



OFFICE OF
CHIEF COUNSEL

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

March 2, 2001

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DL-103615-99

MEMORANDUM FOR CAROL GOLD
DIRECTOR, EMPLOYEE PLANS DIVISION
Attention: Ken Yednock

FROM: David L. Fish
Chief, Branch 1
Assistant Chief Counsel (Disclosure & Privacy Law)

SUBJECT: Privacy Act and Unauthorized Disclosure Considerations of
Placing Form 5500 Information on the IRS's Web Site

This memorandum responds to the Privacy Act question raised in your February 5, 1999, memorandum to this office and to a related disclosure question.

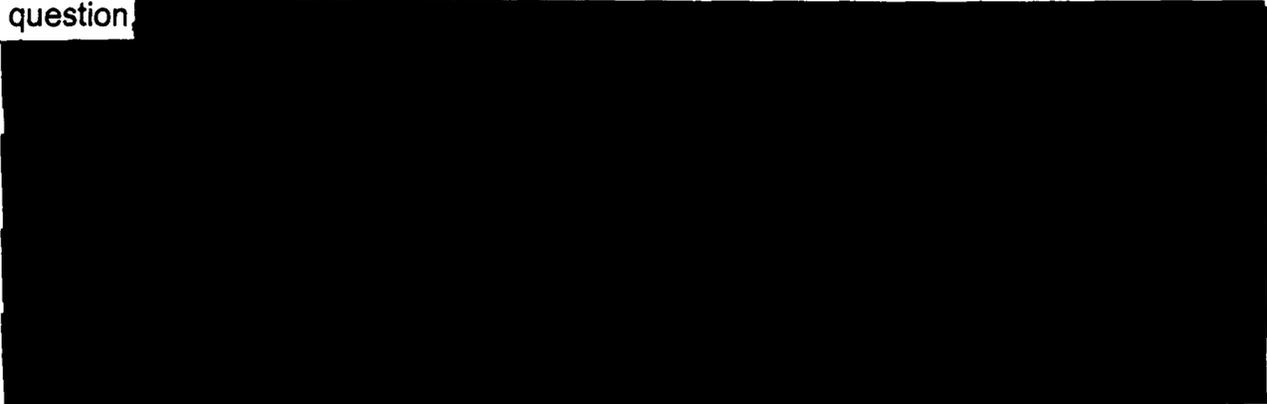
ISSUE ONE: Whether placing return information from filed IRS Forms 5500-EZ (*Annual Return of One-Participant (Owners and Their Spouses) Retirement Plan*), 5500 (*Annual Return/Report of Employee Benefit Plan*), and 5500-C/R (*Return/Report of Employee Benefit Plan*) on the IRS web site would violate the Privacy Act of 1974.

CONCLUSION ONE: As discussed below, putting the return information obtained from filed Forms 5500, 5500-C/R, and 5500-EZ, and attached Schedules P (*Annual Return of Fiduciary of Employee Benefit Trust*) on the IRS's web site would not violate the Privacy Act. Placing return information from Schedules B (*Actuarial Information*) filed with Forms 5500 and 5500-C/R likewise would not violate the Privacy Act, although, as noted below, there is a section 6103 issue with respect to such disclosure. And, although it would violate the Privacy Act to put on the site return information obtained from Schedules B filed with Forms 5500-EZ, the file you have provided to us indicates that data fields identified as being from these Schedules B will be blank on the 5500-EZ records, which obviates any Privacy Act concerns.

ISSUE TWO: Whether placing the information on the IRS web site would violate I.R.C. § 6103(a), which prohibits the unauthorized disclosure of tax returns and return information.

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CONCLUSION TWO: Placing the information obtained from filed Forms 5500 and 5500-C/R and Schedules P on to the web site is not a violation of I.R.C. § 6103(a). Whether information from Schedules B, with the exception of Schedules B filed with Forms 5500-EZ, may be added to the web site without violating section 6103 is a close question.



As for Schedules B filed with Forms 5500-EZ, placing information from these schedules on to the site would violate section 6103. However, as noted, the file you have provided us indicates that data fields identified as being from Schedules B will be blank, which removes any I.R.C. § 6103 concerns.

FACTS: As we understand from the December 2, 1997, memorandum from the Director, Corporate Processing Division, the Martinsburg Computing Center runs the Employee Plans Standard Extract program on a monthly basis. This is a data processing program that extracts certain data from filed Forms 5500 maintained in the IRS's Employee Plans Master File (EPMF). The extracted data is provided to IRS employees and, for a fee, to members of the public who request it.

The extracted data consists of the name of the plan sponsor; address of the plan sponsor; EIN of the sponsor; plan number; plan year ending; effective date of the plan; date(s) of amendment(s) to the plan; defined benefit funding deficiency; defined contribution funding deficiency; total contributions; employer contributions; plan assets; plan liabilities; district office code; state code; region code; document code; type of entity code; type of plan code; type of plan feature; actuarial cost method code; business code; actuary enrollment number; number of participants; return status code; RPA 94² current liability interest rate; and OBRA 87³ current liability interest rate. As proposed, this data would be placed on the Statistics of Income page and Electronic Bulletin Board. The data would be accessible by plan name or EIN, or both.

¹DOL does not appear to have, as yet, placed filed Forms 5500 on its web site, but could be encouraged to do so.

²Retirement Protection Act of 1994.

³Omnibus Budget Reconciliation Act of 1987.

LAW AND ANALYSIS: Subject to twelve enumerated exceptions, the Privacy Act prohibits agencies from disclosing information about an "individual" that is "contained in a system of records" to a third party, except where the individual consents to the release of the information. 5 U.S.C. § 552a(b). A prohibited disclosure includes a disclosure made electronically. OMB Guidelines, 40 Fed. Reg. 28,948, 28,953 (1975). The Act defines an "individual" as "a citizen of the United States or an alien lawfully admitted for permanent residence." 5 U.S.C. § 552a(a)(2). Because Forms 5500 and 5500-C/R pertain to employee plans with multiple participants, data extracted from these forms is the collective data of the participants and, therefore, is not data about an "individual." Additionally, information of business entities, such as corporations, or nonprofit organizations, is not Privacy Act-protected. St. Michaels Convalescent Hosp. v. California, 643 F.2d 1369, 1373 (9th Cir. 1981); OMB Guidelines, 40 Fed. Reg. 28,948, 28,951 (1975). Placing this aggregated data on the Internet would not violate the Act.

As the December 2, 1997, memorandum indicates, placing data extracted from filed Forms 5500-EZ on the Internet, however, is more problematic. Resolving the issue requires looking at the interplay between the Privacy Act and the disclosure provisions of the Code. Form 5500-EZ is for "one-participant" plans, *i.e.*, plans that cover just one person (and his or her spouse), where the person owns the entire business (or owns it with his or her spouse). Individuals acting as sole proprietors are covered by the Privacy Act. However, one of the twelve exceptions provided in the Privacy Act is disclosure for a "routine use." 5 U.S.C. § 552a(b)(3). The System of Records Notice, Treasury/IRS 24.046, *Business Master File (BMF), Taxpayer Services-Treasury/IRS*, which covers "[p]ersons in a sole proprietary role who file business tax returns" and "taxpayer entity records . . . and tax modules," lists as a routine use the "[d]isclosure of returns and return information . . . as provided by 26 U.S.C. 6103." We think that the data extracted from Forms 5500-EZ and maintained on the EPMF falls within the BMF system of records notice and that the routine use allows putting the data on the Internet.⁴

Specifically, I.R.C. § 6103(a) provides for the confidentiality of tax returns and return information, but allows for their disclosure as authorized by the Code. I.R.C. § 6104(b) makes available to the public qualified employee plan return information required to be furnished by Code sections 6033, 6034, and 6058, together with the names and

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addresses of the plans. Information on Form 5500-EZ is required to be filed under section 6058(a) and, thus, is available to the public under I.R.C. § 6104(b). Consequently, disclosure of the Form 5500-EZ data to the public is authorized in the Code and is not a Privacy Act violation because it is provided for in the published routine use.

Moreover, as a settled matter, section 6103 is the controlling statutory authority on disclosure of tax returns and return information, and Congress intended for that section to preempt the more general provisions of the Privacy Act. See Lake v. Rubin, 62 F.3d 113 (D.C. Cir. 1998); Cheek v. IRS, 703 F.2d 271 (7th Cir. 1983).

Regarding the second issue, whether the extracted data can be placed on the IRS's web site without running afoul of disclosure restrictions in the Code, *i.e.*, section 6103, information on Forms 5500, 5500-C/R, and 5500-EZ is required to be filed under section 6058(a) and, thus, as already discussed, is available to the public pursuant to section 6104(b). Similarly, Schedule P is used to satisfy filing requirements imposed by section 6033(a) and, hence, can be disclosed under section 6104(b).



we believe that a reasoned argument can be advanced that data from Schedules B filed with Forms 5500 and 5500-C/R can be made available to the public consistent with I.R.C. § 6104 and sections 103 and 104 of the Employee Retirement Income Security Act of 1974 (ERISA). We believe that this conclusion is consistent with what Congress intended when it enacted ERISA and comports with the IRS' disclosure practices with regard to paper copies of Forms 5500 since the enactment of ERISA.

ERISA effected a massive overhaul of the laws regulating private pension and employee benefit plans. Jurisdiction to enforce the provisions of ERISA is vested in DOL, Treasury, and the Pension Benefit Guaranty Corporation (PBGC). ERISA's reporting and disclosure provisions, contained in Title I, which is administered by DOL, and Title II, which amended the Code and is administered by IRS, are intended, in part, to enable participants and beneficiaries to obtain the full information necessary to enforce their plan rights.

The law requires annual filings with all three entities. ERISA §§ 103 and 104 require, for certain employee benefit plans, that an annual report be filed with the Secretary of Labor, and the reports are available for public inspection in the document room of DOL pursuant to ERISA §§ 104(a)(1) and 106. Included in the annual reports made available for public inspection are actuarial reports required by ERISA § 103(d). ERISA § 4065 requires pension plan administrators to file an annual report with PBGC. I.R.C. § 6058 requires that an annual return be filed with the IRS for certain qualified employee pension and other deferred compensation plans. I.R.C. § 6059 requires a periodic actuarial report be filed with the IRS for certain pension plans similar to the actuarial reports required by ERISA § 103(d). Because of the overlap among these requirements, ERISA provided that IRS, DOL, and PBGC work together to eliminate duplicative reporting. ERISA §§ 3004(a), 4065. Also, I.R.C. §§ 6058 and 6059 provide for coordination between Treasury and DOL concerning the reporting requirements of the two sections. I.R.C. §§ 6058(f), 6059(e).

The Form 5500 was developed in 1975 for "common reporting" to the IRS and DOL. See 40 Fed. Reg. 43134, 43135, 43155 (Sept. 30, 1975); Announcement 77-101, 1977-26 I.R.B. 21. The Form 5500 and Form 5500-C/R satisfy the reporting requirements of both agencies and the PBGC. Both forms state at the top that they are:

required to be filed under sections 104 and 4065 of the Employee Retirement Income Security Act of 1974 and sections 6039D, 6047(e), 6057(b), and 6058(a) of the Internal Revenue Code.

Schedule B to Form 5500 and Form 5500-C/R provides at the top that it "is required to be filed under section 104 of . . . ERISA, except when attached to Form 5500-EZ and, in all cases, under [I.R.C.] section 6059(a) . . ." Since inception, filed Forms 5500, Forms 5500-C/R, and Schedules B have been open to public inspection in the hands of the DOL and the IRS, and each has clearly indicated as much on its face, except that Schedule B provides that it is *not* open to public inspection "when attached to Form 5500-EZ."

Because ERISA requires DOL and Treasury to eliminate duplicative reporting, because ERISA calls for increased access to pension plan information, because the Schedules B are open to public inspection in the hands of DOL, and because the Code specifically provides for agency coordination of actuarial reports, we believe that it is reasonable to conclude that Congress intended information from Schedules B filed with Forms 5500 and 5500-C/R to be open to public inspection in the hands of the IRS. We find it implausible that Congress intended that two reports be filed, and that the IRS report be kept confidential and the identical DOL report be made public. Such a dichotomy in treatment would make sense only if the information required by the two provisions were somehow different. However, the report required by the ERISA provision, which report the statute makes public, contains all the information reported to the IRS on Schedule B.

Additionally, because Schedule B when attached to Form 5500 or 5500-C/R satisfies filing requirements of both the IRS and DOL, and the data contained on the Schedule B is public in DOL's hands, there would seem to be no loss of confidentiality when the IRS makes the very same information available to the public. See William E. Schrambling Accountancy Corp. v. United States, 937 F.2d 1485, 1487-90 (9th Cir. 1991) (Disclosure of return information that is not confidential does not violate section 6103, and return information that is in the public domain is no longer confidential.). However, I.R.C. § 6103 contains no express "public record" exception, and although a number of courts have recognized such an exception, not all courts have done so.

Concerning Schedules B filed with Forms 5500-EZ, the considerations enumerated above do not apply. Form 5500-EZ is solely an IRS form satisfying only the information reporting requirements of I.R.C. § 6059(a). It has no counterpart in the information reporting requirements of ERISA. Therefore, section 6103 prohibits making data from such Schedules B available to the public.

If you have any questions on this matter, please call me at 622-4580.

cc: Director, CL:GLD