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Statutory Authority For Disclosure of Industry Codes By Census
Bureau to the Internal Revenue Service

This memorandum is in response to your inquiry whether statutory authority exists to allow for the disclosure to the Internal Revenue Service (IRS) of industry codes compiled by the Bureau of the Census (Bureau) matched with Employer Identification Numbers (EIN) for use to enhance taxpayer compliance. We conclude that such a disclosure would violate 13 U.S.C. § 9 (1990), which protects the confidentiality of information furnished to the Bureau of the Census.

Industry codes are the result of the requirements of 13 U.S.C. § 131 which proclaims that the "Secretary [of Commerce] shall take, compile, and publish censuses of manufactures, of mineral industries, and of other businesses. . . ."

The failure on the part of individuals or businesses to provide answers to the Bureau, or the making of false or misleading statements, is punishable by fines.

See 13 U.S.C. §§ 221-225. Thus, the statutory framework demonstrates that Congress intended for the census to be both thorough and accurate. In order to assure those responsible for supplying information to the Bureau that the information so supplied would remain confidential and not used for any purposes other than statistical studies, Congress enacted the confidentiality provision of Title 13. That section states in relevant part:

(a) Neither the Secretary, nor any other officer or employee of the Department of Commerce or bureau or agency thereof, or local government census liaison, may, except as provided in section 8¹ or chapter 10² of this title--

¹ Section 8 provides in relevant part:

(b) Subject to the limitations contained in sections 6(c) and 9 of this title, the Secretary may furnish copies of tabulations and other statistical materials which do not disclose the information reported by, or on behalf of, any particular respondent, and may make special statistical compilations and surveys, for departments, agencies, and establishments of the Federal Government, . . . upon payment of the actual or estimated cost of such work. . . .

(c) In no case shall the information furnished under this section be used to the detriment of any respondent or other person to whom such information relates, except in the prosecution of alleged violations of this title.

² Chapter 10 provides as follows:

(a) **Exchange of information**

The Bureau of the Census shall exchange with the Bureau of Economic Analysis of the Department of Commerce information collected under this title, and under the International Investment

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(1) use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied. . . .

and Trade in Services Survey Act, that pertains to any business enterprise that is operating in the United States, if the Secretary of Commerce determines such information is appropriate to augment and improve the quality of data collected under the International Investment and Trade in Services Survey Act. Information provided to the Bureau of Economic Analysis by the Bureau of the Census shall be only those data collected directly from respondents by the Bureau of the Census.

Added Pub. L. 101-533, § 5(a), Nov. 7, 1990, 104 Stat. 2347.

13 U.S.C. § 9 (1995 Supp.).³ "[T]his statute is a clear and strongly worded prohibition against disclosure. . . . It is a flat barrier to disclosure with no exercise of discretion permitted." *Seymour v. Barabba*, 559 F.2d 806, 807-08 (D.C. Cir. 1977) (names and addresses of companies utilized by Bureau are exempt under FOIA exemption (b)(3)). But see *Carey v. Klutznick*, 653 F.2d 732, 742 (2d Cir. 1981) (Stewart, J. concurring) (information "gathered" or "categorized and assembled" for the Bureau, but not reported by census respondents, does not acquire statutory protection).

In 1954, respondents providing information to the Bureau were reassured that the information obtained would be used only for statistical purposes and not for the purpose of "taxation, regulation or investigation."⁴ See *McGranery Opinion*, 41 Op. Att. Gen. 120, 121 (1954). The *McGranery* opinion was a determination by the Attorney General that the Bureau of the Census could make industry codes available to other Federal agencies for classification purposes. In holding that the sharing of industry codes was not prohibited by the statute, *McGranery* emphasized that the proposed use of the industry codes was limited to statistical purposes. The theme of *McGranery* was that neither the identity of

³ To strengthen the prohibition on disclosure, the statute further provides that wrongful disclosure of confidential census information by an officer or employee of the Bureau of the Census is punishable by fine, imprisonment, or both. See 13 U.S.C. § 214.

⁴ ~~The language appears on the questionnaire provided by the Bureau to each~~ respondent which states: "CONFIDENTIAL.--This report is required by Act of Congress, approved August 31, 1954, (13 U.S.C. §§ 131 and 224). Your report is confidential and only sworn Census employees will have access to it. It cannot be used for the purposes of taxation, investigation or regulation." See *St. Regis Paper Co. v. United States*, 368 U.S. 208, 216 n.6 (1961). We do not know if this language currently appears on the face of the questionnaires.

the respondent nor the confidential information reported by the respondent to the Bureau was to be disclosed. *Id.* at 124-25.

The reliance of businesses on the assurances made by the Bureau that information will remain confidential can be demonstrated by the reaction to the Supreme Court's decision in *St. Regis Paper Co. v. United States*, 368 U.S. 208 (1961).⁵ Prior to the Supreme Court's decision in *St. Regis*, it was believed that file copies of completed questionnaires retained by businesses maintained the same confidentiality as that held by the originals delivered to the Bureau. The *St. Regis* Court ruled that the retained copies were not protected because there was no language in the statute specifically providing protection. In a letter to President Johnson supporting the proposed amendment to the statute which would reverse the *St. Regis* decision, the Secretary of Commerce related:

The decision had an extremely adverse effect on Bureau operations, as not only did some companies destroy their file copies, and thus sever reporting continuity, but many companies lost faith in the promises of the Bureau, and the response to surveys has deteriorated. . . . The lack of confidence and cooperation will reduce the number of voluntary reports and correspondingly will reduce the accuracy of the statistics.

1962 U.S. Cong. Code & Admin. News 3188, 3190 (1963). The amendment was passed and retained copies of documents responding to the Bureau's questionnaires are protected from subpoena.

Title 13 does not prohibit other agencies from requesting information from businesses identical to that information provided to the Bureau.⁶ For example, the Bureau attaches industry codes to businesses and obtains financial

⁵ The Federal Trade Commission subpoenaed the file copy of *St. Regis*' census response as part of an investigation into antitrust violations. The company refused to produce the response, believing that the file copies of census documents were confidential and protected.

⁶ Section 132 provides:

To the extent that the provisions of this subchapter or subchapter IV of this chapter conflict with any other provision of this title or other law, pertaining to the Secretary or the Department of Commerce, the provisions of this title shall control; but nothing in this title shall be deemed to revoke or impair the authority of any other Federal agency with respect to the collection or release of information.

information with relation to those businesses. This does not prohibit the IRS from assigning identical industrial codes to businesses and obtaining the businesses' gross and net income or other financial data through means available to the IRS. On the basis of *McGranery*, it would be permissible for the IRS to use the Bureau's industry codes to classify the size of businesses in statistical compilations of income without identifying actual businesses. Likewise, nothing in the statute prohibits the Secretary of Commerce from releasing the list of industry codes without any individual identifying characteristics, because the codes are created by the Bureau, and not by the respondents. Nonetheless, the Secretary's decision not to release the industry codes is a matter of policy.

A determination by the Secretary of Commerce that the industry classification codes will not be released so that they cannot be used for purposes of taxation, investigation or regulation, is a determination assigned to the Secretary by Congress. The statute requires that he interpret the Act as well as promulgate the rules and regulations to carry out the Act. See 13 U.S.C. §§ 4⁷ and 5.⁸

The Secretary's anticipated refusal to share the data with the IRS for enforcement purposes is strengthened, moreover, by implication because, in 1990,

⁷ Section 4, title 13 states in relevant part:

Functions of Secretary; regulations; delegation

The Secretary shall perform the functions and duties imposed upon him by this title, ~~may issue such rules and regulations as he~~ deems necessary to carry out such functions and duties, and may delegate the performance of such functions and duties. . . .

⁸ Section 5, title 13 provides as follows:

Questionnaires; number, forms and scope of inquiries

The Secretary shall prepare questionnaires, and shall determine the inquiries, and the number, form, and subdivisions thereof, for the statistics, surveys and censuses provided for in the title.

Congress amended the Act to provide for the exchange of census information between the Bureau of the Census and the Bureau of Economic Analysis. Pub. L. 101-533, § 5(a), Nov. 7, 1990, 104 Stat. 2347. Of specific importance is subparagraph (b) which provides:

The Director of the Bureau requesting information under this section shall make the request in writing and shall certify that the information will be used *only for statistical activities* performed to improve the quality of data collected under the authority of title 13, United States Code, and the International Investment and Trade in Service Survey Act.

13 U.S.C. § 401(b) (emphasis added). The implication of the statute is that industry codes should only be shared by the Bureau if they are used for statistical purposes. Because the IRS' use of industry codes would be for purposes of "taxation," the Bureau may not be inclined to voluntarily share the codes with the taxing authority.⁹

If you require additional assistance, feel free to call A.M. Gulas at (202) 622-4590.

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⁹We make no determination of whether the codes could be the subject of an administrative summons under the Internal Revenue Code. That determination is best left to the Assistant Chief Counsel (General Litigation).