

**Office of Chief Counsel
Internal Revenue Service
memorandum**

date: May 30, 2008

to: Katherine Q. Janosek
Director, Policy, Planning & Adjudications
Personnel Security & Investigations C:AWSS

from: 
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(Procedure & Administration) CC:PA

subject: Tax Compliance Checks for Federal Employment

The AWSS Personnel Security Office has two members on the Background Investigations Stakeholder Group (BISG), which is a multi-agency working group that is studying federal security policies. One of BISG's recommendations is to require all applicants or appointees for Federal employment to undergo a federal tax check, as part of the National Agency background check. In light of this recommendation, the IRS is endeavoring to determine the legal, staffing and cost implications of conducting such a check for the Office of Personnel Management (OPM). As part of the IRS's consideration, you asked us a number of questions. Because your questions raise both disclosure and personnel matters, I have coordinated this response with my colleagues in the office of the Associate Chief Counsel (General Legal Services).

Q1: Is the current Authorization for Release of Information, which is a part of every security form (SF 85, SF 85P, SF 86) that is required to conduct an investigation, sufficient to allow IRS to conduct a tax check on the subject of the investigation for OPM? If not, could the form be modified to include an authorization to disclose tax return information?

A1: No, the current Authorization for Release of Information is neither sufficient to authorize the disclosure of return information for purposes of the Federal tax check, nor may it be revised to satisfy the taxpayer privacy rules. Pursuant to I.R.C. § 6103(c) and Treas. Reg. § 301.6103(c)-1(b), "a request for or consent to disclosure under his paragraph (b) must be in a form of a *separate* written document pertaining *solely* to the authorized disclosure." (Emphasis added.) The regulations further provide details as to the items of information that must be included on the consent. The regulations also

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require that this consent be received by the IRS within 60 days following its execution by the taxpayer.

Q2: IRS Personnel Offices currently use Form 13362 *Consent to Disclosure of Return Information* for external applicants to authorize IRS to disclose tax-related information to OPM. This form is required for the tax compliance check that IRS conducts for its new hires as part of the pre-employment process. If the SF85 can't be used to authorize disclosure of tax information, could IRS' Form 13362 be standardized and used by other agencies for applicants to allow IRS to conduct the tax check?

A2: IRS's Form 13362 certainly could be standardized. This form was developed with the assistance of my office, to be consistent with the above-referenced statute and regulations. Should the BISG's recommendation be adopted, we are available to work with your office to make whatever changes to the Form 13362 may be necessary for its use throughout the Federal Government.

Q3: Also, could Form 13362 be an electronic form that could be signed electronically by the applicant authorizing disclosure? Would there be any legal issues with an electronic signature or IRC 6103 disclosure implications?

A3: There is nothing in the taxpayer privacy rules that would foreclose making Form 13362 an electronic form. The taxpayer privacy rules do permit electronic consents, so long as they satisfy the requirements of the regulations. Treas. Reg. § 301.6103(c)-1(e)(1). The regulations further provide that the signature requirement for the consent may be satisfied by any method of signing the IRS permits. Treas. Reg. § 301.6103(c)-1(e)(2). However, depending on the manner in which the system is devised, there may be security issues associated with the risks of electronic transmission that would have to be considered under other statutes and policies. I recommend that you consult with Deborah Wolf, Director, Office of Privacy, Information Protection & Data Security, as well as Joe Aceto, Director, Governmental Liaison & Disclosure, for their respective staff's assistance if you should choose to pursue this option.

Q4: IRS is developing a new system, Internet Customer Account Services (ICAS) also known as "My IRS Account" that is scheduled to be released in 2008. ICAS will provide taxpayers with secure electronic access to tax return and account information. It will allow taxpayers to see their return, check estimated payments and view/print their transcripts. Are there any legal implications related to the applicant pulling tax return data from ICAS and sending it electronically or through the mail to OPM? With ICAS, no release or consent form is needed because the applicant is requesting the tax record information directly from the IRS through ICAS.

A4: Applicants for Federal employment, who may avail themselves of ICAS to obtain their own tax return information, would be free to share that information with the prospective hiring agency. There are no I.R.C. § 6103 issues implicated when a taxpayer chooses to share his or her own tax return information with the prospective hiring agency, whether by electronic or other means. As part of the IRS's consideration of the resources that would be needed to process consents from the universe of prospective Federal hirees/appointees, the IRS should consider whether directing this universe to ICAS is more cost effective.

Q5: What information would be permitted to be released to OPM? A decision whether the subject is compliant or not compliant, or would the actual IDRS information be allowed to be released?

A5: Without knowing the specifics of the information that OPM is seeking, as we stated before, we can offer only you some general guidelines. The scope of the information that may be released to OPM should be consistent with what OPM determines is necessary for it (OPM) to make a determination as to the applicant or appointee's suitability for Federal employment, and of course, the disclosure consent would then have to be fashioned to authorize that necessary return information. If OPM determines that IDRS transcripts are necessary in order to determine the extent of tax compliance and consequently, the applicant/appointee's suitability, and the applicant executes the requisite consent, then that return information may be disclosed from the employment and disclosure perspectives.¹ Without knowing the specifics of the program, it may be more helpful for OPM to receive actual IDRS transcripts rather than a summary IRS determination of whether the subject is "compliant or not compliant." The reason is that IRS' view of what constitutes tax compliance may be different from how OPM might define tax compliance from a suitability perspective. If OPM is willing to accept the IRS' definition of tax compliance then perhaps a general statement might suffice. This obviously is an issue that would need to be addressed; we remain available to assist you in any discussions that may take place on this point.

Please note that, pursuant to OPM's suitability regulations, at 5 C.F.R. § 731.202, if OPM determines that an applicant's or appointee's conduct in failing to meet his or her tax obligations is "dishonest" conduct (within the meaning of the specific suitability factors at 5 C.F.R. § 731.202(b)), OPM is also required to consider specific additional considerations (named at 5 C.F.R. § 731.202(c)) when deemed pertinent to the particular case. These additional considerations include the nature and seriousness of the conduct, the circumstances surrounding the conduct, the currency of the conduct, the age of the person at the time of the conduct, contributing societal conditions, and

¹ Pursuant to I.R.C. § 6103(c), the IRS need not disclose return information to an authorized recipient where it determines said disclosure would seriously impair Federal tax administration. While I would expect this exception to occur infrequently, it is important to appreciate that the applicant/appointee's consent does not automatically mean the authorized return information would be disclosed.

the absence or presence of rehabilitation or efforts toward rehabilitation. It is conceivable that information in addition to the IDRS transcripts may be necessary for OPM to consider in making a final suitability determination if this particular regulatory provision comes into play. From a disclosure perspective, rather than crafting a consent sufficiently broad enough to cover the additional return information that may become pertinent, it may be better to inform applicants and appointees that, in this eventuality, an additional consent may be required. A second consent could be drafted to accommodate the "dishonest" conduct situation. Whether that second consent could be standardized, or would be better tailored to each particular case, is a matter for further discussion. We are available to work with you and OPM in developing a consent-driven mechanism that would best balance the taxpayer privacy and employment suitability interests involved in these suitability determinations.

Should you have any further questions, please contact me at 202-622-3400.

cc: Chief, Claims, Labor & Personnel Branch CC:GLS:CLP
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