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**From:**

**Sent:** Wednesday, June 15, 2011 11:44:05 AM

**To:**

**Cc:**

**Subject:** FW: Conference Call at 3:30 today?

Here is the [opinion stating that](#) [needs to sign indemnity agreements.](#)

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**From:**

**Sent:** Tuesday, May 24, 2011 11:41 AM

**To:**

**Cc:**

**Subject:** FW: Erroneous Refund Case

Attached please find a revised Indemnity Agreement, which has also been reviewed by the  
within .

As discussed during our telephone conversation, the Indemnity Agreement that was submitted by raises concerns under the Anti-Deficiency Act, 31 U.S.C. § 1341(a). However, by capping the IRS's liability to the refund amount, \$ , the revised Indemnity Agreement complies with the Anti-Deficiency Act.

The Anti-Deficiency Act prohibits agencies from entering into contracts or incurring obligations in excess of available appropriations. 31 U.S.C. § 1341(a). Contingent liabilities, such as unlimited indemnification agreements, present a risk that occurrence of the contingency would result in an obligation in excess of available appropriations. See Matter of U.S. Park Police Indemnification Agreement, Comp. Gen. B-242146 (August 16, 1991). Thus, the Comptroller General has explained that indemnification agreements are subject to two limitations:

First, a Federal agency may not enter into an indemnification agreement that would impose an indefinite or potentially unlimited contingent liability on the government, unless specifically authorized to do so by law. Second, even if the potential liability is limited, such agreements are permissible only to the extent that they are reasonably necessary or incident to the execution of the applicable program or activity. 63 Com. Gen. 145, 147 (1983). See also *Hercules, Inc. v. United States*, 516 U.S. 417, 427 (1996) (open-ended indemnification agreements barred by the Anti-Deficiency Act).

This first limitation is based upon the Anti-Deficiency Act. To ensure compliance with the Anti-Deficiency Act and to avoid the prohibition on contingent liabilities, it is necessary to set a specific dollar limit on the

liability. Comp. Gen. B-114860 (December 12, 1979), modified by Comp. Gen. B-198161 (November 25, 1980). Further, even in cases where the agency's liability is "limited and determinable," the agency must have sufficient funds available should the contingency ripen into an obligation. GAO, Principles of Federal Appropriations Law, (3d. Ed. Feb. 2006), 6-73, and cases cited therein. This concern may be addressed by either obligating or administratively reserving funds to cover the potential liability. GAO, Principles of Federal Appropriations Law, (3d. Ed. Feb. 2006), 6-73.

The second limitation on entering into an indemnity agreement is based upon the "necessary expense doctrine." Under 31 U.S.C. § 1301(a), funds may only be used for the purpose for which they are appropriated. However, the statute does not require that every item of expenditure be specified in the appropriations act. Under the "necessary expense doctrine" authority is also conferred to incur expenses which are necessary and proper or incident to the execution of the object. 63 Comp. Gen. 422 (1984). Therefore, an indemnification agreement may be proper if it is authorized expressly or if it is a necessary expense. 59 Comp. Gen. 369 (1980).

By capping the IRS liability under the Indemnity Agreement to \$ \_\_\_\_\_, a sum certain that is equal to the refund amount, the revised Indemnity Agreement complies with the Anti-Deficiency Act. Refunds are paid from the permanent indefinite tax refund appropriation authorized under 31 U.S.C. § 1324. 55 Comp. Gen. 625 (1976). This appropriation is called the "Refunding Internal Revenue Collections" account. See GAO, *Principles of Federal Appropriations Law*, Vol. III, Ch.14-27(1994); *Matter of Southside Investment Co.*, Comp. Gen. B-211389 (July 23, 1984). Thus, if the IRS had to reimburse \_\_\_\_\_ for the refund amount under the Indemnity Agreement, the IRS would make the reimbursement from the "Refunding Internal Revenue Collections" account. See U.S.C. § 1324 (disbursements from this appropriation may only be made for "(1) refunds to the limit of liability of an individual tax account; and (2) refunds due from credit provisions of the Internal Revenue Code of 1956 (26 U.S.C. 1 et seq.) enacted before January 1, 1978 or enacted by the Taxpayer Relief Act of 1997, or from section 25A, 35, 36, 36A, 168(k)(4)(F), 53(e), 54B(h), 6428, or 6431, of such Code, or due under section 3081(b)(2) of the Housing Assistance Tax Act of 2008. 31 U.S.C. § 1324(b)").

We understand, however, that \_\_\_\_\_ may not be willing to assist the IRS by returning the erroneous refund check if the indemnification is limited to the amount of the check. That is because \_\_\_\_\_ may incur expenses as a result of returning the check to the IRS (e.g., if the IRS incorrectly identified the taxpayer's account). Those expenses, which could not be paid from the "Refunding Internal Revenue Collections Account," may only be covered by an Indemnification Agreement if they were limited to a sum certain, the IRS (through the \_\_\_\_\_) obligates or reserves sufficient appropriated funds to cover the service's obligations under the Agreement, and the amount is determined to be reasonably necessary to carry out an authorized function such as the Service's collection activities.

In the event that \_\_\_\_\_ is not willing to enter into the indemnity agreement because the indemnification is limited to the refund amount and the \_\_\_\_\_ is willing (and able) to reserve limited funds ( \_\_\_\_\_ ) to cover reasonable expenses of litigation that may be incurred by \_\_\_\_\_, we believe that the IRS could enter into an Indemnity Agreement that would cover such limited expenses. In that case, however, a contracting officer may also need to sign the indemnification agreement (and even recommend specific language). See e.g., Form 13857 (03-2007) (Indemnification of Locksmiths and Tow Truck Operators).

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[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]



2) Should the check be made to the Department of Treasury or the IRS?

The Check should be payable to "United States Treasury." See e.g., <http://www.irs.gov/newsroom/article/0,,id=108544,00.html> and 2010 Instructions for Form 1040, line 76.