess;
- (3) Any information about the liable person's employment, income, or assets; and,
- (4) the income level at which a currently not collectible account will be reactivated.

Subsection (e)(9) authorizes disclosing information to: (1) a person "determined" to be liable for the Trust Fund Recovery Penalty; and (2) such person's authorized representative. A person is "determined" to be liable for purposes of (e)(9) when that person is assessed.

II. CASE LAW

A. Duncan v. Northern Alaska Carpenters Retirement Fund, et al., No. MS90-273, 1991 U.S. Dist. LEXIS 4269 (W.D. Wash., January 10, 1991).

Beneficiaries entitled to return information of pension plan -- I.R.C. § 6103(e)(1)(F).

B. Solargistic Corporation and Geodesco, Inc. v. U.S., 921 F.2d 729 (7th Cir. 1991). Disclosure to investor that tax shelter is under audit is return information of investor - I.R.C. § 6103(e)(1)(A)(i).

C. Britt v. I.R.S., 83-2 U.S.T.C. (CCH) ¶ 9675 (D.D.C. 1983). Taxpayer was not entitled to husband's return information since she could not show that joint returns were filed.

D. Martin v. I.R.S., 857 F.2d 722 (10th Cir. 1988). Although a partner is entitled to partnership return information, he is not entitled to return information of other partners. The mere fact that information supplied by one person may affect the tax liability of another is insufficient to give the second person a right to see the information.

E. Mid-South Music Corporation v. U.S., 818 F.2d 536 (6th Cir. 1987).

CHAPTER 2

PART III: DISCLOSURE PURSUANT TO TAXPAYER'S CONSENT

OBJECTIVES

At the end of Part III of Chapter 2, you will be able to:

1. determine when the disclosure of a taxpayer's return and/or return information may be made to the taxpayer's designee; and
2. determine whether a written consent complies with the applicable Treasury regulations.

I. GENERAL PRINCIPLES

A. Disclosure of returns and/or return information may be made to anyone the taxpayer may designate. Prior to 1996, I.R.C. § 6103(c) provided that consents had to be in writing. In 1996, section 1207 of the Taxpayer Bill of Rights II, Pub. L. No. 104-168, 110 Stat. 1452 (1996), amended section 6103(c) by deleting the word "written" from the language requiring a "written" request or consent before the Service can disclose tax information to a third party designated by the taxpayer. Section 6103(c) provides that the Secretary may disclose returns or return information to a taxpayer's designee, subject to such requirements and procedures as the Secretary may prescribe by regulation.

1. However, the regulations still require consents to be in writing and otherwise conform to the requirements set forth in Treas. Reg. § 301.6103(c)-1. As more fully discussed below, Treas. Reg. § 301.6103(c)-1 retains the requirement of a consent in writing. Consequently, to be valid, consents pursuant to I.R.C. § 6103(c) must be in writing.

B. Regulations

1. Treas. Reg. § 301.6103(c)-1(a) concerns disclosures to a person designated by the taxpayer in a written request. It requires a separate document pertaining solely to the consent to disclose returns and/or return information. Treas. Reg. § 301.6103(c)-1(a) requires the following information be set forth in the written authorization:

- a. the taxpayer's identity information (name, address, taxpayer identifying number (SSN or EIN));

- b. the identity of the person to whom disclosure is to be made;
- c. the type of return or return information to be disclosed; and
- d. the specific tax period(s) covered by the consent.

The consent must be signed and dated and the Service must receive the consent within 60 days of execution. Form 8821 (Tax Information Authorization) has been designed to meet the requirements of Treas. Reg. § 301.6103(c)-1(a).

Example -- Mr. Reed applies for a bank loan. As part of the loan application, Mr. Reed states that his 1990 tax return and related information may be mailed to the bank's loan officer, Mr. Burks. The authorization is not contained in a separate document pertaining solely to the consent to disclose Mr. Reed's return and return information; consequently, the Service may not provide the information to Mr. Burks.

Example -- Mr. Williams submits a written authorization to the Service authorizing the disclosure of his 1988 criminal investigation file to Mr. Greenwell. The authorization is dated April 6, 1989, and contains all information required by Treas. Reg. § 301.6103(c)-1(a). The Service receives the authorization on July 1, 1989. Since the authorization was received by the Service more than 60 days after the date of execution, it is not valid.

2. Treas. Reg. § 301.6103(c)-1(b) deals with disclosure to a designee to comply with a taxpayer's request for information or assistance from Congress, family members, etc., relating to contact between the taxpayer and the Service. The requirements for consents under the "(b)" part of the regulations are somewhat more lenient. The requirements include:

- a. a written request signed by the taxpayer;
- b. the request must contain the taxpayer's address and his/her SSN or EIN; and
- c. the request must contain sufficient facts to enable the IRS to respond.

C. The consent rules do not apply to disclosures to a taxpayer's representative in connection with practice before the Service; power of attorney (POA) rules apply in these circumstances. See Treas. Reg. § 301.6103(c)-1(b). For disclosures to a POA or attorney in fact, see I.R.C. § 6103(e)(6), Treas. Reg. § 601.502 et seq.

D. Consent rules do not apply to disclosures made to taxpayer's attorney of record in a Tax Court proceeding. See Reg. § 601.509.

E. The taxpayer's designee or individual holding power of attorney cannot consent to disclosure by the Service to a third party unless the designation or power of attorney specifically permits it.

F. Case law

1. Huckaby v. IRS, 794 F.2d 1041 (5th Cir. 1986). I.R.C. § 7431 wrongful disclosure action in which the court held that disclosures to third parties based upon the taxpayer's oral consent were unlawful.

2. Olsen v. Egger, 594 F. Supp. 644 (S.D.N.Y. 1984). The court held that the Service properly withheld the ex-husband's tax returns from his ex-wife because the separation agreement entered into by the parties which directed the husband to supply the wife with a copy of such returns failed to meet the necessary requirements for disclosure of tax returns to third parties pursuant to I.R.C. § 6103(c) and the regulations thereunder.

3. Tierney v. Schweiker, 718 F.2d 449 (D.C. Cir. 1983). Open-ended consents (e.g., "all years") do not comply with the regulations. The court also held that the consents signed by the taxpayers were coerced as they were executed at the risk of losing social security benefits. The consents, therefore, did not constitute the type of knowing and voluntary consent contemplated by I.R.C. § 6103(c).

4. Hefti v. Loeb et al., 1992 U.S. Dist. LEXIS 12644 (C.D. Ill. August 11, 1992). Plaintiff complained of disclosures of his tax information to his wife. The court concluded that the named defendants acted in good faith disclosing Mr. Hefti's 1987 tax year return information to his wife pursuant to I.R.C. § 6103(c). All correspondence to the IRS was signed by both Mr. and Mrs. Hefti; Mrs. Hefti wrote to President Bush to enlist his help with the IRS on behalf of herself and her husband; and in Tax Court, Mrs. Hefti advised she would be representing both herself and her husband concerning the 1987 return.

5. Tanoue v. IRS, 904 F. Supp. 1161 (D.C. Hawaii 1995). Information gathered during an interview of a third party witness as part of a criminal tax investigation of a target is the return information of the target and is exempt from disclosure, even to the third party witness, absent a consent from the target.

6. Ward v. U.S., 973 F. Supp. 996 (D. Colo. 1997). Disclosures in a public forum during radio broadcast were not authorized because the taxpayer's consent did not designate or identify persons to whom the disclosures over the radio were to be made. In order to comply with the regulations, the consent must identify or designate the third parties to whom the disclosures are to be made.

G. Section 6103 imposes no use or disclosure restrictions on a designee who receives returns or return information pursuant to section 6103(c).

H. Even with a valid consent, the Service can refuse to disclose the return(s) or return information if a determination has been made that disclosure will seriously impair Federal tax administration. See I.R.C. § 6103(c); Treas. Reg. § 301.6103(c)-1(c); Delegation Order No. 156.

Example -- In United States v. Finch, 434 F. Supp. 1085 (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 such attendance would seriously impair Federal tax administration (e.g., be disruptive).

I. Who must sign the consent.

1. Joint return -- Either spouse may sign the consent.
2. Corporation -- The chief executive officer, President, Vice-president or other officer certifying that he/she has authority to execute the consent for the corporation.
3. Partnership -- Any person who was a partner during the period covered by the return.
4. See Disclosure of Official Information Handbook, IRM Handbook 1.3.2.4.

J. Form 2848 -- Power of Attorney and Declaration of Representative

1. See Reg. § 601.501 et seq.
2. Can only be utilized for individuals authorized to practice before the Service pursuant to Treasury Department Circular No. 230.
3. Facsimile transmission of the power of attorney is acceptable.
4. Substitution and delegation is permitted only if such authority is specified on line 5 of the form.
5. An "all years" provision is invalid. A power of attorney may not extend for more than five years forward. The Centralized Authorization File (CAF) system will, however, only reflect three years forward.
6. A new Form 2848 only revokes prior Forms 2848 for same tax matters and periods; it will not revoke Form 8821- Tax Information Authorization.

K. Form 8821 -- Tax Information Authorization

1. Form 8821 is a 6103(c) disclosure consent form that meets the requirements of Treas. Reg. § 301.6103(c)-1(a).
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 Service must receive the form within 60 days of the date it was signed and dated by the taxpayer.
6. A subsequently executed Form 8821 revokes prior Forms 8821 unless box 6 of the form is checked.
7. The form does not revoke a Power of Attorney.

L. General/Durable/Limited Power of Attorneys

1. This type of POA is acceptable if the power of attorney meets all Service requirements. See Reg. § 601.503.
2. Such POAs will not be entered on CAF unless a transmittal Form 2848 is attached.

CHAPTER 2

PART IV: DISCLOSURE OF INFORMATION AVAILABLE IN THE PUBLIC RECORD

OBJECTIVE

At the end of Part IV of Chapter 2, you will be able to:

1. articulate and apply the Service's position regarding dissemination of otherwise confidential tax information which has been made a matter of public record in a judicial or administrative proceeding pertaining to tax administration.

I. GENERAL PRINCIPLES

A. I.R.C. § 6103 contains no express exception authorizing publication of tax information that has become a matter of public record in connection with tax administration.

B. The Supreme Court has counseled 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 Communications, Inc., 98 S.Ct. 1306, 1311 (1978) (what transpires in open court is a matter of public record); Cox Broadcasting v. Cohn, 420 U.S. 469 (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 (1974); see Restatement (Second) of Torts, Explanatory Notes, Section 652D, comment b, at 385 (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.").

However, in United States Dept. of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989), a case under the Freedom of Information Act, the Supreme Court "recognized the privacy interest inherent in nondisclosure of certain information even where the information may have been at one time public." Id. at 767. The court employed a "practical obscurity" standard to find that substantial privacy interests can exist in personal information, even though the information has been made available to the general public at some time. Id. at 762-63.

C. Despite section 6103's confidentiality mandate, non-I.R.C. § 7431 cases have applied the above principles to tax information that has become a matter of public record.

1. United States v. Posner, 594 F. Supp. 930, 936 (S.D. Fla. 1984), aff'd, 764 F.2d 1535 (11th Cir. 1985). Posner was a decision on the defendant taxpayer's motion for a protective order after a newspaper requested copies of his tax returns, which were introduced as exhibits in his criminal tax trial. The court stated: "[O]nce certain information is in the public domain . . . the entitlement to privacy is lost. This is the case even when the information in question is part of a federal tax return."

2. Cooper v. IRS, 450 F. Supp. 752, 755 (D.D.C. 1977). In this Freedom of Information Act (FOIA) case, the court held that tax information is never again confidential once disclosed in a Tax Court proceeding. The documents at issue were exhibits in a Tax Court proceeding.

D. In the context of I.R.C. §§ 6103 and 7431, however, the circuits are split regarding the proper treatment of tax information that has become a matter of public record in connection with tax administration.

1. The Ninth Circuit has held that tax information that has been made a part of the public record in connection with tax administration is no longer subject to section 6103's disclosure restrictions.

a. William E. Schrambling Accountancy Corp. v. United States, 937 F.2d 1485, 1489 (9th Cir. 1991), cert. denied, 502 U.S. 1066 (1992). Information contained in Notice of Federal Tax Lien and also in a taxpayer's bankruptcy petition was no longer confidential and disclosure did not violate section 6103. The Ninth Circuit reversed the district court's opinions in Schrambling, 689 F. Supp. 1001 (N.D. Cal. 1988) and Allen v. United States, No. C-89-20250 (N.D. Cal., Jan. 3, 1990).

b. Lampert v. United States, 854 F.2d 335, 338 (9th Cir. 1988), cert. denied, 490 U.S. 1034 (1989). The court stated: "We believe that Congress sought to prohibit only the disclosure of confidential tax return information. Once tax return information is made a part of the public domain, that taxpayer may no longer claim a right of privacy in that information." The Ninth Circuit's opinion affirmed three district court decisions: Peinado v. United States, 669 F. Supp. 953 (N.D. Cal. 1987); Lampert, 87-1 U.S.T.C. ¶ 9361 (N.D. Cal. 1987); and Figur v. United States, 662 F. Supp. 515 (N.D. Cal. 1987)).

c. Tanoue v. IRS, 904 F. Supp. 1161 (D. Haw. 1995). The Court cited Schrambling and Lampert as support for the public record argument and focused on the fact that 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.

2. The Sixth Circuit has held that tax information that has been made public in connection with recording a Federal tax lien is no longer protected by § 6103, but has not ruled with respect to disclosures made in judicial proceedings.

a. Rowley v. U.S., 76 F.3d 796 (6th Cir. 1996). Section 6103's general rule of confidentiality has no application to situations where the tax return information is placed in the public domain by the filing of tax lien notices, and is subsequently republished by the IRS for the purpose of carrying out its tax administrative functions.

3. The Fourth Circuit has relied on the absence of an express exception in section 6103 to find that the release of previously publicized return information violates section 6103.

a. Mallas v. United States, 993 F.2d 1111 (4th Cir. 1993). Relying on Rodgers, the court stated: "We decline the government's invitation to usurp the legislative function by adding a judicially created exception to those set forth by Congress in section 6103."

4. The Seventh Circuit has adopted a hybrid test referred to as the "independent source" test. This test would permit the republication of Tax Court opinions, criminal tax indictments, and events that transpired in other judicial proceedings related to tax administration, but would prohibit press releases or responses to media inquiries regarding the filing of notices of federal tax liens.

a. Thomas v. United States, 890 F.2d 18, 21 (7th Cir. 1989), aff'g, 671 F. Supp. 15, 16 (E.D. Wis. 1987). The court would not "indulg[e] the fiction . . . that every item of information contained in a public document is known to the whole world, so that further dissemination can do no additional harm--as if only secrets could be confidences." The court adopted a test whereby section 6103 is not implicated if "the immediate source is a public document lawfully prepared by an agency that is separate from the [IRS] and has lawful access to tax returns." The circuit court affirmed, but on a narrower basis, a district court opinion that had adopted reasoning similar to the Ninth Circuit's public record approach.

b. In unpublished opinions, the Third and Eighth Circuits have cited Thomas, with little analysis or discussion, to justify disclosures based upon public record information. It is unclear what conclusion these circuits would reach given an IRS disclosure based upon

information that the IRS had previously made a part of the public record.

(1) Barnes v. United States, 17 F.3d 1428 (3d Cir. 1994). Press release announcing indictment issued by U.S. Attorney's office was not an unauthorized disclosure.

(2) Noske v. United States, 998 F.2d 1018 (8th Cir. 1993) (table case), No. 92-2761, slip op. at 3 (text of unpublished opinion may be found at 1993 U.S. App. LEXIS 17480). IRS provision of copy of district court opinion dealing with abusive tax shelters to newspaper did not violate I.R.C. § 6103. The circuit court affirmed, but on a narrower basis, a district court opinion (92-2 U.S.T.C. ¶ 50,429 at 85,450 (D. Minn. 1992)) that had adopted reasoning similar to the Ninth Circuit's public record approach.

5. The Tenth Circuit in Rice v. United States, 166 F.3d 1088, 1999 U.S. App. LEXIS 1122, 99-1 U.S.T.C. ¶50224 (10th Cir. Jan. 28, 1999), cert. denied, 145 L.Ed.2d 260, 120 S. Ct. 334 (October 12, 1999), adopted Thomas and followed the reasoning that section 6103 is implicated when the immediate source of information is a return, or some internal document based on a return, and not when the immediate source is a public document lawfully prepared by an agency that is separate from the Service. The Tenth Circuit distinguished its earlier opinion in Rodgers v. Hyatt, 697 F.2d 899, 904, 906 (10th Cir. 1983). In Rodgers, the Tenth Circuit held that 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. In Rodgers, the Tenth Circuit reasoned that the agent actually obtained his confidential information from the taxpayer's tax return and not at the public hearing.

6. The Fifth Circuit in Johnson v. Sawyer, 120 F.3d 1307 (5th Cir. 1997), adopted the Seventh Circuit's approach in Thomas v. United States, permitting the Service to publicize information taken directly from court documents or proceedings records rather than from Service files. In Johnson, a press release was issued in a criminal tax case following indictment and subsequent guilty plea. Tax information not found in the indictment was included in the press release. The court held that four items included in the press release (Johnson's age, home address, occupation and middle initial) were wrongfully disclosed because they came directly from Service records.

E. While § 6103 bars the public disclosure of information taken directly from Service files, it does not ban the disclosure of information that is taken from the public court record. The Service's legal position has confined the disclosure of public record information to tax information that has been made a matter of public record in connection with tax administration activity. The following provides a framework for analyzing public record information.

1. Public record return information in the possession of the Service loses any confidential status it may once have had if it becomes a matter of public record. Returns and return information which have become public as a result of actions taken by, or on behalf of, the Service are no longer subject to the confidentiality provisions of the Internal Revenue Code and may be provided to a third party requester. However, great care should be exercised in determining whether tax information has actually become a matter of public record, as information which is supplemental to that which has become public is subject to the confidentiality provisions.

2. Information made public by a taxpayer or third party, which is identical to returns or return information in the possession of the Service, does not affect the confidentiality of such return or return information. Thus, the Service cannot use return information to confirm information made public by any other party unless specifically authorized to do so by I.R.C. § 6103.

3. Information that has become public, which is not publicly connected with tax administration, remains confidential in the hands of the Service. The Service draws a distinction between general public record information (e.g., decrees of divorce, mortgage deeds of trust) and return information that has become a matter of public record through tax administration activity in determining whether such information can be disclosed. By permitting the release of return information only after it has become a matter of public record in connection with tax administration, the Service avoids linking otherwise innocuous public information with a person's tax liability.

4. Based on the trend in the case law to follow the "independent source" test formulated by the Seventh Circuit, in Thomas v. U.S., the following guidance has been adopted by the Service in making public record disclosures.

- a. Retrieve copies of documents (pleadings, indictments, arrest or search warrant affidavits, recorded notices of federal tax lien) independently from the public source, or use transcripts or copies of documents containing a court stamp.

b. Attribute any statements made directly to the public record document. Press releases should only contain information set forth in the public record and should indicate that the source of the information is the public record.

CHAPTER 3

SECTION 6103(h) -- TAX ADMINISTRATION DISCLOSURES

OBJECTIVES

At the end of this chapter, you will be able to:

1. identify when tax information can be disclosed among IRS employees (including Chief Counsel employees);
2. determine when tax information can be disclosed in administrative and judicial tax administration proceedings, including the circumstances when tax information can be disclosed to the Department of Justice for use in such proceedings; and
3. understand the position of the IRS regarding disclosure of information on prospective jurors in federal criminal tax cases.

I. DISCLOSURES TO TREASURY EMPLOYEES

Section 6103(h)(1) permits the disclosure of tax information to employees of the Department of Treasury whose official duties require the disclosure for tax administration purposes. In essence, this section authorizes access to tax information when the employee establishes a "need to know" to perform a tax administration function.

A. Disclosures within the IRS and Office of Chief Counsel

On many occasions, employees other than the District Counsel attorney, Special Agent or Revenue Agent working a particular case have an official need for tax information to carry out their tax administration responsibilities. Such employees may be other District Counsel 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 such material. See First Western Government Securities, Inc. v. United States, 578 F. Supp. 212 (D. Colo. 1984), aff'd, 796 F.2d 356 (10th Cir. 1986) (intra-agency disclosures were proper); Hobbs v. United States, 97-2 U.S. Tax Cas. (CCH) ¶ 50, 965, 80 A.F.T.R.2d (RIA) ¶ 97-5635 (S.D. Tex. 1997) (disclosures among IRS employees made in connection with reopening audit of former IRS employee were authorized by section 6103(h)(1)); Washecka v. United States, No. A 95-CA-421 (W.D. Tex. July 10, 1996) (actions of employee's manager in obtaining employee's return information

pursuant to employee underreporter program were authorized by section 6103(h)(1); cf. Grogan v. Internal Revenue Service, 3 Gov't Disclosure Serv. (P-H) ¶ 82,384 (E.D. Va. Aug. 18, 1981), aff'd, 3 Gov't Disclosure Serv. (P-H) ¶ 82,385 (4th Cir. Mar. 22, 1982) (per curiam) (group manager's disclosures to group employees of information taken from former IRS employee's own income tax return, for the purpose of alerting the group to possible irregularities in client returns prepared by former employee, was proper "need to know" disclosure under the Privacy Act); Barnard v. United States, 81-1 U.S. Tax Cas. (CCH) ¶ 9318, 48 A.F.T.R.2d (RIA) ¶ 81-5038 (S.D. Fla. 1981) (former employee asserting FOIA claim had no right under section 6103(h)(1) to obtain portion of his conduct investigation report containing third party return information); Gardner v. United States, Civil Action No. 96-1467 (EGS) (D.D.C. January 29, 1999) (court determined that Service personnel were authorized to make certain disclosures during termination of employment proceedings pursuant to 6103(h)(1)).

Example--District Counsel 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. He learns that District Counsel attorney B worked on a similar case involving a different taxpayer. A requests certain information from B's file. The information sought by A may be provided to him since A has an official need for such material for purposes of tax administration.

B. Disclosures to other Department of Treasury Employees

Section 6103(h)(1) also permits disclosure to employees of other Treasury offices. Again, the key to whether or not disclosure is permissible is whether there is an official need for the employee to know the tax information for purposes of tax administration. See generally Young v. Burks, 849 F.2d 610 (6th Cir. 1988) (unpublished table decision), 1988 U.S. App. LEXIS 8514 (text) (section 6103 permits disclosures of returns and return information to Treasury Department employees investigating the taxpayer's liability).

For example, Customs and Secret Service do not usually have tax administration responsibilities, and tax information will not, as a general rule, be available to them. However, an investigation by Secret Service of a forgery of a tax refund check would be considered tax administration, and disclosure would be permissible in that situation under section 6103(h)(1).

While section 6103(h)(1) provides that a written request for disclosure of tax 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.

II. DISCLOSURES TO JUSTICE -- REFERRAL

Section 6103(h)(3) outlines two methods by which the Department of Justice may secure tax information for use in tax administration proceedings before a federal grand jury or any federal or state court, or to prepare for such proceedings, or for use in investigations that may result in such proceedings.

Section 6103(h)(3)(A) provides that the IRS may make disclosures to Justice under section 6103(h)(2) on its own motion where a tax case has been referred to Justice, or, a taxpayer or third party initiates a suit against the IRS under subchapter B of Chapter 76 of the Code (e.g., under sections 7422, 7424, and 7428).

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

The term "referral" is defined in section 7602(c) in the context of administrative summons (including 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). However, a referral for purposes of section 6103 is not limited to a referral for purposes of section 7602, and also includes other situations where Justice is asked to prosecute, defend, or take action on a tax case on behalf of the IRS, including search warrants, summons enforcement, writs of entry, etc. See McQueen v. United States, 5 F. Supp. 2d 473 (S.D. Tex. 1998) (IRS agent's disclosure of an individual's return information to a US attorney in a request for a search warrant for that individual's records was permissible; court found the IRS had "referred" the case to DOJ within the purview of section 6103(h) since, for section 6103 purposes, the request for the warrant constituted a referral of the case to DOJ).

As for pre referral advice, a referral for purposes of section 6103(h)(3) may, in appropriate circumstances, include the necessary solicitation by IRS of advice and assistance from Justice with respect to a case, prior to a formal referral of the entire case. Disclosures of tax information by IRS to Justice in connection with such necessary solicitation of advice and assistance will be authorized provided the requirements of section 6103(h)(2) are satisfied. See Staff of the Joint Committee on Taxation, General Explanation of the Tax Reform Act of 1976, 322 (Comm. Print 1976), 1976-3 C.B. (Vol. 2) 334.

However, strict procedural constraints apply even when the solicitation of pre referral advice is necessary from the standpoint of federal tax administration. In particular, pre referral solicitations for advice that entail the disclosure of tax information may be made only by IRS personnel with the delegated authority to disclose tax information (to the extent authorized by section 6103(h)(2)) in connection with a formal referral of the tax case to Justice. Furthermore, disclosures in connection with the solicitation of pre

referral advice are not authorized after the point in time that the pre referral advice is rendered, *i.e.*, there is no authority to make disclosures to “keep Justice apprized” of developments in a tax investigation or to give Justice periodic updates on non referred cases. The referral terminates once the advice or assistance is rendered.

Under section 6103(h)(3)(B), Justice may obtain tax information in non referred tax administration cases initiated by Justice. In these circumstances, a written disclosure request is required from either the Attorney General, Deputy Attorney General or an Assistant Attorney General. This authority to request tax information cannot be delegated. Therefore, a request from a United States Attorney in these circumstances may not be honored. See, *e.g.*, Williams v. United States, 58 A.F.T.R.2d (RIA) 5642 at 5643-44 (M.D. Ala. 1986).

Courts have scrutinized the IRS' procedures and delegation orders in the context of reviewing challenges to disclosures in referred and non referred cases. See United States v. Bachelier, 611 F.2d 443, 447 (3rd Cir. 1979) (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” to DOJ attorneys--compliance with either section 6103(h)(3)(A) or section 6103(h)(3)(B)); United States v. Chemical Bank, 593 F.2d 451, 457 (2d Cir. 1979) (DOJ attorneys may obtain tax information pursuant to section 6103(h)(2) “only on compliance with” section 6103(h)(3)); United States v. Michaelian, 803 F.2d 1042 (9th Cir. 1986); United States v. Mangan, 575 F.2d 32 (2d Cir.), *cert. denied*, 439 U.S. 931 (1978) (technicalities of disclosure to Justice); *cf.* United States v. Feldman, 731 F. Supp. 1189 (S.D.N.Y. 1990) (requirements for referrals - summons context); Williams v. United States, 58 A.F.T.R.2d (RIA) 5642 (M.D. Ala. 1986) (same); United States v. Carr, 585 F. Supp. 863 (E.D. La. 1984) (same); McTaggart v. United States, 570 F. Supp. 547 (E.D. Mich. 1983) (same); *see also* 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.), *cert. denied*, 484 U.S. 912 (1987).

III. DISCLOSURES TO JUSTICE TO PREPARE FOR CASES

A. Section 6103(h)(2) sets forth the conditions under which tax information may be disclosed to Justice for use in any proceeding before a federal grand jury or in preparation for any proceeding (or investigation which may result in such a proceeding) before a federal grand jury or any federal or state court in matters involving tax administration. These conditions are:

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;

2. the treatment of an item reflected on a return is or may be related to the resolution of an issue in the proceeding [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 which may resolve an issue in the proceeding [transaction test].

B. Section 6103(h)(2) recognizes the need of Justice to access tax information in carrying out its responsibilities in the civil and criminal tax arena. Congress therefore permitted the disclosure of tax information of the taxpayer whose liability is at issue or whose liability gave rise to the case.

Young v. Burks, 849 F.2d 610 (6th Cir. 1988) (unpublished table decision), 1988 U.S. App. LEXIS 8514 (text) (routine investigation); United States v. Michaelian, 803 F.2d 1042 (9th Cir. 1986) (disclosure to Justice to obtain search warrant); United States v. Chemical Bank, 593 F.2d 451 (2d Cir. 1979) (disclosures to Justice in the context of an IRS audit requested by Justice Strike Force Program must follow “institutional system of procedures,” e.g., requisite written request, to ensure IRS does not become “information gathering agency” for Justice); United States v. Olson, 576 F.2d 1267 (8th Cir.), cert. denied, 439 U.S. 896 (1978)(party taxpayer); United States v. Mangan, 575 F.2d 32 (2d Cir.), cert. denied, 439 U.S. 931 (1978) (technicalities of disclosure to Justice); McLarty v. United States, 741 F. Supp. 751 (D. Minn. 1990), related proceeding, 784 F. Supp. 1401 (D. Minn. 1991) (disclosure to Justice and court of counsel's return in connection with criminal case pro hac vice hearing not permissible; pro hac vice hearing is not tax administration); United States v. Robertson, 634 F. Supp. 1020 (E.D. Cal. 1986), aff'd mem., 815 F.2d 714 (9th Cir.), cert. denied, 484 U.S. 912 (1987) (requirements not met); United States v. Lavin, 604 F. Supp. 350 (E.D. Pa. 1985) (disclosure procedures to be strictly followed, drug trafficking is not tax administration); In re Grand Jury Empanelled, 82 F.R.D. 18 (D.N.J. 1979) (defining tax versus nontax matters); Topercer v. Lee, 78-1 U.S. Tax Cas. (CCH) ¶ 9416, 41 A.F.T.R.2d (RIA) 1386 (N.D. Ga. 1978) (disclosure to Justice for grand jury proceedings permissible); Heimark v. United States, 14 Cl. Ct. 643 (1988) (section 6103(h)(2) covers only disclosure to Justice, not disclosures in court).

Example -- A section 7203 willful failure to file case has been referred to Justice for prosecution. The Justice 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 Justice attorney is “personally and directly engaged in” the referred tax case and the taxpayer is or may be a party to a tax proceeding.

Example -- In a summons enforcement case against a bank, in which taxpayer chooses not to intervene, information regarding the nature of the underlying investigation of the taxpayer may be provided to the Justice 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 wrongful levy action under section 7426, the tax information of the taxpayer may be disclosed to Justice under section 6103(h)(2)(A) because the proceeding arises out of or in connection with collecting the taxpayer's liability.

C. Congress did impose restrictions on the disclosure of third party tax information to Justice. Disclosure is permitted under the "item" test of section 6103(h)(2)(B) if the treatment of an item reflected on a third party's return is or may be related to the resolution of an issue in the investigation of the taxpayer, or an issue in a tax proceeding to which the taxpayer is or may be a party.

Example -- In a case involving the assessment of the 100% Trust Fund Recovery Penalty against a particular person for failure to withhold and pay employment taxes, the reflection on a corporate return of items such as wages paid, taxes withheld, and the corporate office, if any, held by the person may relate to resolution of the issue of the person's liability for the penalty.

Example -- The returns of certain third party taxpayers, e.g., subchapter S corporations, partnerships, trusts, and estates may reflect the treatment of certain items which relate, or potentially may relate, to resolution of an issue in a tax proceeding to which a particular taxpayer is or may be a party because of the relationship of that taxpayer (e.g., as shareholder, partner, beneficiary, legatee) to the third party corporation, partnership, trust or estate.

D. The "transactional relationship" test of section 6103(h)(2)(C) is satisfied if the tax information of the third party reflects a transaction between the taxpayer and the third party, and, the third party tax information pertaining to the transaction affects or may affect the resolution of an issue in a tax investigation of the taxpayer, or, in a tax proceeding to which the taxpayer is or may be a party.

Davidson v. Brady, 559 F. Supp. 456 (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, 78-1 U.S. Tax Cas. (CCH) ¶ 9133, 41 A.F.T.R.2d (RIA) 678 (S.D. Fla. 1977) (taxpayer/recordkeeper in summons enforcement case).

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 have been met, the third party's Schedule D may be furnished to the Justice attorney assigned to the case.

E. Only those portions of the third party's return or return information which reflect the item or transaction should be disclosed. See S. Rep. No. 94-938, at 326 (1976), 1976-3 C.B. (Vol. 3) 364; Guarantee Mut. Life Ins. Co. v. United States, 78-2 U.S. Tax Cas. (CCH) ¶ 9728, 42 A.F.T.R.2d (RIA) 5915 (D. Neb. 1978). But see Conklin v. United States, 61 F.3d 915 (10th Cir. 1995) (unpublished table decision), 76 A.F.T.R.2d (RIA) 5896, 1995 U.S. App. LEXIS 20410 (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 clear language of the statute).

Example -- In the preceding example (unreported income/net worth case), only the third party's Schedule D was disclosed. Other schedules of the third party's return do not relate, or potentially relate, to resolution of the unreported income issue, and therefore, should not be disclosed to the Justice attorney.

F. Returns and return information of unrelated but similarly situated third party taxpayers ("third party comparables") cannot be disclosed to a Department of Justice officer or employee since neither the "item" nor the "transactional relationship" test can be met.

Example -- A line item on a corporation's return reflecting a deduction claimed by that corporation for compensation paid to its president is not an item on a third party's return that relates (or even potentially relates) to resolution of an issue regarding the liability of a separate corporation with respect to any deduction it may have claimed on its own return for compensation that it paid to its president. S. Rep. No. 94-938, at 325 (1976), 1976-3 C.B. (Vol. 3) 363.

Example -- During the course of a section 482 case, the Revenue Agent gathered information from IRS files relating to prices paid by similarly situated but unrelated companies in order to determine what prices the taxpayer/company reasonably should have paid for similar services and products. The return information of the third party taxpayers would not be disclosable to the Justice attorney since neither the "item" nor the "transactional relationship" tests have been met. See S. Rep. No. 94-938, at 325-26 (1976), 1976-3 C.B. (Vol. 3) 363-64.

Example -- A third party witness' tax information cannot be used to collaterally impeach the credibility of the witness unless the "item" or "transactional relationship" test is otherwise met. In United States v. McManus, 651 F. Supp. 382 (D. Md.), aff'd, 826 F.2d 1061 (4th Cir. 1987) (unpublished table opinion)

(text in Westlaw), cert. denied, 484 U.S. 1046 (1988), defendant tax attorney charged with tax evasion challenged the government's use of the returns of his character witnesses to attack their credibility. However, the returns showed, among other things, the witnesses' failure to report income received as part of their employment with defendant. Because of the transactional relationship between the employee/witnesses and the employer/defendant, the government argued that the use of the returns went beyond mere impeachment and reflected a transactional relationship between the witnesses and defendant bearing on the issues in the tax case of the defendant's intent, knowledge, and willfulness. (The returns showed defendant failed to provide Forms W-2 to the witnesses.)

IV. DISCLOSURES IN JUDICIAL AND ADMINISTRATIVE TAX PROCEEDINGS

Pursuant to section 6103(h)(4), tax information may be disclosed in a judicial or administrative tax proceeding. The proceeding may be at either the federal or state level, including proceedings before the Tax Court, provided at least one of the following criteria are met:

A. 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 his civil liability. Section 6103(h)(4)(A). See United States v. Mangan, 575 F.2d 32 (2d Cir.), cert. denied, 439 U.S. 931 (1978).

B. The treatment of an item reflected on such return is directly related to the resolution of an issue in the proceeding. Section 6103(h)(4)(B). See Conklin v. United States, 61 F.3d 915 (10th Cir. 1995) (unpublished table decision), 76 A.F.T.R.2d (RIA) 5896, 1995 U.S. App. LEXIS 20410 (allowing the Service to introduce the entire return even if only one part of the return is relevant once the 6103(h)(4)'s predicate requirements have been satisfied).

In Beresford v. United States, 123 F.R.D. 232, 89-1 U.S. Tax Cas. (CCH) ¶ 9166, 63 A.F.T.R.2d (RIA) 990 (E.D. Mich. 1988), the court applied section 6103(h)(4)(B) in the context of discovery in a tax refund suit. The suit involved valuation of certain shares of stock owned by the plaintiff estate. The estate sought to compel discovery of an appraisal report containing third party return information relied upon by the IRS to determine the value of the shares of stock owned by the estate. The court ordered the IRS to produce the appraisal report with the identities of the third party taxpayers deleted, concluding that the third party information was directly related to the valuation issue in the tax proceeding. NOTE: The IRS generally takes the position that third party comparable information is not available to a taxpayer, see Part (F) of Section III of this chapter, above.

C. The third party return or return information to be disclosed directly relates to a "transactional relationship" between a person who is a party to the proceeding and the third party taxpayer which directly affects the resolution of an issue in the tax proceeding. Section 6103(h)(4)(C).

D. Note that the (h)(4) test is slightly different from, and stricter than, the test in (h)(2). Section 6103(h)(2) uses more general "is or may" language in applying standards for disclosure. Under section 6103(h)(4), however, the "may" language is dropped, and a taxpayer must be the party, the item must be "directly related" to the resolution of an issue, or the third party tax information must "directly relate" to a transactional relationship between the third party/taxpayer and the party/taxpayer and must "directly affect" the resolution of an issue in the tax proceeding. In short, the difference between sections (h)(2) and (h)(4) is that under (h)(2), the tax information transferred to Justice must 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 tax information be necessary to the resolution of issues in the tax proceeding, only that it affect the resolution of any of those issues. See First W. Gov't Sec. v. United States, 578 F. Supp. 212, 217-218 (D. Colo. 1984), aff'd, 796 F.2d 356 (10th Cir. 1986).

For interpretations of "directly related" see LeBaron v. United States, 794 F. Supp. 947 (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 the church was a party, i.e., whether information sought in the summons was necessary to IRS' investigation of the church's tax exempt status); Tavery v. United States, 32 F. 3d 1423 (10th Cir. 1994), aff'g 1991 U.S. Dist. LEXIS 15592 (D. Colo. Oct. 18, 1991) (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); Beresford v. United States, 123 F.R.D. 232, 89-1 U.S. Tax Cas. (CCH) ¶ 9166, 63 A.F.T.R.2d (RIA) 990 (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)); Mindell v. United States, 693 F. Supp. 847 (C.D. Cal. 1988). See generally United States v. Tsanas, 572 F.2d 340 (2d Cir.), cert. denied, 435 U.S. 995 (1978) (court's refusal to subpoena corporate return which would not directly affect resolution of tax evasion case not incorrect); Topercer v. Lee, 78-1 U.S. Tax Cas. (CCH) ¶ 9416, 41 A.F.T.R.2d (RIA) 1386 (N.D.Ga. 1978) (disclosure in Tax Court); McLarty v. United States, 741 F. Supp. 751 (D. Minn. 1990), related proceeding, 784 F. Supp. 1401 (D. Minn. 1991) (disclosure to Justice and court of counsel's return in criminal case pro hac vice hearing not permissible);

Guarantee Mut. Life Ins. Co. v. United States, 78-2 U.S. Tax Cas. (CCH) ¶ 9728, 42 A.F.T.R.2d (RIA) 5915 (D. Neb. 1978) (where the issue centers on an individual's status as employee or independent contractor, portions of his return indicating such status may be disclosed); Christoph v. United States, 1995 U.S. Dist. LEXIS 19977, 77 A.F.T.R.2d (RIA) 809 (S.D. Ga. 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) tax 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 tax proceeding).

Note that although Chamberlain v. Kurtz, 589 F.2d 827 (5th Cir.), cert. denied, 444 U.S. 842 (1979), holds that section 6103(h)(4) governs disclosure to federal officials, not to the taxpayer, most other courts have found that the section permits discovery from the Government as long as the statutory tests have been met.

For additional application of the "item" and "transactional relationship" tests, see the following: in employer/employee situations, to establish the nature of the employment relationship, Guarantee Mut. Life Ins. Co. v. United States, 78-2 U.S. Tax Cas. (CCH) ¶ 9728, 42 A.F.T.R.2d (RIA) 5915 (D. Neb. 1978); Cory Pools v. United States, 213 Ct. Cl. 751 (1977); L.A.S. Enterprises, Inc. v. United States, 213 Ct. Cl. 698 (1977); in 100% penalty case, Heimark v. United States, 14 Ct. Cl. 643 (1988); in the case of a donor/donee, to establish whether a gift was made in contemplation of death, Estate of Stein v. United States, 81-1 U.S. Tax Cas. (CCH) ¶ 13405, 47 A.F.T.R.2d (RIA) 1311 (D. Neb. 1981); in the case of a husband/wife, for the treatment of certain withholding exemptions, United States v. Sutherland, No. 80-1675 (5th Cir. Unit A August 10, 1981) (per curiam); in the case of a taxpayer/ recordkeeper in summons enforcement action, Hostetler v. Yungbluth, 78-1 U.S. Tax Cas. (CCH) ¶ 9133, 41 A.F.T.R.2d (RIA) 678 (S.D. Fla. 1977); in the case of a dealer-broker in government securities and his customer-investors, to show why certain losses which they claim through the dealer-broker had been denied, First W. Gov't Sec. v. United States, 578 F. Supp. 212 (D. Colo. 1984), aff'd, 796 F.2d 356 (10th Cir. 1986); 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, Davidson v. Brady, 559 F. Supp. 456 (W.D. Mich. 1983), aff'd on other grounds, 732 F.2d 552 (6th Cir. 1984); in the case of co-tenants-in-common with regard to profit motive and predecessor-in-interest with regard to useful life of a property, Odend'hal v. Commissioner, 80 T.C. 588 (1983); in the case of payments made to individual by exempt organization, Morgan v. United States, Civ. Act. No 91-M-379, 1991 U.S. Dist. LEXIS 12882 (D. Colo. Aug. 30, 1991), aff'd, 1992 U.S. App. LEXIS 1394 (10th Cir. Jan. 30, 1992); in the case of two

individuals arrested together for attempting to purchase marijuana, where an RAR containing one individual's return information was included with a 30-day letter sent to the other individual, Nevins v. United States, 88-1 U.S. Tax Cas. (CCH) ¶ 9199, 71A A.F.T.R.2d (RIA) ¶ 93-3023 (D. Kan. 1987). Confidential Informant 92-95-932X v. United States, 45 Fed. Cl. 556 (2000), 2000-1 U.S. Tax Cas. (CCH) ¶ 50,187 (Fed. Cl. 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 Department of Justice under section 6103(h)(2)(B) and in the tax administration proceeding under section 6103(h)(4)(B)); but see Bristol-Myers Barceloneta, Inc. v. United States, Civil No. 97-2567CC (D.P.R.) (numerous third party taxpayers' information disclosed in discovery based on taxpayer's claim of disparate treatment).

Example -- A Chief Counsel attorney seeks to introduce in a tax proceeding return information of a third party witness for the sole purpose of discrediting the witness' testimony. Unless the "item" or "transactional relationship" tests can be met, the information could not be disclosed in such proceeding.

Example -- Before sentencing, a federal probation officer requests certain return information on a convicted Title 26 taxpayer concerning the taxpayer's filing history since the year of the tax violation. Since Fed. R. Crim. P. 32(c) requires the probation officer to make a presentence investigation and present the report to the court, the probation officer's function is an integral part of the tax prosecution. The requested material may therefore be provided to the probation officer.

For examples of disclosures of third party tax information in tax shelter cases, see Mallas v. United States, 993 F.2d 1111 (4th Cir. 1993) (RARs which included information about promoters' shelter-related convictions for tax evasion sent to tax shelter investors found as unauthorized disclosures); Mid-South Music Corp. v. United States, 818 F.2d 536 (6th Cir. 1987) (letters to tax shelter investors stating disallowed deductions); First W. Gov't Sec. v. United States, 796 F.2d 356 (10th Cir. 1986) (letters to tax shelter investors); Solargistic Corp. v. United States, 89-2 U.S. Tax Cas. (CCH) ¶ 9610, 65 A.F.T.R.2d (RIA) 741 (N.D. Ill. 1989), aff'd, 921 F.2d 729 (7th Cir. 1991) (letters to tax shelter investors); Datamatic Servs. v. United States, 88-1 U.S. Tax Cas. (CCH) ¶ 9163, 61 A.F.T.R.2d (RIA) 358 (N.D. Cal. 1987) (letters to tax shelter investors); Balanced Fin. Management v. Fay, 662 F. Supp. 100 (D. Utah 1987) (letters to tax shelter investors).

E. The Government is not required to disclose information in a tax administration proceeding if the disclosure would identify the identity of 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 (2000), 2000-1 U.S. Tax Cas. (CCH) ¶ 50,187 (Fed. Cl. 2000) (identity of confidential informant held protected from disclosure to taxpayer even in context of suit by the confidential informant against United States to enforce informant's contact with United States governing payment of award in exchange for information leading to collection of taxes from taxpayer).

F. 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 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 that the impairment determination in section 6103(h)(4) does not apply in these circumstances. For discussion of the applicability of § 6103(h)(4)(D), see United States v. Lloyd, 992 F.2d 348 (D.C. Cir. 1993); United States v. Robertson, 634 F. Supp. 1020 (E.D. Cal. 1986) aff'd mem., 815 F.2d 714 (9th Cir.), cert. denied, 484 U.S. 912 (1987); United States v. Recognition Equip., 720 F. Supp. 13 (D.D.C. 1989); Dawes v. United States, 1990 U.S. Dist LEXIS 14671 (D. Kan. Oct. 15, 1990); United States v. Fuentes-Montijo, 1996 U.S. App. LEXIS 965 (9th Cir. Jan. 22, 1996) (circuit court affirmed quashing of defendant's subpoena to IRS for confidential tax records of informants, indicating that the requested information was of marginal relevance and did not outweigh the Congressional policy favoring nondisclosure).

G. Section 6103(h)(4) speaks in terms of judicial and administrative tax administration proceedings. In First W. Gov't Sec. v. United States, 796 F.2d 356 (10th Cir. 1986), and in Nevins v. United States, 88-1 U.S. Tax Cas. (CCH) ¶ 9199, 71A A.F.T.R.2d (RIA) ¶ 93-3023 (D. Kan. 1987), audits were found to be administrative tax proceedings for purposes of the statute. However, in Mallas v. United States, 993 F.2d 1111 (4th Cir. 1993), an audit was held not to be an administrative proceeding described in section 6103(h)(4). See also Ungaro v. Desert Palace, Inc., 91-1 U.S. Tax Cas. (CCH) ¶ 50,294, 65 A.F.T.R.2d (RIA) 1116 (D. Nev. 1989) (criminal investigation and placement of lien or levy is administrative tax proceeding); Young v. Burks, 849 F.2d 610 (6th Cir. 1988) (unpublished table decision), 1988 U.S. App. LEXIS 8514 (text); Niemela v. United States, 92-2 U.S. Tax Cas. (CCH) ¶ 50,481, 71A A.F.T.R.2d (RIA) ¶ 93-3084 (D. Mass. 1992), aff'd in part, vacated in part, 995 F.2d 1061 (2nd Cir. 1993) (unpublished table decision), 1993 U.S. App. LEXIS 21338 (text).

H. Section 6103(h)(4) authorizes disclosure in judicial and administrative tax proceedings. It does not address disclosures to the public. Johnson v. Sawyer, 640 F. Supp. 1126 (S.D. Tex. 1986).

V. SECTION 6103(h) AND SECTION 6103(e) INTERPLAY

In many situations involving, for example, tax shelter promoters, it may be difficult to establish whether the information in question was gathered on the promoter, the investors, or both. This is especially true when the focus of an information gathering effort may not necessarily be on one taxpayer, but on determining whether an entire complex transaction is a sophisticated tax avoidance scheme. If the information regarding one taxpayer relates to a determination of liability of a second taxpayer, an argument exists that the information of the first taxpayer might, by operation of section 6103(b)(2)(A), be the return information of the second taxpayer, and be disclosable to that taxpayer under sections 6103(e) and/or 6103(h)(4)(A).

However, the legislative history of section 6103(h)(4) suggests that there are limitations on the concept of classifying one taxpayer's information as the tax information of another. For example, assume the IRS is examining a seller's return resulting from the sale of a business. During the examination, the revenue agent reviews the treatment on the buyer's return regarding his purchase of the business. In this circumstance, the buyer's return is, for purposes of section 6103(h)(4), a third party tax return subject to the third party tests on disclosure. S. Rep. No. 94-938, at 325 (1976), 1976-3 C.B. (Vol. 3) 363.

The courts have not offered clear guidance on this point. Compare Martin v. Internal Revenue Service, 857 F.2d 722 (10th Cir. 1988), with Solargistic Corp. v. United States, 921 F.2d 729 (7th Cir. 1991) (discussed in Chapter 2, Part II: Section 6103 - Whose Information Is Protected). As a result, the best approach in these types of situations is generally not to rely solely on the dual status theory of return information before making disclosures in a tax administration proceeding, but also be able to argue that the disclosure meets the item or transaction test.

VI. DISCLOSURES OF TAX INFORMATION OF PROSPECTIVE JURORS IN FEDERAL CRIMINAL TAX CASES

In 1997, Congress amended section 6103(h) to eliminate a paragraph providing that in a federal criminal tax case, the Justice attorney and the taxpayer/defendant (and his or her legal representative) could inquire as to whether a prospective juror had or had not been the subject of an audit or other tax investigation. Under such paragraph, the IRS could only respond to such inquiry with an affirmative or negative reply. The amendment eliminating the authority to disclose information about prospective jurors applies to judicial proceedings commenced after August 5, 1997. Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 1283, 111 Stat. 1038 (1997). For purposes of this provision, an action "commences" with a formal charge, preliminary hearing, indictment, information, or arraignment.

VII. DISCLOSURES TO THE INTERNAL REVENUE SERVICE OVERSIGHT BOARD

Section 6103(h)(6) addresses access to tax 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, Pub. L. No. 105-206, 112 Stat. 685, 691-697. This Board is composed of the Secretary of 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 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, and 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 any employee or detailee of the Board by reason of their service with the Board. However, this nondisclosure rule does not apply to reports “or other matter” 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 needs to be included in such report “or other matter” to enable the Board to carry out its duties.

Section 6103(h)(6) also provides that Internal Revenue 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 employee to the Board, or from any employee or detailee of the Board, for tax information that is not permitted to be disclosed under section 6103(h)(6), or any contact they receive from any such individual relating to a specific taxpayer.

VIII. SECTION 6103(h) AND SECTION 6103(i) INTERPLAY

Under section 6103(h), tax information disclosed to Justice attorneys may only be used and subsequently disclosed by those attorneys for tax administration purposes. Justice attorneys seeking tax information for federal nontax criminal purposes must follow the procedures outlined in section 6103(i). See United States v. Mangan, 575 F.2d 32 (2nd Cir.), cert. denied, 439 U.S. 931 (1978); United States v. Recognition Equip., 720 F. Supp. 13 (D.D.C. 1989).

An exception to this rule is found at Treas. Reg. § 301.6103(h)(2)-1. This regulation anticipates situations where a referred criminal tax administration investigation may involve tax aspects of transactions which are also 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 tax 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.

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 Justice, the information must be used directly in connection with the tax administration proceeding, and the nontax use must be confined to the tax administration proceeding. Finally, the regulation requires that if the tax administration portion is terminated, Justice 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).

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CHAPTER 4

SECTIONS 6103(k)(6) AND (n), TAX ADMINISTRATION INVESTIGATIVE DISCLOSURES AND DISCLOSURES TO CONTRACTORS

OBJECTIVES

At the end of this chapter, you will be able to:

1. identify the statutory and regulatory criteria for making investigative disclosures for tax administration purposes, and
2. determine when disclosures for contract services should be made under I.R.C. §§ 6103(k)(6) and (n).

I. SECTION 6103(k)(6): INVESTIGATIVE DISCLOSURES FOR TAX ADMINISTRATION PURPOSES

A. In general

1. Internal Revenue Service and Chief Counsel employees are specifically authorized by I.R.C. § 6103(k)(6) and Treas. Reg. § 301.6103(k)(6)-1 to disclose return information to the extent that 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, or with respect to the enforcement of any other provision of the Code.
2. A taxpayer's identity, the fact that an inquiry pertains to the performance of official duties and the nature of the official duties (e.g. collection inquiry, tax audit, criminal investigation) may be disclosed:
 - a. To obtain necessary information;
 - b. where necessary to properly accomplish certain activities, including:
 - (1) establishing or verifying the actual or potential liability of any person for any tax, penalty, interest, fine, forfeiture, etc. under the internal revenue laws;
 - (2) collection related activities (liens, levies, seizures, sales);

- (3) establishing or verifying the correctness or completeness of any return;
- (4) establishing or verifying the financial status and location of the taxpayer against whom collection activity is directed;
- (5) establishing or verifying the actual or potential liability of any person under the internal revenue laws; and
- (6) obtaining the services of persons having special knowledge or technical skills,

C. but only if such return information cannot otherwise reasonably be obtained in accurate and sufficiently probative form, or in a timely manner, and without impairing the proper performance of official duties, without making the disclosure.

3. I.R.C. § 6103(k)(6) does not authorize disclosure of actual tax returns or copies of actual tax returns. Thus, while a tax return may not be shown to a third party, pertinent data from the return (such as the types and amounts of income, deductions, etc.) may be extracted, when necessary, and used in questions asked of the third party.

4. Factual predicates encourage second guessing, always by the plaintiffs and often by the courts, as to the necessity for any disclosure of return information at all, and/or the necessity for the disclosure of one or more discrete items of information in order to obtain the particular information sought. The relevant inquiry is NOT whether the information sought is necessary for the investigation or examination; the inquiry is whether the disclosure of each element of return information is necessary to obtain the particular information sought. Barrett v. United States, 795 F.2d 446 (5th Cir. 1986) (subsequent history omitted). The only purpose of the disclosure is to obtain information; the Service may not disclose return information for the recipient's benefit.

5. As a general rule, if the taxpayer is cooperating and may have the information sought, the information should first be sought from the taxpayer or the taxpayer's representative, unless to do so would impair the investigation or unless (in a criminal investigation) the taxpayer has refused to waive rights to counsel and to remain silent. If it is deemed appropriate to verify the taxpayer's records or information, and it is necessary to disclose return information in order to accomplish the verification, such disclosure is authorized pursuant to 26 C.F.R. § 301.6103(k)(6)-1(a) (information sought is not reasonably available in accurate, sufficiently probative form, or in a timely manner), and under 26

C.F.R. § 6103(k)(6)-1(b)(1), (3), (4), and (6) (return information may be disclosed in order to verify correctness of return, liability at law or in equity for tax, etc., misconduct or possible misconduct proscribed by internal revenue laws, and the financial status or condition and location of the taxpayer, to locate assets, etc.).

6. Virtually every court that has dealt with section 6103(k)(6) has looked into the circumstances surrounding each disclosure, and has taken a narrow view of the elements of return information that were necessary to be disclosed in order to obtain the information sought.

7. Elements of investigative disclosures under (k)(6).

a. Information is sought for an official purpose. For example, during an examination of an income tax return, a revenue agent wants to verify purchases of goods.

b. The information is not reasonably available without disclosing return information. In our example, if possible, the revenue agent should first try to verify the purchases by examining the taxpayer's records.

c. Disclose only the return information that is necessary to obtain the information sought.

1. In our example concerning purchases, if the taxpayer doesn't have the information or refuses to provide the information, and information is sought from vendors, it would be necessary to disclose to vendors the name and probably the address of the taxpayer.

2. In our example concerning purchases, it would not be necessary to disclose the taxpayer's date of birth, place of birth, social security number, etc. It may not be necessary to disclose the nature of the inquiry, i.e., examination of the taxpayer's return -- "in connection with an official matter" may well be sufficient to satisfy the vendor that the inquiry is official business.

B. Liens and Levies

1. I.R.C. § 6103(k)(6) permits the disclosure of return information by a Service employee "in connection with . . . official duties relating to any . . . collection activity. . ." As the case law has evolved, some courts have distinguished between those cases where the underlying lien or levy is

valid and those where it is not. In those cases in which the courts have held the disclosures improper, the rationale is that if the underlying lien or levy is invalid, the disclosures made in attempting to collect the tax are also invalid. It is the position of the Service 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 Service's collection efforts. The Courts of Appeal for the Third, Fifth, Ninth, and (in an unpublished decision) Tenth Circuits have adopted the Service's position. However, the Eighth Circuit has ruled that if the underlying lien is invalid, the disclosures made in the lien violate I.R.C. § 6103(a). That Eighth Circuit case was decided before Congress enacted I.R.C. § 7433, which created a specific remedy for reckless and/or intentional improper collection activity; except for the Tenth Circuit decision, the other circuit court cases were decided after the enactment of I.R.C. § 7433.

2. Often the return information which the plaintiff alleges to have been improperly disclosed has already been entered into 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 Service takes the position that once return information is properly placed in the public record in a tax administration proceeding, it is no longer confidential and I.R.C. § 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 confidentiality of return information are those explicitly stated in Title 26, and that there is no statutory exception in for return information that has been made a matter of public record. See Chapter 2 for a further discussion of the public record issue.

3. Liens and Levies Case Law

a. Chisum v. United States, 69 A.F.T.R.2d (RIA) 91-512 (D. Ariz. 1991), aff'd, 1993 U.S. App. Lexis 23636 (9th Cir. 1993). The court found that the Service was authorized pursuant to I.R.C. § 6103(k)(6) to disclose tax return information by filing a notice of federal tax lien in the Maricopa County (Arizona) 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.

b. Coplin v. United States, 71A A.F.T.R.2d (RIA) 93-4047 (W.D. Mich. 1991), aff'd, 952 F.2d 403 (6th Cir. 1991), cert. denied, 504 U.S. 974 (1992). The Service made nine different assessments

against the plaintiffs, husband and wife, individually and jointly, that went unpaid, and then filed notices of federal liens with county registrars. In an attempt to satisfy the individual and joint liens, the Service served notices of levy by mail on 374 people whose income tax returns had been prepared by Mr. Coplin in order to capture any money owed to the plaintiffs. At the time the notices of levy were mailed, the individuals were not current clients of the plaintiff, although all had been former clients. The notices stated the type of tax assessments, tax periods of the assessments, and the amounts owed. The court concluded that I.R.C. § 6103(k)(6) authorized the disclosures because the Government had exhausted all reasonably available means of obtaining the information sought, and that disclosing information through notices of levy does not violate section 6103 because the notice of federal tax lien already publicly discloses the information.

c. Cuda v. United States, 71A A.F.T.R.2d (RIA) 93-4188 (W.D. Mich. 1991). To collect the plaintiffs' outstanding tax liability, a revenue officer served numerous notices of levy on the plaintiffs' neighbors, who had entered into oil and gas leases with the plaintiffs. The revenue officer served the levies to determine whether the neighbors had any of the plaintiffs' property pursuant to the leases. The court noted that I.R.C. § 6103(k)(6) authorizes disclosure of return information to the extent necessary to obtain information not otherwise readily available to collect outstanding tax liability. The 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.

d. Dickerson v. United States, 71A A.F.T.R.2d (RIA) 93-4311 (E.D. Tenn. 1991), aff'd, 956 F.2d 269 (6th Cir. 1992). Because of alleged procedural deficiencies in the collection process, the plaintiffs claimed unlawful disclosures when notices of levy were served upon their employers. The court relied on I.R.C. § 6103(k)(6) to grant the Government's motion for summary judgment because the plaintiffs failed to allege facts to support a finding that the Service made disclosures other than "those necessary to effectuate levies and liens and the possible sale of assets."

e. Egbert v. United States, 752 F. Supp. 1010 (D. Wyo. 1990), aff'd without op. 940 F.2d 1539 (10th Cir. 1991), cert. denied, 502 U.S. 1016 (1991). The plaintiff failed to file income tax returns. After assessing and notifying the plaintiff of the deficiencies in an attempt to collect the delinquent taxes, the Service filed notices of

federal tax liens and then served a notice of levy on the plaintiff's employer as well as published notices of the sale of the plaintiff's property. Although the court noted that I.R.C. § 6103(k)(6) provides for the disclosure of return information for the purposes of tax administration, the court did not determine whether or not the plaintiff was entitled to recovery pursuant to I.R.C. § 6103 because the court lacked jurisdiction and therefore, dismissed the wrongful disclosure claim.

f. Elias v. United States, 1990 U.S. Dist. Lexis 19466 (C.D. Cal. Dec. 21, 1990), aff'd, 974 F.2d 1341 (9th Cir. 1992). The district court, in a very comprehensive discussion of section 6103(k)(6) case law and congressional intent, found that disclosures contained in summonses, liens, and levies were authorized by section 6103(k)(6).

g. Erickson v. United States, 952 F.2d 1399 (9th Cir. 1992). The Service seized and sold the plaintiffs' property to satisfy their unpaid tax liabilities. The plaintiffs alleged that the Service's assessments and liens were procedurally invalid because the plaintiffs claimed not to have received notice of assessment and demand for payment. The court cited I.R.C. § 6103(k)(6) as authority for permitting the disclosures necessary to effectuate liens and levies in order to collect the plaintiffs' tax liabilities.

h. Farr v. United States, 990 F.2d 451 (9th Cir. 1993). The plaintiff filed suit contesting a levy upon her wages which was served upon her employer. The court held that the information disclosed in the notice of levy was necessary to the Service's collection activity, and thus fell squarely within the exemption under I.R.C. § 6103(k)(6).

i. Gentry v. United States, 71A A.F.T.R.2d (RIA) 93-4421 (E.D. Tenn. 1991), aff'd, 962 F.2d 555 (6th Cir. 1992). In a combination quiet title, wrongful levy, and unauthorized disclosure action, the court dismissed the complaint, indicating that the plaintiffs failed to allege facts sufficient to establish bad faith. In a footnote, the court said that it would, in any event, have ruled in the Government's favor, since the plaintiffs failed to introduce evidence to refute the Government's claims that disclosures were authorized by section 6103(k)(6) and were made in good faith.

j. Huff v. United States, 10 F.3d 1440 (9th Cir. 1993), cert denied, 512 U.S. 1219 (1994). The plaintiffs alleged that the Service improperly disclosed return information in violation of I.R.C. § 6103 in three notices of tax levy sent to the Huffs' employers. Citing Farr

v. U.S., 990 F.2d 451 (9th Cir. 1993), the court held that levy notices fall squarely within the exemption under I.R.C. § 6103(k)(6) despite the possible procedural lapses involving the actual levy.

k. James v. United States, 71A A.F.T.R.2d (RIA) 93-4360 (D. Wyo. 1991), aff'd and rev'd in part, and rem'd, 970 F.2d 750 (10th Cir. 1992). The Service served levies on the plaintiff's wages in partial satisfaction of the plaintiffs' tax liability. The court cited I.R.C. § 6103(k)(6) as permitting disclosure of tax return information but dismissed the unauthorized disclosure claim because the court did not have jurisdiction to determine the underlying procedural requirements regarding lien enforcement.

l. Lake v. Atkins, 71A A.F.T.R.2d (RIA) 93-4098 (S.D. Fla. 1991). The Service placed liens on the plaintiffs' property to collect unpaid taxes. The plaintiffs contended the taxes were not properly assessed and that no notice of assessment and demand was properly issued. Citing I.R.C. § 6331 (authorizing the issuance of liens against property) and I.R.C. §§ 6323 (a) and (f) (authorizing the filing of tax lien notices), in conjunction with I.R.C. § 6103(k)(6), the court granted the Government's Motion to Dismiss, or in the Alternative, for Summary Judgment.

m. Lovelace v. United States, 71A A.F.T.R.2d (RIA) 93-3441 (D. Tenn. 1991), aff'd mem. 956 F.2d 269 (6th Cir. 1992). The plaintiff claimed the Service unlawfully levied her wages and made unauthorized disclosures in filing a notice of levy with the plaintiff's employer and a notice of federal tax lien recorded at the Register of Deeds Office. The court cited I.R.C. § 6103(k)(6) as authority for granting the Government's summary judgement with regard to the plaintiff's claim of unauthorized disclosure because the plaintiff failed to allege facts to support the proposition that the Service made disclosures "other than those necessary to effectuate levies and liens and the possible sale of assets."

n. Lutz v. United States, 919 F.2d 738 (6th Cir. 1990). The plaintiff alleged that the Service 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. The court cited to I.R.C. § 6103(k)(6) and regulations thereunder, in concluding the unauthorized disclosure claim was meritless.

o. Maisano v. United States, 908 F.2d 408 (9th Cir. 1990), cert. denied, 498 U.S. 1009 (1990). The plaintiff alleged that the filing of

two tax liens and notices of levy violated the confidentiality requirements of section 6103. The 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).

p. Mann v. United States, 2000 U.S. App. LEXIS 2487 (10th Cir. 2/18/00). 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 § 7433, and that if Chandler were to bring suit today, it would be under § 7433, not § 7431. The court followed the reasoning of Venen and Wilkerson to hold that where § 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."

q. Mettenbrink v. United States, 71A A.F.T.R.2d (RIA) (D. Neb. 1991). The plaintiff alleged the Service made unauthorized disclosures in serving levies on the plaintiff's bank and in unauthorized disclosures unknown to the plaintiff. The court affirmed the proposition in Rorex v. Traynor, 771 F.2d 383 (8th Cir. 1985), stating that "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)." However, the court distinguished this case from Rorex because the court found the levies lawful although they were premature, and because the plaintiff failed to show the levies prejudiced him in attempting to pay delinquent taxes. The court cited I.R.C. § 6103(k)(6) and the corresponding regulations in finding that return information was not improperly released.

r. Pack v. United States, 1991 U.S. Dist. Lexis 15523 (E.D. Cal. Oct. 11, 1991). The plaintiff claimed the Service made unauthorized disclosures because taxes had not been properly assessed pursuant to I.R.C. § 6203 and because notices of assessment and demand for payment had not been issued pursuant to I.R.C. § 6303. The plaintiff did not indicate what the Service disclosed, to whom, and on what date although they appear to pertain to various liens, levies, and notices of sale served by the Service in an attempt to collect the plaintiff's tax liability. The court cited I.R.C. § 6103(k)(6) and the corresponding regulations as

authorizing the alleged disclosures and granted the Government's summary judgment motion.

s. Rorex v. Traynor, 771 F.2d 383 (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)."

t. Schrambling Accountancy Corp. v. United States, 937 F.2d 1485 (9th Cir. 1992), 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). "[Lien] information placed on file at the Recorder's Office is [in California a public record and is] 'no longer confidential and may be disclosed again without regard to section 6103.'" (Citation omitted.)

u. Simpson v. United States, 71A A.F.T.R.2d (RIA) 93-3956 (N.D. Fla. 1991). The Service issued statutory notices of deficiency and the plaintiff did not file a timely petition in Tax Court. As a result, the Service assessed taxes against the plaintiff, filed notices of federal tax liens and served the plaintiff's employer a notice of intent to levy the plaintiff's wages. Although the plaintiff's disclosure claims were barred by the statute of limitations, the court went on to conclude that they would have been authorized pursuant to I.R.C. § 6103(k)(6).

v. Spence v. United States, 114 F.3d 1198 (table cite), 79 A.F.T.R.2d (RIA) 97-2987, 97-1 U.S. Tax Cas. ¶ 50,485 (10th Cir. 1997). A delinquent taxpayer transferred real properties to purported religious entities and family members, then denied having any interest in the transferred properties, yet continued to pay the utility bills of the properties. A revenue officer issued summonses to the tenants for their canceled checks in payment of rent and other information as to whether the taxpayer retained an interest in the properties. The taxpayer argued that he had no unpaid tax liability and, therefore, the summonses were unauthorized. The court held that "the validity of the summons, as the means by which the return information was disclosed, is irrelevant to a determination of whether the disclosure of return information violated § 6103."

w. Timmerman v. Swenson, 44 A.F.T.R.2d (RIA) 79-5727 (D. Minn. 1979). Due to a clerical error, a notice of levy was served upon a bank where the plaintiffs had never had an account. The court held that 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.

x. Venen v. United States, 38 F.3d 100 (3d Cir. 1994). The plaintiff's I.R.C. § 7431 count was based on the premise that since underlying levies were invalid that the disclosures of return information contained in them were improper. After discussing cases which have considered this premise, the court sided with those cases which have held that the validity of the underlying levy is not relevant. The court discusses the historical background of I.R.C. §§ 6103 and 7431 and reasoned as follows:

Congress enacted these sections to regulate "information handling." Congress addressed reckless or intentional improper collection activity when it enacted I.R.C. § 7433. Congress has not addressed merely negligent collection activity and the court is not going to permit the plaintiff to seek redress for such activity under I.R.C. § 7431. Section 6103(k)(6) authorizes the disclosures in this case.

y. Wilkerson v. United States, 67 F.3d 112 (5th Cir. 1995). The plaintiff's I.R.C. § 7431 count was based on the premise that the underlying levies were invalid because they were to collect the tax liability of a third party. The district court agreed with the plaintiff. The Fifth Circuit reversed, finding that the validity of the underlying levy was not relevant. So long as the disclosures were necessary to collect the outstanding tax liability, they were authorized by I.R.C. § 6103(k)(6). The court acknowledges 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.

C. Investigative Form Letters

1. 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 Service seeks to determine the amount of cash payments from persons who are known or likely to be customers of the taxpayer.
2. Few problems are encountered when form letters are sent by examination or collection employees. (Where a taxpayer failed to

cooperate, and a tax auditor sent form letters to the taxpayer's customers that informed recipients that the plaintiff was under examination and that requested copies of canceled checks and invoices concerning purchases from the plaintiff, "[w]e 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." Fostvedt v. United States, 824 F. Supp. 978, 983 (D. Colo. 1993), aff'd, 73 A.F.T.R.2d (RIA) 94-1031 (10th Cir. 1994).

3. Most of the cases litigated have concerned letters sent by the Criminal Investigation Division. Taxpayers and courts seem to be particularly offended when the Service 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.

4. There is a provision in the Handbook for Special Agents, IRM 9.3.1.3.3, concerning what CID calls "circular letters." This guidance has changed over the years. The current guidance proscribes the use of the words "criminal investigation division" in the ancillary heading (return address), text, or signature block of circular letters. Although the text does not explicitly say so, by extension, the words should not be used on the return address of the envelope in which the letter is sent, nor on any return envelope which may be enclosed for the recipient's convenience in responding. The guidance also calls for approval by the Chief, CID, prior to sending any circular letters. Failure to obtain Chief, CID, approval has been pointed to by plaintiffs as "a badge of negligence." "An agent's failure to consult the statutory language as interpreted and reflected in IRS regulations and manuals prior to an improper disclosure of return information is strong evidence that the interpretation of the statute was not in good faith." Jones v. United States, 97 F.3d 1121, 1125 (8th Cir. 1996).

5. Please refer to Chapter 13 for a discussion of the applicability of the Right to Financial Privacy Act, 12 U.S.C. § 3401, et. seq., and the Internal Revenue Service Restructuring and Reform Act of 1998, P.L. 105-206, for current requirements concerning third-party contacts.

6. Investigative Form Letter Case Law

(Note: only three circuits (the 5th in Barrett, below; the 9th in Schachter, below, and the 8th in Diamond and May, below) have ruled on the issue of the disclosure of the fact of criminal investigation in investigative form letters.)

a. Barrett v. United States, 795 F.2d 446 (5th Cir. 1986). A special agent sent “circular letters” to patients of a prominent plastic surgeon to determine the amount of money paid to the surgeon. The letters disclosed the fact that the surgeon was under investigation by the CID. The court declared that its inquiry was not whether the information sought was necessary, but whether the disclosures were necessary to obtain the information sought and whether the information sought was otherwise reasonably available. The Circuit Court remanded for a determination of whether it was necessary to contact any of the patients, whether it was necessary to disclose each item of return information that had been disclosed in the letters [including the fact of criminal investigation], and whether at least some of the information sought from the patients was otherwise reasonably available from bank records. On appeal after the district court decision on remand, in Barrett v. United States, 51 F.3d 475 (5th Cir. 1995), the Fifth Circuit reversed the district court’s decision, finding that 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).

b. Diamond v. United States, 944 F.2d 431 (8th Cir. 1991), reh’g denied, 1991 U.S. App. Lexis 25773 (8th Cir. Oct. 30, 1991). A special agent sent “circular letters” to patients of the plaintiff, who was a doctor, requesting information on their financial transactions with the plaintiff during the relevant years. The court found that it was not necessary to disclose the fact of criminal investigation with a signature block that read, "Special Agent, Criminal Investigation Division" (but affirmed the district court's grant of the Government’s motion for summary judgment based on a good faith but erroneous interpretation of I.R.C. § 6103 by the Service, since the IRM at the time advised including the title, "Special Agent, Criminal Investigation Division" in the signature block of “circular letters”).

c. DiAndre and Metro Denver Maintenance Cleaning, Inc. v. United States, 968 F.2d 1049 (10th Cir. 1992), cert. denied, 507 U.S. 1029 (1993). A special agent sent “circular letters” to the plaintiff’s customers requesting information on all payments made to the taxpayer. The 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 I.R.C. § 6103. The court did not rule on whether disclosure of the fact of criminal investigation was necessary (and therefore lawful).

d. Fostvedt v. United States, 824 F. Supp. 978 (D. Colo. 1993), aff'd, 73 A.F.T.R.2d (RIA) 94-1031 (10th Cir. 1994). (See I.C.2. above.)

e. May v. United States, 141 F.3d (table cite), 81 A.F.T.R.2d (RIA) 98-853, 98-1 U.S. Tax Cas. (CCH) ¶ 50,220 (8th Cir. 1998). The Eighth Circuit followed the precedent established in Diamond, above, in holding that “circular letters” containing “Criminal Investigation Division” in the signature block, pursuant to the then-existing IRM instructions, was (in effect) a violation of section 6103 but that the Government did so in good faith. The court noted that the Eighth Circuit decision in Diamond had not been published at the time that the letters were sent.

f. Rhodes v. United States, 903 F. Supp. 819 (M.D. Pa. Oct. 13, 1995). A special agent sent “circular letters” to customers of the taxpayer. The court did not specifically state whether the letters at issue disclosed the fact of the special agent's affiliation with CID or whether the letters disclosed the fact of criminal investigation. In a very favorable opinion on reconsideration of an earlier decision in favor of the Government, the court analyzed prior circuit court decisions and concluded that the Fifth Circuit, in Barrett (above), wrongly determined that disclosure of the fact of criminal investigation in circular letters was not necessary, and that the Eighth Circuit, in Diamond (above), wrongly determined that such disclosure, by the signature block of circular letters that showed that the special agent was in the Criminal Investigation Division, was not necessary.

g. Schachter v. United States, 77 F.3d 490 (9th Cir. 1996). “Circular letters” then in conformance the IRM, sent by a special agent to customers of the plaintiffs, disclosed the fact of criminal investigation. In this decision, the court affirmed on the basis of good faith the district court's decision granting the Government's motion for summary judgment, and did not address whether the disclosures were authorized under section 6103(k)(6).

h. Simpson v. United States, 72 A.F.T.R.2d (RIA) 93-5605 (N.D. Fla. 1993). The court held that disclosures that identified the plaintiff as the subject of a tax liability investigation and that were 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). While 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.

D. In-Person Investigative Disclosures

1. In-person investigative disclosures are permitted under section 6103(k)(6). Until recently, judicial scrutiny has not been as close for in-person disclosures as for circular letters.

2. Until Gandy, below, no court had found that in-person disclosures of the fact that a special agent is employed by the CID, through verbal announcement, and/or by display of a special agent's pocket commission and enforcement badge (which both state "Criminal Investigation Division"), were not authorized. Courts had, however, taken dim views where disparaging remarks were made to third party witnesses regarding the taxpayer under investigation (see Heller v. Plave, below). In Gandy, the plaintiff challenged verbal statements by special agents to third party witnesses that an investigation of a criminal nature was being conducted pertaining to the plaintiff. The statements were made during witness contacts in the form of interviews, personal service of summonses, and telephone contacts. The agents testified that they did not recall the specific words they used when making the contacts, but that their general practice when introducing themselves to third party witnesses was to display their enforcement badges and pocket commissions and then make either of the following two statements.

My name is _____, and I am a Special Agent with the Criminal Investigation Division of the Internal Revenue Service, and we are conducting an investigation of Dennis Gandy.

My name is _____, and I am a Special Agent with the Criminal Investigation Division of the Internal Revenue Service, and we are conducting a criminal investigation of Dennis Gandy.

Either way, the court found, the agents disclosed that the IRS was conducting a criminal investigation of the plaintiff, and that the disclosure that the plaintiff was under criminal investigation was not necessary to secure the desired information. The court also found that "for a special agent to identify himself to a third party witness by displaying his credentials, and by asking for information pertaining to the identified taxpayer under investigation – whether or not the special agent mentions that the investigation is a 'criminal' investigation – is a disclosure that the taxpayer is under criminal investigation." The court concluded that because the special agents had been trained to make such disclosures,

and that such disclosures were authorized by section 6103(k)(6), the disclosures “resulted in a good faith, but erroneous interpretation of [section] 6103.” Because the Service prevailed in the lawsuit, albeit on good faith rather than on the merits, the Service had no standing to appeal the decision.

3. Gandy is the first court to hold that the disclosure of the fact of criminal investigation in the context of in-person interviews through oral statements and/or the display of special agent enforcement badges or pocket commissions is not authorized pursuant to section 6103(k)(6).

4. In-Person Investigative Disclosure Case Law

a. Gandy v. United States, 1999 U.S. District Lexis 1029 (E.D. Tex. 1999). See I.D.2 and I.D.3, above.

b. Heller v. Plave, 657 F. Supp. 95 (S.D. Fla. 1987). A special agent contacted numerous third parties and revealed, among other things, 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. The court, after reviewing IRM requirements that agents be discreet and tactful, concluded that the disclosures were unnecessary and violated section 6103(k)(6).

c. Jones v. United States, 97 F.3d 1121 (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 was held not within any of the exceptions to the general rule against disclosure and therefore unlawful; the trial court later awarded substantial actual damages, including damages for emotional distress, in excess of \$5 million.

d. Kemlon Products & Development v. United States, 638 F.2d 1315 (5th Cir. 1981), modified by, 646 F.2d 223 (5th Cir. 1981), cert. denied, 454 U.S. 863 (1981). A revenue agent advised a taxpayer that he was going to meet with the taxpayer's major customer for the purpose of determining the value of patents held by the taxpayer to products sold to the customer. The taxpayer sought to enjoin the Service from proceeding. The court held that the Service 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).

e. Malis v. United States, 59 A.F.T.R.2d (RIA) 87-988 (C.D. Cal. 1986). The court found that a 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." The court concluded that the disclosures were in the form of statements which in themselves did not seek information, and that, although the witness 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). 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.

f. Payne v. United States, No. H-93-1738 (S.D. Tex. Final order entered 12/13/99) appeal recommended. The district court determined in its findings of fact and conclusions of law entered March 19, 1999, that the United States was liable, in part, because the special agent had introduced himself as a special agent of the Criminal Investigation Division 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. The court concluded that because the plaintiff was cooperating, the special agent had to first obtain information from the plaintiff. Moreover, the court determined that the IRM required the special agent to use his best efforts to obtain information from the taxpayer before going to third parties, even though neither the statute (§ 6103(k)(6)) nor the regulations require such efforts.

g. Roebuck v. United States, No. 5:98-CV-384-BO(3) (E.D. N.C. 6/8/99) aff'd, No. 99-2097, 84 AFTR2d ¶ 99-5539 (4th Cir. 11/23/99). Court determined that financial information was not otherwise reasonably available and had to be obtained from third parties. Court also determined that the special agent had acted appropriately by introducing herself as a CID agent with the IRS conducting an investigation of the taxpayer. To not introduce

herself as a CID agent would be misleading to the witnesses and could cause confusion and misrepresentation.

h. Rodgers v. Hyatt, 697 F.2d 899 (10th Cir. 1983). The court found that 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).

i. Triad American Energy, Inc. v. United States, No. CV 86-1430-AHS(Ex) (C.D. Cal. Feb. 9, 1987). The court determined that disclosures that the plaintiffs may have been connected to the "Jewish Mafia" were necessary to verify the information, and were authorized under section 6103(k)(6).

E. Conclusions

1. Section 6103(k)(6) authorizes the disclosure of return information, but not returns, necessary to collect an outstanding tax liability. Four of the five circuit courts which have addressed the question of whether the validity of the underlying lien/levy (in the Tenth circuit case, a summons) is relevant to the question of whether the disclosures of return information are permitted under I.R.C. § 6103(k)(6) have held that the validity of the underlying lien/levy (or summons) is not relevant.
2. Section 6103(k)(6) provides for the disclosure of return information, in person and in form letters, when the information sought for use in an official matter is not otherwise reasonably available, and when the disclosures are limited to those items of return information for which disclosure is necessary to obtain the information sought.
3. The courts' customary inquiry is NOT whether the information sought is necessary; the focus is whether the disclosure is necessary to obtain the information.
4. Some courts (including the Fifth and Eighth Circuits) have found that disclosure of the fact of investigation by CID in circular letters was not necessary to obtain the information sought. The guidance currently provided in IRM 9.3.1.3.3, however, passes muster under every court decision to date. (Do not use the words "Criminal Investigation Division" anywhere within circular letters [or, by extension, upon any envelope enclosed with or used to send circular letters].)

5. Two court decisions to date have held unnecessary, hence unlawful, the in-person identification of a special agent as employed by the criminal investigation division together with disclosure of the fact of investigation of particular individual.

II. DISCLOSURES TO CONTRACTORS

A. Treas. Reg. § 301.6103(k)(6)-1(b)(5) provides authority to make investigative disclosures of return information to:

obtain the services of persons having special knowledge or technical skills . . . or having recognized expertise in matters involving the valuation of property where relevant to proper performance of a duty or responsibility described in this paragraph.

B. Section 6103(n) and its implementing regulations authorize, among others, the Service and its Office of Chief Counsel to disclose tax information to any person to the extent necessary in connection with obtaining services for tax administration purposes.

C. Persons who receive return information under section 6103(k)(6) are not subject to restrictions on redisclosure. 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 [sections 7213(a) and 7431].

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(a) provides that:

(a) such disclosures are to be made only in connection with the contractual procurement of equipment or other property, or services.

(b) no person to whom such information is disclosed may redisclose it:

(1) except for purposes described in the regulation (effectively, for purposes set forth in the contract); and

(2) no disclosure, even for such described purposes, may be made without written approval from the Service (unless to

an officer or employee of the contractor whose duties or responsibilities require such disclosure).

D. 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. 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.

E. Treas. Reg. § 301.6103(n)-1(c) provides that contractors must notify in writing any of their officers or employees to whom returns or return information may be disclosed pursuant to the contract, of the following:

1. that such information is to be used only for contract purposes;
2. that further disclosure for other purposes, or to an extent not authorized within the contract, is a felony;
3. that such felony is punishable by a fine of up to \$5,000, or imprisonment for up to 5 years, or both, together with the costs of prosecution; and
4. that any unauthorized disclosure may also result in a civil damages award against the officer or employee of no less than \$1000 per disclosure.

F. Treas. Reg. § 301.6103(n)-1(d) provides that:

1. Contractors, their officers and employees, must comply with all applicable conditions and requirements that the Service may prescribe to protect the confidentiality of returns and return information.
2. Any contract shall provide (or be amended to provide) that the contractor, its officers and employees, shall comply with all applicable conditions and requirements for protecting confidentiality prescribed by the Service by regulation, published rules or procedures, or written communication to the contractor.
3. The Service has authority to determine whether a contractor meets the prescribed requirements and conditions. If the Service determines that the contractor does not do so, the Service may take such actions as are deemed necessary to ensure that the conditions or requirements are met.

Such actions may include terminating or suspending any obligations under a contract with Treasury, suspending disclosures by Treasury otherwise authorized under the contract, suspension of disclosures by the Service to the state tax agency, or the Tax Division until the Service is satisfied that the conditions or requirements are or will be met.

G. Both sections (k)(6) and (n) speak to the possibility of obtaining services for tax administration purposes. Only section (n) mentions contracting for such services, or puts any limits on the use of the information by the person to whom disclosure is made.

1. Although the Service has the authority under I.R.C. § 6103(k)(6) to disclose taxpayers' information to expert witnesses for analysis, the Service has generally opted to use its authority under I.R.C. § 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).

2. Taxpayers often prefer that disclosures be made pursuant to a contract, or wish to place express limitations on the recipient's use of information disclosed under section 6103(k)(6).

3. The Service 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 Service and any contractors. When a taxpayer expresses concern about the fact that his/her information is being disclosed to someone outside the Service, if there is a contract, Service employees point out section 6103(n) and the provisions of the contract.

4. The most common situation raising serious taxpayer concern about the type and quantity of return information being disclosed is where the Service 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 Service 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 such situations, the expert should be under contract, so that the restrictions and sanctions of section 6103(n) apply.

5. 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). Again, section 6103(k)(6) permits necessary disclosures to obtain information which is not otherwise reasonably available. Helpful rule of thumb: less is best.

H. Taxpayers are generally much more concerned about disclosures of proprietary or trade secret data to potential or actual third party witnesses who are competitors, suppliers, or customers. Some members of the private bar are suggesting that taxpayers try to limit the Service's disclosures by obtaining injunctive relief, with limited success.

1. Taxpayers argue that damages are an inadequate remedy, since they are recoverable only after the disclosure has occurred.

2. To seek injunctive relief, taxpayers would first have to decline to cooperate and provide information voluntarily, force the Service to issue a summons, and then intervene and force the Service to file a summons enforcement proceeding; the taxpayer would then ask the court to impose disclosure conditions on enforcement. See, e.g., United States v. Zolin, 491 U.S. 554 (1989), aff'd in part, vac'd and rem'd in part, 809 F.2d 1411 (9th Cir. 1987) (the Supreme Court let stand a lower court opinion preserving the inherent equitable authority of the court to entertain equitable relief and permitted conditional enforcement of a summons).

3. Taxpayer problems: the Anti-Injunction Act, I.R.C. § 7421, and I.R.C. § 7602, giving the Secretary the authority to examine books and witnesses. Also, the taxpayer might be seen to have "failed to substantiate" its position, resulting in disallowance.

I. Disclosure to Contractors Case Law

United States v. Charles Schwab Corp., No. C-91-1975 MHP (N.D. Cal. August 23, 1991). In the course of an audit, Service 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 Service had the right to obtain the documents for the audit, and that the Service had the right to disclose them to a hired expert. The taxpayer's objection was to the alleged absence of disclosure restrictions on the expert, and argued that the only authority by which the Service could make disclosures to an expert was I.R.C. § 6103(k)(6), which provided no redisclosure consequences. The taxpayer contended I.R.C. § 6103(n) was inapplicable to expert services contracts, since the Service had then not yet promulgated regulations to implement the 1990

amendment which clarified that experts were covered. The Service argued that it had always interpreted I.R.C. § 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
NONTAX CRIMINAL DISCLOSURES
I.R.C. § 6103(i)

OBJECTIVES

At the end of this chapter, you will be able to:

1. explain to officials of other federal agencies, including Assistant United States Attorneys, what tax information is disclosable to them under I.R.C. § 6103(i) and how to request it;
2. explain to IRS employees what tax information can be disclosed to report nontax criminal violations; and
3. explain to IRS personnel what nontax information can be provided to report nontax criminal violations.

I. INTRODUCTION

Tax information has played a significant role in the discovery and prosecution of violations of nontax federal criminal law. Tax information has proved especially useful in investigations and prosecutions of violations with financial aspects. Prior to 1976, federal law enforcement agencies had relatively convenient access to this information.

By the mid-1970s, however, there was a growing congressional concern about the use of tax information for purposes unrelated to tax administration. Questions were also being raised whether access by law enforcement agencies took inappropriate advantage of the fact that taxpayers are required, under threat of criminal penalties, to 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 the officials 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 in order to obtain a return or information submitted by the taxpayer or his/her representative. The court approval procedure is not required to obtain tax information obtained from a source other than the taxpayer.

II. SECTION 6103(i)(1): ALL TAX INFORMATION

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.

The ex parte court order may only be obtained upon application authorized by the Attorney General, Deputy Attorney General, Assistant Attorney Generals, United States Attorney, Independent Counsel, or an 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). United States v. Bledsoe, 674 F.2d 647 (8th Cir. 1982) cert. denied, Phillips v. United States, 459 U.S. 1040 (1982) (acting officials may request information under I.R.C. § 6103(i)). It is important to note that the authority to authorize the application cannot be delegated. Thus, Assistant United States Attorneys may *not* authorize applications for ex parte orders.

However, while I.R.C. § 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 the United States Attorney was, in fact, personally reviewed and authorized by the United States Attorney on a case-by-case basis. This could be implemented in a variety of ways, such as, for example, (1) changing the language of the local I.R.C. § 6103 (i) order application to specifically indicate that the United States Attorney has "personally reviewed and authorized" the application; (2) having the United States Attorney retain written documentation containing his or her specific authorization of each application; or (3) having the United States Attorney send a letter to the district director documenting his or her practice of personally reviewing and authorizing each application on a case-by-case basis 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 tax 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 from any other source. United States v. Praetorius, 451 F. Supp. 371 (E.D. N.Y. 1978) (courts are expected to review documents and play an active role in balancing investigative need with taxpayer's privacy interests); United States v. Dazzo, 672 F.2d 284 (2d Cir. 1982) cert. denied, 459 U.S. 836 (1982) (signature on return relevant to case); United States v. Barnes, 604 F.2d 121 (2d Cir. 1979), cert. denied, 446 U.S. 907 (1980) (large amounts of "miscellaneous" income on return relevant to drug conspiracy case). An ex parte order properly authorizes 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. Bolin v. United States, 1999 U.S. Dist. LEXIS 19508 (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 tax information under section 6103(i). United States v. Lochmondy, 890 F.2d 817 (6th Cir. 1989); United States v. Recognition Equipment, Inc., 720 F. Supp. 13 (D.D.C. 1989); see United States v. Mangan, 575 F.2d 32 (2d Cir.) (dictum), cert. denied, 439 U.S. 931 (1978).

The ex parte order process is in fact ex parte, with no right of a defendant to notification, hearing on the application, or disclosure of the information on which the judge or magistrate acted. United States v. Barnes, 604 F.2d 121 (2d Cir. 1979), cert. denied, 446 U.S. 907 (1980); United States v. DiLorenzo, 1995 U.S. Dist. LEXIS 4539 (S.D.N.Y. Apr. 10, 1995).

Nontax Civil Forfeitures -- The section 6103(i)(1) ex parte order process is designed to obtain information for use in a federal criminal investigation or proceeding. The process may not be used to obtain tax information for use in a civil proceeding, including a civil forfeiture proceeding. United States v. \$57,303.00 in United States Currency, 737 F. Supp. 1041 (C.D. Ill. 1990); United States Attorneys Manual, Title 9, 9-13.900 (November 12, 1999). However, tax information obtained for legitimate criminal purposes may subsequently be disclosed in a civil forfeiture proceeding in accordance with the requirements set forth in section 6103(i)(4), infra. See also Chapter 7.

III. SECTION 6103(i)(2): RETURN INFORMATION OTHER THAN TAXPAYER RETURN INFORMATION

Return information other than taxpayer return information (that is, information obtained from a source other than the taxpayer or the taxpayer's representative) is available under a less restrictive process. This type of tax information may be disclosed for federal nontax criminal purposes pursuant to a written request from the head of a federal agency, Inspector General, Attorney General, Deputy Attorney General, Associate Attorney General, Assistant Attorney General, Director of the FBI, the Administrator of DEA, United States Attorney, Independent Counsel or any attorney in charge of a criminal division organized crime strike force.

A. The written request must provide:

1. the name, address and taxpayer identification number of the taxpayer, if available;
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 a taxpayer's address do not comply with the section. The section contemplates requests for return information, in addition to a taxpayer's address.

IV. RETURN INFORMATION CONCERNING POSSIBLE CRIMINAL ACTIVITIES

A. 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. In re Grand Jury Investigation, 688 F.2d 1068 (6th Cir. 1982) reh'g denied, 696 F.2d 449 (6th Cir. 1982) (oral disclosure of fact of pending tax investigation not violative of section 6103(i)(3)(A)); United States v. President, 591 F. Supp. 1313 (N.D.Ill. 1984) (disclosure to Department of Labor).

The statute does not require that the information be conclusive. However, the information should sufficiently identify the specific criminal act or event to which it relates.

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.

NOTE: This is the only provision under section 6103(i) that authorizes disclosures to states for nontax criminal law enforcement.

C. For referral procedures, see IRM 1.3.28.6–1.3.28.9.

V. SECTION 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), (2) or (3)(A) may be used as evidence in a judicial or administrative proceeding relating to a federal nontax crime or related civil forfeiture. However, returns and

return information obtained pursuant to an ex parte order may be used in such proceedings only if the court determines that the information is probative of the commission of the crime or if the court directs the disclosure pursuant to the Jencks Act (18 U.S.C. § 3500) 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 tax information on the theory that access to and use of such information can only occur if the United States has previously obtained such information under sections 6103(i)(1), (2) or (3)(A). United States v. Lochmondy, 890 F.2d 817 (6th Cir. 1989); United States v. Recognition Equipment, Inc., 720 F. Supp. 13 (D.D.C. 1989); see also United States v. Jackson, 850 F. Supp. 1481 (D. Kan. 1994).

VI. SECTION 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 exclusively for locating fugitives who have committed a federal felony offense only upon the grant of an ex parte order by a federal district court judge or magistrate. The extent of the disclosures will be governed by the language of such order.

B. Only those persons named in section 6103(i)(1) may authorize an application for ex parte order under this section.

C. The application must indicate that:

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. SECTION 6103(i)(6): IMPAIRMENT

Returns or return information shall not be disclosed if the IRS determines and, where appropriate, certifies to the court, that it would identify a confidential informant or seriously impair a civil or criminal tax case. Note that 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. SECTION 6103(i)(7): DISCLOSURE OF TAX INFORMATION TO THE COMPTROLLER GENERAL

A. Under certain circumstances, tax information may be disclosed to officers and employees of the General Accounting Office (GAO) for purposes of conducting audits of the IRS or the Bureau of Alcohol, Tobacco & Firearms, or audits of a program or activity of a federal agency that involves the use of tax information.

B. These audits can only be conducted if the Joint Committee on Taxation is notified of GAO's intention to audit, and does not disapprove within 30 days after receiving such notice.

IX. SECTION 6103(l)(15): DISCLOSURE OF FORM 8300 INFORMATION ON CASH TRANSACTIONS

Section 6103(l)(15), enacted in 1996 as part of the Taxpayer Bill of Rights 2, authorizes the disclosure of information from returns filed under Section 6050I (*i.e.*, Forms 8300) to Federal, State, local or foreign government agencies, generally under the same terms and conditions as apply to the disclosures of Currency Transaction Reports (Forms 4789) filed under the Bank Secrecy Act (see 31 U.S.C. § 5313).

See generally Chapter 7, which deals with currency transaction and money laundering disclosures.

X. REPORTING VIOLATIONS OF NONTAX CRIMES NOT INVOLVING TAX INFORMATION

Occasionally, IRS employees may observe a nontax crime during official duty hours, or in their official capacities, receive information relating to a nontax crime which does not involve the disclosure of tax information. Chapter 34 of IRM 1.3 establishes 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.

XI. INTERPLAY BETWEEN SECTION 6103(h) AND SECTION 6103(i)

For a discussion of the interplay between section 6103(h) and (i) and Treas. Reg. § 301.6103(h)(2)-1, see Chapter 3.

CHAPTER 6

DISCLOSURE OF RETURNS AND RETURN INFORMATION IN BANKRUPTCY CASES¹

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 Internal Revenue Code. Church of Scientology of California v. Internal Revenue Service, 484 U.S. 9 (1987). The unauthorized disclosure of returns or return information may result in civil damages against the United States (section 7431) and/or criminal penalties against the individual who disclosed the information (section 7213).

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

Generally, a "return" is the actual form filed by the taxpayer, including supporting schedules, as well as 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, the nature, source or amount of his 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 existence (or possible existence) of liability under the Internal Revenue Code. I.R.C. §

¹ This is the text of Document 9225 (Rev. 2-94) reformatted for this Training Reference, with IRM citations updated.

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.

C. When Does a Bankruptcy Case Involve Tax Administration

There are significant differences in the disclosure rules depending on whether or not a case or proceeding 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 the court, to the Department of Justice, or to any other party to the proceeding. Such disclosures generally 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) with the debtor's consent; or (2) to the trustee; or (3) in a criminal proceeding pursuant to section 6103(i). Thus, it is important to determine whether a particular bankruptcy case or proceeding is one pertaining to tax administration.

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 statutes² (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.

See United States v. Mangan, 575 F.2d 32 (2d Cir. 1978), cert. denied, 439 U.S. 931 (1978).

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 which may or may not involve the resolution of tax claims or the application of the 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

² The Bankruptcy Code provisions would be "related statutes" to the extent they are utilized in determining the validity or amount of the Service's tax claim.

bankruptcy proceeding and the application of the revenue laws in the proceeding in order to trigger a tax administration proceeding.

As a general rule, a bankruptcy case should be considered a proceeding pertaining to tax administration if the bankruptcy court's jurisdiction is properly invoked in any manner to determine a tax matter,³ and the Federal government and the taxpayer are properly before the court.

The following are non-exclusive examples of this general rule:

- If the debtor lists the IRS as a creditor in the petition (or in an attached schedule of liabilities), disclosures in the proceeding 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. No other formal action is required for the IRS to make disclosures after being listed in the petition.
- 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 proceeding will pertain to tax administration if the government participates.
- If no tax liability is listed in the debtor's schedules, but the IRS files a proof of claim⁴ or request for payment of administrative expenses, the proceeding would become one involving tax administration upon the filing of the proof of claim or request. By filing the proof of claim or request, the government has formally appeared in the case and put the tax matter in issue.
- If the IRS takes any formal action in a bankruptcy case, such as filing a motion to compel 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, the proceeding would become one pertaining to tax administration upon the IRS's filing of the appropriate formal action (unless an earlier triggering event has occurred).
- 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

³ The bankruptcy court has broad jurisdiction to determine the validity and priority of the Service's tax claims and federal tax liens, and the amount or legality of any tax. Bankruptcy Code §§ 502, 505 and 545.

⁴ The proof of claim is roughly analogous to the formal prerequisites to commence a tax administration proceeding in the Tax Court (notice of deficiency; petition) and in the District Court or Claims Court (claim for refund; complaint).

post-petition, the debtor will accrue employment tax and other continuing tax and reporting obligations which are subject to the court's supervisory authority.⁵ Such operations make the proceeding one 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). In those cases 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 non-tax issues as well as tax claims. For example, under the literal terms of section 6103(h)(4)(A), the debtor's tax information arguably 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. Such disclosures would be directly at odds with the objective of the statute to limit disclosures that have no relationship to tax administration. In addition, taxpayers whose information was disclosed may challenge the propriety of such disclosures under the civil liability provisions of section 7431.

Accordingly, disclosures under section 6103(h) should be limited to information that is relevant to the tax matter that is at issue in the proceeding. For example, if the debtor owes no prepetition tax liabilities, and the only reason a proceeding pertains to tax administration is the monitoring by the U.S. Trustee of 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

⁵ See Bankruptcy Code § 704(8); Bankruptcy Rule 2015(a)(3). Chapter 11 bankruptcies contemplate that the debtor will engage in some sort of business. But see, *Toibb v. Radloff*, 111 S. Ct. 2197 (1991) (individual without business can reorganize under chapter 11). Bankruptcy Code § 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. Bankruptcy Code § 721. In a chapter 13, the business of the debtor, if any, may also be continued. Bankruptcy Code § 1304.

unless the debtor consents. (However, see discussion infra, 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 which 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 Taxpayer or Upon Consent. The IRS may always disclose the debtor-taxpayer's returns and return information to the debtor-taxpayer, and to any other person with the debtor-taxpayer's written consent. I.R.C. § 6103(e)(1), (e)(6), (e)(7), (c).

Disclosures in Judicial Proceeding Pertaining to Tax Administration. The IRS may disclose returns and return information in the course of a bankruptcy proceeding to the court, the trustee, the U.S. Trustee, or other creditors, if the bankruptcy case pertains to tax administration. I.R.C. § 6103(h)(4). As discussed above, a bankruptcy case will pertain to tax administration, generally, if the bankruptcy court's jurisdiction is properly invoked in any manner to determine a tax matter, and the taxpayer and the government are properly before the court. Tax information disclosed under section 6103(h)(4) should be limited to information relevant to the tax matter that is at issue in the case.

Disclosures to Trustee. In an individual's chapter 7 or 11 case, the IRS may disclose to the trustee the debtor's returns and return information for the tax year in which the petition was filed and prior years. I.R.C. § 6103(e)(5), (7). In other cases (if a trustee has been appointed), the IRS may disclose to the trustee the debtor's current and prior years' returns and return information if the IRS finds that the trustee has a material interest which will be affected by the information contained therein. I.R.C. § 6103(e)(4), (7).

Disclosures to Department of Justice. The IRS may disclose tax information to the Department of Justice (including an IRS attorney acting in a SAUSA capacity) for use in a tax administration proceeding if there has been a prior or contemporaneous referral. I.R.C. § 6103(h)(2), (3).

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)). In addition, the disclosure of returns or return information need 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)).

A. To Debtor and Other Persons with a Material Interest -- Section 6103(e)(1)

I.R.C. § 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. See I.R.C. § 6103(e)(1)(D); Disclosure of Official Information Handbook, IRM 1.3.2.4.3. 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 -- Sections 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. The taxpayer may also designate in a written request a person to receive his returns or return information. I.R.C. § 6103(c) (a "waiver" or "consent"). The request must pertain solely to the authorized disclosure, be signed and dated by the taxpayer, and contain the taxpayer's identity information (see, section 6103(b)(6)), the identity of the person to whom disclosure is to be made, the type of return or return information to be disclosed, and the taxable years involved. Treas. Reg. § 301.6103(c)-1(a).⁶ A disclosure consent must be received by the IRS within 60 days of the date the consent was signed and dated by the taxpayer. Form 8821 (Tax Information Authorization) has been designed to meet the requirements of section 6103(c).

⁶ The requirements with respect to consents are somewhat more lenient where the taxpayer requests another person to make an inquiry for information or assistance on the taxpayer's behalf. Treas. Reg. § 301.6103(c)-1(b).

In addition, 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. Disclosure of Official Information Handbook, IRM 1.3.3.2.2(4). An attorney becomes the debtor-taxpayer's attorney of record by filing the bankruptcy petition or otherwise entering an appearance in the bankruptcy case.

The taxpayer's attorney may request that the IRS discuss certain of the debtor's tax information with an accountant or other expert retained by the attorney. Disclosure is not proper under those circumstances unless the debtor has signed a power of attorney (Form 2848) giving the attorney authority to redesignate 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 -- Sections 6103(e)(5) and (e)(1)(E)

Section 6103(e)(5) provides for disclosure of returns to bankruptcy trustees,⁷ upon written request, in cases under chapters 7 and 11 where the debtor is an individual. 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 attribute carryovers to the estate and carry back deductions to the preceding years of the debtor. See S. Rep. No. 1035, 96th Cong., 2d Sess. 31-32 (1980), 1980-2 C.B. 636. Under section 6103(e)(5), returns of the debtor for the taxable year that 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.

A special rule applies in involuntary cases. In an involuntary case, there is an interval between the time the creditors file a petition and the court's entry of an order for relief. In an involuntary case, no disclosure 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).

Upon written request, the trustee may also obtain the returns of the bankruptcy estate. I.R.C. § 6103(e)(1)(E).

⁷ 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.

Section 6103(e)(7) provides that return information of any taxpayer may be open to inspection by or disclosure to any 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) only allows disclosure of the debtor's returns 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 pursuant to paragraphs (e)(1)(E) and (5) (returns) also require a written request. However, a writing is not required for "return information" under paragraph (7). Finally, note that 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.

Disclosures under section 6103(e) do not depend on whether or not the proceeding involves tax administration, or whether such disclosure has a tax administration purpose (although disclosures of return information need not be made if such disclosure would impair Federal tax administration.)

D. To Other Appointed Trustee with a Material Interest -- Section 6103(e)(4)

I.R.C. § 6103(e)(4) applies to Title 11 cases where there is a trustee and the debtor is the person with respect to whom the return is filed--in other words, where section 1398 does not apply and no separate taxable entity is created.⁸ That section allows disclosure upon written request to the trustee or receiver (if substantially all of the property of the debtor 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 any monetary or financial 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, no written request is necessary for return information (as opposed to returns), 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.

⁸ See I.R.C. § 1399 ("Except in any case to which section 1398 applies, no separate taxable entity shall result from the commencement of a case under title 11 of the United States Code.")

I.R.C. § 6103(e)(4) applies to case trustees, who have responsibility for the tax returns of the debtor, and not to the U.S. Trustee or the standing chapter 13 trustee.

E. To Dept. of Justice in Tax Administration Cases -- Section 6103(h)(2)-(3)

The Department of Justice represents the Internal Revenue Service in matters arising before the bankruptcy court. Disclosures to the Department of Justice for use in bankruptcy matters, to the extent that the bankruptcy case involves tax administration, are governed by section 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 the Department of Justice (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 . . .^[9]

As a general matter, the IRS may make disclosures under paragraph (h)(2) only if it has referred the case to the Department of Justice. I.R.C. § 6103(h)(3)(A). A referral for disclosure purposes includes any formal request to the Department of Justice for defense, prosecution, or other affirmative action with respect to a case. See I.R.C. §§ 7401 and 7602(c).

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 necessary information to the Tax Division of the Department of Justice.

⁹ The "item" and "transaction" tests for disclosure of third-party tax information will be discussed at Part II.G.

1. SAUSA Activities

Generally, only the Justice Department has authority to represent the United States in the U.S. courts (except the Tax Court). 28 U.S.C. § 516. However, in most districts, under the "Houston Plan," the U.S. Attorney has designated one or more district counsel 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 CCDM (34)(10)16(4)(a) and (c).

For disclosure purposes, a district counsel attorney acting in his or her capacity as a SAUSA is treated like a Justice Department attorney, since he or she is acting as the designee of the Department of Justice. Thus, since disclosures to the Justice Department are generally permitted only if the IRS "has referred the case to the Department of Justice" (I.R.C. § 6103(h)(3)(A)), a district counsel attorney acting as a SAUSA may access tax 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. To Department of Justice in Non-Tax Criminal Investigation or Prosecution -- Section 6103(i)

The disclosure of tax information to the Department of Justice for use in a non-tax investigation or prosecution is strictly limited. If the alleged non-tax criminal activity is unaccompanied by any related tax charges, the disclosure of tax information to the Justice Department is governed by section 6103(i), as follows:

Section 6103(i)(1). Returns and return information may be disclosed for use in non-tax federal criminal investigations and prosecutions upon grant of an *ex parte* court order by a federal district court judge or magistrate, provided certain conditions set forth in the statute are met.

Section 6103(i)(2). Return information other than "taxpayer return information"¹⁰ may be disclosed upon written request by certain specifically enumerated Department of Justice officials for use in a non-tax investigation or prosecution.

¹⁰ Taxpayer return information is return information which is filed with or furnished to the IRS by or on behalf of the taxpayer to whom such return information relates. I.R.C. § 6103(b)(3).

Section 6103(i)(3)(A). Return information other than taxpayer return information which may constitute evidence of a violation of a federal non-tax criminal law may be disclosed to the extent necessary to apprise the head of the appropriate federal agency charged with the responsibility of enforcing such law.

The statutory provision permitting IRS employees to refer suspected non-tax criminal activity is section 6103(i)(3)(A). When an employee discovers information which may be evidence of a Federal non-tax criminal violation outside the IRS's jurisdiction, the information should be reported by memorandum through functional channels to the district, Service Center, or regional Disclosure Officer, as appropriate. The memorandum should contain the following information relating to the violation:

1. Name, social security number, address, and aliases of subject (if any);
2. Business or occupation of subject (if known);
3. Summary of facts and circumstances surrounding the non-tax violation;
4. U.S. Code sections believed violated, if known;
5. Specific source of information, i.e., 3d party, taxpayer, taxpayer's representative, taxpayer's return and the circumstances under which such information was obtained;¹¹
6. Tax years to which the information applies (e.g., year(s) of examination or criminal activity);
7. Agency and/or unit of agency to whom this violation would be of interest, i.e., Department of Justice (U.S. Attorney, Judicial District), Social Security Administration;
8. Determination as to whether or not disclosure would identify a confidential informant or seriously impair a civil or criminal tax investigation.

¹¹ If the source of information is the taxpayer or the taxpayer's representative, it cannot be referred because such information is "taxpayer return information." In addition, taxpayer identity information may not be disclosed unless there is return information (other than taxpayer return information) which also is disclosed.

The Disclosure Officer reviews the information and, if it qualifies for referral under section 6103(i)(3), will forward it to the District Director to transmit to the appropriate agency.

See Disclosure of Official Information Handbook, IRM 1.3.28 for further discussion of disclosure procedures under section 6103(i).

G. In Bankruptcy Case or Proceeding Pertaining to Tax Administration -- Section 6103(h)(4)

1. Tax Information of the Debtor

I.R.C. § 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. Generally, disclosures should only be made to persons authorized to participate in the proceeding, "parties" and "parties in interest," as well as the court, pursuant to the applicable rules of procedure. For example, in particular situations section 6103(h)(4) may authorize disclosures to the court, the United States Trustee, the standing chapter 13 trustee, the case trustee, a creditor or the creditors committee, among others. See examples at Part IV.

As noted above, the literal terms of section 6103(h)(4)(A) could, arguably, permit disclosure of all the debtor's tax information to the court or to any party to the proceeding. As previously discussed, the better interpretation is that disclosure should be limited to information related to the IRS's determination(s) that the proceeding involves tax administration. For an extensive discussion of when a bankruptcy proceeding pertains to tax administration, and the scope of the information that may be disclosed, see Part I. C. and D., supra. For a discussion of the rules relating to

disclosure of third-party tax information, see discussion immediately following.

2. Tax Information of Persons Other than the Debtor

Section 6103(h)(4)(B) and (C) provides rules under which the returns and return information of third persons may be disclosed in a tax administration case, as follows:

(B) if the treatment of an item reflected on such return is directly related to the resolution of an issue in the proceeding; [or]

(C) if such 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 . . .

Subparagraphs (B) and (C) are referred to as the "item" and "transaction" tests, respectively.¹² See generally, S. Rep. No. 938, 94th Cong., 2d Sess. 325-326 (1976), 1976-3 C.B. (Vol. 3) 363-364; First Western Government Securities, Inc. v. United States, 578 F. Supp. 212 (D. Colo. 1984), aff'd, 796 F.2d 356 (10th Cir. 1986); Davidson v. Brady, 559 F. Supp. 456 (W.D. Mich. 1983), aff'd, 732 F.2d 552 (6th Cir. 1984).¹³ For application of these rules, see, examples at Part IV.L.

Determining the nature of any "transactional relationship" is highly factually oriented. Such a determination is best made by a person very familiar with the facts and relationships of the various taxpayers.

¹² The tests for disclosure of third party tax information to the Department of Justice in § 6103(h)(2) are somewhat more lenient (the information "is or may be related to" or "may affect" the resolution of an issue in the proceeding, rather than "directly related"). See Davidson v. Brady, 559 F. Supp. 456, 462 (W.D. Mich. 1983), aff'd, 732 F.2d 552 (6th Cir. 1984).

¹³ The same item of information may, consistent with the disclosure laws, be the return information of two or more parties, and both parties would have access to the information (without regard to the "item" and "transaction" tests). See Mid-South Music Corporation v. United States 818 F.2d 536 (6th Cir. 1987) (Merritt, J., concurring) (information concerning tax shelter return information of shelter promoter and investors); Martin v. IRS, 857 F.2d 722 (10th Cir. 1988) (information concerning the audit of pre-TEFRA partnership is the return information of the partnership and available to all partners--however, protest of individual partner is not partnership information and is not available to the other partners).

Similarly, the relationship of the information to an issue in the proceeding is best made by a person directly involved in the proceeding. As such, as a general matter, determinations involving the disclosure of third-party tax data are typically made by personnel in the field intimately involved with the case.

H. Matters of Public Record

On the theory that there is no "disclosure" (see section 6103(b)(8)) of matters already in the public record, a number of courts have adopted the IRS position that tax information that has properly become a matter of public record by virtue of the IRS's enforcement activities under the Internal Revenue Code is no longer confidential. Thus, tax information that is part of the public record of a judicial tax proceeding may be further disclosed without regard to the limitations of section 6103. Schrambling Accountancy Corp. v. United States, 937 F.2d 1485 (9th Cir. 1991), cert. denied, 112 S. Ct. 956 (1992); Lampert v. United States, 854 F.2d 335 (9th Cir. 1988), cert. denied, 490 U.S. 1034 (1989); Solargistics Corp. v. United States, 89-2 U.S.T.C. ¶ 9610 (N.D. Ill. 1989), aff'd, 921 F.2d 729 (7th Cir. 1991); United States v. Posner, 594 F. Supp. 930 (S.D. Fla. 1984); Cooper v. IRS, 450 F. Supp. 752 (D.D.C. 1977). Any return or return information once disclosed, which is filed with the Bankruptcy Court, becomes a public record and open to examination. Bankruptcy Code § 107(a).¹⁴

However, IRS employees should exercise caution in disclosing matters of public record, because the "public record exception" has not been adopted in all the Circuits, and has been expressly rejected in the Tenth Circuit. Rodgers v. Hyatt, 697 F.2d 899 (10th Cir. 1983); Chandler v. United States, 687 F. Supp. 1515 (D. Utah 1988), aff'd per curiam, 887 F.2d 1397 (10th Cir. 1989); see also, Thomas v. United States, 890 F.2d 18 (7th Cir. 1989) (allowing disclosure of information contained in Tax Court opinion but not deciding whether Rodgers or Lampert is correct position). It has also been called into question in the Fourth Circuit. Mallas v. United States, 993 F.2d 1111 (4th Cir. 1993). Therefore, the safest course of action is not to disclose information pursuant to the "public record exception" in the Fourth or Tenth Circuits, unless the disclosure is otherwise permitted by section 6103.

Accuracy is critical in disclosing matters of public record. To ensure accurate reporting of public record information, the information should be drawn directly from the public source document, e.g., an indictment, affidavit or pleading.

¹⁴ On request of a party in interest, or upon its own motion, the Bankruptcy Court may protect trade secrets or confidential research, development or commercial information. Bankruptcy Code § 107(b). The court may also protect a person against scandalous or defamatory matter contained in a paper filed with the court. Id.

Information, such as aliases or nicknames, which does not appear in publicly filed court documents in a tax administration case, should not be disclosed. The "public record" exception does not apply to information that has appeared only in the newspaper.

I. Disclosure Authority: Delegation Order 156

The authority to permit disclosure of tax information under § 6103, and the authority to permit testimony or the production of documents, is delegated to selected IRS personnel under Delegation Order 156, IRM 1229. Delegation Order 156, as well as any pertinent local delegation order, should be consulted if there is any question concerning the authority of particular employees, such as district counsel attorneys, to make particular disclosures.¹⁵

III. EVIDENCE OF CRIMINAL VIOLATIONS

While handling a bankruptcy case, an IRS or Chief Counsel employee may obtain or develop information which indicates that a Federal criminal offense may have been committed. The evidence may implicate the debtor-taxpayer, the trustee, a third party or a representative in the proceeding. Also, the information may indicate a tax offense under Title 26 and/or a non-tax offense, including, among others, 18 U.S.C. §§ 151-155 (bankruptcy fraud) or 18 U.S.C. §§ 1956-57 (money laundering).

In this situation, questions arise as to the proper use of the information in the civil proceeding, the authority to refer the information for criminal investigation, and the proper person to whom to make the referral.

As a general matter, assuming the appropriate referral procedures are followed, the statute permits disclosure of tax information for use in a civil or criminal tax proceeding. In addition, in limited circumstances, tax information may be referred for non-tax criminal violations. However, the statute prohibits the IRS (or a SAUSA) from taking tax information directly to the United States Attorney solely for the purpose of initiating an investigation or prosecution under a non-tax criminal statute.

A. Disclosure in the Civil Proceeding

¹⁵ 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. Delegation Order 156 (second full paragraph).

The debtor's tax information may be disclosed in the civil proceeding,¹⁶ even if it indicates a violation of a non-tax 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. This information could be disclosed to the Justice Department 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 the Justice Department (or a SAUSA) to the bankruptcy court, the trustee, or the U.S. Trustee, pursuant to section 6103(h)(4). In addition, such information may be disclosed to a case 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 U.S. Trustee, who has oversight responsibility.

In turn, the above information may be referred by the judge, trustee or U.S. Trustee to 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).¹⁷

B. Referral for Use in 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 tax 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, or a non-tax offense under the money laundering

¹⁶ Under certain circumstances, disclosure of third-party information is also permitted. See Part II.G.2.

¹⁷ Under 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 United States 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).

provisions or other provision within the IRS's jurisdiction, the matter of potential criminal liability should be referred to the Criminal Investigation Division for investigation.

If the Criminal Investigation Division determines that the evidence involves a violation of Title 26, the matter may be referred to the Department of Justice 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 the 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 non-tax criminal offense (such as bankruptcy fraud), provided:

such [non-tax] 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 later is terminated, e.g., the Justice Department drops the Title 26 charges, returns and "taxpayer return information" (see, I.R.C. § 6103(b)(3)) cannot be used subsequently in the non-tax investigation or prosecution without an ex parte court order under section 6103(i)(1). Treas. Reg. § 301.6103(h)(2)-1(a)(2)(ii). Information other than returns and taxpayer return information can still be used by the Justice Department after dropping the Title 26 charges.

If the evidence shows only a violation of a non-tax criminal statute, such as bankruptcy fraud (or if, after investigation, the Criminal Investigation Division determines the evidence shows only a non-tax criminal violation), the matter may be disclosed to the Department of Justice only under the procedures authorized in section 6103(i). See Part II.F., supra. These alternative disclosure routes are depicted in summary form at Appendix A.

IV. EXAMPLES

A. Debtor's Attorney

Example 1. Individual A files a petition in bankruptcy, listing 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 prepetition 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); Disclosure of Official Information Handbook, IRM 1.3.3.2.2(4). Reference: Part II.B.

B. Bankruptcy Court

Example 2. Debtor files a disclosure statement that fails to list employment tax liabilities. Debtor has failed to file prepetition employment tax returns. District Counsel has reason to believe, based on the business and/or other activities of Debtor, that Debtor has employment tax liabilities. The IRS may object to the adequacy of the disclosure statement. The proceeding becomes one pertaining to tax administration at the time of the Service's objection, and the Service could disclose the debtor's return information in the objection or in any subsequent proceedings related thereto. I.R.C. § 6103(h)(4). Reference: Parts I.C., I.D., II.G.

Example 3. Debtor files a petition under chapter 7 on September 1, 1992. He seeks to have income taxes discharged for the years 1985-1988, which taxes were assessed on December 1, 1991. See, Bankruptcy Code §§ 507(a)(7); 523(a)(1). Debtor did not file income tax returns for those years, thus the taxes are not dischargeable. Bankruptcy Code § 523(a)(1)(B)(i). The assessments were based on defaulted statutory notices of deficiency. The IRS may disclose this information during the bankruptcy proceeding. I.R.C. § 6103(h)(4). Reference: Parts I.C., I.D., II.G.

Example 4. Debtor files a petition under chapter 13, owing no prepetition taxes. The Bankruptcy Court confirms Debtor's chapter 13 plan. After confirmation, Debtor incurs tax liabilities which 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.G.

Example 5. The IRS can disclose tax information in the proof of claim. I.R.C. § 6103(h)(4); Wallis v. United States, No. C90-892Z (W.D. Wash. June 4, 1991). In addition, the IRS could disclose in the proof of claim that the claim was subject to amendment pending the result of an ongoing audit, to avoid the result reached in the Matter of Stavriotis, 977 F.2d 1202 (7th Cir. 1992). Reference: Parts I.C., I.D., II.G.

C. 341 Meeting

Example 6. The United States Trustee convenes and presides over a first meeting of the debtor's creditors. Bankruptcy Code § 341; Bankruptcy Rule 2003. This first meeting of creditors is held a very short time after the petition is filed, typically before the IRS has filed its proof of claim for prepetition 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 if assets have improperly been disposed of or concealed or if there are grounds for objection to discharge. An IRS employee may attend this meeting to elicit information concerning the debtor's delinquent tax returns, or persons potentially responsible for the section 6672 penalty for unpaid trust fund taxes. If the IRS is listed as a creditor in the debtor's schedules, the IRS employee may disclose in the 341 meeting return information necessary in examining the debtor. I.R.C. § 6103(h)(4). If the IRS is not listed in the petition, and has not yet filed a proof of claim, the IRS may exhibit general familiarity with the debtor's tax history in examining the debtor, provided the disclosure is necessary in obtaining information, which is not otherwise reasonably available. I.R.C. § 6103(k)(6). Questions should be posed in such a way as to disclose only necessary information. Reference: Parts I.C., II.G.

D. United States Trustee

Example 7. In a chapter 11 case, Debtor has failed to file post-petition employment tax returns or deposit post-petition employment taxes. An IRS employee may disclose this information to the U.S. Trustee, or the IRS may verify this information at the 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 or 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.G.

Example 8. The IRS learns that Debtor has property interests that he has not disclosed to the bankruptcy court (or has committed some other act which may constitute bankruptcy fraud). If the bankruptcy case pertains to tax administration (e.g., the IRS has filed a proof of claim), this information may be disclosed to the U.S. Trustee in order to assist in collecting the IRS's claim.¹⁸ 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.

¹⁸ See 28 U.S.C. § 586(a)(3)(F) (U.S. Trustee shall monitor the administration of cases and trustees, and whenever it is considered appropriate, shall notify "the appropriate United States attorney of matters which relate to the occurrence of any action which may constitute a crime under the laws of the United States . . .").

If the case qualifies as a tax administration case only because the debtor is operating a business (and the debtor is not delinquent in its post-petition tax obligations), the authority for making a disclosure under section 6103(h)(4)(A) arguably is absent due to the lack of any relationship between the bankruptcy fraud and the tax aspects of the case. The safest procedure in this situation, which should avoid potential litigation under section 7431, would be to follow the procedures in section 6103(i) to refer the information. Reference: Parts I.C., I.D., II.F., II.G., III.

E. Trustee for the Case

Example 9. Several creditors file an involuntary petition in bankruptcy against Debtor, an individual. 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. Bankruptcy Code § 303(h). No trustee has been appointed. The proceeding 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. If the court appoints an interim trustee, the trustee could obtain access to the information, unless it is determined that disclosure would seriously impair Federal tax administration. Reference: Part II.C.

Example 10. Taxpayer filed an offer-in-compromise and made a deposit in connection therewith prior to filing a petition in bankruptcy. After filing the petition, Taxpayer withdraws the offer, or, alternatively, the IRS rejects the offer. The IRS generally refunds the deposit unless the taxpayer authorizes the IRS to apply the deposit to the tax liability. However, in a bankruptcy situation, the trustee would, most likely, want the funds turned over as an asset of the estate. The IRS may disclose the existence of the deposit to the bankruptcy trustee. I.R.C. § 6103(e)(4), (5), (7). Reference: Parts II.C., II.D.

Example 11. In a chapter 7 "no-asset" bankruptcy, the debtor-taxpayer, an individual, has no outstanding tax liabilities, and the IRS has not filed a proof of claim. Debtor, a calendar year taxpayer, filed his petition in bankruptcy on November 1, 1990. In July 1992, the trustee asks the IRS for Debtor's latest address. This address would come from Debtor's 1991 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 12. In attempting to recover a fraudulent transfer, the trustee requests 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 13. The IRS has knowledge of a prepetition transfer of property, without adequate consideration, from Debtor to her daughter. The bankruptcy case is a chapter 7 "no-asset" liquidation 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 could disclose the transfer to the trustee, so that the trustee could commence an action to bring the property into the bankruptcy estate. I.R.C. § 6103(e)(5), (7). Reference: Parts II.C.

F. Creditors

Example 14. A creditor (or the creditors' committee), a party in the bankruptcy proceeding, wishes to contest the amount or priority of the IRS's claim. The creditor may obtain the debtor's return information to do so 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, Bankruptcy Code § 502(a) would permit such an objection. Reference: Parts I.C., I.D., II.G.

Example 15. A previously uninvolved creditor wants information about the debtor's tax situation in considering the debtor's request for fresh financing. Since a creditor in this posture 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. Reference: Parts I.C., I.D., II.G.

Example 16. 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). Moreover, this information is in the public record (the date of assessment is on the notice of federal tax lien), and should be disclosable.¹⁹ In addition, the IRS should be able to 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 future intentions with respect to the debtor. Reference: Parts I.C., I.D., II.G., II.H.

¹⁹ In addition, section 6103(k)(2) provides that if a notice of lien has been filed pursuant to section 6323(f), the amount of the outstanding obligation secured by such lien may be disclosed to any person who furnishes satisfactory written evidence that he has a right in the property subject to such lien or intends to obtain a right in such property. See, Disclosure of Official Information Handbook, IRM 1.3.11.10.

Example 17. 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 asks about the IRS 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.G.

Example 18. As part of a plan of reorganization, 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 position with respect to: (1) the tax consequences to Debtor or the estate of the transfer; and (2) the taxation of the liquidating trust. Absent Debtor's consent, the tax consequences of the transfer, *i.e.*, whether and to what extent 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 tax 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 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 Debtor, nor would it prevent Debtor from making a ruling request regarding the tax consequences of the transaction.) Reference: Parts I.C., I.D., II.B., II.G.

Example 19. The IRS possesses a large income tax refund that is scheduled as an asset of Debtor. The IRS is not otherwise involved in the bankruptcy proceeding. Another federal agency has a claim against Debtor. The proceeding 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 on matters of public record. However, the IRS would not be able to disclose any information from its administrative file, such as confirming the existence or amount of the claim for refund. The other agency may then make a request for administrative offset (assuming that relief from the automatic stay is obtained or the stay is no longer in effect). See, I.R.C. §§ 6402(d), 6103(l)(10). Reference: Part II.H.

G. Department of Justice

Example 20. 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. 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.

H. Criminal Violations

Example 21. The IRS is aware, from a prior schedule of assets filed in a Tax Court case or in a Collection Information Statement, that 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 Debtor's estate. This information may be disclosed in the civil 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 (or a statute related to 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.

Example 22. The facts are the same as in Example 21, 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 Debtor's schedule of assets is in the record in the Tax Court proceeding, the "public record exception" may permit disclosures. See discussion, supra, concerning matters of public record. Reference: Parts I.C., I.D., II.E., II.F., II.H., III.

I. Debtor's Employees/Customers

Example 23. 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). 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.²⁰ 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 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.G.

²⁰ Disclosure in this situation may also be permissible under section 6103(k)(2). See, note 19.

J. Debtor's Spouse

Example 24. 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), and under section 6103(h)(4) could be introduced in the bankruptcy proceeding. See Rev. Rul. 79-64, 1979-1 C.B. 390 (copy of return may be disclosed to spouse even though spouse contends that return was filed under duress and thus did not constitute spouse's return). The determination that the proceeding is a tax administration proceeding may also permit disclosure of tax 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) and (C). Reference: Parts I.C., I.D., II.A., II.G.

Example 25. Husband and wife file separate income tax returns. Husband files for bankruptcy under chapter 7. The trustee seeks Wife's returns to aid in determining what is property of the estate. Wife's separately filed returns may not be disclosed without her consent (unless authorized under section 6103(h)). Reference: Parts II.A., II.B.

K. Large Bankruptcy Plan Reviews under CCDM (34)(10)30(3)(e)

Example 26. As a result of reviewing a plan of reorganization in a chapter 11 case, pursuant to CCDM (34)(10)30(3)(e), the National Office provides both oral and written advice to District Counsel and the District Director as to the validity of a purported asset sale and determines that certain statements 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 may be discussed at any subsequent proceeding regarding the objection.²¹ Reference: Parts I.C., I.D., II.A., II.B.

L. Third-Party Return Information

Example 27. A plan of reorganization attempts to designate payments to trust fund taxes. The responsible officers have significant unpaid tax liabilities from

²¹ If the IRS does not file an objection in the bankruptcy proceeding, disclosure of the objections would not be permitted in the bankruptcy proceeding 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 1.3.3.2.2(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).

other businesses or unpaid 1040 liabilities. The IRS could not disclose these other liabilities in objecting to the plan. Reference: Parts I.C., I.D., II.G.2.

Example 28. The trustee, in attempting to recover a fraudulent transfer, requests the debtor's principals' returns to see how a transaction was treated. If the proceeding pertains to tax administration, information in the debtors principals' returns will arguably meet the item or transaction tests because it is relevant to an issue in the proceeding, even though the information is not necessarily relevant to a tax issue. If the transfer does not impair the IRS's ability to collect the tax, the information should not be disclosed. 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.G.2.

Example 29. 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 the Justice Department and in bankruptcy court. I.R.C. § 6103(h)(4)(C). Reference: Parts I.C., I.D., II.G.2.

Example 30. The trustee seeks to prove that an entity related to Debtor is the alter ego of 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," and the information could be disclosed under section 6103(h)(4)(C) if it has a bearing on the IRS's tax claim. Reference: Parts I.C., I.D., II.G.2.

Example 31. The basis for the IRS's proof of claim is Debtor's erroneous treatment of certain individuals as independent contractors rather than employees. The IRS has computed Debtor's liability for withheld income and FICA taxes under section 3509. 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 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) if liability is determined under section 3509. Thus, the individuals' tax information may not be disclosed. However, to the extent that the information may be relevant in determining whether the individuals are employees or independent contractors, such information may be disclosed. See, Guarantee Mutual Life Insurance Co. v. United States, 78-2 U.S.T.C. ¶ 9728 (D. Neb. 1978); Cory Pools v. United States, 213 Ct. Cl. 751 (1977); L.A.S. Enterprises, Inc. v. United States, 213 Ct. Cl. 698 (1977). Reference: Parts I.C., I.D., II.G.2.

Disclosure of Tax Information Indicating Possible Non-Tax Criminal Violations

I. Tax Administration Cases*

Internal Revenue Service Attorney	-----▶	Bankruptcy Court	-----▶	United States
		<i>I.R.C. § 6103(h)(4)</i>		<i>18 U.S.C. § 3057</i>
Internal Revenue Service Attorney	-----▶	United States Trustee	-----▶	United States
		<i>I.R.C. § 6103(h)(4)</i>		<i>28 U.S.C. § 586</i>
Internal Revenue Service	-----▶	Trustee	-----▶	United States Attorney
		<i>I.R.C. § 6103(h)(4)</i>		<i>18 U.S.C. § 3057</i>
		<i>Non-tax violation involves or arises out of same facts as Title 26 (or related title 18) violation</i>		
Internal Revenue Service Division/ Attorney	-----▶		-----▶	DOJ Tax United States
		<i>I.R.C. § 6103(h)(2), (3); Treas. Reg. § 301.6103(h)(2)-1(a)(2) (requires referral)</i>		

II. Non-Tax Administration Cases

		<i>Any Return or Return Information</i>		
Internal Revenue Service Attorney	-----▶		-----▶	United States
		<i>I.R.C. § 6103(i)(1) -- <u>Ex Parte</u> Court Order</i>		
		<i>Return Information Other Than Taxpayer Return Information</i>		
Internal Revenue Service Attorney	-----▶		-----▶	United States
		<i>I.R.C. § 6103(i)(2) -- Written Request</i>		
		<i>Return Information Other Than Taxpayer Return Information</i>		
Internal Revenue Service States Attorney	-----▶		-----▶	DOJ/United
		<i>I.R.C. § 6103(i)(3) -- Written Notification</i>		

III. Any Case (Tax or Non-Tax) Where a Trustee Has Been Appointed

Internal Revenue Service	-----▶	Trustee	-----▶	United States Attorney
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* As a general matter, a bankruptcy case will be a proceeding pertaining to tax administration if: (1) the IRS has filed a proof of claim, a claim for administrative expenses, or participates in the case based on being listed in the debtor's schedule of liabilities or in the plan of reorganization; (2) the IRS has formally notified the court (e.g., by motion to dismiss or convert) that the debtor's tax obligations are or may be delinquent, or that it will otherwise formally participate in the case; or (3) the debtor or the trustee has been authorized to continue the debtor's business post-petition. A tax administration case would also include a prosecution for a Title 26 violation.

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CHAPTER 7

CURRENCY TRANSACTIONS, MONEY LAUNDERING AND FORFEITURE

OBJECTIVES

At the end of this chapter, you will be able to:

1. identify the circumstances under which a Title 31 or 18 U.S.C. §§ 1956 or 1957 investigation involves tax administration; and
2. determine when tax information can be disclosed in an 18 U.S.C. § 981 civil forfeiture.

I. TITLE 31 -- BANK SECRECY ACT

A. Introduction

The Bank Secrecy Act (BSA) was enacted by Congress in 1970 to address the concerns of law enforcement officials regarding the unavailability of foreign and domestic bank records of customers thought to be engaged in activities entailing criminal or civil liability.

The basic purpose of the BSA, as stated at 31 U.S.C. § 5311, is to require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings. Regulations have been promulgated under the BSA to require 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 such financial institution which 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. § 103.26(a)(4) (1989). These reporting requirements are generally implemented through the use of Currency Transaction Reports (CTRs), Forms 4789.

Information evidencing the fact of a payment, receipt, or transfer of currency in excess of \$10,000 has tax implications for all parties to the transaction. Depending on the particular circumstances, this information could disclose either (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 such information was collected by the IRS in administering the internal revenue laws, it would be protected by section 6103 since these types of items are specifically listed in the definition of return information in subsection 6103(b)(2).

In the legislative reports concerning the BSA, both the House and the Senate stressed how the recordkeeping and reporting requirements of the BSA would address a wide range of law enforcement investigatory and regulatory concerns. See, H. R. Rep. No. 975, 91st Cong., 2d Sess. (1970), and S. Rep. No. 1139, 91st Cong., 2d Sess. (1970).

In its discussion of the authority of the Secretary of the Treasury to prescribe recordkeeping requirements for those individuals who acknowledge that they have foreign bank accounts, the Senate Report states 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. (Emphasis added). Thus, the broad purposes of the BSA are not limited to Title 26 violations, as Congress never intended for the BSA to be primarily a tax enforcement tool; rather, they reflect an expansive effort to aid in the enforcement of internal revenue laws as well as numerous other federal laws. California Bankers Association v. Schultz, 416 U.S. 21 (1974).

B. Title 31 and Title 26

Section 6103 presumes that the primary responsibility of the IRS is the enforcement of the internal revenue laws. The BSA is an independent statutory scheme that existed in 1976, but was not considered by Congress in the enactment of section 6103; nor was it considered when section 6103 was revised in 1982 to streamline access procedures for nontax federal criminal cases. Primary investigative jurisdiction for possible criminal violations of the BSA has been delegated to the IRS. 31 C.F.R. § 103.46(8) (1989), Treasury Directive 15-41 (December 1, 1992), and "Dissemination Policies and Guidelines for Release of Information Reported Under the Provisions of the Bank Secrecy Act" (December 6, 1988). Disclosure issues arise when IRS agents attempt to fulfill their obligations under both the BSA and the Internal Revenue Code.

The first issue concerns access to tax information to carry out a BSA investigation. A special agent normally obtains access to tax information pursuant to I.R.C. § 6103(h)(1), which provides that disclosures can be made to Treasury employees (including IRS employees) as long as the employees' official duties require disclosure for tax administration purposes. A special agent who is not performing a tax administration role has no right to tax information under subsection 6103(h)(1). Instead, with regard to accessing tax information, the agent must be treated as if he or she was an employee of another federal agency, and must find some other exception in I.R.C. § 6103 to obtain such information. (Generally, where special agents are assisting other agencies in nontax investigations, no disclosures can be made to those special agents until the I.R.C. § 6103(i) procedures are first followed. See Chapter 5.)

Therefore, if a special agent is working on a nontax administration criminal investigation with another agency (for example, a Title 31 case with DEA), the special agent would not be able to obtain tax information to work the case unless the agency under whose auspices the investigation is being conducted first complied with I.R.C. § 6103(i). Similarly, if the special agent had obtained tax information while previously working a criminal tax case, the agent could not disclose that information during the nontax administration investigation unless the other agency first complied with I.R.C. § 6103(i).

Given the close nexus between money laundering and tax evasion, it became clear that there were investigations directed to cases in which there may be both Title 31 and Title 26 violations, or where the Title 31 violation was committed in contravention of Title 26. As a result, IRM 9.3.1.4.3.1.1.2 specifically deals with situations where special agents, operating under authority granted by the Under Secretary (Enforcement) 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 manual concludes that if an appropriate IRS official makes that determination *in writing*, the Title 31 investigation would be considered to be one of tax administration under the "related statute" portion of the definition of tax administration.¹ There are two practical effects of a "related

¹ 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 I.R.C. 6103(b)(4). When investigat[ing] 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 Chief, CI. This determination is also known as the "related statute call." The Chief, CI, 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

statute" determination. One is that it permits the special agent to access tax information, under section 6103(h)(1), when the agent has a legitimate tax administration need for such information. The second is that information collected or generated after the related statute call is made is protected by I.R.C. § 6103.²

C. Effect of the "Related Statute" Determination

A determination that a Title 31 investigation meets the "related statute" test, and is considered to be one involving tax administration, does not give special agents carte blanche authority to disclose tax information. Instead the normal disclosure rules of I.R.C. § 6103 must still be followed before any subsequent disclosures may be made. For example, tax information obtained by the special agent during the Title 31 tax administration investigation may be disclosed to the Department of Justice as part of that investigation only if the disclosure is consistent with I.R.C. §§ 6103(h)(2) and (3).

In short, the IRS and Justice in a Title 31 "related statute" investigation are subject to the same disclosure rules that apply to disclosures during a normal criminal tax case. If the IRS discloses tax information as part of a referred Title 31 tax administration investigation, Justice can further disclose that information only in accordance with I.R.C. § 6103(h) and Treas. Reg. § 301.6103(h)(2)-1.³

Revenue laws.

4. If this related statute call is made by the Chief, CI, then all the information received, collected and developed by the Service in that investigation is protected from disclosure under I.R.C. 6103 regardless of whether a formal tax case is opened, and regardless of the ultimate determination with respect to any potential Title 26 charges.

* * * *

9. It is not necessary to establish a Title 26 violation or a numbered Title 26 investigation to meet the related statute test. Large amounts of currency being deposited and concealed from the IRS provides indications that income has been earned that has not been, or may not be, reported on an income tax return.

² 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).

³ Even though a related statute call has been made, that does not authorize the IRS or the Department of Justice to disclose information to other agencies involved in the nontax aspects of a Bank Secrecy Act or money laundering investigation, absent an

Disclosure to the Department of Justice of tax information pursuant to section 6103(h) is inappropriate unless it has been determined that a Title 31 violation was committed in contravention of Title 26.

If there are no possible Title 26 violations, Title 31 would not be a statute related to tax administration for section 6103 purposes and any subsequent disclosures could only proceed in accordance with I.R.C. § 6103(i). The decision on whether a Title 31 investigation involves tax administration is to be made by the IRS, and not by Justice.

If the IRS does not make that determination, tax information may not be disclosed to the special agent during the course of that Title 31 investigation, nor may disclosures be made by the IRS to Justice or any other federal agency, except in accordance with I.R.C. § 6103(i). Disclosures of tax information to Justice (and other agencies), even in a referred Title 31 "related statute" investigation, are subject to the requirements of I.R.C. § 6103.

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.

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.

I.R.C. § 6103(i) order. The regulations permitting the use of tax information in joint tax/nontax grand jury investigations require that the tax portion of the proceeding have been authorized by the Assistant Attorney General (Tax Division). Treas. Reg. § 301.6103(h)(2)-1(a)(2)(ii). Money laundering and Bank Secrecy Act investigations generally are not authorized by the Tax Division, even where a related statute call has been made.

D. When Does Title 31 Information Become Return Information?

Data collected by IRS personnel pursuant to their enforcement responsibilities under the BSA is not per se return information under I.R.C. § 6103. In a "pure" Title 31 investigation, such information is subject to the Treasury disclosure rules for Title 31 information found at 31 U.S.C. § 5319 and the implementing regulations (31 C.F.R. § 103.43) and Treasury's December 6, 1988 dissemination guidelines. This position is premised on the fact that while Congress readily acknowledged the usefulness of BSA information to the enforcement of internal revenue laws, it never intended for BSA information to be used solely for this purpose. It therefore follows that, when the IRS is carrying out responsibilities delegated to it by the Under Secretary (Enforcement), 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. Several agencies and bureaus deal with data collected under other statutes which may have a partial tax purpose; this data is not treated as return information.

The IRS's role, in the context of BSA enforcement, should be viewed as segregated from its other 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 should not be considered return information and should not be 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 question of what is return information becomes more complicated. Courts have almost universally read the term "return information" broadly. Specifically, it has been found to include targets of IRS tax investigations and any information gathered by the IRS with regard to the target's liability or possible liability under the Internal Revenue Code; information collected by the IRS when it is focusing on a particular activity and is 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, 840-41 (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.

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. First, courts have given an expansive definition to the term "return information". Second, the predicate for a "related statute" investigation is that the matter at issue is part of a scheme to evade the internal revenue laws. Therefore, discretion would suggest taking a conservative view. Using the related statute call as a touchstone, information received or generated by the IRS pursuant to its enforcement responsibilities under the BSA would not be subject to the disclosure rules of section 6103. Investigatory information received or generated after the "related statute" call is made would be return information, regardless of whether a formal tax case is opened. See IRM 9.3.1.4.3.1.1.2.

In summary:

-- once it is determined that a BSA violation is related to the administration of the internal revenue laws, special agents may access tax information in carrying out their Title 31 "related statute" investigatory responsibilities.

-- the "related statute" determination is an institutional determination by the IRS that a fact situation pertains to a matter in furtherance of or part of a pattern to violate the internal revenue laws, and therefore pertains to possible liability under the internal revenue laws. By operation of the statute, information generated or received by the IRS after the "related statute" determination is made is return information, the disclosure of which is regulated by section 6103.

II. TITLE 18 MONEY LAUNDERING OFFENSES

In addition to Title 31 investigations, IRS special agents also have the authority to conduct 18 U.S.C. §§ 1956 and 1957 investigations pursuant to the authority granted to them by Treasury Directive 15-42, dated January 22, 1999. Under this directive, the Under Secretary (Enforcement) has delegated to the IRS investigatory, seizure, and forfeiture authority over violations of these sections discovered during the course of an ongoing Title 26 or BSA investigation. The IRS may also seize property pertaining to such violations if the bureau with investigatory authority is not present to make the seizure, but must turn over the property to that bureau.

Section 1956 deals with laundering of monetary instruments, and section 1957 with engaging in monetary transactions in criminally derived property. With the exception of section 1956(a)(1)(A)(ii) investigations, which appear to be per se tax related, both of these sections are, like Title 31, not primarily concerned with violations of the internal revenue laws, but are part of a broader effort to hinder the flow of illegally acquired money. Therefore, if a special agent, working a section 1956 or 1957 investigation

wants to access tax information, a “related statute” determination must be made,⁴ or the agent must follow the procedures set forth in I.R.C. § 6103(i). The special agent may access tax information under subsection 6103(h)(1) only if conducting a tax administration investigation.

The one exception to this rule is investigations conducted pursuant to section 1956(a)(1)(A)(ii). This section was designed to cover transactions conducted to facilitate violations of I.R.C. §§ 7201 and 7206. In short, the section requires that a transaction be conducted with the intent to facilitate tax evasion, and that the funds involved represent the proceeds of certain defined "specified unlawful activities", including racketeering and foreign drug operations. See, S. Rep. No. 99-433, 99th Cong., 2nd Sess. 11-12 (1986). Given the relationship between this section and tax evasion, investigations conducted pursuant to this subsection are per se related to tax administration and tax information could always be accessed pursuant to section 6103(h)(1). By the same token, information received or generated during a section 1956(a)(1)(A)(ii) investigation is clearly return information protected by section 6103, since the predicate for that investigation is conduct in violation of the internal revenue laws. In short, the same disclosure rules apply to a related statute call made during a Title 18 money laundering case as for a Title 31 BSA case as discussed above. See IRM 9.3.1.4.3.1.1.2.

III. CIVIL FORFEITURES UNDER 18 U.S.C. § 981

18 U.S.C. § 981 was enacted to provide a means for the government to seize and bring an action for the forfeiture of property involved in transactions which 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.

⁴ In multi-agency money laundering investigations, an ex parte order under section 6103(i)(1) must be obtained to disclose tax 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 tax 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 the case except with respect to 18 U.S.C. § 1956(a)(1)(A)(ii).

A. Disclosures in Tax Administration Cases Under I.R.C. § 6103(h)

The forfeiture provisions of 18 U.S.C. § 981 were clearly intended to reach all property which was involved in violations of the currency transaction provisions of 31 U.S.C. §§ 5313(a) and 5324 and the money laundering provisions of 18 U.S.C. §§ 1956 and 1957, and all property which is traceable to such property. Therefore, a civil forfeiture under section 981 would be a matter pertaining to tax administration if the Chief, CID, made the appropriate "related statute" determination. (See earlier discussion of the "related statute" test on Title 31). If such a determination had been made, a special agent working on the 18 U.S.C. § 981 forfeiture could access tax information under I.R.C. § 6103(h)(1).

The IRS could subsequently disclose tax information to Justice in preparation for the judicial or administrative tax administration forfeiture proceeding if the matter was properly referred, I.R.C. § 6103(h)(3)(A), and if the disclosure otherwise complied with the provisions of I.R.C. § 6103(h)(2). Disclosures in the administrative or judicial tax administration forfeiture proceeding would be subject to I.R.C. § 6103(h)(4).

It is important to note that disclosures of tax information to Justice for an 18 U.S.C. § 981 forfeiture are not limited to situations where there has been a criminal referral of a "related statute" Title 31 U.S.C. §§ 5313(a) or 5324, or 18 U.S.C. §§ 1956 and 1957 investigation. These disclosures can also be made for an 18 U.S.C. § 981 forfeiture prior to, or in lieu of, the criminal referral, as long as the "related statute" call has first been made, the forfeiture case has been properly referred pursuant to I.R.C. § 6103(h)(3)(A), and the requirements of I.R.C. § 6103(h)(2) are followed.

I.R.C. § 6103(h)(2), which sets forth the criteria for disclosures to DOJ, and I.R.C. § 6103(h)(4), which sets forth the criteria for disclosure in the proceeding itself, are closely related. Subsections 6103(h)(2)(A) and (h)(4)(A) permit the disclosure of tax 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)(4)(A).

The first part of these subsections ["the taxpayer is a party to the proceeding"] would not appear to apply in civil forfeiture matters since the forfeiture proceeding is in rem, 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 (1974), reh'g denied, 417 U.S. 977 (1974).

The second part of the above-quoted language of subsections 6103(h)(2)(A)/(h)(4)(A) would, however, appear to form the basis for disclosure, since the "related statute" civil forfeiture proceeding would, by definition, arise out of or in connection with determining the taxpayer's liability or of collecting civil liability in respect to tax. That is, the IRS would have predicated the disclosure on an institutional determination that the underlying Title 31 and/or Title 18 violation was one of tax administration, since it was committed either in furtherance of or as part of a pattern to violate the internal revenue laws.

It may also be possible to rely on subsections 6103(h)(2)(B)/(C) and (h)(4)(B)/(C), which permit disclosures of tax 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)

Assuming that the matter is not one that pertains to tax administration, the question arises as to whether access and subsequent use of tax information is permissible under I.R.C. § 6103(i). In this regard, section 6103(i)(1) does not permit the disclosure of tax information solely for the purpose of a nontax civil forfeiture. However, if information is properly obtained for a criminal investigation under section 6103(i)(1), it may be subsequently disclosed for purposes of a civil forfeiture under section 6103(i)(4). United States v. \$57,303.00 in United States Currency, 737 F. Supp. 1041 (C.D. Ill. 1990); § 9-13.910, United States Attorneys' Manual (Title 9 - Criminal Division); see, H.R. Conf. Rep. 760, 97th Cong. 2d Sess. 675 (1982), 1982-2 C.B. 697; 128 Cong. Rec. 9008 (daily ed. July 22, 1982) (Remarks of Senator Nunn). See generally Chapter 5.

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 such an exchange, and assets used or intended to be used to facilitate drug offenses. The need to permit disclosures of tax information in civil forfeitures under 21 U.S.C. § 881 was specifically considered during the consideration of the 1982 amendments to I.R.C. § 6103(i)(4).

It is possible that the use of tax information in a 21 U.S.C. § 881 forfeiture could arise in the context of a referred "related statute" tax administration case under 31 U.S.C. §§ 5313(a) or 5324, or 18 U.S.C. §§ 1956 or 1957. That is, Justice may wish to forfeit money or other property under 21 U.S.C. § 881 in lieu of, or in conjunction with, seeking a criminal prosecution under Title 31 and/or Title 18 of an individual involved in drug trafficking operations. It would not appear that the

use of and subsequent disclosure of tax information in a 21 U.S.C. § 881 forfeiture would be authorized by I.R.C. § 6103.

Disclosures of tax information in a referred tax administration case may be made to Justice 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 involving tax administration.

Treas. Reg. § 301.6103(h)(2)-1 does anticipate situations where a referred criminal tax administration investigation may involve tax aspects of transactions which are also 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 tax 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 is not authorized by the Regulation. First, the regulation involves the "enforcement of a specific Federal criminal statute other than one" involving tax administration. A civil forfeiture under 18 U.S.C. § 881 does not meet this criterion. Second, the regulation requires that the tax portion of the investigation has been duly authorized by the Tax Division of Justice, the information is being used directly in connection with the tax administration proceeding, and that the nontax use is confined to the tax administration proceeding. A separate civil forfeiture under 18 U.S.C. § 881 would not meet this portion of the regulation either. Finally, the regulation requires that if the tax administration portion is terminated, Justice cannot use returns or taxpayer return information on the nontax portion of the matter unless they first obtain a court order as required by I.R.C. § 6103(i)(1). As was discussed above, the court order mechanism of I.R.C. § 6103(i)(1) is not available for a civil forfeiture.

Tax information may be accessed for a civil forfeiture under 18 U.S.C. § 981 if an institutional determination is made that the underlying Title 31/Title 18 violation was committed either in furtherance of a violation of the internal revenue laws or as part of a pattern of violations of the internal revenue laws. Tax information can be subsequently disclosed to Justice and used in an administrative or judicial 18 U.S.C. § 981 forfeiture proceeding subject to I.R.C. §§ 6103(h)(2)/(4) and (3). Under subsections 6103(h)(2) and (4), the strongest case for disclosure can be made in those situations where the claimant/taxpayer challenges the seizure or forfeiture.

D. Summary on Forfeitures

If an institutional determination is not made that the underlying Title 31/Title 18 violation was committed either in furtherance of a violation of the internal revenue laws or as part of a pattern of violations of the internal revenue laws, tax information may only be accessed and disclosed pursuant to I.R.C. § 6103(i). Under present law, the court order mechanism of I.R.C. § 6103(i)(1) cannot be used to access tax information for a civil forfeiture.

IV. I.R.C. § 6050I DISCLOSURES

I.R.C. § 6050I supplements the reporting requirements of the BSA. Section 6050I provides that an information return (Form 8300) 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). While 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 in their thrust. The purpose of information reported under the BSA provisions of Title 31 has been to aid law enforcement personnel in tracing the movement of currency. In contrast, the legislative history of section 6050I indicates that it was enacted as a supplementary method of information reporting for purposes of tax administration, both civil and criminal. H.R. Conf. Rep. No. 861, 98th Cong., 2nd Sess. 987-989 (1984), 1984-3 C.B. (Vol. 2) 241-243.

Although information reported under the BSA (the Currency Transaction Reports) may be disclosed to agencies under guidelines promulgated by the Under Secretary of the Treasury for Enforcement, information reported under section 6050I is subject to the disclosure restrictions of section 6103.

In 1988, Congress enacted I.R.C. § 6103(i)(8) to permit the 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). This provision expired in November, 1992. In 1996, the Taxpayer Bill of Rights 2, Pub. L. 104-168, § 1206, was enacted. It contained a new I.R.C. § 6103(l)(15), which permanently extended the rules for disclosing Form 8300 information. Moreover, section 6103(l)(15) permits disclosures not only to federal agencies, but also to state, local, and foreign agencies, and for civil, criminal, and regulatory purposes. Generally, the Form 8300 information can now be disclosed in the same manner as is information reported under the BSA.

CHAPTER 8

FEDERAL/STATE EXCHANGE PROGRAM I.R.C. §§ 6103(d) and (p)(8)

OBJECTIVES

At the end of this chapter, you will be able to:

1. describe the procedures that the IRS uses to implement disclosures under the federal/state tax information exchange program; and
2. identify the requirements that states and qualifying cities must meet in their confidentiality laws as a precondition of receiving federal tax information.

I. INTRODUCTION

State and qualifying city¹ tax officials may receive tax information from the IRS pursuant to section 6103(d)(1). Disclosure Officers serve as liaisons between the IRS and those agencies.

The majority of federal tax information is furnished to states pursuant to written agreements (the basic and implementing agreements). If an agreement has not been entered into between IRS and state tax officials, the tax officials may request tax information on a case-by-case basis.

States that require their citizens to submit federal tax information to meet state filing requirements must also enact satisfactory confidentiality laws protecting such 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 (8th Cir. 1997), aff'd 915 F. Supp. 1015 (N.D. Iowa 1996); Loomis v. Internal Revenue Service, 81-1 U.S.T.C. ¶ 9341 (D. Conn. 1981).

¹ Pursuant to section 6103(b)(5)(B), a city with a population of more than 250,000 that imposes a tax on income or wages and with which the IRS has entered into an agreement regarding disclosure is considered a "state" for purposes of the federal/state tax exchange program. Unless specified otherwise, for purposes of this lesson, a reference to a state shall include a reference to a qualifying city.

II. DISCLOSURE PURSUANT TO I.R.C. § 6103(d)

Under I.R.C. § 6103(d)(1), tax information with respect to specified taxes shall be open to inspection by state agencies, bodies, or commissions, or their legal representatives, charged under the laws of the state with tax administration responsibilities. Such inspection is permitted only for state tax administration purposes.

Section 6103(d)(1) also requires a written request from state tax officials as a precondition to disclosure. Since 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 district 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 resource expenditures in tax administration. The mutual exchange of information is referred to as the federal/state exchange program. See, Policy Statement P-1-35.²

If an agreement has not been entered into between 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 multi-district state, (more than one IRS district within its borders) is divided into "liaison" and "non-liaison" districts for purposes of the federal/state exchange program. The liaison district is responsible for liaison with the state tax agency. IRM 1.3.32.8.

A. Basic agreement

IRM exhibit 1.3.32-1 shows the format of the basic agreement between IRS and state tax officials. The basic agreement requires approval by the Commissioner and the head of the state tax agency.

B. Implementing agreement

² P-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 such information.

The implementing agreement is entered into after the basic agreement has been approved. 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. It must be signed by the Director of the liaison district and the head of the state tax agency. IRM 1.3.32.6(2). Disclosures on a continuing basis may only be made in accordance with provisions of the implementing agreement. See IRM 1.3.32.6.1(2) & 1.3.32.10.1.

Bator v. Department of Treasury, IRS, 89-1 U.S.T.C. ¶ 9138 (D. Nev. 1988), aff'd without published opinion sub nom., Bator v. United States, 899 F.2d 1224 (9th Cir. 1990) (text in Westlaw), footnote comment on who may sign the agreements as the head of the state tax agency, cert. denied, 498 U.S. 893 (1990).

C. States with no agreement

States that have no agreements with the IRS under the federal/state exchange program may obtain federal tax information. Requests for access may be made by the head of the state tax agency (other than the governor) on a case-by-case basis. Such case-by-case disclosures trigger the same rules and use limitations as those made under standing basic and implementing agreements. See IRM 1.3.32.13.

D. Restrictions

1. The federal tax data that may be furnished to state tax agencies pursuant to section 6103(d)(1) is limited to taxes imposed by the specific Internal Revenue Code chapters described in section 6103(d)(1). Further, certain types of information may not be disclosed at all (IRM 1.3.32.17(1) [e.g., grand jury information without a valid 6(e) order], and certain types must be referred to the National Office prior to disclosure (IRM 1.3.32.17(2)&(3) [e.g., information from confidential sources]). Only federal tax data which is needed for a valid state tax administration purpose and which will actually be used for such a purpose may be disclosed to state tax agencies by the IRS.

2. Only state tax agency officers and employees may use federal tax data received from the IRS. Redislosure by state tax agencies is limited to:

- a. other state tax agency employees;
- b. state tax agency's legal representative;
- c. state tax agency's contractor for the purpose of obtaining certain tax administration services under I.R.C. § 6103(d)(1) and (n);

- d. state auditors to the extent authorized by I.R.C. § 6103(d)(2);
- e. judicial and administrative tax administration proceedings to the extent authorized by I.R.C. § 6103(h)(4). See IRM 1.32.19.

3. Disclosure of federal tax data to a state tax agency is restricted to the agency's justified tax administration need for and use of such information. IRM 1.3.32.4.

For purposes of I.R.C. § 6103(d), tax administration includes conduct investigations of state tax agency employees or prospective employees. IRM 1.3.32.12. Rueckert v. Internal Revenue Service, 775 F.2d 208 (7th Cir. 1985) (state tax administration includes enforcement of state tax agency personnel rules; see, Smith v. United States, 964 F.2d 630 (7th Cir. 1992), reh'g en banc, denied, 1992 U.S. App. LEXIS 19344 (7th Cir. 1992), cert. denied, 506 U.S. 1067, 113 S. Ct. 1015 (1993)(implicit recognition that compliance with tax filing requirements by state tax employee was state tax administration).

4. "State" is defined to include the District of Columbia and certain territories. I.R.C. § 6103(b)(5)(A). In addition, cities 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)(B).

5. 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 Chief Executive Officer of the state (i.e., the governor) or any person not an employee or legal representative or I.R.C. § 6103(n) contractor of the tax agency, body or commission.

Requests for disclosure must be in writing. Huckaby v. Department of Treasury, IRS, 794 F.2d 1041 (5th Cir. 1986), rehearing denied, Huckaby v. Department of Treasury, 804 F.2d 297 (5th Cir. 1986); Smith v. United States, 964 F.2d 630 (7th Cir. 1992), reh'g en banc, denied, 1992 U.S. App. LEXIS 19344 (7th Cir. 1992), cert. denied, 506 U.S. 1067, 113 S. Ct. 1015 (1993). See also, McQueen v. U.S., 5 F. Supp. 2d 473, 1998 U.S. Dist. LEXIS 6346 (S. D. Tex.), where one of the issues before the court in a § 7431 action was whether the writing and designation requirements authorizing disclosure pursuant to a fedstate agreement with the state of Texas were met, the court found as a matter of law that the disclosure of the seized material to the Texas State Comptroller's Office satisfied the requirements of § 6103(d).

The basic and implementing agreements meet the "written request" requirement of the statute. Long v. United States, 972 F.2d 1174 (10th Cir. 1992); Smith v. United States, *supra*; Taylor v. United States, 106 F.3d 833 (8th Cir. 1997), *aff'g* 915 F. Supp. 1015 (N.D. Iowa 1996); Stone v. Commissioner of the Internal Revenue, T.C. Memo 1998-314 (1998).

6. Disclosure of tax information is not mandated 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: Long v. United States, 972 F.2d 1174 (10th Cir. 1992); Smith v. United States, 964 F.2d 630 (7th Cir. 1992), *reh'g en banc, denied*, 1992 U.S. App. LEXIS 19344 (7th Cir. 1992), *cert. denied*, 506 U.S. 1067, 113 S. Ct. 1015 (1993); Bator v. Internal Revenue Service, 89-1 U.S.T.C. ¶ 9138 (D. Nev. 1988), *aff'd without published opinion sub nom, Bator v. United States*, 899 F.2d 1224 (9th Cir. 1990) (text in Westlaw), *cert. denied*, 498 U.S. 893 (1990); Rueckert v. Internal Revenue Service, 775 F.2d 208 (7th Cir. 1985); Taylor v. United States, 106 F.3d 833 (8th Cir. 1997), *aff'g* 915 F. Supp. 1015 (N.D. Iowa 1996); White v. Commissioner, 537 F. Supp. 679 (D. Colo. 1982); Loomis v. Internal Revenue Service, 81-1 U.S.T.C. ¶ 9341 (D. Conn. 1981); Davis v. United States, 80-2 U.S.T.C. ¶ 9794 (D. Mass. 1980), *aff'd*, 81-1 U.S.T.C. ¶ 9458 (1st Cir. 1981).

7. 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 establish a high-level administrative review procedure wherein a state tax agency can appeal 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 such information.

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 administration pending a final determination, despite the possible detrimental impact of such an action upon the state's tax system. The IRS does not believe that it should disclose federal tax information in a case involving flagrant violations of safeguard procedures.

IV. RELEASE OF TAX DATA IN MAGNETIC TAPE FORM

Programs for providing state tax agencies with tax return information on magnetic media 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. Magnetic tape data is furnished to each state tax agency pursuant to written agreements. Any agreement for furnishing tape extracts to state tax officials must be coordinated through the Office of FedState Relations in the National Office. See IRM 1.3.32.11.

V. TAX RETURN PREPARERS -- Section 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 such 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 section 6103(d) and IRM 1.3.32.4. See IRM 1.3.32.15.

Note that disclosures under section 6103(k)(5) to local agencies regulating tax return preparers are not limited to cities with more than 250,000 people.

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 such "wraparound" information. Any state which

requires the filing of "wraparound" information with its tax returns must comply with section 6103(p)(8) as a precondition for obtaining federal tax information from the IRS under section 6103(d). IRM 1.32.14 & 1.32.14.1.

The IRS has taken the view that section 6103(p)(8) does not require states or cities to enact confidentiality laws which are mirror images of the federal confidentiality statute. 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 which is 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) will be subject to such sanctions.

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 such disclosure is specifically authorized by state law. Intrastate disclosures of "wraparound" information can be made pursuant to the criteria outlined earlier. Interstate 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.

In re Grand Jury Empaneled Jan. 21, 1981, 535 F. Supp. 537 (D. N.J. 1982) (federal grand jury subpoena quashed for failure to meet state disclosure laws. Footnote commenting that N.J.S.A. 54:50-8 subd. b was designed to comply with section 6103(p)(8)).

VII. RESOURCE MATERIAL ON THE FEDERAL/STATE EXCHANGE PROGRAM

Chapter 1.3.32 of the Internal Revenue Manual.

CHAPTER 9

FREEDOM OF INFORMATION ACT

OBJECTIVES

At the end of this chapter, you will be able to:

1. describe the statutory framework of the FOIA;
2. describe the FOIA administrative process; and
3. identify the exemptions which apply to withhold agency records from release.

I. INTRODUCTION

A. Overview

1. 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, moreover, 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.
2. 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. The 1974 amendments narrowed the scope of certain exemptions and broadened procedural provisions such as those relating to time limits, segregability, and in camera inspection by the courts.
3. In 1986, after several years of consideration, Congress amended two areas of the FOIA - access to law enforcement records, and fee charges and circumstances for fee waivers.
4. Most recently, the "Electronic Freedom of Information Act Amendments of 1996 (EFOIA)," P.L. No. 104-231, 110 Stat. 3048, specifically address electronic records issues and contain several provisions changing the timing of agency responses to FOIA requests. The Department of Treasury is in the process of drafting regulations to be issued that will implement the EFOIA, and the Service will revise its own regulations soon after.

II. INFORMATION AVAILABLE

A. The Freedom of Information Act applies only to records held by the administrative agencies of the executive branch of the federal government. 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. See U.S. Dept. of Justice v. Tax Analysts, 492 U.S. 136 (1989), in which 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 decisions were considered agency records because of their inclusion in agency files and use in official business (e.g., consideration of appeal), even though publicly available through the courts, and were releasable as no exemption applied to withhold them. A record that is neither owned by the agency or over which the agency has control is not an agency record. See, e.g., Gilmore v. United States Dep't of Energy, 4 F. Supp. 2d 912 (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 the FOIA because DOE lacked sufficient control over the software.

B. The Act further provides that 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. See Treas. Reg. § 601.701-702, which embody the Service's regulations implementing the FOIA;
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.

C. In addition, the Act provides that 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 as well as 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.
4. Agency records which have been, or the agency expects to be, the subject of repetitive requests.
5. The Act requires each agency to publish and distribute at least quarterly an index of material referred to in 1 - 4, above.
6. For records created on or after November 1, 1996, by November 1, 1997 (December 31, 1999, in the case of the index referred to in paragraph 5, above), each agency must make these records available by "computer telecommunications," i.e., on the Service's Web site on the Internet.

III. ADMINISTRATIVE PROCESS

A. Request

1. FOIA requests are made in writing and are generally processed at the location of the requested documents, i.e., any of the District or Regional Offices, Service and Compliance Centers, Computing Centers, or in the National Office. 26 C.F.R. § 601.702(c)(3)(iii) provides that FOIA requests are to be directed to the office of the Service official who is responsible for the control of the records requested. Under 26 C.F.R. § 601.702(g), Regional Counsel records are included within the jurisdiction of the Regional Commissioner and District Counsel records fall under the jurisdiction of the District Director. So, even though a FOIA request is addressed to the Office of the Regional Commissioner or District Director, and not specifically to the Office of the Regional Counsel or District Counsel, such request may encompass Regional or District Counsel records. If a FOIA request is submitted directly to Regional Counsel or District Counsel, the request should be forwarded to the Regional or District Disclosure Office for processing.
2. The Act requires that the request "reasonably describe" the desired records. This means that an employee of the agency who is familiar with the subject area of the request could locate the record without imposing an undue burden on the agency.

3. An agency has a duty to conduct a reasonable search for responsive records. In re Wade, 969 F.2d 241 (7th Cir. 1992). The legal standard for evaluating a reasonable search is not whether responsive material might conceivably exist, but whether the search for records was adequate. Keegan v. IRS, 1995 U.S. Dist. LEXIS 8213 (D.D.C. May 30, 1995). 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. United States Dep't of Justice, 164 F.3d 20 (D.C. Cir. 1998). Also, 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. Klinge v. IRS, 906 F. Supp. 434; Reeves v. U.S., 74 A.F.T.R.2d 7208 (E.D. Cal. November 16, 1994). However, the enactment of the EFOIA amendments make clear that agencies are obligated to conduct reasonable searches of electronic records and automated databases to identify responsive information that may be extracted therefrom and produced to the requester, either in electronic or hard copy format.

4. The motive of the requester for making a FOIA request is irrelevant. The reason for making a request, the requester's intended use of the information, or the requester's unique knowledge about the information, has no bearing on the entitlement to records. UTAAP (Unsupported Tax Avoidance Argument Program) taxpayers, convicted felons, writers, and scholars all have equal access to agency records. Durns v. Bureau of Prisons, 804 F.2d 701 (D.C. Cir. 1986). Whether requested records are to be made available turns on the applicability of the exemptions vis-a-vis **any** member of the public, regardless of the particular requester's identity (the exception being where the privacy of a person named in the records is involved. The FOIA-based privacy exemptions cannot be asserted to protect the identity of the person who is the requester.)

5. The Act provides that any reasonably segregable portion of a document is to be provided after deletion of the exempt portions. Information which is otherwise nonexempt may be withheld if it is "inextricably intertwined" with the exempt information. Neufeld v. IRS, 646 F.2d 661 (D.C. Cir. 1981). An agency is not required to segregate such that what remains leaves "only essentially meaningless words and phrases." Id.

6. The agency has 20 working days in which to respond to the request. The Act allows an extension not to exceed 10 more working days in which to respond.

B. Appeal

1. If the agency denies the request within the 20-working-day period, the requester may send an appeal letter to the agency (i.e., Disclosure Litigation). If a timely denial of the request is made, the requester must pursue an administrative appeal before filing suit in District Court. See Chandler v. IRS, No. 90-35501 (9th Cir. March 5, 1991) (unpublished), aff'd mem., 927 F.2d 608 (9th Cir. 1991). However, if the agency fails to respond within the 20-day period, the requester may file a suit in District Court or treat the request as having been denied and submit a letter of appeal. The D.C. Circuit, in Oglesby v. Dept. of the Army, 920 F.2d 57 (D.C. Cir. 1991), held that if a requester waits for the agency's response beyond the initial response period, the requester must administratively appeal before bringing suit. See also Taylor v. Appleton, 30 F.3d 1365 (11th Cir. 1994).

2. The agency is required to respond to an appeal within 20 working days after the receipt of such appeal. Should the agency fail to respond within the 20-day period, the requester may file suit in U.S. District Court. 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 in District Court.

3. Thus, at both the request and appeal stages, a judicial remedy exists when the agency fails to respond with a determination within the statutory time periods. A timely denial of the documents at the request stage also entitles the requester to appeal administratively the decision. A denial on appeal may be reviewed in U.S. District Court (5 U.S.C. § 552(a)(6)).

IV. EXEMPTIONS

Government agencies can refuse to disclose information if it falls within one of nine specified exemptions or three special law enforcement exclusions (rarely applicable to IRS). See 5 U.S.C. §§ 552(b) and (c). However, the legislative history of the Act makes it clear that Congress did not intend for agencies to use these exempt categories to justify the automatic withholding of information. Rather, the exemptions are intended to designate those areas in which, under certain circumstances, information may be withheld.

A. Exemption (b)(1)

This exemption pertains to classified documents concerning national defense and foreign policy. The Service seldom invokes this exemption. Where the Service has invoked the exemption, it has involved treaty-related matters.

B. Exemption (b)(2)

This exemption covers matters "related solely to the internal personnel rules and practices of an agency." In defining the scope of this exemption, the Senate and House Reports provide conflicting views.

1. The Senate Report states that Exemption 2 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. 813, 89th Cong. 1st Sess. (1967). See also, Hawkes v. IRS, 467 F.2d 787 (1972). In Abraham & Rose v. IRS, 138 F.3d 1075 (6th Cir. 1998), the Sixth Circuit rejected the IRS's assertion of exemption 2 to withhold the Automated Lien Database, holding that the requested information does not relate predominantly to an internal **personnel** rule or practice. Simply relating to the internal management of the agency is insufficient; "the mere fact that the requested information is part of a system designed specifically for internal agency use" by personnel does not alter this conclusion. Id. at * 15.

2. The House Report, however, states that such exemption applies to: "Operating rules, guidelines, and manuals of procedure for government investigations, or examiners ... but this exemption would not cover all matters of internal management such as employee relations and working conditions and routine administration procedures which are withheld under the present law." H. Rep. No. 1497, 88th Cong., 2d Sess. 10 (1966).

3. Most courts have adopted the Senate Report view, and have ruled that documents must be released where it can be shown that such documents are the subject of a genuine, significant, or legitimate public interest. Department of Air Force v. Rose, 425 U.S. 352 (1976); Vaughn v. Rosen, 523 F.2d 1136 (D.C. Cir. 1975).

4. The D.C. Circuit identified a slightly different standard than the House Report's interpretation for protecting documents under this exemption. Documents are exempt under (b)(2) if the purpose for which they were generated is "predominantly internal" and their disclosure would "significantly risk circumvention of agency regulations or statutes." Crooker v. BATF, 670 F.2d 1051 (D.C. Cir. 1981).

5. As part of the 1986 FOIA amendments, law enforcement manuals, previously withheld from disclosure under the House Report view of (b)(2), are now clearly exempt under modified exemption (b)(7)(E), infra.

C. Exemption (b)(3)

1. Exemption (b)(3) protects information "specifically exempted from disclosure by statute (other than the FOIA), 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."

2. Section 6103 of the Code is the type of statute to which subsection (b)(3) of the FOIA applies. Church of Scientology of California v. IRS, 484 U.S. 9 (1987); Chamberlain v. Kurtz, 589 F.2d 827 (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. Sections 7213 and 7431 of the Code, respectively, set forth criminal and civil penalties for the unauthorized disclosure of return information.

3. Rule 6(e) of the Federal Rules of Criminal Procedure is another "statute" to which subsection (b)(3) of the FOIA applies. Larson v. IRS, No. 5-87-167 (D. Minn., May 4, 1988). This provision, promulgated under the authority of 18 U.S.C. §§ 3771 and 3772, mandates the secrecy of grand jury proceedings. This rule prohibits the disclosure of documents which contain grand jury information generated during the course of any grand jury investigation.

4. 31 U.S.C. § 5319 establishes that reports required to be filed under the Bank Secrecy Act (CTRs, CMIRs, and FBARs) are specifically exempt under the FOIA. Small v. IRS, 820 F. Supp. 163 (D.N.J. 1992).

5. The National Defense Authorization Act, Pub. L. No. 104-201 § 821, 110 Stat. 2444, was established by Congress as a (b)(3) statute prohibiting agencies from releasing certain contractor proposals under the FOIA. This statute was designed to alleviate the administrative burden of agencies in processing requests for such contractor proposals under exemption (b)(4).

D. Exemption (b)(4)

1. Exemption (b)(4) protects from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." This exemption is often used by the National Director for Governmental Liaison and Disclosure regarding requests for government contracts. This exemption applies to trade secrets such as processes, formulas, manufacturing plans, and chemical compositions. See Yamamoto v. IRS, No. 83-2160, slip op. at 2 (D.D.C. November 16, 1983), in which a report on the computation of the "standard mileage rate" prepared by a private company for IRS use was held exempt under (b)(4); see also AGS Computers v. IRS, No. 92-2714 (D.N.J. September 16, 1993), in which proprietary 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 withheld under (b)(4). This 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. However, commercial and financial information other than trade secrets can be withheld from disclosure only if it meets the following criteria: it must be privileged or confidential, and it must be obtained from a "person" by the government. Also, that the information concerns matters occurring during a commercial operation does not alone make the information commercial information. See Chicago Tribune Co. v. FAA, No. 97 C 2363, 1998 WL 242611 (N.D. Ill. May 7, 1998), in which the court held that information on the nature and frequency of in-flight emergencies was not commercial information for purposes of exemption 4.

2. The courts have defined "confidential" information as that information which if disclosed would be likely to (1) impair the government's ability to obtain similar information in the future, or (2) harm the competitive position of the person who supplied it. National Parks and Conservation Association v. Morton, 498 F.2d 765 (D.C. Cir. 1974). Information obtained from a "person" includes data supplied by corporations and partnerships as well as individual citizens. It does not apply to records which are generated by the government such as government prepared documents based on government information. (Such information may be exempt under one prong of Exemption 5, *infra.*) In Critical Mass Energy Project v. NRC, 975 F.2d 871 (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 arguably proprietary information is voluntarily submitted, then the test is a less stringent requirement: whether the submitter ordinarily places such information into the marketplace. If the submitter does not, then the information is exempt under (b)(4). The submitter no longer need demonstrate to the agency

the competitive harm likely to befall the submitter if the information is disclosed.

E. Exemption (b)(5)

1. The (b)(5) exemption of the FOIA 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." Since deliberative process privilege material, confidential attorney-client communications, and attorney work product documents are not generally available to parties in litigation with the government (Fed. R. Civ. P. 26(b)(1) and 26(b)(3)), such documents are protected from disclosure by the (b)(5) exemption.

2. Deliberative process privilege

a. The deliberative process privilege protects material reflective of the predecisional and deliberative processes of government agencies, *i.e.*, internal agency documents containing the opinions, deliberations, and recommendations reached by governmental officials in connection with their official duties. See, e.g., EPA v. Mink, 410 U.S. 73 (1973); NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975); Renegotiation Board v. Grumman Aircraft, 421 U.S. 168 (1975).

b. Facts are generally not protected under the deliberative process privilege unless they are inextricably intertwined with deliberative matter, or so selectively culled from a larger universe of facts, so as to reveal the deliberation itself. Montrose Chemical Corp. v. Train, 491 F.2d 63 (D.C. Cir. 1974).

c. To the extent an otherwise predecisional and deliberative document is subsequently adopted by an agency decision-maker, then the deliberative process privilege is no longer available to resist production. The seminal case on adoption is NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 161 (1975), in which the Supreme Court stated:

. . . if 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 other exemption other than Exemption 5.

In 1981, the D.C. Circuit held that General Counsel Memoranda (GCMs), Actions on Decisions (AODs), and Technical Memoranda (TMs), prepared by the Office of Chief Counsel between 1967 and 1981, because they were reconciled with final decision-makers before issuance, indexed and digested for research purposes, obsoleted or superseded by subsequent issuances, etc., reflected the final position of the agency and, as such, were not predecisional documents subsumed by the deliberative process privilege and Exemption (b)(5). Tax Analysts v. IRS, 646 F.2d 666 (D.C. Cir. 1981). 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, did not precede the decision regarding the agency's legal position and, as such, FSAs were neither privileged under the deliberative process privilege nor the attorney-client privilege. Tax Analysts v. IRS, 117 F.3d 607 (D.C. Cir. 1997). (The IRS Restructuring and Reform Act of 1998 (RRA), P.L. 105-206, expanded I.R.C. § 6110 and now covers Chief Counsel Advice memoranda (CCAs), 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. CCAs covered by I.R.C. § 6110 and issued between 1986 and 1998 will be released according to the schedule set forth in the RRA. CCA material may be withheld under exemptions consistent with existing FOIA case law.)

d. The underlying policy considerations of the deliberative process privilege are: first, to promote frank expression and discussion among those responsible for making the determinations that enable the government to operate, and second, to shield from disclosure the thought processes of executive and administrative personnel.

e. The deliberative process privilege was held waived by a prior disclosure, when an IRS attorney read aloud from an internal draft document at a meeting with oil industry representatives. See Shell Oil Co. v. IRS, 772 F. Supp. 202 (D. Del. 1991). Thus, the court refused to uphold the Service's assertion of the deliberative process privilege encompassed by exemption (b)(5) for that portion of the document read aloud.

f. The Internal Management Document System Handbook, IRM 1230, at text 293(2), provides that, with respect to documents or

information subject to discretionary exemptions (such as the attorney work product, attorney-client, and deliberative process privileges) only those matters whose disclosure would significantly impede or nullify the operations or functions of the Service or constitute an unwarranted invasion of privacy, will be withheld. See Disclosure of Official Information Handbook, IRM 1.3, at text 13.4(ii), and 26 C.F.R. § 601.701, in which the Service establishes the policy that it will assert its discretionary FOIA exemptions only where there is a "compelling necessity" to do so. In October 1993, the Attorney General issued new FOIA policy guidance. The Department of Justice will defend agency assertions of discretionary exemptions only in those cases "where the agency reasonably foresees that disclosure would be harmful to an interest protected by that exemption. Where an item of information might technically or arguably fall within an exemption, it ought not to be withheld from a FOIA requester unless it need be." While the Attorney General's guidance does not only apply to exemption 5, it typically will arise in the context of the deliberative process, attorney-client, and attorney work product privileges.

3. Attorney-client and work product privileges

a. Documents falling within the attorney-client and the attorney work product privileges have also been held to be encompassed by exemption (b)(5). NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975); Fonda v. CIA, 434 F. Supp. 498 (D.D.C. 1977). The attorney-client privilege extends not only to facts divulged by a client to his attorney in confidence, but to opinions rendered by an attorney to his client based upon those facts. In Tax Analysts v. IRS, 117 F.3d 607, 619-20 (D.C. Cir. 1997), the court distinguished between legal conclusions based upon facts sourced in the taxpayer, which were not privileged as confidential attorney-client communications, and those governmentally-sourced facts which reflect on the "scope, direction, or emphasis of audit activity," which are. Unlike the work product privilege, it is not limited to the litigation context. Coastal States Gas Corp. v. Dept. of Energy, 617 F.2d 854 (D.C. Cir. 1980). Under the attorney-client privilege, not only are confidential attorney-client communications protected but also confidential inter-attorney communications. Green v. IRS, 556 F. Supp. 79 (N.D. Ind. 1982), aff'd mem., 734 F.2d 18 (7th Cir. 1984). Since the cornerstone of the attorney-client privilege is the need to maintain the confidentiality of the attorney-client relationship, widespread internal dissemination will likely be deemed a breach of that confidentiality and will destroy the privilege. Upjohn Co. v. United States, 449 U.S. 383 (1981). So

long as the agency is able to demonstrate that the attorney-client communication was circulated no further than among those "members of the organization who are authorized to speak or act for the organization in relation to the subject matter of the communication", then the attorney-client privilege should survive. Mead Data Central, Inc. v. Dept. of the Air Force, 556 F.2d 242 (D.C. Cir. 1977) (emphasis added). As with the deliberative process privilege, it has been suggested that the attorney-client privilege may also be lost upon the client's "adoption." Cf. Niemeier v. Watergate Special Prosecution Force, 565 F.2d 967 (7th Cir. 1977).

b. The attorney work product privilege protects records prepared by an attorney in contemplation of litigation. Litigation need not have actually commenced so long as there is some articulable claim likely to lead to litigation. Coastal States Gas Corp. v. Dept. of Energy, *supra*; Direct Response Consulting Service v. IRS, 76 A.F.T.R.2d 6285 (D.D.C. August 21, 1995). While the document 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. Delaney, Migdail, & Young v. IRS, 826 F.2d 124 (D.C. Cir. 1987). However, 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 attorney work product. Senate of Puerto Rico v. Dept. of Justice, 823 F.2d 574 (D.C. Cir. 1987). In United States v. Adlman, 134 F.3d 1194 (2d Cir. 1998), the court articulated a "but for" test in determining whether the attorney work product privilege attaches to documents prepared in anticipation of litigation. If the underlying document would have been prepared irrespective of whether litigation would have ensued, then the privilege does not attach. Put another way, if the document would not have been drafted but for the expected litigation, then the attorney work product privilege may be claimed. Moreover, the prospect of litigation should be reasonably imminent. The privilege applies also to records prepared by a non-attorney working under an attorney's supervision. Exxon Corp. v. FTC, 466 F. Supp. 1088 (D.D.C. 1978), *aff'd*, 663 F.2d 120 (D.C. Cir. 1980) (economist's report protected). Also, factual material is protected. United States v. Weber Aircraft Corp., 465 U.S. 792 (1984). In Grolier Inc. v. FTC, 462 U.S. 19 (1983), the Supreme Court held that, in the context of the FOIA, the attorney work product privilege continues to be available to protect documents even after the litigation to which they are related is over. And, unlike the attorney-client and deliberative process privileges, widespread internal

dissemination should not vitiate the privilege. Federal Open Market Comm. v. Merrill, 434 U.S. 340 (1979); NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975).

F. Exemption (b)(6)

1. Exemption (b)(6) protects "personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

2. The Supreme Court held that exemption (b)(6) requires a court to balance the right of privacy of affected individuals against the right of the public to be informed. In Dept. of State v. Ray, 502 U.S. 164 (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 held 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. Disclosure would not have shed an additional light on government activities citing U.S. Dept. of Justice v. Reporters Committee, 489 U.S. 749 (1989). See also FLRA v. Dept. of Defense, 510 U.S. 587 (1994).

3. Recently, the D.C. Circuit has held that the balancing under exemption 6 requires consideration of any interest the individual might have in the release of the information. Lepelletier v. FDIC, 164 F.3d 37 (D.C. Cir. 1999). In Lepelletier, plaintiff, an independent money finder, sought the release of the names of depositors with unclaimed funds at three banks in receivership and for which the FDIC was the receiver. The court pointed out that depositors had an interest in learning of their deposited funds and recovering them.

4. The phrase "similar files" as used in the (b)(6) exemption has been given a broad interpretation. In Dept. 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."

5. The majority rule is that death extinguishes privacy rights recognizable under exemptions 6 and 7C, infra, but the D.C. Circuit has adopted the view that death does not extinguish privacy

interests under either exemption. See Accuracy in Media, Inc. v. National Park Service, 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, 1998 U.S. App. LEXIS 7765 (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 v. NASA, 852 F.2d 602 (D.C. Cir. 1988) (the audiotape of Challenger disaster is exempt under subsection (b)(6) to protect the privacy interests of surviving family members.)

G. Exemption (b)(7)

1. Exemption (b)(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 such 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.

2. This exemption allows -- but does not require -- withholding of records or information, not whole files -- "compiled for law enforcement purposes," but only to the extent that the production of such 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 (b)(7).

3. Exemption (b)(7)(A)

a. Information contained in records or information compiled for law enforcement purposes is not exempt unless disclosure would harm a protected interest. Thus, records may be withheld if disclosure "could reasonably be expected to interfere with enforcement proceedings." This means that when there is a concrete prospect of ongoing enforcement proceedings, documents or portions of documents may be withheld if disclosure of information unknown to taxpayers might impede the investigation or harm the government's case in that particular proceeding.

b. Grounds for the nondisclosure of these records which have been repeatedly upheld by the courts include the fear of the disclosure of: evidence, witnesses, prospective testimony, the reliance placed by the government upon the evidence, the transactions being investigated, the direction of the investigation, government strategy, confidential informants, the scope and limits of the government's investigation, prospective new defendants, materials protected by the Jencks Act, attorney work product, the methods of surveillance, and subjects of surveillance. New England Medical Center Hospital v. NLRB, 548 F.2d 377 (1st Cir. 1976); Title Guarantee Co. v. NLRB, 434 F.2d 484 (2d Cir. 1976); May v. IRS, 92-1 U.S.T.C. ¶ 50,072 (W.D. Mo. 1991); Kanter v. IRS, 433 F. Supp. 812, 822 n. 18 (N.D. Ill. 1977);

c. The Supreme Court has stated that nondisclosure may also apply 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 & Rubber Co., 437 U.S. 214 (1978). A number of courts have held that a FOIA requester's right of access under the FOIA is independent of any discovery rights in litigation. Morgan v. Dept. of Justice, 923 F.2d 195, 198 (D.C. Cir. 1991); North v. Walsh, 881 F.2d 1088 (D.C. Cir. 1989); United States v. U.S. District Court (DeLorean), 717 F.2d 478, 480 (9th Cir. 1983). Accordingly, blanket denials of requests for records made during the pendency of Tax Court litigation are not to be made. Each document or category of documents should be evaluated to determine which exemptions, if any, may apply to withhold records. See IRM 1.3, at text 13.6.1. District 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 the FOIA, the fact that the FOIA process may remain incomplete is no basis for a continuance or

stay. Renegotiation Board v. Bannerkraft Clothing Co., Inc., 415 U.S. 1 (1974). A related issue is a petitioner's request or motion for an order by the Tax Court to compel the release of agency records under the FOIA. The Tax Court has no such FOIA jurisdiction; rather, such jurisdiction is conferred on U.S. District Courts. (5 U.S.C. § 552(a)(4)(B).)

4. Exemption (b)(7)(B)

This exemption provides for withholding if the records "(B) would deprive a person of a right to a fair trial or impartial adjudication." This is primarily a protection against prejudicial publicity in civil or criminal trials. This exemption has generally not been used by the Service.

5. Exemption (b)(7)(C)

a. Exemption (b)(7)(C) protects from disclosure records or information compiled for law enforcement purposes whose disclosure "(C) could reasonably be expected to constitute an unwarranted invasion of personal privacy."

b. Except for the omission of the word "clearly," the language of clause (C) is the same as that contained in the Act for exemption (b)(6). Thus, reliance on cases interpreting exemption (b)(6) is proper in constructing the (b)(7)(C) exemption. Deering Milliken, Inc. v. Nash, 90 L.P.R.M. 3138, 3147 (D.S.C. 1975), modified, 548 F.2d 1131 (4th Cir. 1977).

c. Clause (C), however, is not applicable to corporations or other entities. 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 A.G.'s 1974 FOI Amdts. Mem. at page 9. Thus, exemption (b)(7)(C) has been successfully asserted to protect the identities of law enforcement personnel and third parties who cooperate in such investigations. Hahn v. IRS, 1992 U.S. Dist. LEXIS 123 (D.D.C. 1992); Ford et ux. v. United States, No. C-90-5492 TR (W.D. Wa. October 17, 1991), aff'd mem., 1992 U.S. App. LEXIS 34035, 981 F.2d 1258 (9th Cir. 1992) (table cite); Housley v. Treasury, No. 87-3427 (D.D.C. June 29, 1988); Crooker v. IRS, No. 83-2506 (D.D.C. October 15, 1984); Stauss v. IRS, 516 F. Supp. 1218 (D.D.C. 1981).

d. While neither the legislative history nor the terms of the Act comprehensively specify what information about an individual may be deemed to involve a privacy interest, it is read generally to

include information about an individual which he could reasonably assert an option 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.

e. In the seminal (b)(7)(C) case, Dept. of Justice v. Reporters Committee, 489 U.S. 749 (1989), the Supreme Court held that whether disclosure is "warranted" within the meaning of the (b)(7)(C) exemption turns upon the nature of the requested document and its relationship to the FOIA's central purpose of exposing to public scrutiny official information that sheds light on an agency's performance of its statutory duties. This "balancing test", i.e., private versus public interest may be a categorical one, such as in this case, where an FBI "rap sheet" on an individual was held exempt under (b)(7)(C) since the record revealed little or nothing about the agency's own conduct.

6. Exemption (b)(7)(D)

a. Clause (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.

b. 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 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. 1200, 93rd Cong., 2d Sess. 13 (1974). Even if the requester has learned of the identity of the confidential source (b)(7)(D) is still applicable. See Schramm v. IRS, 1991 U.S. Dist. LEXIS 8049 (D. Ariz. 1991).

c. In most circumstances, it would be proper to withhold the names, addresses, and other identifying information regarding a citizen who submits a complaint or report indicating a possible violation 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 was a confidential source with respect to the particular information requested, not whether all connections between him and the agency are entirely unknown. A.G.'s 1974 FOI Amdts. Mem. at 10.

d. Case law had 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. Dept. of Justice, 636 F.2d 472 (D.C. Cir. 1980); Church of Scientology v. Dept. of Justice, 612 F.2d 417 (9th Cir. 1979); Kenney v. FBI, 630 F.2d 114 (2d Cir. 1980). This was codified by the 1986 FOIA amendments. See S. Rep. No. 1200, supra.

e. The second part of clause (D) deals with the information provided by a confidential source. Generally speaking, with respect to civil matters, such information may not be treated as exempt on the basis of clause (D), except to the extent that its disclosure would reveal the identity of the confidential source. However, with respect to criminal investigations conducted by a "criminal law enforcement authority" 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, 44 A.F.T.R.2d 5193 (E.D. Mo. 1979).

7. Exemption (b)(7)(E)

Clause (E) exempts 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." (Refer back to exemption (b)(2) discussion, infra.) Exemption (b)(7)(E) has been applied to protect DIF scores, Naranjo v. IRS, 62 A.F.T.R.2d 5217 (E.D. Ky. 1988); Kanar v. Commissioner, No. 86-60243-AA (E.D. Mich., July 1, 1987), and tolerance and investigative criteria, O'Connor v. IRS, 698 F. Supp. 204 (D. Nev. 1988); Kanar v. Commissioner, supra.

8. Exemption (b)(7)(F)

a. Clause (F) exempts material the disclosure of which could reasonably be expected to "endanger the life or physical safety of any individual."

b. Clause (F) might apply, for example, to information that would reveal the identity of undercover agents (state or federal) working on such matters as narcotics, organized crime, terrorism, or espionage. Clarkson v. IRS, 1990 U.S. Dist. LEXIS 6887 (D.S.C. 1990), aff'd., 935 F.2d 1285 (4th Cir. 1991). 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.

H. Exemption (b)(8)

Exemption (b)(8) exempts from disclosure matters "contained in or related to examination, operating, or condition reports prepared by, or behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions." This exemption is not generally used by the Service.

I. Exemption (b)(9)

Exemption (b)(9) exempts from disclosure "geological and geophysical information and data including maps concerning wells." This exemption is also not generally used by the Service.

IV. STATUTORY EXCLUSIONS

In addition to the changes to the law enforcement provisions of Exemption (b)(7), the 1986 amendments added certain provisions to expand the ability of criminal law enforcement agencies to protect certain of its information.

A. 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 a (b)(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).

B. To the extent an agency maintains informant records under the informant's name and a request is made for such, these records may also be treated as not subject to the Act. 5 U.S.C. § 552(c)(2).

V. RECOVERABLE FEES

A. In the 1986 amendments, Congress clarified the standards for granting fee waivers and reduced the charges incurred by most requesters. However, for the first time, Congress permitted agencies to recoup the direct costs of editing documents made available for release under FOIA, but only to requesters who

are seeking information for their own commercial interests. Agencies no longer may 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). Further, under Treasury regulations (52 Fed. Reg. 10018) at § 1.7(a)(iv) applicable to the IRS, individual (as compared to corporate or other institutional) requesters are not charged search fees for requests for records on themselves, which are retrievable by their names or unique personal identifiers.

B. Under the Act's fee waiver provisions 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 releasable 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. Indigency is not a basis for a waiver or reduction of fees.

VI. ELECTRONIC FREEDOM OF INFORMATION ACT (EFOIA)

A. Background

The Electronic Freedom of Information Act Amendments of 1996 (EFOIA), P.L. No. 104-231, 110 Stat. 2422, specifically bring electronic records within the scope of the FOIA. The amendments make no substantive changes to the FOIA exemptions, but contain procedural provisions covering several distinct subject areas. The amendments, except as otherwise noted, became effective March 31, 1997.

B. Electronic Records

1. Statutory Definition of "Record." Agency records are subject to public disclosure under FOIA. 5 U.S.C. § 552(a). The amendments revise 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). This formulation is consistent with existing agency practice of treating information maintained in electronic form as subject to FOIA.

2. Readily Reproducible Electronic Format. The amendments also require 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 the [FOIA]." 5 U.S.C. § 552(a)(3)(B). 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. Neither Treasury's draft regulations, nor the Service's own draft regulations, attempt to articulate specific rules concerning what is "readily reproducible" and what constitutes "reasonable efforts." These determinations will be made on a case by case basis.

3. "Reasonable Efforts" Search. The EFOIA amendments likewise apply a "reasonable efforts" standard to the conduct of an agency's search for electronic records. They state that "an agency shall make reasonable efforts to search for [such] records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated 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. Once again, the new draft regulations do not attempt to articulate specific rules concerning what constitutes "significant interference." This determination will be made on a case by case basis.

C. Electronic Reading Rooms

1. New Category of (a)(2) Records. The amendments created a new category of (a)(2) records, *i.e.*, records required to receive "reading room" treatment. This category consists of any records processed and disclosed in response to a FOIA request that "the agency determines to have become or are likely to become the subject of subsequent requests for substantially the same records." 5 U.S.C. § 552(a)(2)(D). That is, when records are disclosed in response to a FOIA request, an agency will be required to determine whether such records have already been the subject of repeated FOIA requests or, in the agency's best judgment, based upon the nature of the records and the types of requests regularly received, whether such records are likely to be the subject of multiple requests in the future. If either is the case, then these records must be placed in public reading rooms so that they are automatically available to potential FOIA requesters. However, unlike other "reading room" materials which do not need to be made available in response to particular FOIA requests, FOIA requests received for these records will have to be processed in the regular fashion as well.

2. Internet Availability. The amendments also require agencies to use electronic information technology to enhance the availability of their "reading room" records. They specify that (a)(2) or "reading room" records created on or after November 1, 1996, must be made available to the public by "electronic means." Examples of these "reading room" records include Internal Revenue Manual revisions; Chief Counsel

Directives Manual revisions; General Counsel Memoranda; Actions on Decisions; etc. 5 U.S.C. § 552(a)(2), as amended. The phrase "electronic means" is not defined by the EFOIA, but has been interpreted by the Service as requiring posting on the Service's Web site on the Internet.

D. Time Limits and Backlogs (effective October 2, 1997)

The EFOIA amendments contain several different provisions pertaining to the timing of agency responses to FOIA requests. All of these changes took effect October 2, 1997.

1. **Multitrack Processing.** The amendments permit agencies that experience difficulties in meeting FOIA's time limits to promulgate regulations providing for "multitrack processing" of their FOIA requests "based on the amount of work or time (or both)" involved in processing them. 5 U.S.C. § 552(a)(6)(D)(i). Under multitrack processing, the agency is not limited to strict first-in, first-out processing of FOIA requests. The agency would be permitted to process later in time but relatively simple FOIA requests ahead of prior in time but relatively complex FOIA requests. The amendments also allow an agency to provide FOIA requesters an opportunity to limit or narrow their requests in order to obtain faster processing. 5 U.S.C. § 552(a)(6)(D)(ii).

2. **Limiting Scope of Request.** Where FOIA requests cannot be processed in 30 working days (the original 20 working day period, plus one 10 working day extension), the amendments require 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.

3. **Expedited Processing.** The amendments require 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 term "compelling need" is defined as: (1) involving "an imminent threat to the life or physical safety of an individual"; or (2) in the case of a request made by "a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity." 5 U.S.C. § 552(a)(6)(E). Within 10 calendar days after the date of the compelling need request, the

agency must decide whether to grant expedited processing, and must notify the requester of its decision. 5 U.S.C. § 552(a)(6)(E)(ii)(I). If 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). If expedited processing is not granted, the agency must likewise give "expeditious consideration" to any administrative appeal of that denial. 5 U.S.C. § 552(a)(6)(E)(ii)(II).

E. Denial Specification

The amendments contain two provisions regarding the agency's obligation to specify to a FOIA requester information that is denied in response to a request. These amendments conform to existing agency practice.

First, in the situation in which information is deleted from a record that is disclosed in part, the amendments require that "[t]he amount of information deleted shall 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). This provision also states that "[i]f technically feasible, the amount of the information deleted shall be indicated at the place in the record where such deletion is made." 5 U.S.C. § 552(b).

Second, in the situation in which entire records or entire pages of records are withheld, the amendments require the agency to "make a reasonable effort to estimate the volume" of what is withheld and "provide any such estimate to the person making the request" unless providing such information would harm an interest protected by an applicable exemption. 5 U.S.C. § 552(a)(6)(F).

CHAPTER 10

PRIVILEGES

OBJECTIVES

At the end of this chapter, you will be able to

1. identify the three categories of privileges available to the Government in litigation;
2. name the evidentiary privileges and describe the scope of each; and
3. describe and carry out the procedures used to claim executive privilege in the United States Court of Federal Claims and in other federal courts following the approach of the Court of Federal Claims.

INTRODUCTION

The Government may refuse to provide 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, 31 U.S.C. § 5319, which allow or require specified material to be kept confidential;
2. evidentiary privileges available to any litigant, such as attorney-client and attorney work product, 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 Association for Women in Science v. Califano, 566 F.2d 339, 343 (D.C. Cir. 1977).

I. STATUTORY PRIVILEGES

A. I.R.C. § 6103

The scope of documents and information subject to I.R.C. § 6103, and the circumstances under which I.R.C. § 6103 makes disclosure of such documents and information unlawful, are discussed at length elsewhere in this Deskbook Reference. We note, however, that notwithstanding the limitations of I.R.C. §

6103, upon issuance of a Brady order by the presiding judge in a federal or state criminal proceeding, the Service will disclose, pursuant to the constitutional doctrine announced in Brady v. Maryland, 373 U.S. 83 (1963), returns and/or return information determined to be exculpatory.

B. Privacy Act of 1974, 5 U.S.C. § 552a

The scope of documents and information subject to the Privacy Act, and the circumstances under which the Privacy Act will bar disclosure, are covered in Chapter 11, part 2, of this Deskbook Reference. We note, however, that in accordance with Henthorn v. United States, 73 A.F.T.R.2d ¶ 2130 (9th Cir. 1994), reported as unpublished full opinion, 1994 U.S. App. LEXIS 10728, 24 F.3d 246 (9th Cir. 1994) (table cite), in a criminal proceeding, the Service will disclose, in response to a defendant's motion for document production, "exculpatory" information found in the personnel or other Privacy Act-covered files of investigating agents.

C. Bank Secrecy Act, 31 U.S.C. § 5319

If "pure" Title 31 documents or information are sought in discovery, you should refer to the Dissemination Guidelines issued by the Undersecretary for Enforcement, Department of the Treasury.

II. TYPES OF EVIDENTIARY PRIVILEGES

A. Attorney-Client Privilege

1. 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. In re Lindsey, 148 F.3d 1110 (D.C. Cir. 1998), cert. denied sub nom. Office of the President v. Office of Independent Counsel, 119 S. Ct. 466 (1998). It is one of the oldest recognized privileges for confidential communications. Swidler & Berlin v. United States, 524 U.S. 399 (1998). Its purpose was 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 was 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.

2. The attorney-client privilege protects confidential communications from clients to their attorneys made for the purpose of securing legal advice or services. Tax Analysts v. Internal Revenue Service, 117 F.3d 607 (D.C. Cir. 1997). It also protects communications from attorneys to their clients if the communications "rest on confidential information obtained from the client." Id. (quoting In re Sealed Case, 737 F.2d 94, 98-99 (D.C. Cir. 1984)). Where the documents at issue 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 District of Columbia Court of Appeals found that the documents contained no "confidential communications" where the factual information in the documents was obtained from taxpayers and did not contain confidential information concerning the agency. Tax Analysts, 117 F.3d at 619. Moreover, the court found that the legal analysis contained in FSAs, which it determined to be in the nature of a body of private law, likewise was not subject to the attorney-client privilege. Id. The court held that the attorney-client privilege would apply to particular portions of FSAs containing confidential information transmitted by field personnel regarding the scope, direction, or emphasis of audit activity. Id. at 120.

3. Communications between a client organization and its in-house counsel regarding business decisions must be distinguished from communications exchanged between a client organization and its in-house counsel in the latter's pure legal capacity. United States v. Chevron Corp., et al., 77 A.F.T.R.2d ¶ 1548 (N.D. Ca., March 13, 1996). Only the latter are privileged. Id. Unlike the attorney work product privilege, the attorney-client privilege is not limited to the litigation context. Coastal States Gas Corp. v. Dept. of Energy, 617 F.2d at 862. Since attorney and client are not mutually exclusive classes, 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. Mead Data Central, Inc. v. U.S. Air Force, 566 F.2d 242 (D.C. Cir. 1977). The attorney-client privilege protects attorney-client communications where the specifics of the communication are confidential, even though the underlying subject matter is known. Upjohn Co. v. United States, 449 U.S. 383 (1981).

4. The attorney-client privilege has been narrowly construed. It will cover only those situations where disclosure might not have been made absent the privilege. Fisher v. United States, 425 U.S. 391 (1976). A fundamental prerequisite is that confidentiality of the client communication must have existed at the time it was made and 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.

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 Bruce R. Lindsey, 148 F.3d 1100 (D.C. Cir.), cert. denied sub nom. Office of the President v. Office of Independent Counsel, 119 S. Ct. 466 (1998).

B. Attorney Work Product Privilege

1. The attorney work product privilege protects documents and other memoranda prepared by an attorney in contemplation of litigation. Hickman v. Taylor, 329 U.S. 495 (1947). Since its purpose is to protect the adversary trial process by insulating the attorney's preparation from scrutiny, the work product privilege does not attach until at least "some articulable claim, likely to lead to litigation," has arisen. Coastal States Gas Corp. v. Dept. of Energy, 617 F.2d at 865. The privilege is not limited to judicial proceedings, but extends also to administrative proceedings. Criminal reference letters have been held privileged as attorney work product. Brown v. Commissioner of Internal Revenue, T.C. Memo 1994-282 (June 20, 1994).

2. The privilege has a broad sweep.

a. 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 (5th Cir.), 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 privilege. Delaney, Migdail & Young, Chtd. v. IRS, 826 F.2d 124 (D.C. Cir. 1987). However, 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 attorney work product. Senate of Puerto Rico v. Dept. of Justice, 823 F.2d 574 (D.C. Cir. 1987). The attorney work product privilege has also been held to attach to law enforcement investigations in which the investigation is "based upon a specific wrongdoing and represents an attempt to garner evidence and build a case against the suspected wrongdoer." Safecard Services, 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 attorney work

product privilege 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." Wright, Miller & Marcus, 8 Federal Practice & Procedure Civil 2d § 2024 (1994); United States v. Adlman, 134 F.3d 1194 (2d Cir. 1988); In re Grand Jury Proceedings, 604 F.2d 798 (3d Cir. 1979); National Union Fire Ins. Co. v. Murray Sheet Metal Co., Inc., 967 F.2d 980 (4th Cir. 1992); Binks Mfg. Co. v. National Presto Indus., Inc., 709 F.2d 1109 (7th Cir. 1983); Simon v. G.D. Searle & Co., 816 F.2d 397 (8th Cir.), cert. denied, 484 U.S. 917 (1987); Senate of Puerto Rico v. Dept. of Justice, 823 F.2d 574 (D.C. Cir. 1987). The minority view limits the applicability of the work product doctrine to documents prepared to assist in litigation. See, e.g., United States v. El Paso Co., 682 F.2d 530 (5th Cir. 1982), cert. denied, 466 U.S. 944 (1984). 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), in and of themselves, may not be accorded protection. The attorney work product privilege has also been held to cover documents relating to possible settlements of litigation, as well as the final decision to terminate litigation.

b. Fed. R. Civ. P. Rule 26(b)(3) allows the work product privilege to be used to protect documents prepared "by or for another party or by or for that other party's representative." Not only do documents prepared by agency attorneys who are responsible for the litigation of a case which is being defended or prosecuted by the Department of Justice qualify for the privilege, but also documents prepared by an attorney not employed as a litigator. Cook v. Watt, 597 F. Supp. 545, 548 (D. Ala. 1983). Moreover, courts have recognized that documents prepared by nonattorneys who are supervised by attorneys, e.g., expert's reports, may also qualify for protection as work product. Exxon Corp. v. FTC, 466 F. Supp. 1088 (D.D.C. 1978), aff'd, 663 F.2d 120 (D.C. Cir. 1980) (economist's report protected).

c. The work product privilege has been held to persist where the information has been shared with a party holding some common interest with the agency. United States v. Gulf Oil Corp., 760 F.2d 292 (Temp. Emer. Ct. 1985).

d. Factual information is fully entitled to work product protection. Martin v. Office of Special Counsel, 819 F.2d 1181 (D.C. Cir. 1987).

e. The termination of litigation does not vitiate the protection for material otherwise properly categorized as attorney work product. FTC v. Grolier, Inc., 462 U.S. 19 (1983).

3. The attorney's work product privilege is virtually absolute, at least with respect to the mental impressions, conclusions, opinions, and legal theories of the attorney (so-called "core work product"). The "nonattorney work product;" e.g., factual information, may be subject to disclosure for good cause shown.

C. Other Less Frequently Asserted Privileges

1. 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. Notes of the House Committee on the Judiciary, H. Rep. No. 650, 93rd Cong., 1st Sess. 8-9 (1975). Ultimately, however, Rule 501, as enacted, provides for courts to evolve privileges as necessary. Trammel v. United States, 445 U.S. 40, 47 (1980).

2. In Federal Open Market Committee v. Merrill, 443 U.S. 340 (1979), the Supreme Court recognized a privilege based upon Federal Rule of Civil Procedure 26(c)(7), which provides that "for good cause shown . . . a trade secret or other confidential research, development or commercial information" is protected from discovery.

3. The availability of a settlement negotiations privilege remains unsettled as to documents generated in the course of settlement negotiations with a third party. Communications reflecting negotiations between the government and an adverse party, which are of necessity exchanged between the parties, have been held not to constitute an "intra-agency" memoranda under Exemption 5 of the FOIA. County of Madison v. Dept. of Justice, 641 F.2d 1036, 1040-41 (1st Cir. 1981); Center for Auto Safety v. Dept. of Justice, 576 F. Supp. 739, 747-749 (D.D.C. 1985). Cf. Childers v. Slater, 1998 U.S. Dist. LEXIS 11882 at * 16 (D.D.C. May 18, 1998) (refusing to recognize a privilege for settlement negotiations); Norwood v. FAA, 580 F. Supp. 994, 1002-1003 (W.D. Tenn. 1984) (same). However, the courts have recognized the policy logic that settlement negotiations can be impeded by such a result. County of

Madison v. Dept. of Justice, 641 F.2d at 1040; Center for Auto Safety v. Dept. of Justice, 576 F. Supp. at 746 n. 18. In Bottaro v. Hatton Associates, 96 F.R.D. 158, 159-60 (E.D.N.Y. 1982), the details of a third party settlement were held privileged from discovery in recognition of "the strong public policy of favoring settlements...." Cf. Childers v. Slater, 1998 U.S. Dist. LEXIS 22882 at *16 (limiting interrogatory to permit only a limited intrusion into the Government's settlement process). Contra, Bennett v. La Pere, 112 F.R.D. 136 (D.R.I. 1986).

D. Governmental Privileges

1. States Secrets Privilege

a. The states secrets privilege encompasses matters whose disclosure would harm our national security or the conduct of our foreign relations. The privilege has long been recognized at 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 United States v. 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 states secrets privilege is rarely invoked; when it has been invoked, it has been only with respect to treaty negotiation related information and documents.

b. To invoke the state secrets privilege successfully, the Government need only 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 1. Once it is established that state secrets are involved, "the privilege is absolute." Id. The litigant's need is relevant only to establish how closely the court will examine the validity of the assertion of the privilege.

2. Deliberative Process Privilege

a. 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 sometime consider the deliberative process privilege using the more general term "executive 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 (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.), 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, "such 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. United States v. Nixon, 418 U.S. 683, 705-06 (1974) (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; not reaching the issue of whether there is a constitutional basis for privileged communications between lower-ranking officials).

b. The deliberative process privilege does not protect material the disclosure of which would not hinder the Government's decision-making processes. In addition, factual material is not privileged, unless it is inextricably intertwined with policy recommendations, EPA v. Mink, 410 U.S. 73 (1973), or selectively chosen so as to reflect the deliberative process itself, Mead Data Central, Inc. v. U.S. Air Force, 566 F.2d 242 (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 decisionmaking 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, will no longer be 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 such 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., Merrill v. Federal Open Market Committee, 443 U.S. 340 (1979). Generally, drafts of documents are protected from disclosure under the deliberative process privilege. Arthur Anderson v. IRS, 679 F.2d 254 (D.C. Cir. 1982).

c. Unlike the states 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 such factors 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's Privilege

a. The informant's privilege allows the Government to withhold the identity of persons who furnish information about violations of law to officers charged with law enforcement. See, e.g., Rovario v. United States, 353 U.S. 53 (1957). The rationale for the informant's 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). Only the identity of the informant is privileged. The information the informant provides may not be withheld unless its disclosure would

reveal the informant's identity, Rovario v. United States, 353 U.S. at 60, or is privileged on independent grounds.

b. In Dept. of Justice v. Landano, 508 U.S. 165 (1993), the 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 FOIA's exemption 7(D). 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 deemed necessary for law enforcement purposes[,]" such as testimony. Id. at 174. Moreover, confidentiality may be implied under certain circumstances, such as where the informer is paid, or depending upon the type and nature of contact between the informer and agency.

c. Like the deliberative process privilege, the informant's privilege is qualified. The Government must show that its interest in effective law enforcement outweighs the litigant's need for the information. Rovario v. United States, 353 U.S. 53 (1957). 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. Tejada, 974 F.2d 210 (1st Cir. 1992); United States v. Tenorio-Angel, 756 F.2d 1505 (11th Cir. 1985); United States v. Aguirre, 716 F.2d 293 (5th Cir. 1983).

4. Investigatory Files Privilege

a. Investigatory files compiled for law enforcement purposes are privileged. See, e.g., Friedman v. Bache Halsey Stuart Shields, Inc., 738 F.2d 1336 (D.C. Cir. 1984); Black v. Sheraton Corp. of America, 564 F.2d 531 (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.

b. The investigatory files privilege is qualified and thus may be overcome if a litigant's need is great enough. Black v. Sheraton

Corp. of America, 564 F.2d at 547. In Friedman v. Bache Halsey Stuart Shields, Inc., the District of Columbia 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 subsequent 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.

738 F.2d at 1342-43.

c. Once an investigation is closed, the files generally are no longer privileged. Jabara v. Kelley, 75 F.R.D. 475 (E.D. Mich. 1977). Even if the investigation is not formally closed, the privilege "will expire upon the lapse of a reasonable time." Id. Of course, information contained in the files which is covered by another privilege may still be withheld.

5. How to Claim Governmental Privileges

a. Who Must Claim Governmental Privileges?

(1) United States v. Reynolds, 345 U.S. 1, 7-8 (1953), states that the executive privilege "is not to be lightly invoked . . . [and] there must be a formal claim of privilege lodged by the head of the department[.]" (As noted above, some courts use the general term "executive privilege" when considering deliberative process-type arguments for nondisclosure.) In courts strictly following the Reynolds line

of authority, governmental privileges must be asserted through a formal claim lodged by the head of the department that has control over the matter, after actual personal consideration by that officer. See id. at 7-8. Other courts do not require such a formal claim, accepting claims of governmental privileges by the trial attorney.

The United States Court of Claims and its successors, the United States Claims Court and the United States Court of Federal Claims, have refused to recognize governmental privileges other than the executive privilege. See Cetron Electronic Corp. v. United States, 207 Ct. Cl. 985, 989 (1975). Thus the Court of Federal Claims does not recognize governmental privileges apart from executive privilege. Moreover, the executive privilege must be invoked in the Court of Federal Claims in the manner prescribed in Reynolds, 345 U.S. at 7-8.

Where courts have not accepted claims of executive privilege by the trial attorney, the issue arises whether the agency head may delegate the authority to claim executive privilege. The Court of Federal Claims has not expressly addressed this issue. The Internal Revenue Service and the Claims Court Section at the Department of Justice have agreed to “test” this issue by having claims of executive privilege be made by senior executive who is a delegate of the Commissioner.

(2) Pursuant to Delegation Order No. 220 (Rev. 3), the Commissioner has delegated the authority to claim executive privilege (save the state secrets privilege), in the Court of Federal Claims and all other federal courts which follow Reynolds, to the Assistant Chief Counsel (Disclosure Litigation). Because the Commissioner has not delegated the authority to invoke the state secrets privilege, the Commissioner must be the declarant for such privilege to be claimed.

(3) Case law also requires that the delegation order articulate the guidelines for the assertion of executive privilege. The Commissioner's delegation order incorporates former Policy Statement P-1-192 (now set forth in IRM 1230 at text 293(2)): Documents that otherwise fall within the scope of executive privilege will only be withheld where "disclosure would significantly impede or nullify IRS actions

in carrying out its functions or activities or constitute an unwarranted invasion of personal privacy."

(4) The Assistant Chief Counsel (Field Service) has issued Litigation Guideline Memorandum TL-98, which sets forth the internal procedures to be followed in litigation in which a claim of executive privilege must be made by the head of the agency. The LGM also identifies the various circuits that require compliance with Reynolds.

b. How to Prepare the Declaration

(1) The office of the Assistant Chief Counsel (Disclosure Litigation) generally will not become involved in the discovery process until at least such time as the opposing party files a formal motion for production of documents, and preferably only when a motion to compel production has been filed. At such time, the Counsel attorney having responsibility for the litigation should contact the Office of the Assistant Chief Counsel (Disclosure Litigation), to advise the office of the situation and alert us as to the time frame in which the Government must respond to the document production motion.

(2) The Counsel attorney principally assigned to the litigation, with the assistance of the Procedural Litigation Branch of the Office of the Assistant Chief Counsel (Field Service) and any other Counsel attorneys intimately familiar with the documents sought in the document production request, should review the documents for which executive privilege is to be claimed and ensure (A) that the documents, or portions thereof, fall within the appropriate governmental privilege, and (B) that disclosure of the documents satisfies the standard set forth in Delegation Order No. 220 (Rev. 3). This standard is articulated above.

(3) Having done so, the Counsel attorney should draft a declaration for the signature of the Assistant Chief Counsel (Disclosure Litigation). Such declaration should set forth the context in which the declaration is being made, the authority under which the declaration is being made, the context in which the documents for which the privilege is being claimed were generated (e.g., the revenue ruling or regulation drafting process for revenue ruling or regulation file documents, respectively), and a description of each of the

documents for which the privilege is being claimed. Such declaration should clearly set forth, on its face, why the documents fall within the claimed privilege. (For example, a description stating that "an internal memorandum from X to Y dated Z, setting forth the author's views on a draft of a regulation, which views were not adopted by agency decisionmakers," will generally satisfy the "predecisional" and "deliberative" criteria of the deliberative process privilege.) Examples of prior declarations are available in the Procedural Litigation Branch, as well as the Office of the Assistant Chief Counsel (Disclosure Litigation).

(4) The Counsel attorneys most familiar with the underlying documents and the process in which they were generated should review the documents carefully, separating those that should be produced (i.e., those documents that are purely factual, those that are administrative rather than substantive, and those that the disclosure of which will not meet the Commissioner's policy standard) from those documents for which executive privilege should be asserted. These attorneys, in conjunction with the Counsel attorneys principally assigned the litigation, will be in the best position to assess the appropriateness of asserting privilege and to articulate the factual basis for that assertion in the declaration. Attorneys in the Office of the Assistant Chief Counsel (Disclosure Litigation) assigned to review the declaration and the documents generally cannot bring this perspective or litigation-based expertise to the process. On the other hand, to the extent that the documents at issue fall within certain categories of documents typically found in Service files, Disclosure Litigation attorneys will know the traditional manner in which the Service treats those types of documents in responding to FOIA requests and, to a lesser degree, discovery requests. The Disclosure Litigation attorneys will provide this knowledge to the litigating attorneys in order to facilitate a uniform approach with respect to such documents.

(5) The draft of the declaration, the documents for which the claim is being made, and a copy of a litigation report/defense letter generally explaining the lawsuit in which the declaration is to be filed should be reviewed (as indicated by sign-off) by the Counsel attorney's reviewer, Procedural Litigation, and the Assistant Chief Counsel. They should then be forwarded to Disclosure Litigation, generally at least

five working days before the Government's response date. Of course, if the assertion of executive privilege is being recommended for voluminous documents, more time should be provided for Disclosure Litigation's review.

The declaration should not invoke claims of any of the statutory or evidentiary privileges that may be asserted by trial counsel, and it should not contain any extraneous information. However, if other objections or privileges are to be claimed with respect to any of the information for which executive privilege is being claimed, the declaration should include a statement to the effect that executive privilege is being claimed only insofar as the court rejects the Government's other objections or claims of privilege. Further, where the documents for which governmental privilege is being claimed also contain return information protected under I.R.C. § 6103, including DIF scores, the declaration may include a claim of § 6103 to protect such return information. The declaration, in enumerating the documents for which executive privilege is being claimed, should identify those documents entirely constituting tax return information and those documents containing tax return information.

(6) The vast majority of the agency's claims of executive privilege before the Court of Federal Claims (and other federal courts following the precedent of the Court of Federal Claims) have arisen in refund suits. However, other functions may need to raise a claim of executive privilege in their litigation. As appropriate, the procedures described above should be followed.

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CHAPTER 11

PART I: PERSONNEL OR CLAIMANT REPRESENTATIVE MATTERS I.R.C. § 6103(l)(4)

OBJECTIVES

At the end of this chapter, you will be able to:

1. give examples of the types of proceedings for which I.R.C. § 6103(l)(4) should be used to request access to tax information;
2. identify the standard that persons involved in matters affecting their personnel rights, and their legal representatives if they are represented, must meet in order to obtain tax information for use in connection with such matters;
3. identify the standard under which Treasury Department employees may obtain tax information for use in connection with personnel matters; and
4. identify the limitations, if any, upon the use of tax information obtained under I.R.C. § 6103(l)(4).

INTRODUCTION

Access to tax information for personnel related matters is controlled by I.R.C. § 6103(l)(4). Subsection 6103(l)(4)(A) addresses the standards under which employees or former employees, or their representatives, may access tax information in such matters, while subsection 6103(l)(4)(B) addresses the standards under which Treasury Department employees may access such information to represent the agency in such matters. I.R.C. § 6103(l)(4) is the exclusive vehicle for disclosing tax returns and return information in the personnel context. NTEU v. FLRA, 791 F.2d 183 (D.C. Cir. 1986); see generally IRM 1272, Disclosure of Official Information Handbook, Chapter (20)60-63.

I. PERSONNEL MATTERS

Personnel matters include disciplinary and adverse actions and 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)).

II. CLAIMANT REPRESENTATIVE MATTERS

A. Subsection 6103(l)(4)(A)

Subsection 6103(l)(4)(A) authorizes the disclosure of tax information:

1. to the subject of the personnel or claimant representative action or proceeding, or to that subject's legal representative;
2. upon written request;
3. if the appropriate agency delegate determines that such disclosure may be relevant and material to the matter at issue. Delegation Order No. 156, paragraph (1)(d), IRM 1229, delegates this authority, to inter alia, the Regional Counsels (GLS) and permits redelegation to, inter alia, General Legal Services attorneys handling such matters.

Any return or return information disclosed under this subsection carries with it a use restriction limiting use to the particular action or proceeding for which access is requested and granted.

In a personnel matter where the employee (or former employee) is represented by the NTEU, an NTEU representative (including an NTEU attorney) cannot access tax information in connection with the representation simply by virtue of NTEU's status as the exclusive bargaining representative by dint of a negotiated agreement. See IRM 1272, Disclosure of Official Information Handbook, Chapter (20)84. The NTEU representative must be designated, in writing, by the subject of the personnel matter, as that subject's representative before the representative may make a written request for access to tax information in connection with the representation. Entry of an appearance in a personnel proceeding by an NTEU representative as the authorized representative of the subject of that proceeding, without a specific written request by the representative for access to tax information in connection with the proceeding, will not satisfy I.R.C. § 6103(l)(4)(A); nor does a written request for tax information by the subject of the proceeding obviate the need for a written request by the subject's representative in order for such representative to have access to tax information. NTEU's statutory right under 5 U.S.C. § 7114 does not supersede I.R.C. § 6103. See *NTEU v. FLRA*, 791 F.2d 183 (D.C. Cir. 1986); see also IRM 1272, Disclosure of Official Information Handbook, Chapter (20)(16)4.

B. Subsection 6103(l)(4)(B)

In place of the "relevancy and materiality" predicate to access, found in subsection 6103(l)(4)(A), Treasury employees may access tax information under subsection 6103(l)(4)(B) to the extent necessary to advance or protect the interests of the United States. There is no written request requirement. The only prerequisite to access and use under subsection 6103(l)(4)(B) is necessity "to advance or protect the interests of the United States."

This is the provision under which General Legal Services attorneys and personnel specialists gain access to Federal tax information for use in personnel matters.

C. General

The "for use" language in both paragraphs of subsections of I.R.C. § 6103(l)(4) contemplates redisclosures by the authorized recipients consistent with the purpose for which the tax information was 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 IRS' attorneys in a personnel proceeding, and to a witness in the context of testimony preparation.

While I.R.C. § 6103(l)(4) permits disclosure of tax information under the circumstances set forth in the provision, it is the IRS' practice to sanitize records containing tax information by redacting identifying tax information from such records before providing them, together with a coded key, to subjects and their legal representatives, thereby affording third party taxpayers greater privacy protection.

IRS employees, including NTEU officials, subpoenaed to testify on behalf of a claimant in a personnel action or proceeding, e.g., at a FLRA Hearing, are required to secure an authorization to testify pursuant to 26 C.F.R. § 301.9000-1. NTEU and Dep't of the Treasury, FLRA Office of General Counsel's Affirmation of Decision by FLRA's Regional Director (Atlanta), in Case No. 4-CA-00605, (Jan 18, 1991). See Chapter 12.

Matters arising under section 330 of Title 31, so-called "claimant representative matters" are generally referred to as matters involving the rights of persons such as enrolled agents, attorneys, or accountants who practice before the IRS in representing and assisting taxpayers. See 31 U.S.C. § 330 (Director of Practice).

III. REPORTING ETHICAL VIOLATIONS

If you come upon information which you believe evidences possible professional misconduct on the part of an attorney representing a taxpayer, a question arises as to whether you may report the attorney and the facts and circumstances underlying the possible professional misconduct, which is return information of the taxpayer being represented by the attorney, to the appropriate authorities: (a) Director of Practice; (b) U.S. Tax Court; and/or (c) state bar.

A. Director of Practice. Information evidencing possible misconduct on the part of an attorney representing a taxpayer, including the return information of that taxpayer, may be disclosed to the Director of Practice pursuant to I.R.C. § 6103(h)(1) and 5 U.S.C. § 552a(b)(1) ("need to know" in the course of tax administration duties).

B. U.S. Tax Court. In the context of a judicial proceeding pertaining to tax administration, such as the Tax Court, such disclosures would be authorized by I.R.C. § 6103(h)(4) since the taxpayer whose return information you are to disclose is a party to the proceeding in which the disclosure is to be made.

The Tax Court performs bar disciplinary functions pursuant to T.C. Rule 202; thus, the Tax Court would be the appropriate body to which an ethical violation should be reported. The potential Tax Court disciplinary process as it relates to an attorney's possible misconduct before the court is tax administration as defined in I.R.C. § 6103(b)(4). Thus, to the extent returns or return information are involved, such may be disclosed pursuant to subsection 6103(h)(4)(A); but see, McLarty v. United States, 741 F. Supp. 751, 755, (D. Minn. 1990) (related proceedings, 784 F. Supp. 1401 (D. Minn. 1991) (disclosure to Department of Justice and court of counsel's 1982-85 Federal tax returns and return information in criminal pro hac vice hearing not permissible since "under no circumstances could a pro hac vice hearing be deemed a matter of tax administration"). Disclosure of information other than returns or return information would be governed solely by the Privacy Act.

C. State Bar. Information developed during a TIGTA investigation into the propriety of attorneys' conduct may constitute the tax information of the taxpayers being represented by the attorneys or the attorneys themselves. For example, information gathered by TIGTA with regard to the possible violation of I.R.C. § 7212 (which imposes penalties on anyone who attempts to interfere with the administration of the internal revenue laws) has been protected as return information by the courts, since I.R.C. § 7212 is part of Title 26. O'Connor v. United States, 698 F. Supp. 204 (D. Nev. 1988), aff'd, 935 F.2d 275 (9th Cir. 1991), cert. denied, 502 U.S. 1104 (1992), reh'g denied, 503 U.S. 999 (1992). Information pertaining to potential violations of I.R.C. § 7213 (pertaining to

unauthorized disclosure of tax information) and 7214 (pertaining to employee misconduct) has been similarly protected. Conn v. United States, 92-1 U.S.T.C. ¶ 50,123, 69 AFTR2d ¶ 92-346 (N.D. Cal. 1991); Laxalt v. McClatchy, Misc. No. 86-0051 (D.D.C. March 12, 1987), related proceedings, 809 F.2d 885 (D.C. Cir. 1987). There is no authority for the disclosure of tax information to state bars, absent consent from the taxpayer(s) involved.

For information other than tax information, there is currently no routine use for the applicable systems of records that would explicitly authorize disclosures to professional licensing and disciplinary authorities, such as state bars. We have proposed a revision which when published will ultimately permit a routine use disclosure of ethics violations to state licensing authorities.

CHAPTER 11

PART II: PRIVACY ACT

OBJECTIVES

At the end of this chapter, you will be able to:

1. advise Service employees of the basic requirements of the Privacy Act of 1974 pertaining to the protection of the privacy of individual rights under the Act;
2. define a system of records and applicable terms;
3. advise Service Disclosure Officers how to respond to a subpoena for other than tax return information maintained in agency systems of records; and
4. identify the provisions of section 7 of the Privacy Act and its purpose.

INTRODUCTION

The Privacy Act of 1974, 5 U.S.C. § 552a, states that the right to privacy is a personal and fundamental right protected by the Constitution of the United States, and grants individuals the right to access their own records. The purpose of the Act is to provide certain safeguards for an individual against an invasion of personal privacy. It requires, inter alia, federal agencies to:

1. Maintain accurate, complete, relevant, and up-to-date records;
2. Inform individuals who are subjects of those records about the agency's authority for collection of information and its uses;
3. Protect those records from unauthorized access;
4. Afford individuals access to records, the right to correct records, and to receive an accounting of disclosures of those records.

The Act is intended to give citizens greater control over information collected about them by the federal government and how it is used.

The Privacy 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 Tax Reform Act of 1976.

The OMB has statutory authority for promulgating agency-wide guidance under the Act. 5 U.S.C. § 552a(v). OMB Circular No. A-130, Transmittal Memorandum No. 3 (Feb. 8, 1996), is the latest guidance from OMB. Appendix I to OMB Circular A-130 continues in effect the guidance OMB initially issued to interpret the Privacy Act at 40 Fed. Reg. 28949-28978 (July 9, 1975) and the Final Guidance for Conducting Matching Programs at 54 Fed. Reg. 25819 (June 19, 1989).

I. DEFINITIONS

A. The Privacy Act has definite limits. First, it applies only to "records" about "individuals" which are "maintained" in "systems of records."

1. An "individual" includes a citizen or a lawful alien. It does not include corporations. St. Michaels 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. 28,951 (1975). Privacy Act rights are personal to the individual, they cannot be asserted derivatively by others. E.g., Parks v. IRS, 618 F.2d 677, 684-685 (10th Cir. 1980); Word v. United States, 604 F.2d 1127, 1129 (8th Cir. 1979); Dresser Industries, Inc. v. United States, 596 F.2d 1231, 1237-38 (5th Cir. 1979), cert. denied, 444 U.S. 1044 (1980). Contra, National Federation of Federal Employees v. Greenberg, 789 F. Supp. 430, 433 (D.D.C. 1992), vacated and remanded on other grounds, 983 F.2d 286 (D.C. Cir. 1993). However, "individual" also includes the parent of a minor or the legal guardian of an incompetent individual. 5 U.S.C. § 552a(h).

In published government-wide guidance, OMB took the position that the term "individual" does not include individuals acting in an entrepreneurial capacity. 40 Fed. Reg. 28,951 (July 9, 1975). The courts, however, have not agreed with OMB on this issue. Zeller v. United States, 467 F. Supp. 487 (E.D.N.Y. 1979); Florida Medical Ass'n v. HEW, 479 F. Supp. 1291 (M.D. Fla. 1979); Metadure Corp v. United States, 490 F. Supp. 1368 (S.D.N.Y. 1980); Grachow v. U.S. Customs Service, 504 F. Supp. 632 (D.D.C. 1980) (noting futility of government's defense based upon OMB's guidance in numerous cases); Henke v. Dept. of Commerce, No. 94-189 (D.D.C. May 26, 1995) (1995 WL 904918), vacated and remanded on other grounds, 83 F.3d 1453 (D.C. Cir. 1996), related proceedings, 83 F.3d 1445 (D.C. Cir. 1996). But see, Shermco Industries, Inc. v. USAF, 452 F. Supp. 306 (N.D. Tex. 1978), rev'd on other grounds, 613 F.2d 1314 (5th Cir. 1980) (following OMB's guidance). We have advised the Service that it should no longer rely upon the entrepreneurial distinction.

Where information about individual "A" is contained in a record retrieved by the name of individual "B", 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 (8th Cir. 1981) (plaintiff is entitled to information pertaining to him or his record; thus, agency did not have discretion to withhold information contained in plaintiff's record which pertained to another individual); Topuridze v. FBI, 1989 U.S. Dist. LEXIS 17529 (D.D.C. February 6, 1989), reconsideration denied sub nom., Topuridze v. USIA, 772 F. Supp. 662 (D.D.C. 1991). Compare, DePlanche v. Califano, 549 F. Supp. 685 (W.D. Mich. 1982) (requester was denied material in his file retrieved under his social security number since it was not "about him" or "pertaining to him"). However, individual A is not entitled to access any of the record which is retrieved by the name of individual B (unless B consents to the disclosure) even though A is mentioned in the record.

2. A "record" is any item or collection of information about an individual which is maintained by an agency and which contains that individual's name or other identifying particular (e.g., social security number). Records need not be limited to paper; voiceprints, fingerprints, photographs, and videotapes are records.

3. "Maintain" includes not only retention, but the collection, use, and dissemination of a record.

4. 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. Compare OPF and EPF (systems of records) with vacancy announcement package (not a system of records). Note that the issue is how records are actually retrieved, not how they might theoretically be retrieved -- the focus is on the actual practice of the agency, not on the capacity/capability of a computer program. Henke v. Dept of Commerce, 83 F.3d 1445 (D.C. Cir. 1996). Also, records abstracted from two existing, published systems of records do not create a new illegal system of records. Pippinger v. Rubin, 129 F.3d 519, 526-27 (10th Cir. 1997). Information obtained by a Public Affairs Officer by attending an open court proceeding is not in a system of records, so that issuing a press release based upon that information does not violate the Privacy Act. Rice v. United States, 97-2 U.S.T.C. ¶ 50,833 (D.N.M. 1997), affirmed, 166 F.3d 1088 (10th Cir. 1999), cert. denied, 120 S. Ct 334 (1999).

5. "Routine use" is defined, with respect to disclosure of a record, as the use of that record for a purpose which is compatible with the purpose for which it was collected. A notice of routine use permits such use of the information, it does not mandate the use.

6. "Disclosure" is not defined in the statute. Case law has 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." Harper v. United States, 423 F. Supp. 192 (D.S.C. 1976); see also, Pippinger v. Rubin, 129 F.3d 519, 528-29 (10th Cir. 1997). Disclosure includes any means of communication -- oral, written, electronic, or mechanical.

B. All federal agencies are covered by the Privacy Act. The courts, Congress, and the General Accounting Office are not. State and local agencies, with one exception discussed, infra, and private organizations are not covered. However, if a private organization contracts with a federal agency to operate a system of records, the private organization would then be covered by the Act with respect to the operation of the system. Adelman v. Discover Card Services, 915 F. Supp. 1163, 1166 (D. Utah 1996), contains a succinct discussion of the fact that a state agency is not covered by the Privacy Act, and that operating a program subject to Federal regulation and funding did not make the state agency a Federal agency for Privacy Act purposes.

II. RIGHTS THE PRIVACY ACT PROVIDES

A. Access and Amendment

Individuals may request access to, and amendment of, agency records about themselves. However, I.R.C. § 7852(e) provides that the amendment provisions of the Privacy Act do not apply to tax records. McMillen v. Treasury, 960 F.2d 187, 188 (1st Cir. 1991); England v. Commissioner of Internal Revenue, 798 F.2d 350 (9th Cir. 1986); Green v. IRS, 556 F. Supp. 79, 86 (N.D. Ind. 1982), aff'd, 734 F.2d 18 (7th Cir. 1984) (table), but see Becker v. IRS, 93-2475 (7th Cir. 1994) (court sua sponte ordered removal of records from tax files); Chandler v. U.S., 94-2 USTC 50311 (D. Utah 1994); Clarkson v. IRS, No. 87-1621-3(K) (D.S.C. July 14, 1988) (text at 1988 U.S. Dist. LEXIS 17168); Dyrda v. C.I.R., 633 F. Supp. 2 (D. Neb. 1985); Hudgins v. IRS, 84-2 USTC 9854 (D.D.C. 1984). Thus, the amendment provisions of the Act will only be applicable to personnel and other nontax systems of records within the Service.

Section 7852(e) also provides that the provisions of Privacy Act subsection (g) do not apply to determinations of liability under title 26. Subsection (g) consists of all of the civil action provisions under the Privacy Act. There has been some debate as to whether I.R.C. § 7852(e) prohibits all Privacy Act litigation with respect to tax determination records, or only litigation to amend records.

Several courts have held that I.R.C. § 7852(e) prohibits litigation of Privacy Act issues other than amendment. Ponthieux v. Commissioner, 95-1 USTC 50,138 (9th Cir. 1995) (required filing of Forms 1099); Ford v. U.S., 981 F.2d 1258 (9th

Cir. 1992) (table case) (text at 1992 U.S. App. LEXIS 34035), cert. denied, 508 U.S. 913 (1993) (unauthorized disclosure, inaccurate information); McMillen v. U.S. Dept. of Treasury, 960 F.2d 187 (1st Cir. 1991); Conklin v. U.S., No 83-C-587 (D. Col. Feb. 26, 1985), aff'd, No. 85-1511 (10th Cir. Sept. 12, 1985) (maintenance of First Amendment information, amendment); Berridge v. Heiser, 993 F. Supp. 1136, 1145 (S.D. Ohio 1997) (unauthorized disclosure); Smilde v. Richardson, 80 AFTR2d 97-5439 (D. Minn. 1997) (unauthorized disclosure); Brown v. U.S., 77 AFTR2d 1041 (E.D. Ky. 1996) (unauthorized disclosure); Mallas v. Kolak, 721 F. Supp. 748, 754 (M.D.N.C. 1989) (subsequent history omitted) (accuracy, timeliness, relevance and completeness of records); Cienkus v. U.S., No. 85 C 7286 (N.D. Ill. Nov. 27, 1985) (text at 1985 U.S. Dist LEXIS 13357) (lack of Privacy Act notice on third party summons); Smith v. U.S., 85-1 USTC 9367 (D. Col. 1985) (access, maintenance, accuracy prior to dissemination); Uhrig v. U.S., 592 F. Supp. 349, 353-54 (D. Md. 1984) (collection of information from subject individual), citing as support U.S. v. McAnlis, 721 F.2d 334 (11th Cir. 1983), which contains no mention of I.R.C. § 7852(e).

In contrast, the Circuit Court for the District of Columbia recently held that I.R.C. § 7852(e) applies only to prohibit civil litigation pertaining to amending tax records. Lake v. Rubin, 162 F.3d 113 (D.C. Cir. 1998), cert. denied, 119 S. Ct. 1465 (1999) (access request). However, the Lake decision also held that the access provisions of the Privacy Act are subordinate to the confidentiality provisions of I.R.C. § 6103, citing Cheek v. IRS, 703 F.2d 271 (4th Cir. 1983); see also Gardner v. U.S., No 96-1467 (D.D.C. Jan. 29, 1999).

More generally, pursuant to 5 U.S.C. § 552a(j) and (k), the head of an agency may exempt certain kinds of systems of records from, inter alia, the access and amendment provisions of the Act. See, 42 Fed. Reg. 49404 (September 26, 1977), amended by 52 Fed. Reg. 11990 (April 14, 1987). But see, Doe v. FBI, 936 F.2d 1346, 1353 (D.C. Cir. 1991) ((j) and (k) exemption "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.") These law enforcement exemptions travel with the records (any copies of a (j) or (k) exempt record are also exempt) and remain applicable forever. Doe v. FBI, at 1356 (D.C. Cir. 1991). This means that a record which is exempt in one system of records retains that exemption wherever the record is found.

1. General exemption: 5 U.S.C. § 552a(j) applies to criminal law enforcement records.
2. Specific exemption: 5 U.S.C. § 552a(k) applies to civil law enforcement and some administrative (e.g., security clearance, personnel and training) records.

Each system of records exempt from disclosure pursuant to 5 U.S.C. § 552a(j) or (k) will so state in the system of records notice. The publication of notices of exempt systems is in the Treasury regulations, 31 C.F.R. Subtitle A, § 1.36 (1999).

In addition, 5 U.S.C. § 552a(d)(5) exempts from access records in any system of records that are "prepared in reasonable anticipation of a civil action or proceeding." Although not coextensive with its common law counterpart, this provision is designed to protect work product. Indeed, it may be broader in some ways than the common law attorney work product privilege, in that the statutory language does not limit the exemption to the work product of lawyers and their staff. Hernandez v. Alexander, 671 F.2d 402 (10th Cir. 1982); Varville v. Rubin, 82 AFTR2d 6142 (D. Conn. 1998); Smiertka v. U.S., 447 F. Supp. 221 (D.D.C. 1978). This provision does not require the head of the agency to publish a 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.

Finally, 5 U.S.C. § 552a(k)(5) protects investigatory material compiled solely for the purpose of determining suitability, eligibility or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, if disclosure would identify a source which was given an express promise of confidentiality. In Henke v. Dept. of Commerce, 83 F.3d 1445 (D.C. Cir. 1996), the identities of peer reviewers of a research grant application were withheld from the applicant where the peer review evaluation form stated that "it is the policy of the [agency] that reviews will not be disclosed to persons outside the Government, except that verbatim reviews without the name and affiliation of the reviewer will be sent to the principal investigator." The court held that a research grant is a Federal contract, and that exemption (k)(5) therefore applied.

With respect to nontax records, the Privacy Act provides for access to, and amendment of, the records. However, courts have held that the Privacy Act may not be used to collaterally attack final agency decisions. Where Congress has provided a comprehensive program for challenging agency decisions, an individual may not circumvent that program by requesting amendment of records. U.S. v. Fausto, 485 U.S. 972 (1988) (Civil Service Reform Act); Reinbold v. Evers, 187 F.3d 348, 361 (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 quotation, footnote omitted); Gardner v. U.S., No. 96-1467 (D.D.C. Jan. 19, 1999) slip op. at 16-18,

aff'd. No. 99-5089 (D.C. Cir. August 4, 1999) (CSRA is exclusive remedy for federal employee challenging adverse personnel action); Gowan v. Department of the Air Force, No. 90-94 LFG (D.N.M. Sept 1, 1995) slip op. at 33, affirmed, 148 F.3d 1182 (10th Cir. 1998), cert. denied, 119 S. Ct. 593 (1998); Houlihan v. OPM, 909 F.2d 383 (9th Cir. 1990); Salleh v. Christopher, 85 F.3d 689 (D.C. Cir. 1996); Castella v. Long, 701 F. Supp. 578, 585 (N.D. Tex. 1988), aff'd, 862 F.2d 872 (5th Cir. 1988) (table case) ("Privacy Act claim must be more than an end run around an unfavorable agency decision"); Pellerin v. Veterans Administration, 790 F.2d 1553 (11th Cir. 1986); Hobbs v. U.S., 99-1 USTC ¶ 50,236 (S.D. Tex. 1999) (appeal pending, 99-20273 (5th Circuit)) (employee collaterally estopped from using Privacy Act to challenge agency personnel decision after MSPB review); Lyon v. U.S., 94 F.R.D. 69 (W.D. Ok. 1982) (FECA is exclusive method for federal employee on-the-job injury compensation); Bashaw v. Dept. of Treasury, 468 F. Supp. 1195 (E.D. Wisc. 1979) (sex discrimination claim under Civil Rights Act). Similarly, Bush v. Lucas, 462 U.S. 367 (1983) (Bivens suit precluded where CSRA provided comprehensive remedies).

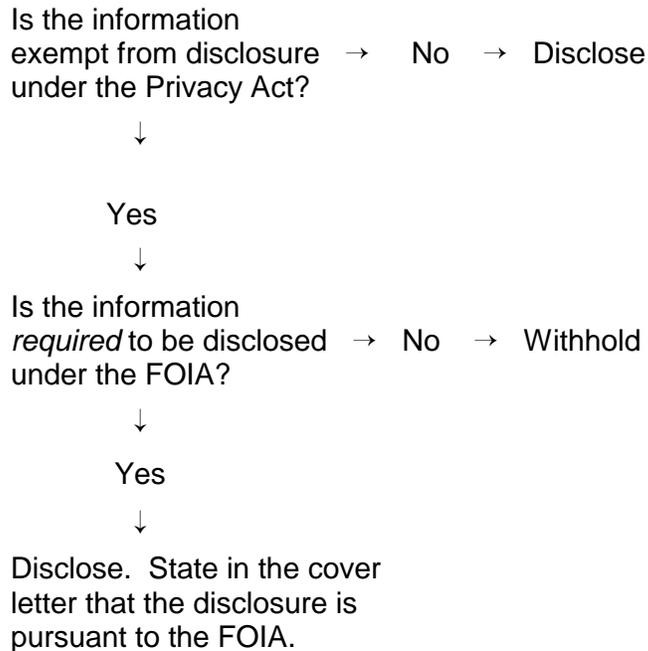
B. Protection Against Unauthorized Disclosure

The Privacy Act, at 5 U.S.C. § 552a(b), establishes the general rule that no record may be disclosed without the written consent of the individual to whom the record pertains. There are twelve statutory exceptions. Some of the more significant include disclosures:

1. *to employees of the agency which maintains the record who have a need for the record in the performance of their official duties.* For Service 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).
2. *required by the Freedom of Information Act.* Section (t) of the Privacy Act provides that exemptions to disclosure under the Freedom of Information Act may not be used to deny access otherwise available under the Privacy Act; and that exemptions to disclosure under the Privacy Act may not be used to deny access otherwise available under the Freedom of Information Act. Information which an agency is *required* to disclose pursuant to a FOIA request may not be withheld on the basis of a Privacy Act exemption. However, where the agency has discretion under FOIA to withhold the information, it is a violation of the Privacy Act to disclose information which the Privacy Act requires to be withheld. Case law requires that an actual FOIA request be received by the agency before an assertion can be made that the FOIA requires disclosure: without a request, FOIA 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., March 23, 1984), on remand, 617 F. Supp. 190 D.D.C. 1985) .

The following decision chart may be helpful in determining whether information should be released pursuant to a Privacy Act request.



3. *for a routine use.* Routine uses for each system of records are published in the Federal Register. For all tax systems of records, I.R.C. § 6103 is the authorizing routine use. The Service's most recent publication of its systems of records may be found at 63 Fed. Reg. 69842, et seq. (December 17, 1998). For OPM government-wide systems of records, see 61 Fed. Reg. 36919, et seq. (July 15, 1996); for EEOC government-wide system of records, see 59 Fed. Reg. 11068 (March 9, 1994); for Office of Government Ethics government-wide systems of records, see, 55 Fed. Reg. 6327-6331 (February 22, 1990); for Merit Systems Protection Board government-wide system of records, see, 61 Fed. Reg. 33946 (July 1, 1996); and for Labor Department's government-wide Workman's Compensation records, see 58 Fed. Reg. 49548, et seq. (September 23, 1993).

4. *to domestic federal and local law enforcement agencies upon the written request of the head of the agency.* While limited delegation is permissible to a supervisory position, 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 acceptable.

5. *to Congress, its committees, joint committees, and subcommittees, and its investigative arm, the General Accounting Office.* This does not extend to individual legislators, whether acting on their own behalf or on behalf of a constituent. However, responses to constituent inquiries may fall within a published routine use.

6. *pursuant to court order, at the federal, state, or local level.* 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 the judge or magistrate. Compare routine use for judicial purpose.

III. ROUTINE USE EXCEPTION

Courts have manifested increasing displeasure with broad categorical routine uses. The court in Krohn v. Department of Justice, Civ. No. 78-1536 (D.D.C. March 19, 1984), vacated in part (November 29, 1984), invalidated a routine use permitting "dissemination of records during appropriate legal proceedings." The holding of the court was that the offending language was overly broad and could encompass any disclosure in a judicial context. In Pippinger v. Rubin, 129 F.3d 519, 532 (10th Cir. 1997), documents were culled from two separate systems of records and combined to create a new system of records. The court held that a routine use listed for the two original systems of records also applied to the new system of records.

In Doe v. DiGenova, 779 F.2d 74, 84-85 (D.C. Cir. 1985), the court held that disclosures pursuant to subpoenas were not permitted by 5 U.S.C. § 552a(b)(11), the court order exception. Subsequently, in Doe v. Stephens, 851 F.2d 1457, 1465-67 (D.C. Cir. 1988) (same case as Doe v. DiGenova, on appeal after remand), the court held that a Veterans Administration routine use which purported to permit disclosures pursuant to subpoenas was not compatible with the purposes for which the information had been collected. The court admonished that the agency could not disclose under a 5 U.S.C. § 552a(b)(3) routine use, what it could not disclose under 5 U.S.C. § 552a(b)(11).

The Privacy Act defines a "routine use" as "the use of such record for a purpose which is compatible with the purpose for which it is collected." 5 U.S.C. § 552a(a)(7). It is now well-established that agencies covered by the Privacy Act may not utilize the "routine use" exception to circumvent the mandates of the Privacy Act. Doe v. Stephens, at 1466. The routine use exception sets forth two requirements for a proper routine use disclosure: (1) Federal Register publication and constructive notice; and (2) compatibility. Britt v. Naval Investigative Service, 886 F.2d 544, 547-50 (3rd Cir. 1989).

Compatibility encompasses (1) functionally equivalent uses, and (2) other uses that are necessary and proper. OMB Guidelines, 51 Fed. Reg. 18982, 18985 (May 23, 1986).

IV. PRIVATE SUPERVISORY NOTES

Private supervisory notes are memory joggers that are maintained by supervisors in order to evaluate subordinate employees. By negotiated contract, the Service and Counsel have agreed that private supervisory notes will be shared with the affected employee. Therefore, although there is caselaw to the contrary, the Service considers private supervisory notes as part of the system of records "Treas./IRS 36.003 - General Personnel and Payroll" and copies of any such notes must be provided to the employee.

V. EMPLOYMENT RECOMMENDATIONS FOR CURRENT OR FORMER SUBORDINATE EMPLOYEES

What are the constraints when an outside prospective employer calls for a recommendation concerning a current or former subordinate employee?

First, when dealing with an individual who has shown indications of being litigious or cantankerous, the most conservative approach would be to request the prospective employer to supply you with a written consensual release from the employee or former employee. This has a two-fold advantage: it will give you time to consider how to respond, and it will assure the agency of a good Privacy Act defense against an improper disclosure suit.

Second, look for a published routine use in the system of records from which you intend to make a disclosure. Most employment records will be located in system of records, IRS 36.003. See Routine use (1), General Personnel and Payroll Records, IRS 36.003, 63 Fed. Reg. 69872 (December 17, 1998) ("Provide information to a prospective employer of an IRS employee or former IRS employee"). Remember that the routine use is permissive, not mandatory.

Third, information divulged from personal opinion stated from memory is not a disclosure of a record from a system of records within the meaning of the Privacy Act. King v. Califano, 471 F. Supp. 180 (D.D.C. 1979). But see, Bartel v. FAA, 725 F.2d at 1408-11 (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).

VI. IMPACT ON THE SERVICE

A. Notice Requirements

The greatest impact on the Service is the recordkeeping, reporting, and notice requirements necessary to verify compliance with the Act and the requirement regarding the use of Government contractors.

1. Statutory Requirements

The Privacy Act requires each agency that maintains a system of records to inform each individual requested to supply information:

- a. Of the authority which authorizes the solicitation of the information, and whether providing the information is voluntary or mandatory;
- b. The principal purpose(s) for which the information is intended to be used;
- c. The routine uses which may be made of the information; and
- d. 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 who are solicited for information as witnesses. Also, the IRS has exempted its Criminal Investigation systems of records from this requirement, as permitted by 5 U.S.C. § 552a(j)(2).

2. Umbrella Notices

The various inquiries made of individuals by the Service 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 Service has adopted an "umbrella" approach to make initial contact. A universal Privacy Act Notice is included in the Form 1040/1040A/1040EZ instruction packages. But, although the universal notice would be legally adequate for subsequent inquiries, the Service makes available a further 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 subsection (e)(3)'s requirements. See, e.g., Annunziato v. United States, 643 F.2d 676, 678 (9th Cir. 1981), cert. denied, 452 U.S. 966 (1981); United States v. Wilber, 696 F.2d 79 (8th Cir. 1982); United States v. Bressler, 772 F.2d 287, 292-93 (7th Cir. 1985); cert. denied, 474 U.S. 1082 (1986).

Taxpayers have attempted to quash summonses and indictments, suppress evidence, and otherwise collaterally attack Service enforcement activities by claiming that the Service failed to provide a Privacy Act Notice. Courts have rejected this argument. See, e.g., United States v. Fain, 78-2 U.S.T.C. ¶ 9540 (M.D.N.C. 1978); United States v. Irvin, 48 AFTR2d 81-6059 (W.D. Wash. 1981).

B. Records About Individuals (Relevant and Necessary)

Agencies may only maintain such 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). Thus, 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. Because it is not always possible for law enforcement agencies to determine the relevance and necessity of information at the moment it is collected, this provision does not apply to civil and criminal investigatory records in systems of records for which an appropriate exemption has been asserted pursuant to 5 U.S.C. § 552a(k).

C. Records About Individuals (Accurate, Relevant, Timely and Complete)

When records that are collected about an individual are to be used in making a determination about that individual, or are to be redisclosed to another federal agency, then the Privacy Act obligates the agency to ensure that the records are "accurate, relevant, timely, and complete" at that time. It is not a strict liability standard, but a test of reasonableness. 5 U.S.C. §§ 552a(e)(5) and (e)(6).

D. Records About Individuals (Collecting Information from Subject)

5 U.S.C. § 552a(e)(2) provides that 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.” The OMB Guidelines (40 Fed. Reg. 28948, 28961 (July 9, 1975)) state the agencies should consider various factors in determining whether it is practicable to collect information from the subject individual. These factors include: whether information can only be obtained 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.

1. Tax Records

The IRS has exempted the investigatory records of the Criminal Investigation Division from this requirement as permitted under 5 U.S.C. § 552a(j)(2). Examination and Collection records are not exempt from this provision. However, consistent with the factors identified by OMB, it is expected that considerable information in these records will be obtained from third parties prior to contacting the taxpayer about the matter. Known cases addressing subsection (e)(2) all arise in the federal employment context, but nevertheless provide some guidance on the courts’ view of the balance 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 for the records.

2. Employment Records

Federal employment is a Federal program, thus inquiries into allegations of misconduct by employees must be conducted consistent with this requirement. Courts have approved contacting a third party prior to contacting the employee in certain circumstances. For example, in Brune v. IRS, 861 F.2d 1284, 1288 (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. See also, Hudson v. Reno, 130 F.3d 1193, 1205 (6th Cir. 1997), cert. denied, 525 U.S. 822 (1998); Jones v. Runyon, 32 F. Supp. 873, 876 (N.D.W.V. 1998), aff’d. per curiam, 173 F.3d 850 (4th Cir. 1999)

(table case) (investigation into possibility of former Postal Service employee improperly collecting disability retirement benefits). Where an employee refuses to provide information upon request, the agency may contact third parties to obtain it. Magee v. United States Postal Service, 903 F. Supp. 1022, 1028-29 (W.D. La. 1995).

Where an employee's ability to alter evidence or coerce a witness is virtually nonexistent, the employee should be contacted prior to 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 before third parties. Dong v. Smithsonian Institution, 943 F. Supp. 69, 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, 1996 U.S. App. LEXIS 31002 (4th Cir. December 3, 1996), cert. denied, 118 S. Ct. 62 (1997) (multiple Forms 171 provided by employee, with signed authorizations for agency to investigate any information on the form); Field v. Brown, 610 F.2d 981, 988 (D.C. Cir. 1979) (information regarding statutorily restricted post-retirement employment solicited from retirees). 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 Appeals, Grievances, and Complaints system of records (IRS 36.001) and are retrieved by the identity of the complainant. Where a formal EEO complaint is filed, the subject of the record of a management investigation of the allegations is the alleged wrongdoer. 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.

E. Records About Individuals (First Amendment Rights)

Records that reflect the exercise of an individual's First Amendment rights may only be maintained by an agency if

1. a statute specifically authorizes maintenance; or
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. Some courts 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., 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. 1987), cert. denied, 481 U.S. 1031 (1987); Albright v. United States, 631 F.2d 915, 918-921 (D.C. Cir. 1980), reh'g denied (1980), related proceedings, 732 F.2d 181 (D.C. Cir. 1984).

F. Records About Individuals (Notice of Disclosure to Public Record)

5 U.S.C. § 552a(e)(8) requires agencies to "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." 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 is handled by field disclosure officers.) 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 an I.R.C. § 6103(i)(1) 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. The IRS has exempted its Criminal Investigation systems of records from this provision of the Privacy Act.

VII. Accounting for Disclosures

5 U.S.C. § 552a(c) provides that 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. Accountings need not be made for intra-agency disclosures and FOIA required disclosures. Moreover, if an accounting of a disclosure of tax return information is required under I.R.C. § 6103(p)(3)(A), then the Privacy Act accounting provision is inapplicable.

VIII. GOVERNMENT CONTRACTORS

The Privacy Act, at 5 U.S.C. § 552a(m)(1), 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. 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 the disclosure of records to contractors. Such authority must otherwise exist; e.g., routine uses. Where such 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 Act." However, as a precautionary measure, we recommend the insertion of the Privacy Act's safeguard/disclosure restriction language in any contract, including those entered into with expert witnesses.

IX. JUDICIAL REVIEW

The Act provides that an individual may seek judicial review over four types of actions: refusal to grant access; refusal to correct or amend a record; failure to maintain a record with accuracy, relevance, timeliness, or completeness; or 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. The right of action carries a two year statute of limitations from the date on which the cause of action arises, unless there is a material and willful misrepresentation by the agency. There is no right to a trial by jury. The Act provides a detailed scheme of exclusive judicial remedies (injunctive or monetary relief), depending on the nature of the violation.

X. CRIMINAL PENALTIES

The Act also provides for criminal penalties against any agency employee who makes a disclosure knowing it to be violative of the Act; or who maintains a system of records without meeting the notice and publication requirements of 5 U.S.C. § 552a(e)(4); or against a contractor under 5 U.S.C. § 552a(m)(1) who violates the Act; or against any person who willfully obtains 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: U.S. v. Trabert, 978 F. Supp. 1368 (D. Col. 1997). Trabert provided name and address information of patients at an Army Medical Center which was shutting down to a university hospital at the request of a Medical Center doctor. Trabert was acquitted of the charge of unauthorized disclosure of records because the government was unable to prove willfulness.

XI. SOCIAL SECURITY NUMBER (PRIVACY ACT § 7, UNCODIFIED)

This is the only provision of the Act that regulates not only the federal government, but state and local governments as well. Section 7(a)(1) of the Privacy Act 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. However, some disclosures of this type are mandatory, such as those required by federal statute and by federal, state, or local government agencies maintaining systems of records in existence and operating prior to January 1, 1975, if the disclosure was required under statute or regulation adopted prior to such date for the purpose of verifying an identity. Also, the Tax Reform Act of 1976, 42 U.S.C. § 405(c)(2)(C)(i), (ii) and (iv) (1988 and Supp. V 1993), allow a state or political subdivision to require the disclosure of SSNs to establish the identity of any person affected by 1) any tax law; 2) any general public assistance law; 3) any driver's license law; 4) any motor vehicle registration law; 5) in the issuance of birth certificates and enforcement of child support orders.

Interestingly, while section 7 of the Act regulates state and local governments, the Ninth Circuit has held that it creates a private cause of action only with respect to Federal agencies. Sutton v. Providence St. Joseph Medical Center, 192 F.3d 826, 844 (9th Cir. 1999) (private entity cannot be sued under the Privacy Act); Dittman v. California, 191 F.3d 1020 (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).

When an agency requests an individual to disclose his or her social security number, it must state whether or not compliance with the request is mandatory or voluntary. The agency must also name the authority which authorizes solicitation of the information. The authority for requiring the use of social security numbers as identifying numbers for tax administration purposes is I.R.C. § 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 should also be stated.

Notices requesting information and disclosure of social security numbers that are not related to tax administration are also subject to the Privacy Act (e.g., requests from Service 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 whenever feasible. Generally, Executive Order 9397 is the basis for soliciting social security numbers for personnel related matters.

XII. REQUEST OR DEMAND FOR PRODUCTION OF RECORDS MAINTAINED IN SYSTEMS OF RECORDS OR TESTIMONY FROM A SYSTEM OF RECORDS

Most of the discussion on Testimony Authorization is in Chapter 12. This portion of the text addresses requests or demands for production of records or testimony which implicate the Privacy Act of 1974. Pursuant to Treas. Reg. § 301.9000-1, any response to a demand or request for production of records, or testimony from officers and employees of the Service, regarding the conduct of official business, must be authorized.

For purposes of this discussion, we are only dealing with Service records that do not contain tax return information, such as personnel records. Typically, the Service receives testimonial or documentary subpoenas for personnel or Inspection records of a current or former employee for use in a nontax proceeding to which the Service is not a party. This issue is also discussed in Litigation Guideline Memorandum DL-3 "Disclosure of Personnel Records (Other Than Tax Information) Pursuant to Subpoena."

To determine whether the information may be produced, we first must consider whether the records are maintained in a system of records such that they are protected by the Privacy Act. If the manner in which the records are retrieved is by name or SSN, rather than by chronological order or general subject matter, then they are maintained in a

system of records. 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 housed in a system of records, we must locate the current notice of the system of records, as published in the Federal Register. 63 Fed. Reg. 69716 et seq. (December 17, 1998). Having located the applicable system of records notice, we turn to the routine uses set forth therein. The Privacy Act will serve as a 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 the Freedom of Information Act (5 U.S.C. § 552) (see, 5 U.S.C. § 552a(b)(2)), or 3) the Service exercises its discretionary authority to disclose the records or information in accordance with its published routine uses. The published routine uses are discretionary, not mandatory.

A. How do we exercise that discretion?

1. Statutory privileges -- if any other statute requires nonproduction of records or refusal to testify, such as I.R.C. § 6103, then the Service would exercise its discretion not to comply with the subpoena, citing 5 U.S.C. § 552a as a statutory bar, along with the applicable statute.
2. Evidentiary or Governmental privileges - if any of these common law privileges (e.g., informant, investigative files, attorney work product, attorney-client, deliberative processes, state secrets) apply, then the Service would exercise its discretion not to comply with the subpoena, citing 5 U.S.C. § 552a as a statutory bar, along with the applicable privilege(s).
3. Other objections -- if the subpoenaed records or information may be objected to on relevancy grounds or any other bases contemplated by Fed. R. Civ. P. 26(c) (protective orders), then the Service would exercise its discretion not to comply with the subpoena, citing 5 U.S.C. § 552a as a statutory bar, along with the applicable objection(s).

If the Service refuses to produce the subpoenaed records or testimony, the party issuing the subpoena may seek to compel production. If the court orders production, then, from a Privacy Act perspective, disclosure may now be made in full compliance with 5 U.S.C. § 552a(b)(11) ("order of a court of competent jurisdiction"). See generally, Doe v. DiGenova, *supra*. However, disclosure in anticipation of a court order is not disclosure pursuant to an order. In Krohn v. DOJ, No. 78-1536 (D.D.C. March 19, 1984), the court held that disclosures in open court as part of the government's opposition to a motion for a court order

do not meet the requirements of (b)(11). One caveat: If the subpoenaed records or information constitute or contain tax return(s) or return information, then such a court order would also have to satisfy the requirements of I.R.C. § 6103.

XIII. REVISED ROUTINE USE TO CONFORM "USE OF RECORDS IN JUDICIAL PROCEEDING" WITH COMPATIBILITY REQUIREMENT

The routine use for utilization of a record in a judicial proceeding has undergone a metamorphosis post-Krohn. Krohn v. DOJ, No. 78-1536 (D.D.C. March 19, 1984). The routine use we published in the 1998 republication, does not meet the OPM standard for government-wide personnel systems. Therefore, in a future republication, we will be adopting the OPM standard. In the interim, we should exercise our discretion to utilize the more stringent standard. The OPM provided routine use is:

To disclose information in a proceeding before a court, adjudicative body, or other administrative body before which the agency is authorized to appear when: (a) the agency, or (b) any employee of the agency in his or her official capacity, or (c) any employee of the agency in his or her individual capacity where the Department of Justice or the agency has agreed to represent the employee; or (d) the United States, when the agency determines that litigation is likely to affect the agency, is a party to litigation or has an interest in such litigation, and the use of such records by the agency is deemed to be relevant and necessary to the litigation or administrative proceeding and not otherwise privileged.

57 Fed. Reg. 56,732 (Nov. 30, 1992). This routine use is 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 an uninterested third-party subpoena); (2) the records are relevant and necessary to the litigation; and (3) not otherwise privileged. If you do not meet this standard, you should oppose the discovery and require the court to order disclosure, in which case you will meet the 5 U.S.C. § 552a(b)(11) exception.

XIV. CRIMINAL TAX TRIALS

Two Ninth Circuit cases, United States v. Henthorn, 931 F.2d 29 (9th Cir. 1991), and United States v. Jennings, 960 F.2d 1488 (9th Cir. 1992), have established 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 the defense. For witnesses who are government employees, this includes a review of their personnel files. 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 overrides any Privacy Act considerations.

CHAPTER 12

TESTIMONY AUTHORIZATION

OBJECTIVES

At the end of this chapter, you will be able to

1. determine whether an IRS employee who receives a request or demand for testimony or production of records must have an authorization before providing such testimony or records; and
2. determine who is responsible for preparing an authorization to permit an IRS employee to give testimony or produce IRS records.

INTRODUCTION

An IRS employee, including an employee of the Office of Chief Counsel, may not testify about or produce official records or information, in response to a request or demand of an authority outside the IRS such as a court or administrative agency, without prior authorization.

Treas. Reg. § 301.9000-1 establishes procedures to be followed by employees of the IRS who receive a request for disclosure of IRS records or information. These regulations are all inclusive in scope, and they apply, regardless of the form of discovery request, to all "records (including copies thereof) or information, made or obtained by, furnished to, or coming to the knowledge of, any officer or employee of the Internal Revenue Service while acting in his official capacity, or because of his official status, with respect to the administration of the internal revenue laws or any other laws administered by or concerning the Internal Revenue Service." Treas. Reg. § 301.9000-1(b)(1). The ultimate decision as to any disclosure of such records or information is that of the Commissioner or the Commissioner's delegate. Thus, when an authority outside the IRS seeks to depose an IRS agent or requests that internal revenue records be produced by the government, no disclosure is permitted absent authorization from the Commissioner or the Commissioner's delegate in accordance with Treas. Reg. § 301.9000-1.

Agents summoned for deposition will usually appear with written authorizations permitting their appearance and designating the matters to which they may testify. No authorization is needed where an IRS employee or agent is called by the government trial attorney to testify as a witness in a tax case.

CCDM (32)240 and Chapter 35 of IRM 1.3 provide detailed instructions and procedures concerning authorization of testimony and the production of documents.

I. SUBPOENA/TESTIMONY AUTHORIZATION

A. Statutory/Regulatory Structure

The General Housekeeping Statute, 5 U.S.C. § 301, authorizes

[t]he head of an Executive department or military department [to] prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property.

The General Housekeeping Statute thus authorizes government agencies to adopt regulations regarding the custody, use, and preservation of agency records, papers, and property. United States Environmental Protection Agency v. General Electric Co., 197 F.3d 592 (2d. Cir. 1999). Pursuant to authority granted under the General Housekeeping Statute, the Secretary of the Treasury has promulgated regulations controlling the production of written records by, and the oral testimony of, employees of the Internal Revenue Service. Treas. Reg. § 301.9000-1. These regulations control the production of any official IRS record or information, and they specifically apply to subpoenas or demands served on IRS employees for information, whether involving tax or nontax records, obtained in the course of their official duties as employees. Treas. Reg. § 301.9000-1(b). Under these regulations, IRS employees are prohibited, without express authority from the Commissioner or the Commissioner's delegate, from (1) providing any records or any copies thereof to private parties or local officers; (2) producing such records or copies thereof in federal or state court, whether in answer to a subpoena duces tecum or otherwise; and (3) testifying in their official capacities. An IRS employee who violates this regulation may be dismissed from employment.

1. General Rule

"The disclosure, including the production, of internal revenue records or information to any person outside the Treasury Department or to any court, administrative agency, or other authority, in response to any request or demand for the disclosure of such records or information shall be made only with the prior approval of the Commissioner." Treas. Reg. § 301.9000-1(c) (emphasis added).

2. Definitions

"Internal revenue records or information" means "any records (including copies thereof) or information, made or obtained by, furnished to, or

coming to the knowledge of, any officer or employee of the Internal Revenue Service while acting in his official capacity, or because of his official status, with respect to the administration of the internal revenue laws or any other laws administered by or concerning the Internal Revenue Service." Treas. Reg. § 301.9000-1(b)(1). The regulation covers all records or information, including, but not limited to, tax records, personnel records, leave and pay records, management records and reports, and statistical records.

"Internal revenue officer and employee" means "all officers and employees of the United States, engaged in the administration and enforcement of the internal revenue laws or any other law administered by the Internal Revenue Service, appointed or employed by, or subject to the directions, instructions or orders of, the Secretary of the Treasury or his delegate." Treas. Reg. § 301.9000-1(b)(2). Note that this definition includes Office of Chief Counsel employees. Former employees, however, are not subject to Treas. Reg. § 301.9000-1.

"Demand" means "any subpoena, notice of deposition either upon oral examination or written interrogatory, or other order, of any court, administrative agency, or other authority." Treas. Reg. § 301.9000-1(b)(3).

"Request" is not defined in Treas. Reg. § 301.9000-1. However, the manual defines the term as a request by any court, administrative agency, or other authority, or by any person, for the disclosure of IRS records or information. CCDM (32)240(3)(c).

3. Procedure in Event of a Request or Demand

a. Request Procedure - Any officer or employee who receives a request for internal revenue records or information should communicate the request to the Commissioner or the Commissioner's delegate and await instructions concerning the response to the request. Treas. Reg. § 301.9000-1(d)(2)(i).

b. Demand Procedure - Any officer or employee who is served a demand for internal revenue records or information should:

(1) Promptly communicate the demand to the Commissioner or the Commissioner's delegate and await instructions concerning the response to the demand.

(2) If the determination is made to oppose the demand, the U.S. Attorney or other appropriate legal representative will

be requested to advise the court, agency, or other authority that the Commissioner or the Commissioner's delegate has instructed the employee not to disclose the records or information.

(3) If instructions are not received by the time the employee is to appear in response to the demand, the U.S. Attorney or other legal representative should appear with the employee and request additional time to receive such instructions.

(4) If the court, administrative agency, or other authority rules adversely with respect to the refusal to disclose pursuant to instruction from the Commissioner or the Commissioner's delegate, or declines to defer ruling pending receipt by the employee of the instructions, the officer or employee should, pursuant to Treas. Reg. § 301.9000-1, respectfully decline to disclose. Treas. Reg. § 301.9000-1(d)(2)(ii).

B. When Authorization Is Not Required

1. Referrals

The procedures set forth in Treas. Reg. § 301.9000-1 do not govern or restrict disclosure of internal revenue records or information which is requested by U.S. Attorneys or Department of Justice attorneys for use in cases which arise under the internal revenue laws or related statutes and which are referred by the IRS to the Department of Justice for prosecution or defense. Treas. Reg. § 301.9000-1(c).

2. Written Records Only

The procedures set forth in Treas. Reg. § 301.9000-1 do not apply to the answering of written interrogatories served in connection with U.S. Tax Court cases or cases referred by or on behalf of the IRS to the Department of Justice or Office of the United States Attorney for defense, prosecution, or other affirmative action. IRM 1.3.35.3(8); CCDM (32)240(3)(d). Additionally, such procedures do not apply to notices to produce documents in U.S. Tax Court unless such production is called for as part of a subpoena duces tecum. IRM 1.3.35.3(9); CCDM (32)240(3)(d).

3. Request of Government Counsel in Tax Cases

Authorization is not needed when testimony or production of records is requested by government counsel in a Tax Court case or a case referred by the IRS to the Department of Justice or U.S. Attorney. IRM 1.3.35.6(3). However, authorization is required when the information or testimony is sought by a party other than the government. IRM 1.3.35.6(4).

It is sometimes possible to examine an IRS agent or other employee 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.

II. VALIDITY OF TREAS. REG. § 301.9000-1

The Supreme Court has specifically recognized the authority of agency heads to restrict testimony of their subordinates by regulations similar to Treas. Reg. § 301.9000-1. United States ex. rel. Touhy v. Ragen, 340 U.S. 462 (1951); Boske v. Comingore, 177 U.S. 459 (1900). See Pippinger v. Rubin, 129 F.3d 519, 533 n.8 (10th Cir. 1997); Boron Oil Co. v. Downie, 873 F.2d 67, 69 (4th Cir. 1989); United States v. Allen, 554 F.2d 398, 406 (10th Cir. 1977); Saunders v. Great Western Sugar Co., 396 F.2d 794 (10th Cir. 1968); NLRB v. Capitol Fish Co., 294 F.2d 868 (5th Cir. 1961); Appeal of United States Securities and Exchange Commission, 226 F.2d 501 (6th Cir. 1955); Universal Airlines v. Eastern Airlines, 188 F.2d 993, 999 (D.C. Cir. 1951); Ex parte Sackett, 74 F.2d 922 (9th Cir. 1935).

Federal government employees acting in conformity with regulations such as Treas. Reg. § 301.9000-1 are protected from contempt for following instructions issued in accordance with such regulations. In Touhy, *supra*, the Supreme Court held that a Department of Justice officer properly refused to obey a subpoena pursuant to the Attorney General's instructions under Department of Justice Order No. 3229. In Boske, *supra*, a collector of internal revenue was adjudged in contempt for failing to file with his deposition copies of a distiller's report in his possession. The Supreme Court subsequently determined that since the regulation centralizing in the Secretary of the Treasury the discretion to submit records to the courts was lawful, the subordinate could not be found to be in contempt. See also Swett v. Schenk, 792 F.2d 1447 (9th Cir. 1986); United States v. Bizzard, 674 F.2d 1382 (11th Cir. 1982); Cates v. LTV Aerospace Corp., 480 F.2d 620 (5th Cir. 1973); Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 788 (D.C. Cir. 1971); Boatright v. Radiation Sterilizers, Inc., 592 F. Supp. 1314 (D. Colo. 1984); Smith v. C.R.C. Builders Co., Inc., 626 F. Supp. 12 (D. Colo. 1983); Marcoux v. Mid-States Livestock, 66 F.R.D. 573 (W.D. Mo. 1975). But see McElya v. Sterling Medical, Inc., 129 F.R.D. 510 (W.D. Tenn. 1990) (Navy's 45-

page instructions, based on recordkeeping regulations, did not supersede Federal Rules of Civil Procedure where Navy was a party to the action).

Treas. Reg. § 301.9000-1 is not, however, a separate privilege or basis for withholding information. Section 301 of Title 5, U.S.C., the statute upon which the regulation is based (see above), expressly provides that "[t]his section does not authorize withholding information from the public or limiting the availability of records to the public." Generally, there must be a separate statutory or common law privilege applicable to the underlying records and/or a sound policy reason for refusing to permit the testimony of a particular employee or class of employees. See Part VI of this Chapter, infra ("DETERMINING WHETHER EMPLOYEES SHOULD BE ALLOWED TO TESTIFY AND WHAT RECORDS MAY BE DISCLOSED"). In addition, consistent with Justice Frankfurter's concurring opinion in Touhy, the protection of such regulations has been limited to protecting subordinate employees from being held in contempt as a result of following the instructions of their superiors. See, e.g., Orange Environment, Inc. v. County of Orange, 145 F.R.D. 320 (S.D.N.Y. 1992).

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 subject to judicial review. Such a decision is an "agency action" subject to judicial review under the Administrative Procedure Act, 5 U.S.C. §§ 701 et seq. United States Environmental Protection Agency v. General Electric Co., 197 F.3d 592 (2d Cir. 1999). Applying the standards for review established by the Administrative Procedure Act, a court can overturn an agency's action restricting employee testimony if such action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Davis Enterprises v. EPA, 877 F.2d 1181 (3d Cir. 1989) (quoting 5 U.S.C. § 706(2)(A)); United States Environmental Protection Agency v. General Electric Co., 197 F.3d at 599 (same); Moore v. Armour Pharmaceutical Co., 927 F.2d 1194 (11th Cir. 1991), aff'g, 129 F.R.D. 551 (N.D. Ga. 1990); Branch International Services, Inc. v. United States, 905 F. Supp. 434 (E.D. Mich. 1995) (finding district director did not act arbitrarily or capriciously in refusing to permit a special agent to testify in a state court action where one of the parties to the local action was under criminal tax investigation); Dent v. Packerland Packing Co., 144 F.R.D. 675 (D. Neb. 1992) (finding that the agency's decision not to allow agency employees to provide deposition testimony was arbitrary, capricious, and an abuse of discretion, where the sole ground for noncompliance was that the party who issued the subpoenas also had a pending lawsuit against the agency, and during the deposition testimony of the agency employees the agency would be unable to cross-examine the agency employees about facts relating to such claim). See also Geiger v. United States, 1993 U.S. Dist. LEXIS 5525 (D. Minn. Apr. 7, 1993) (quashing subpoena for testimony of government employee, but expressing no opinion on any future action which might be brought against the government agency by the plaintiff under the Administrative Procedure Act); Orange Environment, Inc. v. County of Orange, supra (applying Touhy approach, rather than Administrative Procedure Act's arbitrary or capricious test, where litigant brought suit against agency employee rather than against agency itself or official who

determined that employee should not respond to subpoena). In applying the arbitrary, capricious, and abuse of discretion standard for review,

the district court may consider [agency] claims of privilege and undue burden. The application of these standards will maintain the appropriate balance between the interests of the government in conserving limited resources, maintaining necessary confidentiality and preventing interference with government functions, and the interests of suitors in discovering important information relevant to the prosecution or defense of private litigation.

United States Environmental Protection Agency v. General Electric Co., 197 F.3d at 599.

It has also been held that district courts should apply the federal rules of discovery when deciding on discovery requests made against governmental agencies, whether or not the United States is a party to the underlying action; in so doing, courts can ensure that the unique interests of the Government are adequately considered by applying the balancing test authorized by the federal rules of discovery. Exxon Shipping Co. v. United States Department of the Interior, 34 F.3d 774 (9th Cir. 1994). But see United States Environmental Protection Agency v. General Electric Co., 197 F.3d at 598 (expressly disagreeing with the Ninth Circuit's approach, finding "that the only identifiable waiver of sovereign immunity that would permit a court to require a response to a subpoena in an action in which the government is not a party is found in the A[dministrative] P[rocedure] A[ct]").

III. WHO DETERMINES WHETHER OR NOT TO AUTHORIZE TESTIMONY

A. Delegation Order 156 -- Cases Other than Tax Court Cases

Delegation Order No. 156 (Rev. 15) delegates the authority granted to the Commissioner in Treas. Reg. § 301.9000-1 to other IRS officials. See IRM 1229, Handbook of Delegation Orders. In federal and state cases (except for Tax Court cases), Delegation Order No. 156 delegates the authority granted in Treas. Reg. § 301.9000-1 to certain officials, including the Assistant Commissioner (Examination), Regional Commissioners, District Directors, and Service Center Directors, to make the determination whether to comply with a request or demand for IRS records or information. See also IRM 1.3.35.4; CCDM (32)240(4).

1. Regional Commissioners are authorized to determine whether regional employees, District Directors, and employees of the Office of the Regional Counsel will be permitted to testify or produce IRS records in local, state, and Federal courts because of a request or demand for such records. The Regional Commissioner should coordinate such authorizations with Regional Counsel.

2. The Assistant Commissioner (Examination) is authorized to determine whether Regional Commissioners, Service Center Directors, and employees assigned to the National Office, including employees of the Office of Chief Counsel, will be permitted to testify or produce IRS records because of a request or demand for such records. The Assistant Commissioner (Examination) should coordinate such authorizations with the Office of the Assistant Chief Counsel (Disclosure Litigation). Delegation Order 156.

3. Assistant Commissioner (International), District Directors, and Service Center Directors are authorized to determine whether IRS employees assigned to their function, district, or service center will be permitted to testify or produce IRS records in local, state, and Federal courts because of a request or demand for such records. District Directors will authorize local District Counsel and appeals employees for these purposes. These officials should act in all such matters only after coordination with District Counsel. Delegation Order No. 156.

4. Director, Support Services is authorized to determine whether host site employees will be permitted to testify or produce IRS records in local, state, and Federal courts because of a request or demand for such records. Such authorizations should be coordinated with District Counsel. Delegation Order No. 156.

5. Deputy Commissioner, Assistant Chief Counsel (General Legal Services) and Assistant Regional Counsel (GLS) with the concurrence of the Assistant Chief Counsel (GLS) are authorized to determine whether officers and employees of the IRS, including employees of the Office of Chief Counsel, will be permitted to testify or produce IRS records or information because of a request or demand in connection with personnel or claimant representative matters. This authority may be redelegated. Delegation Order 156.

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. See IRM 1.3.35.6(5). This authority has been redelegated to the Regional Counsel. See IRM 1.3.35.6(6); CCDM (30)313.6. Disclosure of internal revenue records or information in response to a request or demand for testimony or production of internal revenue information by petitioners in a U.S. Tax Court proceeding is authorized by the Assistant Chief Counsel (Field Service), Regional Counsels, or District Counsels, to the extent that authority has been redelegated. IRM 1.3.35.6(7); CCDM (30)313.6(3).

C. Attorney Client Privilege

If it is anticipated that the testimony or production of IRS records by a Chief Counsel attorney will involve matters which may fall within the attorney-client privilege, the determination of whether to waive the privilege and the authority to authorize production and/or testimony shall lie with the Assistant Commissioner (Examination), who will act after coordination with the Office of the Assistant Chief Counsel (Disclosure Litigation). If it is anticipated that the testimony or production of IRS records by a District or Regional Counsel attorney will involve matters which may fall within the attorney-client privilege, the determination of whether to waive the privilege and the authority to authorize production and/or testimony shall lie with the Regional Commissioner, who will act after coordination with the Regional Counsel. Delegation Order No. 156.

IV. WHO IS RESPONSIBLE FOR PREPARING TESTIMONY AUTHORIZATIONS

A. Referred cases -- Regional, District, or Service Center Employees (other than employees of the Treasury Inspector General for Tax Administration (TIGTA).

1. Deputy Regional Counsel (GL) are generally responsible for preparing, coordinating, and securing authorization from the Regional Commissioner for employees of the region, not assigned to a district or service center, to testify or produce IRS records or information in a referred tax case (e.g., criminal tax, refund litigation). See CCDM (32)240(5)(a).
2. District Counsel are responsible for preparing, coordinating, and securing the necessary authorization from District or Service Center Directors in referred cases where district or service center employees are called to testify or produce IRS records or information. See CCDM (32)240(5)(a).
3. Examples
 - a. In referred cases arising out of or being litigated in the same region to which the subpoenaed employee is assigned, the Deputy Regional Counsel (GL) or District Counsel, as appropriate, prepares, coordinates, and secures the necessary authorization from the Regional Commissioner, District Director, or Service Center Director. Thus, a request or demand for an employee in the Southeast Region assigned to the Georgia District to testify or produce IRS records in a collection or summons enforcement case arising out of or pending in the region, will be handled by the Georgia District Counsel. CCDM (32)240(5)(a)(1).

b. In referred cases centralized in the National Office involving a request or demand for an employee in a particular region to testify or produce records, the Deputy Regional Counsel (GL) or District Counsel, as appropriate, prepares, coordinates, and secures the necessary authorization from the Regional Commissioner, District Director, or Service Center Director to which the employee is assigned. Thus, in a Federal Tort Claims suit centralized in General Legal Services Division in which a Western Region employee assigned to the Regional office is asked to appear at a deposition, the Deputy Regional Counsel (GL), Western Region, will be responsible for preparing, coordinating, and securing the necessary authorization from the Regional Commissioner, Western Region. Similarly, if the same regional office employee received a subpoena duces tecum in a Freedom of Information Act case, the Deputy Regional Counsel (GL), Western Region, would be responsible for preparing, coordinating, and securing the necessary instructions from the Regional Commissioner, Western Region. CCDM (32)240(5)(a)(2).

c. In referred cases which originate and are pending in one region involving a request or demand on an IRS employee assigned to a different region, the Deputy Regional Counsel (GL) or District Counsel, as appropriate, for the region, district, or service center in which the employee is assigned, will be responsible for preparing, coordinating, and securing the necessary authorization from the Regional Commissioner, District Director, or Service Center Director. Thus in a referred criminal tax prosecution pending in Richmond, Virginia, the Ohio District Counsel would be responsible for securing instructions from the Ohio District Director for testimony and production of IRS records by an IRS employee assigned to the Ohio District. CCDM (32)240(5)(a)(3).

B. Referred Cases -- National Office Employees

1. Assistant Chief Counsel (Disclosure Litigation) -- in referred cases involving requests or demands for testimony or production of documents directed to National Office employees, the Assistant Chief Counsel (Disclosure Litigation), is responsible for preparing, coordinating, and securing the necessary authorization from the Deputy Assistant Commissioner (Examination). CCDM (32)240(5)(b); Delegation Order No. 156.

C. Cases Other Than Referred Cases -- Regional, District, or Service Center Employees

1. Disclosure Officers -- For cases, other than referred cases, involving requests or demands for testimony or production of IRS records or information involving Regional, District, or Service Center employees, disclosure officers are responsible for preparing, coordinating, and securing the necessary authorization from the Regional Commissioner, District Director, or Service Center Director, as appropriate. Delegation Order No. 156 requires coordination with the Regional Counsel or District Counsel, as appropriate. CCDM (32)240(5)(c).

D. Cases Other Than Referred Cases -- National Office Employees

1. Office of Governmental Liaison and Disclosure -- For cases, other than referred cases, involving requests or demands for testimony or production of records by employees assigned to the National Office, the Office of Governmental Liaison and Disclosure, after coordination with Disclosure Litigation, is responsible for preparing, coordinating, and securing the necessary authorizations. CCDM (32)240(5)(d); IRM 1.3.35.7; Delegation Order No. 156.

V. COLLECTING THE NECESSARY INFORMATION

Generally, in preparing authorization for IRS employees to testify or produce IRS records in response to requests or demands for such records or information, it will be necessary to develop the following facts in addition to the caption of the litigation, the nature of the litigation, and the court (or deposition) location:

- A. the returnable date of the request or demand;
- B. the name, title, and post-of-duty of the IRS employee upon whom the request or demand has been made;
- D. on whose behalf and by whom the request or demand has been served;
- E. the nature of the testimony or documents which are subject to the request or demand;
- F. whether the request or demand would require the disclosure of information which would identify, or tend to identify, a confidential informant or would require the release of other sensitive information such as law enforcement manual material;
- G. in the case of tax information, whether the party requesting or demanding such information is entitled to such information under any of the provisions of I.R.C. § 6103;
- H. whether the request or demand would require the disclosure of information which would seriously impair federal tax administration;
- I. Whether there is an open civil or criminal tax investigation and, if so, the IRS function that has jurisdiction over the investigation; and
- J. the availability or feasibility of producing the information or testimony sought; i.e., time limits and volume or format of documents.

CCDM (32)240(6)(a); IRM 1.3.35.10.

VI. DETERMINING WHETHER EMPLOYEES SHOULD BE ALLOWED TO TESTIFY AND WHAT RECORDS MAY BE DISCLOSED

A. Statutory Considerations

I.R.C. § 6103 is the standard for determining whether tax information can be disclosed in response to requests or demands for such returns or return information. If it is clear from the face of the request or demand that I.R.C. § 6103 does not permit disclosure of the desired information, the attorney who served the request or demand should be contacted in an attempt to get the request or demand withdrawn.

In addition, I.R.C. § 6110 governs the disclosure of rulings, determination letters, technical advice memoranda, Chief Counsel advice, and related background documents. I.R.C. § 6104 governs the disclosure of certain information dealing with exempt organizations and pension plans. I.R.C. § 4424 governs the disclosure of wagering tax information.

The Privacy Act, 5 U.S.C. § 552a, will also dictate the extent of permissible disclosure of IRS records in some cases (e.g., personnel records). The routine use (5 U.S.C. § 552a(b)(3)) and court order (5 U.S.C. § 552a(b)(11)) exceptions to the Privacy Act will be consulted most frequently in connection with requests or demands for testimony or production of IRS records. See CCDM (32)240(8).

B. Confidential Informants

Commonly referred to as the "informant privilege," this is really a governmental privilege which affords protection to the identity of, and information which would directly or indirectly reveal the identity of, a person who supplies information to the government under express assurances of confidentiality or in circumstances from which such assurances may reasonably be inferred.

Although originally applied in the context of criminal proceedings, Rovario v. United States, 353 U.S. 53 (1957), this privilege is also applicable in civil cases. Westinghouse Electric Corp. v. City of Burlington, Vermont, 351 F.2d 762 (D.C. Cir. 1965). See also Holman v. Cayce, 873 F.2d 944, 946-947 (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 will shoulder a formidable burden in establishing a justification for overriding the privilege); Dole v. Local 1942, IBEW, AFL-CIO, 870 F.2d 368, 372-373 (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). The 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 (1967); United States v. Panton, 846 F.2d 1335 (11th Cir. 1988).

The IRS will consider dismissing a case or will take sanctions rather than reveal the identity of its informants. Policy Statement P-1-90 (now obsolete and incorporated into the IRM) stated that the IRS will not reveal the identity of confidential informants without the consent of the informants. I.R.C. § 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. With regard to criminal investigations, IRM 9.4.2.5.6.1 provides for maximum security and disclosure of the identity of informants only to authorized persons.

C. Investigative Privilege

The law enforcement investigative privilege is a qualified common law privilege under Fed. R. Civ. P. 26(b) to prevent "the harm to law enforcement efforts which might arise from public disclosure of . . . investigatory files." Raphael v. Aetna Casualty and Surety Co., 744 F. Supp. 71, 74 (S.D.N.Y. 1990,) citing Black v. Sheraton Corp., 564 F.2d 531, 541 (D.C. Cir. 1977). See also Friedman v. Bache Halsey Stuart Shields, Inc., 738 F.2d 1336 (D.C. Cir. 1984); United States v. Winner, 641 F.2d 825, 831 (10th Cir. 1981); Brown v. Thompson, 430 F.2d 1214 (5th Cir. 1970).

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 LEM is sought, the classifying function must decide if the material is still LEM material. If not, it should be declassified. If so, and the function decides to resist production, the privilege argument should be made to the court. If the court orders production, the classifying function should decide whether to produce, with an appropriate protective order. In this regard, see United States v. Moriarty, 69-1 USTC ¶ 9212 (E.D. Wis. 1969). If the decision is made not to produce the LEM material, then consideration must be given to dismissing the case or taking sanctions.

D. Other Privileges

See Chapter 10 of this reference book.

E. Subpoenas for Depositions of High Ranking Officials

Subpoenas for deposition of high ranking officials should be quashed or a motion for protective order filed on grounds that the discovery sought would be burdensome and oppressive.

1. The general rule remains that heads of agencies and other top government executives are not normally subject to deposition. In re United States, 985 F.2d 510 (11th Cir. 1993); Simplex Time Recorder Co. v. Secretary of Labor, 766 F.2d 575, 586 (D.C. Cir. 1985); Kyle Engineering Co. v. Kleppe, 600 F.2d 226, 231 (9th Cir. 1979); Peoples v. Department of Agriculture, 427 F.2d 561, 567 (D.C. Cir. 1970). This limited immunity from discovery is justified on the grounds that such officials must be allowed the freedom to perform their duties without the constant interference of the discovery process. United States v. Miracle Recreation Equipment Co., 118 F.R.D. 100, 104 (S.D. Iowa 1987). In Sykes v. Brown, 90 F.R.D. 77, 78 (E.D. Pa. 1981), the court stated:

This blanket statement is rooted in sound policy. Persons in such positions routinely make administrative decisions in the exercise of their discretionary powers, which may affect many. Lawsuits often follow. Should the agency head be subject to deposition in every resulting case and be repeatedly required to explain the various mental steps he took to reach his decision, the decision may be his last. Therefore, before a party may take the deposition of any agency head, the party must at least show that the agency head possesses particular information necessary to the development or maintenance of the party's case which cannot reasonably be obtained by another discovery mechanism.

2. Deposition on oral examination may be permitted when the official has relevant, first-hand knowledge of factual matters material to the lawsuit. Community Federal Savings & Loan v. Federal Home Loan Bank Board, 96 F.R.D. 619, 621 (D.D.C. 1983).

F. Criminal Nontax Cases -- Litigation Guideline Memorandum DL-1

Litigation Guideline Memorandum DL-1, "Subpoenas and Court Orders Issued in a Criminal Nontax Federal or State Action to Service Personnel for Testimony or Records," discusses the disclosure issues raised and provides guidance in those situations where the subpoena or court order requires an IRS employee to provide testimony or produce IRS records in nontax criminal cases both in federal and state courts.

G. Expert Witnesses

Requests for IRS employees as expert witnesses will normally be denied in nontax matters, unless the IRS has an interest in the issue and the outcome of the litigation, or if the government is a party to the litigation. See 5 C.F.R. § 2635.805; IRM 1.3.35.10(8).

H. Agency Resources, Impartiality, Etc.

If government employees are routinely permitted to testify in private litigation, less time will be available for those employees 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 Pharmaceutical Co., 927 F.2d 1194 (11th Cir. 1991), aff'g, 129 F.R.D. 551 (N.D. Ga. 1990), 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. Similarly, the EPA's "Touhy" regulations generally provide that testimony in actions in which EPA is not involved will be provided when it is in the interests of EPA, in order to "ensure that employees' official time is used only for official purposes, to maintain the impartiality of EPA among private litigants, [and] to ensure that public funds are not used for private purposes." 40 C.F.R. § 2.401(c). In Davis Enterprises v. EPA, 877 F.2d 1181 (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 on this regulation. See also Wade v. Singer Co., 130 F.R.D. 89 (N.D. Ill. 1990). This defense is most successful when the agency has attempted to cooperate and has provided the written records that could legally be disclosed, or offered to provide an alternative to testimony, such as an affidavit.

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. To the extent possible, the authorization should be specific as to names, tax periods, classes of tax or returns, and specify the extent and limitations on disclosure. 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 tax information; (2) information which would tend to identify a confidential informant; (3) wagering tax information as defined in I.R.C. § 4424; (4) tax treaty information; and (5) secret grand jury information.

B. Coordinating the Authorization

1. Referred Cases

Generally, the coordination of authorization in referred cases will entail soliciting the recommendation of the Chief Counsel or District Counsel attorney assigned to the case, discussions with the Department of Justice or U.S. Attorney handling the case, and with the Regional Disclosure Officer. The nature and extent of the coordination will be determined on a case by case basis.

2. Cases Other Than Referred Cases

The role of the Assistant Regional Counsel (GL), District Counsel, or Disclosure Litigation, as appropriate, in the coordination process primarily will entail assuring the accuracy of the facts already developed and determining whether the proposed authorization is legally sound. In certain cases, it may be necessary to coordinate with the Department of Justice or the Office of the U.S. Attorney where a Motion to Quash and/or Motion For Protective Order is necessary or where the employee upon whom the request or demand is made will require legal assistance and guidance in court or at deposition. In cases where such legal assistance and guidance is determined to be necessary, arrangements should be made with the Department of Justice or the Office of the U.S. Attorney as to whether an employee from that office or from the Regional or District Counsel office should accompany the employee.

VIII. STATE COURT ACTIONS

A. Considerations in Deciding Whether to Comply

In the case of a subpoena or order to comply with discovery issued by a state court in a state proceeding, the District Director or Service Center Director must decide whether to comply. Two different types of considerations must be addressed: The state of the law in that federal circuit concerning the circumstances under which cases may be removed to federal court and the position of the local U.S. Attorney concerning removal must first be ascertained and worked out at the local level. Other considerations include the nature of the case, publicity regarding the case, the reasonableness of the request or demand, available resources, the agency's interest in a proceeding to which it is not a party, cooperation with state agencies, and other factors.

B. IRS Need Not Comply with State Court Subpoena

If it is decided not to comply, consideration should be given to removing the case to federal court. The decision not to comply should be made as quickly as possible to allow for as much time as possible to coordinate the removal effort with the local U.S. Attorney's office. The defenses of sovereign immunity and the Supremacy Clause should be considered in the context of a motion to quash and/or motion for protective order.

1. 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). Thus, orders against United States employees to compel them to produce information obtained in their official capacities would constitute orders against the sovereign. Special Prosecutor of New York v. United States Atty. for S.D.N.Y., 375 F. Supp. 797 (S.D.N.Y. 1974).

Case law strongly supports the conclusion that the doctrine of sovereign immunity prevents a state court from exercising jurisdiction over United States government agency actions. In Boron Oil Co. v. Downie, *supra*, at 70, the Fourth Circuit found that the state court did not have jurisdiction to compel an EPA employee to "testify contrary to EPA instructions," nor did it have the power to review and set aside the agency's decision and the federal regulations promulgated pursuant to 5 U.S.C. § 301. See Louisiana v. Sparks, 978 F.2d 226 (5th Cir. 1992) (quashing state court subpoenas in murder case on sovereign immunity grounds); Environmental Enterprises, Inc. v. EPA, 664 F. Supp. 585, 586 (D.D.C. 1987) ("As to sovereign immunity, there is obvious merit to the argument that federal officers should not be subpoenaed to testify in state court proceedings of which they are not parties without their approval.");

Reynolds Metals Co. v. Crowther, 572 F. Supp. 288 (D. Mass. 1982) (state court could not compel OSHA employees to testify against directions of superiors because sovereign immunity applied); see also Automated Mailing and Processing Sys. v. Cost Containment, Inc., 1991 U.S. App. LEXIS 332 (4th Cir. 1991) (sovereign immunity prevented litigant in state court action from obtaining materials provided U.S. Attorney concerning competitor's attempts to organize bid rigging scheme); Swett v. Schenk, 792 F.2d 1447 (9th Cir. 1986) (the state court lacked jurisdiction to find a NTSB investigator in contempt of court for refusing to answer certain deposition questions under instructions from the Chairman of the Board who acted pursuant to agency regulation which forbade Board employees from revealing their opinions in court regarding accidents); In re Complex Blood Bank Litigation, 812 F. Supp. 160 (N.D. Cal. 1991) (plaintiffs could not depose an employee of the Center for Disease Control in pending state action regarding HIV virus).

2. 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 (5th Cir. 1967) (supremacy clause dictates that a state grand jury be enjoined from enforcing subpoenas against federal employees); Special Prosecutor of New York v. United States Atty. for S.D.N.Y., supra (federal supremacy barred a state from compelling the federal government to produce an individual before a state grand jury); United States v. Owlett, 15 F. Supp. 736, 742-743 (M.D. Pa. 1936) (state sovereignty over federal sovereignty is in contravention of dual form of government and derogation of the powers of the federal sovereignty); Jacoby v. Delfiner, 183 Misc. 280, 51 N.Y.S.2d 478 (N.Y. Sup. Ct. 1944), aff'd, 270 A.D. 1013, 63 N.Y.S.2d 833 (1946) (federal supremacy precluded an order compelling the Department of Justice to produce records in a state action).

3. Reviewability of Agency's Decision Not to Allow Employee to Testify - 5 U.S.C. § 701(a)(2) precludes judicial review when "agency action is committed to agency discretion by law." The Supreme Court interpreted this section to mean that "review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." Heckler v. Chaney, 470 U.S. 821, 830 (1985). When a statute does not provide any law to apply, however, "when agency regulations or internal policies provide sufficient guidance to make possible federal review under an abuse of discretion standard, agency decisions are not unreviewable, even absent express statutory limits on agency discretion." Davis Enterprises v. EPA, 877 F.2d 1181, 1185 (3rd Cir. 1989).

In Davis, the Third Circuit stated that the factors the EPA must consider pursuant to its regulations to decide whether an employee will be allowed to testify, including the appearance of taking sides and the effect on agency resources, limits the EPA's own discretion. Thus, the court concluded that the decision is reviewable. 877 F.2d at 1186. The court then determined that it is not free to substitute its judgment for that of the agency on this issue, and held that the EPA did not abuse its discretion or otherwise err in preventing its employee from using agency time to give deposition testimony in private litigation. 877 F.2d at 1188.

In Martinez v. MacHugh Farms, Inc., 753 F. Supp. 872 (W.D. Wash. 1991), the district court accepted the government's argument that DOL regulations, which prohibited employee testimony without appropriate Deputy Solicitor approval, precluded review of the agency's action. However, the court suggested that review could be had under section 702 of the Administrative Procedure Act in a direct action in Federal court, based on a footnote in Swett v. Schenk, *supra*. See also In re Complex Blood Bank Litigation, *supra* (noting, after holding that a CDC employee could not be compelled to testify in state court on sovereign immunity grounds, that an agency's decision to withhold testimony is an agency action reviewable under section 702 of the APA in an action in Federal court).

4. See also Giza v. Secretary of Health, Ed. & Welfare, 628 F.2d 748 (1st Cir. 1980) (affirming district court decision refusing to order FDA employee to testify in state court action; neither the FOIA nor comity nor 28 U.S.C. § 1361 provided a basis for compelling testimony); Alex v. Jasper Wyman & Son, 115 F.R.D. 156 (D. Me. 1986) (affirming magistrate's finding that DOL need not compel specific employee to testify, nor provide a substitute deponent, where testimony by DOL employee would be cumulative).

C. Removal

In the event that a motion to quash or motion for protective order is refused by the state court on the basis of sovereign immunity or the Supremacy Clause, 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 this Notice of Removal of Civil Subpoena 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 provided for by 28 U.S.C. § 1441-1452. 28 U.S.C. § 1442 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 the Notice of Removal of Civil Subpoena in the United States District Court and the filing in the state court of the Notice of Filing of Notice of Removal of Civil Subpoena to the United States District Court "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).

Regarding removal to a federal court, see Swett v. Schenk, *supra*, at 1450, citing State of Wisconsin v. Schaffer, 565 F.2d 961 (7th Cir. 1977) ("It is clear that a contempt action against a federal official for failure to comply with a state court order, although ancillary to the underlying state action, is a distinct action which may be removed"). See also Sharon Lease Oil Co. v. Federal Energy Regulatory Commission, 691 F. Supp. 381 (D.D.C. 1988) (removal of state court subpoena issued to nonparty federal official proper and state court had no jurisdiction to enforce subpoena).

X. COURT ORDERS AND CONTEMPT

A. Court Orders to Disclose

1. I.R.C. § 6103 governs the confidentiality and disclosure of returns and return information. It has been held to be the exclusive means for gaining access to federal tax information. See e.g., Lake v. Rubin, 162 F.3d 113 (D.C. Cir. 1998); White v. IRS, 707 F.2d 897 (6th Cir. 1983); Cheek v. IRS, 703 F.2d 271 (7th Cir. 1983). Section 6103 does provide for certain court ordered disclosures. See e.g., subsections 6103(h)(4)(D), 6103(i)(1)(A), 6103(i)(4)(A)(ii), and 6103(i)(5)(A). However, section 6103 does not provide for disclosure beyond that specifically provided for in Title 26 and does not permit the court to create judicial exceptions to the general prohibition against disclosure established by the statute. Olsen v. Egger, 594 F. Supp. 644 (S.D.N.Y. 1984); Dowd v. Calabrese, 101 F.R.D. 427, 438-439 (D.D.C. 1984).

2. Brady v. Maryland, 373 U.S. 83 (1963)

The IRS will generally comply with Brady-type constitutionally premised orders requiring disclosure. IRM 1.3.35.13. In these situations, the United States should request the court to conduct an in camera review of the information sought. If, after in camera review, the court should decide that there are documents which are constitutionally required to be provided to the defendant, the United States would request the court to enter an appropriate order compelling such disclosure, but which would impose upon the parties conditions restricting their use of the documents and information solely to the instant case, and preventing their dissemination by any person in any manner outside the instant proceeding. See United States v. Moriarty, 1969 U.S. Dist. LEXIS 12657, 69-1 U.S. Tax Cas. (CCH) ¶ 9212 (E.D. Wis. 1969), for language of an appropriate protective order.

B. Court-Ordered Consents to Disclose

The IRS will generally accept court-ordered consents for the disclosure of tax information, subject to the normal limitations and restrictions of I.R.C. § 6103(c). See Chapter 2 of this DESKBOOK REFERENCE.

C. Contempt of Court

Disclosure Litigation is to be consulted in any case in which an employee's refusal to produce records or testify results or may result in an Order to Show Cause or an Order of Contempt. Disclosure Litigation is responsible for coordination with the Department of Justice in such matters. CCDM (32)240(9).

CHAPTER 13

RIGHT TO FINANCIAL PRIVACY ACT

OBJECTIVES

At the end of this chapter, you will have:

1. a general overview of the Right to Financial Privacy Act (RFPA), 12 U.S.C. § 3401 et seq.; and
2. an understanding of the RFPA exception which relates to the Service.

INTRODUCTION

In previous chapters, you have learned about disclosure of tax information in the Service's hands. In this chapter, we explore the "flip" side; that is, attempts by the Service to secure information from financial institutions under the RFPA. Unless otherwise specified, section references in this chapter are to Title 12 of the U.S.C.

This chapter will cover:

- the history of the RFPA;
- the overall scheme of the RFPA;
- the exception for the Service in the RFPA (12 U.S.C. § 3413(c)); and
- an overview of methods of Service access to financial records under the Internal Revenue Code (I.R.C. or Code).

I. HISTORY OF THE RFPA

A. The RFPA was enacted as Title XI of the Financial Institutions Regulatory Act of 1978. It was passed on October 15, 1978, and it was effective on March 10, 1979.

B. The RFPA was essentially a congressional response to the Supreme Court's decision in United States v. Miller, 425 U.S. 435 (1976). Miller held that individuals have no constitutional right to contest government access to bank records.

C. According to the legislative history:

[t]he Act was intended to protect the customers of financial institutions from unwarranted [government] intrusion into their records while at the same time permitting legitimate law enforcement activity ... [The Act] seeks to strike a balance between customers' right of privacy and the need of law enforcement agencies to obtain financial records pursuant to legitimate investigations. Financial Institutions Regulatory Act of 1978 Report, H. Rep. No. 1383, 95th Cong. 2d Sess. (1978) (Hereinafter House Report).

II. SCHEME OF THE RFPA

A. The privacy rights granted by the RFPA are of a limited nature.

1. The customer must be given prior notice of the government's attempt to gain access to his/her financial records.
2. The customer must be given the opportunity to contest government access in court. (House Report at 34.)
3. Generally, the RFPA applies to all attempts by the federal government to procure the financial records of customers of any financial institution. However, there are exceptions.

B. Definitions

1. "Financial institution" is broad based. It includes any bank, savings bank, card issuer as defined by 15 U.S.C. § 1602(n), industrial loan company, trust company, savings association, building and loan or homestead association, credit union, or consumer finance institute located in the United States. (§ 3401(l))
2. "Financial record" means an original, or copy of information or information derived from any record held by the financial institution which pertains to a customer's relationship with the financial institution. (§ 3401(2))
3. "Government authority" means any agency or department of the United States, or any officer, employee, or agent thereof. (§ 3401(3))
4. "Person" means an individual or a partnership of five or fewer individuals. (§ 3401(4))
5. "Customer" means any person or authorized representative of that person who used or is using any service of a financial institution, or for

whom a financial institution is acting or has acted as a fiduciary, in relation to an account maintained in that person's name. (§ 3401(5))

6. "Holding company" means any bank holding company, any company described in 12 U.S.C. § 1842(f)(1) or any savings and loan as defined in 12 U.S.C. § 1461. (§ 3401(6))

7. "Supervisory agency" includes the Federal Deposit Insurance Corporation; the Director, Office of Thrift Supervision; the National Credit Union Administration; Board of Governors of the Federal Reserve System; the Comptroller of the Currency; the Securities and Exchange Commission; and the Secretary of the Treasury (with respect to the Bank Secrecy Act -- 12 U.S.C. § 1951, et seq. and 31 U.S.C. § 53). (§ 3401(7))

8. "Law enforcement inquiry" means a lawful investigation or official proceeding inquiring into a violation of, or failure to comply with, any criminal or civil statute or regulation, rule or order issued pursuant thereto. (§ 3401(8))

C. Access to or obtaining copies of or information derived from financial records by government authorities is prohibited unless one of the following occurs (§ 3402):

1. The customer authorizes the disclosure in accordance with § 3404;
2. The records are disclosed in response to an administrative subpoena or summons which meets the requirements of § 3405;
3. The financial records are disclosed in response to a search warrant pursuant to § 3406;
4. The financial records are disclosed in response to a judicial subpoena which meets the requirements of § 3407; or
5. The financial records are disclosed in response to a formal written request which meets the requirements of § 3408.

D. Financial records are confidential (§ 3403)

1. Customer records may not be released by financial institutions to government authorities, except in compliance with the RFPA. (§ 3403(a))
2. A financial institution may not release records until the government authority seeking the records certifies in writing that it has complied with the provisions of the RFPA. (§ 3403(b))
3. The RFPA does not preclude any financial institution from notifying a government authority that the financial institution has information which might be relevant to a possible violation of any statute or regulation. (§ 3403(c).) Although the disclosures permitted under this provision are limited to the name of the purported violator and the nature of the suspected illegal activity, transactional records may be disclosed where the transactions themselves constitute the suspected violation. Bailey v. USDA, 59 F.3d 141 (10th Cir. 1995) (bank's disclosure of customer's possible food stamp fraud to Department of Agriculture could include customer account records because account transactions themselves were essence of suspected fraud). In addition, it must be the financial institution, not the governmental agency, which initiates the contact in order for the disclosure to be permitted under section 3403(c). See Anderson v. La Junta State Bank, 115 F.3d 756 (10th Cir. 1997).
4. The RFPA does not preclude any financial institution from releasing records as incident to perfection of a security interest, proving a claim in bankruptcy, collecting a debt or processing applications with regard to government loans, loan guarantees, etc. (§ 3403(d))

E. Customers may authorize financial institutions to release records to government authorities. The authorization must meet certain specified criteria, as outlined in this section. The authorization cannot be demanded by the financial authority as a condition of doing business. The customer has a right to access the records which the financial institution has disclosed. (§ 3404)

F. A government authority may obtain financial records pursuant to an administrative subpoena or summons if:

1. there is reason to believe that the records sought are relevant to a legitimate law enforcement inquiry;
2. a copy of the subpoena or summons is served upon the customer or mailed to the customer's last known address with a notice (specified in the

Act) which states with reasonable specificity the nature of the law enforcement inquiry; and

3. the customer does not file a motion to quash within ten days from date of service (or fourteen days from the date of mailing) or, if a motion to quash is filed, the provisions of § 3410 have been complied with. (§ 3405)

G. A government authority may obtain financial records under the RFPA if it obtains a search warrant pursuant to the Federal Rules of Criminal Procedure. This section provides for delay of notification to the customer up to ninety days after the search warrant is executed and for court-ordered delays of up to an additional ninety days. (§ 3406)

H. A government authority may obtain financial records pursuant to a judicial subpoena if (§ 3407):

1. the subpoena is authorized by law and there is a reason to believe that the records sought are relevant to a legitimate law enforcement inquiry;

2. a copy of the subpoena is mailed with a notice which delineates the court procedure to be followed if the customer wishes to challenge the subpoena; and

3. the customer does not file a motion to quash within ten days from date of service (or fourteen days from the date of mailing) or, if a motion to quash is filed, the provisions of § 3410 have been complied with. (§ 3407)

I. A government authority may request records under the RFPA pursuant to a formal written request if (§ 3408):

1. no administrative summons or subpoena authority reasonably appears to be available to the government authority to obtain financial records for the purpose for which records are sought;

2. the request is authorized by regulations promulgated by the head of the agency or department;

3. there is a reason to believe that the records are relevant to a legitimate law enforcement inquiry;

4. a copy of the request is mailed to the customer with a notice (specifically detailed at § 3408(4)) regarding the customer's right to challenge the access; and

5. the customer does not file a motion to quash within ten days from date of service or (fourteen days from the date of mailing) or, if a motion to quash is filed, the provisions of § 3410 have been complied with.
(§ 3408)

J. Under § 3409, if certain conditions are present, the government authority seeking access to the records may request that a court order a delay of up to ninety days in the notification of the customer.

K. Customer challenges (§ 3410)

1. Within ten days of service or within fourteen days of a mailing of a subpoena, summons, or formal written request, a customer may file a motion to quash the subpoena or summons or motion to enjoin the written request. A motion to quash a judicial subpoena is filed in the court which issued the subpoena. Other motions to quash or to enjoin are filed in a U.S. district court with proper venue. The motion must include a sworn affidavit which states:

a. that the applicant is a customer at the financial institution; and

b. the applicant's reasons for believing that the records are not relevant to a legitimate law enforcement inquiry or that the government authority has not complied with the provisions of the RFPA. (§ 3410(a))

2. Sections 3410(b) and (c) provide for governmental responses and for the court to grant the customer's motion if the court finds that there is not a demonstrable reason to believe that the law enforcement inquiry is legitimate and a reasonable belief that the records sought are relevant to that inquiry or if the court finds that the government authority has not substantially complied with the provisions of the RFPA.

3. Section 3410(d) provides that a motion or application under section 3410 is not deemed to be a final order and that no interlocutory appeal may be taken by the customer. An appeal is appropriate only:

a. within the time period as provided by law as part of any appeal from a final order in any legal proceeding initiated against him/her arising out of or based upon the financial records; or

b. within thirty days after notification that no legal proceeding is contemplated against him/her.

This section also details certain time frames regarding notification to a customer that no legal proceeding is contemplated against him/her.

4. The challenge procedures of the RFPA constitute the sole judicial remedy available to a customer to oppose disclosure of financial records. (§ 3410(e))

5. Nothing in the RFPA enlarges or restricts the rights of a financial institution to challenge requests for records by a government authority under existing law. Moreover, the RFPA does not entitle a customer to assert the rights of the financial institution. (§ 3410(f))

L. Financial institutions have a duty, upon receipt of a request for financial records from a government authority, unless otherwise provided by law, to assemble the records and to be prepared to deliver them upon receipt of the certificate required by section 3403(b). (§ 3411)

M. Use of information (§ 3412)

1. Financial records which were obtained pursuant to the RFPA may not be transferred unless the transferring agency certifies that there is a reason to believe that the records are relevant to a legitimate law enforcement inquiry within the jurisdiction of the receiving agency. (§ 3412(a))

2. Within fourteen days of transferring records, the transferring agency must provide a notice (specified in the section) to the customer regarding the transfer. (§ 3412(b))

3. Section 3412(c) provides that notwithstanding section 3412(b), if a court ordered delay pursuant to sections 3409(a) or (b) is in effect regarding the transferred records, notice to the customer may be delayed.

4. The RFPA does not prohibit supervisory agencies from exchanging information with other supervisory agencies. Nor does the RFPA prohibit the transfer of financial records needed by counsel for a government authority defending an action brought by a customer. Finally, this section does not authorize withholding of information by a supervisory agency from a duly authorized congressional committee. (§ 3412(d))

5. Information may be exchanged between the Federal Financial Institutions Examination Council and the Securities and Exchange Commission. (§ 3412(e))

6. Government agencies may transfer financial records to the Attorney General provided that the agency certifies that:

- a. there is reason to believe that the records may be relevant to a violation of federal criminal law; and
- b. the records were obtained in the exercise of the agency's supervisory or regulatory functions.

The records so transferred may only be used for criminal investigation or prosecution, civil action under 12 U.S.C. § 1833a, or forfeitures under 18 U.S.C. §§ 981 or 982 and, upon completion of the investigation or prosecution, must be returned to the transferring agency. (§ 3412(f))

N. Exceptions (§ 3413)

1. Records not identified with a particular customer may be disclosed. (§ 3413(a))
2. Examination by or disclosure to supervisory agencies pursuant to the exercise of supervisory, regulatory or monetary functions is permitted. (§ 3413(b))
3. Disclosures may be made pursuant to procedures authorized by Title 26. (§ 3413(c)) (See discussion below.)
4. Nothing in the RFPA authorizes withholding of financial records required to be reported in accordance with any federal statute. (§ 3413(d))
5. Nothing in the RFPA applies when financial records are being sought by a government authority pursuant to the Federal Rules of Civil and Criminal Procedure or comparable rules of other courts in connection with litigation to which the government authority and the customer are parties. (§ 3413(e))
6. The RFPA does not apply when financial records are sought by a government authority pursuant to an administrative subpoena issued by an administrative law judge in an adjudication subject to 5 U.S.C. § 554 and to which the government authority and the customer are parties. (§ 3413(f))
7. The notification provisions of the RFPA do not apply if disclosure is pursuant to a legitimate law enforcement inquiry seeking only the name,

address, account number, and type of account of a particular customer or group of customers who is associated with:

a. a financial transaction or class of financial transactions; or

b. a foreign country in the case of a government authority exercising control over foreign accounts in the United States under certain sections of the Trading With the Enemy Act, the International Emergency Economic Powers Act or 22 U.S.C. § 287c. (§ 3413(g))

8. The RFPA permits disclosure pursuant to lawful proceedings, investigations, etc. directed at financial institutions or in connection with the consideration or administration of government loans, loan guarantees, etc.

a. This section also provides that applicants for government loans, etc. receive notice of the government authority's access rights under this subsection.

b. Records obtained under this subsection may only be used for the purpose for which they were originally obtained (although certain transfers are permitted to government counsel, to collect indebtedness resulting from a customer's default, or to notify another agency regarding a potential civil, criminal or regulatory violation).

c. Financial institutions are required to keep records and make them available for customer inspection regarding certain disclosures under this subsection. (§ 3413(h))

9. Disclosures are permitted pursuant to the issuance of a subpoena or court order regarding a grand jury proceeding. (§ 3413(i)) (See § 3420.)

10. When the General Accounting Office seeks records pursuant to an authorized proceeding, investigation, examination or audit directed at a government authority, the RFPA does not apply. (§ 3413(j))

11. Certain disclosures which are necessary for the proper administration of programs regarding withholding of taxes on nonresident aliens, Federal Old-Age Survivors, Disability Insurance Benefits, and the Railroad Retirement Act Benefits are permitted. Any request authorized by this subsection is limited to providing the customer's name and address. (§ 3413(k))

12. The RFPA does not apply when a financial institution provides information to the Attorney General or a state law enforcement agency regarding crimes against financial institutions by insiders or violations of 31 U.S.C. § 53. (§ 3413(l))

13. When the Federal Reserve System is exercising its authority to extend credit to financial institutions and others, disclosures to or examinations by the Board of Governor of the Federal Reserve System Or Federal Reserve Bank is permitted. (§ 3413(m))

14. The chapter does not apply to examination by or disclosure to the Resolution Trust Corporation in the exercise of its authority. (§ 3413(n).)

15. The RFPA does not apply to examination by or disclosure to the Federal Housing Finance Board or federal home loan banks when they are exercising their authority to extend credit. (§ 3413(o))

16. Certain disclosures which are necessary for the proper administration of veteran benefits laws are permitted. Any request authorized by this subsection is limited to providing the customer's name and address to the Department of Veterans Affairs. (§ 3413(p))

17. This chapter does not apply to disclosures of financial records or information pertaining to a Federal contractor-issued charge card for official Government travel. (§3423(q))

O. Special procedures. (§ 3414)

1. The RFPA does not apply to government authorities authorized to conduct foreign or counter- or foreign positive-intelligence activities for the purpose of conducting such activities or the Secret Service for the purpose of conducting protective functions. (§ 3414(a)(1).) The government authority shall compile an annual tabulation of occasions in which the section was used. (§ 3414 (a)(4))

2. The government authority acting pursuant to section 3414(a)(1) shall issue a certificate pursuant to section 3403(b). (§ 3414(a)(2))

3. No financial institution shall disclose to any person that the government authority has sought or obtained access to the customer's records. (§ 3414(a)(3))

4. The FBI may access records for foreign counter- intelligence purposes if it certifies specific and articulable facts that the customer is a foreign power or agent of a foreign power as defined by 50 U.S.C. § 1801.

(§ 3414(a)(5)(A)) The section provides for certain dissemination to the Attorney General and the Permanent Select Committee on Intelligence to the House and the Select Committee on Intelligence to the Senate (§ 3414(a)(5)(B)-(C)). The financial institution is prohibited from disclosing that the FBI has sought or obtained access. (§ 3414(a)(5)(D))

5. Nothing in the RFPA prohibits a government authority from obtaining records if delays in the obtaining of the records will create imminent danger of (a) physical injury to any person, (b) serious property damage, or (c) flight to avoid prosecution. A certificate under section 3403(b) is required and the government must file within five days of obtaining access a sworn statement setting forth the grounds for emergency access. An annual tabulation is required under this provision. (§ 3414(b))

P. Section 3415 provides for cost reimbursement to the financial institution for costs reasonably necessary for searching, reproducing or transporting the records.

Q. Section 3416 provides that an action to enforce any provision of the RFPA may be brought in any United States district court with proper venue, without regard to the amount in controversy, within three years from the date on which the violation occurs or the date of discovery of such violation, whichever is later.

R. Civil penalties. (§ 3417)

1. The agency or department of the United States or the financial institution which obtains or discloses records in violation of the RFPA is liable for (§ 3417(a)):

- a. \$100 without regard to the volume of records involved;
- b. actual damages sustained by the customer as a result of the disclosure;
- c. such punitive damages as the court may allow, if the violation is found to be willful or intentional; and
- d. in the case of any successful action to enforce liability under the Act, costs together with reasonable attorney's fees as determined by the court.

With respect to punitive damages, the district court in Neece v. Internal Revenue Service, 93-2 U.S.T.C. ¶ 50,387 (N.D. Okla. 1993), relied upon the Tenth Circuit's "intentional or willful" standard of the Privacy Act to determine that punitive damages were not appropriate in

that case. Under this standard, the violation must be "somewhat greater than gross negligence." 120 Cong. Rec. 40406 (1974). The Tenth Circuit, without commenting on the propriety of the district court's reliance, affirmed the denial of punitive damages. Neece v. Internal Revenue Service, 41 F.3d 1396 (10th Cir. 1994).

2. If the court finds that any agency or department of the United States violated any provision of the RFPA and the court finds that the circumstances surrounding the violation raises questions of whether the officer or employee acted willfully or intentionally, the Director of the Office of Personnel Management is to initiate a proceeding to determine if disciplinary action is warranted against the employee who was primarily responsible for the violation. After investigation, the Director submits his/her findings and recommendations to the administrative authority of the agency and the employee. The administrative authority shall take the corrective action that the Director recommends. (§ 3417(b))

3. A financial institution making a disclosure based upon a good faith reliance upon a certificate by the government authority or pursuant to section 3413(l) will not be liable to the customer for the disclosure. (§ 3417(c))

a. Absent such a certificate, both the government and the financial institution may be held liable for damages if there is a violation of the RFPA, and a financial institution may not cross-claim against the government for contribution or indemnification with respect to its RFPA liability. Beneficial Consumer Discount Co. v. Poltonowicz, 47 F.3d 91 (3d Cir. 1995).

b. Requests for customer information by the Service are normally outside the coverage of the RFPA by virtue of section 3413(c) (see discussion below). Nevertheless, financial institutions occasionally request or demand that the Service furnish an RFPA certificate before information will be released. Examining agents should consult with the Office of the Assistant Chief Counsel (General Litigation) in such situations.

4. The remedies and sanctions described in the RFPA are exclusive. (§ 3417(d))

S. In addition to other remedies in the RFPA, injunctive relief is available to ensure compliance with the procedures of the RFPA. If successful, costs and reasonable attorney's fees as determined by the court may be recovered. (§ 3418)

T. If an individual files a motion or application under the RFPA, which has the effect of delaying the access of a government authority to financial records pertaining to the individual, any applicable statute of limitations is tolled from the date of the filing of the motion until the date upon which the motion is decided. (§ 3419)

U. Grand jury (§ 3420)

1. Records obtained pursuant to a federal grand jury subpoena shall be:

a. returned and actually presented to the grand jury;

b. used only for the purpose of considering whether to issue an indictment or presentment by that grand jury, or for prosecuting the crime for which the indictment issued, or for a purpose authorized by Rule 6(e) of the Federal Rules of Criminal Procedure; and

c. destroyed or returned to the financial institution if not used for one of the purposes specified in (b) and shall not be maintained by any authority other than in sealed grand jury records (unless such records are used in the prosecution of a crime or for a purpose authorized by Rule 6(e)). (§ 3420(a))

2. The financial institution from whom the records were obtained may not disclose the existence of the subpoena or that information was furnished pursuant to the subpoena. (§ 3420(b))

V. Generally, the RFPA applies to the Securities and Exchange Commission, except as provided in 15 U.S.C. § 78a, et seq. (§ 3422)

III. SERVICE EXCEPTION TO THE RFPA (§ 3413(c))

A. The exception reads: "Nothing in this chapter prohibits the disclosure of financial records in accordance with procedures authorized by the Internal Revenue Code."

B. Legislative History

1. The legislative history of this section is modest. The House Report merely indicates that "[a]dministrative summonses issued by the Internal Revenue Service are already subject to privacy safeguards under section 1205 of the Tax Reform Act of 1976. [26 U.S.C. § 7609.] Accordingly, they are exempted from the procedures of this bill." House Report at 226.

2. As originally introduced on the House floor, the RFPA only exempted disclosures pursuant to I.R.C. § 7609 summonses.
3. However, since there were procedures other than I.R.C. § 7609 which the Service used to obtain information (e.g., use of credentials, letters of circularization, etc.), a floor amendment was introduced which deleted the original version and substituted in its place the current version.
 - a. The amendment was introduced by Rep. John LaFalce, who had offered a section by section analysis of the RFPA (including the section quoted above under B(1)). Rep. LaFalce indicated that the amendment was primarily corrective in nature since it was "necessary to exempt all procedures carried out under the Internal Revenue Code which has its own privacy protection provisions." 124 Cong. Rec. (1978) H11734 (daily ed. Oct. 5, 1978). The amendment was accepted without discussion.
 - b. On October 15, 1978 (legislative day Oct. 14, 1978), the bill was passed as amended by the House. There was no discussion of the scope of section 3413(c) when it passed. The bill passed the Senate on the same day, also without discussion of the scope of section 3413(c). 124 Cong. Rec. (1978) S19144 (daily ed. Oct. 14, 1978).
4. Congress acknowledged that the protection of an individual's privacy from unwarranted government intrusion had already been addressed in part by the Code. House Report at 226.
 - a. In fact, to a certain extent, the Service's procedures were used as a model in drafting certain provisions of the RFPA. Congress used the basic concept of I.R.C. § 7609, i.e., the right of notice and the opportunity to be heard.
 - b. Moreover, Congress recognized certain deficiencies in the Service's procedures and structured the RFPA to avoid them. For instance, it was noted that individuals instinctively object to the disclosure of their records, but would not pursue a court hearing. This forced the government to pursue the matter and resulted in hundreds of default judgments for the government. Accordingly, the RFPA places the burden of going to court on the customer. See House Report at 245-246; 124 Cong. Rec. H11738 (daily ed. Oct. 5, 1978).
5. In an attempt to address the decisions in Neece and Peddie (see, infra, Part IV.D) which held that non-summons requests where not

“procedures authorized by the Internal Revenue Code,” the Restructuring and Reform Act of 1998 (RRA) amended I.R.C. §7609 with new subsection (j) as follows: “Use of Summons Not Required – Nothing in this section shall be construed to limit the Secretary’s ability to obtain information, other than by summons, through formal or informal procedures authorized by sections 7601 and 7602.” RRA §3415(a). Although expected to strengthen the Service exception to the RFPA, this new provision has yet to be tested in a lawsuit.

IV. OVERVIEW OF METHODS OF SERVICE ACCESS TO FINANCIAL RECORDS UNDER THE CODE

A. "Menu" of procedures (I.R.C. § 7602(a))

1. I.R.C. § 7602(a) provides:

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax . . . , or collecting any such liability, the Secretary is authorized –

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account . . . , or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

2. The three paragraphs of I.R.C. § 7602(a) set forth the principal procedural tools available to the Service in conducting examinations of taxpayers generally. The use of the conjunction "and" makes clear that these procedures are independent tools available to the Service. The first two options are particularly relevant to the Service's access to financial records of bank customers. The Service may obtain informal access to such records by voluntary cooperation of bank employees, or the Service

may proceed more formally by seeking to compel production by issuance of an administrative summons.

B. Special third-party recordkeeper procedures (I.R.C. § 7609)

1. I.R.C. § 7609 sets forth special additional procedures which must be used when the Service issues a summons to a third-party recordkeeper such as a financial institution. Generally, in such cases, the customer has the right to be notified of the summons and the right to challenge the summons in court before the financial institution complies with the summons.

2. These special I.R.C. § 7609 requirements are not a restriction on the nonsummons examination procedures of I.R.C. § 7602(a)(1). The Restructuring and Reform Act of 1998 (RRA) amended I.R.C. §7609 with new subsection (j) as follows: "Use of Summons Not Required – Nothing in this section shall be construed to limit the Secretary's ability to obtain information, other than by summons, through formal or informal procedures authorized by sections 7601 and 7602." RRA §3415(a).

3. In a given case, a revenue agent may elect to proceed first to attempt to obtain access to records from the taxpayer or third parties informally without compulsion. If that approach fails, the agent may decide to resort to the next step on the procedural continuum, seeking to compel production of records via an administrative summons pursuant to I.R.C. § 7602(a)(2). Generally, except for in criminal investigations, if the party to be compelled to produce records via summons is a third-party rather than the taxpayer, then the agent must observe the special notice and challenge procedures of I.R.C. § 7609.

C. Priority of procedures

1. The Internal Revenue Manual directs Examination personnel not only to recognize, but also to give priority to, nonsummons procedures. See I.R.M. 4022.3(1)(a) ("[B]efore resorting to the issuance of a summons . . . securing of information desired through other means should be explored. For example, financial and other data may be secured from . . . other parties, such as banks, employer, etc., without use of a summons"). The Collection portion of the Manual contains similar instructions. See I.R.M. Part V, 630(3) ("It should be noted that the summons is not a necessary element of the authority of the representatives of the Service to examine books and records. . . It is the device provided by Congress to compel the appearance of persons and the production of documents when such are not forthcoming voluntarily when requested").

2. Non-RFPA case law, both before and after enactment of the RFPA, has rejected taxpayer arguments that the Service must choose formal summons procedures over informal inquiries. United States v. Cohen, 263 F.2d 466 (3d Cir. 1959); United States v. Barksdale, 499 F. Supp. 624 (M.D. Fla. 1980); Speck v. United States, 59 F.3d 106 (9th Cir. 1995).

D. Case Law

1. Summonses pursuant to I.R.C. §§ 7609 and 7602(a)(2)

a. Cermak v. United States, 97-2 U.S.T.C. ¶ 50,505 (7th Cir. 1997) (The court held that section 3413(c) clearly states that nothing in the RFPA prohibits the disclosure of financial records in accordance with procedures authorized by Title 26, and thus, the Service was entitled to summons the Cermaks' financial records pursuant to the procedures set forth in sections 7602 and 7609 of the Code).

b. United States v. MacKay, 608 F.2d 830 (10th Cir. 1979) (The court held that there was no basis in the legislative history or in the express or implied provisions to indicate that the RFPA overrode the summons authority of the Code.)

c. United States v. Wills, 475 F. Supp. 492 (M.D. Fla. 1979) (A financial institution had opposed a summons on the grounds that the Service would not supply a certificate as required by section 3403(b) of the Act. The court found that 3403(b) had no application to the enforcement of a summons issued pursuant to the Code.)

d. King v. United States, 684 F. Supp. 1038 (D. Neb. 1987); McTaggart v. United States, 570 F. Supp. 547 (E.D. Mich. 1983); United States v. Hill, 537 F. Supp. 677 (N.D. Tex. 1982) (Follows Cermak, MacKay and Wills.)

e. Gassaway v. United States, 1999 U.S. App. LEXIS 18645, 99-2 U.S. Tax Cas. (CCH) ¶ 50,770 (10th Cir. 1999) (A financial institution properly released financial information to the Service after receipt of a third-party summons under the procedures set forth in § 7609. The court rejected plaintiff's argument that the summons was based on information illegally obtained by the FBI, citing Neece at 462, since it is only necessary that the information may be relevant to a possible criminal violation.)

f. Lidas, Inc. v. United States, 1999 U.S. Dist. LEXIS 2198, 99-1

U.S. Tax Cas. (CCH) ¶ 50, 309 (C.D. Cal. 1999)(Under § 3413(c), the Service may utilize summonses on behalf of foreign governments with whom the United States has tax treaties in order to ascertain foreign tax liability.)

2. Voluntary compliance with informal request for information pursuant to I.R.C. § 7602(a)(1)

a. Aaron v. Hailey, Civ. No. 79-3498 (9th Cir. March 19, 1981) (RFPFA claim was dismissed because Service's nonsummons request for customer's financial information was covered by section 3413(c).)

b. Young, et al. v. Boyle, et al., Civ. No. 82-72653 (E.D. Mich. Oct. 20, 1983) (Informal access was held inconsistent with "the clear import of the procedural protections built into both the [RFPFA] and the Code's third party summons procedures.")

c. Raikos v. Bloomfield State Bank and Internal Revenue Service, 703 F. Supp. 1365 (S.D. Ind. 1989) (After examining the RFPFA, its legislative history, the Internal Revenue Manual, and commentary, the court concluded that the RFPFA did not preclude informal access to bank records by the Service.)

d. Schneider v. United States, 90-1 U.S.T.C. ¶ 50,182 (S.D. Ohio 1990) (The court found that the Service had violated the spirit of the RFPFA by informal access. However, since the case was brought in the context of a petition to quash a summons, the court found that it had no jurisdiction over the issue.)

e. Neece v. Internal Revenue Service and First Bank of Turley, 1989 U.S. Dist. LEXIS 9749 (N.D. Okla. June 16, 1989), rev'd, 922 F.2d 573 (10th Cir. 1990) (subsequent history omitted). The district court, citing Raikos, found that informal access to bank records (without a summons) did not violate the RFPFA. The Tenth Circuit reversed, finding that voluntary submission by financial institutions of customer records, under I.R.C. § 7602(a)(1), was not a "procedure," so the section 3413(c) exemption could not apply. The Service announced that it will not follow Neece outside the Tenth Circuit. Action on Decision CC-1992-013.

f. Peddie v. United States, 98-1 U.S.T.C. ¶ 50,120 (4th Cir. 1997). The government appealed from the district court's grant of summary judgment to the Peddies in this claim for damages under

the RFPA. The Peddies claimed that the Service violated the RFPA when it informally requested that several financial institutions voluntarily provide financial records pertaining to them. The district court, as did the Tenth Circuit in Neece, found that section 3413(c) did not exempt the Service's requests from the notice and procedure requirements of the RFPA. The district court, however, did not address the government's argument that section 3413(d) also exempted the disclosure of the information. The Fourth Circuit held that the record on appeal was insufficient for review and simply remanded the case to the district court to address the government's 3413(d) argument. On remand, the district court found that section 3413(d) was a proper exemption covering the Service's requests for copies of Forms 1099 and 1098 but that it did not exempt the Service's requests for loan repayment information from the notice and procedure requirements of the RFPA.

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CHAPTER 14

DISCLOSURE GUIDE FOR TAX-EXEMPT BOND EXAMINATIONS¹

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 an employee or otherwise or 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 Internal Revenue Code. Church of Scientology of California v. Internal Revenue Service, 484 U.S. 9 (1987). The unauthorized disclosure of returns or return information may result in civil damages against the United States (section 7431) and/or criminal penalties against the individual who disclosed the information (section 7213).

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

Generally, a "return" is any tax or information return, declaration of estimated tax, or claim for refund, including supporting schedules, which is filed with the IRS. I.R.C. § 6103(b)(1). Thus, a return would include, for example, a Form 8038 (Information Return for Tax-Exempt Private Activity Bond Issues) filed by an issuer. "Return information" is defined, generally, as the taxpayer's identity, the nature, source or amount of his 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 IRS with respect to a return or with respect to the determination of the existence (or possible existence) of liability of any person under the Internal Revenue Code. I.R.C.

¹ This is the text of Document 10011 (3-97) reformatted for this Training Reference.

§ 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.

C. 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 Internal Revenue Code. As such, it is return information protected by section 6103.

D. Whose Return Information Is It?

The critical next 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. The focus, generally, is whose liability under the Internal Revenue 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.

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 information and issues unique to each taxpayer are developed, that latter information is solely the information of the specific taxpayer. For example, information developed during the examination of a partnership is the partnership's return information and available to each partner. I.R.C. § 6103(e)(1)(C). However, the protest of an individual partner (for a pre-TEFRA year) is that partner's information only, and not available to the other partners. Martin v. IRS, 857 F.2d 722 (10th Cir. 1988). Likewise, information regarding a tax shelter could be the information of both the promoter and the investors. See Mid-South Music Corporation v. United States 818 F.2d 536 (6th Cir. 1987) (Merritt, J., concurring). The bond area, involving the potential liability of bondholders, issuers, conduit borrowers, and others, is susceptible to this "taxpayer group" type of analysis.

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 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 solely the return information of the affected bondholder (not the issuer or any other bondholder). Similarly, if the IRS determines that there is a potential for application of the section 6700 penalty against the issuer, information collected after such determination relating to such penalty would be solely the issuer's information.

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 Internal Revenue 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 (UBIT) would be the section 501(c)(3) organization's return information. However, after a separate bond examination is opened (which would occur after bond issues are identified in the conduit borrower's examination), 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 (penalty for promoting an abusive tax shelter). 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 whose return information it is, that does not mean that a third party can never obtain access. It merely means that authority must be found for the disclosure of the information under section 6103, which is discussed below.

II. AUTHORIZED DISCLOSURES

A. Disclosures to Persons with a Material Interest

I.R.C. § 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. See I.R.C. § 6103(e)(1)(D); Disclosure of Official Information Handbook, IRM 1272 text 241; Rev. Proc. 80-46, 1980-2 C.B. 779. 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).²

The Disclosure of Official Information Handbook, IRM 1272 text 241(1)(f), provides that returns and return information of a state or local government may be disclosed to any person legally authorized to act for the state or local government. 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.

B. Disclosures to Powers of Attorney

A taxpayer may authorize another person to receive returns or return information through a power of attorney. I.R.C. § 6103(e)(6), (7). The IRS' standard power of attorney form (Form 2848) contains language authorizing disclosure. A power of attorney is used for a person to designate an individual to represent the person before the IRS. See Proc. & Admin. Reg. §§ 601.501--601.509. As with other disclosures under section 6103(e), return information need not be disclosed if such disclosure would seriously impair Federal tax administration.

C. Disclosures Pursuant to Consent/Waiver

The taxpayer may also designate in a written request a person to receive returns or return information. I.R.C. § 6103(c) (a "waiver" or "consent"). The request must pertain solely to the authorized disclosure, be signed and dated by the taxpayer, and contain the taxpayer's identity information (see section 6103(b)(6)), the identity of the person to whom disclosure is to be made, the type of return or return information to be disclosed, and the taxable years involved. Treas. Reg. § 301.6103(c)-1(a).³ The consent must be received by the IRS within 60 days following the date it was signed and dated by the taxpayer.⁴ Id.

² The authority to permit disclosure of returns and return information under I.R.C. § 6103, including the authority to determine whether a particular disclosure would seriously impair Federal tax administration, is delegated to selected personnel under Delegation Order 156, IRM 1229.

³ The requirements with respect to consents are somewhat more lenient where the taxpayer requests another person to make an inquiry on the taxpayer's behalf for information or assistance relating to the taxpayer's return or a transaction or other contact between the taxpayer and the IRS, for example, where assistance is requested by a constituent from a member of Congress. Treas. Reg. § 301.6103(c)-1(b).

⁴ In the context of a consent to disclose return information involving a tax-exempt
(continued...)

Form 8821 (Tax Information Authorization) has been designed to meet the requirements of section 6103(c), and will suffice for most commonly encountered disclosure situations. (See Appendices for sample disclosure consents for bond matters.) The IRS need not disclose return information pursuant to consent if such disclosure would seriously impair Federal tax administration.

D. Investigative Disclosures

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 such situations and under such conditions as prescribed in regulations.

Regulations promulgated under section 6103(k)(6) provide that IRS employees are authorized to disclose return information, e.g., taxpayer identity information, the fact that the inquiry pertains to the performance of official duties, and the nature of the official duties, in order to obtain necessary information to accomplish certain enumerated activities. Treas. Reg. § 301.6103(k)(6)-1(b). These activities include, among others, verifying the correctness or completeness of any return, determining the responsibility for filing a return, and establishing or verifying the liability (or possible liability) of any person for any tax, penalty, interest, fine, forfeiture or other imposition or offense under the internal revenue laws. Treas. Reg. § 301.6103(k)(6)-1(b). Disclosures to third parties should only be made if the necessary information cannot, under the facts and circumstances of the particular case, otherwise reasonably be obtained in an accurate and sufficiently probative form, or in a timely manner, or if such activities cannot otherwise be properly accomplished without making such disclosure. Treas. Reg. § 301.6103(k)(6)-1(b).⁵

The Tenth Circuit Court of Appeals has interpreted section 6103(k)(6) to impose three basic requirements: (1) the information sought is with respect to the

(...continued)

bond issue, generally, the IRS requires that the individual executing the consent have authority under state law to bind the bond issuer, and that the individual certify that he/she has such authority.

⁵ Thus, in the bond area, as a general matter, information should be requested first from the issuer, unless there is a valid investigative reason for going to the third party source.

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 Internal Revenue Code; (2) the information sought is not otherwise reasonably available; and (3) it is necessary to make disclosures of return information in order to obtain the additional information sought. DiAndre v. United States, 968 F.2d 1049, 1052 (10th Cir. 1992). As a general matter, only the minimum amount of information necessary to obtain the desired information should be disclosed. "Necessity" is determined on the facts and circumstances of each case. Courts that have reviewed the propriety of these types of disclosures have generally required the IRS to justify the information disclosed on an item-by-item basis.

E. Disclosures in Tax Administration Proceedings

Section 6103(h)(4) provides:

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;

(B) if the treatment of an item reflected on such return is directly related to the resolution of an issue in the proceeding; [or]

(C) if such 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 . . .

A refund action in district court or an action to redetermine a deficiency in Tax Court, clearly are "judicial proceedings pertaining to tax administration" within the meaning of section 6103(h)(4). In addition, an examination, with its numerous procedural steps and protections and its appeal process, constitutes an "administrative proceeding" pertaining to tax administration. First Western Government Securities v. United States, 578 F. Supp. 212, 217 (D. Colo. 1984), aff'd, 796 F.2d 356 (10th Cir. 1986); Ungaro v. Desert Palace, Inc., 91-1 U.S.T.C. ¶ 50,294 (D. Nev. 1986); DataMatic Services Corp. v. United States, 88-1

U.S.T.C. ¶ 9163 (N.D. Cal. 1987);⁶ see Proc. & Admin. Reg. §§ 601.105--601.106. Contra Mallas v. United States, 993 F.2d 1111 (4th Cir. 1993).⁷ Thus, disclosures made to the taxpayer during the course of an examination, in the revenue agent's report and during Appeals conferences would be made pursuant to section 6103(h)(4).⁸

I.R.C. § 6103(h)(4) does not specify to whom information may be disclosed, it merely says "in" the proceeding. Generally, disclosures should only be made to persons authorized to participate in the proceeding and to the court pursuant to applicable rules of procedure (e.g., discovery in Tax Court pursuant to the court's rules of procedure).

Subparagraphs (B) and (C) of section 6103(h)(4) permit the disclosure of third-party tax information -- tax information of persons who are not parties to the proceeding. Subparagraphs (B) and (C) are referred to as the "item" and "transaction" tests, respectively. See S. Rep. No. 938, 94th Cong., 2d Sess. 325-326 (1976), 1976-3 C.B. (Vol. 3) 363-364; First Western Government Securities, Inc. v. United States, 578 F. Supp. 212 (D. Colo. 1984), aff'd, 796 F.2d 356 (10th Cir. 1986); Davidson v. Brady, 559 F. Supp. 456 (W.D. Mich. 1983), aff'd, 732 F.2d 552 (6th Cir. 1984). As will be 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 are to be resolved in the proceeding.

F. Disclosures of Statistical Data

The definition of return information excludes statistical studies and 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

⁶ See also I.R.C. § 6223(a)(1) (IRS is required to notify certain partners of "the beginning of an administrative proceeding at the partnership level" [Emphasis added]).

⁷ The Fourth Circuit, in Mallas, rejected the conclusion that an audit is an administrative proceeding pertaining to tax administration. In that case, the IRS had disclosed to investors that the promoters of a tax shelter had been convicted of aiding and abetting the filing of fraudulent returns, after the promoters' convictions had been reversed by the Fourth Circuit Court of Appeals.

⁸ A person's own returns and return information could also be disclosed to that person pursuant to section 6103(e) (see discussion of material interest above). The rules in section 6103(h)(4) permit, under certain circumstances, disclosure of third-party returns and return information.

the IRS can disclose information from a bond examination so long as identifying information is redacted. Information retains its status as return information even if the identifiers are deleted. Church of Scientology of California v. IRS, 484 U.S. 9 (1987). However, the IRS could disclose amalgamations of data, e.g., 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, nonidentifiable statistical data (such as that compiled in the SOI Bulletin) could be disclosed.

III. APPLICATION OF STATUTE TO BOND PROGRAM

A. Bond Examination

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 or not interest on the bonds is exempt from tax with the issuer and any bondholder, because it is their own return information. In addition, such information could be discussed with the representatives of the issuer or bondholders, assuming a valid power of attorney is filed with the IRS.

Such information generally could not be discussed with the trustee without the issuer's consent. However, disclosure of discrete items of information to the trustee would be permitted if the disclosure is necessary to obtain information that is not otherwise reasonably available (e.g., a bondholder list). I.R.C. § 6103(k)(6). As discussed at III.E. below, if the trustee must file Forms 1099, the trustee could also obtain information necessary to perform those responsibilities.

B. Bond Issue Involving Conduit Borrower

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 indicated above, the IRS can disclose information regarding the bonds in order 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.

However, section 6103(k)(6) would not authorize the IRS to openly discuss bond issues with the conduit borrower. Consent from the issuer will ordinarily be 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 should be obtained.

Sample consents permitting disclosures of bond examination information to the conduit borrower and conduit borrower's counsel are at Appendices 1 and 2. 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 conduit borrower's counsel, unless they are listed in the consent.

Disclosures to the trustee would ordinarily be predicated on section 6103(k)(6) (investigative) 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, 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). Revenue Agent had also discovered 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, such disclosure being authorized by section 6104. 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, 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, Revenue Agent opens a separate bond examination to develop the bond issues. Revenue Agent also has concerns about the UBIT implications for the 501(c)(3) organization, as well as the potential application of section 150(b)(3) to the organization.

This is potentially the most difficult area 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 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 below:

- In the context of 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. I.R.C. § 6103(e), (h)(4)(A).
- In the context of the conduit borrower's examination, information from the conduit borrower's examination relating to the UBIT issue (as well as other information relating to the organization's section 501(c)(3) status) may be disclosed to the conduit borrower. I.R.C. § 6103(e), (h)(4)(A).
- In the context of the bond examination, the conduit borrower must obtain the issuer's consent (see sample consents at Appendices 1 and 2) 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 context of 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. I.R.C. § 6103(h)(4)(B), (C).
- In the context of 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. I.R.C. § 6103(h)(4)(B), (C).⁹

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

⁹ We have assumed that the issuer has no interest in the conduit borrower's potential UBIT liability. However, to the extent that such liability may arise in discussions where the issuer or its representatives may be present, consent from the conduit borrower should be obtained.

the bonds of the IRS' 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 thus could 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 cannot be disclosed to the issuer or other bondholders. See Martin v. IRS, 857 F.2d 722 (10th Cir. 1988) (information concerning audit of pre-TEFRA partnership return information of partnership and available to all partners--however, protest of individual partner is not partnership information and is not available to the other partners). However, factual information collected during an individual bondholder's audit, which relates to the bond issue, potentially could be disclosed to the issuer under section 6103(h)(4)(B) and/or (C) assuming the issuer's examination is ongoing.

G. Bond Counsel

Bond counsel would have the same right to tax information as their client (I.R.C. § 6103(e)(6), (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 (I.R.C. § 6103(k)(6)), or with the issuer's consent (I.R.C. § 6103(c)).

I. SEC 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. Disclosures to such 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. However, amalgamated information about the types and classes of cases the IRS is looking into, as well as statistical information, can be disclosed to any person as long as it does not directly or indirectly identify a particular taxpayer.

APPENDIX 1

**CONSENT TO DISCLOSURE OF
TAX INFORMATION**

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: _____

Date: _____

Treasury regulations require that the consent must be received by the Internal Revenue Service within sixty days after signing by the taxpayer.

Appendix 2

Form 8821 (Rev. January 2000) Department of the Treasury Internal Revenue Service	<h3 style="margin: 0;">Tax Information Authorization</h3> <p style="margin: 0; font-size: small;">▶ IF THIS AUTHORIZATION IS NOT SIGNED AND DATED, IT WILL BE RETURNED.</p>	OMB No. 1545-0045 For IRS Use Only Received by: Name _____ Telephone _____ Function _____ Date _____	
1 Taxpayer information. Taxpayer name(s) and address (please type or print)			
City of X 123 Municipal Plaza X, State 99999	Social security number(s) _____	Employer identification number 12 2456789	
	Daytime telephone number 000 444-3333	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"/>			
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.)
1999 City of X Industrial Development	Revenue Bonds	(XY% Project)	
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.) <input type="checkbox"/>			
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 <input type="checkbox"/> b If you do not want any copies of notices or communications sent to your appointee, check this box <input type="checkbox"/>			
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 <input type="checkbox"/> 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 _____ Mary Issuer Mayor Print Name Title (if applicable)	Signature _____ Date _____ _____ 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.	
For Privacy Act and Paperwork Reduction Act Notice, see page 2.		Cat. No. 11586P	Form 8821 (Rev. 1-2000)

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