2018 GL1 - Lesson 10

SUMMONS
(June 2018)

CONTENTS

I. INTRODUCTION

A. Congress has given the Internal Revenue Service broad powers to compel the production of information it needs to determine a tax liability or to collect a tax. I.R.C. § 7602 permits the Service, for any statutorily authorized purpose, to:

1. Examine any books, papers, records or other data;

2. Summon a taxpayer or any other person, requiring him to appear, produce books and records, and give testimony under oath; and

3. Take testimony under oath.

B. The field attorney may be asked to:

1. Give pre-issuance advice about preparing and serving a summons;

2. Provide the necessary information and legal analysis to the Justice Department when the Service authorizes the Department to bring a summons enforcement suit or to defend against a petition to quash the summons in district court.

II. OBJECTIVES

A. The power to summon a taxpayer's records is one of the Service's most fundamental tools for administering and enforcing the tax laws. When revenue agents or revenue officers issue a summons, they need to be aware that it may be challenged in court.

B. The Internal Revenue Manual (IRM) provides Summons guidelines for Collection, Examination, Employee Plans and Exempt Organizations, and Criminal Investigation in one multifunctional IRM. This multifunctional IRM is referred to as the Summons Handbook (Handbook) and can be found at IRM 25.5.

C. At the end of this lesson you will be able to:

1. Explain the authorities for issuing a summons;

2. Review a summons for legal sufficiency; and

3. Explain the actions necessary for enforcing a summons.

III. SUMMONS AUTHORITY

A. Section 7602 authorizes the Secretary to examine any books, papers, records, or other data which may be relevant or material to:

1. Ascertaining the correctness of any return;

2. Making a return where none has been made;

3. Determining the liability of any person or any transferee or fiduciary for internal revenue tax;

4. Collecting any such liability; or

5. Inquiring into any offense connected with the administration or enforcement of the Internal Revenue laws.

B. In United States v. Powell, 379 U.S. 48 (1964), the Supreme Court set forth the standards that the Service must meet to have its summons enforced. The Service must show that:

1. The investigation will be conducted pursuant to a legitimate purpose;

2. The inquiry may be relevant to the purpose;

3. The information sought is not already within the Service's possession; and

4. All administrative steps required by the Code have been followed.

C. Powell also held that a summons cannot be issued for an "improper purpose." This includes using a summons:

1. To harass the taxpayer;

2. To pressure the taxpayer into settling a collateral dispute; or

3. For any other purpose adversely reflecting on the "good faith" of the investigation.

D. Section 7602(d) creates a bright line test for determining if a summons may be issued or enforced if a Justice Department referral is in effect. If an investigation into the tax liability of any person for a particular type of tax (e.g., income) and taxable period is subject to a referral, the Service may not issue a summons or commence a summons enforcement proceeding with respect to the investigation of that person for that tax

liability in that taxable year. See United States v. Natco Petroleum, 166 F.3d 1222 (10th Cir. 1999)(unpublished table decision); United States v. Becker, 965 F.2d 383, 390 (7th Cir. 1992). The Seventh Circuit has ruled that section 7602(d)(1) applies only when the Service has referred the taxpayer whose liabilities are at issue. The Service is not barred from summoning a third-party witness if it has referred such witness to Justice. Khan v. United States, 548 F.3d 549 (7th Cir. 2008); Treas. Reg. § 301.7602-1(c)(1).

1. A Justice Department referral is in effect with respect to any person if:

   a) The Service recommends that the Department of Justice commence a grand jury investigation of or criminal prosecution of the person for any alleged offense connected with the internal revenue laws, or

   b) The Department of Justice, under section 6103(h)(3)(B), requests in writing that the Service disclose the return information of the person for the purpose of a grand jury investigation of or potential or pending criminal prosecution of that person for any alleged offense connected with the internal revenue laws.

   c) The referral is considered in effect the date the document described in (a) is signed or upon the Service's receipt of the document in (b).

2. A Justice Department referral ceases to be in effect with respect to any person:

   a) When the Service receives written notification from the Justice Department that:

      (1) The Department of Justice will not prosecute that person with respect to the offense that gave rise to the referral, or

      (2) The Department of Justice will not authorize a grand jury investigation of that person with respect to the offense, or

      (3) The Department of Justice will discontinue any grand jury investigation of that person with respect to such offense;

   b) When a final disposition with respect to a criminal proceeding brought against that person has been made, or

   c) When the Service receives written notification from the Department of Justice that it will not prosecute that person for any offense based upon its previous request for disclosure under section 6103(h)(3)(B).

IV. BASIC REVIEW OF SUMMONS

A. Check the Summons for Accuracy and Consistency

Problem areas include:

1. Names:

   a) The caption should list only the taxpayer whose liability is actually under examination or investigation. (For example, a husband and wife filed a joint return, but only the husband is under criminal investigation. List only the husband in the caption.)

   b) The name of the summoned party may indicate that he/she is a third-party. Check to see if notice was given to the taxpayer identified in the heading of the summons and to any other person identified in the description of summoned records/testimony. Certain types of third parties are also third-party recordkeepers who may be served with a summons by certified or registered mail under I.R.C. § 7603(b).

   c) When serving a corporation, record the name and title of the person served on the back of the summons. Unless testimony is needed, the summons should only be directed to the corporation. The custodian's name should merely be part of the address.

2. Addresses:

   The address must be correct so the service requirements may be satisfied.

3. Dates:

   a) Tax years under investigation - If records are sought for years outside those under investigation, it is necessary to detail the relevancy of those records in the enforcement letter to the Department of Justice (e.g., the records may be needed to perform a "net worth" income reconstruction of the taxpayer). In United States v. Goldman, 637 F.2d 664 (9th Cir. 1980), a portion of a summons requesting material from prior years was not enforced because the Service failed to meet "minimal showing of relevancy"; the Special Agent did not state an intention to make a net-worth income reconstruction.

   b) Notice requirements. In cases of third-party summonses under I.R.C. § 7609, sufficient time for the taxpayer to bring a proceeding to quash should be factored into the date set for appearance. In Terrell v. United

States, 86-2, USTC 9754 (M.D. Ala. 1985), the court refused to quash a third-party recordkeeper summons that did not give the required 23 days notice, because the party entitled to notice had not shown the degree of harm that justified quashing the summons. Instead, the court ordered that the records need not be produced until the 24th day. This problem can be avoided completely by ensuring that the required notice time is built into the summons. But see Jewell v. United States, 749 F.3d 1295 (10th Cir. 2014).

4. "In the Matter of" description:

a) The "In the Matter of" line of the summons must include the following language if the summons relates to a promoter investigation: *"In the matter of liability of [promoter or preparer's name] under 26 USC Secs. 6694, 6695, 6700, 6701, 6707 and 6708 [use all sections that may be applicable]."* See IRM 4.32.2.7.5(2); see also PMTA 2017-10, available at https://www.irs.gov/pub/lanoa/pmta-2017-10.pdf (advising that the procedure in IRM 4.32.2.7.5(2) does not violate the prohibition on disclosure under section 6103(a)).

b) PMTA 2017-10, recently clarified that the procedure in IRM 4.32.2.7.5(2) does not violate the prohibition on disclosure under section 6103(a) because section 6103(k)(6) permits disclosures of return information to the extent "necessary" – meaning "appropriate and helpful," not essential or indispensable – to further a tax examination. Treas. Reg. § 301.6103(k)(6)-1(c)(1).

5. Designating More Than One Person to Interview a Summoned Witness:

a) More than one person may be designated to receive summoned information or to take testimony under oath at a summoned interview, including Chief Counsel employees. Section 301.7602-1(b)(1) and (2).

b) The summons form does not need to show the identity of the person or persons designated to take summoned testimony or to receive the summoned information. For the convenience of the summoned person, the Service identifies in the summons document at least one officer or employee who is designated as a person before whom the summoned person shall appear. When necessary, however, a summoned interview may be conducted by an officer or employee other than the one who may be identified in the summons document. See section 301.7602-1(b)(1).

c) Pursuant to Treas. Reg. § 301.7602-1(b)(3), the Service may allow outside contractors to ask questions at and otherwise participate fully in a summons interview. In United States v. Microsoft Corp., No. C15-

00102RSM, 2015 WL 9301489 (W.D. Wash. Nov. 20, 2015), Microsoft argued that this temporary regulation is invalid because the asking of questions is an inherently governmental function. The court rejected Microsoft's argument and held that the IRS was not prevented from allowing contractors to ask questions during a summons interview.

6. Use of Social Security Numbers:

a) In 2001, the Judicial Conference of the United States adopted a national policy on privacy and public access to electronic case files. See *Report of the Judicial Conference Committee on Court Administration and Case Management on Privacy and Public Access to Electronic Case Files*, found at: http://www.privacy.uscourts.gov/Policy.htm. Subsequently, the district courts of the United States issued general orders to comply with the Judicial Conference's policy. To properly protect sensitive information, file documents in compliance with the relevant court's general order. See, e.g., General Order 514 of the United States District Court for the Southern District of California, found at: http://www.casd.uscourts.gov/index.php?page=general-orders, effective June 20, 2002.

b) Third-party recordkeepers often have clients with similar names; thus, many third-party recordkeepers who receive a third-party summons often request the taxpayer's SSN in order to assist them in correctly identifying the taxpayer to whom the summoned records relate. In these situations, the Service may, when necessary, identify the taxpayer's SSN when the summoned third party needs that information to correctly identify the summoned records. In providing this information, the Service should employ prudent means of identifying the taxpayer when possible. For example, the Service could type the taxpayer's address in the heading of the summons rather than the taxpayer's SSN. Alternatively, the Service could provide the taxpayer's SSN to the third party in a letter or in a telephone call; this would avoid disclosing information to every person entitled to notice under section 7609(a). IRM 25.5.2.2.11(2).

B. If a case is pending in another function, be sure to coordinate to avoid interference.

C. The issuing officer, and approving officer where necessary, may sign the summons electronically. IRM 25.5.1.3.3(2); IRM Ex. 25.5.2-1(13), (14).

D. Section 7603 provides that books and records sought must be described with reasonable certainty and particularity, including the periods for which the records are sought. Collection summonses for TDI, TDA and TFRP are now pre-printed. Note: Third-party summonses issued as part of tax delinquency investigations for trust fund recovery penalties (i.e., pre-assessment investigations) are not considered collection

summonses under section 7609(c)(2)(D). Accordingly, the Service must follow the notice and waiting period requirements of section 7609(a) for these summonses.

1. In United States v. Calhoun County Hospital Inc., No. WC 74-117-S, 1974 WL 37645 (N.D. Miss. Dec. 9, 1974), the typed-in body of the summons did not specify for what years the records were sought. The court rejected the taxpayer's argument that the summons was facially invalid by looking at the "four corners" of the summons, thus incorporating into the body of the summons the years listed in the caption. Accord United States v. Duke, 379 F. Supp. 545 (N.D. Ill. 1974).

2. If it is not known what records are in the summoned party's possession, a summons can be served identifying only the taxpayer, the tax period under investigation, and the type of tax involved.

a) On appearance, the witness may be asked what books or records exist.

b) Then a second summons may be issued describing them with sufficient particularity.

c) Such a "preliminary" summons upon a third party is specifically exempt from the notice provisions of section 7609, but the exemption applies only to inquiries about the existence of records of the taxpayer's business transactions or affairs. Section 7609(c)(2)(B).

E. Proper Service - I.R.C. § 7603

1. Section 7603 provides that service of the summons will be made by delivery in hand of an attested copy to the person to whom it is directed or by leaving it at his last and usual place of abode. Third-party recordkeepers may also be served by certified or registered mail.

2. The Handbook at IRM 25.5.3.2 outlines the procedures for serving summonses and states that a summons should be handed to the person to whom it is directed. If, after all reasonable attempts to personally serve the summoned party, it is necessary to leave a summons at a person's "abode," as a best practice it should be left (if possible) with a responsible person, over 16 years of age who is capable of understanding the importance of giving the summons to the summoned party. In United States v. Bichara, 826 F.2d 1037 (11th Cir. 1987) the Eleventh Circuit held that section 7603 allows service by merely leaving the summons at the last and usual place of abode, reversing the district court, which had denied enforcement on the grounds that (1) merely leaving the summons was insufficient, and (2) due process required the summons be left with some person of suitable age or discretion. See also United States v. Gilleran, 992 F.2d 232 (9th Cir. 1993) (the appellate court reversed the district court that had required the

Service to mail the summons in addition to leaving the summons at the last and usual place of abode).

3. When reviewing the summons the field attorney should ensure the following:

a) A summons should be issued only to one summoned party, but a consolidated group taxpayer is considered one party.

b) A summons can be personally served on a peson at his business address, but if the person being summoned is not present, the summons may not be left at that address. See United States v. Myslajek, 568 F.2d 55 (8th Cir. 1977), cert. denied, 438 U.S. 905 (1978) (summons left with taxpayer's adult son at taxpayer's place of business held defective for purposes of service, although the summons was ordered enforced because the defect in service was not timely raised). The Code authorizes leaving the summons only at the last and usual abode of the person. The fact that an improperly served summons is actually received by the summoned party will not cure the defective service.

c) A summons being served on a corporation without identifying a specific person may be served on any officer or employee of the corporation authorized to receive process by either state law or the corporate by-laws. It should be noted that a corporation does not have a "place of abode" within the meaning of section 7603(a); therefore, a summons may not be served by fixing it to the door of the corporate building. The summons should be served only on a person authorized to receive process. It may not be left for that person at the corporate offices. (A summoned party may agree to an alternative mode of service, for example on taxpayer's counsel, but such an agreement should be properly memorialized in a writing first, where possible.)

d) Third-Party Recordkeepers. A summons directed to a third-party recordkeeper (in his or her capacity as a third-party recordkeeper) may be served by certified or registered mail to the last known address of such recordkeeper. Section 7603(b).

e) Third-party Recordkeeper Defined. A third-party recordkeeper is defined in section 7603(b)(2) as follows, but the third party must have been acting in this capacity with respect to the taxpayer information sought by the summons also:

(1) Any mutual savings bank, cooperative bank, domestic building and loan association, or other savings institutions chartered and supervised as a savings and loan or similar association under federal or state law, and any bank or credit union;

(2) Consumer reporting agencies;

(3) Persons extending credit by credit cards or similar devices. See Treas. Reg. § 301.7603-2(a)(3). In United States v. New York Telephone, 682 F.2d 313 (2nd Cir. 1982), the court held where a telephone company extends credit cards and credit by other means to both its credit card holders and non-credit card holders, the telephone company is a third-party recordkeeper with respect to all records relating to those transactions. These similar means were third-party billings (billing a call to your own phone) and arranging billing relating to those transactions;

(4) Any broker;

(5) Any attorney;

(6) Any accountant;

(7) Any barter exchange (as defined in section 6045(c)(3)),

(8) Any regulated investment company,

(9) Any enrolled agent, and

(10) Any owner or developer of a computer software source code, (as defined in I.R.C. § 7612(d)(2)), but only when the summons seeks the production of the source code or the program or data to which the source code relates.

f) A summons being served on a specific corporate officer to appear may be personally served on the officer, either at the corporation or wherever the person may be located, or left at the summoned individual's last and usual place of abode. IRM 25.5.2.3(3). The summons should not be left with a person other than the officer being summoned.

g) The authority to issue a summons has been delegated to revenue agents, officers and special agents by Del. Order 25-1 (IRM 1.2.52.2). However, the authority to issue a John Doe summons has been delegated only to those persons identified in Del. Order 25-1, which include the SBSE, W&I, LB&I, CI Directors and Directors of Field Operations, down to the Territory Manager level. Revenue agents, revenue officers, special agents, and office auditors cannot and must not issue John Doe summonses.

h) The Certificate of Service is found on the second page (or reverse) of the original Form 2039. Once executed, the certificate is evidence of the facts to be presented at the enforcement hearing. Section 7603.

i) In accordance with Mimick v. United States, 952 F.2d 230 (8th Cir. 1991), the copy of the summons given to the summoned person must contain a signed certification or affirmation that it is a true and correct copy of the original. On the current pre-printed summons forms, the attestation clause reads as follows: "I hereby certify that I have examined and compared this copy of the summons with the original and that it is a true and correct copy of the original."

j) Improperly served summonses cannot be cured. But as noted above, the taxpayer may agree to an alternative form of service or waive defective service of a summons by failing to object to the defective service in a timely fashion. United States v. Payne, 648 F.2d 361 (5th Cir. 1981), cert. denied, 454 U.S. 1032 (1981); United States v. Myslajek, 568 F.2d 55 (8th Cir. 1977), cert. denied, 438 U.S. 905 (1978).

F. Time and Place of Appearance - I.R.C. § 7605

1. Place for appearance must be reasonable. I.R.C. § 7605(a). This generally means an IRS office close to the witness, unless the witness agrees otherwise. Treas. Reg. § 301.7605-1(d).

2. Date for appearance - Non-Third-Party Summonses:

a) Not less than 10 full days from service, (exclude date of service.)

b) To avoid problems, the Manual instructs that 11 days be allowed, but the witness may agree to comply sooner where “notice” is not required to be given.

c) As added by the Taxpayer Bill of Rights, unless jeopardy is found, no levy can be made on the property of a summoned person on the date the person is required to appear in response to a summons. I.R.C. § 6331(g).

3. Date for appearance - Third-Party summonses under section 7609, the date of appearance is determined by several factors:

a) Notice of the third-party summons must be given to all of the noticees within three days of service.

b) There are twenty days allowed from the date of giving notice, for the

noticees to begin a proceeding to quash the summons.

c) Section 7609(a)(1) states that the notice must be made "no later than the 23rd day before the day fixed in the summons as the day upon which such records are to be examined."

(1) Thus, if notice is given on the same day that service is made, the date of appearance, at the earliest, would be the 23rd day after the notice and service. It is safe to set the appearance date for the 26th day after service to allow for the 3 days in which to provide notice to the noticee. If notice is required, the summoned party may not agree with the Service to respond sooner than this.

(2) To sum, for third-party summonses, the date for appearance can be no less than 23 days after notice is given. For non-third-party summonses, it may be no less than 10 full days after the date of service. In both, the date of service is excluded from the computation.

d) In United States v. Malnik, 489 F.2d 682 (5th Cir. 1974), cert. denied, 419 U.S. 826 (1974), the summoned taxpayer entered into an agreement with the Service not to appear based in part on his claim of constitutional privileges. Even though the privileges were infirm, the court held that the Service waived its right to have the taxpayer appear.

G. Powell Elements and Taxpayer Defenses

In addition to all the foregoing mechanical and format considerations, every summons must be reviewed with the aim of determining whether a *prima facie* case for enforcement can be made pursuant to United States v. Powell, 379 U.S. 48 (1964), and whether it can withstand affirmative defenses to enforcement as raised by the taxpayer.

H. Non-IRS Limitations on IRS Summons Authority

1. The authority of the Service to issue and enforce summonses is governed by I.R.C. §§ 7601 et seq., which gives the Service broad powers to summon any information that may be relevant to the investigation of a person's tax liability. The Service's summons powers are not limited except by clearly expressed Congressional intent or clearly recognized privileges and immunities. In United States v. Arthur Young & Co., 465 U.S. 805, 816 (1984), the Supreme Court stated that except for traditional privileges and limitations, other restrictions on the Service's summons power should be avoided absent unambiguous directions

from Congress.

2. Although courts have been reluctant to circumscribe the Service's summons power as granted to it by Congress, privacy rights have developed in the form of a patchwork of industry and sector-specific statutes that can be found in statutes other than the Code. When Congress has intended to exclude the Service from general restrictions placed on government investigatory powers contained in statutes other than the Code, it has done so explicitly. For example, Congress provided an exception for the Service from the strictures contained in the Right to Financial Privacy Act, 12 U.S.C. §§ 3401 et seq., so long as the Service followed Code procedures or is seeking the information to investigate or recover an improper Federal payment (such as an erroneous tax refund or credit). 12 U.S.C. §§ 3413(c) & (k)(2) (2008); but see Neece v. United States, 922 F.2d 573, 575-76 (10th Cir. 1990) (Tenth Circuit requires compliance with section 7609 notice requirements; informal review under section 7602 insufficient). The Stored Communications Act (SCA), 18 U.S.C. §§ 2701 et seq., may prevent the Service from obtaining from an Internet Service Provider (ISP) the content of customer emails that are less than 180 days old by means of a summons. See United States v. Warshak, 631 F.3d 266 (6th Cir. 2010) (provisions of the SCA allowing government to obtain e-mails in question without a search warrant backed by probable cause violate the Fourth Amendment); Theofel v. Farey-Jones, 359 F.3d 1066, 1075-77 (9th Cir. 2003) (opened e-mails in an ISPs possession are stored for "backup protection," rejecting government's amicus arguments that these opened e-mails were not protected by the SCA).

> **Note:** In Policy Statement 4-120, dated May 3, 2013, the Service announced that it will follow the holding of United States v. Warshak, 631 F.3d 266 (6th Cir. 2010), and obtain a search warrant in all cases when seeking from an internet service provider (ISP) the content of email communications stored by the ISP. Accordingly, such information will not be sought from an ISP in any civil administrative proceeding.

3. Certain federal privacy statutes were designed to protect the right to privacy from private and government sector infringement by imposing limitations on the Service's summons authority. These limitations must be complied with before a party may disclose information to the Service pursuant to a summons. Examples of these statutes include the following: the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (FERPA); the Employee Polygraph Protection Act, 29 U.S.C. §§ 2001–2009 (EPPA); the Cable Communications Policy Act, 47 U.S.C. §§ 551 et seq. (CCPA); the Video Privacy Protection Act, 18 U.S.C. § 2710 (VPPA); the Communications Assistance for Law Enforcement Act, 47 U.S.C. § 1001 et seq. (CALEA); the Stored Communications Act, 18 U.S.C. §§ 2701 et seq. (SCA); and Part D of the Social Security Act, 42 U.S.C. §§ 651-669.

V. WITNESS PROBLEMS

A. Payment

1. I.R.C. § 7610 provides for payment of per diem and mileage costs.

2. Nontender by the United States of such fees does not adversely affect enforcement of the summons. United States v. Schmidt, 816 F.2d 1477 (10th Cir. 1987).

B. Right to Counsel

A witness is entitled to counsel of choice. 5 U.S.C. § 555(b). If the witness cannot speak or understand English, an interpreter must be provided. The taxpayer has no right to be present himself or to have his counsel present during the questioning of a third-party witness. United States v. Taylor, No. 79-28-N, 1979 WL 1298 (E.D.Va. Feb. 13, 1979); United States v. McEligot, No. 14-cv-05383-JST, 2015 U.S. Dist. LEXIS 45519 (N.D. Cal. April 6, 2015). Further, if the taxpayer's counsel at the interview of a third-party witness, claims to be that party's counsel, the interview should be adjourned to explore any possible dual representation problems.

C. Recording of Interviews

The Technical and Miscellaneous Revenue Act of 1988 (TAMRA) added section 7521 to the Code, which prescribes rules for audio recording of interviews.

1. The taxpayer may, after giving advance notice to the Service, record any in-person interviews, at the taxpayer's own expense.

2. The Service may record any in-person interview if:

   a) the taxpayer receives prior notice of such recording;

   b) the taxpayer is provided a transcript or copy of the recording, if the taxpayer so requests, but only if the taxpayer reimburses the Service for the cost of the transcription and/or reproduction. I.R.C. § 7521(a)(2).

D. Counsel Attorney's participation in summoned interviews

Chief Counsel attorneys may question summoned witnesses under oath and receive summoned books, papers, records, or other data in appropriate cases, such as

investigations involving large deficiencies or liabilities, high profile taxpayers, and cases having unusually complex issues of fact or law. See section 301.7602-1(b); Delegation Order 25-1, (IRM 1.2.52.2). Counsel attorneys may directly question summoned witnesses and may fully participate in a summoned interview along with a Service officer or employee.

1. The authority to directly question summoned witnesses is in addition to the other types of assistance given by Counsel attorneys to Service personnel in summoned interviews. Even when Chief Counsel attorneys participate in summoned interviews, Examination, Collection, and Criminal Investigation personnel are responsible for developing and conducting the examination or investigation.

2. Chief Counsel attorneys may not issue, serve, or approve the issuance of any summons. When two or more persons have been designated to interview a summoned witness, the interview should primarily be conducted by one. When it is necessary for two or more persons to question a witness, they shall conduct the interview in seriatim order. The Service and Counsel may determine that it is appropriate for Counsel to question a witness depending on the particular case or the developments arising during the interview.

E. Participation of a Contractor in Interview of a Witness

1. The Service may allow outside contractors to ask questions at and otherwise participate fully in a summons interview. Treas. Reg. § 301.7602-1(b)(3).

2. In United States v. Microsoft Corp., No. C15-00102RSM, 2015 WL 9301489, *6-7 (W.D. Wash. Nov. 20, 2015), the court held that the IRS was not prevented from allowing contractors to ask questions in a summons interview.

F. Intervention and Injunctive Relief in Third-Party Summonses Not Subject To Notice Requirements

1. Neither the witness nor the taxpayer has a right to enjoin or quash a third-party summons not subject to the notice requirements. Reisman v. Caplin, 375 U.S. 440 (1964). The proper proceeding is a motion to dismiss on authority of Reisman. See also Stewart v. United States, 511 F.3d 1251 (9th Cir. 2008).

2. Objections to the validity of the summons can be raised if the government institutes enforcement action. Anyone who fears injury, if the summoned witness complies voluntarily, may seek to have the witness restrained from complying until ordered to do so by a Federal court as a result of an enforcement action. The

government will not ordinarily intervene in an action between the taxpayer and the summoned party, but has done so when a shelter investor sued a promoter to prevent disclosure of the investor's name when the assessment statute expiration date was near to expiring. See Doe v. KPMG, 325 F. Supp. 2d 746 (N.D. Tex. 2004), rev'd in part, 398 F.3d 686 (5th Cir. 2005).

3. A taxpayer has no automatic right to intervene in a proceeding to enforce a third-party summons that is not subject to the notice requirement of section 7609. The court may, in its discretion, permit the intervention. Donaldson v. United States, 400 U.S. 517 (1971)

G. Intervention and Rights of Noticees in I.R.C. § 7609 Cases

For third-party summonses, any person entitled to notice under section 7609(a) has a right to intervene in the summons enforcement proceeding.

VI. ENFORCEMENT JURISDICTION

A. I.R.C. §§ 7604(a) and 7402(b)

If any person is summoned to appear, testify, or to produce books, papers, records, or other data, the United States District Court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records or other data. See United States v. Cathcart, 106 A.F.T.R.2d 6958 (9th Cir. 2010) (jurisdiction and venue proper where summoned party found within the district).

1. **Section 7604(b)** Whenever any summoned person neglects to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required (ordinarily after a court has first ordered enforcement of the summons), the Secretary may apply to the District Court for an attachment against him for contempt.

2. **There are two types of contempt - civil and criminal**.

   a) The purpose of civil contempt is to compel a party to comply or to compensate the other party for his refusal.

   b) Criminal contempt is designed to punish.

   c) Either form may be punished by fine, imprisonment or both.

3. In Schulz v. IRS, 395 F.3d 463 (2d Cir.), clarified on rehearing by, 413 F.3d

297 (2d Cir. 2005), the Service served the taxpayer with several summonses seeking testimony and documents in connection with a Service investigation of the taxpayer. Upon receiving the summons, the taxpayer filed a motion to quash the summonses in the United States District Court. The court dismissed the action for lack of subject matter jurisdiction, finding that the Service had never commenced a proceeding to enforce the summons. The Second Circuit affirmed, noting that the taxpayer was under no threat of consequence for refusing to comply with the summonses until such time the Service chose to compel enforcement through a court order. Id. As such, there was no viable "case or controversy." Id.

4. In Reisman v. Caplin, 375 U.S. 440 (1964), the Supreme Court held section 7604(b) covers instances of "default or contumacious refusal to honor a summons, before a hearing officer." This includes the failure to preserve records after service of the summons. However, as in a criminal prosecution under I.R.C. § 7210, infra at G, the witness may assert objections at the hearing before the court authorized to make such order as it "shall deem proper." Section 7604(b).

a) In In re D.I. Operating Co., 240 F. Supp. 672 (D. Nev. 1965), the taxpayer's failure, through gross inattention and reckless disregard, to preserve its records while contesting the summons, constituted civil contempt and warranted payment of a compensatory fine. The Court held that receipt of a Service summons places a duty on the summoned party to safeguard the records so that they will be available on the effective date of the summons and that any violation of this duty subjects the party to the appropriate sanctions of civil contempt.

b) In United States v. Edmond, 355 F. Supp. 435 (W.D. Okl. 1972), an accountant who turned over work papers to the taxpayer after receiving a summons, was held in civil contempt. The Court fined the accountant the reasonable costs and expenses incurred by the government in the proceeding to enforce the summons. See also, United States v. Herbert, 73-1 USTC 9201 & 9383 (D. Utah 1972).

c) In United States v. Bright, 596 F.3d 683 (9th Cir. 2010), the taxpayers lost a summons enforcement proceeding where they had raised the Fifth Amendment as a defense to compliance with the summons. Subsequently, while the taxpayers produced some responsive documents, they failed to produce other documents and, for the first time, raised the argument that they did not possess some of the relevant documents. The Ninth Circuit affirmed the district court's contempt finding that the taxpayers were not in substantial compliance with the summons enforcement order and not crediting the taxpayers' late claim that they were not in possession of some of the documents.

5. A Court also has the inherent judicial power to hold a party in contempt for refusal to obey its orders (e.g., an order enforcing a summons). See United States v. Asay, 614 F.2d 655, 659 (9th Cir. 1980) for a good discussion of this subject.

6. **Failure to obey the summons** is also a crime. I.R.C. § 7210. This provision is seldom used. When it is, it would come within the Criminal Tax function of our offices.

B. Field Counsel Procedure

1. CCDM 34.6.3 provides that Field Counsel may transmit all suit authorization, defense, settlement and related correspondence directly to the Tax Division of the Department of Justice or the United States Attorney, as appropriate.

2. CCDM 34.6.3.3.2, as amended by CC-Notice 2016-009 (June 30, 2016), provides that suit authorization, defense and settlement letters shall be sent to CC:PA:6 and 7 for review prior to transmittal to the Tax Division, Department of Justice, in the following situations involving summons enforcement proceedings:

a) Suit recommendations for designated summonses and related summonses under I.R.C. § 6503(j). Due to the typically short time frame, these suit letters should be sent to PA and to the Tax Division for simultaneous review.

b) Summonses issued to obtain "audit work papers" or "tax accrual work papers" as defined in the IRM, regardless of whether the summons is served on the taxpayer or on the taxpayer's independent auditor. In U.S. v. Arthur Young, 465 U.S. 805 (1984), the Supreme Court held that tax accrual work papers prepared by a corporation's independent auditor are not entitled to immunity from disclosure in response to an IRS summons. See also U.S. v. El Paso, 682 F.2d 530 (5th Cir. 1982), cert. denied, 466 U.S. 944 (1984); U.S. v. Rockwell Int'l, 897 F.2d 1255 (3d Cir. 1990); U.S. v. Textron, 577 F.3d 21 (1st Cir. 2009), cert. denied , 130 S.Ct. 3320 (2010). But see United States v. Deloitte LLP, 610 F.3d 129 (D.C. Cir. 2010); Regions Financial v. U.S., 2008 WL 2139008 (N.D. Ala. May 8, 2008) (appeal dismissed as moot).

c) Requests for court authorization to serve "John Doe" summonses pursuant to section 7609(f).

d) Summonses for foreign records from third parties.

e) Summons cases that Division Counsel considers sensitive and

deserving of PA pre-review (e.g., for LB&I promoter investigations).

f) Summons cases with HIPPA or RFPA issues.

g) Summons cases where the government advocates assertion of the tax shelter exception of section 7525(b).

h) Summons requests involving other significant, novel, or important issues, at the discretion of Field Counsel.

3. Summonses to obtain information for a foreign government pursuant to a request under a tax treaty shall be coordinated with ACC (International).

C. Judicial Procedure in Enforcement Proceedings

1. Historically, summons enforcement proceedings were straightforward. No responsive pleadings were required of the summoned party. Rather, appearance by the summoned party at the court's hearing would serve as an "answer."

2. However, in United States v. McCarthy, 514 F.2d 368 (3d Cir. 1975), the Third Circuit endorsed a procedure whereby a Show Cause Order was issued to set a deadline for the filing of a responsive pleading, which had to raise defenses, etc., supported by an affidavit. Only defenses thus raised were considered. See United States v. Kis, 658 F.2d 526 (7th Cir. 1981); cert. denied sub nom. Salkin v. United States, 455 U.S. 1018 (1982). The United States now commonly requests and relies upon Show Cause Orders in simple summons cases.

3. Pre-hearing discovery is rarely permitted:

a) The government insists that pre-hearing discovery should not be allowed. Summons enforcement proceedings should be summary in nature and discovery should be limited. United States v. Stuart, 489 U.S. 353, 369 (1989).

b) The Supreme Court does not require evidentiary hearings in Service summons proceedings. Tiffany Fine Arts, Inc. v United States, 469 U.S. 310, 324 n. 7 (1985). To the extent that a district court in its discretion holds an evidentiary hearing, that court could determine whether discovery is justified and to what extent. See United States v. Ryan, 485 F. Supp. 1285 (S.D.N.Y. 1980), and United States v. Kis, 658 F.2d 526 (7th Cir. 1981), cert. denied, 455 U.S. 1018 (1982).

c) In United States v. Clarke, 134 S.Ct. 2361 (2014), the Court held that a

taxpayer is entitled to an evidentiary hearing to examine an IRS agent regarding his purposes for issuing a summons only when the taxpayer can point to specific facts or circumstances plausibly raising an inference of bad faith. See Hawaii Pac. Fin., Ltd. v. United States, No. 13-00692 DKW-RLP, 2014 U.S. Dist. LEXIS 106405 (D. Haw. Aug. 4, 2014) (holding that the taxpayer failed to raise an inference of bad faith because the good faith inquiry requires examination of the institutional posture of the IRS and not the intent of a single agent); see also United States v. Ghafourifar, No. C14-03819 HRL, 2014 U.S. Dist. LEXIS 162149 (N.D. Cal. Nov. 19, 2014) (holding that the taxpayer failed to point to specific facts or circumstances that plausibly raise an inference of bad faith). But see also United States v. Microsoft Corp., No. C15-00102 RSM, 2015 U.S. Dist. LEXIS 97875 (W.D. Wash. June 17, 2015) (granting the taxpayer's request for an evidentiary hearing). On remand from the United States Supreme Court, the Eleventh Circuit, in United States v. Clarke, 816 F.3d 1310 (11th Cir. 2016), held that taxpayers failed to meet their burden under the new standard in Clarke to require an evidentiary hearing. While the court found that taxpayers' submissions raised many allegations that constitute an improper purpose as a matter of law, the court held that taxpayers raised no plausible inference of improper motive but only mere conjecture or bare assertions of improper motive. Id. at 1318.

4. If an order is entered granting or denying the enforcement of a summons, it is an appealable order. Reisman v. Caplin, 375 U.S. 440 (1964).

5. The government's remedy for a summoned party's disobedience of an enforcement order is generally to bring a contempt proceeding where the summoned party is required to show cause why he/she should not be adjudged in contempt of the court order. See United States v. Asay, 614 F.2d 655, 659 (9th Cir. 1980); United States v. Rylander, 460 U.S. 752 (1983).

6. The Supreme Court in United States v. Zolin, 491 U.S. 554 (1989), in an equally divided decision (only eight Justices opined), upheld the Ninth Circuit decision that a district court can place restrictions on the government's use of information (i.e., the ability to disseminate the information) obtained through summons enforcement where the enforced summons satisfies Powell, 379 U.S. 48. The Supreme Court chose to affirm the Ninth Circuit's ruling in Zolin because it was equally divided (effectively meaning the issue was unresolved and required further development in later circuit court cases.) The Court agreed in Zolin that the district court could prohibit the Service from delivering the summoned documents to any other governmental agency unless criminal tax prosecution was sought or a court order obtained. However, in United States v. Jose, 519 U.S. 54 (1996), the Supreme Court, noting that its decision in Zolin was evenly divided, ordered the Ninth Circuit on remand to consider the merits of this

same issue. In United States v. Jose, 131 F.3d 1325 (9th Cir. 1997), the Ninth Circuit reversed its position in Zolin and held that a district court is strictly limited to granting or denying enforcement of a Service administrative summons; it could not impede the Service's ability to transfer summoned information.

VII. NOTICE AND RECORD KEEPING REQUIREMENTS OF THIRD-PARTY CONTACTS

A. Section 7602(c) - Statutory Language

NOTICE OF CONTACT OF THIRD PARTIES. --

(1) **GENERAL NOTICE**. -- An officer or employee of the Service may not contact any person other than the taxpayer with respect to the determination or collection of the tax liability of such taxpayer without providing reasonable notice in advance to the taxpayer that contacts with persons other than the taxpayer may be made.

(2) **NOTICE OF SPECIFIC CONTACTS**. -- The Secretary shall periodically provide to a taxpayer a record of persons contacted during such period by the Secretary with respect to the determination or collection of the tax liability of such taxpayer. Such record shall also be provided upon request of the taxpayer.

(3) **EXCEPTIONS.** -- This subsection shall not apply –
- (a) to any contact which the taxpayer has authorized,
- (b) if the Secretary determines for good cause shown that such notice would jeopardize collection of any tax or such notice may involve reprisal against any person, or
- (c) with respect to any pending criminal investigation.

B. Summary of Section 7602(c) Statutory Requirements

1. Give pre-contact notice

2. Record the contact

3. Report the contact

C. Four Statutory Exceptions:

1. Contacts authorized by the taxpayer

2. Advance notice or reporting the contact may jeopardize collection

3. Advance notice or reporting the contacts may involve reprisal against any person

4. Contacts made with respect to any pending criminal investigation

Note: Final regulations became effective on December 18, 2002.

D. Legislative Background

1. The Finance Committee proposed section 7602(c) as RRA § 3417, which:

    a) Required advance notice of <u>specific</u> contacts

    b) Did not require a record of contacts

    c) Did not include an exception for reprisal situations

    d) Reflected concern with the chilling effect on the taxpayer's business and damage to the taxpayer's reputation in the community

2. Senate proposal modified by the Conference Committee

    a) Notice of specific contacts no longer required

    b) Advance general notice and record of persons contacted now required

    c) Added exception for reprisal situations

E. Key Issues in Applying the Statute

1. Balance three interests in applying the statute

    a) Taxpayer's concerns - reputation and business relations

    b) Third party's concerns – privacy

c) Service's operational needs

2. Elements of a reportable contact - a section 7602(c) contact is a communication which—

a) Is initiated by a Service employee;

b) Is made to a person other than the taxpayer;

c) Is made with respect to the determination or collection of the tax liability of such taxpayer;

d) Discloses the identity of the taxpayer being investigated; and

e) Discloses the association of the Service employee with the Service.

F. Examples of Elements of Reportable Contacts

1. **Elements 1 - 5** (all five elements present - section 7602(c) contact)

Example: A revenue officer refers a case requesting a suit for failure to honor a levy by a third party. The manual states that counsel should attempt to resolve the matter without litigation.

Analysis: Section 7602(c) would apply to any contacts with the person upon whom a levy was served because:

(1) The contact is being initiated by an employee of the Service. Counsel attorneys are employees of the Service for purposes of section 7602(c).

(2) The contact is being made with a person other than the taxpayer whose liability is being collected by means of a levy.

(3) The contact is being made with respect to the collection of the taxpayer's liability because the purpose of the contact is to obtain compliance with the levy without litigation, and

(4 & 5)The identity of the taxpayer has been and will be disclosed to the third party, and the employee's association with the Service will also be disclosed.

Note: Service of the levy is contact with a third party. Under section 301.7602-

2(e)(4), Example 5, service of a copy of the levy to the taxpayer satisfies the post-recording and reporting requirements of section 7602(c) for this contact. The taxpayer should have been provided, however, with the advance general notice prior to the issuance of the levy. Before contacting the levied upon party, the Counsel attorney should verify that the advance general notice has been provided to the taxpayer. Additionally, after making the contact, the Counsel attorney must record the contact on Form 12175 and forward the form to the section 7602(c) Third-Party Contact Coordinator.

2. **Element 1 - communication initiated by a Service employee**

Example 1: An informant contacts an SBSE Counsel attorney to report tax fraud by another taxpayer. Prior to referring the information to CI, the attorney questions the informant about the identity of the taxpayer, the nature of the fraud, and the source of the information. Because this contact was not **initiated** by a Service employee, section 7602(c) does not apply. Section 7602(c) does not apply in situations where the informant initiates the contact, or the Service employee is merely responding to an incoming call or request for a meeting from the informant.

Example 2: Facts from above. Subsequently the SBSE attorney refers the information to CI. CI asks the attorney to contact the informant for additional information before CI determines that they should open an investigation. In this situation, it is a Service employee who will be initiating the contact with the third party. If CI or a CT attorney had made the contact instead, it would be excluded from third party contact rules by IRC § 7602(c)(3)(C).

Note: Because there is no specific exception for Service initiated contacts with informants, the Service employee should determine during the initial contact made by the informant whether the informant has any reason to believe that disclosing his name to the taxpayer may involve reprisal against any person. If it is determined during this contact that the reprisal exception applies, the Service employee may make subsequent contacts with the informant without providing the taxpayer with the advance general notice. The contact should be reported on Form 12175; however, no third party information should be included.

3. **Element 2 - any person other than the taxpayer**

Example 1: A Counsel attorney receives a case with an issue that he knows was litigated in another office. The attorney calls the other Counsel office to talk to the attorney who handled the other case.

Analysis: Section 7602(c) does not apply in this situation because contacts made with other Counsel or Service employees who are acting within the scope of their official duties are not section 7602(c) contacts. Section 301.7602-2(c)(2)(A).

Example 2: A field counsel attorney uses Lexis and the EDGAR/SEC library to obtain information about a particular taxpayer's corporate structure.

Analysis: Section 7602(c) does not apply because a computer is not a **person** other than the taxpayer. Accessing a computer database such as Lexis or Westlaw, or conducting research on the Internet, is similar to obtaining information from a book or a magazine in a library. Section 301.7602-2(c)(2)(B).

Example 3: A Service employee seeks information about a corporate taxpayer from an employee of the taxpayer. The employee is not a corporate officer.

Analysis: Section 7602(c) does not apply if the employee is acting within the scope of his employment. Contacts with employees of a corporation who are acting within the scope of their employment are considered to be contacts with the taxpayer. There is a presumption that employees are acting within the scope of their employment if the employee is on business premises and is contacted during business hours. Section 301.7602-2(c)(2)(C).

4. **Element 3- with respect to the determination or collection of the taxpayer's tax**

Example: As part of a compliance check on a return preparer, a Service employee visits the preparer's office and reviews the preparer's client files to ensure that the proper forms and records have been created and maintained.

Analysis: This contact is not a section 7602(c) contact of the preparer's clients because it is not for the purpose of determining the tax liability of the preparer's clients, even though it might uncover information that would lead to an examination recommendation. Section 301.7602-2(c)(3)(D)(ii), Example 1.

5. **Element 4 - identifies the taxpayer**

Example: A Service employee is appraising a three bedroom, two and a half bath townhouse in a large development in an area containing many such developments in connection with an estate tax examination. After searching the multiple listing service, the Service employee identifies several properties that he believes to be comparable to the taxpayer's property. However, in order to determine what, if any, adjustments should be made to the sales price of those properties in arriving at a value for the taxpayer's property, the Service employee decides to contact the listing agents for the various properties to find out if there were any distinguishing features about those particular properties that should be taken into account.

Analysis: In this scenario, the Service employee is able to obtain the needed information without disclosing to the listing agents the identity of the taxpayer.

Further, because the nature of the property is not unique, the listing agent will not be able to identify the taxpayer based upon the questions asked. Therefore, this contact is not subject to the requirements of section 7602(c). See section 301.7602-2(c)(4)(ii), Example 2.

6. **Element 5 - identifies the employee's association with the Service**

Example: A Service employee calls a telephone company directory assistance line to obtain the telephone number and/or address of a taxpayer.

Analysis: If a Service employee contacts a telephone company directory assistance line like any other consumer, i.e., without identifying his or her name, employment status, and purpose of the directory assistance call-and seeks publicly listed information concerning the telephone number and/or address of an individual or business, the contact is not a section 7602(c) contact.

Note: In most examination situations, Service employees should identify themselves as such when contacting third parties. However, for collection, Service employees ordinarily should not volunteer their association with the Service to third parties or unknown persons, if simply trying to locate the taxpayer or bring the taxpayer to the phone. 15 U.S.C. § 1692b; I.R.C. § 6304(b)(4).

G. Exceptions - I.R.C. § 7602(c)(3)

1. Section 7602(c)(3) lists four situations where the Service needn't provide the taxpayer with advance notice and a list of third parties contacted. However, in many situations, the advance notice that third parties may be contacted will have already been provided to the taxpayer when one of these exceptions arises.

a) Authorization - Section 7602(c)(3)(A) excludes contacts which are authorized by the taxpayer.

(1) Authorization can be expressed orally or in writing. Document the case file to reflect the date and method the taxpayer used to authorize the contact.

(2) Form 12180 can be used to document the taxpayer's authorization. More than one third party can be listed on Form 12180. Blanket authorizations are not acceptable.

(3) In joint filing situations, both spouses must authorize the contact.

(4) If the taxpayer has authorized the third-party contact, the employee will continue to document the case file with routine case actions, but the Form 12175 does not need to be completed.

Note: Section 7602(c) does not require a Service employee to obtain authorization from the taxpayer to contact a third party. Service employees are not prohibited from making a third-party contact as long as the requirements of section 7602(c) are met. The taxpayer may not prevent a Service employee from contacting a third party by refusing to provide authorization.

b) Jeopardy - Section 7602(c)(3)(B) - If the employee making the third-party contact determines that providing advance notice or a record of the specific third-party contact would jeopardize the collection of any tax, the employee should take the following action:

(1) The case file should be documented with specific facts about the third-party contact;

(2) The case file should be documented with information regarding the circumstances surrounding the jeopardy determination;

(3) Form 12175 should be completed but **not** forwarded to the section 7602(c) Third-Party Contact Coordinator. The form should be retained with the file for forwarding at a later date; and

(4) When the jeopardy situation no longer exists, the employee will forward the Form 12175 to the coordinator.

c) Reprisal - Section 7602(c)(3)(B) - If providing third-party information to the taxpayer may subject any person to reprisal, the employee must prepare a separate Form 12175 to report the reprisal situation.

(1) The employee will include the taxpayer's TIN; name control; the employee number; the date of contact; and the word REPRISAL in the name field. **No third-party information may be included on the form.** The form is sent to the coordinator.

(2) While the information on Form 12175 is retained by the Service, it will not be included in the list of persons contacted (Letter 3173) that is provided to the taxpayer.

(3) The reprisal determination must be made for all third-party contacts by the employee making the third-party contact. The

determination must be made on a case-by-case basis. A blanket reprisal determination for different types of contacts is not appropriate.

d) Pending Criminal Investigation - Section 7602(c)(3)(C) - Section 7602(c) does not apply to contacts made during an investigation, or inquiry to determine whether to open an investigation, when the investigation or inquiry is--

(1) Made against a particular identified taxpayer for the primary purpose of evaluating the potential for criminal prosecution of that taxpayer; and

(2) Made by a Service employee whose primary duties include either identifying or investigating criminal violations of the law.

2. Non-statutory exceptions:

a) Contacts made in the course of a pending court proceeding.

b) Contacts made with government officials to obtain publicly available information

c) Contacts with persons hired by the Service to perform services relating to the examination of or collection from a taxpayer.

H. Compliance with Notice and Recordkeeping Requirements

1. Advance General Notification Requirement - Section 7602(c)(1)
When a determination to contact any third parties is made, the employee should review the case file to determine whether the taxpayer has been given the advance general notification. The employee should document the file that this procedure has been done. If the taxpayer has not been given the required notification, then check with your manager as to the procedures presently being employed to give the advance general notification.

a) Courts have been split on whether providing the taxpayer a copy of IRS Publication 1 is sufficient notice to satisfy the advance general notification requirement under section 7602(c)(1). See Bible Study Time, Inc. v. United States, 240 F. Supp. 3d 409 (D.S.C. 2017) (holding that IRS Publication 1 is sufficient notice to a taxpayer under section 7602(c)(1)); compare with Baxter v. United States, Case No. 15-cv-04764-YGR, 2016 WL 468034 (N.D. Ca. Feb. 8, 2016) (holding

that IRS Publication 1 is not sufficient notice because the publication only generically references that the IRS may talk to third parties throughout the course of an investigation). The Baxter case is pending on appeal to the Ninth Circuit.

2. Notice of Specific Contacts - Section 7602(c)(2)

a) The Service is required to provide a record of persons contacted to the taxpayer upon the request of the taxpayer.

b) The Service employee should complete Form 12175 as part of routine case documentation when a third-party contact is made.

c) If multiple contacts are made with the same third party but on different dates, Form 12175 will be completed for each contact.

d) Forms 12175 will be forwarded to the section 7602(c) Third-Party Contact Coordinator. A copy of each Form 12175 prepared should be kept with the appropriate case file and the history documented to show the action taken.

e) A section 7602(c) Third-Party Contact Coordinator will be the responsible party for maintaining Forms 12175 and for providing a list of contacts to taxpayers who request such information.

f) An employee receiving a request from a taxpayer for a list of contacts will need to obtain the taxpayer's TIN and address, and refer such information to the section 7602(c) Third-Party Contact Coordinator. A separate request needs to be submitted for each list of contacts.

VIII. PROHIBITION - FINANCIAL STATUS AUDITS

The Service may only use financial status or economic reality examination techniques in situations where reasonable indications of unreported income already exist. Section 7602(e)

A. A "financial status technique" involves an examination of the taxpayer's inventory of assets, which may have been acquired before or after the period in question.

B. An "economic reality technique" involves an examination of the taxpayer's life style.

IX. POWELL ELEMENTS

A. Legitimacy

1. Civil Purposes - Section 7602(a) authorizes the Service to use the summons power for any bona fide civil audit or tax collection purpose.

2. Criminal Purposes - In the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Congress amended the Internal Revenue Code to permit the Service to issue a summons for the purpose of "inquiring into any offense connected with the administration or enforcement of the Internal Revenue Laws." See section 7602(b). As a result, the Service may issue a summons or the United States may begin an action to enforce a summons for a "solely criminal" purpose up to the point that either:

a) The Service refers the case (for purposes of this section, each taxable period and type of tax are treated separately) to the Department of Justice for criminal tax prosecution; or

b) The tax case is opened for grand jury investigation, whether upon the request of the Justice Department or of the Service. Section 7602(d).

B. Relevancy

The data sought must be of a type that may be relevant or material to the tax investigation.

1. The "may be relevant" standard of section 7602 has been defined by the courts to mean any information that "might shed light" on the correctness of the tax-payer's return. See, e.g., United States v. Harrington, 388 F.2d 520 (2d Cir. 1968). The Supreme Court in United States v. Arthur Young, 465 U.S. 805 (1984) stated that this standard was widely accepted among the Courts of Appeal. See, e.g., United States v. Turner, 480 F.2d 272, 279 (7th Cir. 1973); United States v. Ryan, 455 F.2d 728, 733 (9th Cir. 1972); United States v. Egenberg, 443 F.2d 512, 515-516 (3d Cir. 1971). The Supreme Court in Arthur Young stated that the Second Circuit had amplified the test by stating that "the might" in the articulated standard is an indication of a realistic expectation rather than an idle hope that something may be discovered. Arthur Young, 465 U.S. at 814 n.11. It is important to note that when seeking records of a third party, the standard of relevancy is slightly higher because the Service is required to establish a nexus between the records of the third party and the investigation against the taxpayer.

2. A limited "fishing expedition" is permissible. United States v. Giordano, 419

F.2d 564 (8th Cir. 1969), cert. denied, 397 U.S. 1037 (1970). The Service may inquire into "any offense" connected with the administration or enforcement of the internal revenue laws." United States v. Abrahams, 905 F.2d 1276 (9th Cir. 1990) overruled on other grounds by United States v. Jose, 131 F.3d 1325, 1329 (9th Cir. 1997) (overruled Abrahams to the extent that Abrahams allowed a court to conditionally enforce a summons). See section 7602(b).

3. A summons must be limited and specific to avoid:

a) Unenforceability for overbreadth; and

b) Exercise of judgment in too narrow a fashion by witness.

4. On some occasions, data may be sought for periods before or after the periods under investigation. Relevancy should be clearly explained in the government's declaration(s) in support of enforcement in such situations. See United States v. Goldman, 637 F.2d 664 (9th Cir. 1980).

Note: For the relevance of prior years, see generally, Holland v. United States, 348 U.S. 121 (1954); Falsone v. United States, 205 F.2d 734 (5th Cir.), cert. denied, 364 U.S. 864 (1953); United States v. Carrigar, 592 F.2d 312 (6th Cir. 1979).

5. A summons not naming a specific taxpayer (i.e., a "John Doe" summons) may be enforceable under the "may be relevant" standard. However, judicial review is required for John Doe summonses, before they may be served. Section 7609(f). Field Counsel must send all proposed John Doe summonses and the accompanying suit letters to the Chiefs of Branches 6 and 7 of CC:PA for assignment and pre-review.

C. Non-possession

For a summons to be enforceable under Powell, the Service must not already possess the information requested in the summons. In practice, the courts have taken a practical approach, rather than a literal one, when applying this Powell element. United States v. Davis, 636 F.2d 1028, 1037 (5th Cir.), cert. denied, 454 U.S. 862 (1981). In Davis, the circuit court reasoned that this Powell requirement is a gloss on the section 7605(b) prohibition on unnecessary examinations, which has always been applied narrowly to avoid infringing excessively on the Service's legitimate duty to investigate compliance with the revenue laws. In taking a practical approach to this Powell requirement, the courts often reject a taxpayer's objection to producing summoned records merely because a revenue agent had previously viewed those records during an earlier phase of a civil examination that was later referred for criminal investigation. See Spell v. United States,

907 F.2d 36 (4th Cir. 1990) (taxpayer may not refuse to comply with a summons issued by a special agent merely because his records were examined previously by a RA).

Another common fact pattern arising under this Powell requirement involves a summoned party's objection to a summons for records that the Service possesses but cannot practically retrieve. The issue arose with summoned information returns, such as Forms 1099, submitted by third-party payors. Case law developed holding that the Service's practical inability to retrieve the information means that the Service did not possess the information within the meaning of the third Powell requirement, even though the Service may have technical possession. See United States v. First National State Bank of New Jersey, 616 F.2d 668 (3d Cir.), cert. denied sub nom Levey v. United States, 447 U.S. 905 (1980). However, even though this general principal remains valid, the Service should not rely on it to justify summoning Forms W-2 or 1099 because it now has the computerized ability to retrieve this information. Thus, as a general rule, a summons should not be issued for these or any other records that the Service can practically retrieve. Whenever the Service summonses information that it possesses, the Service should anticipate having to provide testimony that describes its storage and retrieval procedures and explain why the summoned information cannot be retrieved under those procedures. See United States v. Bank of California, 652 F.2d 780 (9th Cir. 1980). See also United States v. Monumental Life Ins., 440 F.3d 729 (6th Cir. 2006); Action Recycling Inc., 721 F.3d 1142 (9th Cir. 2013).

D. Regularity

The Powell requirement that the Service must have followed all administrative steps required by the Code is usually understood to refer to the issuance and service requirements of sections 7602 and 7603. However, at least one district court has refused to enforce a summons because it found the Service had failed to comply with the notice of third-party contact rules under section 7602(c). United States v. Jillson, No. 99-14223-CIV, 1999 WL 1249414 (S.D. Fla. Oct. 28, 1999). Third-party and "John Doe" summonses have additional statutory requirements.

X. COMMON DEFENSES

Some defenses render a summons wholly unenforceable. Often, though, part of the summons will still be valid. The courts have the power to modify the summons rather than deny enforcement of the entire summons. See, e.g., United States v. Bisceglia, 420 U.S. 141 (1975); United States v. Duke, 379 F. Supp. 545 (N.D. Ill. 1974).

A. First Amendment (Freedoms of religion and association)

1. A summons issued pursuant to section 7602 seeking bank records concerning a church neither promotes the establishment of, nor restricts the free exercise of, religion. United States v. Grayson County State Bank, 656 F.2d 1070 (5th Cir. 1981), cert. denied sub nom First Pentecostal Church v. United States, 455 U.S. 920 (1982), (enforcement of the summons would not constitute an excessive governmental entanglement with church affairs and would not have a "chilling" effect upon the free exercise of religion); accord United States v. Toy National Bank, 79-1 USTC & 9344 (N.D. Iowa 1979).

2. The party asserting a First Amendment violation has the burden of showing that disclosure of the summoned information will be prejudicial to those asserting the privilege, such as exposure to public hostility, or deterrence of free association, or denial of anonymity where there is reason therefore. Bronner v. Commissioner, 72 T.C. 368 (1979), aff'd, 734 F.2d 20 (9th Cir.1984); St. German of Alaska Eastern Orthodox Catholic Church v. United States, 840 F.2d 1087 (2d Cir. 1988).

a) The taxpayer should be required to show that the disclosure of the requested information has in the past or is likely in the future, to subject the members of the church or other organization to public hostility or harassment by the Internal Revenue Service. United States v. Freedom Church, 613 F.2d 316 (1st Cir. 1979) (a showing of actual or potential prejudice is required).

b) It is not enough that the members express a generalized dread of Service investigation, as this is a fear undoubtedly shared by many taxpayers. United States v. Norcutt, 680 F.2d 54 (8th Cir. 1982).

3. If the requisite showing of harm is made, it is necessary to balance the respective interests of the parties to determine whether the summoned information must be disclosed.

a) In United States v. Holmes, 614 F.2d 985, 990 (5th Cir. 1980), the court stated: "Balanced against the incidental burden of church religious activities is the substantial government interest in maintaining the integrity of its fiscal policies. This interest is sufficiently compelling to justify any incidental infringement of plaintiff's First Amendment rights."

b) In United States v. Citizens State Bank, 612 F.2d 1091 (8th Cir. 1980), after finding that the United States Taxpayer’s Union made a prima facie showing of First Amendment infringement, the court shifted the burden of proof to the government to make a "cogent and compelling" showing of need for the summoned records.

(1) But in United States v. Berg, 636 F.2d 203 (8th Cir. 1980), bare assertions by affidavit that an organization's members' associational rights would be infringed by enforcement of a summons served on a bank for the organization's records was not sufficient to shift the burden back to the government.

(2) It is the Service's position that the proper test is the "may be relevant" standard of section 7602, rather than the "cogent and compelling" standard of Citizens State Bank. In any event, the Service's cogent and compelling need is its interest in collecting the revenues due the United States. See Holmes, 614 F.2d 985.

4. Whenever a summons requests membership or contributor lists from a church or other organization, the relevance of these items should be fully explained. The same is true for a summons to a bank seeking deposit slips or checks deposited into a church's or other organization's account.

Note: In United States v. City National Bank, 642 F.2d 388 (10th Cir. 1981), the right of the Service to obtain deposit items in a church's bank accounts over which the intervenor taxpayer had signature authority was upheld. The claim that the Service sought to obtain the items to discover the names of contributors was rejected. The Service was entitled to the items if there was "some realistic expectation that they may illuminate the accuracy or inaccuracy of the taxpayer's return." Id. at 390.

B. First Amendment (Freedom of speech)

1. The First Amendment is a valid defense to a summons where the summons requests information related to protected speech and, as a practical matter, will only be a serious consideration in an investigation that may restrict or penalize speech, such as a section 6700 investigation. While the First Amendment protects the expression of an opinion about the tax laws, it does not protect speech that aids in the commission of illegal activity. For example, a promoter may not legitimately claim First Amendment protection for speech that promotes abusive tax shelters and arrangements in a way that violates section 6700 or purposely helps taxpayers to violate section 7201 or a similar provision. United States v. Bell, 414 F.3d 474, 483-84 (3d Cir. 2005).

2. The Service should anticipate and prepare for a First Amendment defense prior to issuing a summons. This means that a summons should be narrowly tailored to exclude information regarding protected speech or that the Service should develop evidence that the speech to which the summoned information relates is unprotected speech, such as false commercial speech. See Chief

Counsel Notice CC-2006-022.

3. The Service can demonstrate that the affected speech is unprotected by demonstrating that it was made in the context of promoting an abusive tax scheme. This requires evidence both that:

a) There is a likely suspicion the promoter is engaged in conduct subject to penalty under section 6700. This suspicion will come from evidence of an actual plan, arrangement, or other similar services being promoted or sold that claim false tax benefits. See Steinhardt v. United States, 326 F.Supp.2d 1113, 1117 (C.D. Cal. 2003).

b) The summons is limited to gathering information reasonably related to confirming that suspicion.

C. Fourth Amendment (unreasonable search and seizure)

1. A summons is not a per se violation of the Fourth Amendment. Oklahoma Press Publishing Co. v. Walling 327 U.S. 186 (1946); Donaldson v. United States, 400 U.S. 517 (1971).

2. The requested information must be:

a) Relevant to a lawful investigation;

b) Definitely described;

c) Adequate, but not excessive, for purposes of the investigation (not over broad).

3. Personal privilege. A taxpayer cannot claim the privilege in the situation where a summons is served on a third party for the third party's records. United States v. Miller, 425 U.S. 435 (1976).

4. When a bank voluntarily makes bank account records available to the Service, the Bank Secrecy Act does not prohibit the use of that information. United States v. Prevatt, 526 F.2d 400 (5th Cir.), reh. denied, 531 F.2d 575 (5th Cir. 1976); see generally, California Bankers' Ass'n v. Shultz, 416 U.S. 21 (1974). However, in the Tenth Circuit, the Service should issue a third-party summons to the bank consistent with Neece v. Internal Revenue Service, 922 F.2d 573 (10th Cir. 1990), except when seeking information to investigate or recover an improper Federal payment (such as an erroneous tax refund or credit) pursuant to 12 U.S.C. § 3413(k)(2) (2008) (see infra regarding the Right to Financial Privacy Act).

5. A corporation may claim Fourth Amendment protections, see G.M. Leasing Corp. v. United States, 429 U.S. 338, 353 (1977), whereas it may not claim the Fifth. See Doe v. United States, 487 U.S. 201, 206 (1988).

6. Use of deceit, trickery or misrepresentation by a Service agent can result in suppression of information obtained. United States v. Tweel, 550 F.2d 297 (5th Cir. 1977) (revenue agent concealed that the audit was being conducted at the specific request of a Justice Department Strike Force attorney).

Note: An undercover situation is different from the situation in Tweel. Where an agent is not seeking a taxpayer's cooperation based on his status as a government agent, there is no duty to disclose the agent's real status. The taxpayer has no legitimate expectation of privacy in information voluntarily revealed in this situation. United States v. Centennial Builders, Inc, 747 F.2d 678 (11th Cir. 1984); Jones v. Berry, 722 F.2d 443 (9th Cir. 1983), cert. denied, 466 U.S. 971 (1984).

D. Fifth Amendment (Privilege against self-incrimination)

1. The Fifth Amendment provides that "No person . . . shall be compelled in any criminal case to be a witness against himself."

a) This defense is often asserted in administrative and enforcement proceedings involving IRS summonses. See Garner v. United States, 424 U.S. 648 (1976).

b) The defense applies to both documentary requests and oral testimony.

2. Compelling the production of documents.

a) In Boyd v. United States, 116 U.S. 616 (1886), the Supreme Court held that any forcible and compulsory extortion of a man's own "private papers" to be used as evidence to convict him of a crime would violate the Fifth Amendment.

b) In Fisher v. United States, 425 U.S. 391 (1976), the Supreme Court held that the Fifth Amendment does not prohibit the compelled production of every sort of incriminating evidence, but only applies where there is compulsion of a testimonial communication that is incriminating i.e., only when the individual is compelled to affirm the truth of a statement which incriminates him. Id. at 408.

(1) The fact that a document was written by the person asserting the privilege, or that the document is incriminating on its face, is insufficient to trigger the privilege as to the content of the document unless the government compelled the person to write the document. Id. at 409.

(2) The act of production is the only thing compelled by a documentary summons. The act of production has communicative aspects of its own, wholly aside from the contents of the papers produced. Specifically, compliance tacitly concedes: (1) the existence of the papers demanded; (2) possession or control of the papers by the summoned party; and (3) the summoned party's belief that the papers are those described in the summons. The last element is known as implicit authentication. Id. at 411-412. See also, United States v. Doe, 487 U.S. 201 (1988).

(3) In United States v. Hubbell, 530 U.S. 27 (2000), an Independent Counsel subpoenaed Hubbell seeking the production of eleven categories of documents in order to determine if Hubbell violated the terms of his plea bargain. At first, Hubbell invoked the Fifth Amendment in refusing to state whether he had documents responsive to the subpoena, but later produced the documents when presented with a court order requiring him to do so and granting him immunity. The government, which was not previously aware of the existence of these documents, used the contents of the documents to prosecute Hubbell for a variety of tax related crimes. In this case, the Supreme Court rejected the foregone conclusion rationale because "the Government ha[d] not shown that it had any prior knowledge of either the existence or the whereabouts of the 13,120 pages of documents ultimately produced by [Hubbell]." The Court went on to hold that the government may not assume that a businessman will always possess general business and tax records and thus, where the government has no prior knowledge that they exist, the act of producing the documents would involve testimonial self-incrimination. Id. at 44-55.

(4) In United States v. Greenfield, 831 F.3d 106 (2nd Cir. 2016), the government sought the production through a summons of documents that relate to various bank accounts. Taxpayer opposed production and invoked his Fifth Amendment right against self-incrimination. The court found that the government had knowledge that the bank accounts existed and knew that the documents, such as bank statements, were issued in connection with the accounts. Id. at 119-21. The court held that the

government showed it is a foregone conclusion that the taxpayer controlled the documents. However, the court also held that the government failed to show that it is a foregone conclusion that it could authenticate the documents. The government suggested that it could authenticate the documents through the testimony of bank employees or through the Hague Evidence Convention, but the court described this as mere speculation and stated that it is not a foregone conclusion that foreign financial institutions and jurisdictions will cooperate with the government's request for authentication. Id. With respect to other responsive documents, the court found that the existence, control, and authenticity of those documents were not a foregone conclusion. Id. at 122.

(5) In United States v. Ali, 874 F.3d 825 (4th Cir. 2017), the government sought the production through a summons of documents that relate to foreign bank accounts and corporate records. The court held that evidence demonstrating the taxpayer was a beneficial owner for the foreign bank accounts and that she served in a representational capacity for the various corporations established a presumption that the taxpayer possessed documents related to those foreign accounts and corporations. The court shifted the burden to the taxpayer to demonstrate that she had taken reasonable efforts to obtain the requested records.

c) In United States v. Doe, 465 U.S. 605 (1984) the Supreme Court held that the contents of pre-existing documents are not protected by the Fifth Amendment privilege, rejecting any lingering contrary notion from Boyd v. United States, 116 U.S. 616 (1886). Testimonial compulsion as to pre-existing documents can arise in three ways. Compliance with the summons tacitly concedes (a) the existence of the documents demanded; (b) the possession or control of the papers by the summoned party; or (c) the summoned party's belief that the papers are those described in the summons or implicit authentication.

(1) Requiring the "target" of a grand jury investigation to sign a consent directive authorizing foreign banks to disclose the target's accounts may not be a testimonial compulsion because the form signed did not acknowledge the existence (nor control) of any bank accounts. Doe v. United States, 487 U.S. 201 (1988).

(2) Decisions subsequent to the 1984 Doe decision disagree on the effect of that decision on the Boyd doctrine. United States v. (Under Seal), 745 F.2d 834 (4th Cir. 1984), held that the Boyd doctrine is "very much alive"; In re Grand Jury Proceedings on February 4, l982, 759 F.2d 1418 (9th Cir. 1985), held that no

contents of any pre-existing documents are protected whether business or personal; In re Grand Jury Proceedings Before the August 6, 1984 Grand Jury, 767 F.2d 39 (2d Cir. 1985), held that contents are not protected if pre-existing records are business records; however, Doe did not decide whether the contents of pre-existing personal records are protected.

(3) While there is some doubt as to whether the Boyd doctrine survived the Doe decision, there seems to be no doubt that the "Required Records Doctrine" survived Doe. See In re Grand Jury Subpoena Duces Tecum Served Upon Underhill, 781 F.2d 64 (6th Cir.), cert. denied, 479 U.S. 813 (1986); In re Grand Jury Proceedings, 801 F.2d 1164 (9th Cir. 1986). The required records doctrine was adopted by the Supreme Court in Shapiro v. United States, 335 U.S. 1 (1948), and provides that certain records required to be kept by State or Federal law are unprotected by the Fifth Amendment. In Shapiro, the records sought were those required to be kept by regulations under the Emergency Price Control Act. See also In re Grand Jury Investigation M.H., 648 F.3d 1067 (9th Cir. 2011) (records required to be kept pursuant to the Bank Secrecy Act with respect to foreign bank accounts fall within required records doctrine); United States v. Chabot, 793 F.3d 338 (3rd Cir. 2015); United States v. Chen, 815 F.3d 72 (1st Cir. 2016).

(4) In Marchetti v. United States, 390 U.S. 39 (1968) and Grosso v. United States, 390 U.S. 62 (1968) the defendants were prosecuted for failure to register and pay a gambling stamp tax. The Court upheld their assertions of Fifth Amendment privilege and stressed that unlike in Shapiro, where the record-keeping requirements were imposed in "an essentially non-criminal and regulatory area of inquiry," those at issue were directed to a "selective group inherently suspect of criminal activities." The Court emphasized that the records should have "public aspects," and be required to be kept pursuant to a reasonable regulatory scheme. Cf. In re Doe, 711 F.2d 1187 (2d Cir. 1983).

(5) In California v. Byers, 402 U.S. 424 (1971), the Court approved a record-keeping requirement that required drivers who were involved in traffic accidents to stop and provide their name and address. The Court focused on the regulatory purpose of the reporting requirements and balanced the government's legitimate needs for regulatory information against regulatory requirements which covertly aid the investigation and prosecution of crime.

(6) Many provisions of the Internal Revenue Code require that taxpayers maintain records that clearly reflect income. However, the Department of Justice has made a policy decision not to apply the required records doctrine to records required to be kept pursuant to the Internal Revenue Code or Treasury regulations. Thus, the Internal Revenue Service should generally not assert the exception to the Fifth Amendment with regard to required records in these circumstances. See and compare, In Re Grand Jury Subpoena Duces Tecum Served Upon Underhill, 781 F.2d 64 (6th Cir.), cert denied, 479 U.S. 813 (1986); (odometer statements kept by automobile dealers); In re Grand Jury Proceedings, (Doe), 801 F.2d 1164 (9th Cir. 1986) (physician records of sale or disposition of dangerous drugs); In re Two Grand Jury Subpoena Duces Tecum Dated August 21, l985, 793 F.2d 69 (2d Cir. 1986) (retainer agreements and closing statements of law firm (prior to firm's incorporation)). However, this policy decision does not apply to records required to be kept pursuant to state laws or state regulations. Since state bodies frequently require businesses and professionals to keep specific records, this is a fertile summons source; and the act of production Fifth Amendment defense of Doe should not be an impediment to enforcement.

d) In Couch v. United States, 409 U.S. 322 (1973), the Supreme Court held that the privilege does not protect taxpayer-authored documents in the possession of non-attorney third-parties (in this case of the accountant).

(1) If the taxpayer gets them back before service of the summons on the third-party, he is safe. United States v. Beattie, Jr., 541 F.2d 329 (2d Cir. 1976).

(2) But transferring the documents back to the taxpayer after service of the summons cannot serve to make the privilege apply retroactively. United States v. Daffin, 653 F.2d 121 (4th Cir. 1981).

(3) Taxpayers may not be able to rely on Beattie after Doe. Once the taxpayer's records have been given to and returned from his accountant, they can be summoned from the taxpayer or taxpayer's counsel. There is no testimonial aspect to the taxpayer's act of production because the accountant can testify regarding the existence and possession of the documents and authentication can be provided by sources other than the taxpayer. United States v. Clark, 847 F.2d 1467 (10th Cir. 1988); United States v. Sideman & Bancroft, LLP, 704 F.3d 1197 (9th Cir. 2013).

(4) An accountant's work papers in the taxpayer's possession are not subject to the privilege. Fisher, 425 U.S. 391; Clark, 847 F.2d 1467.

(5) Accountant's work papers given by the taxpayer to taxpayer's attorney. No privilege since under Couch the work papers could have been obtained from the taxpayer personally, and no privilege was created by a transfer to the attorney. Fisher, 425 U.S. 391; Clark, 847 F.2d 1467.

3. Compelling oral testimony from the taxpayer

a) In Hoffman v. United States, 341 U.S. 479 (1951), the Supreme Court stated that "to sustain the privilege, it need only be evident from the implication of the question and the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." The party summoned must show that his testimony would "support a conviction under a federal criminal statute" or "furnish a link in the chain of evidence" needed to prosecute him for a federal crime. Id. at 486.

b) A witness's fear of incrimination from his testimony or from his act of producing documents must be a "real and substantial" fear of incrimination. United States v. Apfelbaum, 445 U.S. 115 (1980); Zicarelli v. New Jersey Investigation Commission, 406 U.S. 472 (1972); Marchetti v. United States, 390 U.S. 39 (1968); United States v. Neff, 615 F.2d 1235 (9th Cir. 1980); McCoy v. Commissioner, 696 F.2d 1234 (9th Cir. 1983).

(1) A blanket Fifth Amendment claim can never establish a real and substantial danger of incrimination. United States v. Roundtree, 420 F.2d 845 (5th Cir. 1969); United States v. French, 442 F. Supp. 166 (N.D. Iowa 1977), aff'd 567 F.2d 351 (8th Cir. 1978). In addition, such a claim must be raised at the time the questions are asked or documents are demanded, not at a later court proceeding. See Rogers v. United States, 340 U.S. 367 (1951).

(2) Summonses have been enforced over blanket claims of a Fifth Amendment privilege. United States v. Schmidt, 816 F.2d 1477 (10th Cir. 1987); United States v. Reis, 765 F.2d 1094 (11th Cir. 1985).

(3) It should be noted that the privilege applies in any judicial proceeding, including a civil tax investigation since the summoned information could serve as a link in the chain of evidence for

criminal violations of the tax laws. Kastigar v. United States, 406 U.S. 441 (1972). Thus, in the case of a nonfiler who was summoned by the revenue officer so that returns for the years in question could be prepared, the Court, citing United States v. Rendahl, 746 F.2d 553, 555 (9th Cir. 1984), noted that "by admitting to the IRS that he earned income during the years in question, or by providing documentary evidence of such income, [the taxpayer] would be furnishing a link in the chain of evidence needed to prosecute him." United States v. Wirenius, No. CV 93-6786 JGD, 1994 WL 142394 at * 3 (C.D. Cal. Feb. 11, 1994). See also Troescher v. United States, 99 F.3d 933 (9th Cir. 1996); United States v. Sharp, 920 F.2d 1167 (4th Cir. 1990); United States v. Argomaniz, 925 F.2d 1349 (11th Cir. 1991).

c) The Court, not the witness, determines whether the claim of Fifth Amendment privilege has been validly asserted. Hoffman, 341 U.S. 479; Marganroth v. Fitzsimmons, 718 F.2d 161 (6th Cir. 1983). If the district court is amenable, the government should request an in camera inspection of the taxpayer's records or testimony to determine whether the privilege exists.

4. General Considerations

a) The Supreme Court has held that the privilege is personal, applying to "natural individuals." United States v. White, 322 U.S. 694 (1944).

b) Collective Entity Doctrine

The privilege does not apply to a corporate representative. The Supreme Court in Wilson v. United States, 221 U.S. 361 (1911), held that when the witness assumed the position of corporate president, he did so with knowledge of the corporate duty to produce documents upon government demand and thereby "waived" his personal Fifth Amendment right to resist. The Court extended the exception for corporations to other economic institutions. United States v. White, 322 U.S. 694 (1944) (labor union). In Bellis v. United States, 417 U.S. 85 (1974) the Court applied the exception to records subpoenaed from a partner in a three-person law firm. The court in Bellis held that an individual cannot rely on the Fifth Amendment to avoid producing the records of a collective entity which are in his possession in a representative capacity, even if they might incriminate him personally.

In Braswell v. United States, 487 U.S. 99 (1988), the Court held that a sole shareholder of a corporation acting in his capacity as custodian of corporate records is not entitled to resist a subpoena on the ground that his

act of production will be personally incriminating.

c) Sole Proprietorship

A sole proprietorship has no legal existence apart from its owner, and the compelled production of his private or business records implicates his Fifth Amendment privilege. With regard to a sole proprietorship the issue becomes a factual one, whether any admissions of possession or existence implicit in production are sufficiently testimonial to warrant protection under the Fifth Amendment. United States v. Doe, 465 U.S. 605 (1984). See United States v. Cates, 686 F. Supp. 1185 (D. Md. 1988), holding that although the contents of the documents are not privileged, the act of producing them may be. See also In re Grand Jury Proceedings, Subpoenas for Documents, 41 F.3d 377 (8th Cir. 1994); United States v. Fox, 721 F.2d 32 (2d Cir. 1983).

d) The privilege must be properly raised. Hoffman v. United States, 341 U.S. 479 (1951). A blanket assertion of the Fifth Amendment is not a valid claim of the privilege. United States v. Schmidt, 816 F.2d 1477 (10th Cir. 1987); I.C.C. v. Gould, 629 F.2d 847 (3d Cir. 1980), cert. denied, 449 U.S. 1077 (1981); cf. United States v. Malnik, 489 F.2d 682 (5th Cir.), cert. denied, 419 U.S. 826 (1974) (Service written agreement with taxpayer that he need not appear in view of taxpayer's blanket refusal constituted a waiver by the Service of its right to have summons enforced). See also United States v. Barth, 745 F.2d 184 (2d Cir. 1984), cert. denied, 470 U.S. 1004 (1985), (counsel's affidavit that each corporate employee intended to assert a Fifth Amendment privilege is not sufficient).

e) A party who appears in response to a summons must object on a question-by-question, document-by-document basis. This allows the district court to make a proper review of any claims of privilege. See, e.g., United States v. Jones, 538 F.2d 225 (8th Cir. 1976), cert. denied, 429 U.S. 1040 (1977); United States v. Theep, 502 F.2d 797 (9th Cir. 1974).

f) Valid defenses to a summons are the non-existence of the records, or the inability of the summoned party to comply (e.g., the summoned party does not have possession or control of the records).

> (1) In U.S. v. Rylander, 460 U.S. 752 (1983), a corp. president was ordered to appear at an enforcement hearing to show cause why he should not produce the records of his wholly-owned corporation. He did not appear and the court ordered enforcement. He refused to comply and the government brought a contempt action.

(2) The Supreme Court held that inability to comply with a summons may not be raised for the first time at the contempt proceeding. Defendant can raise present inability to comply in order to avoid contempt but on this matter Rylander had the burden of proof. Because of presumption of continued possession arising from the enforcement order and Rylander's refusal to testify on matters for which he had the burden, the court upheld the trial court's finding of civil contempt. See also United States v. Ali, 874 F.3d 825 (4th Cir. 2017) (holding that the taxpayer could not assert a nonpossession defense for the first time during the contempt proceeding and that the burden had shifted to the taxpayer to demonstrate she had taken reasonable efforts to comply with the enforcement order).

(3) United States v. Hankins, 565 F.2d 1344 (5th Cir.), opinion clarified and rehearing denied, 581 F.2d 431 (5th Cir. 1978), cert. denied, 440 U.S. 909 (1979), held that since the taxpayer refused to submit to cross-examination, his statements were not credible evidence and it was proper to strike his testimony from the record. This left the taxpayer guilty of contempt since there was nothing in the record to show that he had met his burden of proof on the issue of inability to comply. This is the government's position.

(4) Another counter-argument is to rely on the presumption that a corporate officer has possession or control of corporate records or can furnish some reasonable explanation as to his inability to produce them. Lopiparo v. United States, 216 F.2d 87 (8th Cir. 1954) cert. denied, 348 U.S. 916 (1955). In Lopiparo, the court held that a witness could not meet his burden simply by a denial of possession coupled with assertions of the Fifth Amendment.

5. Immunity

a) In Pillsbury Co. v. Conboy, 459 U.S. 248 (1983), the Court clearly stated that no court has the authority to immunize a witness. It noted that only the Attorney General or a designated officer of the Department of Justice has such authority pursuant to 18 U.S.C. § 6002, et seq.

b) In United States v. Doe, 465 U.S. 605 (1984), the Supreme Court severed the link between the contents of the records and the act of production. While the Supreme Court refused to extend the jurisdiction of courts to include grants of use immunity, the decision raises new possibilities for the granting of immunity pursuant to 18 U.S.C. §§ 6001-6005. It remains true that under Kastigar v. United States, 406 U.S. 441 (1972), a grant of immunity must necessarily include derivative use

immunity. A theoretical possibility exists, however, that a limited grant of immunity with regard to the act of production will not prevent the Service from using the contents and leads therefrom in a subsequent prosecution. IRM 9.4.5.12.4, 34.6.3.6.7, and 38.1.2.4 sets forth the procedures to be observed in requesting immunity for acts of production.

c) If immunity is granted, testimony may be compelled. See, e.g., United States v. Silkman, 543 F.2d 1218 (8th Cir. 1976), cert. denied, 431 U.S. 919 (1977).

d) The government need only immunize that portion of the requested evidence for which a valid claim of privilege exists. Kastigar v. United States, 406 U.S. 441 (1972).

E. Attorney-client privilege

The broad outlines of the attorney-client privilege are as follows: (1) where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the protection be waived. United States v. Int'l Bhd. of Teamsters, 119 F.2d 210, 214 (2d Cir. 1997). The purpose of the privilege is to encourage clients to make full disclosure to their attorneys. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). No privilege exists, however, merely because the attorney has possession of a taxpayer's records or an accountant's records. United States v. United Shoe Machinery Corp., 89 F. Supp. 357 (D. Mass. 1950).

1. If the Service can compel the production of records from the taxpayer, taxpayer cannot cloak them with privilege by transferring them to an attorney. Falsone v. U.S., 205 F.2d 734, 739 (5th Cir.), cert. denied, 346 U.S. 864 (1953); Fisher v. United States, 425 U.S. 391 (1976).

2. Privilege may exist for records prepared by an accountant (at the direction of an attorney) to facilitate legal advice. United States v. Judson, 322 F.2d 460 (9th Cir. 1963); United States v. Bornstein, 977 F.2d 112 (4th Cir. 1992).

3. Privilege may extend to attorney's employees, including the accountant the attorney employs. United States v. Kovel, 296 F.2d 918 (2d Cir. 1961). However, the Second Circuit also held in United States v. Adlman, 68 F.3d 1495 (2d Cir. 1995) that a memorandum opinion prepared for a corporation by its outside accounting firm on the tax consequences of a reorganization was not protected by the attorney-client privilege because the accounting firm was not hired to provide legal advice. Similarly, in United States v. Richey, 632 F.3d 559

(9th Cir. 2011), the Ninth Circuit held that an appraisal prepared for an attorney hired by the taxpayer to determine the value of an easement did not constitute legal advice protected by the attorney-client privilege. In United States v. Ackert, 169 F.3d 136 (2d Cir. 1999), the Second Circuit concluded that conversations between an attorney and an investment banker regarding a transaction involving the attorney's client were not protected by the privilege because, even though the conversations assisted the attorney in providing legal advice, the privilege protects only communications between the attorney and his client. Moreover, such communications did not fall within a Kovel relationship because the banker did not interpret or clarify communications between the attorney and his client.

4. Only confidential records are protected. Generally, information given to attorney to prepare income tax return is not confidential. United States v. White, 326 F. Supp. 459 (S.D. Tex. 1971), aff'd, 477 F.2d 757 (5th Cir. 1973), cert. denied, 419 U.S. 872 (1974); Colton v. United States, 306 F.2d 633 (2d Cir. 1962), cert. denied, 371 U.S. 951 (1963); United States v. Miller, 660 F.2d 563 (5th Cir. 1981) (records previously given to I.R.S. no longer confidential); United States v. Frederick, 182 F.3d 496 (7th Cir. 1999).

5. The attorney-client privilege in the corporate context extends to communications made by corporate employees to counsel for the corporation acting as such, at the direction of corporate superiors in order to secure legal advice from counsel, where the communications concern matters within the scope of the employees' corporate duties and the employees were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice. Upjohn Co. v. United States, 449 U.S. 383 (1981).

a) The privilege protects not only the giving of professional advice to those who can act on it but also to the giving of information to the lawyer to enable him to give sound and informed advice. Upjohn, 449 U.S. 383.

b) Before Upjohn, some courts recognized a "control group" test. The "control group" test frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation. Upjohn, 449 U.S. 383.

Note: The "control group" test limited the privilege to those employees who were in a position to either control or take a substantial part in any decision or action which a corporation might take upon the advice of an attorney. The court defined this to include only the senior management.

c) The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicate with the attorney. Upjohn, 449 U.S. 383.

6. The burden of establishing the existence of a relationship giving rise to a federally recognized privilege and that the information sought is covered by it rests on the claimant. Kovel, 296 F.2d 918; United States v. Johnson, 465 F.2d 793 (5th Cir. 1972); United States v. Gurtner, 474 F.2d 297 (9th Cir. 1973).

7. The essential facts pertaining to the creation of the relationship, including fees and the identity of the client are normally not protected. See, e.g.,United States v. Hodge & Zweig, 548 F.2d. 1347 (9th Cir. 1977) (no privilege where attorney retained in furtherance of criminal scheme).

8. Nevertheless, the identity of a client may rarely be privileged when so much of an actual confidential communication has been disclosed that merely identifying the client will effectively disclose the information that is traditionally protected by the attorney-client privilege. Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960) (attorney cannot be compelled to reveal name of the client on whose behalf attorney anonymously paid taxes). See also, U.S. v. Liebman, 742 F.2d 807 (3d Cir. 1984) (the Service could not summon the names of attorney's clients who had been erroneously advised that fees charged by the firm were deductible because the Service already knew the substance of the communication and disclosing the identities would reveal all there was to know about the privileged communications). A privilege in identity has been claimed in cases where the Service has summoned tax shelter promoters to produce their list of taxpayers to whom they sold interests in potentially abusive tax shelters. These claims of privilege have been made both under the attorney-client privilege and under I.R.C. § 7525, which protects certain communications between a client and a federally authorized tax practitioner to the extent the communication would be considered a privileged communication if it were between a taxpayer and an attorney. See United States v. BDO Seidman, 337 F.3d 802 (7th Cir. 2003) (where unnamed investors sought to intervene to assert identity privilege in enforcement suit brought against promoter, the court reasoned that investor identity could not be privileged where the Service knew relatively little about the communication between the summoned promoter and the investor-taxpayers; moreover, investor-taxpayers could have no expectation of confidentiality in information the promoter was required to disclose under I.R.C. §§ 6111 and 6112). See also, John Doe v. Wachovia Corporation, 268 F. Supp. 2d 627 (W.D.N.C. 2003) (unnamed investor-taxpayers unsuccessfully sought an injunction to prevent the summoned promoter-bank from disclosing their identities to the Service; court found no Kovel or other attorney client relationship); United States v. Sidley Austin, 2004-2 USTC 50,289 (N.D.Ill. 2004).

9. Federal, not State, law applies in determining whether the privilege exists (government's position). Colton, 306 F.2d 633; Falsone v. United States, 205 F.2d 734 (5th Cir. 1953), cert. denied, 346 U.S. 864 (1953); Contra Baird v.

Koerner, 279 F.2d 623 (9th Cir. 1960); United States v. Cromer, 483 F.2d 99 (9th Cir. 1973). (But in Hodge & Zweig, 548 F.2d 1347, the Ninth Circuit held the newly enacted FRE now control as to the privilege, not state law).

10. FRE 502 was revised; new rule 502 provides limitations on waiver of the attorney-client privilege and the work product doctrine. The rule seeks to provide a predictable, uniform set of standards under which parties can determine the consequences of a disclosure of a communication or information covered by the attorney-client privilege or work product doctrine. Rule 502 "makes no attempt to alter federal or state law on whether a communication or information is protected under the attorney-client privilege or work-product immunity as an initial matter." Judicial Conference of United States, Committee on Rules of Practice and Procedure, Proposed New Evidence Rule 502 (Explanatory Note) (Sept. 2007). Rule 502 became effective December 1, 2008. Non-waiver agreements under FRE 502(e) must be pre-approved by the Associate Chief Counsel (PA), and courts should not review a Service decision not to enter into non-waiver agreements. Chief Counsel Notice 2009-023 (Aug. 3, 2009); United States v. Artex Risk Solutions, Inc., No. 14 C 4081, 2014 U.S. Dist. LEXIS 126932 (N.D. Ill. Sept. 10, 2014).

11. The attorney-client privilege does not attach to communications made in furtherance of a crime or fraud. This exception applies when: (1) a prima facie showing of criminal conduct when the advice is sought and (2) the advice was obtained to further the criminal conduct. In re Grand Jury Investigation (Schroeder), 842 F.2d 1223 (11th Cir. 1987); U.S. v. Zolin, 491 U.S. 554 (1989).

12. Privilege Logs. Whenever taxpayers assert a privilege, they must do so on a document-by-document basis. The party asserting privileges for documents is asked to prepare and provide a privilege log together with an affidavit that sets forth the factual basis for each privilege claimed. Just as a blanket assertion is not enough to raise a valid privilege, a vague and ambiguous description in a privilege log is not enough to support one. The following is a list of information that a properly prepared privilege log should contain.

a) A brief description or summary of the content of the document or communication and its length.

b) The date the document was prepared.

c) The names of the persons who prepared the document and the employers and positions of those persons.

d) The names of the persons to whom the document was directed, or for whom it was prepared and the employers and positions of those persons.

e) The names of any other persons who have received the document and the employers and positions of those persons.

f) The purpose for preparing the document or communication.

g) The privilege asserted for the document or communication.

h) How the document or communication satisfies the privilege elements.

For a case rejecting a privilege log as incomplete, see United States v. KPMG, LLP, 237 F. Supp. 2d 35 (D. D.C. 2003) (the summoned party was denied its request to prepare a categorical privilege log because even a separate, more detailed log it had previously offered was not sufficient to permit the Service, and ultimately the court, to evaluate the claims of privilege). Cf. United States v. BDO Siedman, LLP, 225 F. Supp. 2d 918 (N.D. Ill. 2002) (the documents for which a privilege is claimed must be submitted to the court for viewing together with the privilege logs).

F. Work-Product

The work-product doctrine applies to Service summonses. Upjohn, Co. v. United States, 449 U.S. 383 (1981); Bornstein v. United States, 977 F.2d 112 (4th Cir 1992). The work product doctrine is a qualified privilege that protects documents, interviews, statements, memoranda, correspondence, briefs, mental impressions and tangible things prepared by an attorney in anticipation of litigation. Hickman v. Taylor, 329 U.S. 495, 510-11 (1947). Production can be had on a showing of substantial need and inability to obtain the equivalent without undue hardship.

1. The obligation imposed by a tax summons remains subject to traditional privileges and limitations, United States v. Euge, 444 U.S. 707 (1980). Nothing in the language or legislative history of the Service summons provisions suggests intent on the part of Congress to preclude application of the work-product doctrine.

2. Materials assembled in the ordinary course of business, or pursuant to regulatory requirements, or for other non-litigation purposes are not protected by the work-product doctrine. Fed. R. Civ. Proc. 26(b)(3) Advisory Comm. Notes (1970). Thus, if a document would have been created regardless of whether litigation was expected to ensue, the document is deemed to have been created in the ordinary course of business and is not protected by the work-product doctrine. ReedHycalog UK, Ltd. v. Baker Hughes Oilfield Operations Inc., 242 F.R.D. 357, 360 (E.D. Tex. 2007). Similarly, documents that are required to be created to comply with the law are not protected by the work-product doctrine. In re Raytheon Securities Litigation, 218 F.R.D. 354, 359 (D. Mass. 2003); United States v. Richey, 632 F.3d 559 (9th Cir. 2011). But see United States v. Deloitte

LLP, 610 F.3d 129 (D.C. Cir. 2010). The burden of proving that a document was prepared for the purpose of assisting an attorney in preparing for litigation, and not for some other reason, is on the party asserting the privilege. United States v. KPMG LLP, 237 F.Supp.2d 35, 41 (D.D.C. 2002).

3. Work-product revealing an attorney's mental processes, such as notes and memoranda of interviews prepared by an attorney, are accorded special protection. Upjohn, 449 U.S. 383. Upjohn makes it clear that work product revealing an attorney's mental processes cannot be disclosed simply on a showing of substantial need and inability to obtain the equivalent without undue hardship.

4. Whether work product revealing an attorney's mental processes is absolutely protected is an open question, Upjohn, 449 U.S. 383, but at the very least, a far stronger showing of necessity and unavailability is required to compel disclosure.

5. In United States v. Adlman, 134 F.3d 1194 (2d Cir. 1998), the Second Circuit held that work product protection should be granted if the document could fairly be said to have been prepared "because of" the prospect of litigation. In order to determine whether a document was prepared because of anticipated litigation, a court should look to the purpose or function for which a document was prepared, rather than to the content of the document. United States v. Textron, Inc., 577 F.3d 21 (1st Cir. 2009); United States v. Roxworthy, 457 F.3d 590 (6th Cir. 2006).

a) In United States v. Textron, 577 F.3d 21, the First Circuit concluded that tax accrual workpapers are indisputably prepared to support a company's financial statement filings and to gain independent auditor approval, and that these are purposes or functions which are compelled by public requirements unrelated to litigation and arise in the ordinary course of business for a public company. The First Circuit further concluded that the workpapers are not prepared for "use" in possible litigation and would not serve any useful purpose for Textron in conducting any litigation, if it arose.

b) In United States v. Roxworthy, 457 F.3d 590 (6th Cir. 2006), the Sixth Circuit, reversing the district court, upheld a claim of work-product protection for a document prepared in anticipation of an audit, not litigation. See also Schaeffler v. United States, 806 F.3d 34 (2d Cir. 2015).

c) However, in Valero Energy Corp. v. United States, 2007 WL 4179464 (N.D. Ill. Aug. 23, 2007), the court denied work-product protection to a set of documents that Arthur Andersen had prepared for the taxpayer in connection with the tax implications of a planned merger. The taxpayer, Valero, thought there was a possibility the Service might later challenge the transaction. The court stated that Valero "confuses the possibility of

litigation with the requirement that to be protected, a document must have been prepared *because of* anticipated litigation." Further, the court opined that the fact Valero hired Arthur Andersen "with an eye toward the complex nature of the transaction" and the possibility of a Service investigation did not support the argument that the documents were prepared because of anticipated litigation. (Despite the work-product doctrine holding, the district court ruled that this set of Arthur Andersen documents was protected from disclosure by the I.R.C. § 7525 privilege, otherwise known as the federally authorized tax practitioner privilege. The court's decision regarding the section 7525 privilege was corrected and superseded, 2008 WL 4104368 (N.D.Ill. Aug 26, 2008).
On appeal, the Seventh Circuit affirmed that the section 7525 privilege did not apply as to some documents and that the tax shelter promotion exception applied as to others. 569 F.3d 626 (7th Cir. 2009)

6. The requirement of an adequate privilege log, described above in the section dealing with the attorney-client privilege, applies equally to claims of work-product protection.

7. Work-product protection is waived if the work-product is disclosed in a manner inconsistent with keeping it from an adversary. United States v. Mass. Inst. of Tech., 129 F.3d 681, 687 (1st Cir. 1997). MIT waived the work-product doctrine with respect to documents it provided to an audit agency because the disclosure was to a potential adversary that did not share a common legal interest with MIT. Id. Instead, the audit agency was reviewing MIT's expense submissions to the Department of Defense, thus creating the potential for dispute and even litigation. Thus, the work-product privilege was forfeited. Id.; See also Medinol, Ltd. v. Boston Scientific Corp., 214 F.R.D. 113 (S.D.N.Y. 2002). But see United States v. Deloitte LLP, 610 F.3d 129 (D.C. Cir. 2010). Federal Rule of Evidence 502 also provides limitations on waiver of the work product doctrine, as discussed in the section addressing attorney-client privilege.

G. Federally Authorized Tax Practitioner privilege

1. Prior to RRA 1998, the accountant-client privilege was only provided by law in some states; it was not recognized in Federal law. Couch v. United States, 409 U.S. 322 (1973). With the enactment of I.R.C. § 7525 by RRA 1998, the attorney-client privilege was extended to include some communications between a taxpayer and a tax practitioner to the extent that such communications would be considered privileged communications if they were between a taxpayer and an attorney.

a) Section 7525 extends the application of the attorney-client privilege to

communications between a taxpayer and any "federally authorized tax practitioner" with respect to "tax advice" to the extent the communication would be considered a privileged communication if it were between a taxpayer and an attorney. In Valero Energy Corp. v. United States, 569 F.3d 626, 631 (7th Cir. 2009), the Seventh Circuit held that documents which facilitate tax return preparation or which contain significant accounting advice do not become privileged by the inclusion of "some legal analysis." The section 7525 privilege does not apply in IRS criminal tax investigations or to communications made before July 22, 1998 or for any written communication in connection with the promotion of the direct or indirect participation of the client in any tax shelter (or corporate tax shelter).

b) The American Jobs Creation Act of 2004 amended section 7525(b) by providing that the tax practitioner privilege does not apply to written communications regarding the promotion of tax shelters. Prior to this amendment, the privilege did not extend to written communications regarding the promotion of corporate tax shelters. The 2004 amendments apply to communications made on or after October 22, 2004. The Seventh Circuit ruled that section 7525(b) established an exception to the privilege and that the burden rests on the opponent of the privilege to prove preliminary facts that would support a finding that the claimed privilege falls within an exception. United States v. BDO Seidman, LLP, 492 F.3d 806 (7th Cir. 2007). "Promotion" of a taxpayer's participation in a tax shelter means simply "furtherance" or encouragement," and is not limited to the marketing of a pre-packaged, one-size-fits-all tax shelter product. Valero Energy Corp. v. United States, 569 F.3d 626 (7th Cir. 2009). However, the "written communication" element of the exception is not satisfied when a participant in an oral conversation merely prepares personal notes of the conversation. Countryside Limited Partnership v. Commissioner, 132 T.C. 347 (2009).

c) Likewise, the privilege may be waived by any disclosure of the privileged information to a third party not sharing a common legal interest with the client or not necessary to the attorney-client consultation. The common legal interest rule extends the attorney-client privilege to privileged communications revealed to a third party who shares a common legal goal with the party in possession of the original privilege. TIFD III-E, Inc. v. United States, 223 F.R.D. 47, 50 (D. Conn. 2004). In Schaeffler v. United States, 806 F.3d 34 (2nd Cir. 2015), the summons sought documents that reflected tax analyses shared by the taxpayer with a consortium of banks that helped finance the taxpayer's restructuring. The court held that the common interest doctrine applied and that the tax practitioner privilege was not waived.

d) "Federally authorized tax practitioner" means any individual who is authorized under federal law to practice before the Service. See Circular 230. The term includes attorneys, certified public accountants, enrolled agents and enrolled actuaries. The term "tax advice" means advice given by an individual with respect to matters within the scope of that individual's authority to practice before the Service.

e) The privilege may only be asserted in:

(1) any noncriminal tax matter before the Service [I.R.C. § 7525(a)(2)(A)], and

(2) any noncriminal tax proceeding in federal court brought by or against the United States [I.R.C. § 7525(a)(2)(B)].

f) The privilege may not be asserted to prevent the disclosure of information to any regulatory body other than the Service, such as the Securities and Exchange Commission (SEC), including in an administrative or a court proceeding.

2. The requirement of an adequate privilege log, described above in the section dealing with the attorney-client privilege, applies equally to claims of privilege under I.R.C. § 7525.

H. Improper purpose

1. Improper purposes for issuing a summons include harassing the taxpayer, pressuring the taxpayer into settling a collateral dispute, or any other purpose reflecting on the good faith of a particular investigation. Donaldson v. United States, 400 U.S. 517 (1971); Powell, supra. Using a summons to obtain third-party comparable information is not considered an improper purpose. It does, however, involve disclosure problems and should be used only as a last resort.

2. In United States v. Richey, 632 F.3d 559 (9th Cir 2011), the taxpayers argued that because they agreed to and paid the required assessments, interest, and penalties after the issuance of a summons, enforcement of the summons would now be bad faith. The Ninth Circuit rejected this argument holding that "there can be no showing of bad faith by the IRS in such circumstances unless there has been a predicate 'final, irrevocable determination of the taxpayer's liability.'" Id.

3. Prehearing discovery: denied unless the taxpayer produces evidence of an improper purpose of the summons. See United States v. Clarke, 134 S.Ct. 2361, 2367 (2014) (holding that a taxpayer is entitled to examine an IRS agent

regarding his reason for issuing a summons only when the taxpayer can point to specific facts or circumstances that plausibly raise an inference of bad faith), remanded to 816 F.3d 1310 (11th Cir. 2016) (holding that taxpayers failed to meet their burden under the new standard in Clarke to require an evidentiary hearing). See also United States v. Salter, 432 F.2d 697 (1st Cir. 1970); United States v. Church of Scientology, 520 F.2d 818 (9th Cir. 1975); United States v. McCarthy, 514 F.2d 368 (3d Cir. 1975); United States v. Turner, 480 F.2d 272 (7th Cir. 1973); Hawaii Pacific Finance, Ltd. v. United States, No. 13-00692 DKW-RLP, 2014 U.S. Dist. LEXIS 106405 (D. Haw. Aug. 4, 2014). But see, United States v. Kis, 658 F.2d 526 (7th Cir. 1981) (limited pre-hearing discovery allowed); United States v. Microsoft Corp., No. C15-00102 RSM, 2015 U.S. Dist. LEXIS 97875 (W.D. Wash. June 17, 2015).

I. Records outside the U.S.

1. Records located outside the U.S. may be obtained either from a foreign entity or from a U.S. taxpayer by means of a summons, unless the tax treaty between the U.S. and the foreign country specifically provides that treaty procedures are the exclusive method or the foreign entity has no American point of contact.

2. A federal grand jury subpoenaed bank records maintained in the Bahamas relating to a tax investigation of a U.S. citizen. The subpoena was held enforceable even though compliance would allegedly require the bank to violate Bahamian bank secrecy rules. In re Grand Jury Proceedings (Bank of Nova Scotia), 691 F.2d 1384 (11th Cir. 1982), cert. denied, 462 U.S. 1119 (1983). See also, United States v. Vetco, Inc., 691 F.2d 1281 (9th Cir.), cert. denied, 454 U.S. 1098 (1981) (Service summons for Swiss subsidiary of U.S. company records enforced).

3. Frequently the entity or person to whom the summons was issued will argue that compliance with the summons will force the individual to violate foreign law. The mere fact that foreign law may subject a person to criminal sanctions in the foreign country if he produces certain information does not necessarily bar a domestic court from compelling production. United States v. First National Bank of Chicago, 699 F.2d 341 (7th Cir. 1983). The courts have generally applied a balancing test to determine whether principles of international law or foreign illegality ought to preclude enforcement of a summons. See Vetco, 691 F.2d 1281; United States v. Toyota Motor Corp., 569 F. Supp. 1158 (C.D. Cal. 1983). The factors to be weighed under the current Restatement (Third) of Foreign Relations Law § 442(1)(c) are:

> a) The importance to the investigation or litigation of the documents or other information requested;

b) the degree of specificity of the request;

c) whether the information originated in the United States;

d) the availability of alternative means of securing the information; and

e) the extent to which non-compliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.

4. In United States v. Toyota Motor Corp., 569 F. Supp. 1158 (C.D. Cal. 1983) the court denied a foreign corporation's motion to dismiss proceedings to enforce a summons for records needed to determine the correctness of the tax liability of its U.S. based subsidiary. The Service summoned records of the Toyota Corp. of Japan in connection with an investigation of its U.S. subsidiary. The records were in Japan and the Japanese government refused to give assistance under the U.S. Japan tax treaty. The court held that for purposes of section 7604(a), the corporation could be "found" in any judicial district in which personal jurisdiction could be obtained over it. Personal jurisdiction over the Toyota Corp. of Japan existed because it purposefully availed itself of business opportunities in the forum and because the claim arose out of the corporation's forum-related activities. Service of the enforcement petition on the president of the corporation's U.S. based subsidiary complied with Fed. R. Civ. P. 4(d)(3). On the other hand, just hiring a United States lawyer does not make a foreign bank “present” in the U.S. for all purposes. See Cayman Nat’l Bank v. United States, 2007 WL 641176 (M.D.Fla. Feb. 26, 2007) rev’g, 2006 WL 3359287 (Mag. M.D.Fla. Oct. 20, 2006).

5. Summoned party must take "all reasonable efforts" to obtain the records from outside the United States. See United States v. Hayes, 722 F.2d 723 (11th Cir. 1984); see also United States v. Malhas, No. 15-cv-3932, 2015 U.S. Dist. LEXIS 151990 (N.D. Ill. Nov. 10, 2015).

6. The Service was denied enforcement of a summons compelling taxpayers to sign consent directives that would enable the Service to obtain information from both foreign and domestic financial institutions on the basis that such directive would circumvent the protections Congress provided to taxpayers in section 7609 since the directives were not limited to foreign accounts. United States v. Kao, 81 F.3d 114 (9th Cir. 1996).

7. A district court authorized the Service to seek information from UBS AG, a Swiss-based financial institution, about taxpayers suspected of using UBS bank accounts to evade income taxes. The order issued by the court gave the Service permission to serve a John Doe summons on the foreign institution. The court

noted that the summons "relate[d] to the investigation of an ascertainable group or class of persons" and that a reasonable basis existed for believing the group or class may have failed to comply with U.S. tax laws. Further, the information sought by the Service was not readily available from other sources. Order, In the Matter of the Tax Liabilities of John Does, No. 08-21864-MC-LENARD/GARBER (S.D. Fla. July 1, 2008).

J. Fair Credit Reporting Act - 15 U.S.C. § 1681 et seq.

1. Purpose is to regulate the information that consumer reporting agencies can supply to others. Specifically, the purpose of the Act is to assure that consumer credit, personnel, insurance and other information is collected, disseminated and used in a manner that will protect the consumer's interest in the confidentiality, accuracy, relevancy, and proper use of such information.

2. Consumer reporting agency is one which regularly engages in assembling or evaluating consumer credit information for the purpose of furnishing consumer reports to third parties.

3. A bank may be a consumer reporting agency; however, information it receives and assembles for its own use is excepted.

4. The provisions of the Act have been held applicable to the summons power of the Service. United States v. Puntorieri, 379 F. Supp. 332 (E.D.N.Y 1974).

5. The Act excludes from its definition of "consumer report" a report containing information solely as to transactions or experiences between the consumer and the person making the report. 15 U.S.C. § 1681a. So, information relating only to the bank and its customer (often what is sought) is not covered by the Act. United States v. Lake County Nat'l Bank, C75-55, 1975 WL 548 (N.D. Ohio Mar. 18, 1975); United States v. Bremicker, 365 F. Supp. 701 (D. Minn. 1973).

6. To protect consumers' interests, the Act restricts the circumstances under which a consumer reporting agency may furnish a full consumer report to third parties, including the Service. In general, the consumer reporting agency may only provide a full consumer report to the Service if one of the permissible purposes (or permissible circumstances) listed in 15 U.S.C. § 1681b is satisfied. Relevant to the Service, that section provides that a consumer reporting agency may furnish a consumer report under the following circumstances and no other:

a) in response to a court order;

b) in accordance with the consumer's written instructions;

c) to a person the consumer reporting agency has reason to believe intends to use the information in connection with:

(1) a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer;

(2) employment purposes;

(3) underwriting insurance involving the consumer;

(4) determining the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status; or

(5) a legitimate business need for the information in connection with a business transaction involving the consumer.

7. A consumer reporting agency may provide the Service with a consumer's credit report in response to a summons because a summons falls within the court order permissible purpose. 15 U.S.C. § 1681b(a)(1); see, Forty Years of Experience with the Fair Credit Reporting Act: An FTC Staff Report with Summary of Interpretations at 43 (July 2011), available at http://www.ftc.gov/os/2011/07/110720fcrareport.pdf (replacing the removed 1990 Commentary on the Fair Credit Reporting Act).

8. Absent a permissible purpose, a consumer reporting agency may still provide the Service with a consumer's name, address, former addresses, places of employment, or former places of employment, pursuant to 15 U.S.C. § 1681f, without a summons.

9. Some collection cases begin as tax delinquency investigations, i.e., the investigation begins before there is an assessed tax liability. In these cases, the Service must issue a summons to obtain a full credit report; it cannot lawfully request a full credit report under subsection 1681b(a)(3)(A) of the Act. The Service can obtain a full credit report by issuing a summons because this action satisfies the permissible circumstance requirement of 15 U.S.C. § 1681b(a)(1), which provides that a consumer reporting agency may furnish a full credit report "in response to the order of a court having jurisdiction to issue such an order ... ." The Service takes the position that a third-party recordkeeper summons satisfies the court order requirement in subsection 1681b(1)(a) because former section 7609(a)(3)(B) specifically listed a credit bureau as a type of third-party recordkeeper required to respond to the summons if the person entitled to notice of the summons does not file a timely motion to quash with the district court.

Subsection 1681b(a)(1) does not require the Service to be a creditor of the taxpayer before acquiring a full credit report by summons. See also Forty Years of Experience with the Fair Credit Reporting Act: An FTC Staff Report with Summary of Interpretations at 43 (July 2011), available at http://www.ftc.gov/os/2011/07/110720fcrareport.pdf (replacing the removed 1990 Commentary on the Fair Credit Reporting Act).

K. Forms 8300 and the Attorney-Client Privilege

1. When a person in the course of a trade or business receives more than $10,000 in cash, the person must complete a Form 8300 identifying the payor and the amount received. I.R.C. § 6050I. Many attorneys receiving in excess of $10,000 in cash from their clients have filed the return omitting the identity of the client on the ground that disclosure is protected by the attorney-client privilege. In fact, several state bar associations have so advised attorneys in their states.

2. There have been large numbers of Forms 8300 filed in this way and the Service has taken a position regarding enforcement of the summonses. The position is that there is no defense to compliance based on the attorney-client privilege, or on any other basis.

3. Most Federal circuit courts expressly hold that the identity of a client and fee information are not confidential communications and, provided there are no unusual circumstances, no privilege applies. See, e.g., In re Grand Jury Investigation No. 83-2-35 (Durant), 723 F.2d 447 (6th Cir. 1983), cert. denied, 467 U.S. 1246 (1984). But several circuit courts permit exceptions to the general rule: such exceptions are based on the potential use of the information to incriminate the client in wrongdoing, with little or no regard to whether the information sought to be protected is a confidential communication. See generally, United States v. Gertner, 873 F.Supp 729, aff'd, 65 F.3d 953 (1st Cir. 1995); United States v. Sindel, 53 F.3d 874 (8th Cir. 1995); In re Witnesses Before the Special March 1980 Grand Jury, 729 F.2d 489 (7th Cir. 1984); In re Grand Jury Proceedings (Jones), 517 F.2d 666 (5th Cir. 1975); Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960).

4. The Service has taken the position that communication by a client to an attorney of his own identity and fee arrangements is a matter that occurs in the course of business and is not a confidential disclosure made in order to obtain legal assistance. The attorney-client privilege protects only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege. Fisher v. United States, 425 U.S. 391, 413 (1976). In the situation, where the Service seeks to learn the identity of a person paying more than $10,000 in cash in the course of a trade or business, I.R.C. § 6050I, and nothing

more is known about such person, disclosure of the person's identity and fee arrangement is never tantamount to disclosure of a confidential communication. In support of this position, see the decisions of the Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth and District of Columbia Circuits. See In re Shargel, 742 F.2d 61 (2d Cir. 1984); accord In re Two Grand Jury Subpoena Duces Tecum Dated August 21, 1985, 793 F.2d 69 (2d Cir. 1986); In re Grand Jury Subpoena John Doe Esq., 781 F.2d 238 (2d Cir. 1985), cert. denied, 475 U.S. 1108 (1986); United States v. Goldberger & Dubin, P.C., 935 F.2d 501 (2d Cir. 1991); United States v. Liebman, 742 F.2d 807 (3d Cir. 1984); N.L.R.B. v. Harvey, 349 F.2d 900 (4th Cir. 1965); United States v. Tedder, 801 F.2d 1437 (4th Cir. 1986) cert. denied, 480 U.S.938 (1987); United States v. Ritchie, 15 F.3d 592 (6th Cir.), cert. denied, 513 U.S. 868 (1994); In the Matter of Witnesses Before the Special March 1980 Grand Jury, 729 F.2d 489 (7th Cir. 1984); In re Grand Jury Proceedings (85 Misc. 140), 791 F.2d 663 (8th Cir. 1986); United States v. Blackman, 72 F.3d 1418 (9th Cir. 1995); In re Osterhoudt, 722 F.2d 591 (9th Cir. 1983); accord Tornay v. United States, 840 F.2d 1424 (9th Cir. 1988); In re Grand Jury Subpoenas (Hirsch), 803 F.2d 493 (9th Cir. 1986); United States v. Hodgson, 492 F.2d 1175 (10th Cir. 1974); Tomlinson v. United States, 93 F.2d 652 (D.C. Cir. 1937), cert. denied, 303 U.S. 646 (1938); accord In re Sealed Case, 737 F.2d 94 (D.C. Cir. 1984); Nat'l Union Fire Ins. Co. of Pittsburgh v. Aetna Cas. & Surety Co., 384 F.2d 316 (D.C. Cir. 1967).

5. The legal advice rationale, which protects client identity and fee information where its disclosure would implicate the client in the very matter for which "legal advice" was sought, is more troublesome. Its application depends on the fortuitous circumstance of the reason for the client's seeking legal advice in the first place. Thus, a client paying more than $10,000 in cash for a criminal (non-tax-related) defense would not have his identity protected, but if such client also sought tax related advice, his identity would be privileged. The reason for seeking legal advice is, of course, a matter strictly within the control of the attorney and client and is subject to wide interpretation, if not abuse. It can be readily seen that if a tax-related motive for seeking legal advice can be successfully established, the attorney will be justified in withholding client identity information on Form 8300.

6. The legal advice rationale can be resisted in all circuits on the grounds that it is an inappropriate extension of the attorney-client privilege, and it is dead letter law. The reason it is an inappropriate application of the attorney-client privilege is set out in the decisions cited above. The reason that it is dead letter law is that the Ninth Circuit, which first created the legal advice rationale in United States v. Hodge & Zweig, 548 F.2d 1347 (9th Cir. 1977), has totally repudiated it as a misinterpretation of the holding in Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960). In re Osterhoudt, 722 F.2d 591 (9th Cir. 1983); accord Tornay v. United States, 840 F.2d 1424 (9th Cir. 1988); In re Grand Jury Subpoenas (Hirsch), 803 F.2d 493 (9th Cir. 1986).

7. The last link rationale protects client identity and fee information when disclosure would supply the "last link" on an existing chain of incriminating evidence likely to lead to the client's indictment. It is the position of this office that the last link exception is to no avail in the situation where the Service is seeking to learn from Form 8300 the identity of clients paying cash in excess of $10,000 to their attorneys. Nothing is known about the unidentified clients, so that disclosure of client identity would never provide the necessary last link to an indictment. Indeed, the identity of the client paying more than $10,000 in cash is, if anything, the first link in a possible (but by no means certain) chain of incriminating events. Thus, the exception cannot apply to the information required to be disclosed on Form 8300.

8. Attorneys will assert constitutional and professional responsibility related defenses to enforcement actions as well. The constitutional arguments noted apply in these cases and the Supremacy Clause arguments will overcome state bar association ethics of rules of practice and procedure arguments. Supremacy Clause arguments will also outweigh any state bar related defenses.

L. Second/unnecessary examination

Section 7605(b) protects against the unnecessary examination of taxpayers. Only one inspection of a taxpayer's books of account per taxable year is allowed unless the Secretary notifies the taxpayer in writing that an additional inspection is necessary. This notification authority has been delegated to the Director, International; SB/SE Territory Managers; W&I Territory Managers; TE/GE Directors, Federal/State and Local Governments, Indian Tribal Governments; LB&I Territory Managers; Director, Field Specialist; Director, Tax Exempt Bonds and EP Area Managers, and EO Area Managers. Delegation Order 57 (as revised). There are a number of exceptions to the second inspection rule:

1. Different type of tax. United States v. Kendrick, 518 F.2d 842 (7th Cir.) cert. denied, 423 U.S. 1016 (1975).

2. Sometimes, a Court will enforce a summons even though it requests, in part, information that is already in the possession of the Service.

a) In United States v. First National State Bank of New Jersey, 616 F.2d 668, 673-74 (3d Cir. 1980), cert. denied sub nom. Levey v. United States, 447 U.S. 905 (1980), the Service was permitted to obtain copies of certain tax forms from a third-party recordkeeper although they had been previously filed with the Service. The court held that the total number of such forms in the possession of the Service made it impracticable to retrieve those filed by any individual. Cf. United States v. Bank of

California, 652 F.2d 780 (9th Cir. 1980) which declined to follow First National State Bank.

b) Later, in United States v. Davis, 636 F.2d 1029, 1038 (5th Cir. 1981), it was held that a summons of the sort ordered enforced in First National State Bank, 616 F.2d 668 (3d Cir. 1980), did not constitute an "unnecessary examination or inspection." The Court stated that the "already possessed" rule should be limited to such cases as United States v. Pritchard, 438 F.2d 968 (5th Cir. 1971), where a revenue agent had informally examined the taxpayer's records at length and later sought to force their production without any explanation as to why the opportunity for informed examination had been insufficient.

3. It is not a reexamination if the present examination has not been completed. United States v. Giordano, 419 F.2d 564 (8th Cir. 1969), cert. denied, 397 U.S. 1037 (1970); United States v. Held, 435 F.2d 1361 (6th Cir. 1970), cert. denied, 401 U.S. 1010 (1971). An examination continues until the Service closes the case. See Rev. Proc. 2005-32, 2005-2 C.B. 1206.

4. Different Purposes - If, for example, the Service has conducted a Form W-4 compliance check and inspected the taxpayer's records pursuant to this compliance check, the Service may examine these records again as part of an employment tax examination. See Rev. Proc. 2005-32, 2005-2 C.B. 1206.

5. Different Tax Period – The IRS may inspect a taxpayer's books once per audit of a given year's tax return. See United States v. Titan Int'l, Inc., No. 14-3789, 2016 U.S. App. LEXIS 1687 (7th Cir. Feb. 1, 2016) (holding that the taxpayer's 2009 records, which were already inspected during the audit of its return for tax year 2009, may be inspected once again in connection with the audit of the taxpayer's 2010 tax return).

M. Summonses Issued to Debtors in Bankruptcy

1. The automatic stay provisions of 11 U.S.C. § 362(a)(6) prohibit "any act to collect, assess or recover a claim against the debtor that arose before the commencement of the case under this title."

2. Counsel has determined that service of a collection summons is an "act to collect" and should not be issued while the automatic stay is in effect.

3. However, since the automatic stay does not stay either the issuance of a notice of deficiency (or an assessment of taxes under section 362(b)(9)) or the commencement or continuation of a criminal investigation or proceeding against

the debtor, examination summonses may be issued. See In re Moore, 131 B.R. 893 (Bankr. S.D. Fla. 1991).

4. Prior to RRA 98, summonses in furtherance of TFRP investigations were considered by some courts to be "collection" summonses which violated the automatic stay. See In re Pyramid Restaurant Equipment, 24 B.R. 455 (Bankr. W.D.N.Y. 1982); In re Jon Co., Inc., 30 B.R. 831 (D. Colo. 1983). Section 7609(c)(2)(D) was amended by RRA 98. Now, summonses issued to determine whether a person is liable for the TFRP are no longer subject to the collection exception of section 7609. They are now "examination" summonses to determine a liability and thus not subject to the stay prohibition against collection actions.

N. Pending Tax Court Proceeding

In Ash v. Commissioner, 96 T.C. 459 (1991), the Tax Court established a framework for determining when it is appropriate for the court to exercise its supervisory power with regard to a summons issued to a taxpayer who has a case before the court. Previously, taxpayers had been able to obtain protective orders limiting the Service's use of the summons power on the ground that the summons undermined the court's discovery rules. See Universal Manufacturing Co. v. Commissioner, 93 T.C. 589 (1989); Westreco, Inc. v. Commissioner, T.C. Memo. 1990-501.

1. In Ash, the court held that summonses issued prior to the taxpayer's filing of a Tax Court petition posed no threat to the integrity of the court's discovery rules. See also PAA Management v. United States, 962 F.2d 212 (2d Cir. 1992) (a summons issued after an FPAA was issued but prior to the commencement of a Tax Court proceeding was not viewed as undermining the court's discovery rules).

2. In United States v. Clarke, 816 F.3d 1310, 1317 (11th Cir. 2016), the Eleventh Circuit held that "issuing summons in bad faith for the sole purpose of circumventing tax court discovery would be an improper purpose as a matter of law." However, the court declined to hold that the Service issued summons in bad faith because it found that the agent issued summons before the commencement of a Tax Court proceeding, pursuant to a valid investigation, and within the assessment period. It was of no consequence to the court that the summoned information would assist the Service in the preparation of its case before the Tax Court.

3. In the vast majority of cases, the Service should not be in the process of gathering the data on which to base a redetermination after it issues a SND. The SND represents the Service's determination that is to be presumed correct, and that in and of itself suggests that the Service has come to conclusions. The concern is that if the Service proceeds to issue a summons after mailing the SND,

Tax Court judges may perceive this as a maneuver to avoid the restrictions of Tax Court discovery. If the court is presented with a case of this nature and it views it in that light, the Tax Court may be tempted to reconsider its literal wording in the Ash decision, i.e., its bright line analysis that states that summonses issued before a petition is filed do not infringe on the court's interest in managing its own procedures. Opposing counsel often seeks to clutter a case with needless procedural maneuvering to exhaust the government's resources and delay the ultimate resolution of the case. As a best practice then, we should adopt a conservative approach to this issue.

4. Given these concerns, Counsel will support issuing a summons after an SND has been issued but before a Tax Court petition has been filed in rare situations in which there is an independent and sufficient reason that justifies doing so. Field Counsel will be advised to make a record for the file of the circumstances that gave rise to the post-SND summons and why counsel concluded that the circumstances justified the summonses. This information could be necessary if the petitioner seeks to exclude the summoned information from the Tax Court record.

5. If the post-petition summons concerns different taxpayers or different taxable years as are before the court, the court will not normally exercise its supervisory power, unless the taxpayer can show "lack of an independent and sufficient reason for the summons."

O. Right to Financial Privacy Act

1. If a financial institution agrees to voluntarily provide its financial records of a taxpayer's transactions, the Service need not follow formal summons procedures, except in cases governed by the Tenth Circuit's interpretation of the Right to Financial Privacy Act (RFPA), 12 U.S.C. §§ 3401-3422 and not covered by the 2008 RFPA exception that is explained below. In general, the RFPA requires that account owners be given notice of (and an opportunity to challenge) a government agency's intent to obtain records of their finances from a financial institution. However, the RFPA also provides an exception to these requirements as they apply to the Service. Specifically, section 3413(c) states: "Nothing in [the RFPA] prohibits the disclosure of financial records in accordance with procedures authorized by the [I.R.C.]." In all circuits other than the Tenth, the Service takes the position that an informal request for records is a procedure authorized under section 7602. The Tenth Circuit reached the opposite conclusion in Neece v. Internal Revenue Service, 922 F.2d 573 (10th Cir. 1990) and ruled that a bank's voluntary disclosure of a customer's financial records to the Service, without prior notice to the customer, violated the RFPA. The Tenth Circuit reasoned that section 7609, not section 7602, contained the procedures for obtaining records

concerning a taxpayer from a financial institution, i.e., a third-party source.

2. In RRA 1998, Congress enacted section 7609(j), which provides that nothing in section 7609 shall be construed to limit the Service's ability to obtain information, other than by summons, through formal or informal procedures authorized by sections 7601 and 7602. This section indicates that the Service's ability to informally seek the voluntary exchange of records, i.e., without a summons, constitutes a procedure authorized by the Code. Nevertheless, the Service will follow the Neece ruling in cases that may be governed by Tenth Circuit decisional law, which include situations where:

a) the financial institution is located in the Tenth Circuit;

b) the information sought concerns taxpayers residing in the Tenth Circuit, regardless of the location of the financial institution; or

c) the Internal Revenue Service office is located in the Tenth Circuit, regardless of the location of the financial institution or the residence of the taxpayer.

Note: In July 2008, Congress enacted 12 U.S.C. § 3413(k)(2)(B), a new exception to the notice and other requirements of the RFPA. This exception allows a financial institution to disclose customer financial record information to "any Government authority that certifies disburses, or collects payments" when the information is necessary to, and for the sole purpose of, "the investigation or recovery of an improper Federal payment or collection of funds or an improperly negotiated Treasury check." This exception should reduce the impact of the Neece ruling in the Tenth Circuit in many circumstances (such as where the Service is attempting to learn the identities of persons who received erroneous Federal tax refunds or credits), but the potential scope of the exception is currently untested in any federal court.

3. Suppression of evidence obtained in violation of the RFPA is not a remedy provided by the RFPA, so no fruit of the poisonous tree doctrine should prohibit the enforcement of a summons that was preceded by a good faith RFPA violation. Charles v. United States, No. 1:13-MC-46, 2013 U.S. Dist. LEXIS 152715 (W.D. Mich. Oct. 24, 2013).

XI. INTERVENTION - THIRD-PARTY SUMMONSES THAT ARE NOT SUBJECT TO NOTICE REQUIREMENTS OF I.R.C. § 7609(a)

A. Historically, a taxpayer has no right to notice of service of a summons. In re Cole,

342 F.2d 5 (2d Cir.), cert. denied, 381 U.S. 950 (1965).

B. A taxpayer has no automatic right to intervene in a proceeding to enforce a third-party summons that is not subject to the notice requirement of section 7609. The court may, in its discretion, permit the intervention. Donaldson v. United States, 400 U.S. 517 (1971).

C. The Supreme Court in Donaldson v. United States, 400 U.S. 517 (1971), suggested that the following situations might give rise to the grant of intervention:

1. The intervenor has a proprietary interest in the records;

2. A valid constitutional issue was presented; or

3. A recognized privilege may be available (a defense to compliance).

D. The government takes the position that an unknown John Doe taxpayer who is one of the subjects of a John Doe summons is not entitled to intervene in the case to enforce the John Doe summons. Tiffany Fine Arts, Inc. v. United States, 469 U.S. 310, 321 (1985) (citing legislative history for proposition that section 7609(f) "provides no opportunity for the unnamed taxpayers to assert any 'personal defenses,' such as attorney-client or Fifth Amendment privileges"). But see United States v. Coinbase, Inc., Case No. 17-cv-01431-JSC, 2017 WL 3035164 (N.D. Cal. July 18, 2017) (allowing a John Doe customer of the summoned party to intervene in the enforcement proceeding against the summoned party); United States v. Sidley Austin Brown & Wood LLP, 2004 WL 816448 (N.D.Ill. Apr 15, 2004) (allowing permissive intervention to Does in a John Doe summons enforcement case on a limited issue).

E. For information about requests by taxpayers or their counsel to attend the interview of a summoned third party, see the following section XII on third-party summonses subject to the notice requirement of section 7609(a), subparagraph F.

XII. THIRD-PARTY SUMMONSES SUBJECT TO THE NOTICE REQUIREMENT OF I.R.C. § 7609(a)

A. Scope

Section 7609 contains notice and waiting period requirements which apply to all third-party summonses, except for certain limited categories discussed herein.

1. When a third-party summons is issued, section 7609(a) (as amended by RRA 1998) requires notice be given to the taxpayer identified in the heading of the summons and any other person (whether an individual or an entity) identified in the description of summoned records. A third-party recordkeeper summons is no

longer the sole type of summons for which the Service must give notice. Now, the third-party recordkeeper category merely identifies the class of third-party summonses that may be served by certified or registered mail under section 7603(b)(1) and the class of third-party summonses for which a special agent must observe the notice and waiting period requirements of section 7609(a).

2. In general, the notice and waiting period requirements of section 7609(a) apply to third-party summonses that seek the production of any type of records, not merely the records of another person's business transactions or affairs. These requirements likewise apply to third-party summonses which seek the production of any type of testimony.

3. Any noticee may intervene in any proceeding brought by the government to enforce the summons. The summoned third-party shall have the right to intervene in any proceeding brought by a noticee to quash the summons.

4. Under the RRA 1998 amendments, the notice procedures apply to almost all third-party examination purpose summonses. Therefore, the Service must accurately distinguish between third-party summonses and summonses served on the taxpayer under investigation. In most situations, this distinction is obvious. However, it is less obvious in at least three scenarios. The first scenario involves a married couple who files joint returns and who are jointly and severally liable for payment. If only one spouse is summoned, the government has determined that it will give the other spouse notice in the manner described by section 7609(a) as a person identified in the summons. Even when both spouses are summoned (by issuing and serving separate summonses), each spouse is given notice of the other spouse's summons. This procedure apprises a jointly liable spouse of a summons served on his or her spouse, but it is questionable whether an attempted petition to quash or non-compliance with a summons upon such a jointly liable taxpayer would suspend the assessment statute under section 7609(e). The second scenario involves officers or employees of taxpayer-businesses i.e., corporations and sole proprietorships. When these persons are summoned as current officers or employees (whether or not this capacity is referred to on the face of the summons), the summons is excepted by section 7609(c)(2)(A) from the notice requirements of section 7609(a). The third scenario is a summons issued in a TEFRA partnership examination to a partner, the partnership, or a manager for the partnership. The Tax Division takes the position that a summons in these circumstances is never to determine the partnership's or partner's liabilities, so the exception in IRC 7609(c)(2)(A) does not apply.

5. Section 7609(a) applies to all summonses except:

a) A summons served on a person for whose liability the summons was issued, or any officer, or employee of that person. Section 7609(c)(2)(A).

b) A summons served to determine whether or not records of the business transactions or affairs of an identified person have been made or kept. Section 7609(c)(2)(B).

c) A summons served to determine the identity of holders of numbered bank accounts. (That is, accounts which are identified by a number or code rather than by name.) Section 7609(c)(2)(C).

d) A summons served in aid of the collection of an assessment made or judgment rendered against the person for whose liability the summons is issued, or the liability at law or in equity of any transferee or fiduciary of that person. Section 7609(c)(2)(D). See also Haber v. United States, 823 F.3d 746 (2d Cir. 2016) ("'[I]n aid of' is broad general language, and that language is not limited by a requirement that actual collection must be imminent or immediately possible.").

Note: Taxpayer notification is required for third-party summonses issued for Taxpayer Delinquency Investigations (TDIs), for records to establish the TFRP, or for any other investigation where no liability has been assessed or judgment entered. Notification is not required for third-party summonses issued for taxpayer delinquency accounts (TDAs) or any other investigation where an assessed liability exists.

Note: Summonses issued to determine whether a person is liable for the trust fund recovery penalty are no longer subject to the collection exception and thus notice must be given to any person identified in the summons. If more than one person is potentially liable for the penalty, separate summonses should be issued for each person under investigation even though the summonses seek the same records from the summoned party. The summoned party should be advised that the Service only seeks one set of the records requested in the summonses.

e) A summons issued by a criminal investigator to a third-party **who is not a third-party recordkeeper**. Section 7609(c)(2)(E)(i) and (ii).

f) A "John Doe" summons. Section 7609(c)(3).

g) A summons issued under the provisions of section 7609(g) where a court determines there is reasonable cause to believe that giving notice may lead to attempts to conceal, destroy, or alter records relevant to the examination or to prevent the communication of information from other persons through intimidation, bribery, or collusion, or to flee to avoid prosecution, testifying, or production of records. Section 7609(c)(3).

6. Suspension of the statute of limitations - Section 7609(e).

a) If the taxpayer (or the taxpayer's agent, nominee, or other person acting under the taxpayer's direction or control) intervenes in a summons enforcement suit or brings a proceeding to quash, then all periods of limitation under I.R.C. § 6501 (for assessing the taxpayer's liability for the periods listed in the summons) and all periods of limitation under I.R.C. § 6531 (for criminally prosecuting the taxpayer for the periods listed in the summons) are tolled. The periods are tolled during the time the proceeding is pending or appealed. Section 7609(e)(1).

b) If a third-party recipient of a summons (that is subject to the notice requirement of section 7609(a) or that is a John Doe summons under section 7690(f)) fails to comply with the summons for six months after being served, then the taxpayer's periods of limitations on assessment under section 6501 and on criminal prosecution under section 6531 shall be suspended beginning six months after the summons was served and ending when the dispute is resolved. Section 7609(e)(2); see also Treas. Reg. § 301.7609-5(e)(3) (providing guidance on the final resolution of a third party's response to a summons). IRM 25.5.6.6.3.4 (2009) contains procedures for documenting the Service's intention to rely upon a suspension of this type, including sending a letter to the third party witness, with a copy to the taxpayer.

B. Third-party Recordkeeper

RRA 1998 amended the Code to provide that a summons to a third-party recordkeeper may be served by certified or registered mail to the last known address of such recordkeeper. Section 7603(b). The summons may also be served pursuant to the traditional means allowed by section 7603(a). Third-party recordkeepers are defined in section 7603(b)(2) as:

1. Any mutual savings bank, cooperative bank, domestic building and loan association, or other savings institutions chartered and supervised as a savings and loan or similar association under federal or state law, & any bank or credit union;

2. Consumer reporting agencies;

3. Persons extending credit by credit cards or similar devices. See section 301.7603-2(a)(3). In United States v. New York Telephone, 682 F.2d 313 (2d Cir. 1982), the court held where a telephone company extends credit cards and additionally, extends credit by other means to both its credit card holders and non-credit card holders, the telephone company is a third-party recordkeeper with

respect to all records relating to those transactions. These similar means were third-party billings (billing a call to your own phone) and arranging billing relating to those transactions;

4. Any broker (as defined by 15 U.S.C. § 78c(a)(4));

5. Any attorney;

6. Any accountant;

7. Any barter exchange (as defined in section 6045(c)(3));

8. Any regulated investment company;

9. Any enrolled agent, and

10. Any owner or developer of a computer software source code (as defined in section 7612(d)(2)), but only when the summons seeks the production of the source code or the program and data to which the source code relates.

The first nine categories of third-party recordkeepers are only considered to be third-party recordkeepers when they are summoned to produce records that they made or kept (or give testimony about such records) of another person's business transactions or affairs. Owners or developers of computer software source codes are third-party recordkeepers even though they may not make or keep records of another person's business transactions or affairs. However, pursuant to section 7603(b)(2)(J), owners or developers of computer software source codes are only treated as third-party recordkeepers if they are summoned to produce the source code or the program and data to which the source code relates.

C. Procedures

In the case of all third-party summonses subject to section 7609(a), the following notice and waiting period requirements apply:

1. Time - notice, along with a copy of the summons and an explanation of the noticee's right to bring a proceeding to quash, has to be given within three days of the date on which the summons was served, but no later than the 23rd day before the appearance date fixed in the summons. Section 7609(a)(1).

2. Service of Notice - same manner as provided in section 7603 (relating to service of summons) or by certified or registered mail to the last known address of the noticee, or in the absence of a last known address, left with the person summoned. Section 7609(a)(2).

3. Noticee Defined - Any person (other than the summoned third-party) who is identified in a summons served on a third-party witness for the production of records or testimony relating to the person so identified. The taxpayer identified in the caption of the summons is always a noticee, even though his or her name may not appear in the description of summoned records. A noticee has the right to be given notice of the summons, to intervene in a summons enforcement proceeding, and to bring a proceeding to quash the summons.

a) In the case of a summons for bank records concerning a corporation solely owned by the taxpayer, the corporation is given notice and the taxpayer is also a separate noticee.

b) A summons may involve the records of multiple noticees. Where there are multiple noticees who reside at the same address, separate notices are required to be sent to each individual at that address. This calls for particular attention in husband and wife situations.

4. If the Service fails to give notice and receives the summoned information, it is possible that a court may suppress the summoned evidence. See United States v. Morse, 2007 WL 4233075, (D. Minn. Nov 28, 2007) (discussing defendant's argument to suppress evidence for alleged violation of section 7609's notice requirements, but finding in this case that the notice requirements were met); United States v. Kersting, 891 F.2d 1407, 1411 (9th Cir. 1989) (noting the possibility for a person harmed by abuse of process for an IRS summons to move to suppress evidence obtained by the summons at trial on the merits). If the Service's failure to give proper "notice" to all noticees is raised in a pending summons enforcement case, courts may sometimes find the defect a "harmless error." Adamowicz v. United States, 531 F.3d 151, 161-162 (2d Cir. 2008) (collecting cases: enforceability of that summons depends upon the totality of the circumstances, including the seriousness of the infringement, the harm or prejudice, if any, caused thereby, and the government's good faith). But see Jewell v. United States, 749 F.3d 1295 (10th Cir. 2014).

D. Petition to Quash the Summons

A noticee who wishes to prevent compliance with the summons by the party summoned must begin a civil action in the appropriate U.S. district court to quash the summons no later than twenty days after the day notice of the summons is given.

1. The noticee must mail (by registered or certified mail) a copy of the petition to quash the summons to the summoned person and a copy to the IRS officer who issued the summons. This must be done within the above twenty-day period, and

is a jurisdictional prerequisite to the court hearing the complaint. Ponsford v. United States, 771 F.2d 1305 (9th Cir. 1985); Berman v. United States, 264 F.3d 16 (1st Cir. 2001); Faber v. United States, 921 F.2d 1118 (10th Cir. 1990); Stringer v. United States, 776 F.2d 274 (11th Cir. 1985).

a) The summoned party has the right to intervene in this proceeding.

b) The summoned party is bound by the decision in the petition to quash proceeding whether he intervenes or not.

2. The date set for appearance cannot be sooner than:

a) The twenty-third day after notice is given.

b) It would be safe, therefore to set the appearance date for at least the twenty-sixth day after the date of service of the summons on the third party.

3. If the noticee files a petition to quash the summons, then the Service cannot examine the records until the court issues an appropriate order. The Service may only examine the records under these circumstances if the person bringing the petition consents to the examination.

4. Section 7609(d)(1) plainly prohibits premature *examination* of the records at issue, not physical acceptance. In Conner v. United States, 434 F.3d 676 (4th Cir. 2006), the taxpayer appealed the district court's finding with respect to *Powell's* fourth prong, asserting that by accepting the records from a third party prior to expiration of the twenty-three days in which he, the affected taxpayer, could seek to quash the third-party summonses, the revenue agent did not follow section § 7609(d)(1) nor the IRM. The Fourth Circuit held the taxpayer's argument was without merit. Although the IRM directed the revenue agent not to physically accept records in response to a third-party summons prior to expiration of the twenty-three day period in which the affected taxpayer could seek to quash the summons, such violation, while relevant to the bad faith inquiry presented in this case, did not constitute proof by itself of the Service's bad faith in issuing the challenged summonses.

5. Duty of third-party on receipt of the summons:

a) To assemble the records and prepare to produce them on a date specified in the summons, whether or not a petition to quash has been or will be filed. Section 7609(i)(1).

b) The third party or his agent or employee who makes a disclosure pursuant to a court order or upon reliance of an IRS certificate, where no

proceeding to quash the summons has been commenced, or the noticee has consented to the examination, will not be liable to any customer or other person for such disclosure. Section 7609(i)(3).

6. Certificate - On the second page (or reverse) of the original summons is an unexecuted certification stating that the period for beginning a proceeding to quash a summons has expired and no such proceeding was begun within such period, or that the noticee consented to the examination. Upon either of these events, the authorized Service officer may so certify. Upon request of the summoned third-party, the issuing officer may furnish such a certificate. Section 7609(i)(2).

7. A petition to quash brought by the taxpayer (or the taxpayer's agent, nominee, or other person acting under the direction or control of such person) suspends the periods of limitations under section 6501 on assessment and section 6531 on criminal prosecutions for the period during which the proceeding and appeal therein are pending. Section 7609(e)(1).

E. Exceptions

Sections 7609(c)(3), (f) and (g) provide that notice is not required in the following situations:

1. "John Doe" summonses.

2. Notice detrimental - under section 7609(g), the Service may avoid giving notice to the taxpayer where a court concludes that the giving of such notice may result in:

a) Concealment/destruction/alteration of records;
b) Intimidation/bribery of witnesses; or
c) Flight.

3. Currently these cases are carefully screened by Counsel for legal sufficiency in light of the statutory criteria. The section further provides that upon ex parte petition by the Secretary, the court determines, on the basis of the facts and circumstances alleged, when notice is not required.

F. Request by Taxpayers or their Representatives to be Present at a Summoned Third-Party Interview

1. Neither the taxpayer being investigated nor taxpayer's counsel has a right to

be present at the summoned interview of a third-party witness. The Service, therefore, may exclude the taxpayer and the representative from that proceeding. Generally, section 7609 provides the entire rights given a taxpayer with respect to a summons on a third-party witness. Those rights consist solely of a right to intervene in a summons enforcement proceeding against the witness, section 7609(b)(1), and a right to petition to quash the third-party summons, section 7609(b)(2). The relevant federal statutes do not create a right to be present at the interview of a summoned third-party witness that would be applicable to all taxpayers. Indeed, courts have found that neither the subject of an investigation nor counsel has a right, by statute or otherwise, either to be present at the summoned interview of a third-party witness or to cross-examine that witness. See United States v. Daffin, 653 F.2d 121, 124-25 (4th Cir. 1981) (citing United States v. Traynor, 611 F.2d 809, 811 (10th Cir. 1979) and United States v. Newman, 441 F.2d 165, 173-75 (5th Cir. 1971)); accord United States v. Nemetz, 450 F.2d 924, 926 (3d Cir. 1971). Further, taxpayers and their counsel have no right either to be present when summoned third parties produce requested documents or to participate in such proceedings. Traynor, 611 F.2d at 811.

2. In situations where it is necessary or appropriate to properly assert an evidentiary privilege (1) that belongs to the subject of the investigation, and (2) that the summoned witness might not otherwise invoke, either the taxpayer being investigated or the taxpayer's counsel may be permitted to be present at the summoned interview of a third party witness. But 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 other federally-recognized privilege, the Court issued a stay pending appeal of the court's order denying the taxpayer being investigated or his counsel the right to attend the summoned third-party interview. See United States v. Jones, 1999 WL 1057210 (D.S.C. Oct. 5, 1999) (taxpayer appeal dismissed by Fourth Circuit in June 2000). In United States v. McEligot, No. 14-cv-05383-JST, 2015 U.S. Dist. LEXIS 45519 (N.D. Cal. April 6, 2015), the court denied the taxpayer a right to be present at the summons interview of a third party witness.

3. An interested party to the Service's investigation of a taxpayer and the interested party's representative do not have a right to attend the summoned interview of a third-party witness; therefore, the Service may exclude the representative of an interested party from that proceeding. See United States v. Newman, 441 F.2d 165, 173-74 (5th Cir. 1971) (finding that an individual who had no right to intervene in a summons enforcement proceeding also had no "surveillance privileges," i.e., the opportunity to observe, but not actively participate in, the Service's interview of a summoned third party).

4. The summoned third party may exercise certain rights or make certain requests that may result in the taxpayer under investigation or the taxpayer's counsel being permitted to observe the investigatory interview. In these limited

situations, the Service may not be able to exclude the taxpayer or the taxpayer's counsel from attending that proceeding. Any witness, including the taxpayer being investigated, has the right to have counsel present at a question and answer proceeding. If a taxpayer's counsel appears, however, to represent persons with conflicting interests, such as representing both the taxpayer and a summoned third-party witness, the Service should consult the Summons Handbook at IRM 25.5 and Field Counsel. If a summoned third party chooses to be represented by the taxpayer's attorney at the interview, consider whether the attorney should be disqualified on conflict of interest grounds. The proper procedure to follow in situations of actual or potential dual representation is set forth in IRM 25.5.5.5.

G. Use of Summons Not Required

RRA 1998 added section 7609(j), which provides that nothing in section 7609 shall be construed to limit the Secretary's ability to obtain information, other than by summonses, through formal or informal procedures authorized by sections 7601 and 7602.

1. In United States v. Bank of Moulton, 614 F.2d 1063 (5th Cir. 1980), a special agent was at a bank serving third-party recordkeeper summonses under the prior law. While there, he informally conversed with the vice-president and bookkeeper for five to twenty minutes. The disclosures were limited and included information regarding the existence of relevant accounts and the volume of transactions through them. The taxpayer argued that this violated the waiting period of section 7609(d)(1), and therefore the summons should be unenforceable under the rule of Powell (i.e., the proper administrative steps of the Code had been followed). The court confirmed enforcement, holding the correct approach in determining whether a violation bars enforcement is "to evaluate the seriousness of the violation under all circumstances, including the government's good faith and the degree of harm imposed by unlawful conduct." Id. at 1066.

2. The Service takes the position that section 7609(j) is a legislated counter argument to the Tenth Circuit's reasoning in Neece v. United States,, 922 F.2d 573 (10th Cir. 1990). In Neece, the appeals court reasoned that the informal methods of obtaining bank records without a summons under section 7602(a)(1) did not constitute a procedure authorized by the Code. As a result, the Service could only acquire bank records consistent with the Right to Financial Privacy Act by following the third-party summons procedures of section 7609.

Note: The Service will continue to follow Neece in all circumstances that may be governed by the Tenth Circuit's decisional law. But see 12 U.S.C. § 3413(k)(2)(B).

XIII. "JOHN DOE" SUMMONSES - I.R.C. § 7609(f)

A. Background

A John Doe summons is a summons where the name of the taxpayer under investigation is unknown and therefore not specifically identified. A John Doe summons must be issued pursuant to a genuine investigation of a specific, unidentified person or ascertainable group or class of persons.

1. **Restricted Authority to Issue a John Doe Summons.** John Doe summonses can only be issued by high ranking executives who are specifically authorized to do so in Deleg. Order 25-1, which includes SBSE, W&I, LB&I, CI Directors and Directors of Field Operations or Territory Managers. Revenue Agents and Revenue Officers are not authorized to issue these summonses. Consult Delegation Order Number 25-1 (IRM 1.2.52.2(2)-(4)) whenever a John Doe summons is being considered.

2. **No Fishing Expeditions with John Doe Summonses.** The Service should no longer be in the information-gathering or research stage of a project when it decides to seek court authorization to serve a John Doe summons. The project research should be sufficiently developed to enable the Service to identify a specific tax compliance problem. The Service should be prepared to investigate the tax liabilities of specific taxpayers based on the information received from the John Doe summons. It would be inappropriate to use a John Doe Summons to conduct a 'fishing expedition."

3. **Necessary Purpose.** A John Doe summons is valid if the purpose of the summons is to investigate the tax liability of a specific set of unidentified taxpayers and all the summoned information is relevant to that investigation, even if a secondary purpose is to gather information for research purposes.

4. **Dual Purpose Summons.** Where the Service serves a summons with respect to a known taxpayer with the dual purpose of investigating both the tax liability of that taxpayer and the tax liabilities of unnamed parties, the Service need not comply with the requirements for a John Doe summons set forth in section 7609(f), as long as the information sought may be relevant to a legitimate investigation of the taxpayer with respect to whom the summons was served. It is irrelevant whether the Service's investigation of the known taxpayer is the primary or secondary purpose of the dual purpose summons; all that matters is that the Service is pursuing a legitimate investigation of the known taxpayer and that the summoned information and documents may be relevant to that investigation. The Service need not conduct its investigation in the least intrusive way possible or be satisfied with an offer of documents redacted for customer identities or with a mere sample of the taxpayer's total customers. Tiffany Fine

Arts, Inc. v. United States, 469 U.S. 310 (1985). If a court finds the Service has no genuine investigation of the taxpayer with respect to whom a summons is issued, however, the court may refuse to enforce a purported dual purpose summons. United States v. Gertner, 65 F.3d 963 (1st Cir. 1995). See also United States v. Ritchie, 15 F.3d 592 (6th Cir. 1994) (finding a John Doe summons should have been sought, but still enforcing a purported dual purpose summons where elements required by statute for issuance of John Doe summons were reviewed by the judge prior to the entry of an order enforcing the summons).

B. Statutory Requirements

1. **District Court Approval Required Before Serving a John Doe Summons.** Before a John Doe summons can be served, it **must** be approved for service by a district court in an ex parte proceeding. (The Service can never serve a "friendly" John Doe summons without obtaining court approval. Doing so will violate section 7609 and jeopardize the examination.)

2. **Three Requirements for Approval.** Under section 7609(f), a John Doe summons must meet three requirements to qualify for district court approval:

a) The summons must relate to the investigation of a **particular unidentified person or ascertainable group or class of unidentified persons.**

b) The Service must have **a reasonable basis** for believing that such person or group or class of persons may fail or may have failed to comply with the tax laws.

c) The information and identities sought to be obtained from summoned records **must not be readily available from other sources**.

Each of these three requirements are analyzed in detail below.

C. Ascertainable Group or Class of Persons

The unidentified person, group or class of persons under investigation, and the activity or transaction under investigation must be described with particularity on the line of the summons that begins with "In the matter of." The phrase "group or class" refers to a group or class of persons who have engaged in specifically described transactions or activities that are common to all persons or entities in the group or class. Generally, the common activities or transactions of the group or class of persons will directly relate to compliance with the internal revenue laws.

Example 1: A summons is issued to a bank to obtain the names of bondholders who purchased bonds issued by a county's Housing Authority for a specific construction project. The summons should read: "In the matter of John Does, the record and beneficial owners of County Housing Authority Revenue Bonds, Series 1985 (Blackhorse Housing Project)."

Example 2: A summons is issued to Dealer X to obtain the names of persons who sold metal to the dealer for the period January 1, 1992 through December 31, 1992. The summons should read: "In the matter of John Does, persons who sold metal to Dealer X during the period from January 1, 1992 through December 31, 1992."

Example 3: A summons is issued to ABC University to obtain the names of persons who made in-kind contributions to the University during the period January 1, 1994 through the present. The summons should read: "In the matter of John Does, all persons who made in-kind contributions to ABC University for the period January 1, 1994 through the date this summons is served."

> **Note**: The Service is entitled to information pertaining to the unidentified persons in the group through the time the summons is served even though the current taxable year is not yet completed, but a John Doe summons for the identities of unknown taxpayers who first became members of the group after the summons was served may conflict with the summoned party's duty to provide the Does with the notice described in section 7609(i)(4) after six months.

Example 4: A summons is issued to ABC Bank to obtain the names of all persons who received the interest income earned from Certificates of Deposit issued by the bank in amounts of $100,000 or more during the years 1980, 1981, and 1982. The summons should read: "In the matter of John Does, persons who received interest income from certificates of deposit issued by ABC Bank in denominations of $100,000 or more during the years 1980, 1981, and 1982."

Example 5: A summons is issued to the XYZ Barter Exchange to obtain the names and transaction records of all members of the exchange for the period of January 1, 1992 through December 31, 1993. The summons should read: "In the matter of John Does, all members of the XYZ Barter Exchange during the period of January 1, 1992 through December 31, 1993."

D. Reasonable Basis

1. The Service must establish a reasonable basis for suspecting noncompliance with the tax laws by the unidentified person or the entire group or class of unidentified persons that are the subject of the investigation. The Service need

not establish probable cause for suspecting noncompliance or meet any other evidentiary standard greater than a reasonable basis for suspecting noncompliance. The Service can establish that it has a reasonable basis for believing that an individual or a group or class may have or will fail to comply with the tax laws by showing:

a) the unidentified person or group has engaged in or is engaging in a transaction or transactions that the Service has determined to be noncompliant with the tax laws, or

b) the unidentified person or group has engaged in or is engaging in an activity or course of actions that is of such a nature that there is a likelihood of underreporting or other type of noncompliance with the tax laws.

2. **Common Financial Transaction or Activity Related to Tax Law Compliance.** A John Doe summons will usually not be appropriate unless the unidentified group or class of persons has engaged in a common financial transaction or an activity directly related to compliance with the tax laws. For example, a group that participates in financial activities not susceptible to detection, or designed to avoid detection, or to defeat the payment of taxes may be a candidate for a John Doe summons. On the other hand, members of a group whose only common characteristics relate to non-tax factors, such as political or ideological beliefs, or memberships in trade or professional organizations, should not normally be the subjects of a John Doe investigation.

3. **Statistical Data Needed as Evidence.** To determine whether there is a high degree of noncompliance, the Service should attempt to investigate or canvass as many of the group members that it can identify before considering a John Doe summons. The information gathered from these investigations or compliance checks will support the government's position that a reasonable basis exists to believe that the group or class of persons may have failed to comply with the tax laws. Information or statistical data from investigations of group members from other parts of the country may sometimes be used to support a John Doe summons issued to investigate members in a particular area who are involved in a similar transaction.

4. **Statistical Data Not Needed as Evidence.** While canvassing or performing compliance checks on the identified members of a group is generally useful in any John Doe summons case, there may be situations where, in the exercise of sound judgment, such steps can be deemed unnecessary. For example, where the Service is investigating the promotion of a particular financial transaction and the promoters have taken a position in the prospectus or other document that is contrary to the Service's announced position, it is not necessary to canvass the identified members to learn whether they did in fact follow the promoters' tax

advice. The reasonable basis standard is met by the promoters' documents. Also, for example, if a person or persons deposit a large amount of high denomination currency in decrepit condition within a period of a few weeks, the Service need not try to obtain more factual background on the unidentified person or persons. The inherently suspicious nature of the deposits meets the reasonable basis standard and makes a John Doe summons directed to the bank where the deposits took place appropriate. See United States v. Bisceglia, 420 U.S. 141 (1975).

5. **Statistical Evidence Needed if Common Financial Transaction is Absent.** If the Service has not discovered a common financial transaction suggesting noncompliance with tax laws in a group or class of persons, a John Doe summons may still be appropriate if investigations of known taxpayers in the group produce a significant statistical sample showing a very compelling degree of noncompliance. (A statistical sample that shows 50% or more of noncompliance indicates a high degree of noncompliance. While this is not intended as a bright-line test, to the extent the percentage is less than 50%, it will be more difficult to argue that a reasonable basis exists, and field counsel should consider whether a John Doe summons is appropriate.) A John Doe summons should not be considered where a common financial transaction suggesting noncompliance does not exist unless the Service has first gathered statistical data from identified group members establishing a factual basis for issuing the summons.

6. **Examples.** The following illustrate what evidence satisfies the reasonable basis requirement of section 7609(f)(2) and when statistical data must be used:

Example 1 (Same as Example 1 above): The Service seeks the district court's authorization to serve a John Doe summons on a bank to obtain the names of those persons who purchased bonds issued by a county's housing authority for a certain construction project. Specifically, the summons seeks the names of the record and beneficial owners of the bondholders of the County Housing Authority Revenue Bonds, Series 1985 (Blackhorse Housing Project).

The Service can satisfy the reasonable basis standard with the following fact pattern. The Service has learned that the county did not use the bond proceeds to build the advertised housing project. Instead, the proceeds were used to acquire higher yielding investments that generated taxable interest income to the bondholders. The prospectus or other public documents show that the bonds were advertised as tax-exempt municipal bonds. Thus, the unidentified bondholders have engaged in a transaction based on a promoter's position that the Service has rejected. This is enough to establish a reasonable basis for believing that an ascertainable group, the purchasers of County Housing Authority Revenue Bonds, Series 1985, Blackhorse Housing Project, engaged in a transaction that is not in compliance with the tax laws (the non-reporting of taxable interest income). While statistical data gathered from identified group members may be helpful, it is not necessary to establish a reasonable basis in this case because the Service has

rejected the promoter's position.

Example 2 (Same as Example 2 above): The Service seeks the district court's authorization to serve a John Doe summons on Dealer X, a metal buyer, to obtain the names of persons who sold metal to him from January 1, 1992 through December 31, 1992. The Service can satisfy the reasonable basis standard with the following fact pattern. Metal dealers in 1992 were not required to issue Forms 1099 to the persons from whom they purchased metal (the metal suppliers). As a result, the Service cannot readily detect metal suppliers that underreport income from these sales. Investigations of 40 metal suppliers who sold metal to Dealer X in prior taxable years showed that 30 had underreported their income. Also, the Service has gathered statistical evidence from investigations of other dealers, which shows a high degree of underreporting by the metal suppliers.

A John Doe summons is appropriate because the common activity of the group members (sales of metal to Dealer X) is not reportable to the Service on an information return and thus not susceptible to detection, indicating a likelihood of noncompliance with the law. Also, investigations of known taxpayers in the group show a very high degree of underreporting. It is necessary for the Service to gather statistical data from identified group members to meet the reasonable basis test because the common financial transaction, while not susceptible to detection, is not contrary to any of the Service's announced positions.

Example 3 (Same as Example 3 above): The Service seeks the district court's authorization to serve a John Doe summons on ABC University to obtain the names of persons who made in-kind contributions to the University from January 1, 1994 through the date the summons is served. The common financial transaction is the donation of in-kind gifts to ABC University. Investigations of known taxpayers who had made this type of gift to the University showed that 140 out of 160 taxpayers had overvalued their gifts.

A John Doe summons would be appropriate. The group's common financial transaction is not contrary to any of the Service's announced positions, nor does it suggest that the group members were in any way noncompliant with the internal revenue laws. Therefore, the statistical data gathered from the identified members of the group showing a very high degree of noncompliance is necessary to meet the "reasonable basis" requirement.

Example 4 (Same as Example 4 above): The Service seeks the district court's authorization to serve a John Doe summons on ABC Bank to obtain the names of all persons who received interest income earned on Certificates of Deposit issued by the bank in amounts of $100,000 or more during the years 1980, 1981, and 1982. The Service can satisfy the reasonable basis standard with the following fact pattern. During the years 1980, 1981, and 1982, interest earned from certificates of deposit in denominations of $100,000 or more were exempt from

the usual reporting requirements on information returns to the Service. Thus, members of this group engaged in a transaction that was not susceptible to detection by the Service. Also, investigations of holders of certificates of deposit in amounts of $100,000 or more in another bank revealed that 107 holders out of 115 examined had underreported interest income. A John Doe summons would be appropriate.

Example 5 (Same as Example 5 above): The Service seeks the district court's authorization to serve a John Doe summons on the XYZ Barter Exchange to obtain the names and transaction records of all members of the exchange for the period of January 1, 1992 through December 31, 1993. Members of XYZ Barter Exchange engage in income producing activities that are not susceptible to detection and a likelihood of noncompliance with the tax laws exists. In addition, the Service has conducted investigations of other barter exchanges, and these investigations reveal that approximately 75% of those examined underreported their income. A John Doe summons would be appropriate.

Example 6: The Service wishes to use a John Doe summons to obtain the names and social security numbers of all members of a trade association which it believes includes non-filing members. There is no financial transaction or activity related to compliance with the tax laws that is common to members of the group. However, the Service has statistical data from investigations of known taxpayers in the group which shows that 6 percent of the group has failed to file income tax returns, which percentage is about the same as the national non-filing rate.

The Service is not entitled to use a John Doe Summons to obtain names and social security numbers of the group members. Since there is no financial activity or transaction related to compliance with the tax laws that is common to members of the group, except membership in the group, there is no reasonable basis to believe that the group as a whole has failed to file income tax returns. The statistical data of 6% is not compelling and does not indicate that the group or class of persons failed to comply with the tax laws.

E. Information Is Not Readily Available

The information to be obtained, including the identities of the John Does, is not readily available from other sources when the information cannot be obtained from the Service's own records or public sources such as telephone directories, professional directories, or reporting services, and the information cannot be obtained voluntarily from entities such as state agencies and industry or professional organizations. The fact that it may be more difficult administratively for the Service to conduct the investigation by relying on its own records or on public sources may not satisfy the statutory requirement. The Service must show that retrieving the data from other sources will be impractical. This may be

shown by specifying the additional man-hours or procedures which will be necessary, and the significant impact on the Service's normal operations if the information cannot be obtained by the summons. See In the Matter of the Tax Liabilities of: John Does, 2011 U.S. Dist. LEXIS 144516, at *5-6 (E.D. Cal. Dec. 15, 2011).

Where some, but not all, of the information is readily available from public sources, the Service must establish that the public sources are not complete or not comprehensive, and that the summoned data is necessary to ensure a thorough investigation of all taxpayers in the group under investigation.

XIV. DESIGNATED SUMMONSES - I.R.C. § 6503(J)

A. **Section 6503(j)**, enacted on November 5, 1990, suspends the period of limitations for assessment with respect to certain large corporations (CIC taxpayers) when a court proceeding is instituted to enforce or to quash a designated summons or a related summons. The period of limitations is suspended (tolled) during any judicial enforcement period with respect to the designated summons or a related summons, plus 120 days if the court in any proceeding to enforce requires compliance, or 60 days if the court does not require compliance. The designated summons must be issued 60 days prior to the date the period of limitations (determined with any other applicable extensions) will expire with respect to the taxpayer-corporation; any and all related summonses must be issued within 30 days of the designated summons. The judicial enforcement period begins on the day a court proceeding to enforce the summons is brought and ends on the day on which there is a final resolution as to the summoned party's response to the summons.

B. The Service sought the enactment of section 6503(j) as a means to counter large corporate taxpayers, who refused to extend the statute of limitations on assessment and resisted disclosure of necessary information, thereby trying to force the Service to issue statutory notices of deficiency based on incomplete information. Principally, these taxpayers were corporations who were part of the "large case" program and whose potential tax liabilities might be substantial.

C. A designated summons may only be issued to a corporation which is being examined under the Coordinated Examination Program or any successor program. Currently, the successor program is the Coordinated Industry Case (CIC) program. Field Counsel is to keep the examining agents informed of any judicial action in connection with a designated or related summons so that they can track the statute of limitations on assessment.

D. **Section 6503(j)(2)(A)(i)** requires pre-issuance review by the Regional Counsel (**Note:** Under the reorganization of the Chief Counsel's office, pre-issuance review will be performed by both the Division Commissioner and the Division Counsel of the Office

of Chief Counsel for the organizations that have jurisdiction over the corporation whose liability is the subject of the summons). Only when clearance has been obtained from the Division Commissioner and the Division Counsel shall Field Counsel advise Service personnel to issue the designated summons and related summonses. Subsequently issued related summonses need not be cleared by Field Counsel with the Division Commissioner and the Division Counsel. However, Service personnel will continue to contact their local Field Counsel Office for pre-issuance legal review of related summonses.

E. **Suit recommendations** are to be prepared by Field Counsel and transmitted to the Associate Chief Counsel (Procedure & Administration), as well as to the Department of Justice, for simultaneous review.

F. The corporation will receive notice that a designated summons has been issued to it when the designated summons is served on it. The corporation will receive notice that a related summons has been issued when a copy of the related summons is personally served on it or properly mailed to it in accordance with section 7609(a).

G. **In United States v. Derr,** 968 F.2d 943 (9th Cir. 1992), the Service sought enforcement of a designated summons to Chevron Corporation. The Ninth Circuit affirmed the district court's order enforcing the designated summons. The Court rejected the taxpayer's argument that section 6503(j) effectively required the Service to show that the taxpayer failed to cooperate with the Service. The Service need only show that the Powell requirements have been met. The Ninth Circuit also rejected the taxpayer's attempt to enforce specific language in the Manual which was favorable to the taxpayer.

XV. TAX TREATY SUMMONSES

A. A summons to assist in an investigation of a Canadian tax liability issued pursuant to the exchange of information provisions of our tax treaty with Canada is enforceable. United States v. Stuart, 489 U.S. 353 (1989). The Supreme Court in resolving a conflict between the Ninth Circuit in Stuart v. United States, 813 F.2d 243 (9th Cir. 1987), and the Second Circuit in United States v. Manufacturers and Traders Trust Co., 703 F.2d 47 (2d Cir. 1983), held that the Service may issue a summons to obtain information requested by Canada pursuant to the 1942 Convention, whether or not the Canadian tax investigation is directed toward criminal prosecution. The Supreme Court, in effect, agreed with the Second Circuit which had earlier held that the Service's authority to enforce a summons may differ between the domestic and international areas, and specifically held that the statutory language restricting the use of a summons, after a United States Department of Justice criminal referral, would not limit a request for summons enforcement in a tax treaty case. See Mazurek v. United States, 271 F.3d 226 (5th Cir. 2001) and Lidas, Inc. v. United States, 238 F.3d 1076 (9th Cir. 2001).

B. The Service possesses the authority to issue a summons on behalf of the competent

authority of a country that has a Tax Information Exchange Agreement (TIEA) with the United States. Barquero v. United States, 18 F.3d 1311 (5th Cir. 1994). In Barquero, the taxpayer had challenged the constitutionality of a TIEA with Mexico. The Fifth Circuit found the TIEA in question to be constitutional.

XVI. SOFTWARE SUMMONSES

A. The Internal Revenue Service is generally prohibited from issuing a summons or commencing an action to enforce a summons to produce or analyze tax-related computer software source code. Section 7612(a)(1).

B. The definition of software includes computer software source codes and computer software executable codes. Section 7612(d)(1).

C. Computer software source code is defined as follows:

1. The code written by a programmer using programming language which is comprehensible to appropriately trained persons and is not capable of directly being used to give instructions to a computer;

2. Related programmers' notes, design documents, memoranda, and similar documentation; and

3. Related customer communications. Section 7612(d)(2).

D. Computer software executable code is defined as any object code, machine code or other code, readable by a computer when loaded into its memory and used directly by such computer to execute instructions and any related user manuals.

E. Summons for software permitted - The Service may issue a summons or begin an enforcement action with respect to any portion, item or component of computer software source codes if the following conditions are satisfied:

1. The Service must be unable to reasonably ascertain the correctness of any item on a return from a taxpayer’s books, records or other data or by using the computer software executable code (and any modifications thereof) to which the source code relates, and any associated data which, when executed, produces the output to ascertain the correctness of the item [Section 7612(b)(1)(A)];

2. The Service must identify with reasonable specificity the portion, item, or component of the source code needed to verify the correctness of the item on the return [Section 7612(b)(1)(B)]; and

3. The Service must determine that the need for the particular item or component of the source code outweighs the risk of an authorized disclosure or trade secret [Section 7612(b)(1)(C)].

4. The Service is treated as meeting the requirements contained in subparagraphs E.1 and E.2 above if:

a) The Secretary determines it is not feasible to determine the correctness of an item without access to the computer software executable code and associated data;

b) The Secretary makes a formal request to the taxpayer for such code and data and to the owner of the computer software source codes for such executable code; and

c) Such code and data is not provided within 180 days of such request. Section 7612(b)(3).

F. The exceptions to the prohibition concerning the issuance of a summons or the beginning of an action to enforce a summons to produce or analyze any tax-related computer software are found at section 7612(b) and are as follows:

1. Any inquiry into any offense under the internal revenue laws;

2. Any tax-related computer software codes acquired or developed by the taxpayer or a related person primarily for internal use by the taxpayer rather than for commercial distribution;

3. Any communication between the owner of the tax-related computer software and the taxpayer or related person, or

4. Any tax-related computer software codes which are required to be provided or made available pursuant to any other provision of the Internal Revenue Code.

G. The limitation regarding the issuance of a summons or the enforcement of a summons applies only to tax-related computer software used for accounting, tax return preparation, tax compliance, and tax planning purposes. Section 7612(a)(1) and (d)(6).

H. It is further provided in section 7612(b)(4), that in a proceeding to enforce a summons for the software, any party may request a hearing to determine whether the applicable requirements of section 7612(b) are met.

I. When software comes into the possession of the Service, the Service must take the following actions to protect the software:

1. The software may be used only in connection with the examination of the taxpayer's return, any appeal by the taxpayer to the Internal Revenue Service Office of Appeals, any judicial proceeding (and any appeals therefrom) and, any inquiry into any offense connected with the administration or enforcement of the internal revenue laws.

2. The Secretary must provide, in advance, to the taxpayer and the owner of the software a written list of the names of the individuals who will analyze or have access to the software.

3. The software shall be maintained in a secured area or place and in the case of computer software source codes, will not be removed from the owner's place of business unless the owner permits, or a court orders, such removal.

4. The software may not be copied, except as necessary to perform the analysis. The Service must number all copies of any software made and certify in writing that no other copies have been or will be made. When the software is no longer needed, the software and all copies shall be returned to the person from whom they were obtained and any copies on the hard drive of a computer or any mass storage device shall be permanently deleted.

5. The Service must obtain from persons who analyze or had access to the software a written certification, under penalties of perjury, that all copies and related materials have been returned and no other copies were made of them.

6. The Service may not decompile or disassemble the software.

7. The Service will provide to the taxpayer and to the owner of any interest in the software a written statement between the Service and a person who is not an officer or employee of the United States, but who will have access to the software information:

a) That the person agrees not to disclose the software to any person other than persons to whom such information could be disclosed for tax administration purposes.

b) That the person agrees not to participate for two years in development of software which is intended for a similar purpose as the software examined.

8. The software will be treated as return information for section 6103.

J. **Criminal Penalties**

I.R.C. § 7213 provides that any person in willful violation of the disclosure statutes is

guilty of a felony and upon conviction, will be fined not more than $5,000.00, or imprisoned, for not more than five years, or both, together with the costs of prosecution. The criminal penalties are applicable where any person willfully releases or makes known software that was obtained, whether or not by summons for the purpose of examining a taxpayer's return, in violation of section 7612.

XVII. TAX ACCRUAL WORKPAPERS SUMMONS

A. The term "tax accrual workpapers" refers to those audit workpapers, whether prepared by the taxpayer, the taxpayer's accountant, or the independent auditor, that relate to the tax reserve for current, deferred and potential or contingent tax liabilities, however classified or reported on audited financial statements, and to footnotes disclosing those tax reserves on audited financial statements. These workpapers reflect an estimate of a company's tax liabilities and may also be referred to as the tax pool analysis, tax liability contingency analysis, tax cushion analysis, or tax contingency reserve analysis. IRM 4.10.20.2

B. Tax accrual workpapers (TAW) typically include determinations and related documentation of estimates of potential or contingent tax liabilities related to tax positions taken by the taxpayer on certain transactions. The scope and quality of the workpapers will vary. IRM 4.10.20.2

C. The Service has a policy of restraint with respect to requests for TAW. See Announcement 2002-63, 2002-2 C.B. 72, and IRM 4.10.20. In those situations where the Service requests TAW, the general standard for requests for audit or tax accrual workpapers is the unusual circumstances standard. See IRM 4.10.20.3.1. This standard applies to all requests for audit workpapers, requests for tax accrual workpapers that do not involve a listed transaction as defined in Treas. Reg. § 1.6011-4, and to any request for tax accrual workpapers involving a listed transaction for returns filed on or before February 28, 2000. For the standard for requests for tax accrual workpapers involving a listed transaction for returns filed after February 28, 2000, see IRM 4.10.20.3.2.

D. If a taxpayer or third party does not produce audit or tax accrual workpapers in response to an IDR, the examiner must determine whether to issue a summons. The standards and procedures will differ depending upon whether the request for workpapers was made under the unusual circumstances standard or involved a listed transaction. See IRM 4.10.20.4.1.

Note: Pursuant to Treas. Reg. § 1.6012-2(a)(4)-(5), the Service requires that certain large corporations file a Schedule UTP (Uncertain Tax Position Statement) with their Form 1120 returns for tax years beginning on or after January 1, 2010. The schedule requires the annual disclosure of uncertain tax positions in the form of a concise description of those positions and information about their magnitude. The schedule does not require the taxpayer to disclose the

taxpayer's risk assessment or tax reserve amounts, even though the Service can compel the production of this information through a summons. United States v. Arthur Young, 465 U.S. 805, 815 (1984). While the Service requires the reporting of uncertain tax positions on the new schedule, the Service otherwise retained its policy of restraint with respect to requesting TAW.

XVIII. SUMMARY

Following this lesson plan, you will be able to identify and describe the authority to issue summonses, perform basic reviews of different types of summonses, and, if necessary, enforce compliance.

2018 GL-1 Instruction Assigned to Melinda Fisher (CC:SB)

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