

Office of Chief Counsel
Internal Revenue Service
memorandum

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subject:

This Chief Counsel Advice responds to your request for assistance dated May 5, 2004. This advice may not be used or cited as precedent.

ISSUES

- (1) Whether the Service's use of a private information source, (" "), during a criminal investigation violates the Right to Financial Privacy Act ("RFPA"), 12 U.S.C. §§ 3401-3422?
- (2) If so, whether applicable disclosure and privacy laws prevent the Service from using as an investigative resource during a criminal investigation?

CONCLUSION

The Service may use so long as: (1) it avoids requesting information through where the request could create a cause of action under RFPA against the Service in federal courts within the Tenth Circuit; and (2) under the particular facts and circumstances of the case, the disclosure is necessary to obtain information not otherwise reasonably available within the meaning of Internal Revenue Code ("I.R.C.") § 6103(k)(6) and Treas. Reg. § 310.6103(k)(6)-1T.

FACTS

is a private organization. is one of twenty-two financial institution associations in the United States. One service that provides is the members, which are law enforcement agencies, may submit queries to as to whether a specific individual or business taxpayer owns a checking account, savings account, or safe deposit box at -affiliated financial institutions using the . Generally, members send inquiries via a web-based interface. However, the Service would use facsimile communications to send inquiries to because of disclosure and privacy concerns.

Regarding the Service's use of , a single query may substitute for more traditional information gathering methods, such as interviewing employees of multiple financial institutions. Because maintains consolidated financial information from many financial institutions located in , , and , in some instances, the Service may accomplish investigative results that may have been otherwise unattainable or accomplished through multiple face-to-face interviews.

Internal Revenue Manual ("IRM") 9.4.1 (07-28-2003) describes various investigative techniques for respective types of criminal investigations. IRM 9.4.1.3 lists investigative activities, which do not require authorization, to identify an individual or entity without initiating an investigation. The activities include: clipping news articles; accessing IRS data bases; maintaining liaison with other law enforcement agencies; viewing tax information on the Integrated Data Retrieval System ("IDRS");¹ interviewing informants; identifying individuals through vehicle license checks; visually inspecting a home, office, real estate, or property to identify an individual; and recording results of the aforementioned activities. After an individual or entity is identified, the Service may initiate a Subject Criminal Investigation ("SCI") if an individual or entity is alleged to be in non-compliance with the laws enforced by the IRS and the case has prosecution potential. IRM 9.4.1.6. The object of a SCI is to gather pertinent evidence to prove or disprove the existence of a violation of the laws enforced by the IRS. *Id.* Pursuant to IRM 9.4.1.6.3, a SCI must be authorized by a Special Agent in Charge ("SAC") or Assistant Special Agent in Charge ("ASAC") in Title 26 investigations.²

We understand would be used in the following manner. The Service would submit an inquiry to via facsimile only in circumstances that the Service has: (1) initiated a SCI on a specific individual or entity; (2) attempted (and failed in its

¹ The IDRS system is the Service's primary resource for researching current taxpayer account information. Once a taxpayer's account has been retrieved on IDRS, the locations of tax returns and other paper documents which are pertinent to account transactions can be determined.

² Only a SAC can approve Title 18 or 31 SCI's. IRM 9.4.1.6.3 (1). However, in situations involving "sensitive" investigations, the Director of Field Operations must approve the SCI. IRM 9.4.1.6.3 (2).

attempt) to gather information about the existence of financial assets by using traditional investigative techniques, such as researching the Service's IDRS and searching the taxpayer's trash for evidence of the existence of such financial assets; and (3) determined that the taxpayer is not forthcoming or cooperative after attempting to gather the information from the taxpayer. The special agent may submit the taxpayer's name, address, and, if warranted Taxpayer Identification Number.³ The special agent can usually obtain this information from the Service's records. We understand that would not be used indiscriminately; rather, it would be used only as an alternative method to gather information related to a specific SCI after other traditional methods of information gathering were employed and failed.

After received an inquiry from the Service, would forward the search information via secure e-mail to individual Risk Officers at the affiliated financial institutions using search criteria defined by the IRS special agent. For example, a special agent may narrow the search criteria to include only the affiliated financial institutions located within a defined geographic area of the taxpayer's business or residence. Responses from the affiliated financial institutions, if any, would be returned directly to the special agent. The response times for the inquiries are usually within three work days. Responses are not routed back through . The contents of the responses from the affiliated financial institutions include the type of account, and the identity of the owner of the account.

LAW AND ANALYSIS⁴

Right to Financial Privacy Act

A financial institution may maintain records that establish the existence of taxpayer assets, which may be useful to government agencies for enforcement activities.⁵

³ We understand that in some cases using only the name and address of an individual or entity would be insufficient to search database. Searches including common last names, for example, would yield multiple false positive results.

⁴ The analysis herein was coordinated with Branch 3 of the Office of the Assistant Chief Counsel (Collection, Bankruptcy & Summonses).

⁵ Financial institutions are also subject to the use and disclosure restrictions contained in the Gramm-Leach-Bliley Act ("GLB"), Pub. L. No. 106-102, §§ 501-510 (1999). We believe that disclosures by banks, under the circumstances described in this memorandum, would be permissible under certain law enforcement exceptions to the GLB. 15 U.S.C. § 6802(e)(5) (to law enforcement agencies to the extent specifically permitted or required under other provisions of law and in accordance with RFPA) and (e)(8) (to comply with a properly authorized civil, criminal or regulatory investigation). This position was informally coordinated with Federal Trade Commission Office of the General Counsel personnel, who concurred with our conclusion. Specific GLB issues can be dealt with in the context of a particular case.

Generally, government agencies' access to financial records⁶ is prohibited unless a particular statutory exception applies. RFPA § 3402. One of the exceptions to the general rule is that there is no prohibition on "the disclosure of financial records in accordance with procedures authorized by Title 26." RFPA § 3413(c). It is the Service's position that its investigatory practice of first seeking information informally, before compelling production with a summons, is a procedure authorized by I.R.C. § 7602(a)(1), which fits within the exception of RFPA § 3413(c). Therefore, in general, the Service may informally solicit and receive information from financial institutions without running afoul of the privacy provisions in the RFPA. However, as explained more fully below, the Service cannot take this position in the Tenth Circuit or in any situation that could be governed by that circuit's precedents because of the adverse decision in Neece v. Internal Revenue Service, 922 F.2d 573 (10th Cir. 1990).

In Neece, the court held 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 court reasoned that while I.R.C. § 7602(a)(1) - (3) authorized the Service to take several actions, such as examining and summoning records, it did not contain "procedures" within the meaning of the RFPA § 3413(c). Instead, the court reasoned that the procedures referred to in the RFPA were those codified in I.R.C. § 7609(a), which: (1) require the Service to notify the taxpayer (and any other person identified in the description of summoned records); and (2) provide the taxpayer and any other notified person with an opportunity to challenge the summons in court.⁷

Neece remains viable in the Tenth Circuit despite the 1998 enactment of I.R.C. § 7609(j), which provides: "[n]othing [in I.R.C. § 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." The legislative history does not expressly indicate that Congress intended to overturn Neece, and the Service does not take that position.⁸ Given the holding in Neece, we cannot recommend that the Service send informal requests for information through _____ to financial institutions that are governed by Tenth Circuit precedents.⁹ States in the Tenth Circuit are Wyoming, Utah, Colorado, Kansas, Oklahoma, and New Mexico. _____ has associated financial institutions in _____ and _____; therefore, no requests

⁶ RFPA § 3401 defines a "financial record" as information known to have been derived from any record held by a financial institution pertaining to a customer's relationship with the financial institution. The confirmed existence of an account or safe deposit box fits within this definition.

⁷ The Neece court emphasized that, by enacting I.R.C. § 7609 and the RFPA, Congress intended for bank customers to be notified and to have an opportunity to object whenever the Service (or other federal agencies) sought access to financial records. However, the court did not consider the treatment of third-party summonses excepted from notice requirements by I.R.C. § 7609(c)(2).

⁸ However, I.R.C. § 7609(j) provides a powerful counterargument to the Tenth Circuit's conclusion that I.R.C. § 7602 provides no "procedures" within the meaning of RFPA § 3413(c) for informal information gathering.

⁹ Internal Revenue Manual 25.5.1.4.1 (01-30-1999); accord Internal Revenue Manual 5.17.6.3 (09-20-2000) (Summons Use).

should be forwarded to financial institutions for information about accounts that may be maintained in those two states. Additionally, the Tenth Circuit's precedential influence extends beyond the geographical boundaries of Wyoming, Utah, Colorado, Kansas, Oklahoma, and New Mexico because a RFPA cause of action may arise in any appropriate federal district court. 12 U.S.C. § 3416. Furthermore, pursuant to 28 U.S.C. § 1391(e), venue in any civil action against a federal agency may lie in any district in which: (1) the defendant resides; (2) the cause of action arose; (3) where any real property involved in the action is situated; or (4) where the plaintiff resides (if no real property is involved). Therefore, the Service must not solicit information through _____ if any of the following conditions exist: (1) the financial institution is located in the Tenth Circuit; (2) the information concerns a taxpayer residing in the Tenth Circuit, regardless of the location of the financial institution or the Service office; or (3) the Service office is located in the Tenth Circuit, regardless of the location of the financial institution or the taxpayer's residence.

The Neece decision and our office's recommendations do not eliminate all potential uses of the _____ system. _____ has associated financial institutions in _____ and _____. If, for example, the Service's _____ office sends a request to _____ for information about any _____ or _____ bank accounts that may be owned by a taxpayer who resides in _____ or _____, the Neece decision should not be an impediment.

I.R.C. § 6103(k)(6)

With regards to non-Tenth Circuit uses of _____, in order to obtain taxpayers' financial records from a financial institution, the Service must necessarily disclose return information. A taxpayer's name, address and Taxpayer Identification Number (or any information collected by the Service in connection with determining the existence or possible existence of tax liability) constitutes "return information" under the Internal Revenue Code. I.R.C. § 6103(b)(2).

Generally, I.R.C. § 6103(a) provides that returns and return information are confidential. Except as authorized by Title 26, no officer or employee of the United States shall disclose any return or return information obtained by him in any manner in connection with his service. Id. However, I.R.C. § 6103(k)(6), in pertinent part, states that an internal revenue officer or employee may, in connection with his official duties relating to any criminal tax investigation, "disclose return information to the extent that such disclosure is necessary in obtaining information, which is not otherwise reasonably available," with respect to the enforcement of any provision of this title. Such disclosures shall be made only in such situations and under such conditions as the Secretary may prescribe by regulation. I.R.C. § 6103(k)(6) (emphasis added).

Pursuant to Treas. Reg. § 301.6103(k)(6)-1T, an internal revenue employee, in connection with official duties relating to any criminal investigation, or enforcement activity under the internal revenue laws may disclose return information, of any

taxpayer, to the extent necessary to obtain information relating to such official duties or to accomplish properly any activity connected with such official duties, including, establishing or verifying misconduct (or possible misconduct) or other activity proscribed by the internal revenue laws or related statutes.

According to Treas. Reg. § 301.6103(k)(6)-1T(c)(3), the definition of information not otherwise reasonably available is information that the IRS employee reasonably believes, under the facts and circumstances known to the employee at the time of a disclosure, cannot be obtained in a sufficiently accurate or probative form, or in a timely manner, and without impairing the proper performance of the official duties described by the temporary regulations, without making the disclosure.

The information sought by the Service from _____ in the proposed investigative activity relates to the official duties of the Service employee. Inquiries must, of course, follow the regulations established for investigative disclosures under I.R.C. § 6103(k)(6) and respect the Service's privacy principles. As with any other investigative disclosure of return information in order to obtain information, a disclosure of return information via facsimile communication from the Service to _____ must be measured against the necessity test as provided by I.R.C. § 6103(k)(6) and Treas. Reg. § 301.6103(k)(6)-1T.

Generally, the disclosure of name, address, and, if necessary, Taxpayer Identification Number, by facsimile in order to obtain financial record information for investigative purposes is likely to meet the standards of the statute and regulation because

is being used as a supplemental tool to established investigatory practices.

Whether the Service employee may use _____, in lieu of interviewing employees of multiple financial institutions within a given geographic area, depends on the facts of each case. For example, if employing traditional methods would cause the same information to be "not otherwise reasonably available" because that information could not be obtained in a timely manner; or the traditional method would impair the proper performance of the Service employee's official duties, disclosures of a taxpayer's name, address, or Taxpayer Identification Number by facsimile would be authorized.

Authorization for I.R.C. § 6103(k)(6) disclosures are narrow and only that information necessary to obtain information should be disclosed. The Service's inquiries to _____ must be specific in nature and made on a case-by-case basis. Also, the Service employee making the inquiry must individually define a reasonable scope of the search.

For example, the facts and circumstance of a case are as follows: (1) a SCI exists in which the income of a specific taxpayer is at issue; (2) the Service used traditional investigative methods that have failed; (3) the Service has determined that the taxpayer is not forthcoming or cooperative; (4) investigators have reason to believe that the taxpayer is banking within the specific geographic area of _____ or _____ and the taxpayer is not otherwise subject to the jurisdiction of the Tenth Circuit; (5) there is no

other indications of where the taxpayer may have a financial account; and (6) the taxpayer may be a customer at any of -affiliated financial institutions within the specific geographic area. Under these facts and circumstances, the use of and the consequent disclosures would be authorized under I.R.C. § 6103(k)(6).

As part of the criteria for the inquiry, the Service employee should request that the search be limited to certain financial institutions within a certain distance of the taxpayer's residence or place of business. The Service employee should also provide appropriate contact information so that the responding Risk Officers at respective financial institutions can forward any responsive information directly to the Service employee by phone or facsimile.

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

Please call at if you have any further questions.