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CASE ID: GLS-111953-03
GLS File: GLS-HQ-1072-03
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MEMORANDUM FOR W. R. SWARTZ
ACTING NATIONAL DIRECTOR
LOW-INCOME TAXPAYER CLINICS (LITC)
TAXPAYER ADVOCATE SERVICE (TAS)

FROM: Lori R. Larson
Acting Chief, Public Contracts and Technology Law Branch
(CC:GLS:PCTL)

SUBJECT: 2004 LITC Pub. 3319 / Certifications of Compliance with Tax
Obligations / Paperwork Reduction Act Issues

This is in reply to your inquiries on this subject, raised during teleconferences, and in advance of the formal solicitation of comments of legal counsel on the 2004 version of the LITC Grant Application Package and Guidelines, Publication 3319.

In the interest of meeting the release date of May 1, you have involved counsel, including representatives from the offices of the Associate Chief Counsel (Procedure and Administration), Counsel to the National Taxpayer Advocate, and Associate Chief Counsel (General Legal Services), to be involved in the drafting and discussion phase of the revising of Publication 3319 to conform with the vision and policies of the National Taxpayer Advocate for the LITC program. [REDACTED]

[REDACTED]

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In addition to requiring signatures, titles, and dates, there has been a discussion of the need, or desirability, to obtain Employer Identification and Social Security Numbers (EINs and SNNs) for the entities and their key personnel or directors, who will be required to complete these forms as part of their LITC grant application.

With this interest in mind, and a desire not to risk a delay in the May 1, 2003, scheduled issuance of the 2004 version of Pub. 3319, you have asked the following specific questions:

1. Whether collecting the information by the means of oral (telephone) communications, instead of including the forms in Pub. 3319, would eliminate the requirement of the Paperwork Reduction Act, 44 U.S.C. chapter 35, to obtain OMB's prior review and approval of the collection of information, as set forth in regulations, see 5 C.F.R. Part 1320, that implement OMB's specific statutory authority to "review and approve proposed agency collections of information?" 44 U.S.C. § 3504(c)(1).
2. Whether certifications as a category are exempt from the Paperwork Reduction Act?

The term "collection of information" is defined statutorily in pertinent part as

... the obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public, of fact or opinions by or for an agency, **regardless of form or format**, calling for ... answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons

44 U.S.C. § 3502(3)(A)(i) (emphasis added).

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In regulations, OMB has further defined the phrase "regardless of form or format" to include "oral" and "telephonic" communications. 44 C.F.R. § 1320.3(c)(1); see also 5 C.F.R. § 1320.3(h). Thus, collecting the tax compliance certification by using the telephone in lieu of including the requirement and the form in the application package will not take this activity outside the coverage of the Paperwork Reduction Act. As an aside, we offer that from a "contracting" or "agreement enforceability" perspective, oral communications – even if contemporaneously documented – can present evidentiary challenges that do not exist when written agreements are used.

"Information" is, itself, a term that is defined in OMB's regulations. See 5 C.F.R. § 1320.3(h)(1). Within this definition, the following is said: "*Information* does not generally include items in the following categories; however, OMB may determine that any specific item constitutes *information*." Listed as such categories are, among other things, certifications, consents and acknowledgments. All of these categories, however, have this important proviso:

provided that they entail no burden other than that necessary to identify the respondent, the date, the respondent's address, and the nature of the instrument (by contrast, a certification would likely involve the collection of *information* if an agency conducted or sponsored it as a substitute for a collection of information to collect evidence of, or to monitor, compliance with regulatory standards, because such a certification would generally entail burden in addition to that necessary to identify the respondent, the date, the respondent's address, and the nature of the instrument).

Id.

If, as has been proposed here, a SSN or EIN is collected and used to assist in collecting evidence of compliance with the tax laws and regulations, the certification may be viewed by OMB as increasing the burden to a point where the certification is *information* still covered by the Act. The burden is, in the words of the regulation quoted above, arguably "in addition to that necessary to identify the respondent, the date, the respondent's address, and the nature of the instrument." Thus, we conclude that the proposed certification might be determined by OMB to be *information*, the collection of which is covered by the Paperwork Reduction Act. The only sure way to ascertain an opinion on this is to ask OMB.

If you or others have questions about this opinion, you should contact Dave Ingold on my staff, in the Public Contracts and Technology Law Branch of General Legal Services, by telephoning (202) 283-7952.