



MANUAL TRANSMITTAL

Department of the Treasury
Internal Revenue Service

25.5.5

MARCH 16, 2022

EFFECTIVE DATE

(03-16-2022)

PURPOSE

- (1) This transmits a revision to IRM 25.5.5, Summons for Taxpayer Records and Testimony.

MATERIAL CHANGES

- (1) IRM 25.5.1.1 Subsection was renamed and expanded to provide internal controls information.
- (2) IRM 25.5.5.2.1 Added citations for IRC references and information about reimbursement to third party witnesses.
- (3) IRM 25.5.5.3.1 Added bullets for clarity and removed (2) moving this information to a note regarding fifth amendment and attorney client privileges.
- (4) 25.5.5.4 Added bullets for clarity.
- (5) 25.5.5.4.1 Editorial changes and clarified example of a constitutional privilege warning.
- (6) 25.5.5.4.5 Added basic information about the need for a noticee to file suit in U.S. district court to quash a summons.
- (7) 25.5.5.4.6 Added bullets for clarity.
- (8) IRM 25.5.5.4.7 Clarified that the IRS employee should ask all prepared questions when a summonsed taxpayer or witness claims a privilege and added a note advising that Associate Area Counsel should be contacted in any case in which the taxpayer raises a constitutional defense to a summons.
- (9) 25.5.5.4.8 Clarified that observers may be present during the interview, removed extraneous content and added links to IRM 25.5.5.5.7 and IRM 4.26.8. Removed reference to obsolete IRM 25.5.11.
- (10) 25.5.5.5(1) Added a link to Circular 230.
- (11) 25.5.5.5.3 Clarified information about making litigation recommendations seeking disqualification of an attorney.
- (12) 25.5.5.5(1) Removed break to comply with IRM 1.11.2.3.1.
- (13) 25.5.5.5.7 Added alpha list for clarity.
- (14) Replaced references to “examiner” and/or “officer” with “IRS employee” throughout this IRM.
- (15) Replaced “Service” with “IRS” throughout this IRM.
- (16) Removed “he/she” pronoun usage throughout.
- (17) The revisions to this IRM section include editorial changes, formatting, and IRM reference corrections throughout.

EFFECT ON OTHER DOCUMENTS

This IRM supersedes IRM 25.5.5 dated December 18, 2015.

AUDIENCE

All operating Divisions and Functions.

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Small/Business Self/Employed

25.5.5

Summons for Taxpayer Records and Testimony

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25.5.5.1
(03-16-2022)
Program Scope and Objectives

- (1) The Summons Handbook provides guidelines for all IRS functions in one multi-functional handbook.
- (2) **Purpose:** This IRM section provides instructional procedures relating to summonses for taxpayer records and testimony.
- (3) **Audience:** IRS employees authorized to issue or approve a summons.
- (4) **Policy Owner:** Director, Collection Policy, SB/SE.
- (5) **Program Owner:** Collection Policy Enforcement, SB/SE.
- (6) **Primary Stakeholders:** IRS employees who require testimony or the production of records.
- (7) **Program Goals:** There are times when the IRS must compel a taxpayer, or a third party possessing taxpayer records or information, to provide records or testimony through the use of a summons. The Internal Revenue Code (IRC) provides the IRS with summons authority, and there is a mechanism to enforce compliance with summonses. By following the guidance in this IRM section, IRS employees will be able to prepare and issue summonses for taxpayer records in compliance with law, procedure and taxpayer rights.

25.5.5.1.1
(03-16-2022)
Background

- (1) This section provides information and procedures for:
 - Taxpayer Records and Testimony
 - Taxpayer Records in Possession of Others
 - Rights and Privileges of Persons Summoned
 - Dual Representation

Note: Procedures for the preparation of a summons can be found in IRM 25.5.2, Summons, Preparation

25.5.5.1.2
(03-16-2022)
Authority

- (1) IRC 7602 provides the IRS with summons authority. See IRM 5.17.6.1.2, Authority.
- (2) IRC 7609 provides the IRS with special procedures for third-party summonses.
- (3) IRC 7603 provides procedures for the service of summonses. See IRM 25.5.1.1.2, Authority, for a list of other IRC sections that govern summons issuance by the IRS.
- (4) Delegation Order 25-1, provides the levels of authority delegated to various IRS employees to approve and perform activities concerning summonses. See IRM 1.2.2.14.1, Delegation Order 25-1, Summonses, Oaths, Certifications and Related Functions.

25.5.5.1.3
(03-16-2022)
Responsibilities

- (1) The Director Headquarters Collection is the executive responsible for providing policy and guidance for IRS employees and ensuring consistent application of policy, procedures, and tax law to effect tax administration while protecting taxpayer rights. See IRM 1.1.16.2.3, Headquarters Collection, for additional information.

- (2) The Director Collection Policy reports to the Director Headquarters Collection, and is responsible for the delivery of policy and guidance that impacts the summons program. See IRM 1.1.16.2.3.1, Collection Policy, for additional information.
- (3) The Program Manager Enforcement reports to the Director, Collection Policy and is responsible for providing policy and procedural guidance on specialized processes to IRS employees. See IRM 1.1.16.2.3.1.2, Enforcement, for additional guidance.
- (4) Paragraph (9) of Delegation Order 25-1, lists the IRS employees delegated to issue and serve summonses except “John Doe” summonses. See IRM 1.2.2.14.1, Delegation Order 25-1, Summonses, Oaths, Certifications, and Related Functions.

25.5.5.1.4
(03-16-2022)

Program Management

- (1) There are no servicewide program reports tracking summons issuance. Program Analysts in Collection Policy Enforcement will periodically review summonses issued by revenue officers to ensure taxpayer rights were protected during the summons process and to determine that all standards for preparation, issuance and service of the summonses were met.
- (2) Periodic program reviews are conducted by Field Exam Special Processes to assess the effectiveness of the summons program for Examination, determine if procedures are being followed, validate policies and procedures, and to identify and share best/proven practices.

25.5.5.1.5
(03-16-2022)

Program Controls

- (1) The IRS employee who issued the summons keeps a copy of the original summons, Page 1 of the summons labelled “Original.” The original summons is needed when referring a summons for enforcement. See IRM 25.5.10, Enforcement of Summonses.
- (2) Counsel (and in some areas, Advisory) review requests to enforce summonses.
- (3) When summons approval is required, it is necessary for the IRS employee who issued the summons to maintain the proper approval records associated with each summons. All approved summonses, approval memoranda and counsel review documents, where applicable, should be maintained with the summons in the administrative case file.

25.5.5.1.6
(03-16-2022)

Terms and Acronyms

- (1) The table below lists commonly used acronyms and their definitions.

Acronym	Definition
IRC	Internal Revenue Code
IRM	Internal Revenue Manual
IRS	Internal Revenue Service
SB/SE	Small Business/Self Employed
SSN	Social Security Number
TBOR	Taxpayer Bill of Rights

25.5.5.1.7

(03-16-2022)

Related Resources

- (1) IRM 25.5, Summons, provides guidelines for all IRS functions in one multifunctional handbook. The sections are:
 - IRM 25.5.1, Introduction
 - IRM 25.5.2, Preparation
 - IRM 25.5.3, Procedures
 - IRM 25.5.4, Examination of Books and Witnesses
 - IRM 25.5.5, Summons for Taxpayer Records and Testimony
 - IRM 25.5.6, Summonses on Third-Party Witnesses
 - IRM 25.5.7, Special Procedures for John Doe Summonses
 - IRM 25.5.8, Use of Summons Special Applications
 - IRM 25.5.9, Fees and Costs for Summoned Witnesses
 - IRM 25.5.10, Enforcement of Summons
- (2) The basic legal concepts governing the use and enforcement of administrative summonses can be found in IRM 5.17.6, Legal Reference Guide for Revenue Officers, Summonses.
- (3) The Taxpayer Bill of Rights (TBOR) lists rights that already existed in the tax code, putting them in simple language and grouping them into 10 broad categories. IRS Employees are responsible for being familiar with and acting in accord with taxpayer rights. See IRC 7803(a)(3), Execution of Duties in Accord with Taxpayer Rights. For additional information about the TBOR, see *Taxpayer Bill of Rights*, and Policy Statement 1-236 in IRM 1.2.1, Servicewide Policy Statements.
- (4) Additional summons guidance can be found on the *Summons Knowledge Base*.

25.5.5.2

(03-16-2022)

Taxpayer Records and Testimony

- (1) Taxpayer testimony may be summoned. Taxpayer records may be summoned whether they are in the possession of the taxpayer or in the possession of others, including third-party recordkeepers.
- (2) Information or evidence furnished voluntarily by a person may be used even if it is incriminating.

25.5.5.2.1

(03-16-2022)

Fees and Costs for Witnesses

- (1) Witness fees and travel expenses are payable upon request to witnesses who are required to appear to give testimony or produce records with respect to any summons authorized under IRC 6420(e)(2), IRC 6421(g)(2), IRC 6427(j)(2), or IRC 7602.
- (2) Use the procedures at IRM 25.5.9.4, Claims for Witness Fees and Travel Expenses, to request payment when a witness requests reimbursement for expenses incurred for travel.
- (3) IRC 7610 provides for payments to third parties who request reimbursement for costs incurred in complying with a summons. See IRM 25.5.9.3, Payments for Costs in Complying with Summons.

25.5.5.3

(03-16-2022)

Taxpayer Records In Possession of Others

- (1) Taxpayer records may be in the possession of other individuals or entities. In general, the records may be obtained by summons, whether the records have been voluntarily or involuntarily turned over to others.
- (2) See IRM 25.5.6.9, Records of Foreign Companies, if the IRS employee needs records on a foreign entity or when requesting foreign documents.

- (3) IRS employees may summons records relating to defunct entities.

25.5.5.3.1
(03-16-2022)

**Taxpayer Records
Involuntarily Turned
Over to Others**

- (1) A person cannot successfully oppose a summons for records possessed by another person when the other person obtained the records either by operation and due process of law or by the legal actions of another. For example, courts have ordered production of documents from:
- A trustee in bankruptcy
 - A federal court where they had been impounded
 - A state attorney general who obtained records by subpoena
 - An employer who came across incriminating documents at the workstation of an employee/embezzler
 - A clerk of a state court
 - A federal prison official
 - U.S. Customs agents

Note: Refer to IRM 25.5.5.4.1, Fifth Amendment Privilege Against Self Incrimination, and the accompanying note for a discussion of records shielded from production by a combination of the Fifth Amendment and the attorney-client (or IRC 7525 confidentiality) privileges when records have been transferred to an attorney or an IRC 7525 Federally Authorized Tax Practitioner to obtain tax advice.

25.5.5.4
(03-16-2022)

**Rights and Privileges of
Person Summoned**

- (1) Persons summoned to testify before the IRS or to produce records may assert certain rights or defenses including the following:
- Fifth Amendment Privilege Against Self Incrimination
 - Right to Be Represented by Counsel
 - Attorney-Client, Federally Authorized Tax Practitioner-Taxpayer, Husband-Wife, Clergy-Penitent, and Psychotherapist-Patient Privileges
 - Right to Make an Audio Recording of the Proceeding
 - IRC 7609 Noticee's Right to Petition to Quash a Third-Party Summons
 - Right of Third-Party Witness to Refuse Unreasonable Requests and to Raise Appropriate Defenses
 - Representation Issues
 - Disclosure Issues

25.5.5.4.1
(03-16-2022)

**Fifth Amendment
Privilege Against Self
Incrimination**

- (1) The Fifth Amendment to the Constitution provides no persons shall be compelled to be a witness against themselves. However, information or evidence furnished voluntarily by an individual taxpayer or witness who has been summoned may be used even though it may be incriminating.
- (2) IRC 7602 authorizes the IRS to summon taxpayers and third parties to testify and to produce books and records. However, if answering a question would tend to incriminate the summoned person, that person may assert their Fifth Amendment privilege and refuse to answer. In contrast, a summoned person has no Fifth Amendment privilege in the contents of voluntarily created, pre-existing documents because the Government did not compel that person to create the documents. However, the act of producing those documents may tend to incriminate a summoned person because the mere act of production compels that person to tacitly admit that the documents exist, they are in that person's possession, and he or she believes the documents produced are those required by the summons. Whether any of these tacit admissions may

tend to incriminate a summoned person will depend on the facts and circumstances of each case. Consequently, that person may have a valid Fifth Amendment privilege against producing voluntarily created, pre-existing documents. This situation may exist when a taxpayer (or other person) is summoned to produce the records of their sole proprietorship.

- (3) If a taxpayer transfers their records or the records of their sole proprietorship to another person, the IRS can summon the third party to produce those records. The taxpayer cannot raise a Fifth Amendment objection to prevent a summoned third party from producing these records because the privilege against self-incrimination is personal to the taxpayer. This means that the Fifth Amendment privilege extends only to testimony and records sought from the taxpayer. This is true even though the taxpayer could have successfully avoided producing the records pursuant to a Fifth Amendment objection when they were in the taxpayer's possession. However, a significant exception to this rule exists when the taxpayer transfers their records or records of their sole proprietorship to an attorney to obtain legal advice. If, under these circumstances, the taxpayer could have avoided producing these records while they were in the taxpayer's possession, the attorney-client privilege will prevent the IRS from summoning the records from the attorney so long as the taxpayer transferred the records to obtain legal advice.

Note: IRC 7525 extends the attorney-client privilege to communications between a taxpayer and a federally authorized tax practitioner in noncriminal tax matters before the IRS and noncriminal tax proceedings in federal court. See IRM 25.5.5.4.3(1)(b), Privileged Communication and Summons.

- (4) While a warning of constitutional privilege against self-incrimination, (such as; "You have the right to not answer questions that may incriminate you") may not be required as a matter of law, such warning may have substantial significance from an evidentiary standpoint in overcoming a contention the testimony or information was given involuntarily, under compulsion. A witness who contends the testimony or information was given involuntarily has the burden of sustaining that contention.
- (5) If a summoned person admits that they have the documents requested by the summons, they have waived the Fifth Amendment privilege against self-incrimination and cannot refuse to provide the documents.
- (6) Summoning a taxpayer or other witness to take a handwriting exemplar is within the authority of IRC 7602. This does not violate any constitutional rights or policies enunciated by Congress. Compulsion of handwriting exemplars is neither a search nor a seizure subject to Fourth Amendment protections, nor testimonial evidence protected by the Fifth Amendment privilege against self-incrimination. A handwriting exemplar is an identifying physical characteristic.

25.5.5.4.1.1
(04-30-1999)

**Rights Concerning
Partnership and Other
Unincorporated
Association Books and
Records**

- (1) The Supreme Court has ruled an individual cannot rely upon the privilege against self-incrimination to avoid producing the records of a collective entity that are in the individual's possession, even if these records might incriminate the individual personally. Partnership books and records are not the personal property of an individual; they are the collective property of a group of persons.
- (2) Partnership books and records voluntarily submitted by one partner may be used in evidence against the other partners without violating their constitutional rights.

- (3) A trustee can be directed to comply with a summons which calls for the production of certain books and records of the trust. Since the trust is a separate entity, the trustee can not claim the Fifth Amendment privilege. The books were held in a representative rather than a personal capacity.
- 25.5.5.4.1.2
(04-30-1999)
Rights Concerning Corporate Books and Records
- (1) The privilege against self-incrimination under the Fifth Amendment does not apply to corporations. The theory for this is the State, having created the corporation, has reserved the power to inquire into its activities, and an inanimate corporate body should not be afforded the same protection as a natural person in avoiding incrimination. A corporate officer may not refuse to produce corporate records held by the officer in an official capacity, even though their production may incriminate the officer or the corporation.
- 25.5.5.4.1.2.1
(04-30-1999)
Rights of Corporate Officers
- (1) The mere fact a corporate officer may not refuse to produce corporate records does not take away the constitutional protection against self-incrimination which is the right of any individual. The corporate officer may still refuse to give testimony or exhibit personal records which may tend to incriminate the officer as an individual, or to testify regarding the whereabouts of corporate records not in the officer's possession. Also, the corporate officer's act of production may not be used against the officer in court.
- 25.5.5.4.2
(12-18-2015)
Right to Be Represented by Counsel
- (1) A witness who appears in response to a summons must be afforded the opportunity to be represented by an attorney. The witness should be informed of this right. However, the witness' counsel should not be permitted to control, attempt to interfere, or delay the progress of the interview.
- (2) If a summoned taxpayer appears and wishes to suspend the interview to consult with an authorized representative, continue with the interview. Inform the taxpayer an interview may usually be suspended for that purpose, but not when it is required by an administrative summons. IRC 7521(b)(2), Procedures involving taxpayer interviews.
- (3) If a witness has been summoned to appear for more than one day and the witness indicates (for good reason) they cannot appear on one or more of the continuing dates, do not release the witness from the obligation to appear on those days unless that person agrees in writing to appear on other mutually agreeable dates, identified by hour, month, day, and year in the written statement. See IRM 25.5.2, Exhibit 25.5.2-1, General Instructions for Preparation of a Summons.
- 25.5.5.4.3
(12-18-2015)
Privileged Communication and Summons
- (1) There are certain special types of relationships in which information communicated by one person to the other is held confidential and privileged between them. This privilege may exist between:
- a. Attorney and Client
In general, the communications from a taxpayer to an attorney that are made to secure legal advice are privileged, and the attorney cannot be compelled to disclose that information to the IRS. Also, if the taxpayer creates records to facilitate the exchange of privileged communications with the attorney, those records are privileged. However, if a taxpayer turns over pre-existing records to an attorney, the IRS can obtain those records, unless they were otherwise privileged from production while in the taxpayer's possession.

- b. Federally Authorized Tax Practitioner and Taxpayer
RRA 98 created a confidentiality privilege in IRC 7525 for communications between taxpayers and “any federally authorized tax practitioner” concerning “tax advice.” “Federally authorized tax practitioners” are the persons described in Circular 230 as subject to regulation. “Tax advice” means any advice given “with respect to a matter which is within the scope of the individual’s authority to practice.” This privilege may be asserted both in “any noncriminal tax matter before the Internal Revenue Service” and in “any noncriminal tax proceeding in Federal court with respect to such matter.” It may be asserted “to the extent the communication would be considered a privileged communication if it were between a taxpayer and an attorney,” except for written communications made “in connection with the promotion of the direct or indirect participation of the person in any tax shelter.”
This privilege does not arise automatically but must be asserted by the taxpayer. IRS employees may still seek the same information in the same manner as before. The only difference is taxpayers may now assert, in noncriminal proceedings, a confidentiality privilege for communications made after the date of enactment to “federally authorized tax practitioners” concerning “tax advice” sought or received. When questions of statutory interpretation arise, consult Associate Area Counsel.
- c. Husband and Wife
- d. Clergyman and Penitent
- e. Psychotherapist-Patient

- (2) Privileged communications cannot be obtained by issuing a summons. If the IRS anticipates the summoned person may raise any privilege or if a privilege is raised in response to a summons, the IRS should ask for a privilege log to support the claim. The request for a privilege log may be made in the summons, but it can only be “requested” because a summons cannot require a person to create a new document. Associate Area Counsel should be contacted for assistance with a privilege log.

25.5.5.4.4
(12-18-2015)
**Right to Make an Audio
Recording of the
Proceeding**

- (1) Taxpayers or their representatives may ask to make audio-tape recordings of the proceedings. If the taxpayer requests to tape record the interview, the taxpayer must give 10 days advance notice and the recording must be at the taxpayer’s expense and with the taxpayer’s own equipment. The IRS employee must also record the meeting. Cameras or videotape equipment are not permitted. At no time should IRS employees try to physically confiscate this equipment. Follow the requirements of IRC 7521 and the procedures set forth in IRM 4.10.3.3.6, Requests to Audio Record Interviews and IRM 5.1.12.3, Taxpayer Recording of Interviews concerning audio-taped interviews.

25.5.5.4.5
(10-28-2011)
**Right to Petition to
Quash a Third-Party
Summons**

- (1) A noticee who wishes to prevent summons compliance by a third party witness must initiate a civil action in U.S. district court to quash the summons. See IRM 25.5.6.6.2, Right to File Petition to Quash Summons, for details.

25.5.5.4.6
(03-16-2022)

Rights of Third-Party Witnesses to Refuse Unreasonable Requests and Raise Valid Defenses

- (1) Third-party witnesses are protected against summonses that are overbroad and fail to satisfy the relevancy test in IRC 7602(a). Refer to IRM 25.5.4.5.1, Relevancy and Materiality of Summoned Information.
- (2) Third-party witnesses may assert all valid rights and privileges, such as;
 - Fifth Amendment privilege against self-incrimination
 - Right to be represented by counsel
 - Spousal privilege
 - Attorney-client privilege

25.5.5.4.7
(03-16-2022)

Noncompliance by the Witness or a Representative

- (1) When a summoned witness or the witness' representative indicates the witness will not comply with the summons:
 - a. Do not make any indication or agreement, express or implied, that it is not necessary or required for the witness to appear, and
 - b. Inform the witness or representative that refusal or failure to comply with the summons may result in judicial remedies provided by law. If a valid reason exists, such as an illness, reschedule the date by mutual agreement to another fixed date.
- (2) The witness' representative cannot appear instead of the witness on the appearance date set in the summons.
- (3) When a summoned taxpayer or witness claims either the self-incrimination privilege of the Fifth Amendment, the attorney-client privilege, or the confidential communications privilege under IRC 7525, continue with the interview even though it may be clear that the questions will not be answered. Ask the summoned person all necessary questions so the person asserting the privilege responds to each inquiry by either answering the questions and producing the documents, or by asserting the claimed privilege to each question.
- (4) If the summoned person refuses to submit to questioning and to the request for documents, that person cannot be compelled to remain and continue the interview. When this occurs, do not continue the interview.
- (5) Make a record of the interview by preparing a memorandum describing the facts and occurrences during the interview. Include the questions asked and the responses given to include the privilege asserted to each question.

Note: Associate Area Counsel should be contacted in any case in which the taxpayer raises a constitutional defense to a summons. See IRM 25.5.10.2, Appearance, Compliance or Noncompliance with a Summons.

25.5.5.4.8
(03-16-2022)

Disclosure Issues

- (1) In addition to an attorney, a summoned party, whether the taxpayer or a third party, is permitted to have other persons (or observers) present during the interview. See IRM 25.5.5.5.7(2), Third-Party Witness's Choice of Representation, for details. Written authorization from the taxpayer is required for consenting to or requesting such disclosure if the summoned party is not the taxpayer. If the summoned party is the taxpayer, consent for disclosure to persons being present during the interview may be provided in writing or orally pursuant to the requirements in Treasury Regulation 301.6103(c)-1(c).

- (2) If a third party witness appears pursuant to a summons accompanied by a person (other than the taxpayer) who does not represent the individual witness, such person may be excluded from the interview. However, if the witness requests to have that person present and the person is a designee of the taxpayer within the meaning of IRC 6103(c) , and its regulations, the interview may proceed. See IRM 11.3.3 , Disclosure to Designees and Practitioners. If the person accompanying the witness is not a designee of the taxpayer within the meaning of IRC 6103(c) and the witness refuses to be interviewed if that person is excluded, the IRS employee will terminate the interview. If the interview is terminated, request a recommendation from Associate Area Counsel for judicial enforcement of the summons by the Department of Justice and exclusion of the person from any future interviews pursuant to the court's order.
- (3) Information obtained as a result of a summons issued in a tax administration investigation or examination is considered return information subject to the disclosure provisions of IRC 6103 and related regulations, and IRC 7213, IRC 7213A and IRC 7431. See IRM 11.3.3, Disclosure to Designees and Practitioners. Information obtained in a "pure" money laundering or Bank Secrecy Act investigation or examination does not fall within the above-listed disclosure provisions. See IRM 4.26.8 Bank Secrecy Act, Special Procedures.

Note: In a money laundering or Bank Secrecy Act investigation or examination, once a "related statute" call has been made, from that point forward all information obtained, including information resulting from a summons, becomes return information subject to the above-listed disclosure provisions.

- (4) Make no commitments to the taxpayer or third-party witness to:
 - a. Provide a greater degree of confidentiality or limitation of use than is provided by existing law and regulation;
 - b. Limit the disclosure of information, such as agreeing information will not be turned over to other agencies otherwise entitled to disclosure of the information upon proper request, or
 - c. Impose other conditions regarding the acceptance and use of information by the IRS, such as agreeing to use tax data for civil purposes only.
- (5) Take precautions to ensure no violations of law concerning the disclosure of return information occurs.
- (6) Refer to IRM 25.5.6.12, Information From Federal Officials and Employees, for a discussion on requesting records from government agencies.

25.5.5.4.8.1
(10-04-2006)
**Obtaining Information
from the Securities and
Exchange Commission**

- (1) In investigations in which it is appropriate to seek access to non-public files of the Securities and Exchange Commission (SEC), the IRS may request such information by using the form letter at Exhibit 25.5.5-1, Access Request by Internal Revenue Service. If the SEC approves the request, it will reply using the form letter at Exhibit 25.5.5-2, Reply Letter Granting Access to Internal Revenue Service. IRS employees are permitted to agree to the conditions set forth in the form letter.

25.5.5.5
(03-16-2022)
Dual Representation

- (1) *Treasury Department Circular 230* (Regulations Governing Practice before the Internal Revenue Service) (Rev. 6–2014) provides with respect to dual representation in Section 10.29, Conflicting Interests, that “(a) Except as provided by paragraph (b) of this section, a practitioner shall not represent a client before the Internal Revenue Service if the representation involves a conflict of interest”.
 - (2) Paragraph (b) of Section 10.29 provides for an exception to the general prohibition against conflict of interest. A practitioner may represent clients having conflicting interests if:
 - a. The practitioner reasonably believes that the practitioner will be able to provide “competent and diligent representation” to each affected client;
 - b. The representation is not prohibited by law; and
 - c. Each affected client waives the conflict of interest and gives informed consent at the time the practitioner learns of the conflict. The client’s informed consent must be confirmed in writing no later than 30 days after the clients gave their consent.
 - (3) Dual representation exists when a summoned third-party witness is represented by an attorney, certified public accountant, enrolled agent, or other person who also represents the taxpayer or another interested party. It may also occur when an attorney under investigation represents a third-party witness in that investigation, or when an attorney-witness seeks to represent another witness in the same investigation. An interested party is one who has a significant pecuniary interest in the testimony of the witness or who, by virtue of the nature of the investigation and the known facts, may be incriminated by the witness. When dual representation exists, notify the Group Manager, and consult Associate Area Counsel, if necessary, to determine the appropriate course of action.
- Note:** When dual representation is in question, continue the summons appearance date to allow time for a resolution of the matter if the attorney-witness refuses to testify or produce documents. See IRM 25.5.3.4(5), Time and Place of Examination Set by Summons.
- (4) Except as provided below, the mere existence of a dual representation situation which may potentially have an adverse impact on the investigation will not, without some action by the attorney to impede or obstruct the investigation, provide a sufficient basis for seeking a disqualification. However, where an attorney’s representation has substantially prejudiced the questioning of a third-party witness and, as a result, has significantly impaired the progress of the investigation, the IRS will request the Department of Justice to seek a court order, as part of the summons enforcement proceeding, to disqualify that attorney as counsel for that witness.
 - (5) In view of the well-established principle granting a person the right to counsel of one’s choice, this disqualification procedure will only be used in extreme circumstances, such as where an attorney has taken some action to improperly or unlawfully impede or obstruct the investigation. It is essential the IRS employee have sufficient facts to support such allegations.
 - (6) If the taxpayer-attorney who is the target of the interview represents a third party witness in an interview, refer to IRM 25.5.5.5.4, Procedures for Exclusion of Attorney Prior to Interview of Witness.

- (7) The provisions referring to “attorneys” apply to other representatives (non-attorneys) who represent witnesses or taxpayers.

25.5.5.5.1
(12-18-2015)

Interviewing the Witness

- (1) Upon learning that counsel represents both the taxpayer under investigation (or other interested party) and the summoned witness, the IRS employee should consider exploring with the attorney, prior to interviewing the witness, whether the attorney realizes that the representation of both the subject of the investigation and the witness may be a conflict of interest. This should be done without the witness present.
- (2) If, after discussing the potential conflict of interest with the attorney, the question is not resolved, the IRS employee should ask the witness these questions at the beginning of the interview:
 - a. Do you wish the attorney to be present during the questioning?
 - b. Did you hire the attorney for this purpose?
 - c. Are you paying for the attorney’s services, either alone or in conjunction with someone else? If the latter, do you know who?
 - d. Do you know about a potential conflict of interest regarding the attorney representing the taxpayer or other third-party witnesses?
- (3) In instances where the IRS employee conducting the interview becomes aware of the potential conflict of interest during the interview, the IRS employee should explore the issue by asking the questions listed. In some situations it may be appropriate for the IRS employee to tell the witness that in the view of the IRS, the interest of the taxpayer under investigation conflicts with that of the witness.
- (4) After disclosure of the dual or multiple representation has been made, if the witness wishes to be represented by the attorney in question and the witness is utilizing the services of the attorney in this matter, then the interview should proceed.
- (5) If the witness does not wish to retain that attorney because of the possible conflict of interest, then the witness should be given the opportunity to either proceed with the interview without an attorney present, or adjourn the interview to a specific future date that affords the witness a reasonable amount of time to hire another attorney. The witness should be advised that failure to comply with the summons may result in the initiation of a summons enforcement recommendation to the Department of Justice.

25.5.5.5.2
(04-30-1999)

Obstruction of Interview

- (1) If the IRS employee has reason to anticipate an attorney will improperly impede or obstruct the questioning of a witness, the IRS employee should consult with Associate Area Counsel prior to the interview with respect to the manner of conducting the questioning.
- (2) Speculation that the objective of the investigation might be frustrated is insufficient grounds upon which to seek disqualification of an attorney. The fact the attorney for the summoned witness also represents the taxpayer (or other interested party) does not provide a basis for concluding the presence of such attorney would obstruct the investigation.
- (3) The mere potential for obstruction is generally an insufficient basis to justify a recommendation for disqualification of an attorney. There must be active obstruction by an attorney before disqualification will be sought. A suit to

disqualify an attorney for obstruction will be undertaken only where the facts clearly indicate the attorney has actively impeded the investigation.

- (4) Unjustifiable obstruction by an attorney may take a variety of forms. It is, therefore, impossible to set forth the precise factual circumstances under which the Government would ask a court to disqualify an attorney as counsel for a third-party witness.
- (5) The following is an example of a circumstance which may provide the basis for a recommendation for the institution of litigation to seek the disqualification of an attorney:

Note: Taxpayer and third-party witness are both represented by the same attorney. The witness is summoned to testify. The attorney refuses to permit the witness to answer questions for other than legitimate reasons, or disrupts the questioning by repeatedly making frivolous objections to the questions, or asserts frivolous claims of privilege or defenses on behalf of the witness to delay the investigation, or so disrupts the interview that the IRS employee, with due diligence and perseverance, is unable to proceed with the interview. This is not intended to suggest that there is anything inherently wrong in claiming the Fifth Amendment privilege.

A careful distinction must be drawn between situations in which the proper remedy is to compel the witness to answer and those in which the attorney may be disqualified because of this conduct. The latter is an extreme remedy which will only be sought in very unusual circumstances, as courts are reluctant to deprive a person of their choice of attorney. Associate Area Counsel, therefore, will make a considered determination on a case-by-case basis prior to seeking disqualification of an attorney.

25.5.5.5.3 (12-18-2015)

Suspension of Interview

- (1) If the interview is suspended because of the attorney's actions, the witness should be given the opportunity to hire another attorney within a reasonable period of time or proceed without an attorney. If the witness declines either to proceed without an attorney or retain a new one within a reasonable period of time, the witness should be informed that a summons enforcement proceeding and an action to disqualify the attorney will be recommended.
- (2) After suspending an interview, the IRS employee will consult with their manager. If the manager agrees with the IRS employee's view that the facts are appropriate for litigation, a request seeking disqualification of the attorney will be made to Associate Area Counsel. If Counsel agrees, they will forward a litigation recommendation to the Department of Justice seeking summons enforcement and disqualification of the attorney.
- (3) Suspension of an interview should be made judiciously in view of the time delays in the investigation that may be caused by such action.
- (4) A record should be made of the circumstances in each instance where an interview is suspended because of dual representation or obstruction by an attorney. The IRS employee should also have a verbatim transcript of the interview (if possible) so that the factual allegations concerning the attorney's conduct at the interview may be proven. Consider having a second IRS employee present to assist in this regard should such issues be foreseen.

Note: The IRS may have a court reporter present at a summoned interview. See IRM 25.5.5.4.4, Right to Make an Audio Recording of the Proceeding.

25.5.5.5.4
(04-30-1999)
**Procedures for
Exclusion of Attorney
Prior to Interview of
Witness**

- (1) Where an individual taxpayer under investigation attempts to appear with a summoned witness as the witness' attorney, the witness should be told that the taxpayer-attorney is the person under investigation and that this person will not be allowed to be present during the questioning. The witness should be given the opportunity of either proceeding with the interview without the taxpayer present or to adjourn the interview to a specific future date in order to afford the witness an opportunity to secure the services of another attorney. If the witness refuses to either proceed with the interview without the attorney's representations or to adjourn for the purpose of obtaining a new representative, the interview will be terminated and a request will be made to Associate Area Counsel for judicial enforcement of the summons and exclusion of the taxpayer from representing the witness.
- (2) A witness may appear pursuant to a summons accompanied by an attorney who also represents the taxpayer (or other interested party) where the taxpayer (or other interested party) has already made exculpatory statements to the IRS alleging that the witness was criminally responsible for circumstances to be discussed during the interview. In this instance, the witness will be told that the attorney also represents the taxpayer (or other interested party) and that the agent believes that an irreconcilable conflict of interest exists which could prejudice the investigation. The witness should then be given the opportunity of either proceeding with the interview without the attorney present or adjourning the interview to secure the services of another attorney. If the witness insists upon retaining the same attorney despite the assertion of a conflict of interest, the IRS employee will terminate the interview and a request will be made to Associate Area Counsel for judicial enforcement of the summons and exclusion of the attorney.
- (3) Refer to IRM 25.5.5.4.8, Disclosure Issues, for a discussion of other situations involving the exclusion of other persons from an interview.

25.5.5.5.5
(10-04-2006)
**Excluding a Taxpayer or
a Taxpayer's
Representative From the
Interview of a
Summoned Third Party**

- (1) Except as noted below in IRM 25.5.5.5.7, Third-Party Witness's Choice of Representative, neither the taxpayer under investigation nor their representative has a legal right to be present at the summons interview of a third-party witness, even where a privileged relationship may exist between the taxpayer and the third-party witness. Therefore, the IRS may bar those persons from the interview. The only rights a taxpayer and the representative have regarding a third-party summons are to petition to quash the summons under IRC 7609(b)(2) and to intervene in a summons enforcement suit pursuant to IRC 7609(b)(1). Any objections to the summoned information or claims of privilege should be raised in those proceedings.
- (2) Where a third-party witness has a fiduciary responsibility or an ethical duty to the taxpayer to assert relevant privileges, such as the attorney-client privilege or tax practitioner privilege under IRC 7525, the IRS is not obligated to permit the taxpayer or his counsel to attend the summoned third-party interview.

25.5.5.5.6
(10-04-2006)

Excluding an Interested Party or that Party's Representative From the Interview of a Summoned Third Party

- (1) An individual who is not entitled to notice under IRC 7609(a) of a third-party summons does not have a right to be present at the interview of a summoned third-party witness; therefore, the IRS may exclude the interested party as well as that party's representative from the interview.

25.5.5.5.7
(03-16-2022)

Third-Party Witness's Choice of Representative

- (1) Any witness, including a third-party witness, has the right to have counsel present at a summoned interview. 5 USC 555(b). The taxpayer has no right to be present or to have the taxpayer's counsel present during the questioning of a third-party witness. If a witness's counsel appears to represent persons with conflicting interests, refer to IRM 25.5.5.5, Dual Representation, and consult Associate Area Counsel. A summoned third party may choose to be represented by the taxpayer's attorney at the interview. In that case, consider whether there are dual representation problems and whether the attorney should be disqualified on conflict of interest grounds.
- (2) A summoned witness may choose to have observers present at the interview so long as;
 - a. The observers are silent and do not participate in or disrupt the interview in any manner.
 - b. The taxpayer being investigated provides written consent allowing the disclosure of return information to all attending the interview, and
 - c. The disclosure of that return information would not seriously impair Federal tax administration.

Exhibit 25.5.5-1 (10-04-2006)**Access Request by Internal Revenue Service**

ACCESS REQUEST BY INTERNAL REVENUE SERVICE
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This form letter should be addressed to the Securities and Exchange Commission by the Internal Revenue Service when it is seeking access to non-public files, and should be signed or ratified by an official in a sufficiently senior or supervisory position to enforce the representations made. The form is intended only for use in connection with access requests to be processed by the Division of Enforcement.

Re: [Name of Taxpayer(s)]

Dear _____:

Pursuant to Title 26, United States Code, we request access to the investigative and other non-public files of the U.S. Securities and Exchange Commission (the "Commission") related to the captioned matter. This request is made in connection with a lawful investigation or official proceeding inquiring into compliance with a criminal or civil statute or regulation being conducted by the Internal Revenue Service.

*We understand that the files in this matter contain "financial records" of "customers," as those terms are defined in the Right to Financial Privacy Act of 1978 [12 USC. 3401–22]. We have reason to believe that such information is relevant to our investigation and/or proceeding.*¹

We will only disclose information accessed from the Commission's files if the disclosure is authorized under 26 USC Section 6103. We will establish and maintain such safeguards as are necessary and appropriate under Section 6103 to protect the confidentiality the information.

*We recognize that until this matter has been closed, the Commission continues to have an interest and will take further investigatory or other steps as it considers necessary in the discharge of its duties and responsibilities.*²

Should you have any questions, please contact _____.

Sincerely,

¹This paragraph is to be used only when the files are known to contain Right to Financial Privacy Act material.

²This paragraph may be omitted if the Commission's case is closed.

Exhibit 25.5.5-2 (10-04-2006)**Reply Letter Granting Access to Internal Revenue Service**

REPLY LETTER GRANTING ACCESS TO INTERNAL REVENUE SERVICE

Re: [Name of Case and Case Number]

Dear _____:

Your request, by letter dated _____, for access to Commission files has been granted. In granting access, the Commission has relied upon your assurances that (1) you will disclose information from files accessed only in accordance with 26 USC 6103, and (2) you will establish and maintain such safeguards as are necessary and appropriate to protect the confidentiality of information from files accessed in accordance with 26 USC 6103.

The files in this matter contain "financial records" of "customers" as those terms are defined in the Right to Financial Privacy Act of 1978 [12 USC. 3401–22]. In addition to the assurances described above, we have relied upon your representation that you have reason to believe that such information is relevant to your investigation and/or proceeding.¹

The Commission makes no recommendation with respect to investigation or prosecution by your agency. *In addition, until this matter has been closed, the Commission continues to have an interest and will take further investigatory or other steps as it considers necessary in the discharge of its duties and responsibilities.²*

The files to which access has been granted are being retained by the [name of office] of the Commission. Your representative should contact _____ at [area code and telephone number] to make arrangements to review the files. I would also appreciate it if you would inform that person in the event that your agency institutes public proceedings based upon the information accessed.

Should you have any questions, please contact _____.

Sincerely,

¹This paragraph is to be used only when the files are known to contain Right to Financial Privacy Act material.

²This sentence may be omitted if the Commission's case is closed.