

Department
of the
Treasury

Internal
Revenue
Service

Office of
Chief Counsel

Notice

CC-2012-017

September 13, 2012

Subject: Update to Procedures for Complying
with E-Discovery Obligations

Cancel Date: Upon incorporation
into the CCDM

Background

Since the Federal Rules of Civil Procedure were amended in 2006 to address directly how electronically stored information (ESI) should be handled in discovery, parties and courts have worked to establish practices and procedures to use in meeting the parties' legal obligations to produce relevant ESI. Chief Counsel Notice CC-2009-024, issued in August 2009, established procedures for attorneys in the Office of Chief Counsel to use in all cases in federal courts, and, when appropriate, in matters pending at the administrative level, in order to comply with the legal and ethical obligations regarding the discovery of ESI. Chief Counsel Notice CC-2009-024 was further supplemented by Chief Counsel Notice CC-2010-008, issued in May 2010, which acknowledged the changes to the Tax Court Rules of Practice and Procedure with regard to ESI. This notice supersedes Chief Counsel Notices CC-2009-024 and CC-2010-008.

The procedures described in this notice should not normally apply in Tax Court "S" cases because of both the informal procedures that ordinarily apply to these cases and the relatively routine nature of the issues raised in these cases. Similarly, these procedures should not normally apply to campus cases originating in the automated underreporting program (AUR) and the automated substitute for return program (ASFR) because there is unlikely to be any identifiable individual who has created or possesses ESI to whom to issue a litigation hold. With respect to "S" cases and AUR and ASFR cases, however, the managers, or the attorneys assigned to these cases in consultation with and the approval of their manager, should determine whether the ESI procedures described in this notice should be applied given the facts of the particular case, and any decision to forego these procedures should be documented in the legal file.

The procedures described in this notice also should not normally apply to cases handled by GLS involving labor, employment, procurement and contract at the administrative stage. With respect to these types of cases, managers, or the attorneys assigned to these cases in consultation with and the approval of their manager, should determine whether the ESI procedures described in this notice should be applied given the facts of the particular case, and any decision to forego these procedures should be documented in the legal file.

Distribute to: All Personnel
 Electronic Reading Room

Filename: CC-2012-017 File copy in: CC:FM:PM

There may be other cases when it may be appropriate to forego the litigation hold procedures described in this notice. Generally those cases would be cases when potentially relevant ESI either does not exist or is not reasonably accessible because of undue burden or cost. A manager, or an assigned attorney in consultation with and the approval of a manager, may determine based on the facts of a particular case that it is not necessary to implement a litigation hold in that case. A decision to forego the procedures, and the reasons why, must be documented in the legal file.

The demand for ESI in discovery continues to grow, and courts are becoming more knowledgeable and practiced in handling discovery disputes related to ESI. It is becoming increasingly clear that “a lack of familiarity and/or training in searching for and producing ESI” can be sanctionable. Seven Seas Cruises v. V. Ships Leisure SAM, 2011 WL 772855 (S.D. Fla. Feb. 19, 2011). The legal and ethical obligations to collect and preserve paper documents and files relevant to a case still exist, have not been overridden or overruled by the ESI-related discovery rules, and the discovery rules related to ESI should be seen only as an expansion of those long-standing paper-related rules.

Litigation Holds

Must be in Writing

All business units and functions within the Service and the Office of Chief Counsel have an obligation to preserve and retain all relevant ESI whenever litigation is reasonably anticipated or litigation has commenced. The obligation to issue a litigation hold applies to all cases in the federal courts, including the Tax Court, and should be considered in matters pending at the administrative level when, based on a good faith and reasonable evaluation of the facts and circumstances known at the time, the agency is on notice that future litigation can be reasonably anticipated. Accordingly, unless otherwise provided in this notice, written litigation hold notices must be issued at the earliest possible opportunity to key custodians of relevant information in electronic or paper form. A “key custodian” includes any person directly involved in the case or dispute, a person having custody of relevant records because of position or opportunity, and any other person who might be called to testify at the trial or hearing of the matter because of his or her knowledge of the matter in dispute. When the Service is or will be a plaintiff in litigation, a notice of a litigation hold should be issued no later than when a manager within the Office of Chief Counsel with the authority to authorize suit issues approval to proceed. When the Service is a defendant in litigation, the litigation hold procedures in this notice should be begun when a filed petition or complaint has been received by a manager for assignment to an attorney, *i.e.*, generally within twenty one business days after a filed petition or complaint is received by a manager for assignment to an attorney, as more fully discussed below.

Courts can impose sanctions when an attorney fails to issue a written litigation hold. While the standard for imposing sanctions remains in dispute,¹ it is not disputed that attorneys have an

¹ See Pension Committee v. Banc of America Securities, LLC., 685 F.Supp. 2d 456, 465 (S.D. N.Y. 2010) (“the failure to issue a written litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information”); Orbit One Commc’ns v. Numerex Corp., 271 F.R.D. 429, 440 (S.D. N.Y. 2010) (“The implication of Pension Committee, then, appears to be that at least some sanctions are warranted as long as any information was lost through the failure to follow proper preservation practices, even if there have been no showing that the information had discovery relevance...[i]f this is a fair reading of Pension Committee, then I respectfully disagree.”); Rimkus Consulting Group, Inc. v. Cammarata, 688 F.Supp. 2d 598, 617-620 (S.D. Tex. 2010) (rejecting the

ethical obligation to issue written litigation holds when litigation is reasonably anticipated or initiated.²

Attached to this notice is Exhibit 1, Notification E-Mail, to be used by attorneys to initiate a litigation hold. The purpose of a litigation hold notice is to get information out to key custodians about the fact of pending litigation (or that litigation is reasonably anticipated) and to allow those individuals to take measures to keep from deleting or destroying paper and electronic files in their possession or under their control that may be relevant to the case. A litigation hold notice is also a way to elicit information from these individuals about the type of information they have (e.g., e-mail, Word files, spreadsheets, and paper files related to the case). For regular Tax Court cases, when the nature of the adjustments in the statutory notices of deficiency at issue is routine, whether to take any action beyond issuing a litigation hold to key custodians informing them of pending litigation should be made on a case-by-case basis in consultation with a manager. Any decision to forego the procedures in this notice that is made after sending the litigation hold notice must be approved by a manager and documented in the legal file.

Key Custodians & Relevance

Counsel has an obligation to preserve and collect records – in paper and electronic form – from any key custodian likely to possess material relevant to the case as defined by the scope of discovery in the Federal Rules of Civil Procedure (including those rules as adopted for use in the U.S. Court of Federal Claims) and the Tax Court Rules of Practice and Procedure and as further discussed below. The Service point(s) of contact (discussed in Appendix A) should always be a key custodian. Litigation hold notices, therefore, should be sent to key custodians because these are the individuals most likely to have information subject to discovery and who are likely the individuals Counsel attorneys will rely on to build or defend their case. The universe of key custodians may include contractors or consultants acting on behalf of the Service, as well as employees in other parts of Treasury. A litigation hold is part of a dynamic process, not a static one, and additional key custodians may be added to the litigation hold to meet our obligations in a case as issues are developed and additional facts become known.

A litigation hold should not cover every person who had contact with a case, such as tangential contacts. For example, managers and executives who have only been advised on the status of a case need not be covered by a litigation hold. Attorneys, in conjunction with their managers, and in consultation with Division Counsel Headquarters and PA Attorneys when appropriate, are required to use reasonable judgment in determining the breadth and scope of a litigation hold in light of the relevance of the information a particular key custodian may possess or control. In making this determination, the likely scope of discovery in a case must be considered. Rule 26(b)(1) of the FRCP provides that parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense. Tax Court Rule 70 permits discovery concerning any matter not privileged and which is relevant to the subject matter involved in the case. Rule 401 of the Federal Rules of Evidence defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." As a result, a

"gross negligence" presumption due to Fifth Circuit precedent); see also Surowiec v. Capital Title Agency, Inc., 790 F.Supp. 2d 997, 1007 (D. Ariz. May 4, 2011) ("The Court disagrees with Pension Committee's holding that a failure to issue a litigation hold constitutes gross negligence per se. Per se rules are too inflexible for this factually complex area of the law....").

² See Model Rules of Professional Conduct 3.4(a).

litigation hold should be narrowly tailored to cover those individuals likely to have information that is relevant to any party's claim or defense in the case. See FRCP 26(b)(1). Narrowing the scope of a litigation hold to focus on what is likely relevant to the case reduces the compliance burden on Counsel and the Service and ultimately facilitates a productive discussion with an opposing party. It is also important to define the time frame in which relevant information was created. This time frame may vary by key custodian and will often end long before a court case is filed. Rarely will the time frame extend beyond the date a petition is filed in Tax Court or a complaint is filed in one of the other federal courts. In a very limited number of cases, however, when a new claim is made only in the petition or complaint or after suit has been filed, a litigation hold obligation may extend to a point in time beyond the filing date. In these cases, the attorney, in consultation with a manager, may request ESI created subsequent to the date the petition is filed in the Tax Court or a complaint is filed in federal court.

Cooperation

Determining what is relevant in a particular case cannot be done in a vacuum. In federal courts outside of the Tax Court, communication and cooperation about relevance and the scope of discovery should begin no later than the Rule 26(f) conference. To assist DOJ, assigned attorneys should provide DOJ the identities of those determined to be key custodians as soon as possible and information about the nature and type of information that is known to exist and that may be relevant to the case, e.g., examination files (paper and electronic), e-mails to and from an examination team, Word documents, Excel spreadsheets, and information maintained in RGS (a database used by examination personnel). This information should be clearly identified to DOJ in defense letters and suit letters and in subsequent communications to and discussions with DOJ if additional relevant information is identified. Armed with this information, DOJ attorneys will be prepared to discuss relevant ESI with opposing counsel with the intent of focusing and possibly narrowing the scope of discovery.

Similarly, in Tax Court, if ESI is a potential issue in a case, assigned attorneys should use the informal discussion and Branerton processes to discuss these same matters with petitioner or petitioner's counsel at the earliest appropriate opportunity. As part of that process, the information that is available and what we believe are the limits of discovery should be described in these informal discussions. The issue of what information is available may be raised in the initial Branerton letter or through informal discussions once the parameters of the limits of appropriate discovery in the case are determined.

Given the large amount of data that the Service may collect as part of a litigation hold process in a particular case, cooperation with petitioner or petitioner's counsel will also require the parties to discuss search terms to assist in searching ESI to narrow the amount of data to only that which is relevant. Courts have imposed a duty on parties to offer each other assistance in suggesting possible search terms, especially when a party knows that certain search terms are more likely to locate relevant material. This makes sense given that each party knows how their client conducts business. For example, people unfamiliar with the way the Service operates and the unique terminology the Service uses may need assistance with common abbreviations, internal references used to describe a type of case or tax matter, or other key words Service employees use that the opposing party may not be familiar with. This concept of cooperation is directed at reducing the burdens and costs of discovery and limiting discovery to only those materials that are relevant to the case.

In Tax Court cases, it is important that our attempts to cooperate and any lack of cooperation by the opposing party, including the insistence by the opposing party on overly broad search terms,

be documented in the legal file. In these situations, after attempts to agree to appropriate search terms have failed, a list of proposed search terms that will be used should be sent to the opposing party, unless an agreement is reached by a date certain. Written documentation describing our attempts to discuss ESI and other discovery matters with an opposing party may be needed to support or defend against a motion to compel.

Attached as Appendix A is a detailed description of the ESI Process that is to be followed. Also attached are exhibits to be used in complying with the ESI process described in this notice: Exhibit 1 - Notification E-Mail; Exhibit 2 - Litigation Hold Notice; Exhibit 3 - Litigation Hold Request for Collection & Preservation; Exhibit 4 - Transmittal of Search Terms; and Exhibit 5 - ESI Collection and Search Process.

Following each of the steps outlined is necessary to avoid both potential claims of spoliation and allegations of sanctionable conduct. Additionally, following these steps should substantially reduce our individual and collective burden with respect to the collection, preservation and review of relevant ESI that may be responsive to a discovery request.

PA Attorneys are available to assist in meeting all aspects of the Office's ESI-related obligations. Please contact Branch 6 at 202-622-7950 or Branch 7 at 202-622-4570 with any questions relating to discovery of ESI or discovery matters in general, including the discovery of paper or hard-copy records.

 /s/
Deborah A. Butler
Associate Chief Counsel
(Procedure & Administration)

Appendix A

The ESI Process

The ESI Process begins when the attorney first identifies the key custodians in a particular matter: those Service and Counsel employees most likely to have relevant information and the Service point of contact most familiar with the matter. A “suspense date” tracking event should be created and a date entered into the appropriate Chief Counsel database, such as TLCATS, to ensure that the assigned attorney has taken reasonable and timely steps to identify and preserve ESI. The “suspense date” should be initially set for twenty one business days after a filed petition or complaint is received by a manager for assignment to an attorney or, if earlier, when it is determined that litigation is reasonably anticipated.

Notification to Key Custodians

Once key custodians are identified, the e-mail notification in Exhibit 1 should be sent to the key custodians. This e-mail is intended to inform the recipient of impending or actual litigation, the obligation to preserve paper and electronic files related to the case, and the need to provide information in response to the e-mail regarding what type of ESI the key custodians created, possess, or control. The assigned attorney is responsible for issuing litigation hold notifications directly to those Counsel employees who may possess relevant ESI. Also, the assigned attorney must issue a litigation hold notification either to the identified Service point(s) of contact or directly to Service employees who may possess relevant ESI if a Service point of contact is not identified. The Service point of contact is the key custodian who is most familiar and involved in the case, and who would have knowledge about other Service or Counsel key custodians. There may be a need for more than one point of contact as there could be different organizations and program offices involved in a particular case each of which may involve an extensive number of employees. It also is possible that points of contact may need to include those within contractor or Treasury organizations. Attorneys also should be aware of the records retention schedules (I.R.M. 1.15 *et. seq.*) and may need to use the Service Records Officer, Area Records Manager or the Federal Records Center as a point of contact for the records of retired employees. If a key custodian responds affirmatively that the key custodian has ESI in programs other than email and Microsoft Office, additional information may be needed in order to conduct a search of the programs(s), application(s), system(s) or database(s) identified. In most instances, the taxpayer identification number and tax year(s) or period(s) at issue will be needed and should be provided where requested on the Exhibit 3, Litigation Hold Request for Collection and Preservation, that is submitted TSS4510 to assist PA in working with the IRS information technology office (IRS-IT) in the actual collection of the ESI.

Separated or Retired Employees

When a Counsel attorney or Service employee who worked on a case that is subject to these procedures but is no longer with Counsel’s office or the Service, the assigned attorney must contact the former employee’s manager to determine whether any ESI was created and where that ESI may now be located. The former employee’s manager should be able to answer basic questions regarding the types of applications and programs used by employees, as well as provide information as to the retention of ESI created by the former employee. These procedures should also be followed when an employee is not currently employed in the same capacity or location as when the ESI was created to ensure that all relevant ESI has been

identified and, to the extent possible, located. Similarly, if an attorney worked on a case subject to these procedures and is no longer with the Counsel's office, the assigned attorney should carefully review the former attorney's litigation-related files to identify any potentially relevant ESI. If, after review, the assigned attorney determines that the former attorney may have created or possessed ESI not contained in the former attorney's litigation-related files, the assigned attorney shall contact the former attorney's manager to determine where additional relevant ESI may be located. **If a litigation hold involves a recently separated employee or an employee scheduled to depart Counsel's office or the Service, immediately notify PA of the information relating to that employee so that IRS-IT may start the collection of ESI, even if Exhibit 3 is not otherwise ready to be sent to TSS4510.**

The Litigation Hold mailbox

When all the litigation hold notices (Exhibit 1) have been sent, a copy of Exhibit 2 should be completed and sent by email to the "Litigation Hold" e-mail address so that a central record of each case and each person subject to a litigation hold can be maintained by PA.

Request to TSS4510

Once the assigned attorney has compiled the information concerning who was involved in the matter and what type of information those employees have related to the case, a copy of Exhibit 3 should be completed and sent to TSS4510 along with a copy of the petition, complaint, defense letter, or referral letter. This step triggers the ESI data collection process. PA attorneys will work with IRS-IT and have a copy of all ESI from the key custodians identified in Exhibit 3 collected and preserved on a secure server. This collection effort does not relieve anyone of their obligation to maintain a litigation hold that has been put in place and to preserve any ESI they may have.

Search Terms and Production Alternatives

When the parties in litigation reach agreement on the search terms, the terms must be provided to TSS4510 using Exhibit 4, Transmittal of Search terms. PA and IRS-IT will apply these search terms against the ESI that has previously been collected and preserved on the secure server. Once this search process is complete, the requesting attorney will be provided access to the data that matched the search terms. Attorneys must review the data to ensure that the data is relevant to the case and must also redact or withhold privileged data and third-party return information, when appropriate, before responding to discovery in the Tax Court. With respect to DOJ-related litigation, the assigned attorneys must review the data to ensure that the data is relevant to the case and should discuss privilege claims and the existence of third-party return information with the assigned DOJ trial attorney, and produce the data to the DOJ trial attorney in a manner that is consistent with the ability to preserve any applicable privilege claims and the obligations to protect third-party return information under I.R.C. § 6103.

At this point, if it has not been discussed previously with the opposing party, Counsel attorneys or DOJ should discuss the manner in which the ESI will be provided, which can be accomplished in several different ways. ESI can be printed and provided in paper format, in Adobe .pdf files, in load files for popular litigation support software programs or, in some cases, it can be provided in its native format. One of the considerations in providing data in load files or native format is the need for or relevance of metadata. Metadata are hidden files attached to ESI that contain data that varies by the program that created the ESI but most often metadata contains information about the date of creation and revisions to the file. Discussions with

opposing counsel should include whether metadata is clearly relevant and, if it is not, production of metadata should be opposed based on its lack of relevance. If metadata is to be provided, that information must also be viewed and redacted or withheld in the same fashion as the other file(s) contents. See generally Lorraine v. Markel American Ins. Co., 241 F.R.D. 534, 547-548 (D. Md. 2007), for a description of the types of metadata fields that need to be considered when analyzing electronic records for discovery purposes.

Litigation Hold Reminder Notices

Until a litigation hold is lifted, the assigned attorney must routinely send an e-mail to key custodians who were identified as having ESI or are responsible for storing ESI that has been isolated to remind them of their continuing obligation to preserve the material. This reminder notification must be sent, at a minimum, every six months after the initial notification e-mail is sent to Counsel employees and the Service point of contact. The Service point of contact should be instructed to forward the reminder notification to all identified Service employees. To ensure the reminder notification e-mail has been received, the assigned attorney should inform the recipient of the obligation to respond within five business days acknowledging receipt of the e-mail and providing a brief statement as to whether the ESI remains preserved and unaltered and where the information is stored. If an individual does not respond within five business days, the assigned attorney shall resend the e-mail to the Counsel employee or Service point of contact with a copy to the employee's immediate manager. The Service point of contact should follow the same procedure if an identified Service employee does not respond within five business days. A "suspense date" reminder in TLCATS should be created every six months establishing a new reminder date six months hence to ensure the assigned attorney is aware of their obligation to send this reminder notice every six months.

Lifting the Litigation Hold

The Service will preserve all ESI collected following the process and procedures described in this notice until the litigation hold is lifted. The litigation hold must remain in effect until DOJ provides clear written notice that the hold can be lifted or, for those cases in the Tax Court, when the time for all appeals has expired. In cases when a litigation hold has been sent but no ESI collection has occurred, the litigation hold may be lifted after consultation with and approval by a manager. The litigation hold may be lifted as to some or all of the ESI depending on the proceedings in a given case. If the notice from the Department of Justice does not specify to what extent the litigation hold is lifted, the assigned attorney should seek clarification immediately. To lift the litigation hold, assigned attorneys should send an e-mail to the key custodians subject to the litigation hold informing them that the hold is being lifted and the information subject to the litigation hold can be retained pursuant to normal document retention policies. An e-mail should also be sent to TSS4510 to inform PA that the litigation hold can be lifted along with a copy of the decision, judgment or other document that shows how the case has been resolved. PA then will direct IRS-IT to delete the ESI preserved on its secure server.

Exhibit 1 — Notification E-Mail

[The Notification e-mail should be sent directly to Counsel employees and also to the identified Service point of contact. If the assigned attorney cannot identify an appropriate Service point of contact, the Initial Notification e-mail must be sent directly to those Service employees identified as being key custodians likely to have information relevant to this case to notify them of the litigation hold.]

Include the paragraph below if you are sending the Notification e-mail to an identified Service point of contact:

We have identified you as the appropriate Service point of contact regarding [name of case] [in which litigation is reasonably anticipated] [which is pending in _____ court]. The Service point of contact is the IRS employee who is most familiar with this case, and would have additional knowledge about other IRS employees that may also possess relevant electronically stored information (ESI) and/or paper files. As the Service point of contact, please forward the remainder of this e-mail to all Service employees who were directly involved and may possess potentially relevant ESI, and inform them of their obligation to ensure steps are put in place to preserve their paper and electronic records. Please be aware, you must also follow the litigation hold procedures outlined below for any relevant ESI you may possess regarding this matter.

Include the remaining language below to the Service point of contact, Counsel employees, and other Service employees you are contacting directly:

You are receiving this e-mail because you have been identified as a person may have potentially relevant information to the matter of [name of case] [in which litigation is reasonably anticipated] [which is pending in _____ court].

[Provide details regarding the nature of the litigation or anticipated litigation, including time periods involved and allegations or subject matter.]

Under the Federal Rules of Civil Procedure, the Service has an obligation to search, identify, preserve, and isolate all paper records and electronically stored information (ESI) potentially relevant to the above-described matter. Generally, ESI includes, but is not limited to: all e-mail and attachments; word processing documents, spreadsheets, graphics and presentation documents, images, text files, and other information stored on hard drives or removable media (e.g., desktops, portable thumb drives and CDs), meta-data, databases, instant messages, transaction logs, audio and video files, voicemail, webpages, computer logs, text messages, and backup and archived material.

Although we do not need you to gather the ESI at this time, please ensure that steps are put in place so that this information is preserved and not deleted. Under no circumstances should this information be destroyed until this matter is completed or a litigation hold is lifted.

Please provide an e-mail response to this e-mail **within seven business days**. In that e-mail, please also provide your SEID and indicate whether you created ESI of the following types while working on this case.

1. E-mail and attachments
2. Microsoft Office Suite documents (e.g., Word documents, Excel spreadsheets, PowerPoint presentations)
3. ESI maintained in any other program, application, system or database – please specify.

Please indicate in the e-mail the timeframe during which the ESI was created and your post of duty at the time you created the ESI. If you maintain a particular folder in your e-mail box or in your document folders related to this matter, please include the name of the folder(s) in your e-mail. Also, please indicate whether any of the ESI is maintained offline, that is, on any external drive or storage device (e.g., CDs or flash drives).

Also provide a brief description of the paper files or documents you have related to this case.

In addition, please provide a brief description of your involvement in the matter.

Once located, the ESI needs to be preserved and isolated. Preservation of ESI means that the ESI cannot be altered or destroyed and must be maintained in its native format throughout the duration of this matter. This means that all normal retention schedules related to the ESI have been suspended until such time as the ESI is isolated. ESI is isolated when a mirror image of the ESI in its native format is created and moved to a separate drive, CD, or server for storage for the duration of the litigation. This office will coordinate with the Service's IT personnel to have your ESI isolated and preserved. You should expect IT personnel to need access to your computer and any removable storage devices when they collect the ESI. In the meantime, do not alter or destroy the ESI. **The destruction of ESI could result in judicial sanctions against the agency.**

In the event you received this e-mail and, after a search of your records, you determine that you were not involved in any way in this matter (or you are not the appropriate Service point of contact), please provide an e-mail response to this e-mail **within seven business days** informing the sender you were not involved in the case or the subject matter involved in the suit.

If you have questions related to this e-mail, please contact the undersigned immediately.

Exhibit 2 — Litigation Hold Notice

The IRS is involved in a matter [in litigation, ____ v ____, case number ____ in the (United States District Court for the District of ____) (United States Tax Court) (United States Court of Federal Claims)] [in which litigation is anticipated involving _____]

CaseMIS Number: _____

A litigation hold notice has been issued in this case to the following Counsel and Service employees:

| Name of Employee | SEID |
|------------------|------|
| | |
| | |
| | |
| | |

Exhibit 3 — Litigation Hold Request for Collection & Preservation

TSS4510 – For assignment to CC:PA:6/7

The IRS is involved in a matter [in litigation, ____ v ____, case number ____ in the (United States District Court for the District of ____) (United States Tax Court)] [in which litigation is anticipated involving ____]. The Office of Chief Counsel has determined that a litigation hold should be implemented to suspend the retention schedule to prevent the destruction of ESI until such time as that information has been located and transferred in its native format for preservation. The Office of Chief Counsel is requesting a search be initiated by IRS-IT to locate, isolate, and store copies of the information in its native form requested below.

Type of Litigation: Tax Personnel Procurement Other

CaseMIS Number: _____

Requester's Information

Name:
Office
Telephone No.:
E-mail:

Alternative Contact

Name:
Office:
Telephone No.:
E-mail:

Exhibit 3 — Litigation Hold Request for Collection & Preservation

Page 2

Information Requested

If checked see attached list for additional information.

| Name of Employee | Employee's Position and Business Unit | SEID | Beginning and End Dates for when ESI Created | Post of Duty when ESI Created | Email | Microsoft Office Suite Files | Other Programs, Applications, Systems, or Databases (list systems to be searched) |
|------------------|---------------------------------------|------|--|-------------------------------|-------|------------------------------|---|
| | | | | | | | |
| | | | | | | | |
| | | | | | | | |
| | | | | | | | |

For other program(s), application(s), system(s) or database(s):

Taxpayer Identification Number (if applicable): _____

Tax Year(s) involved (if applicable): _____

Exhibit 4 — Transmittal of Search Terms

TSS4510 – For CC:PA:Branch 6/7

Case Name: _____

CaseMIS Number: _____

The search terms listed below were (check all that apply)

Coordinated with DOJ Coordinated with Opposing Counsel or Opponent

Not coordinated with Opposing Counsel or Opponent and the lack of cooperation is documented in writing

Please search the ESI for the following terms:

Please search for all of the above both individually and in all combinations.

Please also specifically search the following combination of terms:

Exhibit 5 — ESI Collection and Search Process

The Service and the Office of Chief Counsel maintain numerous computer systems which contain electronically stored information (ESI) that may be potentially relevant to a case in litigation. ESI in the form of e-mail and Microsoft Office Suite documents are common to all business units within Service and Chief Counsel. Each business unit creates ESI in systems that may be unique to that office (e.g., ACDS, AIMS, IMS, ICS, and RGS). The type of ESI that can be collected and searched is dependent on the system in which the ESI is maintained.

The Office of the Associate Chief Counsel (Procedure and Administration), in the Office of Chief Counsel, is the point of contact with the IRS information technology office (IRS-IT) for all litigation-related electronic discovery. The process of collecting and searching ESI can be labor intensive because IRS-IT currently has limited software tools to assist in this process. Most importantly, IRS-IT does not have the ability to search all ESI in place. This means that IRS-IT must collect ESI and upload it to the eDiscovery request (EDR) data repository in order to search the ESI for potentially relevant ESI related to a particular case.

The following is a description of how most ESI is collected and preserved, followed by a discussion of how the search is performed when a request is made to IRS-IT for a case, which is subject to the rules on electronic discovery.

E-mail

E-mail for Service and Chief Counsel employees is maintained in several locations. E-mail that is in the active mailbox (Inbox, Sent & Deleted items) is resident on multiple Microsoft exchange servers throughout the country. E-mail that is moved out of an employee's active mailbox to a personal folder is maintained in different locations, depending on whether the employee is in the Service or Chief Counsel. For Service employees, e-mail moved out of an employee's active mailbox to a personal folder is maintained only on the hard drive of that employee's computer. For Chief Counsel employees, e-mail moved out of an employee's active mailbox to a personal folder is maintained on a Chief Counsel network drive. Service and Chief Counsel employees may also have such e-mail stored on removable media, such as thumb drives or CDs.

To collect e-mail, IRS-IT copies all of the designated employee's e-mail located on the exchange servers. IRS-IT also copies all e-mail stored on an employee's hard drive, network drives, and any removable media. The Service currently has no ability to specify a specific date range when collecting e-mail. As a result, all e-mail in existence when IRS-IT collects from a designated employee is collected. This ESI can comprise many gigabytes of data. As part of the collection process, the entirety of this ESI is uploaded in native format to the EDR data repository.

User Created Files

User created files consisting of Microsoft Office Suite documents and other ESI created in desktop programs by Service and Chief Counsel employees are maintained on multiple network servers depending on the business unit and geographic location of the employee, and may also be maintained on a Service employee's workstation. The Service and Chief Counsel server platform locations are geographically distributed nationwide.

Similar to the collection of e-mail, IRS-IT collects all Microsoft Office Suite documents and other ESI created in desktop programs by copying all of the designated employee's ESI from the

employee's home directory, the employee's workstation, and any removable media. IRS-IT will also collect data from other networked locations when specified. That ESI also is uploaded in native format to the EDR data repository.

Other systems

In addition to e-mail and user created files, Service employees may create ESI using a number of other computer systems. These systems store information in a number of different ways. Information may be stored based on which employee created the data, on the TIN of the taxpayer, on the tax year, etc. In collecting data from these systems, it is not always possible to collect the data in native format because the system may use unique proprietary software such that the data output from the system cannot be read by any other system. In these situations, it is usually possible to output the ESI in another format, such as portable document format (pdf) or in a spreadsheet. Similar to the collection of e-mail and user created files, IRS-IT collects the identified ESI (either in native or output format) from these systems and uploads it to the EDR data repository.

Former Service employees

It is the current policy of the Service to sanitize (delete) all storage media, including computer hard drives, of former employees not later than 30 days after their departure from the Service in order for the computer equipment to be either passed on to a new employee or otherwise reused or donated. The policy for sanitation of storage media is set forth in I.R.M. Section 10.8.1.4.7.2. This is done routinely in the ordinary course of business when Service employees leave, and often in advance of the 30 day period described in the IRM. The only ESI that might be available from a former employee would be located on disaster recovery tapes, provided the employee left the Service within the retention period for the tapes. As discussed below, disaster recovery tapes will not be searched for ESI.

Disaster Recovery Tapes

Both the Service and Office of Chief Counsel maintain disaster recovery tapes for a period from 30 days to six months, depending on the system and the geographic unit. These disaster recovery tapes are merely snapshots of the exact moment in which they are made. The disaster recovery tapes are reused at the end of the 30 day to six month cycle, overwriting the earlier contents. If a current employee deleted e-mail from the employee's active mailbox or another document within the retention period for the disaster recovery tapes, it might be found on the disaster recovery tapes, provided it existed when the tape snapshot was taken. Case-specific litigation, however, is rarely ever anticipated or initiated within the retention period. And, because the disaster recovery tapes are mere snapshots, there is no way to determine whether a particular employee's e-mail would be on a specific tape or tapes. Further, the cost to interfere with normal business operations to mount these disaster recovery tapes to collect indeterminate data can be prohibitively expensive. As a result, we do not collect ESI from disaster recovery tapes.

Search

Once all the identified ESI is collected and located on the EDR data repository, it is searched using the search terms provided by the Office of Chief Counsel in the written request to IRS-IT. The search process is conducted by IRS-IT. Before IRS-IT can search the ESI, that office must obtain the encryption certificates relating to each custodian of the ESI. Using those

certificates, the encrypted data must be unencrypted and all of the ESI put into a format that can be searched (which may involve running optical character recognition software against certain of the ESI).

Once all of the ESI is in a format that can be searched, IRS-IT uses DT Search, a software tool, to run the search terms against the ESI. DT Search works much like any legal research in that it can use Boolean searches, proximity searches and wild cards. The ESI files that match the search terms provided by Chief Counsel are placed in a results folder. That results folder is made accessible to the requesting Chief Counsel attorney to review for relevance and for possible redaction for section 6103 and privileged information.