Internal Revenue Service

memorandum

date: FEB 13 1997

to: Assistant Commissioner (Collection) (CP:CO)

from: Assistant Chief Counsel (General Legal Services) (CC:F&M:GLS)
Assistant Chief Counsel (General Litigation) (CC:EL:GL)

subject: Section 117 of the Treasury Department Appropriations Act of 1997 (TAA97) Pub. L. No. 104-208, 110 Stat. 3009 (1996)

This responds to your November 1, 1996, memorandum seeking guidance regarding Section 117 of the Treasury Department Appropriations Act, 1997 (TAA97), enacted as part of Pub. L. No. 104-208, 110 Stat. 3009 (1996), which states:

> Of the funds available to the Internal Revenue Service, $13,000,000 shall be made available to continue the private sector debt collection program which was initiated in fiscal year 1996 and $13,000,000 shall be transferred to the Departmental Offices appropriation to initiate a new private sector debt collection program: Provided, That the transfer provided herein shall be in addition to any other transfer authority contained in this Act.

Your memorandum raises specific questions regarding language in H.R. Rep. 104-660, 104th Cong., 2d Sess. 9-10, 46 (1996) (H.R. Rep. 104-660) and S. Rep. 104-330, 104th Cong., 2d Sess., 8, 37 (1996) (S. Rep. 104-330) which addresses the appropriations for private debt collection programs under Section 117 of TAA97. The Joint Explanatory Statement Of The Committee Of Conference, Section 101(f), TAA97, 1136, states:

> The conference agreement on the Treasury, Postal Service, and General Government Appropriations Act, 1997, incorporates some of the language and allocations set forth in House Report 104-660 and Senate Report 104-330. The language in these Reports should be complied with unless specifically addressed in the following description of the conference agreement.

The description of the conference agreement that follows does not contain any reference to or statement regarding the private debt collection programs. Therefore, throughout this

memorandum we treat H.R. Rep. 104-660 and S. Rep. 104-330 as legislative history for TAA97.

This memorandum should be read in conjunction with a legal opinion prepared with regard to private collection of tax debt. In January 1996, we provided guidance in a memorandum entitled "Legal Issues Associated with Contracting Out Collection Activities Under Treasury, Postal, and General Government Appropriations Act of 1996" (1996 Memorandum). All of the guidance contained in the 1996 Memorandum is applicable to the $13 Million earmarked in TAA97 for the Internal Revenue Service (IRS) to continue the private debt collection program initiated in 1996. Much of this previous guidance also applies to the program to collect tax debt funded by $13 Million TAA97 transfers from IRS appropriations to Departmental Offices.

Re: IRS $13 Million for FY 1997

Q1. What must IRS "continue," the current contract, or the FY 1996 program?

A1. A careful reading of the language used in the Conference Report TAA97 makes it clear that the IRS must continue the FY 1996 private sector debt collection program, regardless of the contract vehicle utilized. This interpretation is supported by the legislative history, where the Committee on Appropriations stated that it was transferring $13 Million to the Departmental Offices to initiate a second program because of its disappointment with the current contracting initiative and its concern that the IRS has not established a viable program which can be expanded and used in the future. H.R. Rep. 104-660 at 9. Additionally, the Department of the Treasury (Treasury) is directed to include in its program performance measures which will be used to compare IRS cost and performance with private sector cost and performance. Id. at 10. Clearly, what is contemplated by Congress is a program with elements of performance measurement and analysis, over and above any individual contract.

Q2. How much flexibility (or inflexibility) is implied by "continue"?

A. No changes to contractors or contract?
B. Changes permitted in contract?
C. Changes permitted in mix of contractors?
D. New RFP, same general scope?

A2. We do not believe anything in the TAA97 or its legislative history intends to circumvent or dictate to an agency the

specifics of its contract management. Within the appropriation authority granted to conduct the program itself, the IRS has the discretion to manage its contracts.

Q3. Can IRS exercise one-year option to extend for some contractors but not others?

A3. Yes, the IRS has the ability to choose which options it wishes to exercise. Questions regarding the specifics of exercising options should be directed to the Contracting Officer in the first instance.

Q4. Can a contractor refuse IRS option to extend? If so, can money be redistributed among remaining contractors?

A4. No, a contractor may not refuse a properly exercised option.

Q5. Can contractors renegotiate price at option renewal?

A5. No.

Q6. How far can IRS revise contract without need to recompete? For example:

A. Could IRS "recycle" unresolved cases from one contractor to another, such as cases from the Unable to Locate and Unable to Contact categories?

B. Could IRS eliminate a category of work from the case mix currently given to contractors?

A6. There is insufficient detail provided here to definitively answer these questions. However, we can say that the answers depend upon the scope of the competition, any modifications to the contracts, and specific clauses in a particular contract. These questions should be raised with the Contracting Officer in the first instance.

Q7. Can the IRS pay administrative support costs out of its $13 Million?

A7. A. FY 1997 costs -- It is a basic principle of federal appropriations law that funds appropriated for a particular object may also be used to incur expenses which are necessary or proper or incident to the proper execution of that object, except where another appropriation makes specific provision for such expenditures. 63 Comp. Gen. 422, 427 - 428 (1984); Comp. Gen. B-230304 (March 18, 1988). See also, 31 U.S.C. § 1301(a). No other appropriation specifically provides for such expenditures,

so that these administrative costs may be paid out of the Service's $13 Million.

B. FY 1996 contract costs incurred in FY 1997 -- The FY 1997 appropriation provides that the IRS's FY 1997 $13 Million shall be made available to continue the private sector debt collection program that was initiated in FY 1996. Therefore, if the IRS exercises the options in the FY 1996 contracts in FY 1997 in continuation of the FY 1996 program, the FY 1997 appropriation may be spent upon FY 1996 contract costs incurred in FY 1997. Otherwise, however, the appropriation provides no authority to pay for FY 1996 contract costs.

Re: Treasury $13 Million for FY 1997

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Q8. What are the operational differences, if any, between "new program," "second program," "new contracting initiative," and "second contract"?

A8. Generally speaking, it would appear that Congress intended neither to limit or to prescribe operational features when it used these various terms. The term "new ... program," as used in section 117 TAA97 distinguishes it from the private sector debt collection program that was initiated by the IRS in FY 1996. The term "second private sector debt collection program," as used in H.R. Rep. 104-660 at 9, and S. Rep. 104-330 at 8, is meant to distinguish it from the IRS's "current contracting initiative," an apparent reference to the private sector debt collection program initiated by the IRS in FY 1996. The term "new contracting initiative," as used in H.R. Rep. 104-660 at 10, refers to the "second private sector debt collection program," discussed above. The term "second contract," as used in S. Rep. 104-330 at 37, is an apparent reference to the "second private sector debt collection program," as discussed at p. 8 of that report. As we read the legislative history, the reference to "second contract" was a shorthand term used to describe the second "program" and was not meant to foreclose Treasury from using multiple contracts in that second program.

Q9. Does Congressional language imply a Treasury contract substantively different from IRS contract[s](as long as it addresses the specified inventory), or only a separate contract? If substantive difference is required, how different must it be?

A9. We have found nothing in the appropriation or its legislative history to suggest that Treasury contracts must be substantively different from the IRS contracts, as long as the contracted for effort addresses the specified inventory. It should be noted, however, that there are comments in the Committee reports that indicate Congressional dissatisfaction with the IRS program. Thus, the Committee Reports state: "The Committee takes this action because of its disappointment with the current contracting initiative and its concern that the IRS has not established a viable program which can be expanded and used in the future." H.R. Rep. 104-660 at 9. Language submitted by Congressman Shelby of the Committee stated: "The Committee is also concerned that IRS is not committed to the success of this program ... ." S. Rep. 104-330 at 8. Neither of these statements, standing alone, mandate that the Treasury program differ substantively from the IRS program or prescribe what changes should be made. You may be able to glean additional insight from the records of Congressional correspondence and the hearings held with respect to the IRS's program.

Q10. Is there any limitation implied regarding the extent to which the IRS can be involved in the Treasury contract?

A10. Yes, since the Treasury's $13 Million has been designated for use in a distinct debt collection program, the IRS may not use its appropriation to establish the Treasury program. Further, the circumstances surrounding the $13 Million transfer of IRS appropriations to Departmental Offices strongly indicate that Treasury must be in charge of the design and management of the substantive portion of its collection initiative.

Q11. Can Treasury pay administrative costs for its private sector debt collection initiative out of its $13,000,000? If yes, can it reimburse IRS for administrative support?

A11. Yes, Treasury may pay administrative costs for its private sector debt collection initiative out of its $13,000,000. See response to Q7A, supra. Regarding IRS administrative support, there is no question that the Service may properly use its own appropriated funds for expenses related to its normal tax collection activities, including those costs it incurs supporting Treasury's initiative. Thus, the Service's expenditure of its own appropriated funds for data exchange and other tax-related matters related to the Treasury program will be proper. However,

since the fundamental design of the Treasury program for FY 1997 has not yet been finalized, we cannot answer all possible questions related to potential reimbursement to the Service from the $13,000,000 designated for Treasury's program.

[redacted]

Q12. What kind of comparison does Congress envision between IRS cost and performance and that of the Treasury contractor?

A12. The legislative history and the statutory language are both silent as to the type of comparison envisioned. There are many different resources that may provide assistance in establishing a method of measuring cost and performance. We recommend

[redacted]

Q13. Is there any indication of what standard of cost/benefit Congress envisions for determining whether to continue and expand the new Treasury initiative?

A13. No, the legislative history and the statutory language are both silent as to Congress' further intentions regarding the standard.

Q14. Does the TAA97 require Treasury to make its FY 1997 contract susceptible to bids by private counsel law firms (as the FY 1996 legislation did), or make it easier for law firms to compete?

A14. The TAA97 and its legislative history are silent on the issue of private counsel law firms bidding on the $13 Million which has been transferred to Departmental offices.

Q15. Does the following language for page 9, paragraph 4 of the HR Report imply that the new Treasury contract includes cases from the CNC categories "defunct/no asset corporations" and "other" as well as from UTL and UTC? (Senate report has similar language.)

> The Committee notes, that as of September 30, 1995, the amount of taxes, penalties, and interest in the "currently not collectible" categories of "defunct/no asset corporations," "unable to locate," and "other," totaled $43,400,000 ... Providing resources through contract to address the $43,400,000 is a way of supplementing IRS staffing and collecting amounts which IRS is not actively pursuing.

A15. In addressing your question, we should not view the above-quoted language in isolation and out of context. In the paragraph just prior to the above-quoted language, H.R. Rep. 104-660 states that $13 Million is being transferred from the IRS --

> ... to Departmental Offices to initiate a second private sector debt collection program which focuses on tax debt which is classified by the IRS as "currently not collectible," "available for collection actions," and deferred (lower value accounts).

This language indicates that currently not collectible tax debt is only one of the three categories of debt upon which the new private debt collection program should focus. However, we find no indication that Congress intended to require that "defunct/no asset corporations" and "other," as well as unable to locate (UTL) and unable to contact (UTC) cases all be included in the new program.

Q16. Does the following language from page 10, paragraph 1 of the HR Report imply that the new Treasury contract precludes using cases from the ACS inventory?

> The Committee believes that the most cost effective manner of collecting this debt is through ACS and directs that contracting efforts for the collection of debt classified as "available for collection actions" should not be made to the detriment of ACS staffing and funding levels.

A16. While this language does not prohibit the inclusion of any ACS inventory in the new private sector debt collection program initiated with the $13 Million transferred to Departmental offices, the language indicates that Congress believes ACS

constitutes a cost effective manner of collecting tax debts. Therefore, the language supports the conclusion that inventory that would be handled by ACS under the Service's current program should not be diminished by any private sector debt collection program.

Q17. Can there be any cross funding between the FY 1996 contract allotment and the two allotments from FY 1997? Or does each allotment have to be "fenced"?

A17. They must be fenced. Section 501 of the FY 1996 appropriation (Pub. Law 104-52) provided that no part of the appropriation would remain available for obligation beyond FY 1996 unless expressly so provided in the appropriation. Section 518 of the appropriation allows the carryover of not to exceed 50 percent of unobligated balances remaining available at the end of FY 1996 from appropriations made available for salaries and expenses for FY 1996. [redacted]

Turning to the FY 1997 appropriation, all appropriations are presumed to be annual appropriations unless the appropriation act expressly provides otherwise. See 31 U.S.C. 1301(c); Principles of Federal Appropriations Law at 5-3. Consistent with this general principle of fiscal law, the 1997 appropriation is made "for the fiscal year ending September 30, 1997." As noted above, the FY 1997 appropriation provides that the IRS's FY 1997 $13 Million shall be made available to continue the private sector debt collection program that was initiated in FY 1996. Therefore, if the IRS exercises options to extend FY 1996 contracts in FY 1997 in continuation of the FY 1996 program, the FY 1997 appropriation may be spent upon FY 1996 contracts costs incurred in FY 1997. Otherwise, however, the appropriation provides no authority to pay for FY 1996 contract costs.

Q18. Must contract work be limited to ARDI categories of deferred, available for collection actions, and CNC (specifically "currently not collectible" categories of "defunct/no asset corporations," unable to locate," "unable to contact," and "other")? Or can the contractors perform work that frees IRS resources to better focus on other enforcement issues? For instance:

A. Can IRS\Treasury use contractors for work such as delinquency prevention, e.g. contact repeat offenders to

remind that ES payments, FTD's and other returns are soon due?

B. Can the contractors work TDI's to seek filing commitments from delinquent taxpayers and forward these commitments to IRS (reducing IRS expenditures of resources on these cases)?

C. Can contractors contact taxpayers on AFSR (Automatic Substitute For Return) cases to obtain taxpayer commitments before IRS initiates SFR procedures?

D. Can contractors perform "last chance" locator services for balance due accounts the IRS is about to declare CNC (either UTL or UTC)?

E. Can contractors make prompt contact on non-current IRS-approved installment agreements that have defaulted or are about to be defaulted?

A18. The legislative history of TAA97 focuses upon collection of existing tax debt. As indicated in the 1996 Memorandum, any interpretation of the language of the statute or legislative history broad enough to encompass delinquency investigations, including non-filers, would encompass all enforcement activities of the IRS and possibly examination functions. Therefore, inclusion of work described in A-C appears to be beyond the scope of TAA97. In addition, assignment of such work to private collection agencies may involve private collection agencies in providing "tax advice," an activity clearly outside the scope of the legislation. However, inclusion of the work described in D and E, last chance locator services for balance due accounts and prompt contact on non-current IRS-approved installment agreements, appears to be within the scope of the tax debt "available for collection action" which Congress indicated should be a focus of the new private debt collection program.

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