

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

CC:PA:06
DISA-111235-12

UILC: 6103.09-01

date: May 09, 2012

to: Director, Governmental Liaison and Disclosure
Attention: Irving Porter

from: Senior Counsel, Branch 7
(Procedure & Administration)

subject: Disclosure Issues Related to Changes in Procedures for Requesting Certified Copies of Bank Secrecy Act Records

This legal advice responds to your request for assistance dated March 13, 2012. This advice may not be used or cited as precedent.

On December 22, 2011, the Executive Office for the United States Attorneys issued a memorandum alerting its personnel of a change in the procedures for requesting certified copies of Bank Secrecy Act (BSA) records. The change resulted from a December 2011 memorandum issued by the Financial Crimes Enforcement Network (FinCEN) advising all federal, state and local law enforcement agencies of the procedures for requesting certified copies of BSA records from FinCEN. Prior to these changes, the IRS had processed requests made by U.S. Attorneys for certified copies of BSA records from FinCEN. You have asked whether these changes create disclosure issues.

FACTS

FinCEN owns and controls documents required to be filed pursuant to the Bank Secrecy Act (BSA), 31 U.S.C. § 5311 *et. seq.*, including, but not limited to, currency transaction reports, casino transaction reports, registration of money services business, foreign bank account reports, suspicious activity reports, and, if filed after January 1, 2002, reports of over \$10,000 received in a trade or business. In the past, pursuant to an agreement between FinCEN and the IRS, the IRS processed requests made by assistant U.S. attorneys for certified copies of BSA records. Technological improvements in data collection, storage, and dissemination have made it possible for FinCEN to process these requests. On January 3, 2012, FinCEN began to process requests for certified copies of BSA records for use in non-Title 26 investigations and prosecutions. The IRS no longer processes such requests. The Department of Justice

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informed the Office of Chief Counsel of the change in procedures prior to their implementation.

LAW AND ANALYSIS

I.R.C. § 6103 requires the IRS to maintain the confidentiality of returns and return information unless a provision of Title 26 provides otherwise. The term “return information” is broad and includes the taxpayer’s identity, and all other information received, acquired, or generated by the Service in connection with the determination of a taxpayer’s liability. See I.R.C. § 6103(b)(2)(A); *Payne v. United States*, 289 F.3d 377, 382 (5th Cir. 2002). Notwithstanding the breadth of I.R.C. § 6103, it does not require the Service to maintain the confidentiality of records not generated or acquired pursuant to the internal revenue laws. The confidentiality provisions of I.R.C. § 6103 only attach to records that pass through the IRS. *Stokwitz v. U.S. Dep’t of the Navy*, 831 F.2d 893, 894-896 (9th Cir. 1987).

Information collected by FinCEN under the Bank Secrecy Act, 31 U.S.C. § 5311 *et. seq.* is not return information that falls within the general confidentiality provisions of I.R.C. § 6103(a). See *Stokwitz*, 831 F.2d at 894-896. Accordingly, FinCEN, the agency that owns and controls these records, can provide BSA records to U.S. attorneys for use in any investigations or prosecutions without implicating I.R.C. § 6103.

If a copy of a BSA record is obtained by the IRS in the course of administering the internal revenue laws, then it becomes an IRS record, as well as return information subject to I.R.C. § 6103. As such, the IRS can certify the authenticity of such a record as a genuine copy of a record received from FinCEN. In order to obtain from the IRS a certified copy of a BSA record that has become part of a tax investigation file, and therefore subject to the confidentiality rule of I.R.C. § 6103, U.S. Attorneys must follow the procedures for obtaining an *ex parte* order pursuant to I.R.C. § 6103(i), if the record will be used in a nontax criminal investigation or proceeding. See I.R.C. § 6103(i)(1)(B).

The April, 2012 FinCEN guidelines state, “If this is a Title 26 investigation, please do not state that in the request. Merely state that it is a current IRS investigation and provide an active case file number.” We concur that if the assistant United States attorney seeks BSA records from FinCEN for use in a tax case, there is no need to refer to Title 26.

A corollary question is what authority exists for IRS employees to make disclosures to FinCEN in order to obtain copies of BSA records for use in Title 26 investigations. IRS officers and employees, including Counsel, are specifically authorized by I.R.C. § 6103(k)(6) and Treas. Reg. § 301.6103(k)(6)-1 to disclose return information to the extent that disclosure is necessary to obtain information which is not otherwise reasonably available with respect to the correct determination of any tax, or the amount to be collected, or with respect to the enforcement of any other provision of the Code. Under this authority, IRS agents may disclose to FinCEN a minimal amount of return

information, such as the taxpayer's name and identifying information, in order to obtain a copy of a BSA record in a timely and probative manner when the record is used for a tax investigation or proceeding.

CONCLUSION:

We reviewed the revised FinCEN and EOUSA procedures and determined there are no I.R.C. § 6103 disclosure concerns if the procedures are properly followed.

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

Please call (202) 622-7950 if you have any further questions.