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To the Reader:

This reference book updates and supersedes the Disclosure Litigation and Reference Book last revised in April 2000. It covers the primary disclosure laws that affect the Internal Revenue Service (IRC §§ 6103 and 6110, the Freedom of Information Act (FOIA), and the Privacy Act of 1974), related statutes, and testimony authorization procedures. Together, these laws represent efforts by the Congress to strike a balance between a citizen's expectation of privacy and an open and effective government. Guidance on legal matters concerning these disclosure laws is provided by the Office of the Assistant Chief Counsel (Disclosure & Privacy Law). This office is also responsible for defending litigation filed pursuant to IRC §§ 6103 and 6110, the FOIA, and the Privacy Act.

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 Although this guide cites to "unpublished" cases by reference to the federal reporter's table citation followed by an applicable electronic or specialized reporter citation number, court rules often instruct that decisions a court has affirmatively designated not to be published should not be cited at all or only under severely limited circumstances.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 Before you cite a decision that the deciding court has labeled "unpublished" or "non-precedential" you should consult that court's rules on this point.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

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

CHAPTER 1

PART I: IRC § 6103 -- HISTORY AND OVERVIEW

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 Executive Branch essentially created all the rules regarding disclosure.

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 much of the executive discretion concerning the disclosure of tax information. With this second approach, Congress established a new statutory scheme under 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 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

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[1] Much of the information in this chapter was taken from *Report on Administrative Procedures of the Internal Revenue Service*, S. Doc. No. 94-266, 821-1028 (1975); Howard M. 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); Richard F. Janssen, *Income Tax Snooping Through History*, Wall St. J., May 6, 1970, at 18; and Mitchell Rogovin, *Privacy and Income Tax Returns*, The Wash. Post, Oct. 13, 1974, at C4.

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

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

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

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

1. 1866 - 1913

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

In 1870, the Commissioner prohibited newspaper publication of the annual list of assessments, but the list itself remained available for public inspection.[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] 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

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[3] Treasury Decision (Apr. 5, 1870).

[4] Act of July 14, 1870, ch. 255, 16 Stat. 256, 259.

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

[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

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 were open to public inspection.[8] Many believed that public inspection of corporate tax returns would be of great assistance in the supervision and control of corporate entities. There was considerable fear of the power of corporations at that time.

The contrary 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]

Although there was disagreement over what was intended by the 1909 legislation, it was universally conceded that it altogether failed to open corporate returns to the public. Some blame this result on poor draftsmanship. Others thought the failure lay in lack of an appropriation to

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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).

[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).

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 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.

2. Revenue Act of 1913

Even though the statute seemed to have two rather inconsistent threads, Congress wove both of them into the Revenue 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.

[10] Act of June 17, 1910, ch. 197, 36 Stat. 468, 494.

[11] Revenue Act of 1913, ch. 16, 38 Stat. 114.

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 - 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:

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

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

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

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 suggested:

[12] Mitchell Rogovin, *Privacy and Income Tax Returns*, The Wash. Post (Oct. 13, 1974), at C4.

> 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.[13]

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

> as soon as practicable in each year cause to be prepared and made available to public inspection . . . lists containing the name and . . . address of each person making an income tax return . . . together with the amount of income tax paid by such person.[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 a provision for the mandatory filing of a so-called "pink slip" with the taxpayer's return.[18] The pink slip was to set forth the taxpayer's gross income, total deductions, net income and tax payable. The pink slip was to be open to public inspection. Fueled by images of kidnappers sifting through pink slips looking for worthwhile victims, the provision was repealed even before it took effect.[19]

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[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.

[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 (1975).

[17] Act of Feb. 26, 1926, ch. 27, 44 Stat. 9, 51-2.

[18] Revenue Act of 1934, ch. 277, 48 Stat. 680, 698.

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

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

C. Disclosure to Government Agencies

Although corporate returns were, in 1910, made available to the public, as well as to other government agencies, individual returns were kept within Treasury until 1920. In 1920, individual returns joined corporate returns as being generally available to federal agencies.[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 ceded discretion to the President and an agency headed by his designee, the expanded uses of tax information was not surprising. Indeed, it would have been unrealistic to expect the President to resist agency arguments for access to more information on which to base important decisions even though such information might be neither necessary nor used for their originally intended purposes.

E. Developments in the 1970's

By the mid 1970's, Congress became increasingly concerned about the disclosure and use of information gathered from and about citizens by federal agencies.[21] The events leading to the revision of the tax disclosure laws in 1976 can, however, be directly traced to Executive Orders 11697[22] and 11709,[23]

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[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] 38 C.F.R. 6888 (Jan. 17, 1973).

issued by President Richard M. Nixon authorizing the Department of Agriculture to inspect the tax returns of all farmers "for statistical purposes."

In 1973, two subcommittees of the House of Representatives held hearings regarding the Department of Agriculture's need for the tax data disclosed under the authority of the two executive orders.[24] During these hearings, sentiments against the orders were expressed. Officers of the Department of Justice testified that the two orders were prototypes for future orders opening other tax returns to inspection by other agencies. Responding to the adverse sentiment expressed in these hearings, the President revoked both on March 21, 1974.[25]

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

The House Judiciary Committee investigating the possible impeachment of President Nixon learned of 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:[26]

> 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 and suggest restrictions on the disclosure of federal income tax

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[23] 38 C.F.R. 13317 (Mar. 27, 1973) (superseding Exec. Order No. 11,697, narrowing the scope of the return information to be made available to the Department of Agriculture).

[24] *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).

[25] Exec. Order 11,773, 39 C.F.R. 10881 (Mar. 21 1974).

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

information. This report, issued on June 9, 1976, recommended major changes in the disclosure of tax data. On June 10, 1976, the Senate Finance Committee issued its report on H.R. 10612, the Tax Reform Act of 1976, in which it, too, proposed substantial revisions in the rules governing tax return confidentiality.[27] The Committee's proposal dealt with the same general issues as had the Privacy Protection Study Commission, but it resolved them differently. With few technical changes, the Conference Committee on H.R. 10612 adopted the Senate Finance Committee's version of the tax confidentiality rules as part of the Tax Reform Act of 1976.[28]

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 understood that citizens reasonably expected the IRS would protect the privacy of the tax information they were required to supply. If the IRS abused that reasonable expectation of privacy, the resulting loss of public confidence could seriously impair the tax system.

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

Ultimately, Congress amended section 6103 to provide that tax returns and return information are confidential and are not subject to disclosure, except in the limited situations delineated by the Internal Revenue Code. In each area of authorized disclosure, Congress attempted to balance the particular office or agency's need for the information with the citizen's right to privacy, as well as the impact of the disclosure upon continued compliance with the voluntary tax

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

[28] Pub. L. No. 94-455, 90 Stat. 1520.

assessment system.[29] In short, Congress undertook direct responsibility for determining the types and manner of permissible disclosures.

B. Structure of Tax Information Confidentiality Provisions

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

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

- The exceptions to the general rule, detailing permissible disclosures. IRC § 6103(c) – (o).

- Technical, administrative, and physical safeguard provisions to prohibit recipients of tax information from using or disclosing the information in an unauthorized manner, and accounting, recordkeeping, and reporting requirements that detail the purposes for which certain disclosures were made to assist in congressional oversight. IRC § 6103(p).

- Criminal penalties, including a felony for the willful unauthorized disclosure of tax information and a civil cause of action for the taxpayer whose information has been inspected or disclosed in a manner not authorized by section 6103. IRC §§ 7213 (criminal penalty for unauthorized disclosure) and 7431 (civil damages provision). [30]

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[29] 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.

[30] The Taxpayer Browsing Protection Act of 1997 created a misdemeanor for the unauthorized inspection of tax information (section 7213A). In addition, in 1996, Public Law 104-294 provided that the unauthorized access of tax information in government computer files is a felony under 18 U.S.C. § 1030(a)(2)(B). *See* Chapter 1, Part III.

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

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

1. Congress

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

The Ways and Means and Finance committees, as well as the Joint Committee on Taxation (JCT), can have access upon the written request of the respective chairman or the Chief of Staff of the JCT. The nontax committees may 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 its behalf 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 request or authorization is obtained from the taxpayer. Chapter 4 of the IRM section on Disclosure of Official Information, IRM 11.3.4, contains further instructions concerning disclosures in response to congressional inquiries.

2. White House

The IRS may disclose tax information to the President and/or to certain named employees of the White House upon the written request of the President, signed by the President personally. A request 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 White House is required to report quarterly to Congress regarding the disclosures of tax information made to it. Similarly, federal agencies are required to report on tax checks.

3. Nontax Civil Cases

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

4. General Accounting Office (GAO)

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

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

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

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

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

5. Inspector General

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

6. Statistical Use

Congress recognized the importance of tax information for other federal agencies' statistical and research functions. Congress decided that tax information should be available for statistical use by certain agencies other than the IRS because there did not appear to be any real likelihood that the use of 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 taxpayers.

7. Disclosures for Federal Programs

Section 6103 permits limited disclosures to a number of agencies in defined 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 section 103(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. Recordkeeping

Section 6103 requires the IRS to maintain a standardized system of permanent records about 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 disclosures to: the general public (accepted offers in compromise, the amounts of outstanding tax liens, etc.); Treasury (including IRS) employees or the Department of Justice for tax administration and litigation purposes; persons with a material interest; persons upon the taxpayer's written consent; the media (taxpayer identity information for unclaimed refunds); and disclosures to contractors that perform tax administration functions.

In addition to the recordkeeping 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 about the use and disclosure of that information. Maintaining such records is a prerequisite to obtaining and continuing to receive tax information.

9. Safeguards

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

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

10. 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 closely review the use of tax information and the extent to which taxpayer privacy is being protected. In order to

permit that review, Congress requires the IRS to make comprehensive annual reports to the JCT as to the use of tax information.

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

11. Enforcement

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

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

Congress amended section 7213 to make a 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 includes the unauthorized access of tax information in government computer files. In 1997, Congress enacted section 7213A to specifically make the unauthorized inspection of tax information, whether in paper or computer files, a misdemeanor.

Before 1982, section 7217 provided civil remedies against individual employees for unauthorized disclosures of tax information. Because legitimate conduct was stifled, Congress amended the law and enacted section 7431 establishing a civil remedy against the United States for any taxpayer damaged by an unlawful disclosure of tax information by federal employees. Because of the difficulty in establishing actual monetary damages sustained by a taxpayer as the result of the invasion of privacy caused by an unlawful disclosure of tax information, section 7431

provides for no less than liquidated damages of $1,000 for each unauthorized disclosure. In the alternative, liability extends to actual damages plus court costs. The statute also provides for punitive damages in addition to actual damages in situations where the unlawful disclosure is willful or is the result of gross negligence.

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

12. Miscellaneous Disclosure Authority[31]

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

- 274(h)(6) - Caribbean Basin exchange agreements
- 3406 – backup withholding
- 4424 - wagering tax information
- 6104 - exempt organizations and employee plans information
- 6105 - tax convention information
- 6108 - statistical studies
- 6110 - written determinations (letter rulings, determination letters, technical advice memoranda, and Chief Counsel advice)
- 6323(f) - notice of federal tax lien
- 7461 - publicity of Tax Court proceedings

See also Chapter I, part II, § VI.

[31] Many of these code sections were added either before or after the Tax Reform Act of 1976.

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 JCT conduct studies on the provisions regarding taxpayer confidentiality. The studies were to examine the present protections for taxpayer privacy, any need for third parties to use tax information, whether publicizing the names of 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 JCT 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). Treasury published its study on October 2, 2002, and it is available on the Department of Treasury website at http://www.treas.gov/offices/tax-policy/library/confide.pdf. These are the first comprehensive reviews of the Code disclosure provisions since the 1976 amendments. Both studies generally endorsed the structure and approach of the current statute, but differ most significantly on the role of contractors' receipt and use of tax information.

IV. CONCLUSION

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

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

There is probably no other government agency having as much contact with as many citizens as the IRS in the course of carrying out its responsibility of collecting the revenue. As a result, a vast majority of our records are confidential in the very real sense that they represent information the American people have provided to their government in confidence. The confidential nature of these records requires that each request for information be evaluated in the light of a considerable body of law and regulations 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 performing our official duties.

PART II: IRC § 7431 - CIVIL DAMAGES FOR UNAUTHORIZED INSPECTION AND DISCLOSURE

I. CAUSE OF ACTION

A. Background

As discussed in Part I, in 1982, section 7431 replaced section 7217. *See* Compro-Tax, Inc. v. IRS, 1999 WL 501014, at *5 (S.D. Tex. May 12, 1999) (magistrate judge recommended dismissal of suit brought under repealed section 7217; court did not read section 7217 claim as a section 7431 claim and advised plaintiffs to amend complaint). The purpose of this amendment was to substitute the United States, rather than individual employees, as the proper defendant in an unauthorized disclosure action arising from the conduct of a federal employee. *See* Part V.A., proper party defendant.

In 1997, section 7431 was amended by the Taxpayer Browsing Protection Act to specifically make damages available for the unauthorized inspection of returns and return information. The Act also added subsection 7431(e) which requires the notification of the taxpayer when any person is criminally charged by indictment or information with the offenses of unauthorized inspection or disclosure of that taxpayer's return or return information in violation of section 7213(a), section 7213A, or 18 U.S.C. § 1030(a)(2)(B).

B. Elements of Claim

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

1. Sharer v. United States, 1999 WL 671010, at *2 (E.D. Cal. Feb. 12, 1999) (plaintiff bears burden of proving unauthorized disclosure of return information).

2. Tobin v. Troutman et al., 1999 WL 501004, at **4-5 (W.D. Ky. Jun. 8, 1999) (plaintiff failed to state a claim under section 7431 where the information allegedly inspected was retained copies of the taxpayer's returns and workpapers in the taxpayer's home; citing Stokwitz v. United States, 831 F.2d 893 (9th Cir. 1987), *cert den.*, 485 U.S. 1033 (1988), court ruled the information was not return information because it had not been received by the IRS).

3. Weiner v. IRS, 789 F. Supp. 655, 656 (S.D.N.Y. 1992) (plaintiff must show (1) that the disclosure was unauthorized; (2) that the disclosure was made knowingly or by reason of negligence; and (3) that the disclosure was in violation of section 6103), *aff'd,* 986 F.2d 12 (2d Cir. 1993).

4. Wilkerson v. United States, 67 F.3d 112, 115 (5th Cir. 1995) (section 7431 claim requires plaintiff to prove that the IRS disclosed confidential tax return information either knowingly or negligently and that this disclosure was not authorized by section 6103).

> **Note**: The analysis for determining whether an unauthorized disclosure has occurred is as follows:
>
> a. Was there a disclosure of returns or return information? *See* Baskin v. United States, 135 F.3d 338, 342-43 (5th Cir. 1998) (IRS special agent's possession and transfer of data to the local police while on temporary assignment to the grand jury did not make the data disclosed "return information" for purposes of section 6103); Stokwitz v. United States, 831 F.2d at 896 (disclosure of the taxpayer's retained copies of returns did not violate section 6103 because the returns did not pass through the IRS).
>
> b. Was the return or return information disclosed that of the plaintiff/taxpayer? *See* Part V.J., Standing.
>
> c. Was the disclosure authorized by some provision in title 26?
>
> d. Was the disclosure made knowingly or negligently? *See* Weiner v. IRS, 789 F. Supp. 655, 656 (S.D. N.Y. 1992) (to hold IRS liable for disclosure through levy resulting from computer error would hold IRS to higher standard than Congress intended in enacting statute); Messinger v. United States, 769 F. Supp. 935, 940 (D. Md. 1991) (mere showing of unauthorized disclosure insufficient to demonstrate negligence, *rejecting* Husby v.United States, 672 F. Supp. 442 (N.D. Cal. 1987), which held that the fact that an unauthorized disclosure was made is prima facie case for section 7431); Christensen v. United States, 733 F. Supp. 844, 854 (D. N.J. 1990) (disclosure resulting from ministerial computer error does not rise to negligence); Timmerman v. Swenson, 1979 U.S. Dist. LEXIS 10172 (D. Minn. Aug. 27,

1979) (under section 7217, court applying duty of due care negligence standard determined that IRS was not negligent when it sent levy to bank as result of clerical error).

II. GOOD FAITH DEFENSE UNDER IRC § 7431(b)

A. Statutory provision

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

B. Case law

1. Agbanc v. United States, No. 87-383 (D. Ariz. 1988) (error by Revenue Agent in sending out wrong report did not occur as a result of a good faith, but erroneous, interpretation of section 6103, but as a result of negligence).

2. Balanced Financial Management, Inc. v. Fay, 662 F. Supp. 100, 106 (D. Utah 1987) (prefiling notification letters issued in compliance with revenue procedure were sent in good faith).

3. Barrett v. United States, 51 F.3d 475, 480 (5th Cir. 1995) (court was not persuaded by the record of testimony at trial that it was necessary to reveal the fact of criminal investigation in circular letters sent to plaintiff's patients; because the special agent did not review section 6103 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). *Compare* May v. United States, 1995 WL 761107, at *6 (W.D. Mo. Oct. 5, 1995) (because letters conformed to IRM provisions, disclosures fell

within section 7431(b) good faith provision), *aff'd,* 141 F.3d 1169 , 1998 WL 71545 (8th Cir. Feb. 23, 1998), *cert. denied*, 525 U.S. 783 (1998).

4. Datamatic Services Corp. v. United States, 1987 WL 28603, at **4-5 (N.D. Cal. Dec. 18, 1987) (because prefiling notification letters followed revenue procedure, good faith defense was available).

5. Diamond v. United States, 944 F.2d 431, 435 (8th Cir. 1991) (although it was improper for special agent to identify himself as an employee of the Criminal Investigation Division in circular letters that he sent to doctor's patients, no liability found because he had followed the IRM).

6. Gandy v. United States, 234 F.3d 281, 286-87 (5th Cir. 2000) (court skipped determination of whether an unauthorized disclosure had occurred, but instead found no liability because agents acted in good faith belief that IRM and section 6103 permitted disclosure; in dicta, court stated that special agents are permitted to show their badges and credentials when conducting third party interviews).

7. Harris v. United States, 35 Fed. Appx. 390, 89 A.F.T.R.2d 2002-2687 (5th Cir. 2002) (affirming lower court finding that revenue officer who disclosed that the plaintiffs had a judgment filed against them for a specific amount had acted in a good faith belief that the disclosure was permitted as a disclosure of information in the public record), *cert. denied*, 538 U.S. 922 (2003).

8. Huckaby v. United States, 794 F.2d 1041, 1049, *reh'g denied, clarified,* 804 F.2d 297 (5th Cir. 1986) (revenue officer disclosed return information based upon taxpayer's oral consent; court found that section 6103(c) requires a written consent and because the statute and regulations were clear and revenue officer's failure to follow them could not be a good faith, but erroneous, interpretation of section 6103).

9. Husby v. United States, 672 F. Supp. 442, 445 (N.D. Cal. 1987) (good faith defense applies only to good faith, but erroneous, interpretations of section 6103, not to general defense of good faith errors in deficiency assessments and subsequent collection activities).

10. Ingham v. United States, 167 F.3d 1240, 1245-46 (9th Cir. 1999) (without deciding whether disclosure to man that former wife had filed for a refund was authorized by section 6103(h)(4), government was protected by good faith defense because the IRM instructed agents that such disclosure was permitted).

11. Johnson v. Sawyer, 640 F. Supp. 1126, 1134 (S.D. Tex. 1986) (subsequent history omitted) (public affairs officer failed to contact AUSA, as required by district guidelines, before issuing press release which contained return information; under predecessor to section 7431, failure to follow established procedures formed basis for finding of bad faith).

12. Jones v. United States, 954 F. Supp. 191, 192 (D. Neb. 1997) (special agent who did not consult either IRM or Code before disclosing to a confidential informant that a search warrant was to be executed the following day at taxpayers' place of business failed to establish a good faith, but erroneous, interpretation of the statute).

13. LeBaron v. United States, 794 F. Supp. 947, 953-54 (C.D. Cal. 1992) (citing Huckaby, found nothing in the statute, case law, or IRS policies or regulations to suggest that the IRS personnel who made the disclosure had interpreted section 6103 in an objectively unreasonable manner).

14. McLarty v. United States, 741 F. Supp. 751, 756-58 (D. Minn. 1990), *on reconsideration*, 784 F. Supp. 1401, 1404 (D. Minn. 1991) (initially adopted a test that contained both objective and subjective components for judging good faith defense; following Diamond, issued a subsequent opinion adopting objective standard (*i.e.*, did wrongful disclosure of the plaintiff's return information violate a clearly established statutory right of which a reasonable person would have known), and found that IRS agent and AUSA were presumed to know, as a general matter, that it is improper to disclose return information), *aff'd*, 6 F.3d 545 (8th Cir. 1993).

15. Payne v. United States, 289 F.3d 377, 385 (5th Cir. 2002) (district court did not have the benefit of the court's decision in Gandy; reversed plaintiff's $1.5 million judgment and remanded for the district court to apply the Gandy rationale).

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

16. Rhodes v. United States, 903 F. Supp. 819, 826 (M.D. Pa. 1995) (upon reconsideration, rejected the Fifth and Eighth Circuits' reasoning in Barrett and Diamond, respectively, that disclosure of the fact of criminal investigation was not "necessary" to obtain information sought; 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?").

17. Rorex v. Traynor, 771 F.2d 383, 387 (8th Cir. 1985) (taxpayers entered into installment payment plan, which was subsequently disallowed by revenue officer's manager and revenue officer failed to notify taxpayers of disallowance and served a notice of levy on the taxpayers' bank; court, using an objective standard, found that a reasonable person would have known that he was violating the taxpayers' rights under section 6103).

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

18. Ryan v. United States, 1998 WL 919881, at **3-4 (D. Md. Jul. 30, 1998) (although disclosure was permitted under section 6103(h)(4), also held that the disclosure was made with the good faith belief that section 6103 permitted it because it was a "close call").

19. Rubel v. United States, 1988 WL 167270, at *6 (W.D.N.C. Aug. 26, 1988) (government officials acted in good faith in issuing press release).

20. Schachter v. United States, 866 F. Supp. 1273, 1275 (N.D. Cal. 1994) (circular letters were sent to present and former customers of taxpayers' company and IRM in effect at the time recommended that special agents state that the taxpayer was "under investigation" and instructed special agents to identify themselves in personal interviews by showing their badge and credentials; agent and IRS acted in good faith because, based on these provisions, a reasonable special agent would not have known that he should not have disclosed that taxpayer was under investigation), *aff'd*, 77 F.3d 490 (9th Cir. 1996).

21. Smith v. United States, 703 F. Supp. 1344, 1348 (C.D. Ill. 1989) (District Director's disclosures to Illinois Department of Revenue did not follow the procedures set forth in the Implementing Agreement, and therefore violated section 6103(d); moreover, the District Director was "no stranger to the disclosure provisions" and under the Huckaby objective standard, lacked good faith), *aff'd in part & rev'd in part*, 964 F.2d 630, 635 (7th Cir. 1992) (not addressing the good faith issue, the Agreement on Coordination satisfied section 6103(d)'s written request requirement and,

therefore, the disclosure was authorized), *cert. denied,* 506 U.S. 1067 (1993).

22. Traxler v. United States, 1988 WL 149358, at *5 (E.D. Cal. Nov. 23, 1988) (even if deficiency assessment was unauthorized, there would be no liability because of the good faith exception and compliance with section 6103(k)(6)).

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

III. DAMAGES FOR UNAUTHORIZED DISCLOSURE AND INSPECTION

The statute provides two damage computations. A prevailing plaintiff may recover the costs of the action plus the greater of (1) statutory damages of $1,000 for each act of unauthorized inspection or disclosure or (2) the sum of actual damages plus, in the case of a willful inspection or disclosure or an inspection or disclosure resulting from gross negligence, punitive damages. 26 U.S.C. § 7431(c).

A. Statutory damages

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

1. Barrett v. United States, 917 F. Supp. 493, 502 (S.D. Tex. 1995) *after remand from* 51 F.3d 475 (5th Cir. 1995) (subsequent history omitted) (after finding of liability, plaintiff entitled to statutory damages in the amount of $260,000.00, based on the number of patients it was presumed received circular letters from the IRS in absence of proof that they had not received the letters).

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).

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

3. Johnson v. Sawyer, 640 F. Supp. 1126, 1136 (S.D. Tex. 1986) (subsequent history omitted) (damages for unauthorized disclosures of a press release determined by number of media outlets sent the document, not number of media persons who may have actually read it - "the degree of a violator's punishment should turn upon a factor within the violator's knowledge and control (*e.g.*, the number of media outlets receiving the release) rather than a factor outside her knowledge or control (*e.g.*, the number of employees each of those outlets happens to allow to read the release)").

4. Mallas v. United States, 993 F.2d 1111, 1125 (4th Cir. 1993) (single envelope addressed to two named persons in single letter constituted two disclosures).

5. Marré v. United States, 1992 WL 240527, at *2 (S.D. Tex. Jun. 22, 1992) (a single communication cannot be split into pieces to create multiple disclosures, nor does disclosure of the same information to the same person on multiple occasions constitute multiple disclosures), *aff'd in part on other grounds, modified in part on other grounds, vacated in part on other grounds*, 38 F.3d 823 (5th Cir. 1994).

6. Miller v. United States, 66 F.3d 220, 224 (9th Cir. 1995) (limiting damages to $1,000 and rejecting taxpayer's argument that statutory damages for unauthorized disclosure to a newspaper reporter should be calculated by reference to number of potential readers, "in modern era of mass communication, strong public policy concerns exist for not allowing this form of second party dissemination to be actionable," and disclosure to person(s) likely to publish the information is relevant only in determining degree of negligence or recklessness involved, *not* number of disclosures), *cert. den.*, 517 U.S. 1103 (1996).

7. Rorex v. Traynor, 771 F.2d 383, 385 (8th Cir. 1985) (although levy contained multiple items of return information, court awarded $1,000 because only one levy was issued).

8. Siddiqui v. United States, 395 F.3d 1200, 1201, 2004 WL 421946 (9th Cir. Mar. 9, 2004) (act of disclosure, not size of the audience that is counted for purposes of statutory damages), *aff'g*, 217 F. Supp.2d 985, 989-91 (D. Ariz. 2002).

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

Successful plaintiffs rarely recover actual damages due to the difficulty of establishing losses based upon the disclosure of tax information.

1. Jones v. United States, 9 F.Supp.2d 1119, 1140 (D. Neb. 1998) (common law elements of causation must be proven to recover actual damages, *i.e.*, "but for" the disclosure the harm would not have occurred and the harm was the foreseeable result of the disclosure - plaintiffs could recover for economic losses of operating business, damages from sale of real and personal property, and emotional distress).

2. Wilkerson v. United States, No. 3:92 CV 78 (E.D. Tex. May 16, 1994) (plaintiff awarded $229,547.19 based primarily upon the value of her business, "which was effectively destroyed by the unauthorized disclosures" in levies), *rev'd on other grounds*, 67 F.3d 112 (5th Cir. 1995).

B. Emotional distress

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

1. Jones v. United States, 9 F. Supp. 2d 1119, 1149 (D. Neb. 1998) (plaintiffs entitled to emotional distress damages when they demonstrate out of pocket damages).

2. Rorex v. Traynor, 771 F.2d at 387-88. (taxpayers were awarded $15,000 each for emotional suffering, however, on appeal, the Eighth Circuit found that plaintiffs had produced no evidence of emotional distress other than personal embarrassment and the court did not believe that "hurt feelings alone constitute actual damages compensable under the statute").

3. Schipper v. United States, 1998 WL 786451, at **10-11 (E.D. N.Y. Sept. 15, 1998) (plaintiff awarded damages for physiological symptoms suffered as a result of the humiliation of coworkers knowing about difficulties with unauthorized disclosures made in the course of unlawful levies).

4. Wilkerson v. United States, 67 F.3d 112, 117-18 (5th Cir. 1995) (reversing award of $20,000 for emotional distress upon a determination that no unauthorized disclosure had occurred through the issuance of an invalid levy).

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

damages in absence of actual damages, Privacy Act requires proof of actual damages, however minimal, to qualify for minimum damage award).

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

In 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; Lane, 518 U.S. at 193. Accordingly, a damage award against the United States must be limited to only so much as is authorized by the statute waiving sovereign immunity, and if the statute does not clearly provide for recovery for emotional distress, recovery should not be awarded.

> **Note:** Section 7433, which was added to the Code in 1988 and provides for civil damages for unauthorized collection activity, provides only for "actual, direct economic damages" plus the costs of the action.

C. Punitive Damages

1. Barrett v. United States, 917 F. Supp. 493, 503 (S.D. Tex. 1995) (no punitive damages because (1) disclosures were not willful or grossly negligent and (2) statutory language of section 7431(c) precludes award of punitive damages where actual damages not proven, which is consistent with the common law tort rule), *aff'd,* 100 F.3d 35 (5th Cir. 1996).

2. Mallas v. United States, 993 F.2d 1111, 1125 (4th Cir. 1993) (taxpayer may recover punitive damages *in excess and instead of* statutory damages, not *in addition to* statutory damages, even if the actual damages are zero).

3. Marré v. United States, 1992 WL 240527, at *4 n.2 ("Though we take a decidedly dim view of [the agent's] actions, we are precluded from granting punitive damages without an award of actual damages"), *aff'd on other grounds*, 38 F.3d at 826-27 (without deciding whether district court was correct, found special agent's conduct was not so egregious as to warrant punitive damages).

4. Mid-South Music Corp. v. United States, Civ. No. 3-83-0602 (M.D. Tenn. Sept. 24, 1985) ($174,000 in statutory damages, plus $1,000 in punitive damages awarded), *rev'd*, 818 F.2d 536 (6th Cir. 1987) (no liability where the IRS disclosed taxpayers own information to taxpayer).

5. William E. Schrambling Accountancy Corp. v. United States, 689 F. Supp 1001, 1008 (N.D. Cal. 1988) (punitive damages are not available unless plaintiff proves actual damage), *rev'd on other grounds*, 937 F.2d 1485 (9th Cir. 1991), *cert. denied*, 502 U.S. 1066 (1992).

6. Siddiqui v. United States, 395 F.3d at 1200, 1202 (no punitive damages without proof of actual damages).

7. Smith v. United States, 730 F, Supp. 948, 954-55 (C.D. Ill. 1990) (criticizing the district court in Mid-South Music, punitive damages not available in the absence of actual damages), *rev'd on other grounds*, 964 F.2d 630 (7th Cir. 1992), *cert. den.*, 506 U.S. 1067 (1993).

IV. ATTORNEYS FEES IN IRC § 7431 ACTIONS

Section 7431(c) provides that the plaintiff may recover

> (2) the cost of the action, plus (3) in the case of a plaintiff which is described in section 7430(c)(4)(A)(ii) [meets the requirements of 28 U.S.C. § 2412(d)(1)(B), *i.e.*, by submitting request within 30 days showing entitlement], reasonable attorneys fees, except that if the defendant is the United States, reasonable attorneys fees may be awarded only if the plaintiff is the prevailing party (as determined under section 7430(c)(4)).

To be considered the prevailing party under section 7430, plaintiffs must establish (1) that the position of the United States is not substantially justified,

and (2) that they have prevailed with respect to the amount in controversy or with respect to the most significant issue presented. IRC § 7430(c)(4).[32]

V. OTHER ISSUES IN IRC § 7431 ACTIONS

A. Proper Party

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

1. Adelman v. Discover Card Services, 915 F. Supp. 1163, 1165 (D. Utah 1996) (rejecting argument that United States was liable because of special relationship between state agency and federal government, no liability where a state employee accessed plaintiff's files and disclosed confidential tax records).

2. Diamond v. United States, 944 F.2d 431, 432 (8th Cir. 1991) (United States is the only proper party defendant even though special agent's actions formed the basis for the unauthorized disclosure action).

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

4. Hassell v. United States, 203 F.R.D. 241, 244 (N.D. Tex. 1999) (even assuming IRS employees made unauthorized disclosures of return information, the claim is against the United States, not individual employees).

5. Henkell v. United States, 1998 WL 41565, at *8 (E.D. Cal.

[32] There is little case law on the application of section 7430 to section 7431 provisions. Before 1998 when section 7430 was amended, the circuits were split as to whether a plaintiff could recover attorneys fees for successfully prosecuting a section 7431 suit. *Compare* McLarty v. United States, 6 F.3d 545 (8th Cir. 1993) (where the underlying proceeding was unrelated to a civil tax proceeding, section 7430 was inapplicable) *and* Scrimgeour v. IRS, 149 F.3d 318 (4th Cir. 1998) (underlying claim of unauthorized disclosure did not pertain to determination of any tax) *with* Huckaby v. United States, 804 F.2d 297 (5th Cir. 1986) (concluding that underlying claim pertained to tax liability because the IRS was in possession of plaintiff's records - which were disclosed - for the purpose of determining his liability). By amending the statute to include attorneys fees, Congress was sending a clear message that "when the IRS violates taxpayer's right to privacy by engaging in unauthorized inspection or disclosure activities, it is appropriate to reimburse taxpayers for the cost of their damages." S. Rep. No. 105-174, *reproduced at* IRS Restructuring and Reform, Law, Explanation and Analysis, ¶ 10250 at 599 (CCH 1998).

Jan. 9, 1998) (by its express language, section 7431 authorizes suit only against the United States and not against individual employees).

6. Payne v. United States, 1998 WL 773625, at *3 (S.D. Tex. Feb. 10, 1998) (even though "the United States may not be held liable in a civil action for unlawful disclosure of tax return information by a former officer or employee," the plaintiff was given leave to amend complaint to add former employee).

7. Ungaro v. Desert Palace, 1989 WL 199264, at *4 (D. Nev. Nov. 17, 1989) (no action against the individual federal employees, section 7431 was a remedy against the United States only).

B. Specificity

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

1. Bleavins v. United States, 1991 U.S. Dist. LEXIS 20975, at **3-4 (C.D. Ill. Jan.18, 1991) (complaint did not allege to whom the information was disclosed or the items of information disclosed; action dismissed without prejudice, providing plaintiff 20 days to amend complaint).

2. Colton v. IRS, 1989 U.S. Dist. LEXIS 12021, at **17-18 (D. Nev. Apr. 4, 1989) (dismissed complaint because it contained mere legal conclusions not factual allegations).

3. Flippo v. United States, No. ST-C-86-145 (W.D.N.C. 1987) (failure to identify the information disclosed, dates of the alleged disclosures, *etc*., would require IRS to engage in constant guessing games as to the disclosures and possible exceptions to section 6103 that might authorize them).

4. May v. United States, 1992 U.S. Dist. LEXIS 16055, at *6 (W.D. Mo. Apr. 17, 1992) (plaintiff must specifically allege who made the alleged disclosures, to whom they were made, the nature of the disclosures, the circumstances surrounding them, and the dates on which they were made).

5. Soghomonian et al. v. United States et al., 82 F. Supp.2d 1134, 1146-47 (E.D. Cal. 1999) (in addition to exclusive remedy for lawsuit premised on disclosure in collection activities being section 7433, claim subject to dismissal where complaint failed to state the "specific taxpayer information allegedly disclosed, the timing of such alleged disclosures," and other pertinent information).

6. Tobin v. Troutman, 1999 WL 501004, at *4 (W.D. Ky. Jun. 8, 1999) (more than a mere allegation of a violation is needed to state a claim).

7. Young v. Boyle, No. 82-72653 (E.D. Mich. Oct. 20, 1983) (under section 7217, plaintiffs granted leave to amend violations of section 6103, including a specific statement of by whom and to whom disclosures were made).

C. Jury trials

Section 7431 lawsuits are not subject to jury trials. The Seventh Amendment right to a jury trial does not apply in actions against the federal government unless Congress has waived sovereign immunity and created that right by statute. Lehman v. Nakshian, 453 U.S. 156, 162 n.9 (1981) ("Since there is no generally applicable jury trial right that attaches when the United States consents to suit, the accepted principles of sovereign immunity require that a jury trial right be clearly provided in the legislation creating the cause of action."); 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").

Under section 7431, Congress has waived the sovereign's right to be sued for the unauthorized inspection or disclosure of information. The statute is silent regarding a jury trial. Following the rationale in Lehman, no such right exists in section 7431 cases. Accordingly, courts that have considered whether a plaintiff is entitled to a jury trial pursuant to section 7431 have unanimously found that there is no such entitlement.

1. Agbanc v. United States, 678 F. Supp. 804, 809 (D. Ariz. 1988).

2. Carbo v. United States, 1998 WL 918473, at *3 (W.D. La. Dec. 30, 1998).

3. Christensen v. United States, 733 F. Supp. 844, 854 (D.N.J. 1990), *aff'd*, 925 F.2d 416 (3d Cir. 1991) (table cite).

4. Retirement Care Associates v. United States, 3 F.Supp.2d 1434, 1445 (N.D. Ga. 1998).

D. Exclusive Remedy

It is the IRS position, and most courts have agreed, that section 7431 is the exclusive remedy for improper disclosure of tax information. Some of the other remedies plaintiffs sought which courts may or may not accept are:

1. Bivens. In Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), the Supreme Court recognized a cause of action against federal employees who violated an individual's Fourth Amendment rights, even though the Fourth Amendment did not expressly authorize a remedy. The court reasoned that "'it is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasions, federal courts may use any available remedy to make good the wrong done.'" 403 U.S. at 396 (citing Bell v. Hood, 327 U.S. 678, 684 (1946)). Courts will not

provide taxpayers a remedy against individual federal employees based on constitutional claims premised on tax administration activities because of the comprehensive remedial scheme Congress passed in the Code.

a. Cameron v. IRS, 773 F.2d 126, 129 (7th Cir. 1985) ("Congress has given taxpayers . . . rights against an overzealous official, including . . . the right to sue the government. . . .").

b. Fishburn v. Brown, 125 F.3d 979, 982-83 (6th Cir. 1997) (court declined to create Bivens action against revenue officers for alleged due process violations during seizure) (IRC § 7433 case).

c. Judicial Watch, Inc. v. Rossotti, 317 F.3d 401, 413 (4th Cir. 2003) ("'it would be inappropriate to supplement the regulatory scheme with a new judicial remedy' for alleged retaliatory tax audits").

d. Malis v. United States, 1986 WL 15721, at *6 (C.D. Cal. Dec. 17, 1986) (no Bivens remedy lies for improper disclosure of returns or return information).

e. Shreiber v. Mastrogiovanni, 214 F.3d 148, 155 (3d Cir. 2000) (denial of Bivens remedy where plaintiff alleged violation of equal protection based on religious animus because "Congress's efforts to govern the relationship between the taxpayer and the taxman indicate that Congress has provided what it considers to be adequate remedial mechanisms for wrongs that may occur in the course of this relationship").

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

a. Cecile Indus., Inc. v. United States, 793 F.2d 97, 100 (3d Cir. 1986) (FTCA not satisfied by federal statutes or regulations).

b. Fishburn v. Brown, 125 F.3d 979 (6th Cir. 1997) (suits alleging liability based on activity connected to the

assessment or collection of taxes are expressly excluded from the FTCA).

c. Johnson v. Sawyer, 47 F.3d 716, 729-30 (5th Cir. 1995) (claim wholly grounded on a duty imposed by federal statute is not enough; state law of "negligence per se" and *respondeat superior* were insufficient bases for federal tort claim).

d. Sellfors v. United States, 697 F.2d 1362, 1365 (11th Cir. 1983) (FTCA not intended to redress breaches of federal statutory duties).

3. Exclusionary rule.

a. In re Grand Jury, No. 85-536 (D. Mass. Feb. 22, 1983) (quashing of a grand jury subpoena on the grounds of a section 6103 violation is not a proper remedy in the face of section 7431).

b. Nowicki v. Commissioner, 262 F.3d 1162, 1164 (11th Cir. 2001) ("[The] imposition of the exclusionary rule is not warranted for a disclosure of return information which violates § 6103. Congress has specifically provided civil (section 7431) as well as criminal penalties (section 7213) for violations of § 6103. There is no statutory provision requiring exclusion of evidence obtained in violation of section 6103 and we will not invent one.").

c. United States v. Chemical Bank, 593 F.2d 451, 457 (2d Cir. 1979) (suppression of evidence may be available for a section 6103 violation) (dicta).

d. United States v. Lavin, 604 F. Supp. 350, 355-56 (E.D. Pa. 1985) (relying on Chemical Bank to set aside portions of an affidavit supporting a search warrant application because of unauthorized disclosure).

e. United States v. Mangan, 575 F.2d 32, 41 (2d Cir.), *cert. den.,* 439 U.S. 931 (1978) (section 7431 and 7213 are exclusive and therefore the exclusionary rule is not available to redress alleged wrongful disclosures) (dicta).

4. Injunctive relief. Trahan v. Regan, 718 F.2d 449, 455-57 (D.C. Cir. 1983) (declaratory judgment is available to declare contemplated disclosures illegal and that, if declared illegal,

injunctive relief could be granted to enjoin the contemplated disclosures) (subsequent history omitted).[33]

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

a. United States v. Author Services, 804 F.2d 1520, 1525 (9th Cir. 1986) (relying on Texas Heart, *below*, even though government had satisfied all the requirements for summons enforcement, a court may, as part of its inherent authority to assure that part of its process is not abused, condition summons enforcement on the requirement that the government secure court approval before the summoned records are disclosed to other government agencies (the condition being imposed to assure that any disclosure is in accordance with section 6103)).

b. United States v. Barrett, 837 F.2d 1341, 1349 (5th Cir. 1988) (*en banc*) (overruled Texas Heart, *below*, indicating that conditional summons enforcement was inappropriate), *cert. den.*, 492 U.S. 926, *reh'g den.*, 493 U.S. 883 (1989).

c. United States v. Texas Heart, 755 F.2d 469, 482 (5th Cir. 1985) (appropriate for district court to determine whether section 6103 was violated and, if so, to condition summons enforcement on compliance with that section).

d. United States v. Zolin, 491 U.S. 554, 561 (1989) (equally divided Supreme Court let stand 9th Circuit's position on conditional summons enforcement first adopted in Author Services, *above)*.

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

a. Berridge v. Heiser, 993 F. Supp. 1136, 1144 (S.D. Ohio 1997) (plaintiffs erroneously brought their suit under the Privacy Act and section 7431 is the exclusive remedy by

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

which to bring a cause of action for the improper disclosure of tax information).

b. Hobbs v. United States, 209 F.3d 408, 412 (5th Cir. 2000) ("§ 6103 is a more detailed statute that should preempt the more general remedies of the Privacy Act, at least where, as here, those remedies are in conflict").

c. Sinicki v. United States, 1998 WL 80188, at **2-3 (S.D.N.Y. Feb. 24, 1998) (plaintiff brought suit alleging that IRS violated Privacy Act by placing her tax returns in her personnel file; court rejected IRS's arguments that section 6103 prevails over the Privacy Act, and held that plaintiff may pursue action for wrongful disclosure under both the Privacy Act and section 7431, but noted, however, that to extent the Privacy Act conflicted with section 6103, section 6103 prevailed).

7. 18 U.S.C. § 1030(g). For claims arising from the alleged unauthorized inspection of return information through the use of a computer, a civil remedy may also be available under this criminal statute, however, certain other conditions apply.

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

a. Elias v. United States, 1990 WL 264722, at *2 & n.7 (C.D. Cal. Dec. 21, 1990) (taxpayer may not use section 7431 to challenge the merits of the assessment; it is reasonable to assume that Congress did not intend for section 7431 damage suits to be maintained in situations arising from collection activities given enactment of section 7433), *aff'd mem.*, 974 F.2d 1341 (9th Cir. 1992).

b. Mann v. United States, 204 F.3d 1012, 1017 (10th Cir. 2000) (section 7433 provides taxpayers a remedy for unauthorized collection activities).

c. Schipper v. United States, 1998 WL 786451, at **9-12 (E.D.N.Y. Sept. 15, 1998) (United States liable for unauthorized disclosures resulting from erroneous levies in the course of a failed collection of a tax refund on plaintiff's wages and bank accounts despite plaintiff's and plaintiff's counsel's effort to correct the error; not a section 7433

matter because IRS sought to recover an erroneous refund rather than a tax assessment).

d. Shwarz v. United States, 234 F.3d 428, 432-33 (9th Cir. 2000) (section 7433 addresses the willful or negligent act of disregarding title 26 during the collection of taxes, therefore any violation of 6103 during collection of taxes would be addressed by section 7433).

e. Simpson v. United States, 1991 WL 253014, at **6-7 & n. 8 (N.D. Fla. Oct. 9, 1991) (although disclosures in various liens and levies were authorized by section 6103(k)(6), section 7433(a) applied to one of the levy claims and precluded any section 7431 liability).

f. Soghomonian, et al. v. United States, 82 F. Supp.2d 1134, 1147 (E.D. Cal. 1999) (plaintiff failed to state a claim when brought claim for unauthorized disclosures through filing of Notice of Federal Tax Lien; section 7433 is the exclusive remedy).[34]

E. Authorized disclosures based upon validity of summonses, liens or levies

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

1. "[W]hether a disclosure is authorized under section 6103 is in no way dependent upon the validity of the underlying summons, lien, or levy." Elias v. United States, 1990 WL 264722, at *2 & n.7 (C.D. Cal. Dec. 21, 1990), *aff'd mem*., 974 F.2d 1341 (9th Cir. 1992).

a. Farr v. United States, 990 F.2d 451, 455 (9th Cir. 1993) (where disclosures were necessary to collection procedures, fact that they may have been defective does not make disclosures wrongful), *cert. Denied,* 510 U.S. 1023 (1993).

b. Huff v. United States, 10 F.3d 1440, 1447 (9th Cir. 1993) (possible procedural lapses in collection process will not render necessary disclosures wrongful), *cert. denied*, 512 U.S. 1219 (1994).

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

c. Mann v. United States, 204 F.3d 1012, 1018-19 (10th Cir. 2000) (distinguishing Chandler v. United States, 687 F. Supp. 1515 (D. Utah 1988), *aff'd per curiam*, 887 F.2d 1397 (10th Cir. 1989), which had been decided before the passage of § 7433, where § 6103(k)(6) permits the issuance of levies and the filings of liens, it is irrelevant whether there is a procedural defect in the collection activity; "sections 6103 and 7431 address improper disclosure of return information and not improper collection activity").

d. McAdams v. United States, 1996 WL 303271, at *3 (W.D. La. Jun. 24, 1996) (principle "that the propriety of the underlying actions is irrelevant to the propriety of the disclosure at issue, controls here").

e. Spence v. United States, 114 F.3d 1198, 1997 WL 314836, at *4 (10th Cir. Jun. 12, 1997) ("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").

f. Venen v. United States, 38 F.3d 100, 105 (3d Cir. 1994) (court joined "those cases that decline to consider the validity of the underlying levy in deciding whether the IRS has disclosed in violation of [IRC] § 6103").

g. Wilkerson v. United States, 67 F.3d 112, 117 (5th Cir. 1995), *reversing in part*, No. 3:92CV78 (E.D. Texas May 16, 1994) (Congress enacted separate and distinct provisions concerning collection activities and information handling, and "[t]hese two bodies of law must remain distinct," however, not every claim of wrongful levy will necessarily fail to give rise to a claim of wrongful disclosure; instead, absent additional evidence proof of a wrongful levy is "legally insufficient" to support a claim for wrongful disclosure).

2. Another line of cases does consider the validity of the levy to be relevant to and/or determinative of unauthorized disclosures under section 7431.

a. Husby v. United States, 672 F. Supp. 442, 445 (N.D. Cal. 1987) (disclosures made pursuant to a levy resulting from a computer error did not fall under "good faith" exception because no interpretation of section 6103 was involved).

b. Maisano v. United States, 908 F.2d 408, 409-10 (9th Cir. 1990) (although not specifically linking the two, court

considered validity of the underlying tax liens and levies before finding IRS authorized to disclose under section 6103).

c. Rorex v. Traynor, 771 F.2d 383, 386 (8th Cir. 1985) ("disclosure in pursuance of an unlawful levy violates the confidentiality requirement of § 6103(a) and is not authorized under § 6103(k)(6)").

d. Schipper v. United States, 1998 WL 786451, at **9-12 (E.D.N.Y. Sept. 15, 1998) (United States held liable for unauthorized disclosures resulting from repeated erroneous levies on plaintiff's wages and bank accounts despite plaintiff's and plaintiff's counsel's effort to correct error; however, the disclosures in this case occurred in the context of a failed collection of a tax refund, not the collection of a tax liability).

e. William E. Schrambling Accountancy Corp. v. United States, 689 F. Supp. 1001, 1006 (N.D. Cal. 1988) (improper notice of levy is basis for liability under section 7431), *rev'd on other grounds*, 937 F.2d 1485 (9th Cir. 1991).

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

F. Statute of Limitations

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

1. Amcor Capital Corp. v. United States, 1995 WL 515690, at **2-5 (C.D. Cal. June 13, 1995) (fourth claim in complaint time-barred because plaintiff failed to allege that it discovered the unauthorized disclosure within two years of date claim was made against United States; plaintiff's own letters and internal memoranda proved that its allegations of not discovering the government's misconduct and unauthorized disclosures until a later date were false), *aff'd,* 106 F.3d 406, 1997 WL 22248 (9th Cir. Jan. 15, 1997), *cert. denied*, 522 U.S. 807 (1997).

2. Carlson v. United States, 1995 WL 687110, at *2 (D. Haw. Sept. 22, 1995) (action filed in 1994 was outside the limitations period when Certificate of Assessments and Payments demonstrated that the administrative levies made against plaintiff resulted in payments to IRS in 1989 and 1990).

3. Darby v. Jensen, 75 A.F.T.R.2d 95-2549, at **11-12 (D. Colo. May 15, 1995) (complaint, filed March 10, 1994, was outside statute of limitations where plaintiff alleged his response to the IRS's letter concerning dispute about 1989 exemptions and tax withholding was mailed on March 22, 1991), *aff'd*, 78 F.3d 597, 1996 WL 84111 (10th Cir. Feb. 27, 1996).

4. Gandy v. United States, 234 F.3d 281, 283-84 (5th Cir. 2000) (plaintiff became aware that circular letters were sent to clients in September 1990, but suit was filed in August 1996 and, therefore, the section 7431 claim pertaining to those letters was barred).

5. Hobbs v. United States, 1997 U.S. Dist. LEXIS 19230, at *18 (S.D. Tex. Nov. 3, 1997) (plaintiff was aware that disclosures of his returns and return information were made as early as 1990 and certainly by April 1994; thus, when suit was brought in November 1996, claims which accrued prior to November 1994 were barred).

6. Pack v. United States, 1991 U.S. Dist. LEXIS 15523, at **3-4 (E.D. Cal. Oct. 11, 1991) (claims time barred where plaintiff failed to submit any admissible evidence he discovered alleged wrongful disclosures within two years of filing of complaint).

7. William E. Schrambling Accountancy Corp. v. United States, 689 F. Supp. 1001, 1008 (N.D. Cal. 1988) (claims regarding levies issued more than two years before filing of lawsuit barred by the statute of limitations).

G. Limited stay of discovery

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

1. Diamond v. United States, Civil No. 86-86-D-1 (S.D. Iowa Feb. 12, 1988) (limited stay of discovery in section 7431 case because there was a potential criminal prosecution of the plaintiff pending) (subsequent history omitted).

2. Lancon v. United States, Civil No. H-92-3499 (S.D. Tex. Nov. 15, 1993) (section 7431 action "administratively closed" until conclusion of criminal proceedings involving the IRS employee who made the alleged unauthorized disclosure).

3. McQueen v. United States, Civil No. H-91-329 (S.D. Tex. June 7, 1991) (unlimited stay of discovery granted pending resolution of related criminal investigation).

H. Survivability

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

1. Schachter v. United States, 847 F. Supp. 140, 141-42 (N.D. Cal. 1993) (rejecting argument that a section 7431 case was in the nature of a personal tort action not intended to survive plaintiff's death, instead finding it a property interest that should survive death and noting that the statute provided for actual damages, an indication that property rights were to be taken into account; administratrix could be substituted as plaintiff).

2. Shapiro v. Smith, 652 F. Supp. 218 (S.D. Ohio 1986) (statute was designed to protect only personal privacy rights and is therefore governed by the rule that privacy actions do not survive the death of the injured party).

I. Standing

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

2. Haywood v. United States, 642 F. Supp. 188, 192 (D. Kan. 1986) (Notice sent to taxpayer's employer revealed husband's tax liability, not plaintiff's).

3. Kaiawe v. Dep't of Treasury, 1995 WL 552260, at *1 (D. Haw. Jun. 21, 1995) (notwithstanding plaintiff's status as president and sole shareholder of corporate taxpayer, plaintiff lacked standing to assert wrongful disclosure and wrongful collection claims pursuant to sections 7431 and 7433 on behalf of corporate taxpayer; no evidence was presented that plaintiff was taxpayer's alter ego or that he had personally suffered any injury).

4. Newberry v. United States, 1986 WL 9460, at *3 (E.D. Ark. Jun. 4, 1986) (allegation that IRS *received* information unlawfully resulted in dismissal for failure to state a claim under section 7431, because action lies only for the improper *disclosure* of returns or return information).

5. Rogers v. United States, 1995 WL 775245, at *1 (S.D. Cal.

Oct. 24, 1995) (government's argument that plaintiff did not have standing to bring a wrongful disclosure claim based on the incorrect assumption that plaintiff was asserting that the tax return information of a third party was wrongfully disclosed; court read complaint to clearly assert that plaintiff's own tax return information was wrongfully disclosed).

6. Ruiz-Rivera v. IRS, 226 F. Supp. 2d 345, 349 (D. P.R. 2002) (only the taxpayer whose return or return information has allegedly been disclosed has standing to sue under section 7431).

7. Simpson v. United States, 1991 WL 330932, at **2-3 (N.D. Fla. Nov. 27, 1991)) (plaintiff's allegations that – concerning investigation of husband - circular letters requesting payment history of husband, his company or payments made to plaintiff insufficient to confer standing to sue upon plaintiff), *aff'd mem*., 986 F.2d 507 (11th Cir.), *cert. denied*, 509 U.S. 925 (1993).

8. Soghomonian v. United States, 82 F. Supp.2d 1134, 1147 (E.D. Cal. 1999) (wife of taxpayer complainant does not have standing under section 7431; also, where information disclosed was that of partnership, not the plaintiff and plaintiff was neither a partner nor liable for partnership's taxes, plaintiff does not have standing to sue for unauthorized disclosure of return information).

VI. OTHER CODE SECTIONS AUTHORIZING DISCLOSURE

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

A. Case Law

1. Messinger v. United States, 769 F. Supp. 935, 938 (D. Md. 1991) (under section 3406(c)(1), the IRS is authorized to release return information to financial institutions to notify them of the necessity to deduct interest and dividends for payees who are underreporting when certain conditions occur; "Title 26 U.S.C. § 3406(c)(1) allows the IRS to disclose the return information in question, provided that it met the specific requirements set forth in the statute").

2. O'Donnell v. United States, 1985 WL 1565, at **2-3 (S.D. Fla. Mar. 26, 1985) (the IRS did not violate section 6103 by disclosing to plaintiff's employer that plaintiff had filed a defective certificate of exemptions because section "6103(a) prohibits the disclosure of certain tax information except as authorized by this title which

refers to Title 26 U.S.C., the Internal Revenue Code," and section 3402 requires an employer to withhold taxes from wages in accordance with procedures promulgated by the Secretary; inasmuch as the procedures provide that the IRS will notify the employer when the certificate is defective, it is evident that the IRS cannot so notify the employer without disclosing the employee's return information).

3. Swierkowski v. United States, 620 F. Supp. 149, 151 (E.D. Cal. 1985) (sections 3402(m) and (n) authorize the promulgation of regulations relating to claims for withholding allowances and for exemptions from withholding; Treas. Reg. § 31.3402(f)(2)-1(g)(5) instructs the IRS to furnish an employer with information such as an employee's status, withholding allowances, *etc*.), *aff'd mem.*, 800 F.2d 1145 (9th Cir. 1986), *cert. den.,* 479 U.S. 1093 (1987).

4. Van Skiver v. United States, 1990 WL 11038, at *2 (D. Kan. Jan. 31, 1990) (filing of proper Notices of Federal Tax Lien and issuing of levies authorized under Title 26 and, as a matter of law, disclosures to effectuate such liens or levies do not violate section 6103).

B. IRC § 9706(f)(1)

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 section 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 subsections (g) and (f) of section 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.

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

PART III: CRIMINAL LIABILITY FOR WILLFUL UNAUTHORIZED INSPECTION AND DISCLOSURE

I. IRC § 7213 -- UNAUTHORIZED DISCLOSURES

A. Background

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

Although section 7213 expressly provides for a fine of not more than $5,000, the United States Sentencing Guidelines note that 18 U.S.C. § 3571(b)(3) authorizes a greater fine if certain factors are present. *See generally*, United States Sentencing Commission, Guidelines Manual, § 5E1.2 (November 2002), and commentary. For purposes of sentencing, USSG §2H3.1 is applied. *See* USSG App. A. 18 U.S.C. § 3571(b)(3) provides for a fine the greater of the amount in the Code section or $250,000.

B. Elements of IRC § 7213

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

1. Persons Covered

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

b. It applies to State officers or employees who receive the information pursuant to section 6103(d).

c. It applies to anyone who receives the information pursuant to the Code sections listed in 7213(a)(2) or (3).

2. Disclosed

a. Although section 7213 does not define "disclose," or any variant of that term, section 6103(b)(8) defines "disclosure" as "[t]he making known to any person in any manner whatever a return or return information."

b. In cases decided under section 7431, which provides a civil remedy for unauthorized disclosures of returns and return information, there is a split of authority regarding whether returns and return information may be "disclosed," within the meaning of section 6103, when they are already a matter of public record as a result of the IRS's tax administration activities or in judicial tax proceedings. The courts that have found a violation of section 6103 uniformly rely on the rationale of Rodgers v. Hyatt, 697 F.2d 899, 904-06 (10th Cir. 1983), that no express provision of section 6103 permits the disclosure of public record information. Rodgers has been sharply criticized for failing to consider whether information in the public record has lost its confidentiality so that there can be no disclosure of that information as the term "disclosure" is defined in section 6103(b)(8). Criticizing Rodgers and cases following its reasoning, the court in Figur v. United States, 662 F. Supp. 515, 518 (N.D. Ca. 1987*), aff'd sub nom.,* Lampert v. United States, 854 F.2d 335 (9th Cir. 1988), *cert. den.,* 490 U.S. 1034 (1989), stated:

> Rodgers and its progeny ignore the mootness of protecting the taxpayer's privacy concerning return information contained in the public record. Instead, these cases apply § 6103 mechanically disregarding the section's *raison d'etre* to protect the taxpayers' "reasonable expectation of privacy." In addition, these cases all assume that "disclosure" of publicly held information is possible. As previously explained, the act of "disclosure" or "making known" presupposes confidentiality or at least limited access to the material disclosed. By its very nature, information in the public record is not confidential and is freely accessible to anyone.

The IRS has adopted the "public record" position that returns and return information that have been made a part of the public record by virtue of the IRS's tax administration

activities or introduced in judicial tax proceedings are no longer confidential and subject to section 6103. For a more detailed discussion of the public record exception to section 6103, *see* Chapter 2, Part IV.

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

4. Not authorized by the Internal Revenue Code

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

b. Generally, Treasury employees may access returns and return information only in furtherance of their official tax administration duties. IRC § 6103(h)(1); *see also* Barnard v. United States, 1981 WL 1754, at 2 (S.D. Fla. Mar. 5, 1981) ("[d]isclosure is for the purpose of facilitating a current employee's official duties").

c. Outside of disclosures to Treasury employees, section 6103 almost always authorizes disclosures only in the context of specified procedures, *e.g.*, tax administration, personnel matters, specific non-tax administration federal programs.

5. Willfulness. Section 7213 was amended in 1978 to require proof that a disclosure was made "willfully." Revenue Act of 1978, Pub. L. No. 600 § 701(b)(6), 92 Stat. 2763 (1978). The Staff of the Joint Committee on Taxation explained that the term "willfully" as used in the amendment of § 7213 relates to a "voluntary, intentional violation of a known legal duty," *citing* United States v. Pomponio, 429 U.S. 10 (1976). Staff of Joint Com. on Int. Rev. Tax, 95th Cong., 2d Sess., GENERAL EXPLANATION OF THE REVENUE ACT OF 1978, at 398 (1979). In Pomponio, the Supreme Court explained that the term "willfully," in the context of criminal violations of the Code, does not require a showing of evil motive beyond a specific intent to violate the law, holding the term simply connotes a voluntary, intentional violation of a known legal duty. 429 U.S. at 12.

C. Statute of Limitations

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

D. Cases under IRC § 7213(a)

1. United States v. Beretta, CR-20013 (N.D. Cal. Oct. 25, 1993) (indictment of IRS employee for, *inter alia*, willingly disclosing tax return information to a third party; employee subsequently pled guilty to this charge).

2. United States v. Kynard, Crim. No. H-95-229 (S.D. Tex. sentenced Feb. 20, 1996) (an IRS computer assistant entered a plea of guilty for the unauthorized disclosure of return information in violation of section 7213, admitting that, at the request of her husband's boss, she used the IRS's IDRS to gain unauthorized access to return information of the requester's partner and disclosing this information to the requester; employee sentenced to 5 years probation, a $5,000 fine, 100 hours of community service, and a $50 assessment).

3. United States v. Marty, No. CR-F-87-3 (E.D. Ca. June 8, 1987) (IRS employee disclosed return information to assist family members' business enterprise and government had recommended probation; sentencing employee to one year in prison for disclosing return information to assist family members' business enterprise, court "absolutely amazed" at government recommendation of probation, observing "[t]he crime strikes at the very heart of the internal revenue system"; if people could not be certain that their return information was confidential, the voluntary system of self-assessment would collapse and further expressed hope that the "sentence is widely communicated to other" IRS employees").

4. United States v. Moore, 47 F.3d 1171, 1995 WL 7969 (6th Cir. Jan. 9, 1995) (per curiam) (conviction and sentence of 19 months in prison and five years probation affirmed for IRS tax adjuster who examined taxpayer accounts on IRS computer systems without authorization and later disclosed information he accessed in letters; United States was required to prove not only that employee accessed return information on the IRS's computers, but that he also disclosed it).

5. United States v. Richey, 924 F.2d 857, 863 (9th Cir. 1991) (upheld conviction of former IRS employee for willfully disclosing to the press that while he was an IRS employee and before the judge's appointment to the bench, he had audited the judge's tax returns and found discrepancies; statements to the press in violation of section 6103 were not protected by the First Amendment).

6. United States v. Schultz, Criminal No. 95-277 (E.D. Pa. plea agreement filed May 31, 1995) (employee entered a guilty plea to a one-count information charging her with violating section 7213(a)(1) for accessing IDRS and obtaining third party return information that she forwarded to an attorney who was representing her in a matter unrelated to any duties she had as a IRS employee; guilty plea memorandum that United States Attorney submitted to the court stated that government had evidence confirming that the attorney was representing the employee without an increased fee in return for the tax disclosures that the attorney wanted for pursuing her own affairs).

7. United States v. Wilson, Case No. 1:95CR350 (N.D. Ohio plea agreement executed October 24, 1995) (employee pled guilty to one count of an information charging her with violation of section 7213(a)(1) acknowledging that, while employed as a taxpayer service representative, she accessed return information from an IRS computer multiple times and disclosed some of the return information to a third party).

E. Additional Provisions of IRC § 7213

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

1. Section 7213(a)(2) makes it a criminal offense for state employees and other persons who acquire returns or return information pursuant to certain selected provisions of section 6103 willfully to disclose those returns and return information, except as authorized by the Code.

2. Section 7213(a)(3) makes it a criminal offense for any person to whom returns or return information is disclosed in a manner which is not authorized by title 26 willfully to print or publish in any manner not provided by law any such return or return information. In other words, if a party knowingly receives information in a manner not permitted by title 26, that party may be subject to criminal sanctions if such party knowingly redisclosures, through some media, a return or return information in a manner prohibited by title 26.

3. Section 7213(a)(4) makes it a criminal offense for any person willfully to offer any item of material value in exchange for return or return information and to receive as a result of such solicitation any such return or return information.

4. Section 7213(a)(5) makes it a criminal offense for any person to whom returns or return information is disclosed pursuant to section 6103(e)(1)(D)(iii) (*i.e.*, a person who is at least a one percent shareholder) to disclose such returns or return information in any manner not provided by law.

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

II. IRC § 7213A -- UNAUTHORIZED ACCESSES (UNAX)

A. Background

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

Retrieval System (IDRS), without a tax administration purpose. Section 7213A(b) provides that a conviction can result in a fine in any amount not exceeding $1,000, or imprisonment of not more than a year, or both. In addition, conviction results in a dismissal from office or discharge from employment.

Although section 7213A expressly provides for a fine of not more than $1,000, the Sentencing Guidelines note that 18 U.S.C. § 3571 authorizes a greater fine if certain factors are present. *See generally*, United States Sentencing Commission, Guidelines Manual, § 5E1.2 (November 2002), and commentary. For purposes of sentencing, USSG §2H3.1 is applied. *See* USSG App. A. 18 U.S.C. § 3571 provides for a fine the greater of the amount in the Code section or $100,000. *See* USSG App. A. *See also* Revenue Reconciliation Act of 1997, REPORT OF THE COMMITTEE ON THE BUDGET OF THE HOUSE OF REPRESENTATIVE TO ACCOMPANY H.R. 2014 at 612 n 16 (Comm. Prt. 1997) ("Pursuant to 18 U.S.C. sec. 3571 (added by the Sentencing Reform Act of 1984), the amount of the fine is not more than the greater of the amount specified in this new Code section or $100,000").

1. Section 7213A(a)(1) makes it unlawful for any officer or employee of the United States, or any person described in section 6103 (l)(18) or (n) or officer or employee of such person, to willfully inspect, except as authorized in title 26, any return or return information.

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

B. Elements of IRC § 7213A

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

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

any examination of a return or return information." The legislative history evidences a Congressional intent to prohibit unauthorized inspections:

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

H.R. Rep. No. 105-148 (1997) Revenue Reconciliation Act of 1997, Pub. L. 105-35, *reprinted in* Report of the Committee on the Budget House of Representatives to Accompany H.R. 2014, 105th Cong., 1st Sess., 611-612 (1997). The statute specifically provides that the element of willfulness must be met, as it must be for section 7213 violations. This is intended to exempt inspections resulting from inadvertent or mistaken accesses.

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

A. Statutory provisions

The Economic Espionage Act of 1996, Pub. L. No. 104-294 (Oct. 11, 1996), amended 18 U.S.C. § 1030(a)(2) to penalize whoever "intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains . . . (B) information from any department or agency of the United States . . . ."

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

B. Punishment

18 U.S.C. § 1030(c) has an elaborate punishment provision, depending upon whether the conviction is a first offense, and whether there is commercial or financial gain. For purposes of sentencing, USSG § 2B1.1 is applied. *See* USSG App. A.

> **Note**: Section 7213 applies to unauthorized disclosures by former employees, whereas section 7213A does not apply to former

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

CHAPTER 2

PART I: DEFINITIONS

I. SECTION 6103(b) DEFINITIONS

A. "Returns" IRC § 6103(b)(1)

1. Tax or information returns (*e.g.*, Forms 1040, 1120, 941, 1099), estimated tax declarations, or refund claims, and any amendments or supplements, including supporting schedules (*e.g.*, Schedules A and B for 1040, Schedule K-1), attachments, or lists which are supplemental to, or part of, the return;

2. That are required by, provided for, or permitted by Title 26; and

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

a. "Secretary" means Secretary of the Treasury or his delegate. IRC § 7701(a)(11)(B).

b. 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, 894-96 (9th Cir. 1987) (civilian's personal copies of his tax returns, retained in his office and taken by Navy agents during an investigation, were not return information), *cert. denied*, 485 U.S. 1033 (1988); 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.4 (N.D. Ill. Jan. 31, 1994) (section 6103 was not intended to curtail the behavior of people without legitimate access to tax information, but to ensure that the IRS and other government agencies behave responsibly in disseminating tax data, and should not be construed as a general prohibition against the release of tax information by any party), *aff'd*, 49 F.3d 1269 (7th Cir. 1995).

c. "Fifth Amendment" returns with jurat crossed out ***are NOT*** "returns." IRC § 7203.

B. "Return information" IRC § 6103(b)(2)

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

2. The nature, source, or amount of income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, tax payments; OR

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

4. Any part of any written determination or background file document which is not open to public inspection under section 6110; OR

5. Any advance pricing agreement entered into by a taxpayer and the Secretary and any background information related to such agreement or any application for an advance pricing agreement; OR

6. Any agreement under section 7121, and any similar agreement, and background information related to the agreement or request for agreement; OR

7. Any other data; AND

8. Which is received by, recorded by, prepared by, furnished to, collected by the IRS; AND

9. With respect to a return OR with respect to the determination of the existence or possible existence of liability or the amount of liability;

10. Of any "person," *see* IRC § 7701(a)(1);

11. Under Title 26;

12. For *any* tax, penalty, interest, fine, forfeiture, or other imposition or offense.

The term 'return information' is broad and includes any information gathered by the IRS with regard to a taxpayer's liability under the Internal Revenue Code. *See* McQueen v. U.S., 264 F.Supp.2d 502, 516 (2003); LaRouche v. U.S. Dept. of Treasury, 112 F.Supp.2d 48, 54 (D.D.C. 2000) "The [Tax Reform Act of 1976] defines returns and return information in the broadest way").

Taxpayer information obtained or prepared by the IRS is "return information" regardless of the person with respect to whom it was obtained or prepared. A Revenue Agent's Report (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, 1118 (4th Cir. 1993). On the other hand, the D.C. Circuit Court of Appeals rejected the Service's position that Field Service Advice memoranda constitute return information in their entireties because they are prepared in specific taxpayer cases, ruling that legal analyses contained within did not fall under the definition of return information. Tax Analysts v. Internal Revenue Service, 117 F.3d 607, 611-16 (D.C. Cir. 1997).

The Service's appraisals of a taxpayer's property where the taxpayer's liability had already been established and are unrelated to his return are *not* return information. In Kamman v. Internal Revenue Service, 56 F.3d 46, 49 (9th Cir. 1995), the court noted that because the appraisals were done after the taxpayer pled guilty to tax fraud, they were not related to the taxpayer's return or liability.

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. 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 the 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. *See* 149 CONG. REC. S10297-02 *10330 (July 30, 2003).

Section 304(a) of the "Consolidated Appropriations Act of 2001", Pub. L. No. 106-544, (effective date December 21, 2000), amended IRC § 6103(b)(2) to provide that closing agreements, similar agreements, and background information concerning such, are confidential return information under IRC § 6103.

Information concerning potential non-tax Title 26 infractions, *e.g.*, IRC §§ 7213, 7214, is "return information" of the person(s) being investigated. *See*, *e.g.,* O'Connor v. Internal Revenue Service, 698 F. Supp. 204, 206 (D. Nev. 1988) (a threat against an IRS employee is a violation of section 7212 and information collected with respect to that offense is return information), *aff'd 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) (investigation report prepared by Inspection concerning conduct of IRS employee accused of making unauthorized disclosure is return information of the accused employee).

Protest "Fifth Amendment" returns with crossed-out jurats ***are*** "return information."

Information the Department of Justice (DOJ) generates or obtains as part of a referred tax case is return information because DOJ acts as the Secretary's attorney. United States v. Bacheler, 611 F.2d 443, 449 (3d Cir. 1979). By contrast, the court in Ryan v. United States, 74 F.3d 1161, 1163 (11th Cir. 1996), ruled that the statutory definition of return information confines it to information that has passed through the IRS, and therefore prosecutor's memoranda distilled from statements of trial witnesses in a criminal tax case were not return information. *See also* Baskin v. United States, 135 F.3d 338, 342-43 (5th Cir. 1998) (IRS special agent's possession and transfer of data collected by a grand jury investigating non-tax crimes to Houston police officers did not transform the data into return information).

Statistical compilations or other amalgamations that do not directly or indirectly identify a particular taxpayer are excluded from coverage by the plain language of the statute. IRC § 6103(b).

Return information from which identifiers (*e.g.*, name, taxpayer identification number, zip code) have been deleted is still subject to the disclosure restrictions of section 6103. Church of Scientology of California v. Internal Revenue Service, 484 U.S. 9, 14-18 (1987). The statute is more than an identity test. *Id.*; Long v. Internal Revenue Service, 891 F.2d 222, 223 (9th Cir. 1989) (even after deletion of taxpayer identifying information, TCMP checksheets containing reported and corrected return line item data were return information).

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

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

1. An item taken directly from a return is taxpayer return information.

2. The distinction between "return information" and "taxpayer return information" is significant ***only*** in the context of disclosures for non-tax federal criminal matters under section 6103(i). *See* Chapter 5.

D. "Tax administration" IRC § 6103(b)(4)

1. Administration, management, conduct, direction, and supervision;

2. Of the execution and application of the internal revenue laws and related statutes (or equivalent laws of a state);

3. And tax conventions to which the United States is a party; AND

4. The development and formulation of federal tax policy relating to existing internal revenue laws, related statutes, and tax conventions;

5. Including assessment, collection, enforcement, litigation, publication, and statistical gathering;

6. Under the internal revenue laws, related statutes, and conventions.

The meaning of tax administration is sweeping. *See, e.g.*, First Western Government Securities, Inc. v. United States, 796 F.2d 356, 360 (10th Cir.1986) (the term tax administration should be interpreted broadly). Nonetheless, not every act performed by Service officers and employees is a tax administration function. For example, as an employer, the IRS routinely addresses employment and personnel related issues on a routine basis. Whether an employment or personnel issue falls within the category of a "tax administration" matter depends on the nexus between the personnel matter at hand and the employee's ability to support and further the integrity of the tax laws. Although the relationship between an IRS employee's personal compliance with the tax laws and the integrity of the tax system, even from a purely personnel perspective, is likely to be considered a tax administration matter, an IRS employee's compliance with nontax laws that may affect his or her personnel status does not necessarily rise to the level of a "tax administration" matter simply because the employer investigating the possible noncompliance is the IRS. *Compare* Sanders v. State, 469 A.2d 476, 485 (Md. App. 1984) (prosecution for planned murder of Revenue Agent pertained to tax administration and defendant's returns and return information were lawfully disclosed in the prosecution) *with* United States v. Sumpter, 133 F.R.D. 580, 584 n.3 (D. Neb. 1990) (in case with insufficient factual record, court found no indication that prosecution under 18 U.S.C. § 876 for mailing threatening letters to IRS agent would cause case to be characterized as tax administration; court would have granted evidentiary hearing to develop the facts, but deemed it unnecessary because the relief sought by defendant, suppression of the evidence, is unavailable for a violation of IRC § 6103).

Tax administration includes state tax authority's disclosure of return information in the context of conduct inquiry designed to ensure the integrity of the state tax system. Rueckert v. Internal Revenue Service, 775 F.2d 208, 212 (7th Cir. 1985).

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, 40 (2d Cir.), *cert. denied*, 439 U.S. 931 (1978).

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

The Service takes the position that an audit is an administrative proceeding pertaining to tax administration for purposes of section 6103. Most courts agree. *See* First Western Government Securities v. United States, 796 F.2d at 360-61 (an audit is an administrative proceeding pertaining to tax administration for purposes of 6103(h)(4); Datamatic Services Corp. v. United States, 1987 WL 28603, at *4 (N.D. Cal. Dec. 18, 1987) (disclosures of promoters return information in letters sent to tax shelter investors during investigation of promoter were permissible because audit was an administrative tax proceeding for purposes of 6103(h)(4)); Balanced Financial Management, Inc. v. Fay, 662 F. Supp. 100, 104-106 (D. Utah 1987) (prefiling notice letters sent to tax shelter investors warning that shelter was abusive were permissible disclosures because audit was an administrative tax proceeding for purposes of 6103(h)(4)); Nevins v. United States, 1987 WL 47316, at *3 (D. Kan. Aug. 26, 1987) (following First Western, audit is administrative tax proceeding). *Cf* Abelein v. United States, 323 F.3d 1210, 1214-15 (9th Cir. 2003) (notices of final partnership administrative adjustment forms issued to shelter investors during audit were part of administrative tax proceeding; IRC § 6223 defines these actions as administrative proceedings). *But see*, Mallas v. United States, 993 F.2d at 1122-24 (an audit is ***NOT*** an administrative proceeding pertaining to tax administration for purposes of section 6103).

A *pro hac vice* hearing for an attorney who sought to represent a taxpayer in a criminal tax prosecution was not a matter pertaining to tax administration for purposes of section 6103. McLarty v. United States, 741 F. Supp. 751, 755-56 (D. Minn. 1990).

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

E. "Disclosure" IRC § 6103(b)(8)

a. Making known

b. To any person

c. In any manner whatever

d. A return or return information.

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

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

F. "Terrorist Incident, Threat or Activity" IRC § 6103(b)(11)

The Victims of Terrorism Tax Relief Act of 2001, P.L. 107-134, amended section 6103 in several places to specify authorized disclosures to aid in combating terrorism. Section 6103(b)(11) was added to define a terrorist incident, threat or activity to mean an incident, threat or activity involving an act of domestic terrorism as defined in 18 U.S.C. § 2331(5) or international terrorism as defined in 18 U.S.C. § 2331(1).

II. SECTION 6103 -- WHOSE INFORMATION IS PROTECTED

A. Section 6103 of the Code permits disclosure only as "authorized by [Title 26]." Before the Tax Reform Act of 1976, disclosures were permitted to the extent "authorized by law."

B. Deciding Whose Return/Return Information Is At Issue

1. The source of a tax return or return information is not always controlling. The same item of information may be the return information of more than one taxpayer, *i.e.*, data supplied to the IRS by Taxpayer A that may affect Taxpayer B's tax return may be the return information of Taxpayer A alone, of Taxpayers A and B, of Taxpayer B alone, or of neither Taxpayer A nor B. For example, information contained on a Form 1099 may pertain to both the employer's tax liability and the employee's tax liability. *See* Tanoue v. Internal Revenue Service, 904 F. Supp. 1161, 1166 (D. Hawaii 1995) (information collected from FOIA requester during tax investigation of third party was the third party's return information).

2. Although information supplied by one taxpayer with respect to his/her own tax liability often affects the liability of another taxpayer, section 6103

does not automatically authorize disclosure to that second taxpayer merely because of its possible effect. *Compare* Martin v. Internal Revenue Service, 857 F.2d 722, 725-26 (10th Cir. 1988) (protests filed by co-partners following an audit of partnership and adjustment of co-partners' returns were return information of co-partners, protected from disclosure by section 6103; partner/shareholder was not entitled to disclosure under Freedom of Information Act of protests filed by co-partners/co-shareholders in response to IRS proposed adjustments to co-partners/co-shareholders' individual tax liabilities stemming from IRS audit of partnership/subchapter S corporation) *with* Solargistic Corporation and Geodesco, Inc. v. United States, 921 F.2d 729, 731 (7th Cir. 1991) (the fact of an audit of a shelter promoter was promoter's return information as well as investors' return information; Service disclosure of information relating to a tax shelter promoted by a corporate taxpayer in letters sent to the corporate taxpayer's customers/investors did not constitute an unlawful disclosure of return information.). *See also* Mid-South Music Corp. v. Internal Revenue Service, 818 F.2d 536, 539 (6th Cir. 1987) (audit of shelter is also return information of investors); First Western Government Securities v. Internal Revenue Service, 796 F.2d at 359-60 (information in RAR was collected during audit of investors and was investors return information); Haywood v. United States, 642 F. Supp. 188, 192 (D. Kan. 1986) (disclosure of husband's return information to wife's employer was not a disclosure of the wife's return information).

3. "Basket Analogy" of Martin:

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

Martin, 857 F.2d at 725.

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

PART II: SECTION 6103(e)
DISCLOSURES TO PERSONS WITH A MATERIAL INTEREST

I. IRC § SECTION 6103(e) DISCLOSURES UPON WRITTEN REQUEST

A. IRC § 6103(e)(1)(A) - Individual returns are available to

1. The individual who filed the return.

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

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

Example--Carl Yaz, 13 year old son of the Yaz's, files his own separate return. To determine his applicable tax rate for his 1990 tax return pursuant to section 1(g), Carl submits a written request for a copy of the Yazs' 1990 joint tax return. Carl is entitled to a copy of his parents 1990 joint return only "to the extent necessary," *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.

B. IRC § 6103(e)(1)(B) - Joint returns are available to

Either spouse on whose behalf the joint return was filed.

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

Note: The IRS may not confirm whether or not Ted filed a return for 1997 or Ted's tax filing status for that year.

C. IRC § 6103(e)(1)(C) - Partnership returns are available to

Any person who was a member of the partnership during any part of the period covered by the return.

Example--Partner A was a member of the ABC partnership from March 16, 1990, through May 16, 1990. Partner A submits a written request for a copy of the ABC's partnership return for 1990.

Because A was a partner of the ABC partnership for a part of the period covered by the return, A is authorized to receive a copy of the return.

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

Note: The partnership return includes Schedules K-1.

D. IRC § 6103(e)(1)(D) - Corporation and corporate subsidiary returns are available to

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

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

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

4. A *bona fide* shareholder of record owning at least one percent of the outstanding corporate stock.

a. Must be a current one percent shareholder.

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

A former shareholder of an existing company could not compel the IRS to produce technical advice memoranda relating to the company for use in a pending securities fraud case. Shareholder inspection privileges extend only to *bona fide* shareholders at the time when inspection is sought; former shareholders are denied this right. *See, .e.g.*, Kirk v. First National Bank of Columbus, 1976 WL 1111, at *2 (N.D. Ga. Aug. 27, 1976). Pursuant to section 6110, however, these documents may be otherwise obtainable in

redacted form. At the time of the Kirk decision, section 6110 did not exist.

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

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

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

5. Any member of a consolidated return group is authorized to receive a copy of the entire consolidated return for any period in which it was a member. *See* Yorkshire v. Internal Revenue Service, 26 F.3d 942, 945-46 (9th Cir. 1994).

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

7. Any person authorized by state law to act on behalf of a dissolved corporation or any person who has been determined to have a material interest which will be affected by information contained in the dissolved corporation's tax return. *See, e.g.*, McAdams v. United States, 1996 WL 303271, at **3-4 (W.D. La. Jun. 24, 1996) (a 50% shareholder had a material interest in the return information of taxpayer-corporation).

E. IRC § 6103(e)(1)(E), (3) - Estate returns and decedent's returns are available to

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

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

Example-- Notwithstanding the illegitimate status of the taxpayer, because state law recognized his status as an heir, the taxpayer was found to have a material interest in decedent's return

information. *See* Williams v. Commissioner, 523 F. Supp. 89, 91 (E.D. Mo. 1981).

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

F. IRC § 6103(e)(1)(F) - Trust returns are available to

1. Any trustee.

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

> **Note:** Be aware of the interplay between sections 6103(e) and 6104 when dealing with beneficiaries of a pension plan. The IRS position set forth in Nichols v. Board of Trustees, 725 F. Supp. 568, 572 (D.D.C. 1989), is that access to return information of a pension plan is governed solely by section 6104. By contrast, the court in Duncan v. Northern Alaska Carpenters Retirement Fund, et al., No. MS9O-273, 1991 W.L. 165052, at **2-4 (W.D. Wash., Jan. 10, 1991), ruled that access is governed by section 6103(e)(1)(F), rather than section 6104.

G. IRC § 6103(e)(2) - Returns of incompetent taxpayers are available to

The committee, trustee, or guardian of an incompetent taxpayer's estate.

Example-- A return is filed on behalf of five year old Philip Protégé, 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 the case. If, under California law, Philip's father is the guardian of Philip's estate, the revenue agent is authorized to discuss the examination with Philip's father. Additionally, section 6103(k)(6) may authorize certain disclosures to Philip's father. *See* Chapter 4.

H. Returns of a debtor in a bankruptcy case - IRC § 6103(e)(4), (5)

See materials in Chapter 6, Bankruptcy.

I. IRC § 6103(e)(6) Attorney in fact

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

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

2. A general power of attorney authorizing an individual to do all acts and receive all information on behalf of an individual would not authorize access to the individual's return because the tax year is not specified. *See* IRC § 6103(c); Treas. Reg. § 301.6103(c)-1(b)(1)(iv); IRS Form 2848, *Power of Attorney and Declaration of Representative*.

3. In the context of a Tax Court proceeding, however, a power of attorney or tax information authorization is ***not*** required. *See* 26 C.F.R. § 601.509.

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

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

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

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

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

a. whether the IRS has attempted to collect the deficiency from the other former spouse;

b. the amount, if any, collected from the other former spouse;

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

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

2. Section 6103(e)(8) does *not* require or permit disclosure to one former spouse, or to that former spouse's authorized representative, of personal information about the other former spouse, such as the other former spouse's:

a. location or telephone number;

b. any information about the other former spouse's employment, income, or assets; nor

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

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

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

General procedural guidelines regarding disclosures of collection related information to former spouses with respect to a joint liability assessed against both former spouses have been incorporated in IRM 5.1.1.6.

Example--Husband and Wife were married and filed a joint return in 1996; however, by 1997 they were divorced and filing separately. In 1998, the IRS examined Husband and Wife's 1996 joint tax return and determined that the taxpayers underreported their income. The IRS issued statutory notices to the taxpayers. Wife wants to know what amount, if any, of the deficiency the IRS has collected from Husband. Wife has a number of options for requesting this collection information: (1) The wife or her authorized representative could submit a written request expressly citing section 6103(e)(8). Under these circumstances, the IRS must respond in writing. The written request, presumably, would take the form of a letter to the local disclosure office, however, any writing by the wife or her authorized representative would be adequate, including a handwritten request handed to a Collection Officer during an interview. A formal Freedom of Information Act (FOIA) request by the wife or her authorized representative also would be adequate, but is not required; and (2) The wife or her authorized representative could submit a written request that does not specifically reference section 6103(e)(8), or telephone, or "walk into" the local disclosure office (which would require a confirmation of identity) and make a request, or make a request orally during an interview with, *e.g.*, a Collection Officer, or, submit a FOIA request. Disclosure in each of these scenarios would be authorized under section 6103(e)(1)(B) in conjunction with section 6103(e)(7).

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

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

a. the name of any other person determined to be liable for the penalty;

b. whether the IRS has attempted to collect such the penalty from any other liable person and the nature of the collection activities;

c. the current collection status (*e.g.*, notice, TDA, installment agreement, suspended, and if suspended, the reason); and,

d. the amount, if any, collected from each individual assessed the penalty.

5. Information that can ***not*** be disclosed in response to a request pursuant to section 6103(e)(9) includes the following:

a. the liable person's location or telephone number;

b. information about any individual whom the IRS did not assess;

c. any information about the liable person's employment, income, or assets; and,

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

II. IRC § 6103(e)(7) DISCLOSURES NOT UPON WRITTEN REQUEST

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. IRC § 6103(e)(7).

Example--Mr. Dent submits a written request to the IRS seeking access to his 1997 examination file. One of the documents contained in the examination file is a witness statement submitted by Mr. Torres concerning Mr. Dent's dealings with the Green Monster Corporation. The 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/direction of the IRS's investigation. Because an impairment determination has been made, Mr. Dent may not have access to the witness statement.

PART III: DISCLOSURES PURSUANT TO TAXPAYER'S CONSENT IRC § 6103(c)

I. INTRODUCTION

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

Before 1996, section 6103 provided that consents had to be in writing. In 1996, section 1207 of the Taxpayer Bill of Rights 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 IRS could disclose tax information to a third party designated by the taxpayer. In January 2001, the Service promulgated temporary regulations permitting, among other things, oral consents when the designee is assisting the taxpayer to resolve a tax matter. *See* Treas. Reg. § 301.6103(c)-1T(c). On April 29, 2003, final regulations including the oral consent provision replaced the temporary regulations. *See* Treas. Reg. § 301.6103(c)-1.

II. DISCLOSURES TO DESIGNEES PURSUANT TO A WRITTEN REQUEST OR CONSENT

A. Treas. Reg. § 301.6103(c)-1(b) contains the requirements for consents to disclose tax information to designated third parties where the consent is not for the purpose of assisting the taxpayer resolve a tax matter.

B. This type of consent must be in the form of a separate written document pertaining solely to the authorized disclosure. The regulation defines separate written document to mean text appearing on one or more sheets of 8½-inch by 11-inch or larger paper, or text appearing on one or more computer screens. *See* Treas. Reg. § 301.6103(c)-1(e)(1).

C. Treas. Reg. § 301.6103(c)-1(b) requires that the following information be set forth in the written authorization:

1. the taxpayer's identity: name, address or taxpayer identifying number (SSN or EIN), or any combination thereof, that enables the IRS to clearly identify the taxpayer;

2. the identity of the person to whom disclosure is to be made;

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

4. the taxable period covered by the return or return information.

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

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

Example -- Mr. Williams submits a written authorization to the IRS authorizing the disclosure of his 2002 criminal investigation file to Mr. Green. The authorization is dated April 6, 2003, and contains all information required by Treas. Reg. § 301.6103(c)-1(b). The IRS receives the authorization on July 1, 2003. Because the authorization was received by the IRS more than 60 days after the date of execution, it is not valid.

III. DISCLOSURE TO DESIGNEES TO COMPLY WITH A TAXPAYER'S REQUEST FOR ASSISTANCE

A. In general

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

B. Written requests for information or assistance

1. Taxpayers sometimes write to a Member of Congress or other person, such as a friend or relative, with a tax question or problem they are having with the IRS. The Member of Congress or other person often forwards the letters to the IRS and requests that the IRS response be made directly to him/her.

2. According to Treas. Reg. § 301.6103(c)-1(c)(1)(i), the taxpayer's letter is a tax information authorization provided it contains the following:

a. the taxpayer's identity: name, address or taxpayer identifying number (SSN or EIN), or any combination thereof, that enables the IRS to clearly identify the taxpayer;

b. the identity of the person to whom disclosure is to be made;

c. sufficient facts about the request for information or assistance to enable the IRS to determine the nature and extent of the information or assistance requested and the tax information to be disclosed; and

d. the signature of the taxpayer and the date of the letter.

3. A person who receives a copy of a taxpayer's written request for information or assistance but who is not the addressee of the request, such as a Member of Congress who is provided with a courtesy copy of a taxpayer's letter to another Member of Congress or to the IRS, cannot receive tax information under 26 C.F.R. § 601.6103(c)-1(c)(1). An exception to this rule will be made when the taxpayer includes a signed addendum requesting the third party's assistance in the matter, and the letter otherwise meets the above requirements for a valid disclosure authorization.

C. Oral requests for information or assistance

1. Treas. Reg. § 301.6103(c)-1(c)(2) authorizes the IRS to accept a taxpayer's oral consent to disclose tax information to parties assisting the taxpayer in resolving a federal tax matter provided that the IRS has:

a. obtained from the taxpayer sufficient facts underlying the request for information or assistance to enable the IRS to determine the nature and extent of the information or assistance requested and the tax information to be disclosed in order to comply with the taxpayer's request;

b. confirmed the identity of the taxpayer and the designee; and

c. confirmed the date, the nature, and the extent of the information or assistance requested.

2. Examples of disclosures pursuant to oral requests for information or assistance include, but are not limited to, disclosures to a friend, relative, or other person whom the taxpayer brings to an interview or meeting with IRS officials, and disclosures to a person whom the taxpayer wishes to involve in a telephone conversation with IRS officials.

3. Provided that the requirements listed above in paragraph C.1. are met, the taxpayer does not need to be present, either in person or as part of a telephone conversation, for disclosures of tax information to be made to

the other person. On the other hand, the IRS cannot infer a taxpayer's consent merely because a third party is present at a meeting or on a telephone call. Oral consent must be explicit.

4. An IRS employee must record on a history sheet or history screen whenever possible the fact of and date of an oral consent and what information the taxpayer consented to be disclosed. IRM 11.3.3.2.1(2).

IV. PERMISSIBLE DESIGNEES AND PUBLIC FORUMS

A. Permissible designees include:

1. individuals;

2. trusts;

3. estates;

4. corporations;

5. partnerships;

6. federal, state, local, and foreign government agencies, or subunits of these agencies; and

7. the general public.

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

C. When disclosures are to be made in a public forum, like a courtroom or congressional hearing, the request for or consent to disclosure must describe the circumstances surrounding the public disclosure (*e.g.*, congressional hearing, judicial proceeding, media, etc.) and the date or dates of the disclosure. Treas. Reg. § 301.6103(c)-1(e)(3).

V. WHO MUST SIGN THE CONSENT

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

Joint return – Either spouse may sign the consent.

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

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

For rules on who may sign a consent with respect to other entities, *see* IRC § 6103(e)(1)-(5); IRM 11.3.2.4.

VI. FORM 8821 – TAX INFORMATION AUTHORIZATION

A. Form 8821 is a section 6103(c) disclosure consent form that meets the requirements of Treas. Reg. § 301.6103(c)-1(b).

B. It is not a power of attorney and cannot be used to name a representative.

C. Facsimile transmission of the form is acceptable.

D. An "all years" provision is invalid. The period of the authorization may not extend for more than five years forward.

E. The IRS must receive the form within 60 days of the date it was signed and dated by the taxpayer.

F. A subsequently executed Form 8821 revokes prior Forms 8821 unless box 6 of the form is checked.

G. The form does not revoke a power of attorney.

VII. FORM 2848 – POWER OF ATTORNEY AND DECLARATION OF REPRESENTATIVE

A. *See* 26 C.F.R. § 601.501, *et seq*.

B. Form 2848 can be utilized only for individuals authorized to practice before the IRS pursuant to Treasury Department Circular No. 230.

C. Facsimile transmission of the power of attorney is acceptable.

D. Substitution and delegation is permitted only if that authority is specified on line 5 of the form.

E. 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, reflect only three years forward.

F. A new Form 2848 revokes prior Forms 2848 only for the same tax matters and periods; it will not revoke a Form 8821 - Tax Information Authorization.

VIII. GENERAL/DURABLE/LIMITED POWER OF ATTORNEYS

A. These types of powers of attorney are acceptable if they meet all IRS requirements. *See* 26 C.F.R. § 601.503.

B. These powers of attorney will be entered on the CAF only if a properly executed transmittal Form 2848 is attached. *See* 26 C.F.R. § 601.503(b)(2).

IX. GENERAL CONSIDERATIONS

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

B. When deciding whether a consent received from a taxpayer authorizes the disclosure requested, consult Treas. Reg. § 301.6103(c)-1 to determine the sufficiency of the consent.

C. The consent should be as specific as possible in describing the tax information to be disclosed. Only that information for which it is clear the taxpayer intended to waive confidentiality should be provided.

D. In a situation involving a conference with multiple taxpayers, consents should be obtained from each taxpayer participating in the conference. In addition, a consent should be obtained if someone other than the taxpayer or the taxpayer's duly authorized representative is to be present during a taxpayer conference. In

these situations, an oral consent may be obtained from the taxpayer to permit disclosures to people attending the conference or meeting, so long as those in attendance are helping resolve a tax matter for the consenting taxpayer, such as an organization's employees who are familiar with the facts surrounding a particular issue.

E. Even with a valid consent, the IRS can refuse to disclose tax information if it determines that disclosure will seriously impair federal tax administration. *See* IRC § 6103(c); Treas. Reg. § 301.6103(c)-1(e)(5); Delegation Order No. 11-2.

> 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 attendance would seriously impair Federal tax administration (*e.g.*, be disruptive).

F. The consent rules do not apply to disclosures to a taxpayer's representative in connection with practice before the IRS; power of attorney rules apply in these circumstances. *See* Treas. Reg. § 301.6103(c)-1(c)(3). For disclosures pursuant to a power of attorney or to an attorney in fact, *see* IRC § 6103(e)(6); 26 C.F.R. § 601.502 *et seq*.

G. Consent rules do not apply to disclosures made to a taxpayer's attorney of record in a tax court proceeding. *See* 26 C.F.R. § 601.509.

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

I. For information on processing requests under section 6103(c) and Treas. Reg. § 301.6103(c)-1, *see* IRM 11.3.3.

X. CASE LAW

A. Hefti v. Loeb, 1992 U.S. Dist. LEXIS 12644 (C.D. Ill. August 11, 1992) (defendants acted in good faith pursuant to section 6103(c) when disclosing Mr. Hefti's 1987 tax year return information to his wife because all correspondence to the IRS was signed by both husband and wife; Mrs. Hefti wrote to President Bush to enlist his help with the IRS on behalf of herself and her husband, and in Tax Court she advised she would be representing both herself and her husband concerning the 1987 return).

B. Huckaby v. IRS, 794 F.2d 1041 (5th Cir. 1986) (disclosures to third parties based upon taxpayer's oral consent held unlawful).

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

D. Tanoue v. IRS, 904 F. Supp. 1161 (D. Haw. 1995) (information gathered during 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 under the Freedom of Information Act, even to the third party witness, absent a consent from the target).

E. Tierney v. Schweiker, 718 F.2d 449 (D.C. Cir. 1983) (open-ended consents (*e.g.*, "all years") do not comply with the regulations; consents signed by taxpayers were coerced because they were executed at the risk of losing social security benefits and, therefore, did not constitute the type of knowing and voluntary consent contemplated by section 6103(c)).

F. Ward v. United States, 973 F. Supp. 996 (D. Colo. 1997) (to comply with the regulations, a consent must identify or designate the third parties to whom the disclosures are to be made; disclosures to public during radio broadcast were not authorized because the taxpayer's consent did not designate or identify persons to whom the disclosures via radio broadcast were to be made).

PART IV: DISCLOSURE OF INFORMATION AVAILABLE IN THE PUBLIC RECORD

I. General Principles

Neither section 6103 nor any other provision of the Internal Revenue Code contain any express exception authorizing publication of tax information that has become a matter of public record in connection with tax administration.

The Supreme Court has held that what transpires in a court of law is a matter of public record and can be reported with impunity. No reasonable expectation of privacy attaches to information that is a matter of public record. Nixon v. Warner Communications, Inc., 435 U.S. 589, 609 (1978) (media is entitled to portions of tapes already released during trial); Cox Broadcasting v. Cohn, 420 U.S. 469, 491-92 (1975) ("[e]ven 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) ("A trial is a public event. What transpires in the court room is public property"). *See also* Restatement (Second) of Torts, Explanatory Notes 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."). *But see* United States Dept. of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 762-67 (1989) (inherent privacy interest in the nondisclosure of something that may once have been public but has, with passage of time, passed into practical obscurity).

II. Case Law

A. Despite section 6103's confidentiality mandate, courts have applied these principles when considering whether to order disclosure of tax information that became a matter of public record.

1. United States v. Posner, 594 F. Supp. 930, 936 (S.D. Fla. 1984) (denying a defendant taxpayer's motion for protective order and granting newspaper's request for access to tax returns that had been admitted into evidence; once certain information is in the public domain the entitlement to privacy is lost, even when the information is federal tax information), *aff'd*, 764 F.2d 1535 (11th Cir. 1985).

2. Cooper v. IRS, 450 F. Supp. 752, 755 (D.D.C. 1977) (once confidential information is released in Tax Court proceeding, it is never again confidential for purposes of the Freedom of Information Act).

B. In the context of unauthorized disclosure lawsuits, 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 actually placed in and made a part of the public record 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) (information contained in Notice of Federal Tax Lien and bankruptcy petition are no longer confidential, therefore disclosure did not violate section 6103), *cert. denied*, 502 U.S. 1066 (1992).

b. Lampert v. United States, 854 F.2d 335, 338 (9th Cir. 1988) (once tax return information is made a part of the public domain, that taxpayer can no longer claim a right of privacy in that information), *cert. denied*, 490 U.S. 1034 (1989). The Ninth Circuit's opinion affirmed three district court decisions: Peinado v. United States, 669 F. Supp. 953 (N.D. Cal. 1987); Lampert, 1987 WL 48210 (N.D. Cal. Apr. 8, 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) (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 section 6103, but has not ruled with respect to disclosures made in judicial proceedings. *See* Rowley v. United States, 76 F.3d 796, 801-02 (6th Cir. 1996) (general rule of confidentiality not applicable where information was disclosed in tax lien filings and later disclosed in notices of sale which were made for tax administration purposes).

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

4. The Seventh Circuit has adopted a hybrid test referred to as the "immediate source" test, *i.e.*, "that the definition of return information comes into play only when the immediate source of the information is a return, or some internal document based on a return, as these terms are defined in § 6103(b)(2), and not when the immediate source is a public document lawfully prepared by an agency that is separate from the Internal Revenue Service and has lawful access to tax returns." Thomas

v. United States, 890 F.2d 18, 21 (7th Cir. 1989) (IRS's release of court's opinion in tax case to newspaper which then published article based on the decision was not an unauthorized disclosure because the information was obtained from the court's opinion).

5. The Third Circuit has not ruled on this issue in a published opinion. It issued a summary opinion in Barnes v. United States, 17 F.3d 1428 (table cite) (3d Cir. 1994), affirming the district court's adoption of the Magistrate's Report and Recommendation. *See* 1991 U.S. Dist. LEXIS 21633, at **14-15 (W.D. Pa. Aug. 2, 1991) (magistrate's recommendation), *adopted at* 1991 U.S. Dist. LEXIS 12883 (W.D. Pa. Aug. 27, 1991). The Magistrate, citing Cox and Lampert, concluded that a press release announcing an indictment issued by the U.S. Attorney's office was not an unauthorized disclosure because the information was already a matter of public record.

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

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

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

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

b. Harris v. United States, No. 01-20543, 35 Fed. Appx. 390, 2002 WL 760887 (5th Cir. Apr. 17, 2002) (revenue officer who disclosed that the plaintiffs had a judgment filed against them for a specific amount had acted in a good faith belief that the disclosure was

permitted as a disclosure of information in the public record), *cert. denied*, 538 US 922 (2003).

III. IRS Position on Public Record Information

Although section 6103 bars disclosure of tax information taken directly from IRS files, it does not ban the disclosure of information that is taken from the public court record. The IRS's 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.

A. Return information loses any confidential status if it becomes a matter of public record. Returns and return information that have become public as a result of actions taken by, or on behalf of, the IRS are no longer subject to the confidentiality provisions of the Code and may be provided to a third party requester. Great care should be exercised in determining whether tax information has actually become a matter of public record, as information supplemental to that which has become public is subject to the confidentiality provisions. IRS employees should consult with their local disclosure officer if they have any questions.

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

C. Information that has become public, which is not publicly connected with tax administration, remains confidential in the hands of the IRS. The IRS 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 the 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 IRS avoids linking otherwise innocuous public information with a person's tax liability.

D. *See* IRM 11.3.11.13 (4/2003), Information Which Has Become Public Record, for further explanation.

PART V: DISCLOSURES TO COMMITTEES OF CONGRESS
IRC § 6103(f)

I. INTRODUCTION

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

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

Members of Congress in their individual capacity may not have access to returns and return information absent a valid consent from the taxpayer requesting that the Member have access.

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

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

A. Section 6103(f)(1) permits returns and return information to be disclosed to the House Ways and Means Committee, Senate Finance Committee, or the JCT upon written request from the chairperson of the committee. Returns and return information that can directly or indirectly identify a specific taxpayer may only be furnished to the committee when sitting in closed executive session (unless the taxpayer consents in writing).

B. Section 6103(f)(2) permits returns and return information to be disclosed to the Chief of Staff of the JCT upon written request. The Chief of Staff may submit the return or return information to the House Ways and Means Committee, Senate Finance Committee, or the JCT, except that any return or return information that can directly or indirectly identify a specific taxpayer may only be furnished to the committee when sitting in closed executive session (unless the taxpayer consents in writing).

C. Section 6103(f)(4)(A) permits the chairperson of the House Ways and Means Committee, Senate Finance Committee, or the JCT, or the Chief of Staff of the JCT, to designate an agent to receive returns and return information on their behalf. For example, the General Accounting Office routinely is designated as an

agent of one of the tax writing committees to receive returns and return information for purposes of conducting investigations.

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

III. DISCLOSURES TO NONTAX WRITING COMMITTEES

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

IV. DISCLOSURES TO MEMBERS OF CONGRESS IN THEIR INDIVIDUAL CAPACITY

Members of Congress in their individual capacity are entitled to no greater access to returns and return information than any other person inquiring about the tax affairs of a third party. Disclosures to Members of Congress may be made only in accordance with section 6103, which, in this context, would require consent from the taxpayer before returns and return information could be shared with the Member. *See* Chapter 2, Part III; Treas. Reg. § 301.6103(c)-1(c).

V. DISCLOSURES BY WHISTLEBLOWERS

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

PART VI: DISCLOSURES TO PRESIDENT AND CERTAIN OTHER PERSONS IRC § 6103(g)

I. INTRODUCTION

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

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

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

II. DISCLOSURES TO THE PRESIDENT AND THE WHITE HOUSE

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

B. Under section 6103(g)(1), the President can gain access to returns and return information only upon written request signed by the President personally. The statute requires no formality other than that the request: (1) name the taxpayer and provide the taxpayer's address; (2) set forth the type of return or return information being requested and the taxable periods involved; and (3) indicate the reason why disclosure is sought.

C. Under section 6103(g)(1), the President may also designate by name in the written request employees of the White House Office to whom disclosure is authorized. Section 6103(g)(3), however, specifically precludes redisclosure of returns and return information by those employees without the personal written direction of the President.

D. Section 6103(g)(4) precludes disclosure of returns and return information under this section to any employee of the White House Office whose annual rate of basic pay is less than the Executive Level V pay rate. It is likely that this provision was intended as a limitation not only on IRS disclosures in the first instance to individuals at a certain executive level, but also on redisclosure by persons, including the President, who have received such information under

section 6103(g)(1). The legislative history for this section indicates that the provision, to a large extent, codifies former President Ford's Executive Order 11805 (September 20, 1974). A similar provision in the Executive Order was intended to restrict access to returns and return information to a relatively limited number of people in the White House. S. Rep. No. 94-938, at 323 (1976).

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

III. TAX CHECKS

A. Section 6103(g)(2) provides for tax check disclosures, upon written request by the President or head of an agency, for individuals under consideration for an appointment in the executive or judicial branch of the federal government. The same restrictions as to redisclosure (section 6103(g)(3)), executive level disclosure (section 6103(g)(4)), and the reporting requirements (section 6103(g)(5)), discussed above, apply to the President and the head of an agency regarding tax checks.

B. However, it is the practice to perform these tax checks pursuant to taxpayer consents. Consents to disclose for tax checks are processed centrally by the IRS Office of Governmental Liaison and Disclosure, Tax Checks Section. *See* Chapter 2, Part III; Treas. Reg. § 301.6103(c)-1.

CHAPTER 3

TAX ADMINISTRATION DISCLOSURES

IRC § 6103(h)

I. INTRODUCTION

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

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

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

Section 6103(h)(6) addresses access to returns and return information by members of the IRS Oversight Board. The Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206 (July 22, 1998), created the IRS Oversight Board to oversee the IRS in its administration, management, conduct, direction, supervision, execution, and application of the tax laws. Generally, presidential appointees to the Board and employees and detailees of the Board are not entitled to returns or return information. An exception exists for reports containing returns or return information, prepared by the Commissioner of Internal Revenue or the Treasury Inspector General for Tax Administration, to assist the IRS Oversight Board in, and for the sole purpose of, carrying out its duties.

II. DISCLOSURES TO TREASURY EMPLOYEES

Section 6103(h)(1) permits disclosure of tax information to officers and employees of the Department of the 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 field attorney, special agent or revenue agent working a particular case have an official need for tax information to carry out their tax administration responsibilities. These employees may be other field attorneys or IRS employees working similar or related cases. The propriety of each disclosure will hinge on whether there is an official tax administration need for the material. *See, e.g.,* Gardner v. United States, 213 F.3d 735, 738-39 (D.C. Cir. 2000) (Service personnel authorized to make certain disclosures pursuant to section 6103(h)(1) during termination of employment proceedings); National Treasury Employees Union v. FLRA, 791 F.2d 183, 187 n.7 (D.C. Cir. 1986) (referring to section 6103(h)(1), "[t]his inroad on privacy is both necessary and expected; the very reason for requiring returns and return information from the public is 'for purposes of tax administration'"); Hobbs v. United States, 1997 U.S. Dist. LEXIS 19230, at **30-31 (S.D. Tex. Nov. 3, 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-CV-421 (W.D. Tex. July 10, 1996) (actions of employee's manager in obtaining employee's return information pursuant to employee under reporter program were authorized by section 6103(h)(1)), *aff'd without opinion*, 116 F.3d 1477 (5th Cir. 1997); *cf.* Barnard v. United States, 1981 WL 1754, at *2 (S.D. Fla. Mar. 5, 1981) (former employee asserting Freedom of Information Act claim had no right under section 6103(h)(1) to obtain portion of his conduct investigation report containing third party return information).

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

B. Disclosures to other 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.

TIGTA employees, as employees of a component of the Department of the Treasury, are permitted to inspect or disclose returns or return information in the course of their official tax administration duties under section 6103(h)(1). According to the legislative history, "[t]axpayer returns and return information are available for inspection by the Treasury IG for Tax Administration pursuant to

section 6103(h)(1). Thus, the Treasury IG for Tax Administration has the same access to taxpayer returns and return information as does the Chief Inspector under present law." *See* Conference Report, H.R. 2676, IRS Restructuring and Reform Act of 1998, Pub. L. 105-206 (July 22, 1998) at 224 (1998).

Whereas 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. *See* IRM 11.3.22.4(4).

III. DISCLOSURES TO THE DEPARTMENT OF JUSTICE -- REFERRAL

Section 6103(h)(3) outlines two methods by which DOJ 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 these proceedings, or for use in investigations that may result in these proceedings.

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

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

The term "referral" is defined in section 7602(d) in the context of an administrative summons, and includes a recommendation for a grand jury investigation or criminal prosecution for offenses connected with the administration of the internal revenue laws. This definition is encompassed within the meaning of referral for purposes of section 6103(h)(3). But a referral for purposes of section 6103 is not limited to a referral for purposes of section 7602. It also includes other situations where the Service asks DOJ to prosecute, defend, or take action on a tax case on behalf of the IRS, such as search warrants, summons enforcement, writs of entry, etc. *See* United States v. Bacheler, 611 F.2d 443, 447-49 (3d Cir. 1979) (referral to DOJ for criminal tax prosecution proper under section 6103(h)(3)(A)).

A referral for purposes of section 6103(h)(3) may, in appropriate circumstances, include the necessary solicitation by IRS of advice and assistance from DOJ with respect to a case before a formal referral of the entire case, so called "pre-referral advice." Disclosures of tax information by IRS to DOJ in connection with the necessary solicitation of advice and assistance will be authorized by section 6103(h)(3)(A), provided the requirements of section 6103(h)(2) are satisfied. *See* 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.

Note, however, that strict procedural constraints apply even when the solicitation of pre-referral advice is necessary for 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 refer the underlying matter, or with specific delegated authority to refer a case for legal advice to DOJ. Furthermore, disclosures in connection with the solicitation of 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 DOJ apprised" of developments in a tax investigation or to give it periodic updates on non-referred cases. The referral (and disclosure authority) terminates once the advice or assistance is rendered.

Under section 6103(h)(3)(B), DOJ may obtain tax information in a non-referred tax administration case if it was initiated by DOJ. In these circumstances, a written disclosure request is required from the Attorney General, Deputy Attorney General or an Assistant Attorney General. This authority to request 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, 1986 WL 9721, at **2-4 (M.D. Ala. June 24, 1986).

Courts have scrutinized the IRS's procedures and delegation orders in the context of reviewing challenges to disclosures in referred and non-referred cases. *See* United States v. Bacheler, 611 F.2d at 447 (technical requirements of referral; in tax cases "there are two possible routes under which disclosure of tax returns and return information can be made" to DOJ attorneys--compliance with either section 6103(h)(3)(A) or section 6103(h)(3)(B)); United States v. 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. Mangan, 575 F.2d 32, 37-41 (2d Cir. 1978) (technicalities of disclosure to DOJ); *cf*. United States v. Feldman, 731 F. Supp. 1189, 1197-98 (S.D.N.Y. 1990) (requirements for referrals - summons context); Williams v. United States,1986 WL 9721, at **2-4 (same); United States v. Carr, 585 F. Supp. 863, 866 (E.D. La. 1984) (same); McTaggert v. United States, 570 F. Supp. 547, 550 (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. 1987).

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

A. Section 6103(h)(2) recognizes the need of DOJ to access tax information to carry out its civil and criminal tax responsibilities in cases referred under section 6103(h)(3). Under section 6103(h)(2), tax information may be disclosed to DOJ for use in any proceeding before a federal grand jury or in preparation for any proceeding (or investigation which may result in a proceeding) before a federal grand jury or any federal or state court in matters involving tax administration if:

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

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

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

> Example. In a wrongful levy action under section 7426, the tax information of the taxpayer may be disclosed to DOJ under section 6103(h)(2)(A) because the proceeding arises out of or in connection with collecting the taxpayer's liability;

2. the treatment of an item reflected on a return is or may be related to the resolution of an issue in the proceeding (section 6103(h)(2)(B) – the "item" test); or

3. the return or return information relates or may relate to a transactional relationship between a person who is or may be a party to the proceeding and the taxpayer which may resolve an issue in the proceeding (section 6103(h)(2)(C) – the "transactional relationship" test). *See* Davidson v. Brady, 559 F. Supp. 456, 461-62 (W.D. Mich. 1983), *aff'd on other grounds*, 732 F.2d 552 (6th Cir. 1984) (third party tax information in tax evasion case); Hostetler v. Yungbluth, 1977 WL 1297, at *1 (S.D. FL., Sept. 30, 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 DOJ attorney assigned to the case. Other schedules of the third party's return, however, do not relate, or potentially relate, to resolution of the unreported income issue, and therefore, should not be disclosed to the DOJ attorney.

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

B. Case Law

1. Chemical Bank, 593 F.2d at 457 (disclosures to DOJ in the context of an IRS audit requested by DOJ Strike Force Program must follow "institutional system of procedures," *e.g.*, requisite written request, to ensure IRS does not become "information gathering agency" for DOJ).

2. Heimark v. United States, 14 Cl. Ct. 643, 647 (1988) (section 6103(h)(2) covers only disclosures to DOJ, not disclosures in court).

3. Mangan, 575 F.2d at 37-41 (technicalities of disclosure to DOJ).

4. McLarty v. United States, 741 F. Supp. 751, 753-57 (D. Minn. 1990) (disclosure of counsel's return to DOJ and the court in connection with criminal case pro hac vice hearing not permissible; pro hac vice hearing is not tax administration), *related proceeding*, 784 F. Supp. 1401 (D. Minn. 1991).

5. Topercer v. Lee, 1978 WL 1211, at *2 (N.D. Ga. April 6, 1978) (disclosure to DOJ for grand jury proceedings permissible).

6. United States v. Lavin, 604 F. Supp. 350, 355-56 (E.D. Pa. 1985) (disclosure procedures to be strictly followed; drug trafficking is not tax administration).

7. Young v. Burks, 1988 WL 62396, at *3 (referral for routine summons enforcement actions).

V. DISCLOSURES IN JUDICIAL AND ADMINISTRATIVE TAX PROCEEDINGS

A. Section 6103(h)(4) provides rules regarding the disclosure of returns and return information in judicial and administrative tax proceedings. The tax proceedings may be at either the federal or state level, including refund suits and proceedings before the Tax Court. The rules outlined in section 6103(h)(4) are in addition to the rules of evidence and other rules governing discovery in judicial

and administrative tax proceedings, and also subject to rules imposed by tax conventions and tax information exchange agreements on returns or return information disclosed pursuant to those conventions or agreements.

B. The principal purpose behind section 6103(h)(4) is to regulate the sensitive tax information that is disclosed in proceedings which are often public. Although permitting the disclosure of tax information of a person who is a party to the tax proceeding, section 6103(h)(4) generally limits the disclosure of tax information of persons who are not parties to the proceeding (third parties). These third parties have important privacy interests in limiting the disclosure of their tax information in tax proceedings because they are not parties and because their tax liability is not at issue. Congress provided a very simple explanation of why it decided to limit third party tax information disclosures:

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

S. Rep. No. 94-938, 94th Cong., 2d Sess. 1, 324-25 (1976), 1976-3 C.B. (Vol. 3) 49, 362-363. Thus, tax information of third parties may be disclosed under the second clause of section 6103(h)(4)(A), and the more restrictive rules of section 6103(h)(4)(B), (C), and (D).

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

1. the taxpayer is a party to the tax proceeding, or the tax proceeding arose out of, or in connection with, determining the taxpayer's civil or criminal liability, or the collection of the taxpayer's civil liability, in respect of any tax imposed under the Code (section 6103(h)(4)(A));

2. the treatment of an item reflected on the return is directly related to the resolution of an issue in the tax proceeding (section 6103(h)(4)(B) – the "item" test);

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

4. the disclosure is authorized by order of a court pursuant to 18 U.S.C. 3500 or Rule 16 of the Federal Rules of Criminal Procedure, the court

being authorized in the issuance of the order to give due consideration to congressional policy favoring the confidentiality of returns and return information as set forth in the Code.

D. Definitions

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

1. Third party returns and return information. These terms mean returns and return information filed, received, prepared, or collected by the IRS with respect to the liability or possible liability under the Code or related statutes of a taxpayer (or a group of specific taxpayers) who are not parties to the proceeding. A third party return is a return that is filed with the IRS by, on behalf of, or with respect to, a person who is not a party to the tax proceeding. Third party return information is return information, as defined in section 6103(b)(2), with respect to a person who is not a party to the tax proceeding. Documents that consist of returns or return information in their entirety retain their character as section 6103 protected returns or return information even if they do not identify the taxpayer, or if data that can identify the taxpayer is redacted. The copy of a return retained by the taxpayer, or the copies of information provided to the IRS that are also kept by the taxpayer, are not returns and return information, respectively, and their character as returns or return information is determined at the time the copies are collected or received subsequently by the IRS. A taxpayer's return that is filed with the IRS, or a taxpayer's return information that is received or collected by the IRS with respect to another taxpayer, does not become the second taxpayer's return information even if placed in the second taxpayer's file.

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

Example. The IRS serves a summons on a bank for records regarding Taxpayer C. The information received from the bank is C's return information; not the bank's return information. In a tax proceeding involving the liability of C, the information received from the bank is not third party return information.

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

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

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

2. Judicial proceeding pertaining to tax administration. This term means any judicial proceeding in which a person's liability or collection of that liability under the internal revenue laws, related statutes, or tax conventions is determined, or any judicial proceeding arising out of or in connection with a determination, to which the United States, the IRS, the Commissioner of Internal Revenue, an IRS or DOJ employee in his or her official capacity, or an IRS or DOJ employee in his or her individual capacity where DOJ has agreed to represent or provide representation to the employee, is a party.[35]

Examples include, but are not limited to, suits for tax refund filed in district court or the United States Court of Federal Claims, any action filed in the United States Tax Court, criminal prosecutions under the internal revenue

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

laws and related statutes, suits to foreclose tax liens, quiet title actions, summons enforcement lawsuits, and lawsuits for unauthorized collection actions or unauthorized disclosures. In addition, a lawsuit under the Freedom of Information Act (FOIA), 5 U.S.C. 552, or the Privacy Act of 1974, 5 U.S.C. 552a, involving returns or return information, is a judicial proceeding pertaining to tax administration as defined in this section. Additionally, lawsuits for alleged constitutional violations (so-called Bivens suits, after Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971)), lawsuits under the Federal Tort Claims Act (28 U.S.C. §§1346(b), 2671) and other lawsuits arising out of the IRS' examination, collection, or other enforcement activities under the Code are judicial proceedings pertaining to tax administration.

3. Administrative proceeding pertaining to tax administration. This term means any procedure or other action arising out of or in connection with a determination of a person's liability or potential liability, or in connection with the collection of that person's liability, under the internal revenue laws or related statutes and tax conventions to which the United States is a party, and in which a person, whose liability or potential liability, or collection of that person's liability, is or may be at issue, is given notice and an opportunity to present information to the IRS.

(i) This term includes any procedural steps which are a part of a larger action or procedure.

(ii) Examples of administrative proceedings pertaining to tax administration include, but are not limited to, examinations of returns, administrative appeals, refund claims, requests for private letter rulings, requests for certificates of release or discharge, administrative review of jeopardy and termination assessments, collection matters, requests for pre-filing agreements, requests for interest abatement, requests for innocent spouse relief, offers in compromise, trust fund recovery penalty proceedings, collection due process proceedings, alternative dispute resolution proceedings, requests for advance pricing agreements, criminal investigations and Federal Deposit Insurance Corporation receivership proceedings where the IRS has a tax claim.

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

In First Western Gov't Sec. v. United States, 578 F. Supp. 212, 217-218 (D. Colo. 1984), *aff'd*, 796 F.2d 356 (10th Cir. 1986) and in Nevins v. United States, 1987 WL 47316, at *3 (D. Kan. Aug. 26, 1987), audits were found to be administrative tax proceedings for purposes of the statute. *See also* Abelein v. United States, 323 F.3d 1210, 1214-15 (9th Cir. 2003)

(by statute – IRC § 6223 - TEFRA audits are administrative tax proceedings); Ungaro v. Desert Palace, Inc., 1989 WL 199264, at *4 (D. Nev. Nov. 17, 1989) (criminal investigation and placement of lien or levy is administrative tax proceeding); Young, 1988 WL 62396, at *3; Niemela v. United States, 1992 WL 314040, at *3 (D. Mass. Aug. 4, 1992), *aff'd on other grounds in part, vacated on other grounds in part*, 995 F.2d 1061 1993 WL 198171 (2nd Cir. Jun. 11, 1993), *cert. denied*, 510 U.S. 948 (1993). By contrast, in Mallas v. United States, 993 F.2d 1111, 1122 (4th Cir. 1993), an audit was held *not* to be an administrative proceeding described in section 6103(h)(4).

4. Disclosure in the proceeding. This term means a disclosure of returns or return information made to a court (including a court reporter or stenographer), a mediator or arbitrator, or to a party to the proceeding under the practices and procedures generally applicable to the proceeding, and subject to any rules governing the proceeding. This includes disclosures in court during a trial, disclosures in formal or informal discovery (including depositions), disclosures in settlement negotiations, disclosures in mediation or arbitration, disclosures in an application for a search warrant, or disclosures to the taxpayer in a 30-day letter issued in accordance with 26 C.F.R. § 601.105(c)(2), a notice of deficiency issued under section 6212, or a notice of decision or determination letter issued by an IRS Appeals office. For disclosures in interviewing third party witnesses, disclosures to interpreters, or other disclosures to obtain information outside of the proceeding, *see* Treas. Reg. §§ 301.6103(k)(6)-1 and 301.6103(h)(2)-1(b)(1)(i), (ii).

E. IRC § 6103(h)(4)(A)

Section 6103(h)(4)(A) permits the disclosure of tax information in a tax proceeding if either the taxpayer is a party to the tax proceeding, or the tax proceeding arose out of or in connection with determining the taxpayer's liability or collection of taxes owed by the taxpayer under the Code. *See* Mangan, 575 F.2d at 40.

The second clause of section 6103(h)(4)(A) ("or the proceeding arose out of . . ."), as well as similar language in section 6103(h)(2)(A), were added in 1978 because there was some uncertainty as to whether the item and transactional relationships tests of section 6103(h)(4)(B) and (C) were broad enough to cover disclosures in summons enforcement proceedings (in which the taxpayer was not a party), and nominee and transferee liability cases. *See* H.R. Conf. Rep. No. 1800, 95th Cong., 2d Sess. 1, 293 (1978), 1978-3 C.B. (Vol. 1) 521, 627.

F. Disclosures of Third Party Tax Information - IRC § 6103(h)(4)(B) and (C)

1. IRC § 6103(h)(4)(B) – The "Item Test."

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

The legislative history of the "item" test provides, as examples, that the returns of subchapter S corporations, partnerships, estates, and trusts may reflect the treatment of certain items which directly relate to the resolution of the taxpayer's liability because of some relationship of the taxpayer, like shareholder, partner, or beneficiary, with the corporation, partnership, estate, or trust. *See* S. Rep. No. 94-938, 94th Cong., 2d Sess. 1, 325 (1976), 1976-3 C.B. (Vol. 3), at 363. In these examples, the item becomes directly related by operation of a provision of the Code (for example, the passthrough of the relevant items from a partnership to a partner). United States v. Northern Trust Co., 210 F. Supp. 2d 955, 957 (N.D. Ill. 2001) (court stated that the item test "[d]oes not require any transactional nexus" because "[s]uch a requirement would make one of the other statutory exceptions, permitting disclosure if "return information directly relates to a transactional relationship between a person who is a party to a proceeding and the taxpayer, superfluous").

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

2. IRC § 6103(h)(4)(C)—The "Transactional Relationship" Test

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

The legislative history of the "transactional relationship" test provides, as an example, that the treatment of a third party buyer's return regarding his purchase of a business would directly relate to the seller's tax liability resulting from the sale of the business. *See* S. Rep. No. 94-938, 94th Cong., 2d Sess. 1, 325 (1976), 1976-3 C.B. (Vol. 3), at 363. In this example, the buyer's treatment of the purchase on his or her return would also satisfy the item test of section 6103(h)(4)(B). This example demonstrates that both the item and transactional relationship tests may be met under the same facts. On the other hand, the buyer's treatment of business expenses incurred after the buyer's purchase of the business would not directly relate to the seller's treatment of the sale and would not satisfy either the item or transactional relationship test.

3. The key factor in determining whose return information is at issue is not whose tax liability may be affected by the data, but rather whose tax liability is under investigation by the IRS for which the information is obtained. *See* Martin v. Internal Revenue Service, 857 F.2d 722, 726 (10th Cir. 1988).

G. Similarly Situated Taxpayers

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

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

unrelated to the taxpayer company would not be disclosable under either the item or transaction tests.

S. Rep. No. 94-938, 94th Cong., 2d Sess. 1, 325-26 (1976), 1976-3 C.B. (Vol. 3) 49, 363-64.

In Vons Cos. Inc. v. United States, 51 Fed. Cl. 1 (2001), a taxpayer sought, through discovery, unredacted technical advice memoranda (TAMs) and private letter rulings (PLRs) purportedly addressing the same legal issue raised in the taxpayer's litigation. The taxpayer argued that section 6103(h)(4)(B), the item test, authorized disclosure of the information. The court, however, concluded that section 6103(h)(4)(B) did not authorize disclosure of the requested records and rejected a construction of section 6103(h)(4) allowing for disclosure of return information of a third party solely on the basis that the party to the proceeding and the third party are, or were, similarly situated. The court pointed out that the language establishing what is "relevant evidence" under the Federal Rules of Evidence is quite different and certainly much broader than the "directly related" language in section 6103(h)(4)(B). This decision is in contrast to the discovery order in Bristol-Myers Barceloneta, Inc., v. United States, Civ. No. 97-2567CC (D.P.R. Feb. 5, 1999), in which the court required the IRS to disclose numerous third party taxpayers' information based on taxpayer's claim of disparate treatment.

For a further discussion of this issue, *see* Report to the Congress on Scope and Use of Taxpayer Confidentiality and Disclosure Provisions, Vol. I: Study of General Provisions, at 47-50, Office of Tax Policy, Department of the Treasury, October 2000 (Treasury Confidentiality Report). This report is available on the internet at the Department of the Treasury web site: http://www.treas.gov/offices/tax-policy/library/confide.pdf. *See also* CC-2006-003, Disclosure of Third Party Tax Information in Tax Shelter Matters.

H. Impeachment of Witnesses

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

I. Disclosure Limited to Necessary Part or Parts

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

J. IRC § 6103(h)(4) Compared to IRC § 6103(h)(2)

Note that the section 6103(h)(4) test is slightly different from, and stricter than, the test in section 6103(h)(2). Congress chose the more general "is or may" language authorizing disclosures to DOJ pursuant to section 6103(h)(2). 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 DOJ must only have the potential for meeting the tests under (h)(4) for disclosure in a tax proceeding. *See* Davidson, 559 F. Supp. at 462. 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 Western Gov't Sec. v. United States, 578 F. Supp. at 217-218.

K. Meaning of "Directly Related"

1. Beresford v. United States, 123 F.R.D. 232, 234-35 (E.D. Mich 1988), (select portions of third party tax data that IRS had relied upon in its valuation of taxpayer/party's stock, which valuation was squarely at issue in the taxpayer/party's tax refund suit, satisfied the requirements of section 6104(h)(4)(B)).

2. Christoph v. United States, 1995 U.S. Dist. LEXIS 19977, at **2-3 (S.D. Ga. Dec. 12, 1995) (at issue in ex-husband's tax deficiency proceeding was deductibility of a payment made by the taxpayer/ex-husband to his ex-wife; court held that the third party (ex-wife's) 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 ex-husband's tax proceeding), *vacated on other grounds*, 1996 U.S. Dist. LEXIS 19245 (S.D. Ga. Jan. 30, 1996).

3. Guarantee Mut. Life Ins. Co, 1978 WL 4574, at **1-2 (where the issue centers on an individual's status as employee or independent contractor, portions of his return indicating that status may be disclosed in the employer's proceeding).

4. LeBaron v. United States, 794 F. Supp. 947, 950-52 (C.D. Cal. 1992) (third party/parishioner's tax treatment - as business expense deductions - of payments she made to her church was directly related to resolution of an issue in a summons enforcement tax proceeding to which the church was a party, *i.e.*, whether information sought in the summons was necessary to IRS' investigation of the church's tax exempt status).

5. Shell Petroleum, Inc. v. United States, 46 Fed. Cl. 719, 722-25 (2000) (section 6103(h)(4)(B) justified the disclosure of unrelated third party tax information because the information was "directly related" to proving taxpayer's case; the court interpreted "directly related" as a concept akin to admissibility).

6. Tavery v. United States, 32 F.3d 1423, 1429 (10th Cir. 1994) (third party/wife's tax information directly related to resolution of the issue of her husband's eligibility for court appointed counsel in a judicial tax proceeding to which she was not a party).

7. United States v. Tsanas, 572 F.2d 340, 347 (2d Cir. 1978) (court's refusal to subpoena corporate return that would not directly affect resolution of individual's tax evasion case was not incorrect).

L. Additional cases involving the "item" and "transactional relationship" tests.

1. Balanced Fin. Management v. Fay, 662 F. Supp. 100, 105-06 (D. Utah 1987) (letters to tax shelter investors).

2. Confidential Informant 92-95-932X v. United States, 45 Fed. Cl. 556, 559 (2000) (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 DOJ under section

6103(h)(2)(B) and in the tax administration proceeding under section 6103(h)(4)(B)).

3. Davidson v. Brady, 559 F. Supp. at 460-462 (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).

4. Estate of Stein v. United States, 1981 WL 1807, **1-2 (D. Neb. Jan. 16, 1981) (to establish whether a gift was made in contemplation of death in the case of a donor/donee).

5. First Western Gov't Sec. v. United States, 578 F. Supp. at 217-18 (in the case of a dealer-broker in government securities and his customer-investors, to show why certain losses which they claimed through the dealer-broker had been denied).

6. Guarantee Mut. Life Ins. Co. v. United States, 1978 WL 4574, at *2 (in employer/employee situations, to establish the nature of the employment relationship).

7. Heimark v. United States, 14 Cl. Ct. 643, 647-49 (1988) (trust fund recovery penalty case).

8. Hostetler v. Yungbluth, 1977 WL 1297, at *1 (taxpayer/recordkeeper in summons enforcement action).

9. Mallas v. United States, 993 F.2d at 1122 (RARs that included outdated information about promoters' shelter-related convictions for tax evasion sent to tax shelter investors found to be unauthorized disclosures).

10. Mid-South Music Corp. v. United States, 818 F.2d 536, 538-39 (6th Cir. 1987) (letters to tax shelter investors stating disallowed deductions).

11. Morgan v. United States, 1991 U.S. Dist. LEXIS 12882, at *2 (D. Colo. Aug. 30, 1991) (payments made to an individual by an exempt organization), *aff'd*, 953 F.2d 1391, 1992 WL 14934 (10th Cir. Jan. 30, 1992).

12. Nevins v. United States, 1987 WL 47316, at *3 (two individuals arrested together for attempting to purchase marijuana and an RAR containing one individual's return information was included with a 30-day letter sent to the other individual).

13. Solargistic Corp. v. United States, 1989 WL 134505, at **1-5 (N.D.Ill. Oct. 11, 1989) (letters to tax shelter investors), *aff'd*, 921 F.2d 729 (7th Cir. 1991).

M. Special Rule for Disclosure in Federal Criminal Tax Cases

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

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

For discussion of the applicability of section 6103(h)(4)(D), *see* United States v. Lloyd, 992 F.2d 348, 350-52 (D.C. Cir. 1993); Dawes v. United States, 1990 WL 171074, at **2-3 (D. Kan. Oct. 15, 1990); United States v. Recognition Equip., 720 F. Supp. 13, 14 (D.D.C. 1989); United States v. Robertson, 634 F. Supp. 1020, 1026-29 (E.D. Cal. 1986), *aff'd mem.*, 815 F.2d 714 (9th Cir. 1987); United States v. Fuentes-Montijo, 74 F.3d 1247, 1996 WL 21616, at *4 (9th Cir. Jan. 22, 1996) (quashing of defendant's subpoena to IRS for confidential tax records of informants affirmed; requested information was of marginal relevance and did not outweigh the congressional policy favoring nondisclosure).

N. Freedom of Information Act Lawsuits

Section 6103(h)(4) does not authorize disclosure of returns or return information to a plaintiff in lawsuit brought under the FOIA; only section 6103(e) does. Chamberlain v. Kurtz, 589 F.2d 827, 837-38 (5th Cir.), *cert. denied*, 444 U.S. 842 (1979). *Cf*. Aloe Vera of America, Inc. v. United States, 2002 WL 1484463, at *2 (D. Ariz. May 10, 2002) (same rationale for discovery disclosures to opposing parties). Third party returns and return information are exempt from disclosure under Exemption 3 of the FOIA, 5 U.S.C. § 552(b)(3), pursuant to IRC § 6103(a).

O. Confidential Informants and Impairment Determination

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

information leading to collection of taxes from taxpayer). For a listing of persons who have the authority to make the impairment determination, *see* Delegation Order 11-2 (IRM 1.2.2, Exh. 1.2.2-2, available at http://www.irs.gov/irm/part1/ch02s08.html#d0e43506).

VI. IRC § 6103(h) AND IRC § 6103(i) INTERPLAY

Under section 6103(h), tax information disclosed to DOJ attorneys may be used and subsequently disclosed by those attorneys generally only for tax administration purposes. DOJ attorneys seeking tax information for federal nontax criminal purposes must follow the procedures outlined in section 6103(i). *See* Mangan, 575 F.2d at 37-41; Recognition Equip., 720 F. Supp. at 14. For a discussion of section 6103(i), *see* Chapter 5.

An exception to this rule is found at Treas. Reg. § 301.6103(h)(2)-1. This regulation anticipates situations where a referred criminal tax 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 (*e.g.*, a joint IRS/FBI investigation involving tax and bankruptcy fraud).

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

VII. DISCLOSURES TO THE INTERNAL REVENUE SERVICE OVERSIGHT BOARD

Section 6103(h)(6) addresses access to 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 the Treasury (or the Deputy Secretary if the Secretary so designates), the Commissioner of Internal Revenue, and seven members (six individuals who are not otherwise government employees and one individual is a full-time government employee or representative of employees) who are appointed by the President with Senate confirmation. The Board oversees the Service in its administration, management, conduct, direction, supervision, execution, and application of the tax laws.

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

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

CHAPTER 4

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

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

A. In general

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

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

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

1. Establishing or verifying the correctness or completeness of any return or return information;

2. Determining the responsibility for filing a return, for making a return if none has been made, or for performing any acts as may be required by law concerning those matters;

3. Establishing or verifying the liability (or possible liability) of any person, or the liability (or possible liability) at law or in equity of any transferee or fiduciary of any person, for any tax, penalty, interest, fine, forfeiture, or other imposition or offense under the internal

revenue laws or related statutes or the amount thereof for collection;

4. Establishing or verifying misconduct (or possible misconduct) or other activity proscribed by the internal revenue laws or related statutes;

5. Obtaining the services of persons having special knowledge or technical skills (such as, but not limited to, knowledge of particular facts and circumstances relevant to a correct determination of a liability described in clause (iii) [*see* 3, above] of this subparagraph or skills relating to handwriting analysis, photographic development, sound recording enhancement, or voice identification) or having recognized expertise in matters involving the valuation of property if relevant to proper performance of official duties described in this paragraph;

6. Establishing or verifying the financial status or condition and location of the taxpayer against whom collection activity is or may be directed, to locate assets in which the taxpayer has an interest, to ascertain the amount of any liability described in clause (iii) [*see* 3, above] of this subparagraph for collection, or otherwise to apply the provisions of the Code relating to establishment of liens against the assets, or levy, seizure, or sale on or of the assets to satisfy any liability;

7. Preparing for any proceeding described in section 6103(h)(2) or conducting an investigation which may result in a proceeding; or

8. Obtaining, verifying, or establishing information concerned with making determinations regarding a taxpayer's liability under the Code, including, but not limited to, the administrative appeals process and any ruling, negotiated agreement, or prefiling process.

Treas. Reg. § 301.6103(k)(6)-1(a)(1).

B. Definitions

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

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

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

2. Disclosure of return information to accomplish properly an activity connected with official duties means a disclosure of return information to carry out a function associated with official duties generally consistent with established practices and procedures. Treas. Reg. § 301.6103(k)(6)-1(c)(2).

3. Information not otherwise reasonably available means information that an internal revenue or TIGTA employee reasonably believes, under the facts and circumstances at the time of a disclosure, cannot be obtained in a sufficiently accurate or probative form, or in a timely manner, and without impairing the proper performance of the official duties described by this section, without making the disclosure. Treas. Reg. § 301.6103(k)(6)-1(c)(3).

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

Note: An internal revenue or TIGTA employee may make a disclosure to a third party witness to corroborate information

provided by a taxpayer. Treas. Reg. § 301.6103(k)(6)-1(c)(3).

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

C. Liens and Levies

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

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

The Courts of Appeal for the Third, Fifth, Ninth, and Tenth Circuits have adopted the IRS's position. However, the Eighth Circuit has ruled that if the underlying lien is invalid, the disclosures made in the lien violate section 6103(a). That Eighth Circuit case was decided before Congress enacted section 7433, which created a specific remedy for reckless and/or intentional improper collection activity;[36] the other circuit court cases were decided after the enactment of section 7433. For more information, *see* Chapter 1, Part II.

[36] In 1998, as part of the IRS Restructuring and Reform Act, Pub. L. 105-206, § 3102(a)(1)(A), Congress amended section 7433 to include recovery for negligent unauthorized collection activities. Prior to the 1998 amendment, as the Third Circuit had noted in Venen v. United States, 38 F.3d 100, 105-107 (3d Cir. 1994), Congress had addressed reckless or intentional improper collection activity when it enacted section 7433. At the time Venen was rendered, Congress had not addressed merely negligent collection activity and the court was not going to permit the plaintiff to seek redress for such activity under section 7431. The amendment buttresses the IRS's position that section 7433, not section 7431, is intended to address challenges to the validity of liens or levies.

Sometimes 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 IRS 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 section 6103 no longer applies. There is a split of authority among the courts as to this "public record exception." The courts that have ruled otherwise hold that the only exceptions to the confidentiality of return information are those explicitly stated in Title 26, and that there is no statutory exception in section 6103 for return information that has been made a matter of public record. *See* Chapter 2 for a further discussion of the public record issue.

Liens and Levies Case Law

1. Chisum v. United States, 1991 WL 322976, at *2 (D. Ariz. Dec. 10, 1991) (the IRS was authorized pursuant to section 6103(k)(6) to disclose tax return information by filing a notice of federal tax lien in the county recorder's, by mailing a notice of sealed bid sale, and by publishing a notice of sealed bid sale in several newspapers, because the disclosures were attempts to collect an alleged tax deficiency), *aff'd*, 19 F.3d 26, 1994 WL 19020 (9th Cir. Jan. 24, 1994), *cert. denied*, 513 U.S. 946 (1994).

2. Coplin v. United States, 1991 WL 22804, at *4 (W.D. Mich. Jan. 3, 1991) (information disclosed by the establishment of a lien is not wrongfully disclosed information; disclosure of the same information in an attempt to satisfy the lien is not a wrongful disclosure, either), *aff'd*, 952 F.2d 403, 1991 WL 270831 (6th Cir. Dec. 17, 1991) (per curiam), *cert. denied*, 504 U.S. 974 (1992).

3. Cuda v. United States, 1991 WL 80842, at *3 (W.D. Mich. Apr. 2, 1991) (section 6103(k)(6) authorizes disclosure of return information to the extent necessary to obtain information not otherwise readily available to collect outstanding tax liability; court determined the disclosures were necessary because the only way to discover whether individuals had assets belonging to the plaintiffs was to serve them with notices of levy).

4. Egbert v. United States, 752 F. Supp. 1010, 1016-17 (D. Wyo. 1990) (court noted that section 6103(k)(6) provides for the disclosure of return information for the purposes of tax

administration, however, the court did not determine whether or not the plaintiff was entitled to recovery pursuant to section 6103 because the court determined it lacked jurisdiction and, therefore, dismissed the wrongful disclosure claim), *judgment aff'd by* United States v. Egbert, 940 F.2d 1539, 1991 WL 150859 (10th Cir. Aug. 7, 1991), *cert. denied*, 502 U.S. 1016 (1991).

5. Elias v. United States, 1990 WL 264722, at **3-4 (C.D. Cal. Dec. 21, 1990) (after comprehensive discussion of section 6103(k)(6) case law and congressional intent, court found that disclosures contained in summonses, liens, and levies were authorized by section 6103(k)(6)), *aff'd*, 974 F.2d 1341, 1992 WL 214538 (9th Cir. Sept. 2, 1992).

6. Farr v. United States, 990 F.2d 451, 455 (9th Cir. 1993) (the information disclosed in the notice of levy was necessary to the IRS's collection activity, and thus fell squarely within the exemption under section 6103(k)(6)).

7. Huff v. United States, 10 F.3d 1440, 1447 (9th Cir. 1993) (citing Farr v. U.S., the court held that levy notices fall squarely within the exemption under section 6103(k)(6) despite the possible procedural lapses involving the actual levy), *cert denied*, 512 U.S. 1219 (1994).

8. Lutz v. United States, 919 F.2d 738, 1990 WL 193066, at **3-4 n.2 (6th Cir. Dec. 6, 1990) (per curiam) (plaintiff alleged that the IRS made unauthorized disclosures of the plaintiff's name, tax period, and type and amount of taxes in serving a notice of levy on the plaintiff's employer and a notice of federal tax lien with the clerk of the court; court cited to section 6103(k)(6) and the applicable regulations in concluding the unauthorized disclosure claim was without merit).

9. Maisano v. United States, 908 F.2d 408, 410 (9th Cir. 1990) (plaintiff alleged that the filing of two tax liens and notices of levy violated the confidentiality requirements of section 6103; court found the disclosure necessary in obtaining correct determination of tax, liability for tax, or the amount to be collected under section 6103(k)(6)), *cert. denied*, 498 U.S. 1009 (1990).

10. Mann v. United States, 204 F.3d 1012, 1016-20 (10th Cir. 2000). In a decision which distinguished the Tenth Circuit's prior decision in Chandler v. United States, 687 F. Supp. 1515 (D. Utah 1988) *aff'd per curiam*, 887 F.2d 1397 (10th Cir. 1989), the court noted that Chandler had been decided prior to the passage of section 7433, and that if Chandler were to bring suit today, it would

be under section 7433, not section 7431. The court followed the reasoning of Venen and Wilkerson to hold that where section 6103(k)(6) permits the issuance of levies and the filings of liens, it is irrelevant as to whether there is a procedural defect in the collection activity. The disclosure is permitted; "sections 6103 and 7431 address improper disclosure of return information and not improper collection activity."

11. Mettenbrink v. United States, 1991 WL 82837, at **6-8 (D. Neb. Apr. 8, 1991) (the court distinguished the case from Rorex finding the levies, although premature, were lawful because plaintiff did owe taxes and section 6103(k)(6) and the corresponding regulations permitted the disclosures).

12. Rorex v. Traynor, 771 F.2d 383, 386 (8th Cir. 1985) ("a disclosure in pursuance of an unlawful levy violates the confidentiality requirements of section 6103(a) and is not authorized under section 6103(k)(6)").

13. Schrambling Accountancy Corp. v. United States, 937 F.2d 1485, 1488-90 (9th Cir. 1992) (lien on file at the recorder's office in California is a public record, therefore, it is no longer confidential and may be disclosed again without regard to section 6103), *rev'g,* 689 F. Supp. 1001 (N.D. Cal. 1988) and Allen v. United States, No. C-89-20250 (N.D. Cal. Jan. 3, 1990).

14. Spence v. United States, 114 F.3d 1198, 1997 WL 314836, at **3-4 (10th Cir. Jun. 12, 1997) (that summonses were issued to taxpayer's tenants for their canceled checks where taxpayer owed no liability was irrelevant to a determination of whether the disclosure of return information violated section 6103).

15. Timmerman v. Swenson, 1979 WL 1446, at **2-3 (D. Minn. Aug. 27, 1979) (section 6103(k)(6) authorized the disclosure of the information contained in the levy and the service of levy on the wrong bank resulted solely from a ministerial error. The court further stated that this error did not violate any standard of care or duty legally owed to these plaintiffs and was, therefore, not negligent).

16. Venen v. United States, 38 F.3d 100, 105-107 (3d Cir. 1994) (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, reasoning that Congress enacted sections 6103 and 7431 to regulate information handling).

17. Wilkerson v. United States, 67 F.3d 112, 116-117 (5th Cir. 1995) (the validity of the underlying levy was not relevant, as long as the disclosures were necessary to collect the outstanding tax liability, they were authorized by section 6103(k)(6); court acknowledged the split among the circuits on the question of whether the underlying lien/levy was invalid and elected to follow Venen and Farr rather than Rorex).

D. Investigative Form Letters

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

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

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

IRM 9.3.1.3.3 (rev. 7/29/2002), which addresses "circular letters," proscribes the use of the words "criminal investigation" in the return address, text, or signature block of circular letters.

Whereas the Treasury regulations provide that the IRS or TIGTA employee may disclose, as part of the official investigation, his or her affiliation with the IRS or TIGTA through the use of letterhead when corresponding with witnesses or other third parties, Treas. Reg. § 301.6103(k)(6)-1(a)(3), because of the nature of circular letters, policy

matters behoove the use of generic letterhead without the inclusion of "criminal investigation." Although the text of IRM 9.3.1.3.3 does not explicitly say so, by extension, the words should not be used on the return address of the envelope in which the letter is sent, nor, on any return envelope that may be enclosed for the recipient's convenience in responding.

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

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

Investigative Form Letter Case Law

> **Note**: only three circuits (the Fifth in Barrett; the Ninth in Schachter; and, the Eighth in Diamond and May) have ruled on the issue of the disclosure of the fact of criminal investigation in investigative form letters.
>
> 1. Barrett v. United States, 795 F.2d 446, 451 (5th Cir. 1986) ("circular letters" sent to patients of a prominent plastic surgeon to determine the amount of money paid to the surgeon disclosed the fact that the surgeon was under investigation by the CID; Fifth Circuit found it was not necessary to reveal the fact of criminal investigation in letters sent to patients of a surgeon to determine the amount of money paid to the surgeon, and that the agent did not act in good faith in sending the letters, where the letters disclosed that the plaintiff was under criminal investigation, contrary to the then-existing IRM).
>
> 2. Diamond v. United States, 944 F.2d 431, 435 (8th Cir. 1991) (court found it was not necessary for special agent to disclose the fact of criminal investigation with a signature block that read, "Special Agent, Criminal Investigation Division" in circular letters sent to patients of plaintiff-doctor, but affirmed the district court's grant of the government's motion for summary judgment based on a good faith but erroneous interpretation of section 6103 by the IRS, since the IRM at the time advised including the title, "Special

Agent, Criminal Investigation Division" in the signature block of "circular letters").

3. DiAndre v. United States, 968 F.2d 1049, 1053 (10th Cir. 1992) (where a special agent sent "circular letters" to the plaintiff's customers requesting information on all payments made to the taxpayer, court found that disclosure of nonsensitive public information such as a business address to aid in identification was appropriate and necessary and did not violate section 6103), *cert. denied*, 507 U.S. 1029 (1993).

4. May v. United States, 141 F.3d 1169, 1998 WL 71545 (8th Cir. Feb. 23, 1998) (per curiam) (following the precedent established in Diamond, above, court held that "circular letters" containing "Criminal Investigation Division" in the signature block, pursuant to the then-existing IRM instructions, was a violation of section 6103 but that the Government did so in good faith, noting the Eighth Circuit decision in Diamond had not been published at the time that the letters were sent).

5. Rhodes v. United States, 903 F. Supp. 819, 820-823 (M.D. Pa. 1995) (declining to follow the Fifth Circuit in Barrett and the Eighth Circuit in Diamond, the court determined that the special agent had not made unauthorized disclosures by sending "circular letters" to customers of the taxpayer).

6. Schachter v. United States, 77 F.3d 490, 1996 WL 56164, at **1-2 (9th Cir. Feb. 8, 1996) (defendant was not liable under good faith safe harbor for disclosures made in "circular letters" then in conformance with the IRM, sent by a special agent to customers of the plaintiffs, which disclosed the fact of criminal investigation, and did not address whether the disclosures were authorized under section 6103(k)(6)).

7. Simpson v. United States, 1993 WL 478850, at *4 and n.3 (N.D. Fla. Jul. 13, 1993) (court held that disclosures identifying the plaintiff as the subject of a tax liability investigation contained in "circular letters" sent to customers were necessary to obtain information not otherwise reasonably available about the plaintiff's sources of income, and were authorized under section 6103(k)(6); although not affecting the outcome, the court in a footnote said it doubted the government's argument that some letters sent were not circular letters within the meaning of the IRM because they were sent to *known* rather than *likely* customers).

E. In Person Investigative Disclosures

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

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

Treas. Reg. § 301.6103(k)(6)-1(a)(3).

<u>In-Person Investigative Disclosure Case Law</u>

1. <u>Gandy v. United States</u>, 1999 WL 112527, at **3-5 (E.D. Tex. Jan. 15, 1999) (court found that special agents who identified themselves to third party witnesses by displaying credentials, and by asking for information pertaining to the identified taxpayer, disclosed that the taxpayer is under criminal investigation, however, the disclosures resulted from a good faith, but erroneous interpretation of section 6103; on taxpayer's appeal, the Fifth Circuit affirmed that the special agents had acted in good faith because the IRM in effect at the time did not prohibit the oral disclosure of the special agents' affiliation with the Criminal Investigation Division, and rejected the taxpayer's argument that the IRM provision pertaining to circular letters should apply to all disclosures, and in dicta, the Fifth Circuit acknowledged that special agents are authorized to display their badges and credentials identifying them as CID agents when interviewing a third party witness (and implicitly, that the agent would be able to disclose orally that he was an agent for CID)), *aff'd*, 234 F.3d 281, 286-87 (5th Cir. 2000).

2. <u>Heller v. Plave</u>, 657 F. Supp. 95, 99 (S.D. Fla. 1987) (court found that a special agent who revealed that a grand jury had been impaneled, that the taxpayer would be indicted, that the case involved tax evasion, that criminal prosecution was recommended,

that the taxpayer would go to jail, that the taxpayer was an attorney who charged exorbitant fees, that the taxpayer had charged one client higher fees than another client for the same service, and that the taxpayer was a despicable human being had made unnecessary disclosures and violated section 6103(k)(6)).

3. Jones v. United States, 97 F.3d 1121, 1124-25 (8th Cir. 1996) (disclosure by a special agent to a confidential informant of an impending search of a taxpayer's premises pursuant to a warrant, where the special agent believed the disclosure was necessary for the confidential informant's safety "did not fall into any of the exceptions to the general rule against disclosure contained in 26 U.S.C. § 6103(c)-(o)").

4. Kemlon Products & Development v. United States, 638 F.2d 1315, 1321-23 (5th Cir.) (when a taxpayer sought to enjoin the IRS from proceeding with a meeting with taxpayer's major customer for purpose of determining the value of certain patents, court held that the IRS could not be enjoined because (1) there was no showing of irreparable harm, and (2) there was no showing that the Government could not prevail on the lawfulness of the disclosure pursuant to section 6103(k)(6)), *modified by* 646 F.2d 223 (5th Cir.), *cert. denied*, 454 U.S. 863 (1981).

5. Malis v. United States, 1986 WL 15721, at **3, 6-7 (C.D. Cal. Dec. 17, 1986) (where special agent made statements to third party witnesses that revealed, among other things, the fact of investigation, that the investigation involved tax evasion, that the taxpayer was involved in a tax scam concerning abusive horse tax shelters, that the taxpayer was intimidating witnesses, that the taxpayer was going to jail, and that the special agent was "out to get him," court concluded that the disclosures were in the form of statements which in themselves did not seek information, and that, although the 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), and court further found that the conduct of the agent was willful or in reckless disregard of the rights of another and awarded punitive damages).

6. Payne v. United States, 91 F. Supp.2d 1014, 1020-21 (S.D. Tex. 1999) (district court determined that the United States was liable, in part, because the special agent had introduced himself to third party witnesses as a special agent of 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), *rev'd & rem'd*, 289 F.3d 377 (5th Cir. 2002) (directed district court to consider the effect of the Fifth Circuit's decision in Gandy, as well as to determine whether there were any unauthorized disclosures in the summons issued to third parties).

7. Roebuck v. United States, 1999 WL 501003, at **3-4 (E.D.N.C. Jun. 8, 1999) (court determined that financial information was not otherwise reasonably available and had to be obtained from third parties, the special agent had acted appropriately by introducing herself as a CID agent with the IRS conducting an investigation of the taxpayer, and that to not introduce herself as a CID agent would be misleading to the witnesses and could cause confusion and misrepresentation), *aff'd by* 84 A.F.T.R.2d 99-7051 (4th Cir. Nov. 23, 1999).

8. Rodgers v. Hyatt, 697 F.2d 899, 904 (10th Cir. 1983) (statements made by a Chief, CID, during a meeting on a wholly unrelated matter with a third party regarding rumors that a taxpayer was dealing in stolen oil, were merely rumors and gossip and were not disclosures necessary to secure information under section 6103(k)(6)).

II. DISCLOSURES TO CONTRACTORS

A. Background

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

> Obtaining the services of persons having special knowledge or technical skills such as, but not limited to, knowledge of particular facts and circumstances relevant to a correct determination of a liability described in clause (iii) [*see* 3, above] . . . or having recognized expertise in matters involving the valuation of property where relevant to proper performance of duties described in this paragraph.

See also IRM 11.3.21.4.1 (rev. 11-30-2001); 11.3.24.1 (rev. 5/8/2002). Section 6103(n) and its implementing regulations authorize, among others, the IRS 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.

Persons who receive return information under section 6103(k)(6) are not subject to restrictions on redisclosure. *See* IRM 11.3.21.5 (rev. 11-30-2001). Persons who receive information under section 6103(n) are specifically covered by the disclosure laws [IRC § 6103(a)(3)] and are subject to criminal and civil sanctions for unauthorized disclosures. *See* IRC §§ 6103(a)(3), 7213(a)(1), 7213A(a)(1)(B), 7431(a)(2).

B. Regulations[37]

1. Treas. Reg. § 301.6103(n)-1 specifically describes limitations on contractor disclosures, including the use and treatment by the contractor of the information disclosed.

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

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

3. Treas. Reg. § 301.6103(n)-1(c) requires the contractor to provide written notice to their officers or employees of the following proscriptions:

> a. That returns or return information disclosed to the officer or employee can be used only for a purpose and to the extent authorized by the general rule in Treas. Reg. § 301.6103(n)-1.
>
> b. That further inspection of any returns or return information for a purpose or to an extent unauthorized by paragraph (a) of this section constitutes a misdemeanor, punishable upon conviction by a fine of as much as $ 1,000, or imprisonment for as long as 1 year, or both, together with costs of prosecution.

[37] *See also* IRM 11.3.24.2 (rev. 5/8/2002).

c. That further disclosure of any returns or return information for a purpose or to an extent unauthorized by paragraph (a) of this section constitutes a felony, punishable upon conviction by a fine of as much as $ 5,000, or imprisonment for as long as 5 years, or both, together with the costs of prosecution.

d. That any unauthorized further inspection or disclosure of returns or return information may also result in an award of civil damages against any person who is not an officer or employee of the United States in an amount not less than $ 1,000 for each act of unauthorized inspection or disclosure or the sum of actual damages sustained by the plaintiff as a result of the unauthorized disclosure or inspection as well as an award of costs and reasonable attorneys fees.

e. If the person is an officer or employee of the United States, a conviction for an offense referenced in paragraph (c)(2) or (c)(3) of this section shall result in dismissal from office or discharge from employment.

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

a. Contractors, their officers and employees, must comply with all applicable conditions and requirements that the IRS may prescribe to protect the confidentiality of returns and return information.

b. Any contract shall provide (or be amended to provide) that the contractor, its officers and employees, shall comply with all applicable conditions and requirements for protecting confidentiality prescribed by the IRS by regulation, published rules or procedures, or written communication to the contractor.

c. The IRS has authority to determine whether a contractor meets the prescribed requirements and conditions. If the IRS determines that the contractor does not do so, the IRS may take any actions deemed necessary to ensure that the conditions or requirements are met. Actions may include terminating or suspending any obligations under a contract with Treasury, suspending disclosures by Treasury otherwise authorized under the contract, suspension of disclosures by the IRS to the state tax agency, or the Tax

Division until the IRS is satisfied that the conditions or requirements are or will be met.

C. Comparison of section 6103(k)(6) and section 6103(n) disclosure authorities

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

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

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

The most common situation raising this taxpayer concern about the type and quantity of return information being disclosed is where the IRS seeks valuation or expert witness services. This frequently occurs during the course of an examination of a taxpayer whose financial transactions are of an unusual or very complex nature, and IRS employees lack the expertise to understand or correctly evaluate them. For the outside expert to provide information of value, he or she must first be provided with substantial amounts of sensitive financial (and sometimes trade secret) information about the taxpayer under examination. In these situations, the expert should be under contract, so that the restrictions and sanctions of section 6103(n) apply.

Disclosures necessary in connection with preliminary inquiries to the prospective contractee (for conflicts of interest, to ascertain availability and

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

CHAPTER 5

DISCLOSURES FOR NONTAX CRIMINAL PURPOSES

IRC § 6103(i)

I. INTRODUCTION

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

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

A. Federal agencies may obtain tax information for use in nontax criminal investigations pursuant to an *ex parte* order of a federal district court judge or magistrate. *See* IRC § 6103(i)(1); Treas. Reg. § 301.6103(i)-1.

B. The *ex parte* court order may be obtained only upon application authorized by the Attorney General, Deputy Attorney General, Associate Attorney General, any Assistant Attorneys General, any United States Attorney, any special prosecutor appointed under 28 U.S.C. § 593, or any attorney in charge of a criminal division organized crime strike force established pursuant to 28 U.S.C. § 510. The application can also be authorized by someone officially acting in the absence of a named official (*e.g.*, an Acting Assistant Attorney General). *See* United States v. Bledsoe, 674 F.2d 647, 670 (8th Cir.), *cert. denied*, Phillips v. United States, 459 U.S. 1040 (1982) (properly designated acting officials may request information under section 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.

> **Note**: Whereas section 6103 (i)(1)(B) requires a named official to authorize each application, there is no requirement that the official actually *sign* the

application. The best evidence, of course, of the required authorization is the signature of the named official on the application. Nevertheless, it may be possible to design alternative methods of ensuring proper authorization. For example, documentation could be secured to indicate that each application not signed by a United States Attorney was, in fact, personally reviewed and authorized by the United States Attorney in each case. This could be implemented in a variety of ways, such as, for example: (1) changing the language of the local section 6103 (i) order application to specifically indicate that the United States Attorney has "personally reviewed and authorized" the application; (2) each United States Attorney retaining written documentation containing his or her specific authorization of each application; or (3) each United States Attorney sending a letter to the district director documenting his or her practice of personally reviewing and authorizing each application before submission to the court.

The application must establish: (1) reasonable cause to believe that a federal nontax criminal violation has occurred; (2) reasonable cause to believe that 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, under the circumstances, from any other source. *See* United States v. Praetorius, 451 F. Supp. 371, 372 (E.D. N.Y. 1978). The courts are expected to review documents and play an active role in balancing investigative need with taxpayer's privacy interests. *See id.* at 373; United States v. Barnes, 604 F.2d 121, 146 (2d Cir. 1979) (large amounts of "miscellaneous" income on return relevant to drug conspiracy case), *cert. denied*, 446 U.S. 907 (1980). An *ex parte* order may properly authorize disclosure of joint returns and return information where the request for the order sought information regarding a joint filer for the years joint returns were filed. *See* Bolin v. United States, 1999 WL 1270979, at * 2 (N.D. GA Nov. 16, 1999).

A federal district court judge or magistrate may **NOT** on his or her own motion initiate an order directing production of tax information under section 6103(i). United States v. Lochmondy, 890 F.2d 817, 823-24 (6th Cir. 1989); *see also* United States v. Recognition Equipment, Inc., 720 F. Supp. 13, 14 (D.D.C. 1989) ("Under § 6103(i)(1)(B) only specified Federal prosecutors, including United States attorneys, may authorize an application to this Court for an order for the disclosure of tax returns or return information").

Because the *ex parte* order process is in fact *ex parte*, a defendant does not have a right to notification, hearing on the application, or disclosure of the information on which the judge or magistrate acted. *See* United States v. Barnes, 604 F.2d at 146; United States v. DiLorenzo, 1995 WL 169003, at ** 8-9 (S.D.N.Y. Apr. 10, 1995).

The section 6103(i)(1) *ex parte* order process may *not* be used to *obtain* tax information for use in a civil proceeding, including a civil forfeiture proceeding. *See*

United States v. $57,303.00 in United States Currency, 737 F. Supp. 1041, 1043 (C.D. Ill. 1990) ("Congress distinguished between criminal investigations or proceedings and civil forfeiture actions when drafting these disclosure provisions."); *United States Attorneys Manual*, Title 9, 9-13.900 (November 12, 1999). Nevertheless, 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). *See* section V and 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) may be disclosed under a less restrictive process than taxpayer return information. This type of tax information may be disclosed for federal nontax criminal purposes in response to a written request from the head of a federal agency or its Inspector General, or, in the case of the Department of Justice, the Attorney General, Deputy Attorney General, Associate Attorney General, Assistant Attorney General, Director of the Federal Bureau of Investigation, the Administrator of the Drug Enforcement Administration, a United States Attorney, a special prosecutor appointed under 28 U.S.C. § 593, or an attorney in charge of a criminal division organized crime strike force established pursuant to 28 U.S.C. § 510. *See* IRC § 6103(i)(2); Treas. Reg. § 301.6103(i)-1.

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 taxpayers' addresses do not comply with the section. The section contemplates requests for return information in addition to taxpayers' addresses.

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

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

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

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

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

C. Terrorist Activities. Section 6103(i)(3)(C) permits the Commissioner to disclose to the Attorney General that the IRS has returns and/or return information that may be of interest in antiterrorism efforts. This section provides that return information that may be related to a terrorist incident, threat, or activity may be disclosed to the extent necessary to apprise the heads of the appropriate federal law enforcement agencies responsible for investigating or responding to the terrorist incident, threat, or activity. The agency head may disclose the return information to the agency's officers or employees to the extent necessary to investigate or respond to the terrorist incident, threat, or activity.

For purposes of section 6103(i)(3)(C)(iii), taxpayer identity information is not treated as return information and by itself may be disclosed so long as it is related to antiterrorism efforts.

Returns and taxpayer return information may also be disclosed to the Attorney General under section 6103(i)(3)(C)(ii) to the extent necessary for, and solely for use in preparing, an application for an *ex parte* disclosure as authorized by the

Commissioner. *See* IRC § 6103(i)(7)(D). Under section 6103(i)(7)(D), the statute reiterates that, for purposes of section 6103(i)(3)(C), a taxpayer's identity is *not* treated as taxpayer return information.

> **Note:** The statutory authority to disclose return information under section 6103(i)(3)(C) expires December 31, 2006, however, Congress has extended this provision every year since its enactment. Check the current version of the U.S. Code to be certain this section remains in effect.

D. For referral procedures, *see* IRM 11.3.28, Disclosure to Federal Agencies for Administration of Nontax Criminal Laws.

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) or 7(C), disclosures under *ex parte* orders, may be used as evidence in a judicial or administrative proceeding relating to a federal nontax crime or related civil forfeiture, provided a few requirements are first met: (1) the court determines that the information is probative of the commission of the crime or (2) the court directs the disclosure pursuant to 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 the information can occur only if the United States has previously obtained such information under sections 6103(i)(1), (2) or (3)(A). *See* United States v. Lochmondy, 890 F.2d at 823-24; United States v. Jackson, 850 F. Supp. 1481, 1504 (D. Kan. 1994).

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

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 for the sole purpose of locating a fugitive who has committed a federal felony only upon the grant of an *ex parte* order by a federal district court judge or magistrate. The extent of the disclosure will be governed by the language of the order.

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

C. The application must indicate:

1. a federal felony arrest warrant has been issued and the taxpayer is a fugitive from justice;

2. the return or return information is sought exclusively for locating the taxpayer/fugitive; AND

3. there is reasonable cause to believe information will help locate the fugitive.

VII. SECTION 6103(i)(6): CONFIDENTIAL INFORMANTS; IMPAIRMENT

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

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

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

VIII. SECTION 6103(i)(7): DISCLOSURE UPON REQUEST FOR INFORMATION RELATING TO TERRORIST ACTIVITES

Note: The statutory disclosure authority in this subsection expires December 31, 2006, however, Congress has extended this provision every year since its enactment. Check the current version of the U.S. Code to be certain this section remains in effect.

A. Law Enforcement Agencies.

Returns and return information may be disclosed, upon written request, to officers and employees of a federal agency who are personally and directly engaged in the response to or investigation of any terrorist incident, threat, or activity.
The request to the Secretary must:

1. be made by the head (or delegate) of any Federal law enforcement agency involved in the response to or investigation of any terrorist incident, threat, or activity; and

2. set forth the specific reason(s) why the disclosure may be relevant to the response to or investigation of any terrorist incident, threat, or activity.

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

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

B. Intelligence Agencies.

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

1. be made by a Department of Justice or Department of the Treasury officer or employee or the Director of the United States Secret Service who is responsible for the collection and analysis of intelligence and counterintelligence information concerning any terrorist incident, threat, or activity; and

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

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

C. *Ex Parte* Orders.

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

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

1. there is reasonable cause to believe (based upon information believed to be reliable) that the return or return information may be relevant to a matter relating to such terrorist incident, threat, or activity; and

2. the return or return information is sought exclusively for use in a Federal investigation, analysis, or proceeding concerning any terrorist incident, threat, or activity.

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

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

IX. SECTION 6103(i)(8): DISCLOSURE OF TAX INFORMATION TO THE COMPTROLLER GENERAL

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

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

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

Trades or businesses other than financial institutions are required to report cash transactions exceeding $10,000 to the Service on Form 8300. Section 6103(l)(15) authorizes the disclosure of information from returns filed under section 6050I (*i.e.*, Forms 8300) to federal, state, local or foreign government agencies, under the same terms and conditions applying to the disclosures of Currency Transaction Reports (Forms 4789) filed by financial institutions under the Bank Secrecy Act (31 U.S.C. § 5313, *et seq.*). *See* IRM

9.5.5.1.25.5, Use and Disclosure of Form 8300 Information; Chapter 7 (currency transaction and money laundering disclosures).

Section 365 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (the "USA Patriot Act"), P.L. 107-56, added section 5331 to the Bank Secrecy Act. 31 U.S.C. § 5331. It requires any person who is engaged in a trade or business and who in the course of the trade or business receives more than $10,000 in coins or currency in one transaction or in related transactions, to file a report with the Financial Crimes Enforcement Network (FinCEN) of the Department of the Treasury. This is the same information collected by the IRS under Internal Revenue Code section 6050I on Form 8300 that is return information subject to section 6103 limitations. The information collected by the FinCEN under Title 31 is not return information protected from disclosure by section 6103. Therefore, to the extent federal, state, local or foreign government agencies can access this information from FinCEN, rather than the IRS, they would not need to rely on the authority in section 6103(l)(15).

XI. REPORTING VIOLATIONS OF NONTAX CRIMES NOT INVOLVING TAX INFORMATION

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

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

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

CHAPTER 6

DISCLOSURE OF RETURNS AND RETURN INFORMATION IN BANKRUPTCY CASES

I. GENERAL DISCLOSURE CONCEPTS

A. General Rule -- Confidentiality

The general rule regarding disclosure of returns and return information is found in IRC § 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 ("Code"). *See* Church of Scientology of California v. I.R.S., 484 U.S. 9, 12 (1987). The unauthorized disclosure of returns or return information may result in civil damages against the United States (IRC § 7431) and/or criminal penalties against the individual who disclosed the information (IRC § 7213). *See* Nowicki v. Comm'r, 262 F.3d 1162, 1163 (11th Cir. 2001).

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

Generally, a "return" is the actual form filed by the taxpayer, including supporting schedules, a claim for refund, as well as any information return filed by a third party with respect to the taxpayer. IRC § 6103(b)(1). "Return information" is defined, generally, as the taxpayer's identity (name, address, and taxpayer identification number), 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 determination of the existence (or possible existence) of liability under the Code. IRC § 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 a case pertains to "tax administration." If a bankruptcy case pertains to tax administration, disclosures of the debtor's tax information are permitted, under the rules of section 6103(h), to the court, to the Department of Justice (DOJ), or otherwise in the proceeding according to the applicable rules of procedure, evidence, etc. 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) to the debtor; (2) with the debtor's consent; (3) to the Chapter 7 or 11 trustee; or (4) in a criminal proceeding pursuant to section 6103(i). Thus, it is important to determine whether a particular bankruptcy case is a proceeding 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 statutes[38] (or equivalent laws and statutes of a State) and tax conventions to which the United States is a party ... [including] assessment, collection, enforcement [and] litigation ... functions under such laws, statutes or conventions.

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

It is not uncommon for a debtor to be under audit at the time a petition is filed, or for the bankruptcy petition to trigger an audit of the debtor in large bankruptcy cases. The IRS's examination of the debtor, as a taxpayer, is a tax administration proceeding, but that does not automatically make the bankruptcy itself a tax administration proceeding. In general, a bankruptcy case pertains to tax administration if the bankruptcy court's involvement is needed to determine a matter pertaining to assessment or collection of tax, or is otherwise needed to

[38] Bankruptcy provisions would be "related statutes" to the extent they are utilized in determining the validity or amount of the IRS's tax claim.

enforce the internal revenue laws.[39] When that nexus is established will depend upon the facts of the bankruptcy case.

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

- If the debtor lists the IRS as a creditor in the petition (or in an attached schedule of liabilities), disclosures under section 6103(h) would be permitted at the commencement of the case. By virtue of the debtor's putting the tax in issue and the government's participating in the case, the proceeding becomes one pertaining to tax administration. Upon making a referral to DOJ pursuant to section 6103(h)(3)(A), 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 bankruptcy case will be a proceeding pertaining to tax administration if the IRS participates.

- If no tax liability is listed in the debtor's schedules, but the IRS files a proof of claim or request for payment of administrative expenses, the case would become a proceeding pertaining to tax administration upon the filing of the proof of claim or request. By filing the proof of claim or request, the IRS has formally appeared in the case and put the tax matter in issue.

- If the IRS takes any formal action in a bankruptcy case, 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 case would become a proceeding pertaining to tax administration upon the IRS's filing of the appropriate formal action (unless an earlier triggering event has occurred).

- If United States Code, Title 11, hereinafter the “Bankruptcy Code” or “B.C.” (unless otherwise noted) permits the debtor to operate the debtor's business post-petition, or the court authorizes the trustee to operate the debtor's business post-petition, the debtor will accrue employment tax and other continuing tax and reporting obligations which are subject to the court's supervisory authority.[40] Such operations make the bankruptcy case a proceeding pertaining to tax administration; this would permit the

[39] The Bankruptcy Court has broad jurisdiction to determine the validity and priority of the IRS's tax claims and federal tax liens, and the amount or legality of any tax. B.C. §§ 502, 505 and 545.

[40] *See* B.C. § 704(8); Bankr. R. 2015(a)(3). Chapter 11 bankruptcies contemplate that the debtor will engage in some sort of business. *But see*, Toibb v. Radloff, 501 U.S. 157, 160 – 166 (1991) (individual without business can reorganize under Chapter 11). B.C. § 1108 authorizes the trustee (or debtor in possession) to operate the debtor's business. In a Chapter 7, the court may authorize the trustee to operate the debtor's business for a limited period. B.C. § 721. In a Chapter 13, the business of the debtor, if any, may also be continued. B.C. § 1304.

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 could be disclosed to a creditor who has filed a proof of claim, even if the information has no relation to the government's tax claim, since the statute only requires that the taxpayer be a party to the proceeding. This type of disclosure is at odds with the objective of section 6103 to limit disclosures that have no relationship to tax administration.

Accordingly, disclosures under section 6103(h) in bankruptcy cases should be limited to information pertaining to the tax matter that is at issue in the case. For example, if the debtor owes no pre-petition tax liabilities, and the only reason a case 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 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 the Debtor. A debtor is entitled to its returns and, if disclosure would not seriously impair federal tax administration, its return information. IRC § 6103(e)(1), (e)(7). In Chapter 7 and 11 cases involving an individual debtor (where IRC § 1398 applies), the IRS may disclose the returns filed by the trustee on behalf of the bankruptcy trustee to the individual debtor. IRC § 6103(e)(5)(B); IRM 11.3.2.4.12(8).

Disclosures Upon Consent. The IRS shall disclose the debtor's returns and, absent an impairment determination, the IRS may disclose the debtor’s return information to the debtor, and to any other person with the debtor's written

consent. IRC § 6103(e)(1), (e)(6), (e)(7), (c). In addition, the debtor and trustees who are authorized to receive returns under IRC § 6103(e)(1), (4), or (5), may consent to the disclosure of the debtor's returns and return information to third parties if the requirements of Treas. Reg. § 301.6103(c)-1 are met. *See* Treas. Reg. § 6103(c)-1(e)(4).

Disclosures in Judicial Proceedings Pertaining to Tax Administration. The IRS[41] may disclose the debtor's returns and return information in the course of a bankruptcy case to the court, the trustee, the U.S. Trustee, or other creditors, if the bankruptcy case pertains to tax administration. IRC § 6103(h)(4). As discussed above, a bankruptcy case pertains to tax administration if the bankruptcy court's involvement is needed to determine a matter pertaining to assessment or collection of tax, or is otherwise needed to enforce the internal revenue laws and the taxpayer and the government (on behalf of the IRS) are properly before the court. While the statute does not include any limitation on the party to the proceeding's return and return information that may be disclosed under section 6103(h)(4)(A), a good rule of thumb is to disclose only the debtor's tax information pertaining to the tax matter that is at issue in the bankruptcy case. Third party return information may also be disclosed in the proceeding subject to the item or transaction tests, including the "directly related" threshold pursuant to section 6103(h)(4)(B) and (C).

Disclosures to Trustee in Chapter 7 and 11 Cases Involving a Non-Individual Debtor. Where a trustee has been appointed in a Chapter 7 or 11 bankruptcy case in which the debtor is not an individual, *e.g.,* a corporation, the IRS may disclose to the trustee, upon written request, the debtor's returns for the years prior to the one in which the petition is filed. IRC § 6103(e)(4); IRM 11.3.2.4.12(9). IRC § 6103(e)(4) permits disclosures to bankruptcy trustees only if the trustee has a "material interest" in the debtor's return information.

Material interest is generally defined as a financial or monetary interest. Material interest is not limited to the trustee's responsibility to file a return on behalf of the bankruptcy estate. IRC § 6103(e) does not permit disclosures to the United States Trustee or the standing Chapter 13 trustee; however, such disclosures may be permitted in the context of a judicial proceeding if the bankruptcy case pertains to tax administration. IRM 11.3.2.4.12(10).

Disclosures to Trustees in Chapter 7 and 11 Cases Involving an Individual Debtor. In an individual's Chapter 7 or 11 case (where IRC § 1398 applies), a return for the estate of the debtor is filed by the trustee in addition to the return filed by the debtor. In these cases, the trustee may receive, upon written request, copies of any return filed by the debtor for the year in which the petition was filed and all prior years. IRC § 6103(e)(5)(A); IRM 11.3.2.4.12(6).

[41] Throughout this Chapter, references are made to disclosures by the IRS during the course of a bankruptcy case pertaining to tax administration. Such disclosures are not directly made by the IRS. Instead, the IRS makes such disclosures to the Department of Justice for its disclosure, as required, in the course of the bankruptcy case.

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

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

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

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

Debtor's Duty to Provide Federal Tax Returns. For cases filed on or after October 17, 2005, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) places a number of duties on a bankruptcy debtor to provide copies of returns or transcripts to various entities within the bankruptcy case.

a. B.C. § 521(e)(2) requires the debtor to provide to the trustee a copy of his or her federal income tax return (or, at the election of the debtor, a transcript of such return) for the most recent tax year ending before the commencement of the case.

b. B.C. § 521(f) requires that the debtor provide copies of any federal income tax returns, or transcripts of those returns, filed by the debtor for post-petition periods, and copies of any returns/transcripts for certain pre-petition periods that were filed post-petition, to the court and parties in the bankruptcy proceeding, if requested.

c. B.C. § 1308 requires that Chapter 13 debtors file with the IRS before the first meeting of creditors copies of federal income tax returns for taxable periods ending within four years of the bankruptcy petition. In order to ascertain whether Chapter 13 debtors have complied with their filing obligations under section 1308, Chapter 13 trustees may ask the debtors for copies of transcripts of such returns. Although trustees may wish to verify that the returns provided by the debtor were actually filed with the IRS, Congress did not amend section 6103 as part of the BAPCPA. In such instances, the debtor may consent to the IRS's disclosure of return information to the trustee.

The IRS has existing procedures, which comply with section 6103, for debtors to obtain tax information to satisfy their obligations under the BAPCPA and show what has been filed with the IRS. The debtor may fulfill its obligation by

supplying tax transcripts. Tax transcripts are available to the debtor for free by calling the IRS's toll-free customer service number (1-800-829-1040) or by submitting a Form 4506-T with the IRS. In addition, the debtor can also request a copy of his or her filed income tax returns by submitting a Form 4506 to the IRS. There is a fee per each requested return. In those cases where the IRS cannot disclose the debtor's returns to the trustee upon the trustee's request (Chapter 13 bankruptcies), the IRS may disclose the returns or transcripts to the trustee if the debtor consents to such disclosure. IRC § 6103(c).

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 (IRC § 6103(c), (e)(7)). Similarly, in the context of any bankruptcy case that is a tax administration proceeding, the disclosure of returns or return information shall not be made if the disclosure would identify a confidential informant or seriously impair a civil or criminal tax investigation (IRC § 6103(h)(4)).

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

IRC § 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. IRC § 6103(e)(1)(D). A person's "return information" may also be disclosed to that person, unless the IRS determines the disclosure will seriously impair Federal tax administration. IRC § 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. IRC § 6103(e)(6) and (7). The IRS's standard power of attorney form (Form 2848) contains language authorizing disclosure. An authorization for purposes of tax administration made by power of attorney does not require a separate writing and does not require receipt within 60 days of the date the authorization was signed and dated by the taxpayer as does a consent made pursuant to section 6103(c) as described below.

The taxpayer may also designate in a separate written request a person to receive his returns or return information. IRC § 6103(c) (a "waiver" or "consent"). The request must pertain solely to the authorized disclosure, be signed and dated by the taxpayer, contain the taxpayer's identity information as set forth in section 6103(b)(6), provide 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).[42] 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). *See* IRM 11.3.3.1.1.

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

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), specifically giving the attorney authority to designate another individual to receive the information, or unless the accountant or other expert has a separate written authorization from the debtor.

C. To Trustee in Individual Chapter 7 or 11 Cases -- Sections 6103(e)(5) and (e)(1)(E)

Section 6103(e)(5)(A) provides for disclosure of returns to bankruptcy trustees,[43] upon written request, in cases under Chapters 7 and 11 where the debtor is an individual. IRM 11.3.2.4.12(9). In such cases, pursuant to section 1398, a separate taxable bankruptcy estate is created. The estate succeeds to various tax attributes of the debtor. IRC § 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. IRC § 6103(e)(5)(C); IRM 11.3.2.4.12(7).

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

[43] 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. IRC § 6103(e)(6). Being the trustee's attorney of record is not sufficient.

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

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

Disclosures of returns pursuant to paragraphs (e)(1)(E) and (5) also require a written request. However, a written request is not required for the disclosure of return information under paragraph (e)(7). Finally, remember 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. Note, however, that disclosures made under section 6103(e) do not depend on whether the proceeding involves tax administration, or if the disclosures have a tax administration purpose (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)

IRC § 6103(e)(4) applies to Chapter 7 or 11 bankruptcy 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.[44] 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 defined as 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, while a written request is needed before a return may be disclosed, no written request is necessary for return information, 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.

[44] *See* IRC § 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.").

IRC § 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 the Department of Justice in Tax Administration Cases -- Section 6103(h)(2)-(3)

DOJ represents the IRS in tax matters arising before the bankruptcy court. Disclosures to DOJ for use in bankruptcy matters, to the extent that the bankruptcy case involves tax administration, are governed by subsections 6103(h)(2) and (3). Section 6103(h)(2) provides in pertinent part as follows:

> In a matter involving tax administration, a return or return information shall be open to inspection by or disclosure to officers and employees of DOJ (including United States attorneys) personally and directly engaged in, and solely for their use in, a proceeding before . . . any Federal . . . court, but only if--
>
> > (A) the taxpayer is or may be a party to the proceeding, or the proceeding arose out of, or in connection with, determining the taxpayer's civil or criminal liability, or the collection of such civil liability, in respect of any tax imposed under this title;
> >
> > (B) the treatment of an item reflected on such return is or may be related to the resolution of an issue in the proceeding . . .; or
> >
> > (C) such return or return information relates or may relate to a transactional relationship between a person who is or may be a party to the proceeding and the taxpayer which affects, or may affect, the resolution of an issue in such proceeding . . .[45]

A bankruptcy case is said to pertain to tax administration if the bankruptcy court's involvement is needed to determine a matter pertaining to assessment or collection of tax, or is otherwise needed to enforce the internal revenue laws. IRC § 6103(b)(4).

As a general rule, before any disclosures may be made to DOJ in a bankruptcy case that pertains to tax administration, the matter must be referred to DOJ for their representation or advice. IRC § 6103(h)(3)(A).[46] A referral for disclosure

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[45] The "item" and "transaction" tests for disclosure of third party tax information are discussed in Part II.F and at greater length in Chapter 3.

[46] Section 6103(h)(3)(A) describes IRS initiated referrals, which are used in most tax administration cases that the IRS brings against taxpayers. It is possible, however, for DOJ to initiate a referral, pursuant to section 6103(h)(3)(B). This form of referral requires a written request for the returns or return information from the Attorney General, Deputy Attorney General, or Assistant Attorney General.

purposes includes any formal request to DOJ for defense, prosecution, or other affirmative action with respect to a case. IRC §§ 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 the debtor's tax information to the Tax Division of DOJ. If the bankruptcy is a tax administration case, then disclosures of tax information may be made to DOJ, to the extent authorized by section 6103(h)(2)(A)-(C), after a determination that DOJ's assistance is necessary, *i.e.*, appropriate and helpful.

Due to pre-petition events, some bankruptcy cases may pertain to tax administration immediately upon the filing of the petition. For example, if the debtor lists the IRS as a creditor on its schedule of liabilities or plan of reorganization, then the bankruptcy pertains to tax administration if the IRS chooses to pursue the listed debt. Other examples include when the IRS has a current notice of lien filed against the debtor's property prior to the petition's filing, or if the trustee or debtor-in-possession is permitted to operate a business post-petition. This last example pertains to tax administration only for post-petition incurred employment taxes and other reporting or filing obligations. In each of these examples, the IRS has a tax interest in the bankruptcy case from the moment the petition is filed. If the IRS chooses not to pursue its interests in the case, however, no referral to DOJ for representation or advice would be appropriate and no disclosures of tax information to DOJ should be made. Examples where the IRS might choose not to pursue its interests in a case include Chapter 7 no asset bankruptcies and bankruptcies where the tax debts owed are the sort that would not be discharged by a bankruptcy proceeding.

Some bankruptcy cases may become tax administration proceedings after the petition is filed. For example, the debtor may file a motion to determine taxes under B.C. § 505, or initiate a preference action against the IRS under B.C. § 547. Alternatively, the IRS may determine that it is necessary to file a proof of claim, request payment of administrative expenses, or take some action in the case to invoke the jurisdiction of the bankruptcy court, such as filing a motion to extend the bar date, lift the automatic stay, or object to a proposed plan. Any of these actions subjects the IRS to the bankruptcy court's jurisdiction and makes the bankruptcy case a tax administration proceeding. The IRS may also make the bankruptcy case a tax administration proceeding by requesting DOJ's representation in negotiating a stipulation with the debtor.

In general, the Office of Chief Counsel requests DOJ's representation or input when it is necessary to protect the Service's interests in a bankruptcy case.[47] Using the same definition that the Service applies to investigatory disclosures,

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The written request for information must also state the need for the disclosure. DOJ-initiated referrals are extremely rare, and still require that the case pertain to tax administration.

[47] The Office of Chief Counsel has previously determined that the Insolvency Unit may have direct referral authority to send smaller bankruptcy matters to DOJ for their representation. See IRM 34.3.1.1.7.

the term necessary "does not mean essential or indispensable, but rather appropriate and helpful . . . ." Treas. Reg. § 301.6103(k)(6)-1(c)(1).

The IRS may communicate with DOJ prior to the issuance of a referral, but these occurrences are rare.[48] Pre-referral requests for advice seek DOJ's guidance on a limited issue, with DOJ's involvement in the investigation or case ending after that particular issue has been resolved. For example, Chief Counsel may request pre-referral advice from DOJ on whether DOJ would defend a proposed motion in a particular proceeding. Pre-referral advice requests to DOJ still require that the bankruptcy be a tax administration proceeding, that the request for pre-referral advice and assistance be made by the same level of authority in Chief Counsel as would authorize a referral, and the scope of tax information to be disclosed should be no more than that authorized in section 6103(h)(2).[49]

The internal determination to seek DOJ's advice prior to making a referral must be documented for the case file and approved by the same level of authority that would authorize a referral. The authorization to disclose tax information to DOJ for pre-referral advice ceases once the advice is received. *See* IRM 11.3.22.12.2. Requests for pre-referral advice are not a blanket authorization to consult with DOJ informally throughout the duration of the bankruptcy.

Once a referral has been made, any of the debtor's tax information that is related to and helpful in resolving the issues or liabilities that the IRS has chosen to pursue in the proceeding, including related tax year information as may arise from carryovers or carrybacks, may be disclosed to DOJ. The tax information of a person other than the debtor may also be disclosed to DOJ if it satisfies the item or transaction tests provided in section 6103(h)(2)(B)-(C).

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, the U.S. Attorney has designated one or more Area Counsel or field attorneys as Special Assistant United States Attorneys (SAUSAs). SAUSAs are permitted to perform a number of tasks involving bankruptcy cases. The types of matters that may be handled by SAUSAs are described at IRM 34.11.1.

For disclosure purposes, an Area Counsel or field 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 DOJ. Thus, since disclosures to the Justice Department are generally permitted only if the IRS "has referred the case to DOJ" (IRC § 6103(h)(3)(A)), an Area Counsel or field

[48] See Staff of the Joint Committee on Taxation, GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1976, 94th Cong., 2nd Sess. 322 (1976).

[49] For most bankruptcy cases, Delegation Order 11-2 assigns the referral authority in the Office of Chief Counsel to the Associate Chief Counsel or Division Counsel. This authority may be redelegated to Counsel attorneys directly involved in the matter to be referred.

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

1. Tax Information of the Debtor

IRC § 6103(h)(4)(A) provides rules under which a debtor's returns and return information may be disclosed in federal judicial and administrative proceedings pertaining to tax administration. That section provides, in pertinent part, that:

> A return or return information may be disclosed in a Federal . . . judicial or administrative proceeding pertaining to tax administration, but only—
>
> (A) [if] the taxpayer is a party to the proceeding, or the proceeding arose out of, or in connection with, determining the taxpayer's civil or criminal liability, or the collection of such civil liability, in respect of any tax imposed under this title

Section 6103(h)(4) does not specify to whom information may be disclosed, it merely says "in" the proceeding. Disclosure “in the proceeding” means a disclosure of returns or return information made to a court (including a court reporter or stenographer), a mediator or arbitrator, or to a party to the proceeding under the practices and procedures generally applicable to such proceeding, and subject to any rules governing such proceeding. For example, in particular situations section 6103(h)(4) may authorize disclosures to the court, 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.

A literal interpretation of section 6103(h)(4)(A) permits the disclosure of all the debtor's tax information to the court or to any party to the proceeding. But this type of disclosure is at odds with the objective of section 6103 to limit disclosures that have no relationship to tax administration. Accordingly, after a proper referral to DOJ is made, attorneys should disclose only the debtor’s tax information that pertains to the tax matter at issue in the case. For an extensive discussion of when a bankruptcy case pertains to tax administration, and the scope of the information that may be disclosed, see Part I. C. and D., supra. For a discussion of the rules relating to disclosure of third party tax information pursuant to the item and transaction tests of section 6103(h)(4)(B) and (C), see Part II, supra. See Chapter 3 for a fuller discussion of section 6103(h)(4)(A), (B) and (C).

G. To DOJ in Non-Tax Criminal Investigation or Prosecution -- Section 6103(i)

The disclosure of tax information to DOJ 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"[50] may be disclosed upon written request by certain specifically enumerated DOJ officials for use in a non-tax investigation or prosecution.

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 appropriate disclosure personnel. 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;

[50] 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. IRC § 6103(b)(3).

5. Specific source of information, *i.e.*, third party, taxpayer, taxpayer's representative, taxpayer's return and the circumstances under which such information was obtained;[51]

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.*, DOJ (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.

Disclosure personnel will review the information and, if it qualifies for referral under section 6103(i)(3), will forward it to the appropriate agency.

Section 6103(i)(3)(C). Section 6103(i)(3)(C) permits the IRS to disclose to the DOJ that it has returns and/or return information that may be of interest in anti-terrorism efforts (*i.e.,* information that may be related to a terrorist incident, threat, or activity). Section 6103(i)(3)(C) also permits the IRS to make disclosures upon court order or written request, some involving law enforcement agencies, others involving intelligence agencies. For a fuller discussion on disclosures authorized for purposes of anti-terrorism efforts pursuant to section 6103(i), *see* Chapter 5.

H. Matters of Public Record

As explained more fully in Chapter 2, neither section 6103 nor any other provision of the Code contain any express exception authorizing publication of tax information that has become a matter of public record in connection with tax administration. With respect to disclosures made in a court of law, the Supreme Court has held that what transpires therein is a matter of public record and can be reported with impunity as no reasonable expectation of privacy attaches to information that is a matter of public record. See Nixon v. Warner Communications, Inc., 435 U.S. 589, 609 (1978) (media is entitled to portions of tapes already released during trial). Even where the information disclosed in the proceeding is tax information, once such information is in the public domain, any entitlement to privacy is lost. See United States v. Posner, 594 F. Supp. 930, 936 (S.D. Fla. 1984).

On the theory that there is no "disclosure" (*see* IRC § 6103(b)(8)) of matters already in the public record of a judicial tax proceeding (including a bankruptcy case that pertains to tax administration) or as a result of IRS enforcement activities (*e.g.*, recording of a Notice of Federal Tax Lien, or a notice of public

[51] 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 may also be disclosed.

sale of a taxpayer's seized real property), a number of courts have adopted the position that tax information that has properly become a matter of public record by virtue of the judicial tax proceeding or as a result of the IRS's enforcement activities is no longer confidential. *See* William E. Schrambling Accountancy Corp. v. United States, 937 F.2d 1485, 1489 (9th Cir. 1991), *cert. denied*, 502 U.S. 1066 (1992); Lampert v. United States, 854 F.2d 335 (9th Cir. 1988), *cert. denied*, 490 U.S. 1034 (1989); Peinado v. United States, 669 F.Supp. 953 (N.D. Cal. 1987).[52] Return or return information once disclosed, which is filed with the Bankruptcy Court, becomes a matter of public record and open to examination. B.C. § 107(a).[53] Although this "public record" exception has not been universally accepted, the IRS has determined that tax information taken directly from the public record of a judicial tax proceeding or as a result of enforcement activities under the Code may be disclosed irrespective of section 6103, so long as there is attribution to that public source of the tax information. IRM 11.3.11.13. To ensure accurate reporting of public record information, the information disclosed should be drawn directly from the public source document, e.g., an indictment, affidavit, or pleading. Note that the "public record" exception does not apply to information that has appeared only in the newspaper.

[52] 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. B.C. § 107(b). The court may also protect a person against scandalous or defamatory matter contained in a paper filed with the court. *Id.*

[53] 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. B.C. § 107(b). The court may also protect a person against scandalous or defamatory matters contained in a paper filed with the court. *Id.*

I. Disclosure Authority: Delegation Order 11-2

The authority to permit disclosure of tax information under section 6103, and the authority to permit testimony or the production of documents, is delegated to selected IRS personnel under Delegation Order 11-2, IRM 11.3.35.2. Delegation Order 11-2, as well as any pertinent local delegation order, should be consulted if there is any question concerning the authority of particular employees, including Counsel attorneys, to make particular disclosures.[54]

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 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). The evidence may implicate the debtor, the trustee, a third party or a representative in the proceeding. In these situations, questions arise as to the proper use of the information in civil proceedings, authority to refer the information for criminal investigation, and the proper persons to whom to make the referral.

A. Disclosure in the Civil Proceeding

The debtor's tax information may be disclosed in a civil proceeding (including a bankruptcy case),[55] 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 (Concealment of assets; false oaths and claims; bribery). 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. IRC § 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).[56]

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[54] 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 11-2 (second full paragraph).

[55] Under certain circumstances, disclosure of third party information is also permitted. *See* Part II.G.

[56] Pursuant to 18 U.S.C. § 3057, any judge, receiver, or trustee having reasonable grounds for believing that a violation of the bankruptcy fraud provisions has been committed or that an investigation should be had in connection therewith, must report to the appropriate U.S. Attorney all

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, a non-tax offense under the money laundering provisions, information that may be of interest in anti-terrorism efforts, or other provision within the IRS's jurisdiction, the matter of potential criminal liability should be referred to Criminal Investigation for investigation. If Criminal Investigation determines that the evidence involves a violation of Title 26, the matter may be referred to DOJ for prosecution (after administrative investigation) or grand jury investigation, following the normal referral path for criminal tax cases. Section 6103(h)(2)-(4) permits disclosure of the information for purposes of a Title 26 investigation and prosecution.

Moreover, the section 6103(h) regulations *also* permit information that has been disclosed for a criminal tax investigation or prosecution to be used for the investigation or prosecution of a *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 is later terminated, *e.g.*, the Justice Department drops the Title 26 charges, returns and "taxpayer return information" (IRC § 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, Criminal Investigation determines the evidence shows only a non-tax criminal violation), the matter may be disclosed to

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the facts and circumstances of the case, the names of the witnesses, and the offense or offense believed to have been committed. In addition, when the United States Trustee considers it to be appropriate, he or she may notify the appropriate U.S. Attorney of matters which relate to the occurrence of any action which may constitute a crime under the laws of the United States. 28 U.S.C. § 586(a)(3)(F).

DOJ only under the procedures authorized in section 6103(i). *See* Part II.G., *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 pre-petition levy and B wants to negotiate a cash collateral agreement and/or obtain turnover of the property without incurring unnecessary litigation expenses. The IRS may discuss A's return information with B. IRC § 6103(e); IRM 11.3.3.1.6 (4). Reference: Part II.B.

B. Bankruptcy Court

Example 2. The debtor files a disclosure statement that fails to list employment tax liabilities. The debtor has failed to file pre-petition employment tax returns. SBSE Area Counsel has reason to believe, based on the business and/or other activities of the debtor, that the debtor has employment tax liabilities. The IRS may object to the adequacy of the disclosure statement. The case becomes one pertaining to tax administration at the time of the IRS's objection. Upon objection, the IRS could disclose the debtor's return information in the objection or in any subsequent proceedings. IRC § 6103(h)(4). Reference: Parts I.C., I.D., II.F.

Example 3. The debtor files a petition under Chapter 7 on September 1, 2002. He seeks to have income taxes discharged for the years 1995-1998, which taxes were assessed on December 1, 2001. *See*, B.C. §§ 507(a)(7); 523(a)(1). The debtor did not file income tax returns for those years, thus the taxes are not dischargeable. B.C. § 523(a)(1)(B)(i). The assessments were based on defaulted statutory notices of deficiency. The IRS may disclose this information during the bankruptcy case. IRC § 6103(h)(4). Reference: Parts I.C., I.D., II.F.

Example 4. The debtor files a petition under Chapter 13, owing no pre-petition taxes. The Bankruptcy Court confirms the debtor's Chapter 13 plan. After confirmation, the debtor incurs tax liabilities 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. IRC § 6103(h)(4). Reference: Parts I.C., I.D., II.F.

C. 341 Meeting

Example 5. The United States Trustee convenes and presides over a first meeting of the debtor's creditors. B.C. § 341; 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 pre-petition taxes. During this meeting, the debtor is examined under oath by interested creditors. The purpose

of the examination is to enable creditors and the trustee to determine 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. IRC § 6103(h)(4). Reference: Parts I.C., II.F.

D. United States Trustee

Example 6. In a Chapter 11 case, the 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. IRC § 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.F.

Example 7. The IRS learns that the debtor has property interests that he has not disclosed to the bankruptcy court (or has committed some other act 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. IRC § 6103(h)(4). If the case does not pertain to tax administration, the procedures in section 6103(i) must be followed in order to make any disclosures.

E. Trustee for the Case

Example 8. Several creditors file an involuntary petition in bankruptcy against the debtor, an individual. The IRS has information indicating that debtor is insolvent (*i.e.,* generally not paying debts as they come due), which is relevant to determining whether the court should grant an order for relief. B.C. § 303(h). No trustee has been appointed. The case does not pertain to tax administration. Creditors subpoena the IRS records for use at the court hearing. The IRS should oppose the subpoena on the basis that section 6103(e)(5)(C) and (e)(7) only permits disclosures to the trustee, not to creditors. Reference: Part II.C.

Example 9. 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. IRC § 6103(e)(4), (5), (7). Reference: Parts II.C., II.D.

Example 10. In a Chapter 7 "no-asset" bankruptcy, the debtor, an individual, has

no outstanding tax liabilities, and the IRS has not filed a proof of claim. The debtor, a calendar year taxpayer, filed his petition in bankruptcy on November 1, 2000. In July 2002, the trustee asks the IRS for the debtor's latest address. This address would come from the debtor's 2001 return. The address cannot be disclosed because it is return information from a year subsequent to the commencement of the case. IRC § 6103(e)(5). Reference: Part II.C.

Example 11. In attempting to recover a fraudulent transfer, the trustee requests the debtor's return for a year prior to the filing of the petition to see how a transaction was treated. Upon written request, the return may be disclosed to the trustee. IRC § 6103(e)(4), (5). Reference: Parts II.C., II.D.

Example 12. The IRS has knowledge of a pre-petition transfer of property without adequate consideration from the debtor to her daughter. The bankruptcy case is a Chapter 7 "no-asset" liquidation in which the IRS has not filed a proof of claim. If the transferred property were an asset of the estate, the IRS would have priority over some of the debtor's other creditors, and could thus obtain a portion of any proceeds of sale. The IRS may disclose the transfer to the trustee, so that the trustee could commence an action to bring the property into the bankruptcy estate. IRC § 6103(e)(5), (7). Reference: Parts II.C.

F. Creditors

Example 13. A creditor (or the creditors' committee), a party in the bankruptcy case, 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, B.C. § 502(a) would permit such an objection. Reference: Parts I.C., I.D., II.F.

Example 14. A previously uninvolved creditor wants information about the debtor's tax situation in considering the debtor's request for fresh financing. Since 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.F.

Example 15. A creditor wants to obtain general information concerning the existence or amount of a federal tax claim, the filing date for the notice of federal tax lien, or the date of the assessment. If the IRS has filed a claim, and the creditor is a party to the proceeding, this information would be available under section 6103(h)(4). Moreover, this information is in the public record (the date of assessment is on the notice of federal tax lien), and may be disclosed.[57] In addition, the IRS may disclose the fact that no claim has been filed. However, to

[57] 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

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.F., II.H.

Example 16. The attorney for the creditors' committee inquires about the status of negotiations between debtor and the IRS concerning a shortfall in payments to debtor's pension plan, which forms the basis for the IRS's proof of claim. The attorney also 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.F.

Example 17. As part of a plan of reorganization, the debtor will transfer the bulk of her property to a liquidating trust for the benefit of creditors. The attorneys for the creditors' committee wish to know the IRS position with respect to: (1) the tax consequences to the debtor or the estate of the transfer; and (2) the taxation of the liquidating trust. Absent the debtor's consent, the tax consequences of the transfer, *i.e.*, whether and to what extent the debtor or the estate recognizes gain or loss, should not be discussed with the creditors' committee's attorneys unless and until the IRS takes some formal action in the case regarding the transfer, *i.e.,* objecting to the plan and/or attempting to have an escrow or reserve set aside for any resulting tax. Because a trust's 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 the IRS the taxation of the liquidating trust. IRC § 6103(e)(1)(F)(ii), (e)(7). (Further, this would not prevent the IRS from discussing such matters with the debtor, nor would it prevent the debtor from making a ruling request regarding the tax consequences of the transaction.) Reference: Parts I.C., I.D., II.B., II.F.

Example 18. The IRS possesses a large income tax refund that is scheduled as an asset of the debtor. The IRS is not otherwise involved in the bankruptcy case. Another federal agency has a claim against the debtor. The case does not pertain to tax administration and disclosure of this information to the other agency would not be permitted under section 6103(h)(4). However, because the schedule of assets is in the public record, the IRS may notify the agency that the schedule lists the tax refund as an asset of the estate. *See* discussion above on matters of public record. However, the IRS would not be able to disclose any information from its administrative file, such as information that may confirm the existence or amount of the claim for refund. The other agency may 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* IRC §§ 6402(d), 6103(l)(10). Reference: Part II.H.

G. Department of Justice

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person who furnishes satisfactory written evidence that he has a right to the property subject to such lien or intends to obtain a right to such property. *See* IRM 11.3.11.10(1).

Example 19. The United States Attorney, representing the Department of Defense, wants access to a Chapter 7 debtor's returns in order to develop information on which to base an objection to discharge. The debtor has timely filed all employment tax returns, and is not otherwise delinquent in any tax obligations. Disclosure is not permitted because the case does not involve tax administration. Reference: Parts I.C., I.D., II.E.

Example 20. The debtor is currently under audit. The IRS may advise DOJ that the debtor is under audit if each of the following conditions is met: (a) the bankruptcy pertains to tax administration; and (b) an appropriate referral has been made. The audit information should be relevant to the tax administration aspects of the bankruptcy case. Reference: Parts I.C., I.D., II.E.

Example 21. A debtor who recently filed for bankruptcy is currently under examination. The audit is not going to be resolved by the bar date. The IRS should determine whether a motion to extend the bar date should be filed. Upon deciding to seek an extension, a referral should be made to request DOJ's representation. After the referral, the disclosure of items of tax information necessary, *i.e.* helpful and appropriate, to support the motion may be made (*i.e.,* a description of the complexity of the audit or the involvement of the listed transaction). Reference: Parts I.C., I.D., II.E.

Example 22. A DOJ attorney is aware of the bankruptcy filing by a highly visible individual. The DOJ attorney calls the IRS and asks what the IRS plans to do in the case. Although there is an ongoing audit, the agent believes that an agreement will be reached with respect to most issues. Such information cannot be disclosed to DOJ attorney unless and until the IRS determines that it will be filing a motion or a proof of claim in the bankruptcy. Reference: Parts I.C., I.D., II.E.

Example 23. A corporate debtor with 150 related entities files for bankruptcy, only some of which are part of the consolidated group. The debtors agree to a stipulation that will allow the federal government to negotiate a combined proof of claim from the IRS for the entire consolidated group, since all are severally liable for the liabilities. The request for stipulation makes the bankruptcy case a tax administration proceeding even though the IRS has not yet filed a claim. If the IRS determines that DOJ's representation is necessary, a referral may be made so as to allow DOJ to negotiate with the debtor on the IRS's behalf. The tax information of related entities outside the consolidated group may be disclosed to DOJ so long as such information is necessary to fulfill the purpose of the referral and meets the requirements of section 6103(h)(2)(B)-(C). Reference: Parts I.C., I.D., II.E.

H. Criminal Violations

Example 24. The IRS is aware, from a prior schedule of assets filed in a Tax Court case or in a Collection Information Statement, that the debtor has omitted assets from the bankruptcy schedules. The IRS has filed a proof of claim, and would benefit from having the assets included in the debtor's estate. This

information may be disclosed in the civil bankruptcy case in order to obtain the return of the assets to the bankruptcy estate. IRC § 6103(h)(4). In addition, to the extent that omitting the assets constitutes both a crime under Title 26 and the bankruptcy fraud provisions, disclosure could be made in connection with a criminal tax referral as a tax administration matter. IRC § 6103(h)(2); Treas. Reg. § 301.6103(h)(2)-1(a)(2). Reference: Parts I.C., I.D., II.E., II.F., II.G., III.B.

Example 25. The facts are the same as in Example 24, except the debtor is in full compliance with the tax laws and the case is not otherwise a tax administration proceeding. Disclosure to the United States Attorney of information regarding the omitted assets is not permitted under section 6103(h)(2). The result should be the same even if the IRS is monitoring the taxpayer for post-petition tax compliance. Disclosure under these circumstances would only be permitted under section 6103(i). However, if the debtor's schedule of assets is in the record in the Tax Court proceeding, the "public record exception" may permit disclosures. *See* discussion, *supra*, concerning matters of public record. Reference: Parts I.C., I.D., II.E., II.G., II.H., III.A and B.

I. Debtor's Employees/Customers

Example 26. The debtor's employees may be interested in the debtor's continued financial health, or, at the very least, in obtaining wage payments. To the extent that the employees are creditors, *e.g.,* with respect to wages, disclosure could be premised on section 6103(c) (consent) or (h)(4). 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.[58] In addition, the "public record exception" may permit certain disclosures to customers or employees, such as the amount of the IRS's claim. Further, if the employees also are one-percent shareholders, information may be available under sections 6103(e)(1)(D)(iii) and (e)(7). Reference: Parts I.C., I.D., II.B., II.F., II.H.

J. Debtor's Spouse

Example 27. In a Chapter 13 case, the IRS has filed a proof of claim with respect to tax due on a jointly filed return. The husband and wife are separated, and only one spouse has filed for bankruptcy. The debtor spouse has asserted that the non-debtor spouse forged her signature on the joint return. Returns and return information with respect to the jointly filed returns would be available to either spouse under section 6103(e). Also, returns and return information with respect to the jointly filed returns could be introduced in the bankruptcy proceeding under section 6103(h)(4). The determination that the bankruptcy case is a tax administration proceeding may also permit disclosure of 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) or (C). Reference: Parts I.C., I.D., II.A., II.F.

[58] Disclosure in this situation may also be permissible under section 6103(k)(2). *See* note 57.

Example 28. Husband and Wife file separate income tax returns. Husband files for bankruptcy under Chapter 7. The trustee seeks Wife's returns to assist in determining what property is in the estate. Wife's separately filed returns may not be disclosed without her consent (unless otherwise authorized under section 6103(h)(4)(B)-(C)). Reference: Parts II.A., II.B.

K. Significant Bankruptcy/Insolvency Case Program under CCDM 34.3.1.3

Example 29. As a result of reviewing a plan of reorganization in a Chapter 11 case, pursuant to CCDM 34.3.1.1.4, an Associate Chief Counsel's office provides both oral and written advice to Counsel and the IRS 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.[59] Reference: Parts I.C., I.D., II.A., II.B.

L. Third Party Return Information

Example 30. A plan of reorganization attempts to designate payments to trust fund taxes. The responsible officers have significant unpaid tax liabilities from other businesses or unpaid 1040 liabilities. The information pertaining to responsible officers is third party return information. Such information cannot be disclosed because the third party return information is not directly related to the resolution of an issue in the proceeding nor is such information directly related to a transactional relationship between a person who is a party to the proceeding and the taxpayer which directly affects the resolution of an issue in the proceeding. *See* IRC§ 6103(h)(4)(B) and (C). As such, the IRS could not disclose these other liabilities in objecting to the plan. Reference: Parts I.C., I.D., II.F.

Example 31. The trustee, in attempting to recover a fraudulent transfer, requests the debtor's principals' returns to see how a transaction was treated. If the case pertains to tax administration, information in the debtor's principals' returns will arguably meet the item or transaction tests if it is directly related to the resolution of an issue in the proceeding. If the transfer does not impair the IRS's ability to collect the tax, the information should not be disclosed because it is not directly related to resolving the matter. If the proceeding does not otherwise pertain to tax administration, the third party returns and return information may not be disclosed. Reference: Parts I.C., I.D., II.F.

Example 32. The principal of a Chapter 11 debtor proposes in the plan that his individual income tax refund be applied to corporate debts. These refunds are not available because the section 6672 penalty has been assessed or because

[59] If the IRS does not file an objection in the bankruptcy case, disclosure of the objections would not be permitted in the bankruptcy case pursuant to section 6103(h)(4). However, the IRS could discuss the plan and the IRS's objections with the debtor or with the debtor's attorney of record. IRM 11.3.3.1.6.(4). The information could also be discussed with creditors or the court pursuant to a written consent executed by the debtor pursuant to section 6103(c).

the individual owes past income tax liabilities. This information may be disclosed to the Justice Department and in bankruptcy court. IRC § 6103(h)(4)(C). Reference: Parts I.C., I.D., II.F.

Example 33. The trustee seeks to prove that an entity related to the debtor is the alter ego of the debtor, in order to bring its assets into the estate. The trustee seeks to obtain the non-debtor entity's returns (or to determine whether the entity did not file returns) in order to prove the relationship. In a tax administration case, the existence of the alter ego relationship establishes the requisite "transactional relationship," and the information may be disclosed under section 6103(h)(4)(C) if it bears on the IRS's tax claim. Reference: Parts I.C., I.D., II.F.

Example 34. The basis for the IRS's proof of claim is the debtor's erroneous treatment of certain individuals as independent contractors rather than employees. The IRS has computed the debtor's liability for withheld income and FICA taxes under section 3509. The debtor seeks to obtain credit for the amount of income and self employment tax paid by those employees, to reduce the IRS's claim. While there is a transactional relationship between the debtor and those individuals, the amount of tax reported by individual employees is not relevant (and the employer does not get credit for such taxes) since an employer whose liability is determined under section 3509 is not entitled to recover from the employee any tax so determined. Thus, the individuals' tax information may not be disclosed. However, to the extent that the information is directly related to resolving whether the individuals are employees or independent contractors, such information may be disclosed. *See*, 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, 751-52 (1977); L.A.S. Enterprises, Inc. v. United States, 213 Ct. Cl. 698, 699-700 (1977). Reference: Parts I.C., I.D., II.F.

Disclosure of Tax Information Indicating Possible Non-Tax Criminal Violations

I. *Tax Administration Cases**

Internal Revenue Service —*IRC § 6103(h)(4)*→ Bankruptcy Court —*18 U.S.C. § 3057*→ United States Attorney

Internal Revenue Service —*IRC § 6103(h)(4)*→ United States Trustee —*28 U.S.C. § 586*→ United States Attorney

Internal Revenue Service —*IRC § 6103(h)(4)*→ Trustee —*18 U.S.C. § 3057*→ United States Attorney

Non-tax violation involves or arises out of same facts as Title 26 (or related title 18 violation

Internal Revenue Service → DOJ Tax Division/United States Attorney

IRC § 6103(h)(2), (3); Treas. Reg. § 301.6103(h)(2)-1(a)(2) (requires referral)

II. Non-Tax Administration Cases

Internal Revenue Service —*Any Return or Return Information*; *IRC § 6103(i)(1) -- Ex Parte Court Order*→ United States Attorney

Internal Revenue Service —*Return Information Other Than Taxpayer Return Information*; *IRC § 6103(i)(2) -- Written Request*→ United States Attorney

Internal Revenue Service —*Return Information Other Than Taxpayer Return Information*; *IRC § 6103(i)(3) -- Written Notification*→ DOJ/United States Attorney

III. Any Case (Tax or Non-Tax) Where a Trustee Has Been Appointed

Internal Revenue Service —*IRC § 6103(e)(4), (5)*→ Trustee —*18 U.S.C. § 3057*→ United States Attorney

** In general, a bankruptcy case pertains to tax administration if the bankruptcy court's involvement is needed to determine a matter pertaining to assessment or collection of tax, or is otherwise needed to enforce the internal revenue laws.*

CHAPTER 7

BANK SECRECY ACT, MONEY LAUNDERING, FORFEITURE AND RETURN INFORMATION

I. TITLE 31 -- BANK SECRECY ACT

A. Introduction

The Bank Secrecy Act (BSA) was enacted by Congress in 1970 to address 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 is to require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings. 31 U.S.C. § 5311. Regulations were promulgated under the BSA to require, for example, that each financial institution, other than a casino, shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to the financial institution that involves a transaction in currency of more than $10,000. 31 C.F.R. § 103.22. These reports must be filed with the IRS. 31 C.F.R. § 103.27(a)(4). These reporting requirements are generally implemented through the use of Currency Transaction Reports (CTRs), Forms 4789. The BSA and its implementing regulations contain several other reporting requirements, all intended to cease and/or uncover various financial crimes.

Information evidencing the fact of a payment, receipt, or transfer of currency over $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 the information was collected by the IRS in administering the internal revenue laws, it would be protected by section 6103 because these items are specifically listed in the definition of return information in section 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. 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 stated that "**the Secretary would not be limited to the narrower objectives of the Internal Revenue Code**, but rather the objectives spelled out" in the Currency and Foreign Transactions Reporting section of the Act. (Emphasis added).

Congress never intended for the BSA to be primarily a tax enforcement tool, rather, it sought to enact expansive legislation to aid the enforcement of numerous federal laws including the internal revenue laws. California Bankers Association v. Schultz, 416 U.S. 21 (1974).

B. Title 31 and Title 26

When it enacted section 6103 in 1976, Congress acknowledged that the primary responsibility of the IRS is the enforcement of the internal revenue laws. The BSA was an existing statutory scheme that Congress evidently did not consider in drafting section 6103. Nor was it considered when section 6103 was revised in 1982 to streamline access procedures for nontax federal criminal cases. IRC § 6103(i); *see* Chapter 5. Nevertheless, Treasury delegated primary investigative jurisdiction for possible criminal violations of the BSA to the IRS. 31 C.F.R. § 103.56(c)(2); Treasury Directive 15-41 (Dec. 1, 1992). Disclosure issues can, and often do, arise when IRS agents attempt to fulfill their obligations under both the BSA and the Code.[60]

Pursuant to section 6103(h)(1), which provides that disclosures can be made to Treasury employees (including IRS employees), IRS employees normally have authority to access tax information as long as their official duties require disclosure for tax administration purposes. *See* Chapter 3. When seeking to access tax information while conducting a BSA investigation, which is not a tax administration purpose, the agent must be treated as if he or she was an employee of another federal agency, and must rely on some other authority in section 6103 to obtain the information. Generally, where special agents are assisting other agencies in nontax criminal investigations, no disclosures can be made to those special agents unless and until section 6103(i) procedures are first followed. *See* Chapter 5.

Therefore, if an IRS employee is working on a nontax criminal investigation with another agency (for example, a Title 31 case with DEA), the IRS employee 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 section 6103(i). Similarly, if the IRS employee had obtained tax information while previously working a criminal tax case, the employee could not disclose that information during the nontax administration investigation unless the other agency first complied with section 6103(i).

Given the close relationship between money laundering and tax evasion, it became clear that there were investigations in which both Title 31 and Title 26

[60] Whereas Criminal Investigation (CI) is responsible for most BSA enforcement activities delegated to the IRS, in April 2003 SBSE was given responsibility for Foreign Bank and Financial Accounts Reports (FBAR) civil penalty enforcement. The same disclosure analysis applies whether CI or SBSE is conducting enforcement, bearing in mind that disclosure authority for nontax criminal investigations under section 6103(i) will not be available to SBSE when enforcing a *civil* penalty only.

violations may have been committed, or where a Title 31 violation was committed that is also in violation of Title 26. As a result, IRM 9.3.1.4.3.1.1.2 specifically addresses situations where special agents, operating under authority granted by the Deputy Assistant Secretary for Terrorist Financing and Financial Crimes to investigate certain Title 31 matters, discovered that a Title 31 violation may have been committed as part of a pattern of violating the internal revenue laws. The manual provides that if an appropriate IRS official makes that determination ***in writing***, the Title 31 investigation is considered to be tax administration under the "related statute" portion of the definition of tax administration.[61] There are two practical effects of a related statute determination. One is that it permits the IRS employee conducting the investigation to access tax information under section 6103(h)(1) when the employee has a legitimate tax administration need for the information. The second is that information collected or generated in that

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[61] 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 IRC 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 SAC. This determination is also known as the "related statute call." The SAC will make such determination in memorandum form with his or her signature for placement in the administrative investigative file. . . . Returns and return information cannot be used to evaluate information related to a money laundering investigation to determine whether a related statute call should be made.

3. The factors to be considered are whether the offense:

A. was committed in furtherance of a violation of the Internal Revenue laws, or

B. is part of a pattern of violations of the Internal Revenue laws.

4. If this related statute call is made by the SAC, then all the information received, collected and developed by the IRS in that investigation is protected from disclosure under IRC§ 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.

investigation after the related statute call has been made is protected by section 6103.[62]

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.

C. Effect of the Related Statute Determination

A determination that a Title 31 investigation meets the related statute test involving tax administration, while authorizing IRS employees to access tax information in conducting an investigation, does not give IRS employees carte blanche authority to disclose tax information. Subsequent disclosures may be made only if authorized by section 6103. For example, tax information obtained by an IRS employee during the related statute Title 31 tax administration investigation may be disclosed to the Department of Justice (DOJ) as part of that investigation only if the disclosure is consistent with sections 6103(h)(2) and (3). In short, the IRS and DOJ in a Title 31 related statute investigation are subject to the same disclosure rules that apply to disclosures during a pure Title 26 criminal tax case. If the IRS discloses tax information as part of a referred Title 31 tax administration investigation, DOJ can further disclose that information only in accordance with section 6103(h) and Treas. Reg. § 301.6103(h)(2)-1.[63]

If there are no possible Title 26 violations, Title 31 could not be a statute related to tax administration for section 6103 purposes and any subsequent disclosures

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[62] 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).

[63] Even if a related statute call has been made, that does not authorize the IRS or DOJ to disclose information to other agencies involved in the nontax aspects of a BSA or money laundering investigation, absent a section 6103(i) order. The regulations permitting the use of 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 BSA investigations are not generally authorized by the Tax Division, even where a related statute call has been made.

could only proceed in accordance with section 6103(i). The decision on whether a Title 31 investigation involves tax administration is to be made by the IRS, and not by other agencies (including DOJ). If the IRS does not make that determination, tax information may not be disclosed to the IRS employee during the course of that Title 31 investigation, nor may disclosures be made by the IRS to DOJ or any other federal agency, except in accordance with section 6103(i).

D. When Does Information Gathered in a Title 31 Investigation Become Return Information?

Data collected by IRS personnel pursuant to their enforcement responsibilities under the BSA is not *per se* return information under section 6103. In a "pure" Title 31 investigation, the information is subject to the disclosure rules found at 31 U.S.C. § 5319, 31 C.F.R. § 103.53, and Treasury's Financial Crimes Enforcement Network (FinCEN) Re-Dissemination Guidelines for Bank Secrecy Act Information (Jun. 25, 2004). As noted above, although 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 Deputy Assistant Secretary for Terrorist Financing and Financial Crimes, every piece of data collected pursuant to a BSA investigation does not become "return information" simply because one of the Act's purposes is related to tax administration.

The IRS's BSA enforcement role must be viewed as separate from its primary role of enforcing the internal revenue laws. When the IRS is operating strictly within the parameters of responsibility assigned to it by the BSA, the data collected is not considered return information and is not subject to the disclosure provisions of section 6103.

When Title 31 has been determined to be a statute related to tax administration for section 6103 purposes, all information collected in the investigation from the time the related statute determination was made and onward is considered return information. 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 Code, information collected by the IRS when it is focusing on a particular activity and attempting to evaluate the tax consequences of the individuals or entities involved in the activity, as well as:

> summaries of the case, memoranda of interviews with witnesses, assorted agency workpapers dealing with the computation of . . . taxes, reports by different agents who have worked on the case, and letters or memoranda from one Service official to another dealing with different aspects of the case.

Chamberlain v. Kurtz, 589 F.2d 827, 840-41 (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. Using the related statute call as a touchstone, information received or generated by the IRS pursuant to its enforcement responsibilities under the BSA, and the BSA only, is not return information as defined in section 6103(b)(2), and is not subject to the disclosure rules of section 6103. Investigatory information received or generated in a BSA investigation after the related statute call is made is return information as defined in section 6103(b)(2) and is subject to the disclosure rules of section 6103, regardless of whether a formal tax case is opened. *See* IRM 9.3.1.4.3.1.1.2.

II. TITLE 18 MONEY LAUNDERING OFFENSES

In addition to Title 31 investigations, IRS special agents also have the authority to conduct money laundering investigations under 18 U.S.C. §§ 1956 and 1957, pursuant to the authority granted to them by Treasury Directive 15-42 (Jan. 22, 1999). Under this directive, the Deputy Assistant Secretary for Terrorist Financing and Financial Crimes has delegated to the IRS investigatory, seizure, and forfeiture authority for violations of these sections discovered during the course of Title 26 or BSA investigations. The IRS may also seize property pertaining to these violations if the bureau with primary investigatory authority is not present to make the seizure, but must turn over the property to that bureau.

Title 18, section 1956 deals with laundering of monetary instruments and 18 U.S.C. § 1957 pertains to engaging in monetary transactions in criminally derived property. With the exception of 18 U.S.C. § 1956(a)(1)(A)(ii) investigations, which are *per se* tax related, both of these sections are 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 money laundering investigation wants to access tax information, either a related statute determination must be made[64] or the agent must follow the procedures set forth in section 6103(i). Like title 31

[64] 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 done in these cases, except with respect to 18 U.S.C. § 1956(a)(1)(A)(ii).

investigations, the special agent may access tax information under the authority of section 6103(h)(1) only if conducting a tax administration investigation.

The one exception to this rule is for investigations conducted pursuant to 18 U.S.C. § 1956(a)(1)(A)(ii). This section was designed to cover transactions conducted to facilitate violations of sections 7201 and 7206. 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 section 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 the investigation is return information protected by section 6103. *See* IRM 9.3.1.4.3.1.1.2.

III. CIVIL FORFEITURES

Whether tax information may be disclosed to DOJ to further efforts to effect civil forfeitures depends primarily on whether the forfeiture relates to tax administration.

A. Civil Forfeitures Under 18 U.S.C. § 981

Congress enacted 18 U.S.C. § 981 to provide a means for the government to seize and bring an action for the forfeiture of property involved in transactions that violate the currency transactions reporting requirements of 31 U.S.C. §§ 5313 and 5324 and the money laundering provisions of 18 U.S.C. §§ 1956 and 1957.

Like BSA and money laundering matters, a civil forfeiture under 18 U.S.C. § 981 would be a matter pertaining to tax administration only if the IRS made the appropriate related statute determination. If so, a special agent working on the 18 U.S.C. § 981 forfeiture could access tax information under section 6103(h)(1). The IRS also could disclose tax information to DOJ in preparation for the judicial or administrative tax administration forfeiture proceeding if the matter was properly referred, pursuant to section 6103(h)(3)(A), and if the disclosure otherwise complied with the provisions of section 6103(h)(2). Disclosures in any subsequent administrative or judicial tax administration forfeiture proceeding would be subject to section 6103(h)(4). *See* Chapter 3.

It is important to note that disclosures of tax information to DOJ for an 18 U.S.C. § 981 forfeiture are not limited to situations where there has been a criminal referral of a related statute BSA or money laundering investigation. These disclosures can also be made for an 18 U.S.C. § 981 forfeiture before, or in lieu of, the criminal referral as long as the related statute call has first been made, the forfeiture case has been properly referred pursuant to section 6103(h)(3)(A), and the requirements of section 6103(h)(2) are followed.

Section 6103(h)(2), which sets forth the criteria for disclosures to DOJ, and section 6103(h)(4), which sets forth the criteria for disclosure in the proceeding itself, are closely related. Sections 6103(h)(2)(A) and (h)(4)(A) permit the disclosure of 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].

IRC § 6103(h)(4)(A).

The first part of these sections ["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, *reh'g denied*, 417 U.S. 977 (1974). The second part of the above-quoted language of sections 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 collecting civil liability, with 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 related to tax administration, because it was committed either in furtherance of or as part of a pattern to violate the internal revenue laws.

Under sections 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. It may also be possible to rely on sections 6103(h)(2)(B) or (C) and (h)(4)(B) or (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 Section 6103(i)

Section 6103(i)(1) does not permit disclosure of tax information solely for the purpose of a nontax civil forfeiture. Nevertheless, if information is properly obtained by DOJ or any other federal agency under section 6103(i)(1), it may be disclosed subsequently for purposes of a civil forfeiture under section 6103(i)(4), which provides explicit authority for disclosures in “any judicial or administrative proceeding pertaining to enforcement of a specifically designated Federal criminal statute *or related civil forfeiture* (not involving tax administration).” (Emphasis added). United States v. $57,303.00 in United States Currency, 737 F. Supp. 1041, 1042-43 (C.D. Ill. 1990) (dicta); § 9-13.910, United States Attorneys' Manual (Title 9 - Criminal Division); 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 also* 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 the exchange, and assets used or intended to be used to facilitate drug offenses. The authority to permit disclosures of tax information in civil forfeitures under this provision was specifically addressed during the consideration of the 1982 amendments to section 6103(i)(4).

It is also possible that the use of tax information in a 21 U.S.C. § 881 forfeiture proceeding could arise in the context of a referred BSA or money laundering matter for which a related statute call was made. That is, DOJ may wish to forfeit money or other property under 21 U.S.C. § 881 in lieu of, or in conjunction with, criminal prosecution under Title 31 and/or Title 18 of an individual involved in drug trafficking operations. It would not appear that the use and subsequent disclosure of tax information in a 21 U.S.C. § 881 forfeiture proceeding related to tax administration is authorized by section 6103(h). Disclosures of tax information in a referred tax administration case may be made to DOJ employees "personally and directly engaged in, and solely for their use in" proceedings (including preparation for such proceedings) and investigations in matters "involving tax administration." IRC § 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 address situations where a referred criminal tax administration investigation may involve tax aspects of transactions that are also violations of nontax laws. The very impetus for committing 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, however, 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 21 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 DOJ, 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 21 U.S.C. § 881 would not meet this portion of the regulation either. Finally, the regulation requires that if the tax administration aspect is terminated, DOJ cannot use

returns or taxpayer return information in the nontax portion of the matter unless it first obtains a court order as required by section 6103(i)(1). As discussed above, section 6103(i)(1) does not provide disclosure authority for a civil forfeiture.

IV. Section 6050I DISCLOSURES

Section 6050I supplements the reporting requirements of the BSA under title 31. It requires 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). Although the type of information reported under section 6050I is very similar to that reported under the BSA, and would be similarly useful in criminal enforcement activities, the reasons for the reporting requirements are different. The purpose of information reported under the BSA is to aid law enforcement personnel in tracing the movement of currency. By contrast, section 6050I was enacted as a supplementary method of information reporting for 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 former Under Secretary of the Treasury for Enforcement, information reported under section 6050I is subject to the disclosure restrictions of section 6103. In 1988, Congress added a subsection to section 6103(i) to permit disclosure of these returns to federal agencies. This was the first provision of the Code permitting the release of a return for nontax criminal enforcement purposes outside of the court order mechanism of section 6103(i). The provision expired in November, 1992. In 1996, the Taxpayer Bill of Rights 2, Pub. L. 104-168, § 1206, was enacted and contained a new section 6103(l)(15), which permanently extended the rules for disclosing Form 8300 information. Moreover, section 6103(l)(15) permits disclosures 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 information reported under the BSA.

Note that section 365 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (the “USA Patriot Act”), P.L. 107-56, added section 5331 to the BSA. 31 U.S.C. § 5331 requires any person who is engaged in a trade or business and who in the course of the trade or business receives more than $10,000 in coins or currency in one transaction or related transactions, to file a report with Treasury. This is the same information collected by the IRS under section 6050I, however, the information collected by FinCEN under Title 31 is not tax information protected by section 6103. As such, to the extent federal, state, local or foreign government agencies can obtain this information from FinCEN instead of the IRS, they would not need to rely on section 6103(l)(15), but would be subject to FinCEN’s re-dissemination guidelines noted in Section I.D, above.

CHAPTER 8

FEDERAL/STATE EXCHANGE PROGRAM

IRC § 6103(d) and (p)(8)

I. INTRODUCTION

State (including certain qualifying) city tax agencies may receive tax information from the IRS for state tax administration reasons pursuant to section 6103(d)(1). Governmental Liaison serve as liaisons between the IRS and those agencies. State employees receiving federal tax information under section 6103(d)(1) are subject to civil and criminal penalties for the unauthorized disclosure of the tax information so received. States are required to adequately safeguard the tax information received under section 6103(d).

States that require their citizens to submit federal tax information to meet state filing requirements must also enact satisfactory confidentiality laws protecting the information as a precondition of receiving tax information from the IRS. IRC § 6103(p)(8).

Disclosures pursuant to section 6103(d) have been upheld as constitutional. Taylor v. United States, 106 F.3d 833, 837 (8th Cir. 1997), *aff'g* 915 F. Supp. 1015 (N.D. Iowa 1996); Loomis v. IRS, 1981 WL 1767, at **2-3 (D. Conn. Mar. 17, 1981).

II. DISCLOSURE PURSUANT TO IRC § 6103(d)

Under section 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. Inspection is permitted only for state tax administration purposes.

Section 6103(d)(1) requires a written request from state tax officials as a precondition to disclosure. Because most state agencies are interested in continuing disclosure, the statutory request requirement is normally met by means of a basic agreement between the IRS and the state tax agency, and an implementing agreement between the IRS area 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. *See* Policy Statement P-1-35.[65]

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[65] 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 the agreements are in the interest of good tax administration. In order to maximize the effectiveness of these formal agreements, they will be supplemented with implementing agreements. Tax information provided by the Service to state tax authorities will be restricted to the authorities' justified needs and uses of the information.

If an agreement has not been entered into between the IRS and a state tax agency, the state agency may request federal tax data on a case-by-case basis. Disclosure Officers serve as liaisons between the IRS and the state agencies requesting federal tax information.

A. Basic agreement

IRM exhibit 11.3.32-1 shows the format of the basic agreement between the IRS and state tax officials. The basic agreement requires approval by the Commissioner and the head of the state tax agency.

B. Implementing agreement

The implementing agreement is entered into after the basic agreement has been executed. The implementing agreement supplements the basic agreement by specifying the detailed working arrangements and items to be exchanged, including tolerances and criteria for selecting those items. It must be signed by the Governmental Liaison and Disclosure Area Manager and the head of the state tax agency. IRM 11.3.32.6. Disclosures on a continuing basis may be made only in accordance with provisions of the implementing agreement. *See id*.

States may still obtain federal tax information not included in the implementing agreement. Requests for access may be made by the head of the state tax agency (other than the governor) on a case-by-case basis. Case-by-case disclosures trigger the same rules and use limitations as those made under standing basic and implementing agreements. IRM 11.3.32.13.

C. Restrictions

The federal tax data 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 information may not be disclosed at all. IRM 11.3.32.17(1) (*e.g.*, grand jury information without a valid Rule 6(e) order). Other information must be referred to the National Office for review before disclosure. IRM 11.3.32.17(2) (*e.g.*, information from confidential sources). Only federal tax data needed for a valid state tax administration purpose and which will actually be used for that purpose may be disclosed to state tax agencies by the IRS. IRM 11.3.32.4.

Only state tax agency officers and employees may use federal tax data received from the IRS. Redisclosure by state tax agencies is limited to:

1. Other state tax agency employees;

2. State tax agency's legal representative;

3. State tax agency's contractor for the purpose of obtaining certain tax administration services under section 6103(d)(1) and (n);

4. State auditors to the extent authorized by section 6103(d)(2);

5. Judicial and administrative tax administration proceedings to the extent authorized by section 6103(h)(4). *See* IRM 11.3.32.19.

For purposes of section 6103(d), tax administration includes conduct investigations of state tax agency employees or prospective employees. IRM 11.3.32.12; Smith v. United States, 964 F.2d 630, 632 (7th Cir. 1992) (implicit recognition that compliance with tax filing requirements by state tax employee was state tax administration), *cert. denied*, 506 U.S. 1067 (1993); Rueckert v. Internal Revenue Service, 775 F.2d 208, 212 (7th Cir. 1985) (state tax administration includes enforcement of state tax agency personnel rules).

"State" is defined to include the District of Columbia and certain territories. IRC § 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. IRC § 6103(b)(5)(B).

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 contractor pursuant to section 6103(n) of the tax agency, body or commission.

Requests for disclosure must be in writing. IRC § 6103(d)(1); Smith v. United States, 964 F.2d at 632; Huckaby v. Department of Treasury, IRS, 794 F.2d 1041, 1046-47 (5th Cir.), *reh'g denied*, 804 F.2d 297 (5th Cir. 1986). *See also*, McQueen v. United States, 5 F. Supp. 2d 473, 487-88 (S.D. Tex. 1998) (one of the issues in a section 7431 action was whether the writing and designation requirements authorizing disclosure pursuant to a Fed-State 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 section 6103(d)).

The basic and implementing agreements meet the "written request" requirement of the statute. Taylor v. United States, 106 F.3d at 835-36; Long v. United States, 972 F.2d 1174, 1179-80 (10th Cir. 1992); Smith v. United States, 964 F.2d at 635-36; Stone v. Commissioner of the Internal Revenue, T.C. Memo 1998-314, at **7-9 (1998).

Disclosure of tax information is not authorized if it would identify a confidential informant or seriously impair a civil or criminal tax investigation. IRC § 6103(d)(1).

Disclosures pursuant to basic and implementing agreements have been challenged and upheld in: Taylor v. United States, 106 F.3d at 835-36; Long v. United States, 972 F.2d at 1179-80; Smith v. United States, 964 F.2d at 635-36; Bator v. IRS, 1988 WL 150699, at *2 (D. Nev. Dec. 16, 1988), *aff'd sub nom*, Bator v. United States, 899 F.2d 1224, 1990 WL 40300 (9th Cir. Apr. 4, 1990), *cert. denied*, 498 U.S. 893 (1990); White v. Commissioner, 537 F. Supp. 679, 684 (D. Colo. 1982).

Subsection 6103(d)(2) provides that tax information obtained by a state agency under subsection 6103(d)(1) may be disclosed to a state audit agency charged under the laws of the state with the responsibility of auditing state revenues and programs. The disclosure may be made only to the extent necessary in making an audit of the section 6103(d)(1) agency.

III. TERMINATION OF DISCLOSURE - IRC § 6103(p)(7)

Section 6103(p)(7) and Treas. Reg. § 301.6103(p)(7)-1 contain procedures describing how the IRS may terminate disclosure of federal tax information to a state tax agency after a determination by the IRS that the agency made an unauthorized disclosure of federal tax information or that it does not maintain adequate procedures for safeguarding the information. The regulation also establishes a high-level administrative review procedure wherein a state tax agency can appeal the determination.

The regulations also provide that, upon so notifying the state tax agency, if the IRS determines that federal tax administration would otherwise be seriously impaired, the IRS may suspend further disclosure of federal tax information pending a final determination, despite the possible detrimental impact of that action upon the state's tax system.

IV. RELEASE OF TAX DATA IN 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 Governmental Liaison in the National Office. *See* IRM 11.3.32.11.

V. TAX RETURN PREPARERS – IRC § 6103(k)(5)

Under section 6103(k)(5), taxpayer identity information with respect to an income tax return preparer, and whether the preparer has been assessed a penalty under sections 6694, 6695 and 7216, may be furnished to agencies, bodies or commissions charged under state or local law with licensing, registration or regulation of income tax return preparers. Information may be disclosed only upon the written request of the head of those agencies, bodies or commissions. The written request must designate the officers or employees to whom information is to be disclosed. Disclosures are subject to "need and use" restrictions similar to section 6103(d)(1) and IRM 11.3.32.4. *See* IRM 11.3.32.15.

Note that disclosures under section 6103(k)(5) to local agencies regulating tax return preparers are not limited to cities with more than 250,000 people and impose a tax on wages or income.

VI. IRC § 6103(p)(8)

Section 6103(p)(8) provides that the IRS can make no disclosure under section 6103(d) to a state which requires the inclusion of federal tax information in its tax returns (so-called "wraparound information") unless the state has first enacted provisions of law guaranteeing the confidentiality of wraparound information. Any state that 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 11.3.32.14.

The IRS has taken the view that section 6103(p)(8) does not require states to enact confidentiality laws which mirror 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 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 the sanctions.

Note: Section 6103(p)(8)(B) provides that the confidentiality required by section 6103(p)(8)(A) does not preclude disclosure of wraparound information to officers or employees of the state if disclosure is specifically authorized by state law. Intrastate disclosures of wraparound information can be made pursuant to the criteria outlined above. 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, 542 n.4 (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 11.3.32 of the Internal Revenue Manual.

CHAPTER 9

FREEDOM OF INFORMATION ACT

I. INTRODUCTION

Look for "Practice Notes" in **bold** throughout this chapter intended to give practical tips when addressing a FOIA request.

Practice Note: For more detailed information concerning the FOIA and an explanation of the exemptions, consult the DOJ FOIA Reference Guide at www.usdoj.gov/04foia/04_3.html.

Congress enacted the Freedom of Information Act in 1966 with the intent that any person should have access to identifiable records without having to demonstrate a need or reason. The burden of proof for withholding information, 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. Because some government agencies responded slowly and reluctantly to the law, a number of procedural and substantive changes in the law were enacted in 1974. Those amendments narrowed the scope of certain exemptions and broadened certain procedural provisions relating to time limits, segregability, and *in camera* inspection by the courts.

In 1986, after several years of consideration, Congress amended two areas of the FOIA, access to law enforcement records, and fee charges and circumstances for fee waivers. In 1996, the "Electronic Freedom of Information Act Amendments of 1996 (EFOIA)," P.L. No. 104-231, 110 Stat. 3048, specifically addressed electronic records issues and contained several provisions changing the timing of agency responses to FOIA requests. The amendments brought electronic records within the scope of the FOIA. Congress made no substantive changes to the FOIA exemptions, but did alter provisions covering several distinct subject areas. The amendments, except as otherwise noted, became effective March 31, 1997. The Department of Treasury regulations implementing the EFOIA are located at 31 C.F.R. Part 1, Subpart A. The IRS regulations are published as the Statement of Procedural Rules, 26 C.F.R. § 601.701, *et seq*.

In 2002, Congress added subsection (E) to 5 U.S.C. § 552(a)(3), which provides

> An agency, or part of an agency, that is an element of the intelligence community (as that term is defined in section 3(4) of the National Security Act of 1949 (50 U.S.C. § 401a(4)) shall not make any record available under this paragraph to –
>
> > (i) any government entity, other than a state, territory, commonwealth, or district of the United States, or any subdivision thereof; or
> > (ii) a representative of a government entity described in clause (i).

This section was added to prevent foreign governments from seeking information from the United States intelligence agencies, or from using a United States resident as a representative to seek records on any foreign government's behalf. Given the availability of exemption 1, which protects information pertaining to, *inter alia*, national security interests, the new provision would prevent the intelligence agencies from wasting resources defending a FOIA action brought by a foreign government, or the representative, and thereby risking disclosure of the very information to be protected through the use of affidavits or motions defending the assertion of the exemption. This limitation pertains only to intelligence agencies designated by 50 U.S.C. § 401a(4), which currently does not include the IRS.

II. INFORMATION AVAILABLE

A. Agency Records

The FOIA applies to records held by only *executive branch* administrative agencies and independent regulatory agencies of the federal government. Therefore, records held by Congress or the Federal courts are not subject to the FOIA. *See* Mayo v. U.S. Government Printing Office, 9 F.3d 1450, 1451 (9th Cir. 1994) (GPO, an arm of Congress, not subject to FOIA); Dow Jones v. Dept. of

Justice, 917 F.2d 571, 574 (D.C. Cir. 1990) (Congress not subject to FOIA); Warth v. Dept. of Justice, 595 F.2d 521, 523 (9th Cir. 1979) (federal courts not subject to FOIA).

All agency records in the possession and control of these entities must be released upon request unless the information falls within one of the Act's nine specific exemptions or three special law enforcement exclusions. In U.S. Dept. of Justice v. Tax Analysts, 492 U.S. 136, 145 (1989), the Supreme Court held that the Department of Justice must make available copies of U.S. district court decisions it receives in the course of litigating tax cases. These records were considered agency records because they were included in agency files and used in official business (*e.g.*, consideration of appeal), even though they were also publicly available from the courts, and were required to be disclosed in full because no exemption applied to withhold them.

A record that is not owned by the agency or over which the agency has no control is not an agency record. *See, e.g.*, Gallant v. NLRB, 26 F.3d 168, 172 (D.C. Cir. 1994) (letters written on agency time by Board member seeking renomination were not agency records when the letters had not been integrated into agency files); Gilmore v. United States Dept. of Energy, 4 F. Supp.2d 912, 922 (N.D. Cal. 1998) (holding that software owned by a corporation and in which the Department of Energy had a non-exclusive license for use was not an agency record subject to the FOIA because DOE lacked sufficient control over the software).

Agency records are subject to public disclosure under FOIA. 5 U.S.C. § 552(a). The EFOIA amendments added the definition of the term "record" to include "any information that would be an agency record subject to the requirements of [FOIA] when maintained by an agency in any format, including an electronic format." 5 U.S.C. § 552(f)(2).

B. Electronic Records

1. Readily Reproducible Electronic Format.

The Act requires that an agency "provide the record in any form or format requested . . . if the record is readily reproducible by the agency in that form or format." 5 U.S.C. § 552(a)(3)(B). Moreover, the agency is directed to "make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of the [FOIA]." 5 U.S.C. § 552(a)(3)(B).[66] These provisions require agencies to honor a

[66] In 2002, Congress passed the E-Government Act of 2002, Pub. L. 107-347 (Dec. 17, 2002), which directed the Office of Management and Budget (OMB) to set forth a strategy to make the federal government more responsive to the citizenry electronically. An example of an E-Government-type initiative is the IRS' Free Filing electronic program. The E-Government Act reaffirms the notion that electronic records need to be reproduced for disclosure, to the extent they are not exempt.

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. The IRS Statement of Procedural Rules at 26 C.F.R. § 601.702(c)(2)(ii), define “readily reproducible,” with respect to electronic format as

> a record or records that can be downloaded or transferred intact to a floppy disk, computer disk (CD), tape or other electronic medium using equipment currently in use by the office or offices processing the request. Even though some records may initially be readily reproducible, the need to segregate exempt from nonexempt records may cause the releasable material to be not readily reproducible.

2. "Reasonable Efforts" Search.

"[A]n agency shall make reasonable efforts to search for [responsive] records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system." 5 U.S.C. § 552(a)(3)(C). This provision promotes electronic database searches and encourages agencies to expend new efforts in order to comply with the electronic search requirements of particular FOIA requests. Thus, searches for records maintained in electronic format “may require the application of [computer] codes, queries, or other minor forms of programming to retrieve the requested records.” Treas. Reg. § 610.702(c)(2)(iii).

C. Section 552(a)(1) Material - Published Information

Certain information must be published in the Federal Register. 5 U.S.C. § 552(a)(1). This includes:

1. The organizational structure of the agency and procedures for obtaining information under the Act;

2. Statements describing the functions of the agency and all formal and informal procedures;

3. Rules of procedure, *see* 26 C.F.R. § 601.101 *et seq*., descriptions of forms (but not the forms themselves) available or the places at which forms may be obtained, and instructions describing all papers, reports, and examinations;

4. Rules of general applicability and statements of general policy or interpretations of general applicability; and

5. Amendments, revisions, or repeals of 1- 4, above.

D. Section 552(a)(2) Material - Guidance

Certain information must be made available for public inspection and copying unless promptly published and offered for sale. 5 U.S.C. § 552(a)(2). This includes:

1. Final opinions and orders made in the adjudication of cases;

2. Statements of policy and interpretations not published in the Federal Register;

3. Administrative staff manuals and instructions to staff that affect a member of the public, *e.g.*, Internal Revenue Manual, including the Chief Counsel Directives Manual available at www.irs.gov/foia/index.html;

4. Agency records that have been, or the agency expects to be, the subject of repetitive requests;

5. A quarterly (or more frequent) index of material referred to in 1 - 4, above; and

6. For records created on or after November 1, 1996, each agency must make these records available by "computer telecommunications," *i.e.*, on the Service's Internet web site at www.irs.gov.

III. SECTION 552(a)(3) REQUESTS - ADMINISTRATIVE PROCESS

Certain information not otherwise available under 5 U.S.C. § 552(a)(1) or (2) must be made available upon a request which reasonably describes the records sought and comports with the IRS's regulations. The FOIA was enacted to facilitate public access to government records. John Doe Agency v. John Doe Corp., 493 U.S. 146, 151 (1989). It was designed "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." Department of Air Force v. Rose, 425 U.S. 352, 361 (1976).

Practice Note: A number of courts have held that a FOIA requester's right of access is independent of any discovery rights in litigation. Morgan v. Dept. of Justice, 923 F.2d 195, 198 (D.C. Cir. 1991); United States v. U.S. District Court (DeLorean), 717 F.2d 478, 480 (9th Cir. 1983). Accordingly, there should not be any blanket denials of requests for records made during the pendency of Tax Court litigation. Each record or category of records must be evaluated to determine which exemptions, if

any, may apply to withhold records. *See* IRM 11.3.13.6.1. Chief Counsel attorneys should provide recommendations to disclosure officers as to what exemptions may apply. Sometimes in the context of tax litigation, taxpayers request a continuance or stay of the proceeding pending the processing of a FOIA request or appeal. Although a taxpayer may have exercised his statutory right to request information through the FOIA, the fact that the FOIA process may remain incomplete is no basis for a continuance or stay. Renegotiation Board v. Bannercraft Clothing Co., Inc., 415 U.S. 1, 20-21 (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 jurisdiction under the FOIA; rather, jurisdiction is conferred on U.S. district courts. *See* 5 U.S.C. § 552(a)(4)(B).

Practice Note: Glomarization. The (c)(1) and (c)(2) exclusions, discussed at Part IV, permit the agency, in certain limited circumstances, to deny that records exist when responsive records do, in fact, exist. In other instances, based on the wording of the request, the agency may "neither confirm nor deny" the existence of responsive records. The term "glomarization" is taken from the cases concerning the Glomar Explorer. *See* Phillippi v. CIA, 655 F.2d 1325 (D.C. Cir. 1981) and Military Audit Project v. Casey, 656 F.2d 724 (D.C. Cir. 1981). The Glomar Explorer Project was a classified CIA project supposedly undertaken to raise a sunken Soviet submarine from the ocean floor. Its original cover story was that it was a dredging project locating manganese nodules on the ocean floor. When the manganese mining cover was blown, the story was switched to the Soviet submarine recovery story, which was never confirmed by the CIA. Speculation was that the submarine story was a fallback cover for an even bigger, more secret project. The D.C. Circuit held that, even if certain facts had been publicized about the project, those facts did not result in a waiver of applicable FOIA exemptions. The court reasoned "the line between what may be revealed and what must be concealed is itself capable of conveying information . . . ." 655 F.2d at 1330. The court also noted that "[t]here might be much left to hide, and if there is not, that itself may be worth hiding." *Id*. at 1331.

Based on the rationale and holdings in the Glomar Explorer cases, agencies can, if necessary, respond in a manner to avoid revealing confidential information based on the confirmation of knowledge already available to the requester. For example, if a taxpayer believes that one of five people was a confidential informant, and structures a FOIA request so that to supply information about four of the five would reveal the fifth to be the confidential informant, the IRS can glomarize its response, *i.e.*, neither confirm nor deny the existence of any information responsive to the request, rather than assert exemption 7(D) and reveal the very information it is attempting to protect.

Because glomarization is not a FOIA exemption, in addition to neither confirming nor denying the existence of the records, the IRS must assert an exemption that would be applicable if the records did exist. For example, if the request seeks tax records pertaining to a third party, the IRS would assert exemption 3, in conjunction with section 6103(a), to the extent responsive records exist.

The importance of consistency in the use of this approach is very important. For example, if the IRS claims there are “no records” when there are not any records when circumstances would permit the use of an exclusion, but “neither confirms nor denies” only when records exist, requesters will soon be able to determine when the IRS is protecting records and when there are no records to protect.

If a Chief Counsel employee believes that certain information subject to a FOIA request should be glomarized, he or she should discuss the matter with his manager and the local disclosure officer.

A. Request

1. In General.

FOIA requests are made in writing and are generally processed by the Disclosure Office having control over their geographic area, *i.e.*, any of the Area or Territory Offices, Campuses, Compliance Centers, Computing Centers, or in the National Office. 26 C.F.R. § 601.702(h)(1). Requesters should submit their requests to the Disclosure Office located closest to their residence. Under 26 C.F.R. § 601.702(h), Counsel records other than records in the National Office of the Office of Chief Counsel are included within the jurisdiction of the local Disclosure Office. Records under the control of the National Office of the Office of Chief Counsel fall under the jurisdiction of the Director, Office of Governmental Liaison and Disclosure.

> **Practice Note:** If a FOIA request is submitted directly to a Chief Counsel office, the request should be forwarded to the local Disclosure Office for processing.

The Act requires that the request "reasonably describe" the desired records. 5 U.S.C. § 552(a)(3)(A). This means that members of the agency's staff familiar with the subject area of the request could locate the record without imposing an undue burden on the agency. 26 C.F.R. § 601.702(c)(5); IRM 11.3.13.5.

An agency has no duty to conduct research or create records not already in existence at the time the request is made in order to fulfill the request. Klinge v. IRS, 906 F. Supp. 434, 436 (W.D. Mich. 1995) (citing NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975)); Reeves v. United States, 74 A.F.T.R.2d 7208 (E.D. Cal. Nov. 16, l994). Nevertheless, agencies are obligated to conduct reasonable searches of electronic records and automated databases to identify responsive information that may be extracted there from and produced to the requester, in either electronic or hard copy format. 5 U.S.C. § 552(a)(3)(B), (C).

The reason for making a request, the requester's intended use of the information, or the requester's unique knowledge about the information, has no bearing on the entitlement to records. Unsupported Tax Avoidance Argument Program taxpayers, convicted felons, writers, and scholars all have equal access to agency records. Dept. of Justice v. Julian, 486 U.S. 1, 13-14 (1988). Whether requested records are to be made available turns on the applicability of the exemptions vis-à-vis any member of the public, regardless of the particular requester's identity.

Practice Note: The FOIA based privacy exemptions should not be asserted to protect the identity of the person who is the requester (absent the application of another exemption).

Note: *See* I.A.5, above, discussing that Congress has amended the FOIA to exclude foreign governments, or their representatives, as permissible requesters for records maintained by United States intelligence agencies.

2. Searches.

An agency has a duty to conduct a reasonable search for responsive records. Zemansky v. EPA, 767 F.2d 569, 571-73 (9th Cir. 1985) (reasonableness of search depends on facts of the case). The search must be "reasonably calculated to uncover all relevant documents." Weisberg v. United States Dept. of Justice, 705 F.2d 1344, 1251 (D.C. Cir. 1983). Thus, the legal standard for evaluating a search is not whether responsive material might conceivably exist, but whether the search for records was adequate. Murphy v. IRS, 79 F. Supp. 2d 1180, 1185-86 (D. Haw. 1999) (IRS conducted reasonable search in light of fact that requester gave no indication of the records sought or the offices to be searched). Judicial evaluation of the reasonableness of a search is based on what the agency knew at the conclusion of the search rather than what the agency believed at its inception, *i.e.*, if, in conducting the search where responsive records are reasonably likely to be found, it appears to the agency that there may be other responsive records in other files, then those files should be searched as well. Campbell v. United States Dept. of Justice, 164 F.3d 20, 27 (D.C. Cir. 1998).

3. Time for Responding.

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 in exceptional circumstances. 5 U.S.C. § 552(a)(6)(B)(i).

Where FOIA requests cannot be processed in 30 working days (the original 20 working day period, plus one 10 working day extension), the Act requires the agency to notify the requester and provide him with an opportunity "to limit the scope of the request" and/or "to arrange with the agency an alternative time frame for processing the request or a modified request." 5 U.S.C. § 552(a)(6)(B)(i),(ii). This provides a basis for agencies and FOIA requesters to reach agreement on the timing of agency responses in cases in which the circumstances of the particular request, rather than a more general agency backlog, cause difficulty in meeting FOIA's time limits.

> **Practice Note**: Chief Counsel employees should inform the local disclosure officer as soon as possible if the volume of responsive records would require an extension.

The statute requires agencies to promulgate regulations to provide for expedited processing in cases where a requester demonstrates a "compelling need." 5 U.S.C. § 552(a)(6)(E). The IRS regulations define "compelling need" as:

> (A) Circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual;
>
> (B) An urgency to inform the public concerning actual or alleged Federal Government activity is made by a person primarily engaged in disseminating information. . .
>
> (C) The loss of substantial due process rights.

26 C.F.R. § 601.702(c)(6)(i). The regulations further require the requester to provide a certified statement explaining the nature of the compelling need to expedite the request. 26 C.F.R. § 601.702(c)(6)(ii). Within 10 calendar days after the date of the compelling need request, the disclosure office will decide, based solely on the information provided by the requester, whether to grant expedited processing, and must notify the requester of its decision. Treas. Reg. § 610.702(c)(6)(iv). Once expedited processing is granted, the agency must give priority to that FOIA requester and process the requested records for disclosure "as soon as practicable." 5 U.S.C. § 552(a)(6)(E)(iii). The denial of request for expedited treatment may be appealed. 26 C.F.R. § 601.702(c)(6)(v). The appeal must be given "expeditious consideration." 5 U.S.C. § 552(a)(6)(E)(ii)(II).

> **Practice Note**: The Disclosure Officer, or his or her delegate, will make the determination of whether the request meets the criteria for expedited treatment.

If the IRS fails to respond to a request within the statutory time period, a requester may proceed to court without filing an administrative appeal. 5 U.S.C. § 552(a)(6)(C)(i); 26 C.F.R. § 601.702(c)(13).

4. Denying Access to Responsive Information.

The Act provides that any reasonably segregable portion of a record is to be provided after deletion of the exempt portions. Information that is otherwise nonexempt may be withheld only if it is "inextricably intertwined"

with the exempt information. Neufeld v. IRS, 646 F.2d 661, 665 (D.C. Cir. 1981). An agency is not required to segregate in a manner that what remains leaves "only essentially meaningless words and phrases." *Id*.

The Act has two provisions regarding the agency's obligation to specify to a FOIA requester the amount of information that is denied in response to a request. First, in the situation in which information is deleted from a record that is disclosed in part, the amount of information deleted must be indicated on the released portion of the record, unless including that indication would harm an interest protected by the applicable exemption. 5 U.S.C. § 552(b). In addition, if technically feasible, the amount of the information deleted must be indicated at the place in the record where the deletion is made. 5 U.S.C. § 552(b). Second, where entire records or entire pages of records are withheld, the agency must make a reasonable effort to estimate the volume of what is withheld and provide an estimate to the person making the request unless providing the information would harm an interest protected by an applicable exemption. 5 U.S.C. § 552(a)(6)(F).

> **Practice Note**: Chief Counsel attorneys who make exemption recommendations to the Disclosure Office should generally highlight the portions recommended to be withheld. The local Disclosure Office staff usually performs the mechanics of "redacting" the indicated portion if they agree with the attorneys' recommendations. If the attorney and the Disclosure Office staff cannot agree on the appropriate redactions and exemptions, the matter will be resolved through the reconciliation procedures in the CCDM and IRM.

B. Appeal

If the agency denies any portion of the request within the 20 working day period, the requester may send an appeal letter to the Chief, Appeals. If the agency fails to respond within the 20-day period, the requester may file a suit in district court without first pursuing an administrative appeal. On the other hand, if a denial of the request is made at any time before a lawsuit is filed, the requester must submit an administrative appeal before filing suit in district court. *See* Taylor v. Appleton, 30 F.3d 1365, 1367 (11th Cir. 1994); Oglesby v. Dept. of the Army, 920 F.2d 57, 63 (D.C. Cir. 1991); Chandler v. IRS, 927 F.2d 608 (table), 1991 WL 27804 (9th Cir. Mar. 5, 1991).

The agency is required to respond to an appeal within 20 working days after its receipt. Should the agency fail to respond within the 20 day period, the requester may file suit. Requesters have a choice of venue: where the records are located, where the requester lives or has his or her principal place of business, or in the U.S. District Court for the District of Columbia. If the agency denies the

appeal in whole or in part, it must inform the requester of the right to seek judicial review, and the requester may then file suit.

IV. EXEMPTIONS[67]

Government agencies may refuse to disclose information if it falls within one or more of nine specified exemptions or two special law enforcement exclusions (rarely applicable to IRS).[68] *See* 5 U.S.C. § 552(b) and (c). Congress did not intend, however, for agencies to use certain exemptions to justify automatic withholding of information. These exemptions are generally known as discretionary exemptions and are intended to designate those areas in which, under certain circumstances, information may be withheld.

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

Effective April 23, 2004, the Service issued Policy Statement 11-13 (formerly P-1-192) echoing the principles of the Ashcroft memorandum. The policy statement provides in pertinent part:

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

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[67] Additional discussion of those exemptions most common to CCA and their background file documents can be found at Chapter 13, II-D and E.

[68] A third exclusion (5 U.S.C. § 552(c)(3)) applies *only* to the FBI.

Practice Note: *All available exemptions* should be asserted at one time rather than piecemeal. That way, should a record lose one exemption, perhaps through the passage of time, other exemptions may be available to withhold all or portions of the record if programmatic and policy reasons so require. For example, if at the time of the request the IRS is conducting an audit of the requester/taxpayer, a number of exemptions would be available to withhold information in order to avoid interference with the ongoing investigation. (*E.g.*, exemptions 7(A), 3 in conjunction with section 6103(e)(7), and - where applicable - 5.) If the audit were concluded at the time the requester litigates the denial of records, exemption 7(A) would no longer be applicable; however, the other exemptions may remain available to protect information which the government seeks to withhold for tax administration reasons. It behooves the IRS or Counsel office to assert and defend all possible exemptions initially and avoid a ruling that the government waived the exemption by failing to assert it. *See* Maydak v. U.S. Dept. of Justice, 218 F.3d 760, 767-69 (D.C. Cir. 2000) (court of appeals refused to permit agency to assert other exemptions when exemption 7(A) lost applicability due to conclusion of investigation), *cert den*., 533 U.S. 950 (2001).

A. Exemption 1

This exemption pertains to classified records concerning national defense and foreign policy. The IRS seldom invokes this exemption. Where the IRS has invoked the exemption, it has involved treaty-related matters.[69]

B. Exemption 2

Exemption 2 of the FOIA covers matters "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2). In defining the scope of this exemption, the Senate and House Reports provided conflicting views. The Senate Report stated that the exemption relates only to the internal personnel rules and practices of an agency. Examples of these may be rules as to personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave and the like. S. Rep. No. 813, 89th Cong. 1st Sess. (1967). *See also*, Hawkes v. IRS, 467 F.2d 787, 794 (1972). In Abraham & Rose v. IRS, 138 F.3d 1075, 1079-83 (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. Hawkes, 467 F.2d. at 794.

[69] Tax information obtained from a foreign government as the result of a Tax Treaty or Convention is protected by section 6105. *See* Chap. 13, Pt II. Section 6105 provides that as a general rule "[t]ax convention information shall not be disclosed." It is an exemption 3 statute. Accordingly, it would not be necessary to invoke exemption 1 for tax convention information.

The House Report, however, stated that the exemption applies to "[o]perating 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." Rep. No. 1497, 88th Cong., 2d Sess. 10 (1966).

Most courts have adopted the Senate Report view, and have ruled that records must be released where it can be shown that they are the subject of a genuine, significant, or legitimate public interest. Department of Air Force v. Rose, 425 U.S. 352, 367-69 (1976); Vaughn v. Rosen, 523 F.2d 1136, 1141-43 (D.C. Cir. 1975). The D.C. Circuit, however, identified a slightly different standard than the House's interpretation for protecting records under this exemption. Records may be withheld under exemption 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, 1055-63 (D.C. Cir. 1981). This standard is known as "high 2."

As part of the 1986 FOIA amendments, law enforcement manuals, previously withheld from disclosure under the House Report view of exemption 2, are now clearly exempt under exemption 7(E).

C. Exemption 3

Exemption 3 requires agencies to withhold information "specifically exempted from disclosure by statute (other than the FOIA), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3). Section 6103 of the Code is the type of statute to which subsection 3 of the FOIA applies. Church of Scientology of California v. IRS, 484 U.S. 9, 12 (1987); Chamberlain v. Kurtz, 589 F.2d 827, 843 (5th Cir.), *cert. denied*, 444 U.S. 842 (1979). Under section 6103(a), returns and return information "shall be confidential" and can be disclosed only as authorized by Title 26.

> **Practice Note**: Sections 7213, 7213A, and 7431 of the Code, respectively, set forth criminal and civil penalties for unauthorized disclosure of return information. They are not cited as exemption 3 statutes. (*See* discussion of sections 7213, 7213A, and 7431 in Chapter 1.)

Exemption 3 statutes cited by the Service in response to FOIA requests include:

> 1. Rule 6(e) of the Federal Rules of Criminal Procedure. Fund for Constitutional Government v. National Archives & Records Service, 656

F.2d 856, 867 (D.C. Cir. 1981). This provision, promulgated under the authority of 18 U.S.C. §§ 3771 and 3772, mandates the secrecy of grand jury proceedings. The rule prohibits the disclosure of records that contain information generated during the course of any grand jury investigation. *Cf*. Senate of Puerto Rico v. U.S. Dept. of Justice, 823 F.2d 574, 584 (D.C. Cir. 1987) (agency must establish nexus between release of the records and the revelation of the grand jury process).

2. 31 U.S.C. § 5319 establishes that reports required to be filed under the Bank Secrecy Act (*e.g.*, CTRs, CMIRs, and FBARs) are specifically exempt under the FOIA. Small v. IRS, 820 F. Supp. 163, 166 (D.N.J. 1992).

3. The National Defense Authorization Act, Pub. L. No. 104-201 § 821, 110 Stat. 2444, was established by Congress as an exemption 3 statute prohibiting agencies from releasing certain contractor proposals under the FOIA. This statute was designed to alleviate the administrative burden upon agencies processing requests for contractor proposals under exemption 4.

4. Section 6105 protects tax convention information (discussed more fully in Chapter 13, part II) and meets the criteria for an exemption 3 statute. Tax Analysts v. IRS, 217 F. Supp.2d 23, 26-28 (D.D.C. 2002).

D. Exemption 4

Exemption 4 protects from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). This exemption applies to trade secrets such as processes, formulas, manufacturing plans, and chemical compositions. *See* Yamamoto v. IRS, Civ. No. 83-2160, slip op. at 2 (D.D.C. November 16, 1983) (exemption 4 protects as a trade secret a report on the computation of the "standard mileage rate" prepared by a private company for IRS use). The exemption also applies to commercial or financial information such as corporate sales data, salaries and bonuses of industry personnel, and bids received by corporations in the course of their acquisitions. Commercial and financial information other than trade secrets can be withheld from disclosure *only* if it is privileged or confidential and it must be obtained by the government from a "person." Be aware that simply because the information concerns matters occurring during a commercial operation does not alone make the information commercial information. *See, e.g.,* Chicago Tribune Co. v. FAA, 1998 WL 242611 (N.D. Ill. May 7, 1998) (information on nature and frequency of in-flight emergencies not commercial information for purposes of exemption 4).

Courts have defined "confidential" information as that which, if disclosed, would be likely to (1) harm the competitive position of the person who supplied it, or (2)

impair the government's ability to obtain similar information in the future. National Parks and Conservation Association v. Morton, 498 F.2d 765, 770 (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 generated by the government such as government prepared records based on government information. (The information may be exempt under one prong of exemption 5.) In Critical Mass Energy Project v. NRC, 975 F.2d 871, 878 (D.C. Cir. 1992) (en banc), *cert. denied*, 507 U.S. 984 (1993), the D.C. Circuit limited the National Parks submitter's "harm" test to those situations wherein the submitter was required to submit the information to the agency. Where the purported proprietary information is voluntarily submitted, the test is less stringent: whether the submitter ordinarily places the information into the marketplace. *See* AGS Computers v. IRS, Civ. No. 92-2714 (D.N.J. Sept. 16, 1993) (applying Critical Mass, confidential information voluntarily submitted by a company suspended by the IRS from serving as an electronic filer, as part of its appeal of the suspension, was protected by exemption 4). If the submitter does not ordinarily publicize the information, then it is exempt. In these cases, the submitter need not demonstrate to the agency the competitive harm likely to befall the submitter if the information is disclosed.

If information in the file is determined to be business submitter information, the IRS must provide written notice to the submitter in accordance with 26 C.F.R. § 601.702(g)(4) before disclosing information in response to a FOIA request.

E. Exemption 5

Exemption 5 protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party. . . in litigation with the agency." 5 U.S.C. § 552(b)(5). Deliberative process privilege material, confidential attorney-client communications, and attorney work product records are not generally available to parties in litigation with the government (Fed. R. Civ. P. 26(b)(1) and 26(b)(3)), therefore the records are protected from disclosure by the exemption 5. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975). *See also*, Schell v. U.S. Dept. of Health & Human Services, 843 F.2d 933, 939 (6th Cir. 1988) ("This language contemplates that the public will not be entitled to government documents which a private party could not discover in litigation with the agency."); Parke, Davis & Co. v. Califano, 623 F.2d 1, 5 (6th Cir. 1980) (exemption 5 interpreted as preserving to the agencies recognized evidentiary privileges such as the attorney-client and deliberative process privileges and the work product doctrine).

1. Deliberative process privilege

The deliberative process privilege protects material reflective of the predecisional deliberative processes of government agencies, *i.e.*, internal agency records containing the opinions, deliberations, and

recommendations rendered by governmental officials in connection with their official duties. *See*, *e.g.*, NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1975); Renegotiation Board v. Grumman Aircraft, 421 U.S. 168, 188 (1975); EPA v. Mink, 410 U.S. 73, 87-88 (1973). The primary purposes of the privilege are protecting the integrity of the decision making process and preventing the "disrobing of an agency decision-maker's judgment." Russell v. Dept. of the Air Force, 682 F.2d 1045, 1049 (D.C. Cir. 1982). Specifically, three policy purposes have been held to constitute the basis for the deliberative process privilege: (1) to encourage frank, open discussions on matters of policy between subordinates and superiors; (2) to protect against the premature disclosure of proposed policies before they are finally adopted; and (3) to protect the public from confusion that might result from the disclosure of reasons and rationales that were not the ultimate ground for the agency action. Russell, 682 F.2d at 1048. *See also* NLRB v. Sears, Roebuck & Co., 421 U.S. at 150-51 (underlying policy considerations of the deliberative process privilege are to promote frank expression and discussion among those responsible for making the determinations that enable the government to operate, and to shield from disclosure the thought processes of executive and administrative personnel).

Agencies generally may not withhold facts under the deliberative process privilege unless they are inextricably intertwined with otherwise deliberative matter, or so selectively culled from a larger universe of facts so as to reveal the deliberation itself. Montrose Chemical Corp. v. Train, 491 F.2d 63, 71 (D.C. Cir. 1974).

To the extent an otherwise predecisional and deliberative record is expressly adopted by an agency decision maker, then the deliberative process privilege is no longer available to resist production.

> [I]f an agency chooses expressly to adopt or incorporate by reference an intra-agency memorandum previously covered by Exemption 5 in what would otherwise be a final opinion, that memorandum may only be withheld on the ground that it falls within the coverage of some other exemption other than Exemption 5.

NLRB v. Sears, Roebuck & Co., 421 U.S. at 161.

A district court held that the Service waived the deliberative process privilege for the portion of an internal draft document read aloud by an IRS attorney at a meeting with oil industry representatives. Shell Oil Co. v. IRS, 772 F. Supp. 202, 210-11 (D. Del. 1991). The court did uphold the Service's assertion of the deliberative process privilege for the unread portion of the record.

2. Attorney-client privilege and work product doctrine

The attorney-client privilege protects "confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice." Mead Data Central, Inc. v. U.S. Dept. of Air Force, 566 F.2d 242, 252 (D.C. Cir. 1977). The privilege also applies to agency counsel who provides guidance to the agency. *See* In re Lindsay, 148 F.3d 1100, 1104 (D.C. Cir. 1998); Tax Analysts v. IRS, 117 F.3d 607, 618 (D.C. Cir. 1997) (FSA case). The privilege extends not only to facts divulged by a client to his attorney in confidence, but also to opinions rendered by an attorney to his client based upon those facts. In Tax Analysts v. IRS, the court distinguished between legal conclusions based upon facts provided by a taxpayer, which were not privileged as confidential attorney-client communications, and those governmental source facts which reflect on the "scope, direction, or emphasis of audit activity," which are. 117 F.3d at 619-20. Unlike the work product doctrine, it is not limited to the litigation context. Coastal States Gas Corp. v. Dept. of Energy, 617 F.2d 854, 864 (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, 85-86 (N.D. Ind. 1982), *aff'd mem.*, 734 F.2d 18 (7th Cir. 1984).

The attorney work-product doctrine protects records and other memoranda prepared by, or on behalf of, an attorney in contemplation of litigation. Hickman v. Taylor, 329 U.S. 495, 509-10 (1947). *See also* Fed. R. Civ. Proc. 26(b)(3). The reasoning is to protect the adversarial trial process by insulating the attorney's preparation from scrutiny and ordinarily arises when some articulable claim, which is likely to lead to litigation, has arisen. Coastal States Gas Corp. v. Dept. of Energy, 617 F.2d at 865. It is not limited to civil proceedings, but extends to administrative and criminal proceedings as well. Martin v. Office of Special Counsel, 819 F.2d 1181, 1187 (D.C. Cir. 1987) (applying Privacy Act, 5 U.S.C. § 552a(d)(5)). Litigation need not have actually commenced so long as there is some articulable claim likely to lead to litigation. Coastal States Gas Corp. v. Dept. of Energy, 617 F.2d at 864; Delaney, Migdail, & Young v. IRS, 826 F.2d 124, 127 (D.C. Cir. 1987) (although the record must be, fully or in principal part, "prepared in contemplation of litigation," litigation need not have been commenced, so long as there are specific claims identified that make litigation probable); Tax Analysts v. IRS, 152 F. Supp.2d 1, 19 (D.D.C. 2001) (record prepared to determine whether a particular case should be submitted for litigation meets threshold for privilege). Nevertheless, the mere fact that it is conceivable that litigation may occur at some future time is not sufficient to protect

records generated by attorneys as attorney work product. Senate of Puerto Rico v. U.S. Dept. of Justice, 823 F.2d 574, 587 (D.C. Cir. 1987). The doctrine also applies to records prepared by a non-attorney working under an attorney's supervision. Exxon Corp. v. FTC, 466 F. Supp. 1088, 1099 (D.D.C. 1978) (economist's report protected), *aff'd*, 663 F.2d 120 (D.C. Cir. 1980). Factual material is protected as well. United States v. Weber Aircraft Corp., 465 U.S. 792, 802 (1984). Moreover, the work product doctrine continues to protect records even after the litigation to which they are related is over. Grolier Inc. v. FTC, 462 U.S. 19, 28 (1983).

3. Settlement Negotiations Privilege

Although some courts have recognized a privilege for documents generated in the course of settlement negotiations with a third party, *see, e.g.*, Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc., 332 F.3d 976, 981 (6th Cir. 2003) ("any communications made in furtherance of settlement are privileged"), 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) (non-FOIA case refusing to recognize a privilege for settlement negotiations); Norwood v. FAA, 580 F. Supp. 994, 1002-1003 (W.D. Tenn. 1984) (same). Some courts, however, have recognized 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. *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).

F. Exemption 6

1. Exemption 6 protects "personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 USC § 552(b)(6).

2. The Supreme Court held that exemption 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, 178 (1991), the Supreme Court upheld the withholding of the names and home addresses of repatriated Haitian refugees interviewed by U.S. officials regarding the conditions of their repatriation. The Court reasoned that release of identities would significantly invade their privacy interests and that the public interest was served by the

release of the edited interview summaries. Moreover, disclosure of the persons names and addresses would not have shed any additional light on government activities, *citing* U.S. Dept. of Justice v. Reporters Committee, 489 U.S. 749, 773 (1989). *See also* FLRA v. Dept. of Defense, 510 U.S. 487, 499 (1994) (vindication of policies behind federal labor statute irrelevant in FOIA where disclosure of employee names and addresses would not provide insight into how the government operates).

3. The phrase "similar files" as used in the 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."

4. The majority rule is that death extinguishes privacy rights recognizable under exemptions 6 and 7(C), *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 WL 202247, at *1 (D.C. Cir. Mar. 3, 1998) (per curiam) (Although the privacy interest of the deceased may be "reduced," the privacy interest should be protected under exemption 7(C) unless outweighed by the public interest in disclosure).

G. Exemption 7

Exemption 7 exempts from disclosure records or information compiled for law enforcement purposes, but only to the extent that the production of such records:

> (A) could reasonably be expected to interfere with enforcement proceedings; (B) would deprive a person of a right to a fair trial or an impartial adjudication; (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy; (D) could reasonably be expected to disclose the identity of a confidential source, including a state, local or foreign agency or authority or any private institution, which furnished information on a confidential basis, and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by the confidential source; (E) would disclose techniques and procedures for law enforcement investigations or prosecutions or would disclose guidelines

for law enforcement investigations or prosecutions if disclosure could reasonably be expected to risk circumvention of the law; or, (F) could

reasonably be expected to endanger the life or physical safety of any individual.

5 U.S.C. § 552(b)(7).

This exemption allows – but does not require – withholding of records or information, not whole files, "compiled for law enforcement purposes," but only to the extent that the production of the records would cause one of the six specifically enumerated harms described above. This threshold requirement encompasses records generated out of civil and criminal, judicial and administrative enforcement proceedings, or used in investigations (such as manuals, guidelines and instructions to staff). Case law has established that criminal tax investigations, audits, collection activities, consideration of tax exemption applications, church examinations, conduct investigations, and litigation are "law enforcement purposes" within the meaning of exemption 7. *See e.g.,* Becker v. IRS, 34 F.3d 398, 407 (7th Cir. 1994) (investigating potential illegal tax protestor activity); Church of Scientology Int'l v. IRS, 995 F.2d 916, 919 (9th Cir. 1993) (enforcing the provisions of the federal tax code that relate to qualification for exempt status); Lewis v. IRS, 823 F.2d 375, 379-80 (9th Cir. 1987) (criminal investigation).

1. Exemption 7(A)

Determining the applicability of exemption 7(A) requires a two-step analysis: 1) whether a law enforcement proceeding is pending or prospective, and 2) whether release of information could reasonably be expected to cause some articulable harm. *See* NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 239-40 (1978) (government must show how release of records "would interfere with a pending enforcement proceeding"); Manna v. U.S. Dept. of Justice, 51 F.3d 1158, 1164 (3d Cir. 1995) (same). This means that when there is a concrete prospect of ongoing enforcement proceedings, records or portions of records may be withheld if disclosure of information unknown to taxpayers might impede the investigation or harm the government's case in that particular proceeding.

Grounds for the nondisclosure of these records that 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. Title Guarantee Co. v. NLRB, 534 F.2d 484, 491 (2d Cir. 1976); Kanter v. IRS, 433 F. Supp. 812, 822 n. 18 (N.D. Ill. 1977).

The Supreme Court has stated that nondisclosure may also be appropriate when the release of requested information would give the requester earlier and greater access to the government's case than he would otherwise have. NLRB v. Robbins Tire, 437 U.S. at 238-39.

2. Exemption 7(B)

This exemption provides for withholding if the records "would deprive a person of a right to a fair trial or impartial adjudication." 5 U.S.C. § 552(b)(7)(B). This is primarily a protection against prejudicial publicity in civil or criminal trials. This exemption has rarely been used by the IRS.

3. Exemption 7(C)

Exemption 7(C) protects from disclosure records or information compiled for law enforcement purposes whose disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C).

Reliance on cases interpreting exemption 6 is proper in constructing the 7(C) exemption. *See* U.S. Dept. of Justice v. Reporter's Committee, 489 U.S. 749, 768 (1988) (wherein Court notes that the discussion of exemption 6 in Dept. of Air Force v. Rose, 425 U.S. 352 (1976), was applicable to current case interpreting exemption 7(C)). The exemption, however, does not apply to corporations or other entities. The individuals whose interests are protected by clause (C) clearly include the subject of the investigation and "any (other) person mentioned in the requested file." *See* Attorney General's 1974 FOI Amdts. Mem. at 9. Thus, agencies have successfully asserted exemption 7(C) to protect the identities of law enforcement personnel and third parties who cooperate in investigations. May v. IRS, 85 F. Supp.2d 939, 947 (W.D. Mo. 1999).

In Reporters Committee - considered the seminal 7(C) case - the Supreme Court held that whether disclosure is "warranted" within the meaning of the exemption turns upon the nature of the requested record and its relationship to the FOIA's central purpose of exposing to public scrutiny official information that sheds light on an agency's performance of its statutory duties. Although neither the legislative history nor the explicit terms of the FOIA 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. As the Supreme Court noted in Reporters Committee, 489 U.S. at 763, "privacy encompass[es] the individual's control of information concerning his or her person."

4. Exemption 7(D)

Exemption 7(D) exempts material the production of which could reasonably be expected to disclose the identity of a confidential source, including a state, local, or foreign agency or authority, or any private institution which furnished information on a confidential basis, and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by the confidential source.

The first part of this provision, concerning the identity of confidential sources, applies to any type of law enforcement record, civil or criminal. The term "confidential source" refers not only to paid informants but also to any person who provides information "under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred." S. Rep. No. 1200, 93rd Cong., 2d Sess. 13 (1974). Even if the requester has independent knowledge of the confidential source's identity, exemption 7(D) applies. *See* Cleary v. FBI, 811 F.2d 421, 423 (8th Cir. 1987); Schramm v. IRS, 1991 U.S. Dist. LEXIS 8049, at *1 (D. Ariz. 1991).

In most circumstances, it would be proper to withhold the names, addresses, and other identifying information regarding citizens who submit complaints or reports indicating possible violations of law. Of course, a source can be confidential with respect to some items of information he provides, even if he furnishes other information on an open basis; the test, for purposes of this provision, is whether he was a confidential source with respect to the particular information requested, not whether all connections between him and the agency are entirely unknown. Attorney General's 1974 FOI Amdts. Mem. at 10.

Early case law interpreted "sources" to include local, state, and foreign law enforcement agencies (those whose primary function is the prevention or investigation of violations of criminal statutes, or the apprehension of alleged criminals) which provide information to an agency in confidence. Lesar v. Dept. of Justice, 636 F.2d 472, 489-90 (D.C. Cir. 1980); Kenney v. FBI, 630 F.2d 114, 119 (2d Cir. 1980); Church of Scientology v. Dept. of Justice, 612 F.2d 417, 427-28 (9th Cir. 1979). This was eventually codified by the 1986 FOIA amendments. *See* S. Rep. No. 1200.

The second part of clause (D) deals with information provided by a confidential source. With respect to civil matters, the 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. By contrast, 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, 1979 WL 1428, at *7 (E.D. Mo. Jul. 2, 1979).

5. Exemption 7(E)

Exemption 7(E) protects records to the extent that release "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions, if such disclosure could reasonably be expected to risk circumvention of law." It has been applied to protect DIF scores, Gillin v. IRS, 980 F.2d 819, 822 (1st Cir. 1992); Long v. IRS, 891 F.2d 222, 224 (9th Cir. 1989); Small v. IRS, 820 F. Supp. 163, 166 (D.N.J. 1992), and tolerance and investigative criteria, O'Connor v. IRS, 698 F. Supp. 204, 205 (D. Nev. 1988).

6. Exemption 7(F)

Exemption 7(F) exempts material the disclosure of which could reasonably be expected to "endanger the life or physical safety of any individual." It might apply, for example, to information that would reveal the identity of undercover agents (state or federal) working on matters such as narcotics, organized crime, terrorism, or espionage. Clarkson v. IRS, 1990 U.S. Dist. LEXIS 6887, at *9 (D.S.C. May 2, 1990), *aff'd*, 935 F.2d 1285, 1991 WL 106190 (4th Cir. Jun. 20, 1991) (per curiam). The exemption, however, is not limited to law enforcement personnel. The 1986 FOIA amendments broadened the scope of the exemption to encompass danger to any person.

For a discussion of FOIA exemptions 8 and 9, not usually asserted by the IRS, see the DOJ FOIA Reference Book at the link given at the front of this chapter.

IV. STATUTORY EXCLUSIONS

In addition to the changes to the law enforcement provisions of exemption 7, the 1986 amendments added subsection (c) to the FOIA to expand the ability of criminal law enforcement agencies to protect certain of its information. Where the requester, a subject of a criminal investigation, is unaware of the investigation, and acknowledging the existence of records in response to that person's request would result in 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). To the extent an agency maintains informant records under the informant's name and a request is made for them, the records may also be treated as not subject to the Act. 5 U.S.C. § 552(c)(2).

V. RECOVERABLE FEES

Permissible fees fall into three categories: search, review and duplication. Agencies do not charge requesters (other than commercial users) for the first 100 pages of duplication or the first two hours of search. 5 U.S.C. § 552(a)(4)(A). Under the Service's regulations, individual (as compared to corporate or other institutional) requesters are not charged search fees for requests for records retrieved by identifiers that are covered by the Privacy Act. 26 C.F.R. § 601.702(f)(3)(iv)(C). The Act permits agencies to recoup the direct costs of editing records made available for release under FOIA, but only from requesters seeking information for their own commercial interests.

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 non-exempt 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.

> **Practice Note**: Indigence is not a basis for a waiver or reduction of fees. The determination of any fee waiver is made by the local Disclosure Officer.

CHAPTER 10

LITIGATION PRIVILEGES

I. INTRODUCTION

This chapter provides a brief overview of the privileges most commonly invoked by the IRS in litigation. For more information about litigation privileges, consult with Branch 3 of the Office of the Assistant Chief Counsel (Administrative Provisions and Judicial Practices). For more information concerning the interrelationship between these and other litigation privileges with the Freedom of Information Act, see Chapter 9.

The government may refuse to provide litigants with access to documents and may refuse to provide information through other means such as deposition or trial testimony on three grounds:

1. Statutes such as IRC § 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 the attorney-client privilege and work product doctrine, and other generally available objections such as relevancy; and

3. Certain privileges available only to the government -- the so-called governmental privileges. For a listing of the governmental privileges, see Association for Women in Science v. Califano, 566 F.2d 339, 343 (D.C. Cir. 1977).

II. STATUTORY PRIVILEGES

A. IRC § 6103

The scope of documents and information subject to IRC § 6103, and the circumstances under which IRC § 6103 makes disclosure of such documents and information unlawful, are discussed at length elsewhere in this book. We note, however, that notwithstanding the limitations of IRC § 6103, upon issuance of a Brady order by the presiding judge in a federal or state criminal proceeding, the Service will disclose to the attorney for the government, pursuant to the constitutional doctrine announced in Brady v. Maryland, 373 U.S. 83 (1963), returns and/or return information which may be determined to be exculpatory. If the attorney for the government does not believe that disclosure of a particular return or item of return information is required under the Constitution, the attorney can offer to submit the information to the court *in camera* for a determination as to whether the information is exculpatory evidence required to be disclosed to the defendant.

B. Privacy Act of 1974, 5 U.S.C. § 552a

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. We note, however, that in accordance with Henthorn v. United States, 931 F.2d 29, 30 (9th Cir. 1991), in a criminal proceeding, the Service will disclose, in response to a criminal defendant's discovery request, "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 Title 31 documents or information are sought in discovery, you should refer to the Re-dissemination Guidelines for Bank Secrecy Act Information, issued June 25, 2004, by the Director of the Financial Crimes Enforcement Network. See Chapter 7 for additional information on the Bank Secrecy Act.

III. TYPES OF EVIDENTIARY PRIVILEGES

A. Attorney-Client Privilege

The attorney-client privilege protects confidential communications made between clients and their attorneys when the communications are for the purpose of securing legal advice or services. In re Lindsey, 1548 F.3d 1263, 1267-68 (D.C. Cir.), *cert. denied sub nom*. Office of the President v. Office of Independent Counsel, 525 U.S. 996 (1998). It is one of the oldest recognized privileges for confidential communications. Swidler & Berlin v. United States, 524 U.S. 399, 403 (1998). Its purpose is to ensure that clients' confidences to their attorneys will be protected, thereby encouraging clients to be open and honest in their communications with their attorneys. This confidentiality is deemed essential to the adversary system underlying our judicial process. That process is dependent upon sound legal advice and advocacy. These interests are, in turn, fostered by attorneys being fully informed by their clients. The attorney-client privilege reflects society's judgment that promotion of trust and honesty within the relationship is more important than the burden it potentially places on the discovery of truth.

The attorney-client privilege also protects communications from attorneys to their clients if the communications "rest on confidential information obtained from the client." Tax Analysts v. IRS, 117 F.3d 607, 618 (D.C. Cir. 1997) (quoting In re Sealed Case, 737 F.2d 94, 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 court found that they contained no “confidential communications” where the

factual information in the documents was obtained from taxpayers and did not contain confidential information concerning the agency. *Id*. at 619. Moreover, the court found that the legal analysis contained in FSAs, 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 only to particular portions of FSAs containing confidential information transmitted by field personnel regarding the scope, direction, or emphasis of audit activity. *Id.* at 120.

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., 77 A.F.T.R.2d ¶ 1548, at **8-9 (N.D. Cal., March 13, 1996). Only the latter are privileged. *Id.* Unlike the work product doctrine, the attorney-client privilege is not limited to the litigation context. Coastal States Gas Corp. v. Dept. of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980). 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, 253 n.24 (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 to others. Upjohn Co. v. United States, 449 U.S. 383, 395-96 (1981).

The attorney-client privilege has been narrowly construed. It will cover those situations only where disclosure might not have been made absent the privilege. Fisher v. United States, 425 U.S. 391, 403 (1976). A fundamental prerequisite is that confidentiality of the client communication must have existed at the time it was made and 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 Lindsey, 1548 F.3d at 1272-78.

B. Work Product Doctrine

The work product doctrine protects documents and other memoranda prepared in contemplation of litigation. Hickman v. Taylor, 329 U.S. 495, 508 (1947). Since its purpose is to protect the adversary trial process by insulating the

attorney's preparation from scrutiny, the work product doctrine does not attach until 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 doctrine has a broad sweep:

> 1. Litigation need not have actually commenced, so long as specific claims have been identified which make litigation probable. Kent Corp. v. NLRB, 530 F.2d 612, 623 (5th Cir.), *cert. denied*, 429 U.S. 920 (1976). Even documents prepared when the identity of the prospective litigation opponent was unknown can suffice to come within the doctrine. Delaney, Migdail & Young, Chtd. v. IRS, 826 F.2d 124, 127 (D.C. Cir. 1987). The mere fact that it is conceivable that litigation may occur at some future time will not be sufficient to protect documents generated by attorneys as work product. Senate of Puerto Rico v. Dept. of Justice, 823 F.2d 574, 586-87 (D.C. Cir. 1987). The work product doctrine 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).
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> Even where a document is prepared for two or more disparate purposes, so long as litigation was a major factor in the decision to create it, then the work product doctrine will attach. The majority rule is that documents should be deemed prepared "in anticipation of litigation" if "in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation." Wright, Miller & Marcus, 8 Federal Practice & Procedure Civil 2d § 2024 (1994); United States v. Adlman, 134 F.3d 1194, 1202-03 (2d Cir. 1998); National Union Fire Ins. Co. v. Murray Sheet Metal Co., Inc., 967 F.2d 980, 984 (4th Cir. 1992); Senate of Puerto Rico v. Dept. of Justice, 823 F.2d 574, 586 n. 42 (D.C. Cir. 1987); Simon v. G.D. Searle & Co., 816 F.2d 397, 401 (8th Cir.), *cert. denied*, 484 U.S. 917 (1987); Binks Mfg. Co. v. National Presto Indus., Inc., 709 F.2d 1109, 1118-19 (7th Cir. 1983); In re Grand Jury Proceedings, 604 F.2d 798, 803 (3d Cir. 1979). The minority view limits the applicability of the work
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> product doctrine to documents prepared "primarily" to assist in litigation**.** *See, e.g.*, United States v. El Paso Co., 682 F.2d 530, 543-44 (5th Cir. 1982), *cert. denied*, 466 U.S. 944 (1984). Note that "'documents that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation' are not protected." Pacific Gas and Elec. Co. v. United States, 69 Fed. Cl. 784, 798-99 (Fed. Cl. 2006) (quoting Adlman, 134 F.3d at 1202). Thus, documents prepared in the agency's ordinary course of business (*e.g.*, review of a proposed statutory notice of deficiency or a draft summons),

without more, may not be accorded protection. The work product doctrine has also been held to cover documents relating to possible settlements of litigation, as well as the final decision to terminate litigation.

2. Fed. R. Civ. P. Rule 26(b)(3) allows the work product doctrine 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 doctrine, 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, may also qualify for protection as work product. Shacket v. United States, 339 F.Supp.2d 1092, 1094-95 (S.D. Cal. 2004) (Special Agent's Report used to summarize and analyze evidence, and to recommend prosecution of defendant protected).

3. The work product doctrine has been held to persist where the information has been shared with a party holding some common interest with the agency. United States v. Gulf Oil Corp., 760 F.2d 292, 296 (Temp. Emer. Ct. App. 1985).

4. Factual information is fully entitled to work product protection. Tax Analysts v. IRS, 117 F.3d 607, 620 (D.C. Cir. 1997); Martin v. Office of Special Counsel, 819 F.2d 1181, 1187 (D.C. Cir. 1987); Shacket v. United States, 339 F.Supp.2d at 1096.

5. The termination of litigation does not vitiate the protection for material otherwise properly categorized as work product. FTC v. Grolier, Inc., 462 U.S. 19, 26-28 (1983).

6. Where a lawyer gives work product to an expert who considers it in forming opinions to which he or she will be testifying at trial, the doctrine no longer protects the information and it must be disclosed. In re Pioneer Hi-Bred Intern., Inc., 238 F.3d 1370, 1375-76 (Fed. Cir. 2001) ("the district court may allow inquiry into matters disclosed to the expert witnesses, and order production of documents or compel oral testimony with respect to the matters disclosed"); Trigon Ins. Co. v. United States, 204 F.R.D. 277,

282-83 (E.D. Va. 2001) (materials otherwise protected by work-product privilege must be disclosed under Rule 26 if considered by an expert); TV-3, Inc. v. Royal Ins. Co. of Am., 194 F.R.D. 585, 589 (S.D. Miss. 2000) (correspondence between counsel and expert witness is discoverable, "given plain language of Rule 26(a)(2) and its accompanying Advisory Committee Note"); Lamonds v. General Motors Corp., 180 F.R.D. 302,

305 (W.D. Va. 1998) (at least with respect to experts who testify at trial, the disclosure requirement of Fed. R. Civ. Proc. 26(a)(2), adopted in 1993, was intended to predetermine further discussion and mandate disclosure despite work product protection). *But see* Nexxus Products Co. v. CVS New York, Inc., 188 F.R.D. 7, 9 (D. Mass. 1999) (documents provided to the expert containing counsel's mental impressions are still afforded work product protection); Haworth, Inc. v. Herman Miller, Inc., 162 F.R.D. 289 (W.D. Mich. 1995) (same).

The work product doctrine 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

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 provides for courts to evolve privileges as necessary. Trammel v. United States, 445 U.S. 40, 47 (1980).

In Federal Open Market Committee v. Merrill, 443 U.S. 340, 356-57 (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.

Recently, the Court of Appeals for the Sixth Circuit expressly recognized a civil discovery privilege protecting documents generated in the course of settlement negotiations. Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc., 332 F.3d 976, 981 (6th Cir. 2003) ("any communications made in furtherance of settlement are privileged"). *See also* Bottaro v. Hatton Associates, 96 F.R.D. 158, 159-60 (E.D.N.Y. 1982) (details of a third party settlement were held privileged from discovery in recognition of "the strong public policy of favoring settlements . . . .").

D. Governmental Privileges

1. State Secrets Privilege

The state secrets privilege encompasses matters the disclosure of which would harm national security or the conduct of our foreign relations. The

privilege has long been recognized 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* 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.

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 7. Once it is established that state secrets are involved, "the privilege is absolute." *Id*. at 10. The litigant's need is relevant only to establish how closely the court will examine the validity of the assertion of the privilege. *See generally*, Trulock v. Wen Ho Lee, 66 Fed. Appx. 472, 475-76 (4th Cir. 2003) (discussion of basis for privilege and circumstances under which invocation of privilege will force dismissal of the case.).

2. Deliberative Process Privilege

The government may also assert a privilege to protect opinions, recommendations, and advice generated in the process of formulating policies and making decisions--the so-called "deliberative process" of the government. (As discussed below, courts 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, 150-51 (1975). The district court in Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318 (D.D.C. 1966), *aff'd on opinion below*, 384

F.2d 979 (D.C. Cir.), *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).

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, 87-88 (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, 256 (D.C. Cir. 1977). Thus, analytical portions, but not the entirety, of revenue agent reports, special agent reports, Appeals Case Memos, etc., may typically fall within the deliberative process privilege. A document embodying an outcome of the decision making process (the decision itself) is not privileged, even though it may have originally been drafted as a recommendation. For example, a memorandum containing a recommendation of a subordinate to a superior, which includes an "approved" line that has been signed, 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 the recommendation but does not attribute the reasons for the decision to the subordinate's memorandum, the superior's action does not vitiate the deliberative process privilege for the recommendatory

memorandum. *See*, *e.g.*, NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 155-58 (1975). Generally, drafts of documents are protected from disclosure under the deliberative process privilege. Arthur Anderson v. IRS, 679 F.2d 254, 257-58 (D.C. Cir. 1982).

Unlike the state secrets privilege, the deliberative process privilege is not absolute. In determining whether to recognize the privilege, a court must balance the public interest in protecting the information with the litigant's need for it. The court may weigh factors such as the relevance of the information sought, its availability elsewhere, the nature of the case, the degree to which disclosure would hinder the government's ability to hold

frank discussions about contemplated policy, and the extent to which protective orders may ameliorate any potential harm caused by disclosure.

3. Informant's Privilege

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, 59 (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, 353 U.S. at 60, or is privileged on independent grounds.

In Dept. of Justice v. Landano, 508 U.S. 165, 181 (1993), the Supreme Court held that the government is not entitled to a presumption that all sources supplying information to the FBI in the course of a criminal investigation are confidential sources within the meaning of exemption 7(D) of the FOIA. 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.

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, 353 U.S. at 60-61. The privilege may expire when the need for secrecy ceases to exist, but this does not necessarily mean when the identity of

the informer has become known to the party seeking disclosure. United States v. Tejeda, 974 F.2d 210, 217 (1st Cir. 1992); United States v. Tenorio-Angel, 756 F.2d 1505, 1510-11 (11th Cir. 1985); United States v. Aguirre, 716 F.2d 293, 300 (5th Cir. 1983).

4. Investigatory Files Privilege

Investigatory files compiled for law enforcement purposes are privileged. *See*, *e.g.*, Friedman v. Bache Halsey Stuart Shields, Inc., 738 F.2d 1336, 1342-43 (D.C. Cir. 1984); United States ex rel. Burroughs v. DeNardi Corp., 167 F.R.D. 680, 687 (S.D. Cal. 1996). The privilege is necessary to protect the law enforcement process. Disclosure of investigatory files would undercut the government's efforts to prosecute criminals by disclosing investigative techniques, forewarning suspects of the investigation, deterring witnesses from coming forward, and prematurely revealing the facts of the Government's case. In addition, disclosure could prejudice the rights of those under investigation.

The investigatory files privilege is qualified and thus may be overcome if a litigant's need is sufficiently justified. Friedman, 738 F.2d at 1342. In Friedman, the court of appeals quoted with approval Frankenhauser v. Rizzo, 59 F.R.D. 339, 344 (E.D. Pa. 1973), as setting forth the factors to be considered in weighing the litigant's need:

> (1) the extent to which disclosure will thwart governmental processes by discouraging citizens from giving the government information; (2) the impact upon persons who have given information of having their identities disclosed; (3) the degree to which governmental self-evaluation and subsequent program improvement will be chilled by disclosure; (4) whether the
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> 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.

Once an investigation is closed, the files generally are no longer privileged. Jabara v. Kelley, 75 F.R.D. 475, 494 (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?

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[.]" United States v. Reynolds, 345 U.S. at 7-8. (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. Other courts do not require such a formal claim, accepting claims of governmental privileges by the trial attorney.

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 held invalid the Service's delegation of authority to claim executive privilege. Marriott Intern. Resorts, L.P. v. United States, 61 Fed. Cl. 411, 419 (Fed. Cl. 2004) ("[r]equiring the head of the agency personally to assert executive privilege after gaining familiarity with the documents and determining that their release would significantly impede the agency's operations serves the important function of ensuring that the privilege is invoked only when absolutely necessary") (appeal pending).[70]

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[70] There is a conflict on this issue among the various federal courts. In addition to the Federal Circuit, the Third Circuit adheres to the requirement of personal invocation of executive privilege by the head of the agency, established by the Supreme Court in United States v. Reynolds, 345 U.S. 1, 7-8 (1953). *See* United States v. O'Neill, 619 F.2d 222, 227 (3d Cir. 1980). Trial courts in the First Circuit, United States v. Salemmee, 1997 WL 810057, at *6 n.6 (D. Mass. Dec. 29, 1997), and in the Eighth Circuit, Nelson v. Production Credit Ass'n of the Midlands, 131 F.R.D. 161 (D. Neb. 1989), have adopted the same view.

Other federal courts, however, allow the invocation of the deliberative-process privilege by lower-level officials. For example, the D.C. Circuit allows agency heads to delegate their authority to invoke the "deliberative process privilege" (which is treated by the D.C. Circuit as a discrete privilege rather than part of an overarching "executive privilege") in the context of requests made pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, *See* Judicial Watch, 365 F.3d 1108, 1121 (D.C. Cir. 2004) (citing cases in which a "Pardon Attorney" invoked deliberative-process privilege); Landry v. Federal Deposit Ins. Corp., 204 F.3d 1125, 1135-36 (D.C. Cir. 2000) (discussing the deliberative-process and law-enforcement privileges and noting that "District courts in this Circuit have also allowed lesser officials to assert these privileges"). Following the lead of the D.C. Circuit, delegation has been

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 and Privacy Law). Claims of the state secrets privilege may be made only by the Commissioner because the authority to assert that privilege has never been delegated.

Litigation Guideline Memorandum TL-98 (Oct. 7, 1992), "Guidelines and Procedures for Asserting the Deliberative Process privilege in Federal Civil Tax Litigation," identifies the various circuits that require compliance with Reynolds. This memorandum applies to all Chief Counsel attorneys who are assisting the Department of Justice in responding to opposing counsel's requests for interrogatories, deposition testimony and production of documents in tax refund suits. This memorandum also applies to any attorney who is responding, or assisting a response, to opposing counsel's request for interrogatories, deposition testimony or production of documents in Tax Court.

b. How to Prepare the Declaration

The office of the Assistant Chief Counsel (Disclosure and Privacy Law) generally will not become involved in the discovery process until the opposing party files a formal motion for production of documents, and preferably only when a motion to compel production has been filed. The Chief Counsel attorney having responsibility for the litigation should contact the Office of the Assistant Chief Counsel (Disclosure and Privacy Law), 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.

The Chief Counsel attorney principally assigned to the litigation, with the assistance of Branch 3 of the Office of the Assistant Chief Counsel (Administrative Provisions and Judicial Practice) and any other Chief 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

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allowed by trial courts in the Second Circuit, Martin v. Albany Bus. Journal, Inc., 780 F. Supp. 927, 934 (N.D.N.Y. 1992), in the Seventh Circuit, Moorhead v. Lane, 125 F.R.D. 680, 684 n.1 (C.D. Ill. 1989), and in the Ninth Circuit, Sanchez v. Johnson, 2001 WL 1870308, at *5 (N.D. Cal. Nov. 19, 2001) ("the duty to invoke the privilege cannot be delegated so far down the chain of command that purposes of the requirement [for an agency head's involvement] are undermined").

the appropriate governmental privilege, and (B) that disclosure of the documents satisfies the standard set forth in Delegation Order No. 220 (Rev. 3).

Having done so, the Chief Counsel attorney should draft a declaration for the signature of the Assistant Chief Counsel (Disclosure and Privacy Law). The 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. The declaration should set forth explicitly 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 decision makers," will generally satisfy the "predecisional" and "deliberative" criteria of the deliberative process privilege).

The Chief 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 the documents for which executive privilege should be asserted. These attorneys, in conjunction with the Chief 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 and Privacy Law) 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 and Privacy Law 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 and Privacy Law attorneys will provide this knowledge to the litigating attorneys in order to facilitate a uniform approach with respect to the documents.

The draft 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 Chief Counsel attorney's reviewer and Administrative Provisions and Judicial Practice Branch 3. They should then be forwarded to Disclosure and Privacy Law, 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 and Privacy Law'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. If other objections or privileges are to be claimed with respect to any of the information for which executive privilege is 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. However, where the documents for which executive privilege is claimed also contain return information protected under IRC § 6103, including DIF scores, the declaration may include a claim of § 6103 to protect that return information. The declaration, in enumerating the documents for which executive privilege is claimed, should identify and carefully distinguish documents constituting tax return information in their entireties and documents containing tax return information in part.

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. On occasion, other functions may need to raise a claim of executive privilege in their litigation. As appropriate, the procedures described above should be followed.

CHAPTER 11

PART I: PERSONNEL AND CLAIMANT REPRESENTATIVE MATTERS IRC § 6103(l)(4)

I. INTRODUCTION

Section 6103(l)(4) controls access to tax information for personnel and claimant representative (i.e., practitioner) related matters. Section 6103(l)(4)(A) provides standards under which employees, former employees, practitioners under Circular 230, or their representatives, may access tax information in those matters, and section 6103(l)(4)(B) outlines standards under which Treasury Department employees may access tax information to represent the agency in these matters. Section 6103(l)(4) is the exclusive authority for disclosing tax returns and return information in these contexts. NTEU v. FLRA, 791 F.2d 183, 187 (D.C. Cir. 1986).

Personnel matters include disciplinary and adverse actions, other personnel decisions and litigation proceedings arising out of or flowing from personnel actions or decisions (e.g., Equal Employment Opportunity discrimination matters, Merit Systems Protection Board matters, Merit Systems Review Board proceedings, and unfair labor practice allegations under 5 U.S.C § 7116(a)(1)). Matters arising under section 330 of Title 31 (Circular 230) involve the rights of persons like enrolled agents, attorneys, or accountants who practice before the IRS in representing and assisting taxpayers. They are referred to generally as "claimant representative matters." *See* 31 U.S.C. § 330.

II. ACCESS BY EMPLOYEES, FORMER EMPLOYEES, PRACTITIONERS, AND AUTHORIZED LEGAL REPRESENTATIVES

Section 6103(l)(4)(A) authorizes the disclosure of tax information:

> A. to the subject of a personnel related action or proceeding, to any person whose rights are or may be affected by an administrative action or proceeding under 31 U.S.C. § 330, or to their authorized legal representatives;
>
> B. upon written request;
>
> C. if the appropriate agency delegate determines that disclosure may be relevant and material to the matter at issue. Delegation Order No. 11-2 delegates this authority to, *inter alia*, the Associate Chief and Division Counsels and permits redelegation to supervisors and Chief Counsel attorneys directly involved in the matters.

Any tax information disclosed under this section carries with it a restriction limiting use to the particular action or proceeding for which an individual requests

and receives access. In addition, disclosures of tax information pursuant to section 6103(l)(4)(A) must be accounted for in accordance with section 6103(p)(3). IRM 11.3.20.9.1(8).

"Authorized legal representative" refers to every person designated by an employee or practitioner who has signed a form letter, which, among other things, acknowledges his/her awareness of the disclosure ramifications and penalties associated with accessing confidential tax information. IRM 11.3.20.9.1(2). In a personnel matter where the NTEU represents an employee or former employee, an NTEU representative (including an NTEU attorney) cannot access 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. The employee must designate, in writing, the NTEU representative as that person's representative before he/she may make a written request for access to tax information on behalf of the employee. Simply entering an appearance as the authorized representative of the subject of a proceeding, without a specific written request by the representative for access to tax information in connection with the proceeding, will not satisfy section 6103(l)(4)(A). NTEU's statutory right of access to information under 5 U.S.C. § 7114 does not supersede section 6103. *See* NTEU v. FLRA, 791 F.2d 183, 187 (D.C. Cir. 1986).

III. ACCESS BY DEPARTMENT OF TREASURY EMPLOYEES

General Legal Services attorneys and personnel specialists gain access to tax information for use in personnel related matters under section 6103(l)(4)(B). Unlike the "relevancy and materiality" predicate for access pursuant to section 6103(l)(4)(A), the only prerequisite to access and use under this section is necessity "to advance or protect the interests of the United States." There is no written request requirement and no accounting for disclosures is required.

IV. MISCELLANEOUS

A. The "for use" language in both subsections of section 6103(l)(4) contemplates redisclosures by the authorized recipients consistent with the purpose for which the 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's attorneys in a personnel proceeding, and to witnesses in the context of testimony preparation.

In addition, Department of Treasury employees are authorized to disclose tax information for the purpose of obtaining, verifying, or establishing other information that is or may be relevant and material to investigations of personnel or claimant matters. *See* Treas. Reg. § 301.6103(k)(6)-1(b).

B. Although section 6103(l)(4) permits disclosure of tax information under the circumstances set forth in the provision, it is the Service's additional practice to sanitize records containing third party tax information by redacting identifying information before providing them, together with a coded key, to subjects and their legal representatives, thereby affording those taxpayers greater privacy protection. *See, e.g.*, IRM 11.3.20.9.(5)b.

C. IRS employees, including NTEU officials, subpoenaed by claimants to testify in personnel actions or proceedings, e.g., at FLRA hearings, are required to secure an authorization to testify pursuant to Treas. Reg. § 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 also* Chapter 12.

V. REPORTING POSSIBLE ETHICAL VIOLATIONS

Sometimes during the course of a taxpayer's dealings with the Service, an IRS employee comes upon information he/she believes demonstrates possible professional misconduct on the part of an attorney representing the taxpayer. A question arises as to whether the employee may report the representative and the facts and circumstances underlying the possible professional misconduct to the appropriate authorities. Any information learned in these situations is the taxpayer's return information and appropriate disclosure authority must be found in section 6103.

A. Director of Practice.

An employee may disclose to the IRS Office of Professional Responsibility information evidencing possible misconduct on the part of an attorney representing a taxpayer, including the return information of that taxpayer, pursuant to section 6103(h)(1) and 5 U.S.C. § 552a(b)(1) ("need to know" in the course of tax administration duties).

B. U.S. Tax Court

In the context of a Tax Court proceeding, Tax Court Rule 202 authorizes the court to perform bar disciplinary functions. Therefore, the IRS should report potential ethical violations directly to the Tax Court. The disciplinary process, as it relates to an attorney's possible misconduct before the court, constitutes tax administration as defined in section 6103(b)(4). To the extent returns or return information are involved, they may be disclosed pursuant to section 6103(h)(4)(A). *But see* McLarty v. United States, 741 F. Supp. 751, 755, (D. Minn. 1990) (disclosure to Department of Justice and court of pro hac vice applicant's 1982-85 federal tax returns and return information not authorized by section

6103(h)(4) because "under no circumstances could a pro hac vice hearing be deemed a matter of tax administration" pertaining to the applicant).

C. State Bar

There is no authority for disclosure of tax information to state bar authorities, absent consent from the taxpayer(s) involved. Information developed during a TIGTA investigation into the propriety of attorneys' conduct may constitute the tax information of the taxpayers represented by the attorneys or the attorneys themselves. For example, information gathered by TIGTA with regard to the possible violation of section 7212 (imposing penalties on anyone who attempts to interfere with the administration of the internal revenue laws) has been held to be the target's return information because section 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, *reh'g denied*, 503 U.S. 999 (1992) (Freedom of Information Act case). Information pertaining to potential violations of section 7213 (unauthorized disclosure of tax information) and 7214 (employee misconduct) has also been deemed return information. Conn v. United States, 1991 WL 333707, at *1 (N.D. Cal. Dec. 10, 1991) (motion to quash subpoena served on revenue agent).

Disclosure of information other than returns or return information is governed solely by the Privacy Act.

PART II: PRIVACY ACT

I. INTRODUCTION

The purpose of the Privacy Act of 1974, 5 U.S.C. § 552a, is to balance the government's need to maintain information about individuals with the rights of those individuals to be protected against unwarranted invasions of their privacy stemming from the collection, maintenance, use and disclosure of their personal information. Its provisions seek to accomplish four basic policy objectives:

A. Restrict disclosure of personally identifiable records maintained by federal agencies;

B. Grant individuals the right of access to records about themselves maintained by federal agencies;

C. Grant individuals the right to seek amendment of records about themselves maintained by federal agencies if the individuals show the records are not accurate, timely, relevant or complete; and

D. Establish a code of fair information practices that requires federal agencies to comply with statutory standards for collection, maintenance and dissemination of records.

The Act's roots are founded in the aftermath of Watergate, the tremendous growth in information technology, and a concomitant increase in the nature and amount of information collected by federal agencies. But even Congress recognized that tax records have a special sensitivity that needed to be addressed. That came two years later with the overhaul of section 6103 by the Tax Reform Act of 1976.

The Office of Management and Budget (OMB) has statutory authority for promulgating agency-wide guidance under the Privacy Act. 5 U.S.C. § 552a(v). The latest comprehensive guidance from OMB is Circular No. A-130, Transmittal Memorandum No. 4 (Nov. 28, 2000). Appendix I to Circular A-130 continues in effect the guidance OMB initially issued to interpret the Privacy Act at 40 Fed. Reg. 28948-78 (1975) and the Final Guidance for Conducting Matching Programs at 54 Fed. Reg. 25818-29 (1989).

II. DEFINITIONS

The Privacy Act applies only to "records" about "individuals" that are "maintained" by federal "agencies" in "systems of records."

A. An "individual" is a citizen of the United States or an alien lawfully admitted for permanent residence. 5 U.S.C. § 552a(a)(2). It does not

include corporations. St. 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. at 28,951; Crumpton v. United States, 843 F. Supp. 751, 756 (D.D.C. 1994), *aff'd on other grounds sub nom*. Crumpton v. Stone, 59 F.3d 1400 (D.C. Cir. 1995). Privacy Act rights are personal to the individual and they cannot be asserted derivatively by others. *See, e.g.*, Parks v. IRS, 618 F.2d 677, 684-685 (10th Cir. 1980) (union lacks standing to sue for damages to its members); Sirmans v. Caldera, 27 F. Supp. 2d 248, 250 (D.D.C. 1998) (plaintiffs "may not object to the Army's failure to correct the records of other officers"). *But see* National Federation of Federal Employees v. Greenberg, 789 F. Supp. 430, 433 (D.D.C. 1992) (union had standing because members whose interests union sought to represent would have standing if they sued individually), *vacated & remanded on other grounds*, 983 F.2d 286 (D.C. Cir. 1993). Note, however, that the Act specifically provides that the parent of a minor or the legal guardian of an incompetent individual may act on their behalf. 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. at 28,951. The courts, however, have split on this issue. *Compare* Shermco Industries, Inc. v. United States Air Force, 452 F. Supp. 306, 315 (N.D. Tex. 1978) (agreeing with OMB), *rev'd & remanded on other grounds*, 613 F.2d 1314 (5th Cir. 1980) *with* Henke v. Dept. of Commerce, Civil No. 94-189, 1995 WL 904918, at *2 (D.D.C. May 26, 1995) (rejecting OMB rationale), *vacated & remanded on other grounds*, 83 F.3d 1453 (D.C. Cir. 1996). To provide maximum protection to individuals, the Service has determined that it will not rely upon the entrepreneurial distinction.

B. "Maintain" includes not only retention, but also the collection, use, and dissemination of a record. 5 U.S.C. § 552a(a)(3).

C. A "record" is any item or collection of information about an individual that is maintained by an agency and contains that individual's name or other identifying particular (e.g., social security number). 5 U.S.C. § 552a(a)(4). Records need not be limited to paper. Voiceprints, fingerprints, photographs, and videotapes are records. *Id*.

D. A "system of records" is a group of records under the control of an agency from which information is retrieved by the name of the individual or by some other identifying particular assigned to the individual. 5 U.S.C. § 552a(a)(5). According to the Department of Justice, this technical definition of system of records is "perhaps the single most important Privacy Act concept, because [with certain exceptions] it makes coverage

under the Act dependent upon the method of *retrieval* of a record rather than its substantive content." Department of Justice Freedom of Information Act Guide & Privacy Act Overview, at 911 (2004). The focus is on the actual practice of the agency, not on the capacity or capability of a computer program. Henke v. Dept of Commerce, 83 F.3d at 1448 n.1.

A Service database containing an abstraction of information from two existing Privacy Act systems of records did not create a new, illegal system of records because it could be "accessed only by the same users, and only for the same purposes, as those published in the Federal Register for the original" systems of records. Pippinger v. Rubin, 129 F.3d 519, 526-27 (10th Cir. 1997). Information obtained by a Service public affairs officer attending an open court proceeding is not retrieved from a system of records, thus issuing a press release based upon that information does not violate the Privacy Act. Rice v. United States, 166 F.3d 1088, 1092 n.4 (10th Cir.), *cert. denied*, 528 U.S. 993 (1999).

In addition to IRS systems of records, there are government-wide systems of records administered by the Office of Personnel Management, Office of Government Ethics, Equal Employment Opportunity Commission, Merit Systems Protection Board, Department of Labor, General Services Administration and Federal Retirement Thrift Investment Board. The most recent IRS and government-wide systems of records notices can be found at the websites noted at the end of this chapter.

> **Practice note**: Where information about individual "A" is in a record pertaining to individual "B" that is retrieved from a system of records by B's name or individual identifier, B is entitled to access to the entire record, including the information about A, unless a statutory exemption applies. Voelker v. IRS, 646 F.2d 332, 334 (8th Cir. 1981) ("a federal agency does not have discretion to withhold information contained in a requesting individual's record on the ground that the information does not pertain to that individual"). *But see* DePlanche v. Califano, 549 F. Supp. 685, 696-99 (W.D. Mich. 1982) (requester was denied access to information about his estranged children located in a file retrieved by his social security number because the record requested was not "about him" or "pertaining to him"). Note that individual A is not entitled to Privacy Act access to any of the records retrieved by the name of individual B (unless B consents to the disclosure) even though A is mentioned in the record.

E. "Routine use" is, concerning disclosure of a record, the use of that record for a purpose that is compatible with the purpose for which it was collected. 5 U.S.C. § 552a(a)(7). A notice of routine use permits use of the information, but does not require it.

F. "Disclosure" is not defined in the statute. Courts have interpreted the term to mean "the imparting of information which in itself has meaning and which was previously unknown to the person to whom it is imparted." Sullivan v. United States Postal Serv., 944 F. Supp. 191, 196 (W.D.N.Y. 1996); King v. Califano, 471 F. Supp. 180, 181 (D.D.C. 1979); Harper v. United States, 423 F. Supp. 192, 197 (D.S.C. 1976). Disclosure includes any means of communication -- oral, written, electronic, or mechanical.

G. All federal agencies are covered by the Privacy Act. Federal courts, Congress and the General Accounting Office are not. Likewise, state and local agencies, with one exception discussed below. Private organizations are not covered, but if a private organization enters into a contract with a federal agency to operate a system of records, the organization is covered by the Act regarding the operation of the system.

III. PRIVACY ACT PROVISIONS

A. No Disclosure Without Authority

The Privacy Act establishes the general rule that no record maintained in a system of records may be disclosed without the written consent of the individual to whom the record pertains. 5 U.S.C. § 552a(b). Nevertheless, there are twelve statutory exceptions. Some of the more significant are disclosures:

1. To employees of the agency that maintains the record who have a need for the record in the performance of their official duties. 5 U.S.C. § 552a(b)(1). For 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 at 529-30.

2. Required by the Freedom of Information Act (FOIA). 5 U.S.C. § 552a(b)(2). An actual FOIA request must be received by the agency before an assertion can be made that the FOIA requires disclosure: without a request, FOIA disclosure requirements are not invoked. Bartel v. FAA, 725 F.2d 1403, 1411-13 (D.C. Cir. 1984), *reh'g en banc denied*, No. 82-2473 (D.C. Cir., Mar. 23, 1984), *on remand*, 617 F. Supp. 190 (D.D.C. 1985).

3. For a routine use. 5 U.S.C. § 552a(b)(3). Routine uses for each system of records are published in the Federal Register. For all systems of records containing tax returns or return information, section 6103 is the authorizing routine use.

a. The Privacy Act defines a routine use as "the use of [a] record for a purpose which is compatible with the purpose for which it is collected." 5 U.S.C. § 552a(a)(7). By its terms, the Act sets forth two requirements for a proper routine use disclosure: (1) Federal Register publication, thereby providing constructive notice to the public; and (2) compatibility. *See, e.g.*, Britt v. Naval Investigative Service, 886 F.2d 544, 547-50 (3rd Cir. 1989). In Covert v. Harrington, 876 F.2d 751, 754-56 (9th Cir. 1989), the court added a third requirement: actual notice to the individual of the routine use at the time information was collected from the individual, pursuant to 5 U.S.C. § 552a(e)(3)(C). *Accord* United States Postal Serv. v. Nat'l Ass'n of Letter Carriers, 9 F.3d 138, 146 (D.C. Cir. 1993) ("[a]lthough the statute itself does not provide, in so many terms, that an agency's failure to provide employees with actual notice of its routine uses would prevent a disclosure from qualifying as a 'routine use,' that conclusion seems implicit in the structure and purpose of the Act").

b. 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).

c. Courts have, on occasion, refused to recognize broad categorical routine uses. The court in Krohn v. Department of Justice, Civ. No. 78-1536 (D.D.C. Mar. 19, 1984), *vacated in part* (D.D.C. Nov. 29, 1984), invalidated a routine use permitting "dissemination of records during appropriate legal proceedings." The court concluded that the routine use was overly broad and could encompass any disclosure in a judicial context. Distinguishing between court orders and subpoenas, the court in Doe v. DiGenova, 779 F.2d 74, 84-85 (D.C. Cir. 1985), held that the court order exception to the non-disclosure rule, 5 U.S.C. § 552a(b)(11), *see* below, did not apply to routine subpoenas unendorsed by a court order. The same court later held that the Veterans Administration could not rely upon a routine use that permitted disclosures to comply with grand jury subpoenas because that use, standing alone, was incompatible with the purposes for which the information had been collected. Doe v. Stephens, 851 F.2d 1457, 1466-67 (D.C. Cir. 1988).

d. The routine use in many systems of records for utilization of a record in a judicial proceeding published in the 2001

republication is not consistent with the OPM standard for government-wide personnel systems of records. Therefore, in a future republication, the OPM standard will be reflected. In the interim, the more stringent OPM standard should be utilized. The routine use suggested by OPM 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 a disinterested third party); (2) the records are relevant and necessary to the litigation; and (3) not otherwise privileged. If the requirements of the OPM routine use above are not met, discovery should be opposed.

e. In the Service context, the court in Pippinger v. Rubin, 129 F.3d at 532, found that disclosure of disciplinary records in an MSPB proceeding was authorized by a routine use even though documents were culled from two separate systems of records and maintained in a new database. The court held that the database did not constitute a new system of records and that routine uses applicable to each of the two original systems of records authorized the disclosures because they were compatible with the purpose for which the records were created.

4. To domestic federal and local law enforcement agencies upon the written request of the head of the agency. 5 U.S.C. § 552a(b)(7). Although a limited delegation to a supervisory position

is permissible, the request cannot be made at the working level. Law enforcement may be civil, criminal, or administrative. Requests must identify the subject individual(s) and the information sought. "Fishing expeditions" for individuals meeting stated criteria are not permitted.

5. To Congress, its committees, joint committees, and subcommittees, and its investigative arm, the General Accounting Office. 5 U.S.C. § 552a(b)(9). This exception does not extend to individual legislators, whether acting on their own behalf or on behalf of a constituent. Responses to inquiries on behalf of constituents, however, often fall within a published routine use and/or furnished upon the constituent's request.

6. Pursuant to a federal, state or local court order. 5 U.S.C. § 552a(b)(11). This only applies to judicial proceedings, not administrative tribunals (i.e., orders of ALJs and MSPB do not qualify). Summonses and subpoenas are not orders under this provision, unless they are actually signed by a judge or magistrate. Compare with routine use for judicial purpose, above.

B. Accounting for Disclosures

Each federal agency must keep an accounting of disclosures so that an individual can be informed about disclosures made, trace information to be corrected, and ensure compliance with the Privacy Act. 5 U.S.C. § 552a(c). This requirement is not absolute. Accountings need not be made for intra-agency disclosures, FOIA required disclosures, and when certain Privacy Act exemptions are invoked in systems of records notices to shield "accounting of disclosures" records from production to the subject thereof pursuant to subsection (c)(3). *See* 5 U.S.C. § 552a(j) and (k). Moreover, if section 6103(p)(3)(A) requires an accounting for a disclosure of tax return information, then the Privacy Act accounting provision is inapplicable.

C. Access and Amendment

Generally, individuals have the right to seek access to records about themselves contained in a system of records. 5 U.S.C. § 552a(d)(1). They may also request amendment of any record about themselves they believe is not accurate, relevant, timely or complete. 5 U.S.C. § 552a(d)(2). Agencies are required to promulgate rules to carry out the access and amendment provisions of the Act.
5 U.S.C. § 552a(f). The Service's access and amendment rules are covered by the Department of Treasury's (Treasury) Privacy Act regulations found at 31 C.F.R. §§ 1.20 – 1.36 and app. B.

Individual rights of access to and amendment of certain Service records contained in systems of records are either limited or completely exempted by statute, regulation or published systems notices. For example, section 6103 supersedes the general access provisions of the Privacy Act if the records sought consist of returns or return information. Lake v. Rubin, 162 F.3d 113, 115-16 (D.C. Cir. 1998), *cert. denied*, 526 U.S. 1070 (1999). Thus, the access provisions of the Privacy Act apply only to nontax records maintained in systems of records by the Service. In addition, Treasury regulations list all the Service's systems of records that it has deemed exempt from various provisions of the Privacy Act. *See* 31 C.F.R. § 1.36.

Likewise, records pertaining to the determination, collection and payment of federal taxes are not subject to amendment under the Act. IRC § 7852(e); 31 C.F.R. § 1.27(f)(4). *See also* Gardner v. United States, 213 F.3d 735, 741 n.5 (D.C. Cir. 2000), *cert. denied*, 531 U.S. 1114 (2001); Weiss v. Sawyer, 28 F. Supp. 2d 1221, 1228 (W.D. Ok. 1997); O'Connor v. United States, 669 F. Supp. 317, 323 (D. Nev. 1987), *aff'd*, 935 F.2d 275 (9th Cir. 1991), *cert. denied*, 502 U.S. 1104 (1992). Section 7852(e) also provides that the provisions of subsection (g) of the Act do not apply to determinations of liability under title 26. Subsection (g) consists of all of the civil action provisions under the Act. Most courts have observed that section 7852(e) deprives them of jurisdiction to decide all Privacy Act issues relating to the determination of tax liability. *See, e.g.*, McMillen v. U.S. Dept. of Treasury, 960 F.2d 187, 188 (1st Cir. 1991) (Act does not waive sovereign immunity "directly or indirectly" if the lawsuit relates to the determination of the existence or possible existence of liability (or the amount thereof) of any person for any tax) (dicta); Mallas v. Kolak, 721 F. Supp. 748, 754 (M.D.N.C. 1989) ("section 7852(e) acts to supersede causes of action brought under section 552a(g) if the lawsuit relates directly or indirectly to the determination of the existence or possible existence of an individual's federal tax liability") (subsequent history omitted). More recently, however, the Circuit Court for the District of Columbia opined that section 7852(e) prohibits civil litigation pertaining only to amendment of tax records and actions for damages – as opposed to actions for injunctive relief - for failure to provide access to records covered by the Privacy Act. Lake v. Rubin, 162 F.3d at 115. The Lake court ultimately held, however, that the general access provisions of the Privacy Act are superseded by section 6103, and that the plaintiffs reliance upon the Privacy Act to compel disclosure of tax information was misplaced.

One provision of the Privacy Act bars access to all "information compiled in reasonable anticipation of a civil action or proceeding." 5 U.S.C. §

552a(d)(5). Both access and amendment rights are limited by other exemptions in the Privacy Act. *See* 5 U.S.C. § 552a(j) and (k).

Privacy Act subsection (d)(5) is sometimes overlooked because it is not located with the other exemptions in sections (j) and (k). This provision reflects Congress's intent to exclude civil litigation files from access under subsection (d)(1). *See* 120 Cong. Rec. 36,959-60 (1974). Although not coextensive with its common law counterpart, this provision is designed to protect attorney 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, 408 (10th Cir. 1982); Varville v. Rubin, 1998 WL 681438, at *4 (D. Conn. Aug. 18, 1998); Smiertka v. U.S., 447 F. Supp. 221, 227-28 (D.D.C. 1978). This provision does not require the head of the agency to publish a special notice of exemption to trigger its use. The exemption does not require that litigation ever actually occur, and the exemption applies even after it becomes apparent that no litigation will ever occur. The determining factor as to the applicability of this exemption is whether *at the time the record was created* there was reasonable anticipation of a civil action or proceeding.

Known as the "general exemption" because it applies to a broad category of information, subsection (j) of the Privacy Act permits the head of an agency to exempt systems of records pertaining to criminal investigations and enforcements from the access and amendment provisions of the Act, so long as the records are maintained by a component of the agency which "performs as its principal function any activity pertaining to the enforcement of criminal laws."
5 U.S.C. § 552a(j)(2). Subsection (k) lists the "specific exemptions" that any agency, or component thereof, may utilize to bar access to or amendment of records pertaining to, *inter alia*, national security, civil law enforcement investigations, and federal employment or contracting suitability, eligibility or qualifications. To be effective, exemptions declared by agency heads must be published in a system of records notice along with a statement of the reasons why the system is exempt from any provision of the Privacy Act. The Service's publication of notices of exempt systems is in the Treasury regulations at 31 C.F.R. § 1.36.

Note that publication of exempt systems of records "does not remove that entire filing system from the requirements of the Act; rather . . . documents qualify for exemption only if they constitute law enforcement records within the meaning of the statute." Doe v. FBI, 936 F.2d 1346, 1353 (D.C. Cir. 1991). Moreover, these exemptions travel with the records (any copies of a (j) or (k) exempt record are also exempt) and remain applicable forever. *Id*., at 1356. This means that a record that is exempt in one system of

records retains that exemption wherever the record is found. *See also* 31 C.F.R. § 1.36(g).

Section (t) of the Privacy Act provides that FOIA exemptions may not be invoked to deny access otherwise required by the Privacy Act, and that Privacy Act exemptions may not be invoked to deny disclosure otherwise required by the FOIA. In other words, information that an agency is *required* to disclose pursuant to a FOIA request may not be withheld on the basis of a Privacy Act exemption. Where the agency has discretion under FOIA to withhold information, however, it is a violation of the Privacy Act to disclose that information if the Privacy Act requires it to be withheld.

The following decision template may be helpful in determining whether the Service should disclose information in response to an individual's "first party" request:

> ***Is the information exempt from disclosure pursuant to a Privacy Act exemption?***
>
> > ***No. Disclose.***
> >
> > ***Yes. Is the information exempt from disclosure pursuant to a FOIA exemption?***
> >
> > > ***No. Disclose and state in the response letter that, although exempt from disclosure under the Privacy Act, the disclosure is made pursuant to the FOIA.***
> > >
> > > ***Yes. Withhold the information and cite both the Privacy Act and FOIA exemptions in the response letter.***

Even though the Privacy Act permits access to and amendment of nontax records, it may not be used to collaterally attack final agency decisions. The Privacy Act was not "intended to permit an individual collaterally to attack information in records pertaining to him which has already been the subject of or for which adequate judicial review is available." OMB Guidelines, 40 Fed. Reg. at 28,969. *See also, e.g.*, Reinbold v. Evers, 187 F.3d 348, 361 (4th Cir. 1999) ("[T]he 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); Pellerin v. Veterans Administration, 790 F.2d 1553, 1555 (11th Cir. 1986) (Veterans Administration disability benefits determinations may not be collaterally challenged using the Privacy Act); Houlihan v. Office of Personnel Management, 909 F.2d 383, 385 (9th Cir. 1990) (plaintiff cannot bring an accuracy-related Privacy Act claim to challenge a determination made

pursuant to the Civil Service Reform Act); Hobbs v. United States, 1999 WL 132432, at *8 (S.D. Tex. Jan. 22, 1999) (discharged Service employee collaterally estopped from using Privacy Act amendment claim to challenge agency personnel decision after MSPB decision), *aff'd on other grounds*, 209 F.3d 408 (5th Cir. 2000); Lyon v. U.S., 94 F.R.D. 69, 72 (W.D. Ok. 1982) (Federal Employees Compensation Act is exclusive method for determining federal employee on-the-job injury compensation; cannot compel amendment of compensation determinations to a different amount); Bashaw v. Dept. of Treasury, 468 F. Supp. 1195, 1196 (E.D. Wisc. 1979) (Chief Counsel employee's sex discrimination claim falls under Civil Rights Act; may not seek amendment under Privacy Act of decision by agency to deny claim).

D. Relevance and Necessity

Agencies may maintain only as much information about an individual as is relevant and necessary to accomplish an agency purpose required under a statute or Executive Order. 5 U.S.C. § 552a(e)(1). Either the statute or the Executive Order must therefore expressly authorize the maintenance of the records, or maintenance of the records must be necessary to accomplish the purpose of the statute or Executive Order. Civil and criminal investigatory records maintained in systems of records may be exempted from this requirement pursuant to 5 U.S.C. § 552a(j) or (k) because it is not always possible for law enforcement agencies (or components) to determine the relevance and necessity of information at the moment it is collected.

E. Collecting Information Directly from Individual

Each agency that maintains a system of records shall "collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs." 5 U.S.C. § 552a(e)(2). The OMB Guidelines state that agencies should consider various factors in determining whether it is practicable to collect information from the subject individual, including whether information can be obtained only from a third party, the risk of obtaining inaccurate information from the third party, and the need to verify with a third party information obtained from the subject. 40 Fed. Reg. at 28961.

1. Tax Records

The IRS has exempted the investigatory records of the Criminal Investigation Division from this requirement as permitted by 5

U.S.C. § 552a(j)(2). On the other hand, Examination and Collection records are not exempt from this provision, but, consistent with the factors identified by OMB, it is expected that some information in these records will be obtained from third parties before contacting the taxpayer about the matter. The known cases addressing this requirement arise in the federal employment context (discussed below), but nevertheless provide some guidance on courts' views of the tension between ensuring that the subject individual is contacted first, whenever practicable, and ensuring that an investigation is conducted in a manner most likely to obtain true and accurate information.

2. Employment Records

Courts have approved contacting a third party before contacting the employee in certain circumstances. For example, in Brune v. IRS, 861 F.2d 1284, 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. Consistent with Brune, two other decisions have upheld the IRS's practice of contacting taxpayers before confronting agents who were under internal investigation. Alexander v. IRS, 1987 WL 13958, at **6-7 (D.D.C. Jun. 30, 1987); Merola v. Dep't of the Treasury, No. 83-3323, slip op. at 5-9 (D.D.C. Oct. 24, 1986).

Where an employee's ability to alter evidence or coerce a witness is virtually nonexistent, the employee should be contacted before third parties. Waters v. Thornburgh, 888 F.2d 870, 873-74 (D.C. Cir. 1989). Also, that an employee might be distressed, embarrassed, or angered by questions about his conduct does not, standing alone, override the general requirement that the employee be contacted first. Dong v. Smithsonian Institution, 943 F. Supp. 69, 73-74 (D.D.C. 1996), *rev'd on other grounds*, 125 F.3d 877 (D.C. Cir. 1997), *cert. denied*, 524 U.S. 922 (1998). Reviewing the agency's own file of documents completed and provided by the employee may be sufficient collection "from the subject individual". Darst v. SSA, 172 F.3d 1065, 1068 (8th Cir.1999) (SSA employee's application for SSA benefits reviewed); Olivares v. NASA, 882 F. Supp. 1545, 1549-50 (D. Md. 1995), *aff'd*, 103 F.3d 119, 1996 WL

690065, at *2 (4th Cir. Dec. 3, 1996) (multiple Forms 171 provided by employee, with signed authorizations for agency to investigate any information on the form), *cert. denied*, 522 U.S. 814 (1997). When an investigator determines that obtaining information from the subject individual is not practicable, the reasons for the determination should be articulated in writing.

3. EEO Records

In the context of equal employment opportunity complaints, it is important to keep in mind who is the "subject" of the record. The subject of the record created during EEO counseling (or "pre-complaint" counseling) conducted pursuant to 29 C.F.R. 1614.105, is the complainant. These records are maintained in the Appeals, Grievances, and Complaints system of records (IRS 36.001), and are retrieved by the identity of the complainant. Complaint records at the Treasury Regional Complaint Center are also retrieved by the identity of the complainant. When an inquiry is made into whether discipline of the employee whose actions were the basis of the EEO complaint is appropriate, the subject of this inquiry is the alleged wrongdoing employee. These records are maintained in the General Personnel and Payroll system of records (IRS 36.003), and are retrieved by the identity of the alleged wrongdoer. Neither of these systems is exempt from Privacy Act access by the subject of the record, but the applicability of 5 U.S.C. § 552a(d)(5) should be considered if a request for access is received from the subject employee.

F. Notice Requirements

The Privacy Act requires each agency that maintains a system of records to inform each individual requested to supply information:

1. Of the authority which authorizes the solicitation of the information, and whether providing the information is voluntary or mandatory;

2. The principal purpose(s) for which the information is intended to be used;

3. The routine uses which may be made of the information; and

4. The effects, if any, on the individual of not providing all or any part of the requested information.

5 U.S.C. § 552a(e)(3). The notice requirement does not extend to individuals solicited for information as witnesses. OMB Guidelines, 40 Fed. Reg. at 28,961. *But see* Saunders v. Schweiker, 508 F. Supp. 305, 309 (W.D.N.Y. 1981) (plain language of subsection (e)(3) "does not in any way distinguish between first-party and third party contacts"). Nevertheless, the IRS has exempted its Criminal Investigation systems of records from this requirement, as permitted by 5 U.S.C. § 552a(j)(2).

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. A universal Privacy Act notice is included in the Form 1040/104OA/104OEZ instruction packages. Even though the universal notice is legally adequate for subsequent inquiries, the Service makes available an additional notice, Notice 609. Notice 609 is distributed to taxpayers subject to collection activity or taxpayers whose returns are selected for examination. Case law has embraced these notices as satisfying the requirements of subsection (e)(3). *See, e.g.*, United States v. Bressler, 772 F.2d 287, 292-93 (7th Cir. 1985), *cert. denied*, 474 U.S. 1082 (1986); United States v. Wilber, 696 F.2d 79, 80 (8th Cir. 1982); United States v. Annunziato, 643 F.2d 676, 678 (9th Cir.), *cert. denied*, 452 U.S. 966 (1981).

Taxpayers have attempted to quash summonses and indictments, suppress evidence, and otherwise collaterally attack Service enforcement activities by claiming that the Service failed to provide a Privacy Act notice. Courts have universally rejected this argument. *See, e.g.*, United States v. McAnlis, 721 F.2d 334, 337 (11th Cir. 1983); United States v. Berney, 713 F.2d 568, 572 (10th Cir. 1983).[71]

G. Accuracy, Relevance, Timeliness and Completeness

When records collected about an individual are to be used in making a determination about that individual, or are to be disseminated to another person (other than an agency and other than pursuant to any of the provisions of subsection (b)(2)), the Privacy Act obligates the Service to make reasonable efforts to ensure that the records are "accurate, relevant, timely, and complete" at that time. 5 U.S.C. § 552a(e)(5) and (6). Perfect records are not required by subsection (e)(5); instead, "reasonableness" is the standard. *See* Johnston v. Horne, 875 F.2d 1415, 1421 (9th Cir. 1989). Likewise, subsection (e)(6) requires agencies to make reasonable

[71] This principal of law is so accepted that recent appellate decisions rejecting efforts to quash summonses on Privacy Act grounds are unpublished. *See* Theuring v. United States, 178 F.3d 1296, 1999 WL 220135, at *2 (6th Cir. Mar. 18, 1999); United States v. Harris, 172 F.3d 54, 1998 WL 870351, at *2 (7th Cir. Dec. 10, 1998); United States v. Koziol, 79 F.3d 1155, 1996 WL 102582, at *1 (9th Cir. Dec. 8, 1996).

efforts to review records before they are disseminated. NTEU v. IRS, 601 F. Supp. 1268, 1272 (D.D.C. 1985).

H. First Amendment Rights

Records that reflect the exercise of an individual's First Amendment rights may be maintained by an agency only if (1) a statute specifically authorizes maintenance; (2) the individual consents to maintenance; or (3) the records are pertinent to and within the scope of an authorized law enforcement activity. 5 U.S.C. § 552a(e)(7).

Agencies cannot exempt themselves from this requirement. Law enforcement includes civil and criminal investigations, administrative, regulatory, or judicial proceedings, and information gathering. 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.*, Maydak v. United States, 363 F.3d 512, 516 (D.C. Cir. 2004); MacPherson v. IRS, 803 F.2d 479, 481 (9th Cir. 1986); Clarkson v. IRS, 678 F.2d 1368, 1372-77 (11th Cir. 1982), *appeal after remand*, 811 F.2d 1396 (11th Cir.), *cert. denied*, 481 U.S. 1031 (1987); Albright v. United States, 631 F.2d 915, 918-921, *reh'g denied* (D.C. Cir. 1980), *related proceedings*, 732 F.2d 181 (D.C. Cir. 1984).

I. Legal Process: Notice to Individual of Disclosure

Agencies must "make reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compulsory legal process when such process becomes a matter of public record." 5 U.S.C.
§ 552a(e)(8). This notice is not advance notice, but must be made to the last known address of the individual within five working days after the disclosure is made. This provision applies to:

1. disclosures made pursuant to subpoenas or summonses;

2. disclosures made pursuant to an "order of a court of competent jurisdiction" under 5 U.S.C. § 552a(b)(11) (but note that notice of disclosures made pursuant to a sealed order should not be provided until after the order has been unsealed by the court); and

3. disclosures of tax returns and return information pursuant to a section 6103(i) *ex parte* order.

This provision does not apply to disclosures made pursuant to a written request by, or with the written consent of, the individual to whom the record pertains.

Note: The IRS has exempted its Criminal Investigation systems of records from this provision of the Privacy Act.

J. Civil Remedies

The Act provides that an individual may seek judicial review over four types of actions: (1) refusal to grant access; (2) refusal to correct or amend a record; (3) failure to maintain a record with accuracy, relevance, timeliness, or completeness; or (4) failure to comply with any of the other provisions of the Privacy Act. 5 U.S.C. § 552a(g)(1). The right of action created by the Act is limited to actions against federal agencies, and not against employees of the agencies.

The right of action carries a two year statute of limitations from the date on which the cause of action arises. The only exception to the that rule is where an agency has materially and willfully misrepresented any information required by the Privacy Act to be disclosed *and* that misrepresented information is material to establishing the agency's liability to the individual about whom the information relates, in which case the statute of limitation is two years after discovery by the individual of the misrepresentation. 5 U.S.C. § 552a(g)(5).

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.

Remember, section 7852(e) provides that the provisions of subsection (g) of the Privacy Act do not apply to determinations of liability under title 26. *See* Section II.C.3, above.

K. Criminal Penalties

The Act also provides for criminal penalties against: (1) any agency employee who makes a disclosure knowing it to violate the Act or who maintains a system of records without meeting the notice and publication requirements of section (e)(4); (2) a section (m)(1) contractor (or contractor's employee) who violates the Act; or (3) any person who willfully obtains an individual's records from an agency under false pretenses. 5 U.S.C. § 552a (i).

Only one criminal case under the Privacy Act has ever been reported: U.S. v. Trabert, 978 F. Supp. 1368 (D. Col. 1997). In Trabert, the defendant provided patient name and address information to a university hospital at the request of an Army medical center doctor. He was

acquitted of the charge of unauthorized disclosure of records because the government did not prove willfulness.

L. Government Contractors

The Privacy Act provides that a government contractor that operates a system of records for a federal agency is subject to the same Privacy Act limitations as the federal agency with respect to the system of records. 5 U.S.C. § 552a (m)(1). The agency is then required to enforce the recordkeeping and disclosure restrictions of the Act upon the contractor and its employees.

This provision does not authorize disclosure of records to contractors. The authority must otherwise exist; e.g., routine uses. Where routine use authority does exist, then it is necessary to determine whether the contractor is operating a system of records to accomplish an agency function.

This provision does not extend to every government contractor who has access to Privacy Act covered records. The contract must call for the contractor to "operate a system of records" to accomplish an agency function. OMB Guidance states that the statutory language was "intended to limit the scope of the coverage to those systems actually taking the place of a federal system which, but for the contract, would have been performed by an agency and covered by the Privacy Act." OMB Guidelines, 40 Fed. Reg. at 28,976.

M. Social Security Number (Privacy Act § 7, uncodified)

This is the only provision of the Act that extends beyond the federal government to also include state and local governments. Section 7(a)(1) of the Privacy Act, *see* 5 U.S.C. § 552a note (Disclosure of Social Security Number), provides that it is “unlawful for any federal, state, or local government agency to deny any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his or her social security number.”

Notwithstanding the seemingly simple mandate above, it does not apply to disclosures required by federal statute and by federal, state, or local government agencies maintaining systems of records in existence and operating before January 1, 1975, if the disclosure was required under statute or regulation adopted prior to that date for the purpose of verifying an identity. *See* Sec. 7(a)(2)(A)-(B). Also, the Tax Reform Act of 1976, 42 U.S.C. § 405(c)(2)(C)(i) and (iv) (2000), expressly exempts state agencies from this restriction to the extent that SSNs are used “in the administration of any tax, general public assistance, driver’s license, or motor vehicle

registration law within its jurisdiction." *See, e.g.*, Stoianoff v. Comm'r of the Dep't of Motor Vehicles, 12 Fed. Appx. 33, 35 (2d. Cir.) (finding that plaintiff's Privacy Act claim would fail because section 405(c)(2)(C)(i) "expressly authorizes states to require the disclosures of social security numbers in the administration of driver's license programs" and further provides that "any federal law that conflicts with this section is 'null, void, and of no effect'"), *cert. denied*, 534 U.S. 954 (2001).

Interestingly, although section 7 of the Privacy Act regulates state and local governments, the Ninth Circuit has held that individuals have a private cause of action only against federal agencies. Sutton v. Providence St. Joseph 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, 1026 (9th Cir. 1999) ("The civil remedy provisions of the statute do not apply against private individuals, state agencies, private entities, or state and local officials" (citing Unt v. Aerospace Corp., 765 F.2d 1440, 1447 (9th Cir. 1985)). In contrast, the Eleventh Circuit rejected Dittman and specifically found that a private remedy against state governments for violations of section 7 exists via the Civil Rights Act, 42 U.S.C.
§ 1983. *See* Schwier v. Cox, 340 F.3d 1284, 1289-90 (11th Cir. 2003). *See also* Greidinger v. Davis, 988 F.2d 1344, 1348-54 (4th Cir. 1993) (sustaining citizen's claim, based upon Equal Protection Clause of the 14th Amendment, that Virginia law requiring publication of prospective voter's social security number violated section 7 of the Privacy Act).

When an agency requests an individual to disclose his or her social security number, it must state whether or not compliance with the request is mandatory or voluntary. The agency must also name the authority that authorizes solicitation of the number. The authority for requiring the use of SSNs for tax administration purposes is section 6109. Also, the agency must state the intended use of the information. Any penalties or other effects of failure or refusal to provide the social security number must also be stated. These requirements are in addition to the general notice requirements of the Privacy Act at 5 U.S.C. § 552a(e)(3), noted above.

Notices requesting information and disclosure of SSNs not related to tax administration are also subject to the Privacy Act (e.g., requests 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. Generally, Executive Order 9397 is the authority for soliciting social security numbers for personnel-related matters.

N. Requests or Demands for Production of Records Maintained in Systems of Records or Testimony from a System of Records

This section of the Privacy Act chapter is limited to Service records maintained in systems of records ***not*** containing tax information, e.g., personnel records. For a more complete discussion of testimony authorizations, *see* Chapter 12.

Typically, the Service receives subpoenas for personnel records of a current or former employee for use in a nontax proceeding to which the Service is not a party. To determine whether the information may be produced, first consider whether the records are maintained in a Privacy Act system of records. For example, compare payroll records (retrieved by individual name) with vacancy announcement records (retrieved by vacancy announcement number, not by applicant's name). Only the former is covered by the Privacy Act. In fact, identical information may be in different records that are afforded different status under the Privacy Act, depending on the manner in which the records are stored and retrieved.

Assuming that the record or information requested is kept in a system of records, locate the current notice of the system of records, as published in the Federal Register. *See* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2001_register&docid=01-29878-filed.pdf (as amended). The Privacy Act serves as an absolute statutory bar to the production of subpoenaed records or the giving of testimony unless (1) a consent to disclosure is obtained pursuant to 5 U.S.C. § 552a(b); (2) the disclosure is required by the FOIA, *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. Remember, published routine uses are discretionary, not mandatory.

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, disclosure is permitted by subsection (b)(11) ("order of a court of competent jurisdiction"). *See generally* Doe v. DiGenova, 779 F.2d at 84-85.[72]

This issue is also discussed in Litigation Guideline Memorandum DL-3, "Disclosure of Personnel Records (Other Than Tax Information) Pursuant to Subpoena." *See* 1991 IRS LGM LEXIS 27 (Sept. 12, 1991).

IV. MISCELLANEOUS CONSIDERATIONS

[72] As noted above, this section pertains only to nontax information maintained in Privacy Act systems of records. If the subpoenaed records or information ordered disclosed constitute or contain tax return(s) or return information, then the court order also must satisfy the requirements of section 6103.

A. Private Supervisory Notes

"Private supervisory notes" are notes maintained by supervisors as "memory joggers" to assist with preparing appraisals of subordinate employees. By contract, the Service and Counsel have agreed that private supervisory notes will be shared with the affected employee. Therefore, although case law to the contrary exists, 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 notes must be provided to the employee upon request.

B. Employment Recommendations for Current or Former Subordinate Employees

Most employment records are located in system IRS 36.003, General Personnel and Payroll Records. *See* Routine Use (1) ("Provide information to a prospective employer of an IRS employee or former IRS employee"). If relying on records from a different system of records, determine whether there is a published routine use permitting disclosure for this purpose. Remember also that the routine use permits, but does not require, disclosure.

Information divulged from personal opinion stated from memory (and not derived from a Privacy Act record) is not a disclosure of a record from a system of records within the meaning of the Privacy Act. Krowitz v. Dept. of Agriculture, 641 F. Supp. 1536, 1544-45 (W.D. Mich. 1986), *aff'd*, 826 F.2d 1063 (6th Cir. 1987), *cert. denied*, 484 U.S. 1009 (1989); King v. Califano, 471 F. Supp. at 181. *But see* Wilborn v. HHS, 49 F.3d 597, 601 (9th Cir. 1995) (person involved in the creation of the record, or who makes a decision based on the information in the record, who discloses information from memory violates the Privacy Act); Bartel v. FAA, 725 F.2d at 1408-11 (same).

C. Criminal Tax Trials

Two Ninth Circuit opinions 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 counsel for the defendant. United States v. Jennings, 960 F.2d 1488, 1490-91 (9th Cir. 1992); United States v. Henthorn, 931 F.2d 29, 30 (9th Cir. 1991). For government employee witnesses, this includes a review of their personnel files. Jennings 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.

V. LINKS TO OTHER RESOURCES

IRS Privacy Act Systems of Records:
http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2001_register&docid=01-29878-filed.pdf (as amended)

Government wide systems of records:
http://www.defenselink.mil/privacy/govwide/

Department of Justice Office of Information & Privacy Overview of the Privacy Act of 1974
http://www.usdoj.gov/04foia/04_7_1.html

Treasury Directive 25-04
http://www.ustreas.gov/regs/td25-04.htm

Treasury Department Privacy Act Handbook, TDP 25-04
http://www.ustreas.gov/foia/reading-room/tdp25-04.pdf

CHAPTER 12

TESTIMONY AUTHORIZATION

I. INTRODUCTION

IRS employees, including current and former employees of the Service, Office of Chief Counsel, and IRS contractors, may not testify about or produce official IRS records or information in response to a request or demand from outside the IRS without prior authorization.

Treas. Reg. §§ 301.9000-1 to 301.9000-7 establish procedures to be followed by current and former employees of the IRS and its contractors who receive requests for disclosure of IRS records or information. The ultimate decision to disclose Service records or information belongs to the authorized official with delegated authority to authorize testimony or disclosure of IRS records or information. Thus, when an authority outside the IRS seeks to depose an IRS employee or contractor or requests that IRS records be produced by the government, disclosure is not permitted absent authorization from the Commissioner or the Commissioner's delegate in accordance with Treas. Reg. § 301.9000-3(a).

CCDM 32.2.4 and IRM 11.3.35 also provide detailed instructions and procedures concerning authorization of testimony and the production of documents.

II. TESTIMONY AUTHORIZATION

A. Statutory/Regulatory Structure

Under the General Housekeeping Statute, 5 U.S.C. § 301, heads of executive or military departments may prescribe regulations for, among other things, the custody, use, and preservation of their records, papers, and property. Many departments and agencies have promulgated regulations under this statute for the disclosure of their official records and information. Generally, these are termed Touhy regulations, after the Supreme Court's decision in United States *ex rel*. Touhy v. Regan, 340 U.S. 462 (1951). The Supreme Court held that an agency employee could not be held in contempt for refusing to disclose agency records or information when following the instructions of his or her supervisor regarding the disclosure.

The Service's Touhy regulations concerning the production of written records by, and the oral testimony of, employees of the IRS are found at Treas. Reg. §§ 301.9000-1 to 301.9000-7. With limited exceptions, current and former IRS employees and contractors may not testify or disclose IRS records or information to any court or governmental agency, the Congress, or to a committee or subcommittee of the Congress, without express authority from the appropriate authorizing official. An IRS employee who violates the regulations may be subject to administrative discipline, up to and including dismissal from

employment. Treas. Reg. § 301.9000-4(h). IRS contractors that violate the regulations may be subject to applicable contractual sanctions and/or criminal penalties. *Id*.

1. General Rule

Except as otherwise provided in the regulations, when a request or demand for IRS records or information is made, no current or former IRS officer, employee or contractor shall testify or disclose IRS records or information to any court, administrative agency or other authority, or to the Congress, or to a committee or subcommittee of the Congress without a testimony authorization. Treas. Reg. § 301.9000-3(a).

2. Definitions

a. "IRS records or information" means any material (including copies thereof) contained in the files (including paper, electronic or other media files) of the IRS, any information relating to material contained in the files of the IRS, or any information acquired by an IRS officer or employee, while an IRS officer or employee, as a part of the performance of official duties or because of that IRS officer or employee's official status with respect to the administration of the internal revenue laws or any other laws administered by or concerning the IRS. IRS records or information includes, but is not limited to, returns and return information as those terms are defined in section 6103(b)(1) and (2) of the Internal Revenue Code (Code), tax convention information as defined in section 6105, information gathered during Bank Secrecy Act and money laundering investigations, and personnel records and other information pertaining to IRS officers and employees. IRS records and information also includes information received, generated or collected by an IRS contractor pursuant to the contractor's contract or agreement with the IRS. The term does not include records or information obtained by IRS officers and employees while under the direction and control of the United States Attorney's Office during the conduct of a federal grand jury investigation, but does include records or information obtained during the administrative stage of a criminal investigation (before the initiation of the grand jury), obtained from IRS files (such as transcripts or tax returns), or subsequently obtained by the IRS for use in a civil investigation. Treas. Reg. § 301.9000.1(a).

b. "IRS officers and employees" means all officers and employees of the United States appointed by, employed by, or subject to the directions, instructions, or orders of the Commissioner or IRS Chief

Counsel and also includes former officers and employees. Treas. Reg. § 301.9000.1(b).

c. "IRS contractor" means any person, including the person's current and former employees, maintaining IRS records or information pursuant to a contract or agreement with the IRS, and also includes former contractors. Treas. Reg. § 301.9000.1(c).

d. A "request" is any request for testimony of an IRS officer, employee or contractor or for production of IRS records or information, oral or written, by any person, which is not a demand. Treas. Reg. § 301.9000.1(d).

e. A "demand" is any subpoena or other order of any court, administrative agency or other authority, or the Congress, or a committee or subcommittee of the Congress, and any notice of deposition (either upon oral examination or written questions), request for admissions, request for production of documents or things, written interrogatories to parties, or other notice of, request for, or service for discovery in a matter before any court, administrative agency or other authority. Treas. Reg. § 301.9000.1(e).

f. An "IRS matter" is any matter before any court, administrative agency or other authority in which the United States, the Commissioner, the IRS, or any IRS officer or employee acting in an official capacity, or any IRS officer or employee (including an officer or employee of IRS Chief Counsel's office) in his or her individual capacity if DOJ or the IRS has agreed to represent or provide representation to the IRS officer or employee, is a party and that is directly related to official business of the IRS or to any law administered by or concerning the IRS, including, but not limited to, judicial and administrative proceedings described in section 6103(h)(4) and (l)(4). Treas. Reg. § 301.9000.1(f).

g. An "IRS congressional matter" is any matter before the Congress, or a committee or subcommittee of the Congress, that is related to the administration of the internal revenue laws or any other laws administered by or concerning the IRS, or to IRS records or information. Treas. Reg. § 301.9000.1(g).

h. A "non-IRS matter" is any matter that is not an IRS matter or an IRS congressional matter. Treas. Reg. § 301.9000.1(h).

i. A "testimony authorization" is a written instruction, or oral instruction memorialized in writing within a reasonable period, by an

authorizing official that sets forth the scope of and limitations on proposed testimony and/or disclosure of IRS records or information issued in response to a request or demand for IRS records or information. A testimony authorization may grant or deny authorization to testify or disclose IRS records or information and may make an authorization effective only upon the occurrence of a precedent condition, such as the receipt of a consent complying with the provisions of section 6103(c). Treas. Reg. § 301.9000.1(i).

j. An "authorizing official" is a person with delegated authority to authorize testimony and the disclosure of IRS records or information. Treas. Reg. § 301.9000.1(j).

3. Procedures in Event of a Request or Demand

a. Notification of the disclosure officer. Except for requests or demands in United States Tax Court cases, in personnel, labor relations, government contract, IRS congressional matters, in matters related to informant claims or the rules of Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) (Bivens matters), or the Federal Tort Claims Act (FTCA), an IRS officer, employee or contractor who receives a request or demand for IRS records or information for which a testimony authorization is or may be required shall notify promptly the disclosure officer servicing the IRS officer's, employee's or contractor's geographic area. The IRS officer, employee or contractor shall await instructions from the authorizing official concerning the response to the request or demand. Treas. Reg. § 301.9000-4(b).

b. Requests or demands in United States Tax Court cases. An IRS officer, employee or contractor who receives a request or demand for IRS records or information on behalf of a petitioner in a United States Tax Court case shall notify promptly the IRS Chief Counsel attorney assigned to the case. The IRS Chief Counsel attorney shall notify promptly the authorizing official. The IRS officer, employee or contractor who received the request or demand shall await instructions from the authorizing official. Treas. Reg. § 301.9000-4(c).

c. Requests or demands in personnel, labor relations, government contract, Bivens or FTCA matters, or matters related to informant claims. An IRS officer, employee or contractor who receives a request or demand, on behalf of an appellant, grievant, complainant or representative, for IRS records or information in a personnel, labor relations, government contract, Bivens or FTCA matter, or

matter related to informant claims, shall notify promptly the IRS Associate Chief Counsel (General Legal Services) attorney assigned to the case. If no IRS Associate Chief Counsel (General Legal Services) attorney is assigned to the case, the IRS officer, employee or contractor shall notify promptly the IRS Associate Chief Counsel (General Legal Services) attorney servicing the geographic area. The IRS Associate Chief Counsel (General Legal Services) attorney shall notify promptly the authorizing official. The IRS officer, employee or contractor who received the request or demand shall await instructions from the authorizing official. Treas. Reg. § 301.9000-4(d).

d. Requests or demands in IRS congressional matters. An IRS officer, employee or contractor who receives a request or demand in an IRS congressional matter shall notify promptly the IRS Office of Legislative Affairs. The IRS officer, employee or contractor who received the request or demand shall await instructions from the authorizing official. Treas. Reg. § 301.9000-4(e).

B. Testimony Authorization Not Required

1. To respond to a request or demand for IRS records or information by an attorney or other government representative regarding an IRS matter;

2. To respond solely in writing, under the direction of an attorney or other representative of the government, to requests and demands in IRS matters, including, but not limited to, admissions, document production, and written interrogatories to parties;

3. To respond to a request or demand issued to a former IRS officer, employee or contractor for expert or opinion testimony if the testimony involves general knowledge (such as information contained in published procedures of the IRS or the IRS Office of Chief Counsel) gained while the former IRS officer, employee or contractor was employed or under contract with the IRS; or

4. If a more specific procedure established by the Commissioner governs disclosure of IRS records or information. These procedures include, but are not limited to, those relating to: procedures pursuant to 26 C.F.R. § 601.702(d); Freedom of Information Act requests pursuant to 5 U.S.C. § 552; Privacy Act requests pursuant to 5 U.S.C. § 552a; disclosures to state tax agencies pursuant to section 6103(d); and disclosures to DOJ pursuant to an *ex parte* order under section 6103(i).

Treas. Reg. § 301.9000-3(b). It is sometimes possible for an opposing party to examine an IRS employee or contractor as a witness even if the person does not

have a prior written authorization. The government trial attorney must agree to call the IRS employee as a government witness for which no authorization is needed. Under general adversarial rules the taxpayer will then be entitled to cross-examine the witness. This procedure is discretionary with the government trial attorney, however, and it will be utilized only rarely.

III. VALIDITY AND SCOPE OF TREAS. REG. § 301.9000

A. Validity of Treas. Reg. §§ 301.9000-1 to 301.9000-7

Federal employees following instructions issued in conformity with Touhy regulations are protected from contempt citations. The Supreme Court specifically recognized the authority of agency heads to restrict testimony of their subordinates by regulations similar to Treas. Reg. §§ 301.9000.1 to 301.9000-7. United States *ex. rel*. Touhy v. Ragen, 340 U.S. 462, 467-69 (1951); Boske v. Comingore, 177 U.S. 459, 469-70 (1900). In Touhy, the Supreme Court held that a DOJ officer properly refused to obey a subpoena pursuant to the Attorney General's instructions under DOJ Order No. 3229. Much earlier, the Supreme Court in Boske reversed a contempt citation issued to a collector of Internal Revenue for failing to produce copies of a distiller's report in his possession. Because the regulation concerning submission of records to the courts vested discretion in the Secretary of the Treasury and was lawful, the subordinate was not held in contempt.

B. Scope of Authority to Withhold Information

1. Generally.

The General Housekeeping statute, 5 U.S.C. § 301, expressly provides "[t]his section does not authorize withholding information from the public or limiting the availability of records to the public." In addition, the Service's regulations provide "[n]othing in these regulations creates a separate privilege or basis to withhold IRS records or information." Treas. Reg. § 301.9000-4(i). Generally, there must be a separate statutory or common law privilege applicable to the records sought and/or a sound policy reason for refusing to permit the testimony of a particular employee or class of employees. *See* Part VI, below. Moreover, consistent with Justice Frankfurter's concurring opinion in Touhy, the protection of the regulations has been limited to protecting subordinate employees from orders of contempt because they followed the instructions of their superiors. *See, e.g.*, Orange Environment, Inc. v. County of Orange, 145 F.R.D. 320, 322 (S.D.N.Y. 1992); Milton Hirsch, "The Voice Of Adjuration": The Sixth Amendment Right to Compulsory Process Fifty Years After United States *ex rel*. Touhy v. Ragen, 30 Fla. St. U.L. Rev. 81, 104-09 (2002).

An agency's decision, made pursuant to agency regulations, to provide or not provide agency records or to permit or deny employee testimony in litigation not involving the agency is an "agency action" subject to judicial review under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701, *et seq*. United States Environmental Protection Agency v. General Electric Co., 197 F.3d 592, 598 (2d. Cir. 1999). Applying the standards for review established by the APA, a court can overturn an agency's action restricting employee testimony if the action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Davis Enterprises v. EPA, 877 F.2d 1181, 1186 (3d Cir. 1989) (quoting 5 U.S.C. § 706(2)(A)), *cert. denied*, 493 U.S. 1070 (1990). Nevertheless, in applying the APA standard of 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. *See also, e.g.,* Branch International Services, Inc. v. United States, 905 F. Supp. 434, 440 (E.D. Mich. 1995) (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); Geiger v. United States, 1993 U.S. Dist. LEXIS 5525, at **4-5 (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 APA); Dent v. Packerland Packing Co., 144 F.R.D. 675, 679 (D. Neb. 1992) (agency's decision not to allow employees to be deposed in state court action was arbitrary, capricious, and an abuse of discretion where sole ground for refusal was that the party who issued the subpoenas also had a pending lawsuit against the agency, and during the deposition of agency employees the agency would be unable to cross-examine them about facts relating to the other claim and agency claimed it would permit other, more narrow, forms of discovery).

The Ninth Circuit Court of Appeals has held that the federal rules of civil procedure should be applied when deciding discovery disputes whether or not the United States is a party to the underlying action. In so doing, they can ensure that the unique interests of the government are adequately considered by applying the balancing test embodied in the federal rules. Exxon Shipping Co. v. United States Department of the Interior, 34 F.3d 774, 778 (9th Cir. 1994); Dent, 144 F.R.D. at 679. By contrast, the

Second and Fourth Circuits expressly disagreed with the Exxon Shipping approach. United States Environmental Protection Agency v. General Electric Co., 197 F.3d at 598 ("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 APA"); COMSAT Corp. v. National Science Foundation, 190 F.3d 269, 277 (4th Cir. 1999) ("we decline to follow this holding").

2. State court actions.

Based on sovereign immunity and the Supremacy Clause of the Constitution, the Service need not comply with a state court subpoena for testimony or records. In the event the Service receives a state court subpoena and decides not to comply, it should consider asking DOJ to remove the case to federal court to have the subpoena quashed. The Service should decide as quickly as possible to allow sufficient time to coordinate the removal effort with the local U.S. Attorney's office.

a. Sovereign Immunity.

The federal government's sovereign immunity extends, in cases where the government has not consented to be subject to an action, to legal proceedings where the government is named, or where the net effect of the judgment would be to restrain the government from acting or to force it to act:

> Even though the government is not a party to the underlying action, the nature of the subpoena proceeding against a federal employee to compel him to testify about information obtained in his official capacity is inherently that of an action against the United States because such a proceeding "interfere[s] with the public administration" and compels the federal agency to act in a manner different from that in which the agency would ordinarily choose to exercise its public function. Dugan v. Rank, 83 S. Ct. 999 (1963). The subpoena proceedings *fall within the protection of sovereign immunity* even though they are technically against the federal employee and not against the sovereign.

Boron Oil Co. v. Downie, 873 F.2d 67, 70-71 (4th Cir. 1989) (emphasis added). A federal court's jurisdiction upon removal under 28 U.S.C. § 1442(a)(1) is derivative of the state court jurisdiction. Thus, if a state court lacks jurisdiction to compel a federal employee to testify or produce documents, a federal court

can acquire no jurisdiction to enforce a state court subpoena or order upon removal.

Case law strongly supports the proposition that the doctrine of sovereign immunity prevents a state court from exercising jurisdiction over United States government agency refusals to permit employee testimony. In Boron Oil, the Fourth Circuit found that a state court did not have jurisdiction to compel an EPA employee to "testify contrary to EPA instructions," nor did it have jurisdiction to review and set aside the agency's decision or its regulations promulgated pursuant to 5 U.S.C. § 301. 873 F.2d at 70. *See also* United States v. Williams, 170 F.3d 431, 433 (4th Cir. 1999) (an order of a state court seeking to compel a federal official to comply with a state court subpoena is "an action against the United States, subject to the governmental privilege of sovereign immunity") (quoting Smith v. Cromer, 159 F.3d 857, 879 (4th Cir. 1998)); Elko County Grand Jury v. Siminoe, 109 F.3d 554, 556 (9th Cir, 1997) (state grand jury lacked jurisdiction not only to compel a federal employee to testify, but also to determine the validity of USDA's Touhy regulations); Edwards v. Department of Justice, 43 F.3d 312, 317 (7th Cir. 1994) ("the cases involving § 1442(a) removals of state subpoena proceedings against unwilling federal officers have held that sovereign immunity bars the enforcement of the subpoena").

b. Supremacy Clause.

A separate basis for opposing subpoenas or orders to comply with discovery issued by state courts is the Supremacy Clause of the United States Constitution, art. VI, cl. 2. Federal law provides the only means through which access to federal documents may be sought and granted. *See* United States v. McLeod, 385 F.2d 734, 751-52 (5th Cir. 1967) (Supremacy Clause dictates that a state grand jury be enjoined from investigating federal agency and enforcing subpoenas against federal employees); United States v. Kaufman, 980 F. Supp. 1247, 1251-52 (S.D. Fl. 1997) (subpoena issued by state bar to federal judge concerning investigation of defense attorney in ongoing federal criminal matter over which judge was presiding violated Supremacy Clause).

c. Removal.

In the event that a motion to quash or motion for protective order based upon sovereign immunity or the Supremacy Clause is refused by the state court, a Notice of Removal of Civil Subpoena under 28 U.S.C. § 1442(a)(1) should be filed. In some jurisdictions,

the U.S. Attorney's Office automatically files in federal district court and files a Notice of Filing of Notice of Removal of Civil Subpoena to the United States District Court in the state court. Removal is authorized by 28 U.S.C. § 1442, which provides in relevant part:

> (a) A civil action or criminal prosecution commenced in a State court against any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> > (1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

The filing of a notice of removal in federal court and the filing in the state court of a notice of filing "shall effect the removal" of the subpoena from the state court to the United States District Court, "and the State court shall proceed no further unless and until the [matter] is remanded." 28 U.S.C. § 1446(d). The Supreme Court has held that "the right of removal is absolute for conduct performed under color of federal office, and has insisted that the policy favoring removal 'should not be frustrated by a narrow, grudging interpretation of [28 U.S.C.] § 1442(a)(1).'" Arizona v. Manypenny, 451 U.S. 232, 242 (1981) (quoting Willingham v. Morgan, 395 U.S. 402, 407 (1969)).

IV. WHO DETERMINES WHETHER OR NOT TO AUTHORIZE TESTIMONY

A. Delegation Order 11-2 -- Cases Other than Tax Court Cases

Delegation Order 11-2, dated June 15, 2004, identifies IRS and Chief Counsel officials who may authorize disclosures of returns and return information that are confidential pursuant to section 6103, but which may nonetheless be disclosed pursuant to exceptions as provided by the Code. It also contains tables that identify IRS and Chief Counsel officials who may authorize (or deny) testimony and production of *any* documents when requested or demanded by any subpoena, notice of oral deposition, notice of written interrogatory, or other order of a court, administrative agency, or other authority, pursuant to Treas. Reg.

§§ 301.9000-1 to 301.9000-7. These tables also identify the IRS and Chief Counsel employees who are to prepare testimony authorization documents and should be used in conjunction with IRM 11.3.35, Requests and Demands for Testimony and Production of Documents.

B. General Counsel Order No. 4 -- Tax Court Cases

General Counsel Order No. 4 delegates to the Chief Counsel the authority to determine whether to permit testimony and production of records in response to a request, subpoena, or other order of the Tax Court. *See* IRM 11.3.35.6(5). This authority has been redelegated to the Area Counsel. *See* IRM 11.3.35.6(6).

V. COLLECTING THE NECESSARY INFORMATION

Generally, in preparing an authorization for a present or former IRS employee or contractor to testify or produce records in response to a request or demand for records or information, it will be necessary to ascertain the following facts in addition to the caption of the litigation, the nature of the litigation, and the court (or deposition) location:

A. the return date of the request or demand;

B. the name, title, and post-of-duty of the IRS employee or contractor upon whom the request or demand was made;

C. on whose behalf and by whom the request or demand was served;

D. the nature of the testimony or documents subject to the request or demand;

E. whether the request or demand would require the disclosure of information that would identify, or tend to identify, a confidential informant, tax treaty (convention) information, or would require the release of other sensitive information;

F. in the case of tax information, whether the party requesting or demanding the information is entitled to it under any of the provisions of section 6103;

G. whether the request or demand would require the disclosure of information that would seriously impair federal tax administration;

H. whether there is an open civil or criminal tax investigation and, if so, the IRS function that has jurisdiction over the investigation; and

I. the availability or feasibility of producing the information or testimony sought; *i.e.*, time limits and volume or format of documents.

IRM 11.3.35.10(4); 11.3.35.12(1).

VI. DETERMINING WHETHER EMPLOYEES SHOULD BE ALLOWED TO TESTIFY AND WHAT RECORDS MAY BE DISCLOSED

A. Statutory Considerations

The Code, principally through section 6103, governs all disclosures of returns and return information. If it is apparent from content of the request or demand that section 6103 would not permit disclosure of the desired information, the individual who served the request or demand should be contacted in an effort to get it withdrawn. In addition, section 6110 pertains to the disclosure of written determinations (rulings, determination letters, technical advice memoranda, and Chief Counsel advice) and related background file documents. Section 6104 requires disclosure of certain information concerning exempt organizations and pension plans. Section 4424 governs the disclosure of wagering tax information. Section 6105 governs the disclosure of tax convention information.

The Privacy Act, 5 U.S.C. § 552a, also dictates the extent of permissible disclosure of IRS records maintained and accessed by an individual's name or personal identifier, other than returns and return information (*e.g.*, personnel records). The routine use (5 U.S.C. § 552a(b)(3)) and court order (5 U.S.C. § 552a(b)(11)) provisions of the Privacy Act are consulted most frequently in connection with requests or demands for testimony or production of these (nontax) IRS records. *See* Chapter 11.

B. Confidential Sources

Information that would directly or indirectly reveal the identity of a person who supplied information to the government under express assurances of confidentiality or in circumstances from which those assurances may reasonably be inferred may be protected by what is commonly referred to as the "informant privilege." Information withheld from disclosure pursuant to this privilege is broader than, and not to be confused with, information relating to the term "confidential informant" as defined in the Criminal Investigation section of the IRM. *See* IRM 9.4.2.5.

Although originally applied in the context of criminal proceedings, 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, 769-70 (D.C. Cir. 1965). *See also* Holman v. Cayce, 873 F.2d 944, 946-47 (6th Cir. 1989) (where the informant was neither a witness nor an active participant in the conduct which gave rise to the civil cause of action, the party seeking to compel disclosure of the identity of a confidential government informant shoulders a formidable burden in establishing a justification for overriding the privilege); Dole v. Local 1942, IBEW, 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). A court will look to the particular circumstances, including balancing the public interest in effective law enforcement with the public interest in disclosing the identity of anyone whose testimony would be relevant and helpful or is essential to a fair determination of a case, to determine whether the privilege should be applied. McCray v. Illinois, 386 U.S. 300, 312-14 (1967); United States v. Panton, 846 F.2d 1335, 1336 (11th Cir. 1988).

The IRS will consider dismissing a case or will take sanctions rather than revealing the identity of an informant. Policy Statement P-1-90 (now obsolete and incorporated into IRM 35.5.13.2 (1)h) stated that the IRS would not reveal the identity of confidential informants without their consent. Section 7623 and Treas. Reg. § 301.7623-1, which provide for rewards for information relating to violations of internal revenue laws, provide that no unauthorized person shall be advised of the identity of the informant. In criminal investigations, IRM 9.4.2.5.6.1 provides for maximum security and disclosure of the identity of informants only to authorized persons. See also Chief Counsel Notice CC-2003-001 (reminding Chief Counsel employees of Counsel's adherence to the Service policy of not disclosing the identities of confidential sources).

C. Investigative Privilege

The law enforcement investigative privilege is a qualified common law privilege to prevent "the harm to law enforcement efforts which might arise from public disclosure of . . . investigatory files." Raphael v. Aetna 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). Law Enforcement Manual (LEM) material containing tolerances and criteria (*e.g.*, dollar amount limitation on prosecution or collection) may be subject to this privilege. If a request or demand seeks LEM material, the classifying function must decide if the material is still LEM material. If not, it should be declassified and produced, unless subject to another privilege or statutory bar to production. If, however, the function decides to resist production, the privilege should be invoked. If a court ultimately orders production, the classifying function should decide whether to produce, with an appropriate protective order. *See* United States v. Moriarty, 69-1 USTC ¶ 9212 (E.D. Wis. 1969). If, however, the decision is made not to produce the LEM material in spite of the court order, the Service must consider dismissing the case or taking sanctions.

D. Other Privileges

See Chapter 10.

E. Subpoenas for Depositions of High Ranking Officials

Generally, the Service should move to quash subpoenas for deposition of high ranking officials on grounds that the discovery sought would be burdensome and oppressive.

1. As a general principle, a party can conduct the deposition of any other person who possesses information relevant to a claim or defense. Fed. R. Civ. P. 26(b)(1). The Supreme Court approved an exception to this rule as it applies to high-ranking public officials in United States v. Morgan, 313 U.S. 409, 422 (1941). The Morgan doctrine recognizes that, left unprotected, high-ranking government officials would be inundated with discovery obligations involving scores of cases where the public official would have little or no personal knowledge of material facts. Left unchecked, the litigation related burdens placed upon them would render their time remaining for government service significantly diluted or completely consumed. Morgan has come to stand for the notion that, as for high-ranking government officials, their thought processes and discretionary acts will not be subject to later inspection under the spotlight of deposition. Decision makers essentially enjoy a mental process privilege. In re United States (Reno), 197 F.3d 310, 313-14 (8th Cir. 1999); United States v. 11,950 Acres of Land (In re FDIC), 58 F.3d 1055, 1060 (5th Cir. 1995); In re United States (Kessler), 985 F.2d 510, 512-13 (11th Cir.), *cert. denied*, 510 U.S. 989 (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, 231-32 (9th Cir. 1979). This limited immunity from discovery is justified on the grounds that these officials must be allowed the freedom to perform their duties without the constant interference of the discovery process.

2. Courts may permit depositions when a high ranking official has relevant, first hand knowledge of factual matters material to the lawsuit or when there are adequate grounds, not apparent in the administrative record, to suspect bad faith or improper behavior of the decision maker. *See, e.g.,* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420-21 (1971); Alexander v. FBI, 186 F.R.D. 1, 5 (D.D.C. 1998); Sokaogon Chippewa Community v. Babbitt, 929 F. Supp. 1165, 1176 (W.D. Wi. 1996); Community Federal Savings & Loan v. Federal Home Loan Bank Board, 96 F.R.D. 619, 621 (D.D.C. 1983).

3. There is a split in the circuits concerning whether government officials may seek mandamus to compel a district court judge to withdraw an order permitting deposition testimony or must first find themselves in contempt for failing to comply with such an order and seeking an immediate appeal thereof. *Compare* In re United States (Reno), 197 F.3d 310, 313-14 (8th Cir. 1999) and United States v. 11,950 Acres of Land (In re FDIC), 58 F.3d

1055, 1060 (5th Cir. 1995) (mandamus available), *with* In re Kessler, 100 F.3d 1015, 1017-18 (D.C. Cir. 1996) (order compelling deposition not final, and thus court lacks jurisdiction to consider agency official's petition for mandamus).

F. 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 cases in which neither the IRS nor its employees are a party, or not arising from IRS actions, unless the IRS has an interest in the issue and the outcome of the litigation. *See* 5 C.F.R. § 2635.805; IRM 11.3.35.10(11). Note, however, that *former* employees need not obtain a testimony authorization for expert or opinion testimony if the testimony involves general knowledge (such as information contained in published procedures of the IRS or the IRS Office of Chief Counsel) gained while the former IRS officer, employee or contractor was employed or under contract with the IRS. Treas. Reg. § 301.9000-3(b).

H. Agency Resources, Impartiality, Etc.

Although it is not entirely accurate to say that the Service may deny a discovery request solely on the basis of administrative burden or limited agency resources, there is a line of cases holding that a party seeking discovery from an agency (that is not a party to its lawsuit) must comply with the procedures set forth in that agency's regulations. When a requester does not comply, it is perfectly appropriate for an agency to cite to the burden of lending its human and other resources to private litigation in which it has no vital interest, without more, and it is likely that the agency would prevail in an APA lawsuit challenging its decision to resist discovery. In these cases, much of how to approach a court depends on the precise posture of a discovery request – whether it comes from a state or federal court; whether it is an informal request or pursuant to a subpoena; or whether the issue arises on a motion to compel, an APA lawsuit or an order of contempt.

If the Service routinely permits employees to testify in private litigation, less time will be available for them to perform official duties. Several agencies have successfully argued that particular employees should not have to testify in private litigation because of these "resource" considerations. In Moore v. Armour Pharmaceutical Co., 927 F.2d 1194, 1197-98 (11th Cir. 1991), the court upheld the Center for Disease Control's decision not to let a researcher testify because the agency had received so many requests relating to AIDS litigation that it simply could not grant all the requests and simultaneously carry on its governmental functions. Likewise, in Davis Enterprises v. EPA, 877 F.2d 1181, 1186-87 (3d Cir. 1989), the court upheld the EPA's refusal to provide an employee as a fact witness in a lawsuit concerning liability for an underground gasoline spill based in part on the agency's argument that compliance with a subpoena would put a strain on agency resources.

Assuming the court has jurisdiction, resource limitations most likely cannot be the sole basis upon which to resist discovery requests. Although "the policy behind prohibition of testimony is to conserve governmental resources where the United States is not a party to a suit, and to minimize governmental involvement in controversial matters unrelated to official business," Reynolds Metals Co. v. Crowther, 572 F. Supp. 288, 290 (D. Mass. 1982), an agency's Touhy regulations do not, by themselves, create a substantive basis upon which to refuse discovery requests. An agency's decision not to authorize an employee's testimony or production of documents on the sole basis of conservation of agency resources is evaluated against how well a plaintiff demonstrates the necessity of the information sought from the government, *see, e.g.*, Wade v. Singer Co., 130 F.R.D. 89, 92 (N.D. Ill. 1990), and whether the plaintiff cannot obtain the information sought through alternative means, such as certified documents.

VII. PREPARING AND COORDINATING THE AUTHORIZATION

A. Preparing the Authorization

Based on the facts developed and legal considerations noted above, a written authorization should be prepared setting forth the scope of the proposed authorization, even if authority is denied. To the extent possible, it should be specific as to the extent and limitations upon disclosure, including, as necessary, names, tax periods, and classes of tax or returns. It should also include the operative facts upon which the authorization is premised (*i.e*., a description of the testimony and production sought, and the nature of the testimony and production authorized). Unless otherwise approved, the authorization instructions should expressly prohibit testimony concerning the following matters, where applicable: (1) unrelated third party tax information; (2) information that would tend to identify a confidential informant; (3) wagering tax information as defined in section 4424; (4) tax convention information as defined in section 6105; and (5) grand jury information subject to Fed. R. Crim. P. 6(e).

B. Coordinating the Authorization

1. Cases Referred to DOJ.

For cases referred to DOJ, coordination entails soliciting the recommendation of the Chief Counsel attorney assigned to the case, discussions with the DOJ attorney handling the case, and with the disclosure officer servicing the IRS officer's or employee's geographic area. The nature and extent of the coordination is determined on a case-by-case basis.

2. Other Cases.

Chief Counsel attorneys are primarily expected to assure the accuracy of the facts as developed and determine whether the proposed authorization is legally sound. In certain cases, it is necessary to coordinate with DOJ or the Office of the U.S. Attorney where a motion to quash and/or motion for protective order may be sought or if the employee upon whom the request or demand was made may require legal assistance and guidance in court or at deposition. In cases where legal assistance and guidance is necessary or helpful, Chief Counsel and DOJ attorneys should agree in advance which agency is best suited, under the circumstances of the case, to accompany the employee.

VIII. COURT ORDERS AND CONTEMPT

A. Court Orders to Disclose

1. Section 6103 governs disclosure of returns and return information. With one notable exception, see below, it provides the exclusive means for gaining access to federal tax information. Lake v. Rubin, 162 F.3d 113, 115 (D.C. Cir. 1998), *cert. denied*, 526 U.S. 1070 (1999); Cheek v. IRS, 703 F.2d 271, 271-72 (7th Cir. 1983). Section 6103 does authorize certain court ordered disclosures. *See* IRC § 6103(h)(4)(D), (i)(1)(A), (i)(4)(A)(ii), (i)(5)(A), and (i)(7)(C). Nevertheless, section 6103 does not provide for disclosure beyond that specifically provided for in Title 26 and does not permit a court to create judicial exceptions to the general prohibition against disclosure established by the statute. Olsen v. Egger, 594 F. Supp. 644, 647 (S.D.N.Y. 1984); Dowd v. Calabrese, 101 F.R.D. 427, 438-439 (D.D.C. 1984).

2. In all criminal cases, the government is under a constitutional obligation to disclose, upon the defendant's request, exculpatory evidence material to either guilt or punishment. Brady v. Maryland, 373 U.S. 83 (1963). This includes evidence that may be used to impeach a Government witness. Giglio v. United States, 405 U.S. 150 (1972). Returns and return information constituting exculpatory evidence existing in the government's files used for purposes of prosecuting a federal tax administration crime may be disclosed in a criminal tax proceeding pursuant to a constitutional obligation to disclose it to a criminal defendant. As a result, the IRS generally complies with Brady-type court orders requiring disclosure. IRM 11.3.35.13. In these situations, the United States should request the court to conduct an *in camera* review of any third party return information located. If, after *in camera* review, the court rules that the Constitution requires information to be provided to the defendant, the United States should request a disclosure order that also imposes upon the parties conditions restricting the use of the information solely to the instant case, and preventing dissemination by any person in any manner outside the instant proceeding. For sample language of an appropriate protective order, *see* United States v. Moriarty, 1969 U.S. Dist. LEXIS 12657, at *1 (E.D. Wis. Jan. 3, 1969).

B. Court-Ordered Consents to Disclose

The IRS generally accepts court-ordered consents for disclosure of tax information, subject to the normal limitations and restrictions of section 6103(c). *See* Chapter 2.

C. Contempt

Consult Disclosure and Privacy Law (DPL) in any case in which an employee's refusal to testify or produce records results or may result in an order to show cause or an order of contempt. DPL is responsible for coordination with DOJ in these matters. CCDM 32.2.4(9).

CHAPTER 13

PART I: IRC § 6110 - PUBLIC INSPECTION OF WRITTEN DETERMINATIONS

Note: This chapter is intended to provide the legal framework, not the procedures, for processing section 6110 material. Instructions for processing section 6110 material are on the Office of Chief Counsel website and in the CCDM.

I. BACKGROUND

Historically, the National Office of the Internal Revenue Service provides written advice to taxpayers on the treatment of specific transactions, generally known as private letter rulings (PLRs). The first several revenue procedures issued by the IRS each year, published in the Internal Revenue Bulletin, contain detailed instructions on how a taxpayer is to submit requests to the IRS for private letter rulings and other written advice, such as technical advice memoranda (TAMs) or determination letters.

In the early 1970s, two separate United States Courts of Appeals determined that PLRs were subject to the Freedom of Information Act (FOIA) and had to be disclosed, thereby rejecting the government's argument that these written products were tax returns protected by FOIA exemption 3 in conjunction with section 6103 as then written. The two courts differed, however, in their treatment of TAMs. The D.C. Circuit ruled that TAMs were a part of a tax return and therefore exempt from disclosure under FOIA, Tax Analysts & Advocates v. IRS, 505 F.2d 350, 355 (D.C. Cir. 1974), whereas the Sixth Circuit ruled that TAMs should be open to inspection under FOIA. Fruehauf Corp. v. IRS, 522 F.2d 284, 290 (6th Cir. 1975), *judgment vacated by* IRS v. Fruehauf Corp., 429 U.S. 1085 (1975) (for reconsideration in light of the Tax Reform Act of 1976).

One of the primary arguments raised by the plaintiffs in both cases was that the IRS was developing a secret body of law that was available to only a few practitioners. Generally, requests for PLRs were submitted by accounting firms or law firms on behalf of their clients. When the PLR was issued, the firm would retain a copy for historical purposes, thereby developing a library of issued determinations. This allowed the firm to have insight into the IRS's interpretation of the law on a particular matter, as demonstrated by the analyses in the PLRs or TAMs. These insights were not available to the general public, small firms or sole practitioners. Another argument was that, because the entire process was secret, there may have been third parties attempting to influence the IRS's determination to obtain one favorable to the taxpayer. GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1976, H.R. 10612, PUB. L. 94-455 [hereinafter GENERAL EXPLANATION] at 301-303.

In December 1974, the IRS issued proposed procedural rules that were intended to make PLRs and TAMs open to public inspection. The proposed rules set up a framework whereby the full text version, including taxpayer identifying information but not including trade secrets and matters pertaining to national defense or foreign policy, would be open to public inspection. GENERAL EXPLANATION at 303. The proposed rules were not implemented because of substantial public comments against the notion as well as comments from DOJ indicating that the rules might be contrary to other principles of law.

In 1976, when the proposed section 6110 legislation was considered by Congress, the debate centered primarily on the relationship between the necessity to protect taxpayer privacy and the need for openness in government, *i.e*., to eliminate the perceived development of a secret body of law and to assure that there was no undue influence being used in the PLR process. *See generally*, *Public Inspection of IRS Private Letter Rulings*, HEARING BEFORE THE SUBCOMMITTEE ON ADMINISTRATION OF THE INTERNAL REVENUE CODE OF THE COMMITTEE ON FINANCE UNITED STATES SENATE, 94th Cong. 1st Sess. 5 (Nov. 6, 1975) (Remarks of Sen. Haskell). The balance reached by Congress was to make written determinations (*i.e*., PLRs, TAMs, and determination letters) available to the public, but only after the taxpayer to whom it pertained was notified of the IRS's intent to disclose the document:

> Before any written determination requested after October 26, 1976, is made available for public inspection, any person who receives a ruling or determination letter or to whom a technical advice memorandum pertains must be personally notified in writing that public disclosure is about to occur. Such person will then have 60 days . . . . Such 60-day period will start on the date the IRS actually mails a notice to the person . . . .

GENERAL EXPLANATION at 305-06, 310.

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 contribute to the development of the agency's legal position on the matter, and as such, were not protected from disclosure by either the deliberative process or attorney-client privilege. Tax Analysts v. IRS, 117 F.3d 607, 617-20 (D.C. Cir. 1997).

Once again, in response to a Tax Analysts suit, the 105th Congress was faced with the same competing interests as the 94th Congress in 1975 and 1976: balancing the public's right to know against the individual taxpayer's right to privacy.[73] Once again, the conferees keenly recognized that the taxpayer's right

[73] Because there is no third party input into the CCA process, the concern for undue influence, as expressed by Senator Haskell with respect to the private letter ruling process, is absent. Therefore, the balance is between the general public's right to know how the agency

to privacy was extremely important: "[T]he privacy of the taxpayer who is the subject of the advice must be protected. Any procedure for making such advice public must therefore include adequate safeguards for taxpayers whose privacy interests are implicated." Conference Report for H.R. 2676, INTERNAL REVENUE SERVICE RESTRUCTURING AND REFORM ACT OF 1998 [RRA98], H.R. No. 105-599 at 299 (1998). The conferees also recognized that, because the CCA documents were subject to the FOIA, there was "no mechanism by which taxpayers [could] participate in the administrative process of redacting their private information from such documents or to resolve disagreements in court." *Id*. By amending section 6110 to include CCA within the scope of that section, Congress struck a balance "designed to protect taxpayer privacy while allowing the public inspection of these documents." *Id*.

RRA98 expanded section 6110 to cover CCA, which includes FSAs, litigation guideline memoranda (LGMs), service center advice (SCAs), tax litigation bulletins, criminal tax bulletins, general litigation bulletins, and any other written advice prepared by any National Office Chief Counsel component and issued to Counsel or IRS field office employees that conveys a legal interpretation or Counsel position or policy with respect to a revenue provision. (A transition rule for certain CCA issued between 1986 and the October 22, 1998, effective date was also set forth in RRA98).

In December, 2003, the D.C. Circuit ruled in Tax Analysts v. IRS, 350 F.3d 100, 104 (D.C. Cir. 2003), that letters denying tax exempt status issued to certain organizations applying for that status, and the letters revoking the tax exempt status of existing exempt organizations, were "written determinations" within the meaning of section 6110(b)(1)(A).[74]

II. GENERAL CONCEPTS

A. General Rule - Public Inspection

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conducts its business versus the taxpayer's right to privacy and confidentiality of its returns and return information.

[74] The Service had declined to make these letter rulings available for public inspection because they fell within the exclusion of section 6110(l)(1), which provides that "this section shall not apply to any matter to which section 6104 . . . applies." The Service promulgated Treas. Reg. §§ 301.6104(a)-1(i) and 301.6110-1(a) to the effect that denial and revocation letter rulings were not subject to the public inspection provisions of either section 6104 or section 6110. Until the Tax Analysts decision, the letter rulings had remained the confidential return information of the organizations to which they related and were exempt from public access under section 6103 and FOIA exemption 3. The D.C. Circuit decision invalidated those particular paragraphs of the regulations, thereby requiring that the IRS make the EO letters available for public inspection pursuant to section 6110.

The general rule concerning the public inspection of written determinations is set forth in section 6110(a), which provides:

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

B. Definitions

1. Written determination means a ruling, determination letter, technical advice memorandum, or CCA. IRC § 6110(b)(1)(A). **Except** that a written determination does **not** include any matter pertaining to an advanced pricing agreement, a closing agreement entered into pursuant to section 7121, or the background information pertaining to an advanced pricing agreement or closing agreement. IRC § 6110(b)(1)(B).

2. Reference Written Determination is any written determination which the Commissioner determines has significant reference value. For example, any written determination that the Commissioner decides to be the basis for a published revenue ruling is a reference written determination *until* the revenue ruling is made obsolete, revoked, superceded, or otherwise held to have no effect.

3. Background file document includes the request for the written determination, any written material submitted in support of the request or supplemental material submitted in support of the request, and, any communication, written or otherwise, between the IRS and persons outside the IRS in connection with the written determination **except** for communications between the IRS and the Department of Justice (DOJ) relating to a pending civil or criminal case or criminal investigation. IRC § 6110(b)(2).

> **Note:** Documents in the written determination file that do not meet the definition of "background file document" retain their identity as confidential return information. *See supra*, Chapter 2, Part I: Definitions; IRC § 6103(b)(2)(B). For example, an e-mail or notes of a telephone call between the National Office attorney and the examining revenue agent about the transaction and the affect on another tax year would remain confidential return information (because it is information collected with respect to the taxpayer's potential liability) because it is not available for public inspection under section 6110.

4. CCA is any written advice or instruction, under whatever name or designation, prepared by any National Office component of the Office of Chief Counsel which–

a. is issued to field or service center employees and conveys

b. (i) any legal interpretation of a revenue provision;

(ii) any IRS or Chief Counsel position or policy with regard to a revenue provision; or,

(iii) any interpretation of state law, foreign law, or other federal law relating to the assessment or collection of any liability under a revenue provision. IRC § 6110(i)(1)(A).

Note: For purposes of determining the authorship of CCA, the Chief Counsel Division Counsel Headquarters Office is considered National Office.

5. Revenue provision means any existing or former internal revenue law, regulation, revenue ruling, revenue procedure, or other published or unpublished guidance, or tax treaty, either in general or as applied to specific taxpayers. IRC § 6110(i)(1)(B).

6. Taxpayer specific Chief Counsel advice means a CCA written pertaining to a specific taxpayer or group of specific taxpayers. IRC § 6110(i)(4)(B). Even if the written determination does not name the taxpayer, if the facts are derived from and describe a specific taxpayer's case, it is a taxpayer specific CCA.

7. Non-taxpayer specific Chief Counsel advice means a CCA written without respect to any specific taxpayer or group of specific taxpayers, but rather, addresses a general issue. IRC § 6110(i)(4)(A).

C. Timing of Disclosures

Generally, written determinations are available for public inspection between 75 and 90 days after the written determination was issued to the recipient. IRC § 6110(g).

With respect to taxpayer specific CCA, the time period begins after the notice of intent to disclose is mailed to the taxpayer. IRC § 6110(i)(4)(B). The notice of intent to disclose a taxpayer specific CCA must be mailed to the taxpayer within 60 days of issuance. *Id*. Non taxpayer specific CCA must be made available for public inspection within 60 days after issuance. IRC § 6110(i)(4)(A)(ii).

> **Note**: There is no need to send a Notice to the taxpayer if the decision is to withhold the document from public disclosure because it is exempt in its entirety. *E.g*., a document subject to the attorney work product privilege.

In instances where an action has been brought to either restrain or compel disclosure, the written determination will be made available for public inspection within 30 days after the court order is final. IRC § 6110(g)(1)(B). The court may order an additional postponement of availability if necessary. IRC § 6110(g)(2).

The public availability of a written determination may be postponed for up to 90 days at the written request of the party, or the party's representative, to whom the written determination pertains if a relevant transaction is not complete at the time the written determination is issued. IRC § 6110(g)(3). If the transaction is not final after the additional 90 days, the person to whom the written determination pertains may obtain (up to) an additional 180 days delay in availability, but only if the person can establish that good cause exists for the additional delay. The fact that the transaction in question was not completed by the end of the initial 90-day delay is not, by itself, good cause for the additional delay.

Examples:

> 1. A corporate taxpayer finds itself the possible target of a hostile takeover. The taxpayer enters into merger negotiations with a "white knight" corporation to obtain a more favorable treatment for the stockholders. Because written determinations are sanitized to prevent a member of the general public from identifying the taxpayer, not someone familiar with the taxpayer, if release of the written determination could allow the hostile corporation to identify the taxpayer and any potential weaknesses in the transaction with the "white knight" corporation, the hostile corporation could use the information to interfere with the negotiations and/or the merger transaction. Using the same facts, if the taxpayer could be identified by the public through the disclosure of the redacted written determination, release of the IRS's advice might tip off investors, affect the stock market prices and trigger questions of insider trading. Either of these possibilities would constitute "good

cause" for an additional 180 day delay because they would cause interference with the completion of the transaction.

2. "Good cause" is *not* shown if the person to whom the written determination pertains asks for a reconsideration of an adverse determination and requests delay of disclosure pending the reconsideration; if the person to whom the written determination pertains requests delay of disclosure pending the outcome of litigation; or, if the person to whom a written determination pertains requests an additional delay solely on the basis that the transaction is not yet completed.

Special Rules:

1. The IRS is not required to make available for public inspection any written determination or background file document of any matter which is the subject of a civil fraud or criminal investigation or jeopardy or termination assessment until after the action relating to the written determination is completed, or –

2. Any written determination or related background file document that relates solely to approval of the Secretary of any adoption or change of –

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

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

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

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

Note, however, the IRS will make available for public inspection these items upon written request after the date the written determination would have been available for public inspection but for these provisions.

D. Exemptions from Disclosure - Non-CCA

Written determinations or background file documents, other than CCA, are sanitized or redacted according to the standards set forth in section 6110(c)(1)-(7).

1. The names, addresses, and other identifying details of the person to whom the written determination pertains, *and* of any other person (other than a third party contact described in section 6110(d)(1)) must be redacted. Identifying details are those items of information which would permit a member of the public to identify the person with information that is publicly available, *e.g.*, through LEXIS or Westlaw, Internet or other search vehicles, court filed documents, documents filed with other agencies such as the SEC and available for public inspection (*e.g*. 10-K filings), state corporate databases, state tax rolls, *etc*;

2. Any information designated by Executive Order to remain secret in the interest of national security or foreign policy is to be redacted;

3. Any information specifically exempt by disclosure by any statute other than title 26;

4. Trade secrets, commercial or financial information obtained from a person and privileged or confidential;

5. Information which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy;

6. Information related to the examination or regulation of a financial institution;

7. Geological or geophysical data concerning wells.

The information designated in these paragraphs parallel FOIA exemptions (1) - (4), (6), (8) and (9).

E. Exemptions from Disclosure – Chief Counsel Advice

RRA98 added special rules for CCA to section 6110 at paragraph (i). Although the amendment kept intact the provisions of section 6110(c)(1), pertaining to the deletion of identifying details, it specifically provided that all of the FOIA exemptions set forth in 5 U.S.C. § 552(b) and (c) apply to CCA. Accordingly, several additional FOIA exemptions are available to withhold information in CCA from release to the public.

For a detailed explanation of these exemptions, *see* Chapter 9.

III. DISPUTES RELATING TO DISCLOSURE

A. Request for Additional Deletions

1. Administrative remedies.

Section 6110(f)(2)(B) provides that the IRS must promulgate regulations to advise a person to whom a written determination pertains, or to whom a background file document relates (or successor, or other person authorized to act on his behalf), or who has a direct interest in maintaining the confidentiality of the written determination or background file document, of the administrative remedies available to restrain disclosure of portions of the written determination or background file document.

Requests for additional deletions are addressed to the Chief, Disclosure & Litigation Support Branch, Legal Processing Division of Procedure and Administration. The request should identify the additional information to be withheld and provide a reason for the additional deletions. Generally, the branch paralegal will contact the attorney who authored the written determination for his or her recommendation as to whether the additional deletions are necessary.

> **Note**: Third party contacts, as described in section 6110(d), cannot request deletion of their identities.

2. Judicial Remedies.

If the IRS denies a request for additional deletions (whether in whole or in part), the person to whom a written determination pertains or background file relates (or successor, or other person authorized to act on his behalf), or that has a direct interest in maintaining the confidentiality of the written determination or background file document may file a petition in U.S. Tax Court to restrain disclosure. IRC § 6110(f)(3)(A). The petition must be filed within 60 days of the mailing of the notice of intention to disclose. IRC § 6110(f)(3) (flush language). The petition may be filed anonymously. IRC § 6110(f)(3)(B). The Tax Court may provide for proceedings or portions of hearings, testimony, evidence, and reports may be closed to the public in order to preserve the anonymity or privacy of any person. IRC § 6110(f)(6).

The IRS must notify any person to whom a written determination or background file document pertains (unless that individual is the petitioner) of the filing of the petition to restrain disclosure within 15

days of receipt of the petition. That individual may intervene in any proceeding pertaining to the petition; anonymously if so desired. IRC § 6110(f)(3)(B).

B. Request for Additional Disclosures

1. Administrative remedies.

Any person may seek to obtain additional disclosure of information in any written determination or background file document that has been made subject to public inspection. IRC § 6110(f)(4). Requests for additional disclosure are to be addressed to the FOIA Reading Room. If the request is for the identity, *i.e.,* name, address and Taxpayer Identification Number of the person to whom the written determination pertains, the IRS will inform the requester that the information will not be disclosed.

If the request is for other identifying information, *e.g.*, type of industry, type of transaction, or other confidential information, the IRS will notify the person to whom the written determination pertains or background file document relates, or any other person that has an interest in maintaining the confidentiality of the information in the written determination or background file document, of the request for additional disclosure. The IRS will inform the addressee that there has been a request for additional disclosure, that the requester has the right to take judicial action to compel additional disclosure and that the recipient has 20 days to respond with comments on the proposed additional disclosure. If all the recipients of the notice of additional disclosure agree, the requester is informed and the written determination or background file document is revised to reflect the additional disclosure. If all the parties who received notice of the request for additional disclosure do not agree, or do not respond to the notice, the IRS will inform the requester and deny the request for additional disclosure.

2. Judicial remedies.

Once the requester seeking additional disclosure has exhausted the administrative remedies, that individual can file a petition in Tax Court or file a complaint in U.S. District Court for the District of Columbia requesting an order to compel disclosure of additional information in the written determination or background file document. IRC § 6110(f)(4).

If the requester has not received a response to a properly submitted request within 180 days, the requester may seek the judicial remedy described above.

> **Note**: No petition or complaint may be filed under section 6110(f)(4) to seek the identity of a third party contact. These actions must be brought pursuant to section 6110(d)(3).

C. Judicial Remedies for Violations of IRC § 6110

If the IRS fails to make the appropriate redactions to a written determination under section 6110(c), fails to provide a notice of intention to disclose required by section 6110(i)(4)(B), or fails to follow the timing requirements of section 6110(g), the recipient of a written determination or any person identified in the written determination may bring suit in the United States Claims Court. IRC § 6110(j)(1).

This provision is the exclusive remedy for violations of enumerated section 6110 provisions. IRC § 6110(j)(1)(B).

If the court determines that an IRS officer or employee willfully or intentionally failed to delete material, or failed to provide timely notice or act in accordance with the timing requirements of section 6110(g), the United States will be liable for the actual damages or, at the least, statutory damages of $1000 as well as attorneys fees and costs of the action. IRC § 6110(j)(2).

IV. SPECIAL PROVISIONS

A. Precedent

Documents made available for public inspection pursuant to section 6110 **are not** to be used or cited as precedent. IRC § 6110(k)(3). Consequently, Counsel attorneys authoring written determinations should refrain from citing to previously released written determinations as support for their position.

B. Items not covered by IRC § 6110

Section 6110 does not apply to any matter to which sections 6104 or 6105 apply. The framework of section 6104 sets forth specific methods for the public to inspect certain documents related to the entities described therein. IRC § 6110(l)(1). Any matter involving a tax convention information, as defined by section 6105, is not covered by section 6110. *Id*. In Tax Analysts v. IRS, 350 F.3d at 104, the D.C. Circuit held invalid

portions of the section 6104 and 6110 regulations that excluded from public inspection under both statutes written determinations denying or revoking tax exemption. Accordingly, the provisions of section 6110 do apply to those matters.

PART II: CONFIDENTIALITY OF INFORMATION ARISING UNDER TREATY OBLIGATIONS – IRC § 6105

I. BACKGROUND

Historically, the IRS took the approach that information received from a foreign country concerning the tax liability of a taxpayer was protected by FOIA exemption 3 in conjunction with a tax treaty between the United States and the foreign government. Exemption 3 protects information that is specifically exempted from disclosure by statute, provided that the statute "requires withholding in such a manner so as to leave no discretion on the issue, or establishes particular criteria for withholding or refers to particular types of matter to be withheld." 5 U.S.C. § 552(b)(3). The IRS argued that a tax treaty stood on equal footing with a statute, such that its secrecy clauses – which bar specific information from disclosure – qualified under exemption 3.

Under the United States Constitution, Senate ratified treaties have the same status as statutory law. *See* Whitney v. Robertson, 124 U.S. 190, 194 (1888) ("By the constitution, a treaty is placed on the same footing, and made of like obligation, with an act of legislation. . . When the two relate, to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either."); Public Citizen v. Office of U.S. Trade Representative, 804 F. Supp. 385, 388 (D.D.C. 1992) ("the GATT and its subsequent modifications are not Senate-ratified treaties, and they therefore do not have the status of statutory law."), *citing* Suramerica de Aleaciones Laminadas, C.A. v. Unites States, 966 F.2d 660, 668 (Fed. Cir. 1992).

Although there was no case law holding that a treaty qualifies as a statute for FOIA exemption 3 purposes, there was a sound basis in law for concluding that a treaty can qualify. As noted by the Supreme Court in Whitney, "[b]oth [senate-ratified treaty and statute] are declared by that instrument [constitution] to be the supreme law of the land, and no superior efficacy is given to either over the other." 124 U.S. at 194.

II. STATUTORY FRAMEWORK

In 2000, Pub. L. 106-554, § 304(b)(1) added section 6105 to the Code. Section 6105 provides, as a general rule, the "[t]ax convention information shall not be disclosed."

A. Definitions

1. "Tax convention information" means any

(a) agreement entered into with the competent authority of one or more foreign governments pursuant to a tax convention;

(b) application for relief under a tax convention;

(c) background information related to the agreement or application;

(d) document implementing the agreement; and,

(e) other information exchanged pursuant to a tax convention which is treated as confidential or secret under the tax convention.

2. "Tax convention" means any income tax or gift and estate tax convention, or any other convention or bilateral agreement (including multilateral conventions and agreements and any agreement with a possession of the United States) providing for the avoidance of double taxation, the prevention of fiscal evasion, nondiscrimination with respect to taxes, the exchange of tax relevant information with the United States, or mutual assistance in tax matters.

B. Exception

The general rule does not apply to the disclosure of tax convention information to persons or authorities (including courts and administrative bodies) which are entitled to disclosure pursuant to a tax convention, to any generally applicable procedural rules regarding applications for relief under a tax convention, to the disclosure of tax convention information on the same terms as return information may be disclosed under paragraph (3)(C) or (7) of section 6103(i), except that in the case of tax convention information provided by a foreign government, no disclosure may be made without the written consent of the foreign government, or, after consultation with each other party to the tax convention, that disclosure would not impair tax administration.

C. Case law

Because the statute is relatively new, there are few cases interpreting the provision. In Tax Analysts v. IRS, 152 F. Supp.2d 1, 10 (D.D.C. 2001*), aff'd in part, rev'd & remanded on other grounds*, 294 F.3d 71 (D.C. Cir. 2002), the district court held that an entire document written by the Office of Chief Counsel with respect to a specific taxpayer based on information obtained from a tax convention partner was exempt from disclosure under

section 6105, and did not need to be parsed to separate the hornbook law from the taxpayer specific information. Relying on legislative history, the court reasoned that Congress had intended to exempt the entire document under section 6105. The court noted that the section was added to the Code when the Tax Analysts "FSA" case was still pending in the district court after remand from the D.C. Circuit's opinion Tax Analysts v. IRS, 117 F.3d 607 (D.C. Cir. 1997). The court stated "Congress expressed its clear intent that regardless of their exemption status under Section 6103, FSAs are fully exempt under Section 6105 if they qualify as tax convention information." 152 F. Supp.2d at 12. Consequently, written determinations will be withheld from public inspection and exempt from section 6110 when it constitutes tax convention information.

PART III: PUBLICITY OF INFORMATION REQUIRED FROM CERTAIN EXEMPT ORGANIZATIONS - IRC § 6104

I. BACKGROUND

With the passage of the Revenue Act of 1950, Congress required that certain tax exempt educational and charitable organizations annually file information to be made available to the public. In 1958, Congress amended the Revenue Act of 1954 to include applications for exempt status of those organizations granted exempt status, as well as annual returns reflecting the organization's gross income, expenses, disbursements for charitable purpose, accumulations of income and a balance sheet. The reason for the publicity of this information was to allow the public to determine whether the organizations were operating in a manner consistent with the applications, which would be a substantial aid to the IRS's policing activities. *See* 1958 U.S. Cong. Code & Admin. News 4791, 4883-84 (1959). In 2000, Congress amended section 6104 to require publicity of certain information filed by political organizations granted exemption status under section 527.

II. STATUTORY PROVISIONS

A. In General

The application filed by any organization exempt from taxation under section 501(a) or a political organization exempt from taxation under section 527, for any taxable year, or any papers submitted in support of an application for exempt status, and any letter or other document issued by the Service granting the qualified or exempt status are open to public inspection. IRC § 6104(a)(1)(A). In addition, any application filed with respect to the qualification of a pension, profit-sharing, or stock bonus plan under sections 401(a) or 403(a), an individual retirement account described in section 408(a), or an individual retirement annuity described in section 408(b), any application filed with respect to the exemption from tax under section 501(a) of an organization forming part of a plan or account are open to public inspection. IRC § 6104(a)(1)(B). Any inspection under section 6104 may be made as provided by regulations. *See* Treas. Reg. § 301.6104(a)-1, *et seq*.

Information not open to public inspection includes information from which the compensation (including deferred compensation) of any individual may be ascertained. Moreover, at the request of the organization submitting any supporting papers, the IRS will withhold from public inspection any information which relates to any trade secret, patent, process, style of work, or apparatus, of the organization, if public disclosure of the information would adversely affect the organization. In addition, the IRS will withhold from public inspection any information

contained in supporting papers if public disclosure would adversely affect the national defense.

Committees of Congress (as described in section 6103(f)) can inspect the application for exemption of any section 501(c) or (d) organization or notice of status of any exempt section 527 political organization, and any qualified plan as well as any other papers which relate to the application.

Information concerning exempt political organizations is available on the Internet at www.irs.gov/charities/political or www.guidestar.org, or can be inspected in person. The available information consists of:

1. A list of all political organizations which file a notice with the Secretary under section 527(i), and

2. The name, address, electronic mailing address, custodian of records, and contact person for the organization.

Information must be made available not later than five business days after the IRS receives a notice from a political organization under section 527(i).

Individuals may make a request to inspect copies of annual returns, reports, and exempt status application materials, or, materials will be provided to the requester without charge other than a reasonable fee for any reproduction and mailing costs. The request may be made in person or in writing.

There are some exceptions from the disclosure requirements. In the case of an organization which is not a private foundation (within the meaning of section 509(a)) or a political organization exempt from taxation under section 527, the name or address of any contributor to the organization is not disclosed. In the case of an organization described in section 501(d), no partnership returns or names may be disclosed.

B. Definitions:

1. "Exempt status application materials" includes the application for recognition of exemption under section 501 and any papers submitted in support of the application, along with any letter or other document issued by the IRS with respect to the application.

2. "Notice materials" means the notice of status filed under section 527(i) and any papers submitted in support of the notice and any letter or other document issued by the IRS with respect to the notice.

C. Disclosure of reports by Internal Revenue Service.

Any report filed by an organization under section 527(j) (relating to required disclosure of expenditures and contributions) must be made available to the public at whatever times and in whatever places as the Secretary may prescribe by regulation.

III. INTERRELATION OF IRC §§ 6104 AND 6110

See Part I, above.

CHAPTER 14

DISCLOSURE GUIDE FOR TAX-EXEMPT BOND EXAMINATIONS

I. GENERAL DISCLOSURE CONCEPTS

A. General Rule -- Confidentiality

Returns and return information must be kept confidential unless disclosure is permitted by some specific provision of the Internal Revenue Code. *See* Chapters 1 & 2; Church of Scientology of California v. IRS, 484 U.S. 9, 10 (1987). 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) United States v. Orlando, 281 F.3d 586, 596 (2002).

B. Definitions of "Return" and "Return Information"

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. IRC § 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. IRC § 6103(b)(2). The distinction between "return" and "return information" is significant because in some situations the Code 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 Code. As such, it is return information protected by section 6103.

D. Whose Return Information Is It?

The next critical step in any disclosure analysis is determining, with respect to any item of information, whose return information it is. This is because persons can generally access their own return information, while access to the return information of others is strictly limited. Generally, the determination focuses on whose liability under the Code is at issue when the information is collected.

Thus, information collected during the examination of taxpayer A is taxpayer A's return information, even if it is collected from a third party.

The same principles apply with respect to a group of taxpayers. If an investigation is of a specifically targeted group of taxpayers, the information collected becomes the return information of each person in the group. Then, as the Service develops information and issues unique to each taxpayer, that latter information is the return information solely of the specific taxpayer. The bond area, involving the potential liability of bondholders, issuers, conduit borrowers, and others, is susceptible to this "taxpayer group" type of analysis.[75]

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 the return information solely of the affected bondholder (not the issuer or any other bondholder). Similarly, if the IRS determines that there is a potential for application of a section 6700, *Promoting abusive tax shelters*, penalty against the issuer, information collected thereafter relating to the penalty would be solely the issuer's information.

Likewise, information generated during the examination of a conduit borrower is the conduit borrower's return information. Even if there is some relationship to a bond matter, the information remains the conduit borrower's return information *so long as* the information pertains to some aspect of the conduit borrower's liability under the Code. For example, tax-exempt bond proceeds may have been used in an unrelated trade or business of a section 501(c)(3) organization. Even though there is some relationship to a bond matter, the information collected during the organization's examination related to whether the organization has unrelated business taxable income would be the section 501(c)(3) organization's return information. After a separate bond examination is opened (which would occur after bond issues are identified in the conduit borrower's examination), however, information gathered under the auspices of the *bond* examination would be the issuer's and bondholders' return information.

Depending on the facts of the case, issuers, conduit borrowers, and others associated with the bond issuance may have liability under section 6700. Information collected during an investigation for potential application of the

[75] For purposes of this chapter, we assume the reader is familiar with the concepts and definitions of bondholder, issuer, trustee, conduit borrower, bond counsel, underwriter, letter of credit provider, and other terms related to tax exempt bonds.

section 6700 penalty would be the return information of the subject or subjects of the section 6700 examination.

While it is critical to determine the “owner” of return information for purposes of disclosure, it does not necessarily mean that the Service cannot provide access to a third party. It merely means that one or more subsections of section 6103 must authorize the disclosure of the information, as discussed below.

II. AUTHORIZED DISCLOSURES

Other chapters discuss at length the various exceptions to the general rule of confidentiality, many of which may be implicated or available in the tax exempt bond arena.

Section 6103(e)(1) 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. IRC § 6103(e)(1)(D); *see also generally*, IRM 11.3.2, *Disclosure to Persons with a Material Interest*. A person's "return information" may also be disclosed to that person, pursuant to section 6103(e)(7) unless the IRS determines the disclosure will seriously impair federal tax administration. *See* Chapter 2.

Internal Revenue Manual 11.3.32, *Disclosure to States for Tax Administration Purposes*, 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.

A taxpayer may authorize another person to receive returns or return information through a power of attorney. IRC § 6103(e)(6), (7); Chapter 2, Part III. The taxpayer may also designate a person to receive returns or return information through a "waiver" or "consent.” IRC § 6103(c); Chapter 2, Part III; *see also* Appendices to this chapter for sample disclosure consents for bond matters. 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. IRC § 6103(k)(6). Disclosures under section 6103(k)(6) may be made only in situations and under conditions as prescribed in regulations. *See* Chapter 4.

Section 6103(h)(4) provides that a return or return information may be disclosed in a federal judicial or administrative proceeding pertaining to tax administration in three situations:

(A) if the taxpayer is a party to the proceeding, or the proceeding arose out of, or in connection with, determining the taxpayer's civil or criminal liability, or the collection of such civil liability, in respect of any tax imposed under 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 the return or return information directly relates to a transactional relationship between a person who is a party to the proceeding and the taxpayer which directly affects the resolution of an issue in the proceeding.

See Chapter 3. As discussed below, the transactional relationship that exists among the bondholders, issuer, trustee, and conduit borrower may provide a basis for disclosure under section 6103(h)(4)(B) and/or (C), depending on what issues must be resolved in the proceeding.

The definition of return information excludes statistical studies and compilations of data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer. IRC § 6103(b)(2). This does not mean that 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. *See* Church of Scientology of California v. IRS, 484 U.S. at 15. The IRS may disclose amalgamations of data, *e.g*., that it is examining particular classes of cases or particular types of abuses, so long as the individual issuances being looked at cannot be identified. In addition, nonidentifiable statistical data (such as that compiled in the SOI Bulletin) may be disclosed.

III. APPLICATION OF SECTION 6103 TO BOND PROGRAM

A. Bond Examination

A Revenue Agent opens a bond examination on 1993 County A general revenue bonds. May the IRS disclose return information relating to whether interest on the bonds is tax-exempt to the issuer, the bondholders, or the trustee?

The IRS could discuss whether 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, the information could be discussed with the representatives of the issuer or bondholders, but only if a valid power of attorney is filed with the IRS.

As a general rule, absent the issuer's consent the information could not be discussed with the trustee. Disclosure of discrete items of return information to the trustee would nevertheless be permitted if the disclosure were necessary to obtain information that is not otherwise reasonably available (*e.g*., a bondholder list). IRC § 6103(k)(6). As discussed in section III.E., below, if the trustee must

file Forms 1099, the Service could disclose to the trustee information necessary to perform those responsibilities.

B. Bond Issue Involving Conduit Borrower

A Revenue Agent examines a bond issue, the proceeds of which were loaned to a taxable organization to build a low income housing project.

1. May the IRS disclose return information relating to whether interest on the bonds is tax-exempt to the issuer, the bondholders, the trustee, or the conduit borrower?

Information relating to whether the interest on the bonds is tax-exempt may be disclosed to the issuer and bondholders.

Disclosures to the conduit borrower in this situation are much more restricted. As noted above, the IRS can disclose information regarding the bonds to obtain information that is not otherwise reasonably available. IRC § 6103(k)(6). The conduit borrower, for example, may have information regarding bond compliance. Tax information may be disclosed in connection with the bond examination to the conduit borrower, or to any other person involved in the bond issuance, in the same manner and under the same rules as other third party investigative inquiries.

Section 6103(k)(6) would ***not*** authorize the IRS to discuss wide-ranging bond issues with the conduit borrower. Consent from the issuer is required to make any disclosures to the conduit borrower beyond those minimal disclosures authorized by section 6103(k)(6). For example, if it becomes clear that the conduit borrower wants to participate in the examination, the issuer's consent to disclosure must be obtained.

Sample consents permitting disclosures of bond examination information to the conduit borrower and conduit borrower's counsel are in Appendices 1 and 2 of this chapter. 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. For additional information on consents, including the requirements for oral consents, see Chapter 2, Part III.

Disclosures to the trustee would ordinarily be predicated on section 6103(k)(6) (investigative) 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. IRC § 6103(c).

C. Revocation of Exempt Status

While examining a tax-exempt hospital, a Revenue Agent discovers that the hospital's earnings inure to its staff physicians. The IRS determines that the hospital is no longer exempt from tax under section 501(c)(3). The Revenue Agent 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, a Revenue Agent discovers that the organization borrowed the proceeds of a tax-exempt bond issue for use in the construction of a multi-purpose center. The bonds are purportedly qualified section 501(c)(3) bonds. Based on concerns about the private activity limitations of sections 141 and 145, the Revenue Agent opens a separate bond examination to develop the bond issues. The Revenue Agent also has concerns

about the unrelated business taxable income (UBIT) implications for the organization, as well as the potential application of section 150(b)(3).

This is perhaps the most difficult area to analyze because of the overlapping issues and the two possibly simultaneous examinations. From a disclosure standpoint, it is critical to segregate which information came from which examination. In addition, because the third party information disclosure rules of section 6103(h)(4)(B) and (C) are implicated, the relevance of each item of data to each examination must be carefully scrutinized. The basic rules are summarized as follows:

- In the bond examination, information from the bond examination relating to whether the interest on the bonds is tax-exempt may be disclosed to the issuer and bondholders. IRC § 6103(e), (h)(4)(A).

- In the conduit borrower's examination, information from the conduit borrower's examination relating to the UBIT issue and other information relating to the organization's section 501(c)(3) status may be disclosed to the conduit borrower. IRC § 6103(e), (h)(4)(A).

- In the bond examination, the conduit borrower must obtain the issuer's consent (*see* sample consents in Appendices 1 and 2 of this chapter) to discuss issues related to the taxability of the bond interest. As a general matter, the issuer's consent should be filled out to permit disclosures to the conduit borrower, the conduit borrower's representative, and other persons participating in the bond examination.

- In the conduit borrower's examination, no consent is necessary to disclose factual information to the conduit borrower that relates to the conduit borrower's UBIT liability, even if the information originated in the bond examination. IRC § 6103(h)(4)(B), (C).

- In the bond examination, information from the conduit borrower's examination relating to whether interest on the bonds is tax-exempt may be disclosed to the issuer. IRC § 6103(h)(4)(B), (C).[76]

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

[76] We have assumed that the issuer has no interest in the conduit borrower's potential UBIT liability. To the extent that liability may arise in discussions where the issuer or its representatives may be present, however, consent from the conduit borrower should be obtained.

trustee or other person making the interest payments to the beneficial owners of 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 may be disclosed to the trustee or other interest payor under section 6103(e).

F. Disclosures to Issuer or Bondholders of Settlements with Individual Bondholders

Any settlement reached with an individual bondholder is that bondholder's return information, and may not be disclosed to the issuer or other bondholders. Factual information collected during an individual bondholder's audit, which relates to the bond issue, could be disclosed to the issuer under IRC § 6103(h)(4)(B) and/or (C), assuming the issuer's examination is ongoing and the information directly relates to an issue to be resolved in the issuer’s examination.

G. Bond Counsel

Bond counsel would have the same right to tax information as their client (section 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 [section 6103(k)(6), or with the issuer's consent section 6103(c)].

I. Securities Exchange Commission and State Oversight Authorities

Section 6103(k)(6) can justify limited disclosures to obtain information from any person, including a state bond oversight authority or the Securities and Exchange Commission. Disclosures to these authorities can also be premised on the issuer's consent, pursuant to section 6103(c).

As discussed above, information does not lose its character as return information merely because identifying information is deleted. As such, no disclosure to the SEC or a state bond oversight authority could be predicated on a "redacted" fact pattern. On the other hand, amalgamated information about the types and classes of cases the IRS is looking into, as well as statistical information, may be disclosed to any person as long as it does not directly or indirectly identify a particular taxpayer.

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:	/s/_____
Date:	xx/xx/20xx____

Treasury regulations require that the consent must be received by the Internal Revenue Service within sixty days after signing by the taxpayer.

Appendix 2

Form **8821**
(Rev. January 2000)
Department of the Treasury
Internal Revenue Service

Tax Information Authorization

▶ IF THIS AUTHORIZATION IS NOT SIGNED AND DATED, IT WILL BE RETURNED.

OMB No. 1545-1165
For IRS Use Only
Received by:
Name
Telephone ( )
Function
Date / /

1 Taxpayer information.

Taxpayer name(s) and address (please type or print)	Social security number(s)	Employer identification number
City of X 123 Municipal Plaza X, State 99999		12 2456789
	Daytime telephone number (000) 867-5309	Plan number (if applicable)

2 Appointee.

Name and address (please type or print)	
	CAF No. Telephone No. ( ) Fax No. ( ) Check if new: Address ☐ Telephone No. ☐

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.)
Revenue Bonds	1040	1999	(XYZ 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.) . . . . . ▶ ☑
If you checked this box, skip lines 5 and 6.

5 Disclosure of tax information (you must check the box on line 5a or b unless the box on line 4 is checked):

a If you want copies of tax information, notices, and other written communications sent to the appointee on an ongoing basis, check this box . . . . . ▶ ☐

b If you do not want any copies of notices or communications sent to your appointee, check this box . . . . . ▶ ☐

6 Retention/revocation of tax information authorizations. This tax information authorization automatically revokes all prior authorizations for the same tax matters you listed above on line 3 unless you checked the box on line 4. If you do not want to revoke a prior tax information authorization, you MUST attach a copy of any authorizations you want to remain in effect AND check this box . . . . . ▶ ☐
To revoke this tax information authorization, see the instructions on page 2.

7 Signature of taxpayer(s). If a tax matter applies to a joint return, either husband or wife must sign. If signed by a corporate officer, partner, guardian, executor, receiver, administrator, trustee, or party other than the taxpayer, I certify that I have the authority to execute this form with respect to the tax matters/periods covered.

Signature	Date	Signature	Date
Mary Issuer	Mayor		
Print Name	Title (if applicable)	Print Name	Title (if applicable)

General Instructions

Section references are to the Internal Revenue Code unless otherwise noted.

Purpose of form. Form 8821 authorizes any individual, corporation, firm, organization, or partnership you designate to inspect and/or receive your confidential information in any office of the IRS for the type of tax and the years or periods you list on this form. You may file your own tax information authorization without using Form 8821, but it must include all the information that is requested on the form.

Form 8821 does not authorize your appointee to advocate your position with respect to the Federal tax laws; to execute waivers, consents, or closing agreements; or to otherwise represent you before the IRS. If you want to authorize an individual to represent you, use Form 2848, Power of Attorney and Declaration of Representative.

Use Form 56, Notice Concerning Fiduciary Relationship, to notify the IRS of the existence of a fiduciary relationship. A fiduciary (trustee, executor, administrator, receiver, or guardian) stands in the position of a taxpayer and acts as the taxpayer. Therefore, a fiduciary does not act as an appointee and should not file Form 8821. If a fiduciary wishes to authorize an appointee to inspect and/or receive confidential tax information on behalf of the fiduciary, Form 8821 must be filed and signed by the fiduciary acting in the position of the taxpayer.

Taxpayer identification numbers (TINs). TINs are used to identify taxpayer information with corresponding tax returns. It is important that you furnish correct names, social security numbers (SSNs), individual taxpayer identification numbers (ITINs), or employer identification numbers (EINs) so that the IRS can respond to your request.

For Privacy Act and Paperwork Reduction Act Notice, see page 2. Cat. No. 11596P Form **8821** (Rev. 1-2000)

Partnership items. Sections 6221–6231 authorize a Tax Matters Partner to perform certain acts on behalf of an affected partnership. Rules governing the use of Form 8821 do not replace any provisions of these sections.

When to file. Form 8821 must be received by the IRS within 60 days of the date it was signed and dated by the taxpayer.

Where to file. Generally, mail or fax Form 8821 directly to the Centralized Authorization File (CAF) Unit at the service center where the related return was, or will be, filed. To find the service center address, see the related tax return instructions. To get the fax number, call 1-800-829-1040.

If Form 8821 is for a specific tax matter, mail or fax it to the office handling that matter. For more information, see the instructions for line 4.

Specific Instructions

Line 1—Taxpayer information

Individuals. Enter your name, TIN, and your street address in the space provided. Do not enter your appointee's address or post office box. If a joint return is used, also enter your spouse's name and TIN. Also enter your EIN if applicable.

Corporations, partnerships, or associations. Enter the name, EIN, and business address.

Employee plan. Enter the plan name, EIN of the plan sponsor, three-digit plan number, and business address of the plan sponsor.

Trust. Enter the name, title, and address of the trustee, and the name and EIN of the trust.

Estate. Enter the name, title, and address of the decedent's executor/personal representative, and the name and identification number of the estate. The identification number for an estate includes both the EIN, if the estate has one, and the decedent's TIN.

Line 2—Appointee. Enter your appointee's full name. Use the identical full name on all submissions and correspondence. If you wish to name more than one appointee, indicate so on this line and attach a list to the form.

Note: *Only the first three appointees you list will be input on the CAF.*

Enter the nine-digit CAF number for each appointee. If an appointee has a CAF number for any previously filed Form 8821 or power of attorney (Form 2848), use that number. If a CAF number has not been assigned, enter "NONE," and the IRS will issue one directly to your appointee.

The CAF number is a number that the IRS assigns to appointees. The appointee's CAF number must be used on all future Forms 8821 or 2848. The IRS does not assign CAF numbers to requests for employee plans and exempt organizations.

Line 3—Tax matters. Enter the type of tax, the tax form number, the years or periods, and the specific tax matter. Enter "Not applicable," in any of the columns that do not apply.

In column (c), write the years using the YYYY format, for example, "2000." Do not use general references such as "all years," or "all periods." If you do, your application will be returned.

You may list any prior years or periods, but for future periods, you are limited to the 3 future periods that end no later than 3 years after the date Form 8821 is received by the IRS. For employment tax or excise tax returns, enter the applicable quarters of the tax year. For estate tax returns, enter the date of the decedent's death instead of the year or period.

In column (d), enter any specific information you want the IRS to provide. Examples of column (d) information are: transcript of an account, a balance due amount, a specific tax schedule, or a tax liability.

For requests regarding a foreign certification shown on Form 6166, Certification of Filing A Tax Return, enter "Form 6166" in column (d) and check the box on line 4.

Line 4—Specific use not recorded on CAF. Generally, the IRS records all tax information authorizations on the CAF system. However, authorizations relating to a specific issue are not recorded.

Check the box on line 4 if Form 8821 is filed for any of the following reasons: (1) requests to disclose information to loan companies or educational institutions, (2) requests to disclose information to Federal or state agency investigators for background checks, (3) civil penalty issues, (4) trust fund recovery penalty, (5) application for EIN, or (6) claims filed on Form 843, Claim for Refund and Request for Abatement. If you check the box on line 4, your appointee should mail or fax Form 8821 to the IRS office handling the matter. Otherwise, your appointee should bring a copy of Form 8821 to each appointment to inspect or receive information. A specific use tax information authorization does not automatically revoke any prior tax information authorizations.

Line 6—Retention/revocation of tax information authorizations. Check the box on this line and attach a copy of the tax information authorization you do not want to revoke.

To revoke an existing authorization, send a copy of the previously executed Form 8821 to the IRS office where it was filed. Write "REVOKE" across the top of the form and sign your name again under the existing signature (line 7). If you do not have a copy of the prior Form 8821, send a letter to the IRS office where you filed it. The letter must indicate that the authority of the tax information authorization is revoked and must be signed by the taxpayer. Include the name and address of each appointee whose authority is revoked.

Note: *Filing Form 8821 does not revoke any Form 2848 that is in effect.*

Line 7—Signature of taxpayer(s)

Individuals. You must sign and date the authorization. Either husband or wife must sign if Form 8821 applies to a joint return.

Corporations. Generally, Form 8821 can be signed by: (1) an officer having legal authority to bind the corporation, (2) any person designated by the board of directors or other governing body, (3) any officer or employee on written request by any principal officer and attested to by the secretary or other officer, and (4) any other person authorized to access information under section 6103(e).

Partnerships. Generally, Form 8821 can be signed by any person who was a member of the partnership during any part of the tax period covered by Form 8821. See Partnership items above.

All others. See section 6103(e) if the taxpayer has died, is insolvent, is a dissolved corporation, or if a trustee, guardian, executor, receiver, or administrator is acting for the taxpayer.

Privacy Act and Paperwork Reduction Act Notice. We ask for the information on this form to carry out the Internal Revenue laws of the United States. Form 8821 is provided by the IRS for your convenience and its use is voluntary. If you designate an appointee to inspect and/or receive confidential tax information, you are required by section 6103(c) to provide the information requested on the form. Under section 6109, you must disclose your social security number (SSN), employer identification number (EIN), or individual taxpayer identification number (ITIN). If you do not provide all the information requested on this form, we may not be able to honor the authorization.

Routine uses of this information include giving it to the Department of Justice for civil and criminal litigation, and to cities, states, and the District of Columbia for use in administering their tax laws. We may also give this information to other countries pursuant to tax treaties.

You are not required to provide the information requested on a form unless the form displays a valid OMB control number. Books or records relating to a form or its instructions must be retained as long as their contents may become material in the administration of any Internal Revenue law. Disclosure of the information on this form may be made as provided in section 6103.

The time needed to complete and file this form will vary depending on individual circumstances. The estimated average time is: Recordkeeping, 7 min.; Learning about the law or the form, 12 min.; Preparing the form, 24 min.; Copying, assembling, and sending the form to the IRS, 20 min.

If you have comments concerning the accuracy of these time estimates or suggestions for making this form simpler, we would be happy to hear from you. You can write to the Tax Forms Committee, Western Area Distribution Center, Rancho Cordova, CA 95743-0001. DO NOT send Form 8821 to this address. Instead, see Where to file on this page.