



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

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OFFICE OF
CHIEF COUNSEL

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JMTosh / MNeedle

MEMORANDUM FOR CHIEF, CRIMINAL INVESTIGATION

FROM: Nancy J. Jardini 
Division Counsel/Associate Chief Counsel (Criminal Tax)

SUBJECT: Investigating I.R.C. § 6050I and 31 U.S.C. § 5331 Violations
Under Section 365 Of The Patriot Act

This responds to your request for guidance regarding how violations of I.R.C. § 6050I and 31 U.S.C. § 5331 should be investigated.¹ The differences between the two reporting regimes are minimal. There are differences in terms of penalties, statute of limitations, referral path, disclosure limitations, and forfeiture. The determination of which statute to use to investigate Form 8300 reporting violations will require a balancing of these differences.

Discussion

The Treasury Department issued an interim rule and companion notice of proposed rulemaking to add a new provision to its regulations under the Bank Secrecy Act. The new regulations implement Section 365 of the Patriot Act, which requires trades and businesses to report cash transactions of more than \$10,000 (or two or more related transactions involving more than \$10,000) as well as certain transactions involving monetary instruments to Treasury's Financial Crimes Enforcement Network ("FinCEN"). This is a dual reporting requirement, as it is analogous to reports currently required to be filed with the Internal Revenue Service ("IRS").² Trades and businesses required to

¹ Section 365 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("Patriot Act"), Public Law 107-56 (115 Stat. 272), amended the Bank Secrecy Act ("BSA") by adding 31 U.S.C. § 5331.

² See I.R.C. § 6050I, which also requires trades and businesses to report cash transactions of more than \$10,000 (or two or more related transactions involving more

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report this information will do so using Amended Form 8300, jointly prescribed by FinCEN and the IRS. There is no dual filing requirement, and there are no new reporting or record keeping requirements. The method of filing Forms 8300 remains the same; that is, those who are required to file Forms 8300 will mail them to the Detroit Computing Center and that information will then be entered into the CBRS database. Both FinCEN and IRS will be able to access Forms 8300 on this database.³ If the transaction covered by the Form 8300 occurred prior to January 1, 2002⁴, the data on CBRS will be blocked to FinCEN.

Since the IRS has investigatory jurisdiction over both the Internal Revenue Code and Title 31⁵, the question has arisen as to which statute special agents should use to conduct their investigations with respect to cash reporting violations. To address this question, we have analyzed each statute based on penalties, sentencing guidelines, statute of limitations, referral path, disclosure limitations and forfeiture. Although our analysis focuses on the differences between these factors, it is important to note the option of investigating Form 8300 violations under Title 31 instead of Title 26 applies only to Forms 8300 filed on or after January 1, 2002.

²(...continued)

than \$10,000) as well as certain transactions involving monetary instruments to the IRS. It is noted that whereas § 6050I reporting requirements includes court clerks within the definition of a trade or business, § 5331 does not. Additionally, only § 6050I requires the filer to provide notice of filing to the person whose transaction was the subject of the filing.

³ Since the Title 31 reporting requirement does not include Court Clerks, FinCEN will not be able to access Forms 8300 filed by Court Clerks.

⁴ January 1, 2002 is the effective date of revised Form 8300.

⁵ Pursuant to 31 C.F.R. § 103.56(c)(2) and Treasury Directive 15-41, the Commissioner of Internal Revenue has the authority to initiate investigations for possible criminal violations of 31 C.F.R. § 103, Financial Recordkeeping and Reporting of Currency and Foreign Transactions (except for violations of 31 C.F.R. § 103.23, which pertain to CMIR violations). Since this Treasury Directive is broadly drafted to include all criminal violations under Title 31, except as mentioned above, it does not need to be amended to incorporate 31 U.S.C. § 5331 specifically.

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Penalties

The Form 8300 satisfies reporting requirements for two separate statutes; therefore, there are two potential criminal violations.⁶ The penalties for § 6050I involving failure to file Forms 8300 are found under I.R.C. § 7203, which provides a maximum fine of \$250,000 (\$500,000 in the case of a corporation), or a maximum term of imprisonment of five years, or both.⁷ Furthermore, the penalties for filing false Forms 8300 are found under I.R.C. § 7206, which provides a maximum fine of \$100,000 (\$500,000 in the case of a corporation), or a maximum term of imprisonment of three years, or both.⁸

The penalties for Title 31 violations, including new § 5331, are found under 31 U.S.C. § 5322, and provide a maximum fine of \$250,000, or a maximum term of imprisonment of five years, or both. Additionally, if the § 5331 violation occurs during a violation of another law of the United States, or as a pattern of any illegal activity involving more than \$100,000 within a twelve month period, § 5322(b) provides for a maximum fine of \$500,000 or a maximum term of imprisonment of 10 years, or both.

Sentencing Guidelines

The Sentencing Guidelines provision is the same for both § 6050I violations and § 5331 violations. U.S.S.G. § 2S1.3 applies to the following violations: structuring transactions to evade reporting requirements; failure to report cash or monetary transactions; failure to file currency and monetary instrument reports; and knowingly filing false reports. The background statement under the Commentary of § 2S1.3 provides, "[t]he offenses covered by this guideline relate to records and reports of certain transactions involving

⁶ It is important to note an individual may not be tried for two separate crimes that contain the same elements. "Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." Blockburger v. United States, 284 U.S. 299, 304, 76 L. Ed. 306, 52 S. Ct. 180 (1932). The Blockburger test has been applied to delineate the scope of the Fifth Amendment's Double Jeopardy Clause, which prevents multiple or successive prosecutions for the "same offense." Texas V. Cobb, 532 U.S. 162, 173 (2001). [REDACTED]

⁷ We note that the penalty for failure to file a Form 8300 is higher than for other I.R.S. forms.

~~⁸ See also 18 U.S.C. § 3571(b) and (c).~~

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currency and monetary instruments. These reports include Currency Transaction Reports, Currency and Monetary Instrument Reports, Reports of Foreign Bank and Financial Accounts, and Reports of Cash Payments Over \$10,000 Received in a Trade or Business." U.S.S.G. § 2S1.3, commentary.

Statute of Limitations

The statute of limitations for § 6050I involving the failure to file Forms 8300 is three years. See I.R.C. § 6531(4). Where the § 6050I violation involves filing false Forms 8300, the statute of limitations is six years. See I.R.C. § 6531(5). There is no specific provision for statute of limitations under Chapter 53 of Title 31; therefore, the general statute of limitations provision of five years under 18 U.S.C. § 3282 applies to § 5331 violations.

Referral Path

The referral path of § 6050I with respect to Forms 8300 depends on the nature of the particular violation. Generally, violations involving the failure to file Form 8300 or the supplying of false information on Forms 8300 fall within the scope of the IRM and Tax Division Directive 87-61, and may be directly referred to the United States Attorney's Office, unless the violation is specifically designated as one that must be referred through the Tax Division.⁹

Since there are no directives conferring Tax Division oversight regarding Title 31 violations nor restricting referral directly to United States Attorney Offices, referral of Title 31 violations are so directly referred without Tax Division approval.

Disclosure Limitations

I. Access to Taxpayer Information - Effective January 1, 2002, special agents can access Form 8300 information for investigations under either Title 26 or Title 31. Agents must be cognizant of which investigatory role they are acting in when accessing Form 8300 information to protect against unauthorized disclosures. Title 26 Form 8300

⁹ Tax Division Directive 87-61 directs that I.R.C. § 6050I violations involving the prosecution of the following must be referred through the Tax Division: accountants, physicians, or attorneys or their employees; casinos or their employees; financial institutions or their employees; local, state, federal or foreign public officials or political candidates; members of the judiciary; religious leaders; representatives of the electronic or printed news media; officials of a labor union; and publicly-held corporations and/or their officers. See also CCDM 31.4.14.5.

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information, like other taxpayer information, is protected by I.R.C. § 6103. Generally, if the investigation concerns violations of the internal revenue laws (e.g., § 6050I), relevant returns (e.g., Forms 1040) and files relating thereto may be accessed. See I.R.C. § 6103(h)(1). If, however, the investigation concerns violations of other Titles (e.g., Title 31), access to these same items is much more limited, and a court order might be necessary (See I.R.C. § 6103(i)).

II. Disclosure of Form 8300 - The disclosure limitations vary depending on whether the Form 8300 reporting violation is being investigated under I.R.C. § 6050I or 31 U.S.C. § 5331. If the special agent is investigating the violation under § 6050I, disclosure is governed by I.R.C. § 6103. Generally, the form and underlying files may be disclosed as part of a referral for grand jury tax investigation or prosecution. Title 26 Form 8300 information may also be disclosed for law enforcement purposes in response to a written request, pursuant to I.R.C. § 6103(l)(15).¹⁰ However, the form itself or related return information cannot be so disclosed. Under § 6103(l)(15), special agents may access Title 26 Form 8300 information contained on CBRS. If, however, additional Title 26 information is sought beyond information from the Form 8300, a related statute call determination¹¹ will still be necessary. Alternatively, in any nontax investigation, special agents have the option of obtaining the Title 26 Form 8300 information, the form itself, and related files pursuant to a court order. See I.R.C. § 6103(i).

¹⁰ Section 6103(l)(15) provides "the Secretary may, upon written request, disclose to officers and employees of any federal agency, (B) any agency of a State or local government, or (C) any agency of the government of a foreign country, information contained on returns filed under section 6050I." This section also provides that disclosures of Form 8300 information under (l)(15) must comply with the disclosure laws applicable to reports filed under Title 31. Specifically, 31 U.S.C. § 5319 provides that information in reports filed under Title 31 may be disclosed to State and Federal agencies upon request.

¹¹ A related statute determination will be necessary, for instance, if the Special Agent in Charge determines that the Title 31 investigation involves a Form 8300 filed prior to January 1, 2002, and the investigation is tax administration within the meaning of § 6103(b)(4). See IRM 9.3.1.4.3.1.1.2. This determination, which is often called the "related statute" determination, changes the Title 31 investigation into a tax administration matter, subject to § 6103. Furthermore, if the Title 26 information beyond the Form 8300 is to be shared amongst members of a multi-agency task force, as opposed to being used by Treasury personnel in a Title 31/Title 26 matter, an (i) order may be necessary for use of tax return information in the Title 18 nontax investigations (e.g. bank fraud, bankruptcy fraud).

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For disclosure purposes, Forms 8300 are treated as returns, regardless of whether they are fraudulent¹², wholly fictitious¹³, or correct Forms filed to comply with the necessary reporting requirements. Until notified otherwise, filed Forms 8300 that are not required to be filed (less than \$10,000.00 or designated "suspicious") should be treated as return information, and therefore are ineligible for disclosure under § 6103(l)(15).

Forfeiture

The Service has forfeiture authority under the Internal Revenue Code and Title 31 as well as the money laundering laws. See I.R.C. § 7301, et. seq., 31 U.S.C. § 5317¹⁴, 18 U.S.C. § 981, and Treas. Dir. 15-41 & 15-42. If the investigation is under § 6050I, then § 7301, et. seq., can be used to forfeit the property used or intended for use in the violation. The difficulty with § 7301, et. seq., is that this forfeiture does not contain a tracing provision. If the investigation is under § 5331, then § 5317 can be used for forfeiture. Finally, if there is proof that the transaction violated the money laundering laws (18 U.S.C. §§ 1956 and 1957), then § 981 allows for the forfeiture.

Conclusion

As noted the substantive differences between the two statutes governing the Form 8300 are minimal. The differences in penalties, statute of limitations, referral path, disclosure limitations and forfeiture, might make use of one statute more attractive than the other.

We offer our assistance in assessing the differences in particular cases. Should you have any questions or wish to discuss the matter further, please feel free to contact me or Jennifer Tosh of the Criminal Tax Division on (202) 622-4470.

cc: Area Counsel (Criminal Tax)

¹² Fraudulent returns are defined as returns filed with fraudulent data (i.e., false identification number, or incorrect amount) in an attempt to defraud the government.

¹³ Fictitious returns are returns or reports filed for harassment purposes and not related to any actual reportable transaction.

¹⁴ The Patriot Act enhanced the scope of Title 31 forfeitures by attempting to move all violations of the Bank Secrecy Act under § 5317. Unfortunately, a typographical error incorrectly references § 5331 as § 5333 (which does not exist).