

Lesson 15

DISCLOSURE ISSUES

(March 2012)

CONTENTS

I. INTRODUCTION	2
II. OBJECTIVES	2
III. DISCLOSURE OF TAX RETURN OR RETURN INFORMATION	3
A. General rule of confidentiality – I.R.C. § 6103(a)	3
B. Definitions – I.R.C. § 6103(b)	3
C. Exceptions to the general rule – selective permissible disclosures – I.R.C. §§ 6103(c) – 6103(o)	4
1. Disclosures to taxpayer's designees (consent) – § 6103(c)	4
2. Disclosures to state tax officials – § 6103(d)	5
3. Disclosures to the taxpayer and other persons having a material interest – § 6103(e)	5
4. Disclosures to Treasury and DOJ for tax administration purposes – § 6103(h)	7
5. Disclosures for certain miscellaneous tax administration purposes – § 6103(k)	9
6. Disclosures to contractors for tax administration purposes – § 6103(n)	10
IV. CIVIL AND CRIMINAL LIABILITY FOR UNAUTHORIZED DISCLOSURES	11
A. I.R.C. § 7213 – Unauthorized disclosure of information	11
B. I.R.C. § 7213A – Unauthorized access (UNAX)	11
C. I.R.C. § 7431 – Civil damages for unauthorized inspection or disclosure of returns and return information	11
D. I.R.C. § 7433 – Civil damages for certain unauthorized collection actions	12
V. FREEDOM OF INFORMATION ACT	12
A. Introduction	12
B. The ways in which the IRS makes records available	13
C. Administrative Process	13
D. Exemptions	14
VI. TESTIMONY AUTHORIZATIONS	16
A. Introduction	16
B. Procedures in the event of a request or demand	17
C. Delegation Order 11-2	18
D. Discretionary Disclosures	18
VII. ADVICE ISSUED BY FIELD ATTORNEYS	18
VIII. REFERENCE MATERIALS	19

I. INTRODUCTION

The Tax Reform Act of 1976 created a comprehensive statutory scheme for the disclosure and use of tax returns and return information and centered it around one section of the Internal Revenue Code: section 6103. Congress recognized that the IRS had more information about citizens than any other federal agency and that other agencies routinely sought access to that information. Congress also understood that citizens reasonably expected the IRS would protect the privacy of the tax information they were required to supply. If the IRS abused that reasonable expectation of privacy, the resulting loss of public confidence could seriously impair the tax system. Accordingly, Congress amended section 6103 to provide that tax returns and return information are confidential and are not subject to disclosure, except in the limited situations delineated by the Code. In each area of authorized disclosure, Congress attempted to balance the particular office or agency's need for the information with the citizen's right to privacy, as well as the impact of the disclosure upon continued compliance with the voluntary tax compliance system.

As attorneys within the Office of Chief Counsel, we must foster public confidence that the IRS respects the confidentiality of the personal and financial information taxpayers provide for tax administration purposes. Therefore, we must administer the disclosure provisions of the internal revenue laws in accordance with the spirit and intent of the law, ever mindful of this public trust.

II. OBJECTIVES

By the end of this session, you will be able to understand:

- when information may be disclosed pursuant to the taxpayer's written or oral consent and what is required for a valid consent under section 6103(c);
- who has a material interest in the taxpayer's return or return information under section 6103(e);
- what information may be disclosed to certain federal officers and employees for purposes of tax administration under section 6103(h);
- how section 6103(k)(6) authorizes collection activities conducted by the agency;
- civil and criminal liabilities resulting from unauthorized disclosure of, or access to, returns or return information under sections 7213, 7213A, and 7431;
- when an agency action falls within section 7433 or section 7431;
- what constitutes an agency record subject to, or exempt from, disclosure in response to a FOIA request;
- the testimony authorization rules under Treas. Reg. §§ 301.9000-1 to 301.9000-7;
- how advice issued by field counsel is processed and when coordination is required.

III.DISCLOSURE OF TAX RETURN OR RETURN INFORMATION

A. General rule of confidentiality – I.R.C. § 6103(a)

The general rule is that returns and return information are confidential and may be disclosed only as authorized by Title 26.

B. Definitions – I.R.C. § 6103(b)

1. A return means a tax or information return (*e.g.*, Forms 1040, 1120, 941, 1099), estimated tax declarations, refund claims, and any amendments or supplements, including supporting schedules (*e.g.*, Schedules A and B for 1040, Schedule K-1), attachments, or lists which are supplemental to, or part of, the return, that are required by, provided for, or permitted by Title 26, and that are filed with the Secretary by, on behalf of, or with respect to any person. See I.R.C. § 6103(b)(1).
2. Return information includes a taxpayer's identity (name of person with respect to whom a return is filed, the person's mailing address, and taxpayer identifying number (SSN or EIN), or a combination thereof); the nature, source, or amount of income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, tax payments; whether the return was, is being, or will be examined or subject to other investigation or processing; any part of any written determination or background file document that is not open to public inspection under section 6110; any advance pricing agreement entered into by a taxpayer and the Secretary and any background information related to such agreement or any application for an advance pricing agreement; any agreement under section 7121, and any similar agreement, and background information related to the agreement or request for agreement; any other data which is received by, recorded by, prepared by, furnished to, collected by the IRS, with respect to a return OR with respect to the determination of the existence or possible existence of liability or the amount of liability, of any "person," (see I.R.C. § 7701(a)(1)) under Title 26 for any tax, penalty, interest, fine, forfeiture, or other imposition or offense. See I.R.C. § 6103(b)(2).
3. Section 6103(b)(8) defines "disclosure" as making known to any person in any manner, tax returns or return information.

C. Exceptions to the general rule – selective permissible disclosures – I.R.C. §§ 6103(c) – 6103(o).

1. Disclosures to taxpayer's designees (consent) – § 6103(c)

a) Section 6103(c) and Treas. Reg. § 301.6103(c)-1 authorize the IRS to disclose returns and return information to any person(s) the taxpayer designates. The consent may be to assist the taxpayer with a tax matter. It may also be for a non-tax matter (e.g., mortgage lender seeking financial information.)

b) Treas. Reg. § 301.6103(c)-1 also permits disclosures to designees pursuant to an oral request or written consent when the designee is assisting the taxpayer to resolve a tax matter.

c) Treas. Reg. § 301.6103(c)-1(b) requires that a written consent must be on a separate written document pertaining solely to the authorized disclosure. Moreover, the consent must be signed and dated and the IRS must receive the consent within 120 days of execution. See Prop. Treas. Reg. § 301.6103(c)-1(b), 76 Fed. Reg. 14827 - 14829 (March 18, 2011) (to be codified at 26 C.F.R. pt. 301). Form 8821 (Tax Information Authorization) has been designed to meet the requirements of Treas. Reg. § 301.6103(c)-1(b). The written authorization must contain:

(1) name, address or taxpayer identifying number (SSN or EIN), or any combination thereof, that enables the IRS to clearly identify the taxpayer;

(2) the identity of the person to whom disclosure is to be made;

(3) the type of return (or the specific portion of the return) or return information (including particular data) to be disclosed; and

(4) the taxable period covered by the return or return information.

d) Treas. Reg. § 301.6103(c)-1(c) contains the requirements for requests made by the taxpayer to other persons, such as a Member of Congress or a relative, for information or assistance relating to the taxpayer's return or a transaction or other contact between the taxpayer and the IRS. Consents under this provision may be in writing or oral.

2. Disclosures to state tax officials – § 6103(d).

a) Pursuant to section 6103(d)(1), the IRS may disclose Federal tax information pertaining to taxes imposed by specified Code chapters to States and certain qualifying city revenue agencies to the extent necessary for use in their tax administration. State employees receiving federal tax information under section 6103(d)(1) are subject to civil and criminal penalties for the unauthorized disclosure of the tax information so received. States are required to adequately safeguard the tax information received under section 6103(d).

b) Section 6103(d)(1) requires a written request from state tax officials as a precondition to disclosure. The written request is generally met by basic and implementing agreements between the IRS and the state revenue agencies. These agreements often provide for a mutual exchange of information to increase tax revenues and taxpayer compliance, and to reduce resource expenditures in tax administration.

c) A State may request specific federal tax data at any time, regardless of whether there is an agreement between the State and the IRS, provided the written request meets the requirements of I.R.C. § 6103(d)(1). Governmental Liaison Officers serve as liaisons between the IRS and the state agencies requesting federal tax information.

3. Disclosures to the taxpayer and other persons having a material interest – § 6103(e).

a) I.R.C. § 6103(e) specifies those who may have access to certain types of returns and return information based on whether there is a material interest. (A complete list of people who might have a material interest can be found at I.R.C. § 6103(e)(1)-(6).) While the Code does not specifically define the term “material interest,” it has been broadly interpreted as an “important interest,” generally financial in nature.

b) Requests for returns under I.R.C. § 6103(e) must be in writing. Requests for return information are not subject to this requirement, although a written request is preferred.

c) Upon written request, returns shall be made available to the following persons:

- (1) Individual return: the individual who filed the return.
- (2) Joint return: either spouse on whose behalf the joint return was filed.

Note: Pursuant to section 6103(e)(8), if a deficiency is assessed with respect to a joint return and the individuals who filed the return are divorced (former spouses) or no longer reside in the same household, the IRS must disclose, in writing, certain information about the IRS's collection activities with respect to the joint liability assessed against both former spouses, to one of the former spouses, or to the former spouse's authorized representative, in response to a written request from that former spouse, or from that former spouse's authorized representative.

(3) Partnership returns: any person who was a member of the partnership during any part of the period covered by the return.

(4) Corporation and subsidiary returns:

- i. Any person designated by resolution of the corporation's board of directors.
- ii. Any corporate officer or employee if a written request has been submitted by a principal officer and attested to by any other corporate officer.
- iii. Any corporate officer authorized by the corporation in accordance with applicable state law to legally bind the corporation.
- iv. A *bona fide* shareholder of record owning at least one percent of the outstanding corporate stock.
- v. Any member of a consolidated return group is authorized to receive a *copy* of the entire consolidated return for any period in which it was a member.
- vi. Any shareholder of a Subchapter S corporation who was a shareholder during any part of the period covered by the return.

vii. Any person authorized by state law to act on behalf of a dissolved corporation or any person who has been determined to have a material interest which will be affected by information contained in the dissolved corporation's tax return.

4. Disclosures to Treasury and DOJ for tax administration purposes – § 6103(h)

a) Under section 6103(h)(1), returns and return information are, without written request, open to inspection by, or disclosure to, officers and employees of the Department of the Treasury whose official duties require the inspection or disclosure for tax administration purposes. This is referred to as a “need to know” disclosure.

b) When drafting section 6103(h)(2), Congress recognized the Department of Justice's need to have access to tax information to carry out its civil and criminal tax responsibilities. Under section 6103(h)(2), the IRS may disclose tax information to DOJ for use in any proceeding before a federal grand jury, or in preparation for any proceeding (or investigation which may result in a proceeding) before a federal grand jury, or any federal or state court in matters involving tax administration if:

(1) the taxpayer is or may be a party to the proceeding, or the proceeding arose out of, or in connection with, determining the taxpayer's civil or criminal liability, or the collection of civil liability, with respect to tax (section 6103(h)(2)(A));

(2) the treatment of an item reflected on a return is or may be related to the resolution of an issue in the proceeding (section 6103(h)(2)(B) – the “item” test); or

(3) the return or return information relates or may relate to a transactional relationship between a person who is or may be a party to the proceeding and the taxpayer which may resolve an issue in the proceeding (section 6103(h)(2)(C) – the “transactional relationship” test).

c) Section 6103(h)(3) outlines two methods by which DOJ may secure tax information for use in tax administration proceedings before a federal grand jury or any federal or state court, or to prepare for these proceedings, or for use in investigations that may result in these proceedings.

(1) Section 6103(h)(3)(A) provides that the IRS may make disclosures to DOJ under section 6103(h)(2) on its own motion where a tax case has been referred to DOJ.

(2) Under section 6103(h)(3)(B), the IRS may disclose return or return information to DOJ in a non-referred tax administration case in response to a written request made by the Attorney General, Deputy Attorney General or an Assistant Attorney General. This authority cannot be delegated.

d) Under section 6103(h)(4), returns and return information may be disclosed in Federal or State judicial or administrative tax proceedings if certain conditions are satisfied. The rules relating to disclosure in judicial and administrative tax proceedings are narrower than the rules that authorize disclosures to DOJ; *i.e.*, they require a more stringent test before disclosure in a tax proceeding. Section 6103(h)(4) provides that returns and return information may be disclosed in judicial and administrative tax proceedings if:

(1) the taxpayer is a party to the tax proceeding, or the tax proceeding arose out of, or in connection with, determining the taxpayer's civil or criminal liability, or the collection of the taxpayer's civil liability, in respect of any tax imposed under the Code (section 6103(h)(4)(A));

(2) the treatment of an item reflected on the return is directly related to the resolution of an issue in the tax proceeding (section 6103(h)(4)(B) – the “item” test). See In re U.S., --- F.3d ---, 2012 WL 164059 (Fed. Cir. Jan. 20, 2012), (item test requires a more direct relationship than that the related taxpayer merely had the same tax issue on its return);

(3) the return or return information directly relates to a transactional relationship between a person who is a party to the proceeding and the taxpayer which directly affects the resolution of an issue in the proceeding (section 6103(h)(4)(C) – the “transactional relationship” test); or

(4) the disclosure is authorized by order of a court pursuant to 18 U.S.C. § 3500 or Rule 16 of the Federal Rules of Criminal Procedure, the court being authorized in the issuance of the order to give due consideration to congressional policy favoring the confidentiality of returns and return information as set forth in the Code.

5. Disclosures for certain miscellaneous tax administration purposes – § 6103(k)

a) Section 6103(k)(2) authorizes disclosure of the amount of an outstanding lien. If a Notice of Federal Tax Lien (NFTL) has been filed pursuant to section 6323(f), the amount of the outstanding obligation secured by the lien may be disclosed to any person who furnishes satisfactory written evidence that he/she has a right in the property subject to the lien or intends to obtain a right to such property.

b) IRS, Chief Counsel, and Treasury Inspector General for Tax Administration (TIGTA) employees are specifically authorized by section 6103(k)(6) and the 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 tax, liability for tax, or the amount to be collected, or with respect to the enforcement of any other provision of the Code. **Note:** A return may not be disclosed under IRC § 6103(k)(6).

c) Thus, IRS, Chief Counsel and TIGTA officers and employees may disclose return information, of any taxpayer, to the extent necessary to obtain information relating to their official duties or to accomplish properly any activity connected with those official duties relating to any examination, administrative appeal, collection activity, administrative, civil or criminal investigation, enforcement activity, ruling, negotiated agreement, prefiling activity, or other proceeding or offense under the internal revenue laws or related statutes, or in preparation for any proceeding described in § 6103(h)(2) (or investigation which may result in a proceeding). Treas. Reg. § 301.6103(k)(6)-1.

d) The Treasury regulation provides a non-exclusive list of the types of activities covered by section 6103(k)(6) as follows:

- (1) Establishing or verifying the correctness or completeness of any return or return information;
- (2) Determining the responsibility for filing a return, for making a return if none has been made, or for performing any acts as may be required by law concerning those matters;
- (3) Establishing or verifying the liability (or possible liability) of any person, or the liability (or possible liability) at law or in equity of any transferee or fiduciary of any person, for any tax, penalty,

interest, fine, forfeiture, or other imposition or offense under the internal revenue laws or related statutes or the amount thereof for collection;

(4) Establishing or verifying misconduct (or possible misconduct) or other activity proscribed by the internal revenue laws or related statutes;

(5) Obtaining the services of persons having special knowledge or technical skills (such as, but not limited to, knowledge of particular facts and circumstances relevant to a correct determination of a liability described above in subparagraph (3) or skills relating to handwriting analysis, photographic development, sound recording enhancement, or voice identification) or having recognized expertise in matters involving the valuation of property if relevant to proper performance of official duties described in this paragraph;

(6) Establishing or verifying the financial status or condition and location of the taxpayer against whom collection activity is or may be directed, to locate assets in which the taxpayer has an interest, to ascertain the amount of any liability described above in subparagraph (3) for collection, or otherwise to apply the provisions of the Code relating to establishment of liens against the assets, or levy, seizure, or sale on or of the assets to satisfy any liability;

(7) Preparing for any proceeding described in section 6103(h)(2) or conducting an investigation which may result in a proceeding; or

(8) Obtaining, verifying, or establishing information concerned with making determinations regarding a taxpayer's liability under the Code, including, but not limited to, the administrative appeals process and any ruling, negotiated agreement, or prefiling process. Treas. Reg. § 301.6103(k)(6)-1(a)(1).

6. Disclosures to contractors for tax administration purposes – § 6103(n)

Section 6103(n) and Treas. Reg. § 301.6103(n)-1 authorize, among others, the IRS and Office of Chief Counsel employees to disclose tax information to any person to the extent necessary in connection with obtaining (contracted) services for tax administration purposes.

IV. CIVIL AND CRIMINAL LIABILITY FOR UNAUTHORIZED DISCLOSURES

A. I.R.C. § 7213 – Unauthorized disclosure of information

Section 7213(a) provides that a willful unauthorized disclosure of any return or return information is a felony, punishable by imprisonment of not more than five years, or a fine of not more than \$5,000, or both, together with prosecution costs. An employee or officer of the United States must be dismissed from office or discharged from employment upon conviction. Section 7213(a) does not create a right of action for a taxpayer against the United States.

To sustain a conviction under I.R.C. § 7213(a)(1), the United States must prove beyond a reasonable doubt that: (1) an officer or employee of the United States, or any person described in section 6103(n), or a former officer or employee; (2) disclosed; (3) returns or return information; (4) in a manner not authorized by the Internal Revenue Code; and (5) the disclosure was made willfully.

B. I.R.C. § 7213A – Unauthorized access (UNAX)

“Browsing” is a term used to describe the unauthorized access to, or inspection of, returns or return information without regard to whether the “browser” further disclosed that information to another person. The IRS also refers to this activity as unauthorized access, or UNAX. UNAX typically arises in the context of IRS employees accessing taxpayer accounts on an automated database, such as the Integrated Data Retrieval System (IDRS), without a tax administration purpose. Section 7213A(b) provides that a conviction can result in a fine in any amount not exceeding \$1,000, or imprisonment of not more than one year, or both. In addition, conviction results in a dismissal from office or discharge from employment.

To sustain a conviction under section 7213A(a), the United States must prove beyond a reasonable doubt that: (1) an officer or employee of the United States, any person described in section 6103(l)(18) or (n), or a state or other employee described in section 7213A(a)(2); (2) inspected; (3) any return or return information; (4) in a manner not authorized by the Internal Revenue Code; and (5) such inspection was made willfully.

C. I.R.C. § 7431 – Civil damages for unauthorized inspection or disclosure of returns and return information

a) For a taxpayer to prevail under § 7431(a)(1), the taxpayer must demonstrate that an unauthorized inspection or disclosure of his return or return information was made: (1) by an officer or employee of the U.S.; (2) that the inspection or disclosure was made knowingly or negligently; and (3) that the inspection or disclosure was made in violation of § 6103.

b) Where the allegation of unlawful disclosure is premised on the fact that the IRS engaged in improper collection activity, such as erroneously filing a lien or levy, numerous courts have found that the taxpayer's exclusive remedy is under section 7433. See, e.g., Wilkerson v. U.S., 67 F.3d 112, 117-18 n.10 (5th Cir. 1995) (Congress enacted separate and distinct provisions concerning collection activities and information handling, and "[t]hese two bodies of law must remain distinct"; absent additional evidence, proof of a wrongful levy is "legally insufficient" to support a claim for wrongful disclosure); Elias v. U.S., No. CV 90-0432-WJR (JRX), 1990 WL 264722, at *5 (C.D. Cal. Dec. 21, 1990), aff'd mem., 974 F.2d 1341 (9th Cir. 1992) (table cite) ("[W]hether a disclosure is authorized under section 6103 is in no way dependent upon the validity of the underlying summons, lien, or levy."); Evans v. U.S., 478 F. Supp. 2d 68, 71-72 (D.D.C. 2007).

D. I.R.C. § 7433 – Civil damages for certain unauthorized collection actions

a) Section 7433(a) provides for civil damages where an officer or employee of the IRS recklessly or intentionally, or by reason of negligence, disregards any provision of Title 26 or the regulations issued thereunder. Numerous federal courts, including the District Court for the District of Columbia, have determined that, in order to sustain a claim under § 7433, a plaintiff must have properly filed an administrative claim and exhausted his or her administrative remedies within the Service. Nogueras-Cartegena v. U.S., 125 F.App'x 323, 327 (1st Cir. 2005); Venen v. U.S., 38 F.3d 100, 103 (3rd Cir. 1994); Conforte v. U.S., 979 F.2d 1375, 1377 (9th Cir. 1993).

b) Treas. Reg. § 301.7433-1(e) sets forth the procedures for filing an administrative claim under I.R.C. § 7433. Specifically, the regulations direct the taxpayer to file an administrative claim with the Compliance Technical Support Manager of the area in which the taxpayer currently resides. Treas. Reg. § 301.7433-1(e)(1).

V. FREEDOM OF INFORMATION ACT

A. Introduction

1. The Freedom of Information Act (FOIA) provides for public access to records created and maintained by federal agencies.
2. The access provisions of FOIA are premised on the public's right to know how the executive agencies perform their duties. Accordingly, the FOIA was enacted to facilitate public access to government records. John Doe Agency v.

John Doe Corp., 493 U.S. 146, 151 (1989). It was designed “to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.” Dep’t of Air Force v. Rose, 425 U.S. 352, 361 (1976).

B. The ways in which the IRS makes records available

1. Certain information must be published in the Federal Register. 5 U.S.C. § 552(a)(1). This includes: (a) the organizational structure of the agency and procedures for obtaining information under the Act; (b) statements describing the functions of the agency and all formal and informal procedures; (c) rules of procedure, see Treas. Reg. § 601.101 *et seq.*, descriptions of forms (but not the forms themselves) available or the places at which forms may be obtained, and instructions describing all papers, reports, and examinations; (d) rules of general applicability and statements of general policy or interpretations of general applicability; and (e) amendments, revisions, or repeals of any of the above.
2. Certain information must be made available for public inspection and copying unless promptly published and offered for sale. 5 U.S.C. § 552(a)(2). This includes: (a) final opinions and orders made in the adjudication of cases; (b) statements of policy and interpretations not published in the Federal Register; (c) administrative staff manuals and instructions to staff that affect a member of the public, *e.g.*, Internal Revenue Manual, including the Chief Counsel Directives Manual available at www.irs.gov/foia/index.html; (d) agency records that have been, or the agency expects to be, the subject of repetitive requests; (e) a quarterly (or more frequent) index of material referred to in a – d, above; and (f) for records created on or after November 1, 1996, each agency must make these records available by “computer telecommunications,” *i.e.*, on the Service’s Internet web site at www.irs.gov.
3. Certain information that is not otherwise available under 5 U.S.C. § 552(a)(1) or (2) must be made available in response to a request that reasonably describes the records sought and comports with the IRS’s regulations. 5 U.S.C. § 552(a)(3).

C. Administrative Process

1. Specific requests for agency records pursuant to 5 U.S.C. § 552(a)(3) must meet certain criteria set forth in the IRS’ Statement of Procedural Rules found at Treas. Reg. § 601.702 (c)(3). All of the elements of a valid request must be satisfied. The request must: (a) be in writing; (b) be signed by the requester; (c) state that the request is made pursuant to the FOIA; (d) be addressed to the IRS official responsible for control of the records; (e) establish the right of the person to receive the records in cases where disclosure is limited by statute; (f) reasonably describe the records being requested; (g) provide an address where the response letter is to be sent; and (h) agree to pay fees (or seek a fee waiver and explain why a fee waiver is warranted).

2. The agency must respond to requests for information within specific periods of time.

a) The agency generally must respond to the request or seek a voluntary extension of time within 20 working days of receipt. In exceptional circumstances, the statute allows for an extension not to exceed 10 more working days in which to respond.

b) Administrative appeals and judicial remedies are available to anyone denied access to records under the FOIA. (No appeal is necessary if the agency fails to respond on time.) At any time within 35 days after the date of the letter that denied access to agency records, the requester can submit an administrative appeal to the Commissioner. The Commissioner or delegated Appeals office must respond to the appeal within 20 business days after receipt, unless extended. If the appeal is denied, the requester can bring legal action in the U.S. District Court.

D. Exemptions

Government agencies may refuse to disclose information if the information falls within one or more of nine specified exemptions. Some exemptions are mandatory or required by statute; other exemptions are discretionary.

1. **Exemption 1** – This exemption pertains to classified records concerning national defense and foreign policy. The IRS seldom invokes this exemption. Where the IRS has invoked the exemption, it has involved treaty-related matters. Exemption 1 is not a discretionary exemption.

2. **Exemption 2** – This exemption covers matters “related solely to the internal personnel rules and practices of an agency.” 5 U.S.C. § 552(b)(2). The exemption only encompasses records relating to issues of employee relations and human resources, and only those limited to internal agency interest. Generally, exemption 2 is applied to withhold information that relates to trivial administrative matters of no genuine public interest such as file numbers, initials, signature and mail routing stamps, references to interagency transfers, and data processing references.

3. **Exemption 3** – Exemption 3 requires agencies to withhold information “specifically exempted from disclosure by statute (other than the FOIA), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.” 5 U.S.C. § 552(b)(3). Section 6103 of the Code is an Exemption 3 statute. Under section 6103(a), returns and return information “shall be confidential” and can be disclosed only as authorized by Title 26.

4. **Exemption 4** – Exemption 4 protects from disclosure “trade secrets and commercial or financial information obtained from a person and privileged or confidential.” 5 U.S.C. § 552(b)(4). This exemption applies to trade secrets such as processes, formulas, manufacturing plans, and chemical compositions. Exemption 4 also applies to commercial or financial information such as corporate sales data, salaries and bonuses of industry personnel, and bids received by corporations in the course of their acquisitions. Commercial and financial information other than trade secrets can be withheld from disclosure *only* if it is privileged or confidential and it must be obtained by the government from a “person.”

5. **Exemption 5** – Exemption 5 protects from disclosure “inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency.” 5 U.S.C. § 552(b)(5). Deliberative process privilege material, confidential attorney-client communications, and attorney work product records generally are not available to parties in litigation with the government (Fed. R. Civ. P. 26(b)(1) and 26(b)(3)); therefore such records are protected from disclosure by Exemption 5.

6. **Exemption 6** – Exemption 6 protects “personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” 5 USC § 552(b)(6). Exemption 6 requires a court to balance the right of privacy of affected individuals against the right of the public to be informed as to how the agency performs its functions. In Dep’t of State v. Ray, 502 U.S. 164, 178 (1991), the Supreme Court upheld the agency withholding the names and home addresses of repatriated Haitian refugees interviewed by U.S. officials regarding the conditions of their repatriation. The Court reasoned that releasing identities would significantly invade their privacy interests and that the public interest was served by releasing the edited interview summaries. Moreover, disclosing the names and addresses would not have shed any additional light on government activities. See U.S. Dep’t of Defense v. FLRA, 510 U.S. 487, 499 (1994); see also U.S. Dep’t of Justice v. Reporters Committee, 489 U.S. 749, 773 (1989).

7. **Exemption 7** – Exemption 7 withholds from disclosure “records or information compiled for law enforcement purposes, but only to the extent that the production of such records:

- a) could reasonably be expected to interfere with enforcement proceedings;
- b) would deprive a person of a right to a fair trial or an impartial adjudication;

c) could reasonably be expected to constitute an unwarranted invasion of personal privacy;

d) could reasonably be expected to disclose the identity of a confidential source, including a state, local or foreign agency or authority or any private institution, which furnished information on a confidential basis, and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by the confidential source;

e) would disclose techniques and procedures for law enforcement investigations or prosecutions or would disclose guidelines for law enforcement investigations or prosecutions if disclosure could reasonably be expected to risk circumvention of the law; or,

f) could reasonably be expected to endanger the life or physical safety of any individual. 5 U.S.C. § 552(b)(7).

8. **Exemptions 8 and 9** – Exemption 8, relating to materials for the use of an agency responsible for the regulation or supervision of financial institutions, and Exemption 9, relating to geophysical information and data, are not usually asserted by the IRS.

Note: For a discussion of all FOIA exemptions, see the DOJ FOIA Guide and the IRS Office of Chief Counsel's Disclosure & Privacy Law Reference Guide. Links to these documents can be found in Section VII.

VI. TESTIMONY AUTHORIZATIONS

A. Introduction

IRS employees, including current and former employees of the Service, Office of Chief Counsel, and IRS contractors, may not testify about or produce official IRS records or information in response to a request or demand from outside the IRS without prior authorization.

Treas. Reg. §§ 301.9000-1 to 301.9000-7 establish procedures to be followed by current and former employees of the IRS and its contractors who receive requests for disclosure of IRS records or information. The ultimate decision to disclose Service records or information belongs to the authorized official with delegated authority to authorize testimony or disclosure of IRS records or information. Thus, when an authority outside the IRS seeks to depose an IRS employee or contractor, or requests that IRS records be

produced by the government, disclosure is not permitted absent authorization from the Commissioner or the Commissioner's delegate in accordance with Treas. Reg. § 301.9000-3(a).

CCDM 32.2.4 and IRM 11.3.35 also provide detailed instructions and procedures concerning authorization of testimony and the production of documents.

B. Procedures in the event of a request or demand

1. Notification of the Disclosure Officer

a) An IRS officer, employee or contractor who receives a request or demand for IRS records or information for which a testimony authorization is or may be required shall notify promptly the disclosure officer servicing the IRS officer's, employee's or contractor's geographic area.

b) The IRS officer, employee or contractor shall await instructions from the authorizing official concerning the response to the request or demand. Treas. Reg. § 301.9000-4(b).

2. Requests or demands in United States Tax Court cases. An IRS officer, employee or contractor who receives a request or demand for IRS records or information on behalf of a petitioner in a United States Tax Court case shall notify promptly the IRS Chief Counsel attorney assigned to the case. The IRS Chief Counsel attorney shall notify promptly the authorizing official. The IRS officer, employee or contractor who received the request or demand shall await instructions from the authorizing official. Treas. Reg. § 301.9000-4(c).

3. Requests or demands in personnel, labor relations, government contract, Bivens or FTCA matters, or matters related to informant claims.

a) An IRS officer, employee or contractor who receives a request or demand, on behalf of an appellant, grievant, complainant or representative, for IRS records or information in a personnel, labor relations, government contract, informant claim, Bivens matter (Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971)), or a Federal Tort Claims Act (FTCA) matter, shall notify promptly the IRS Associate Chief Counsel (General Legal Services) (GLS) attorney assigned to the case.

b) If no GLS attorney is assigned to the case, the IRS officer, employee or contractor shall notify promptly the GLS attorney servicing the geographic area.

c) The GLS attorney shall notify promptly the authorizing official. The IRS officer, employee or contractor who received the request or demand shall await instructions from the authorizing official. Treas. Reg. § 301.9000-4(d).

4. Requests or demands in IRS congressional matters. An IRS officer, employee or contractor who receives a request or demand in an IRS congressional matter shall notify promptly the IRS Office of Legislative Affairs. The IRS officer, employee or contractor who received the request or demand shall await instructions from the authorizing official. Treas. Reg. § 301.9000-4(e).

C. Delegation Order 11-2

Delegation Order 11-2 (IRM 1.2.49 and IRM Exhibit 1.2.49-2) identifies the IRS and Chief Counsel officials who may authorize disclosures of confidential returns and return information pursuant to exceptions as provided by the Code. Delegation Order 11-2 also contains tables identifying IRS and Chief Counsel officials who may authorize (or deny) testimony and production of *any* documents when requested or demanded by any subpoena, notice of oral deposition, notice of written interrogatory, or other order of a court, administrative agency, or other authority, pursuant to Treas. Reg. §§ 301.9000-1 to 301.9000-7.

These tables also identify the IRS and Chief Counsel employees who prepare testimony authorization documents. These tables should be used in conjunction with IRM 11.3.35, Requests and Demands for Testimony and Production of Documents.

D. Discretionary Disclosures

See also Office of Chief Counsel Notice, CC-2005-005, issued April 8, 2005, regarding Discretionary Disclosure Policy affecting IRS response to discovery and FOIA requests. **Note:** CC Notice 2005-005 has been incorporated into CCDM 33.1.3.2.2(8) and 30.11.1.6.

VII. ADVICE ISSUED BY FIELD ATTORNEYS

Field attorneys often render advice directly to client organizations without consultation with the Associate offices with respect to issues that can be resolved with a high degree of certainty by the application of settled principles of law.

Where the law or the Service's position is unclear, or when the law is being applied in a setting that is significantly different from the context in which it was developed, Field Counsel should coordinate with the Associate Chief Counsel having subject matter jurisdiction over the issue before rendering the requested legal advice. Any doubts about whether an issue should be

coordinated should be resolved in favor of coordination. Where the Field Counsel advice is reviewed by the National Office, the resulting advice is subject to release to the public as Field Authored Advice. The memorandum should be redacted of any confidential taxpayer information or privileged material so that it can be released for public inspection pursuant to FOIA. **Note:** Field-authored advice is not subject to I.R.C. § 6110 procedures and the taxpayer DOES NOT have a right to review the memorandum for proposed redactions.

There are procedures for processing the field authored advice memorandum on the Chief Counsel website at:

<http://ccintranet.prod.irsounsel.treas.gov/OrgStrat/Offices/PA/Pages/CheckSheetsandOtherResourcesaboutMakingCCDocumentsPubliclyAvailable.aspx>

VIII. REFERENCE MATERIALS

- A. Disclosure questions – Consult your local Disclosure Officer
- B. Legal issues regarding disclosure – Consult the Office of Associate Chief Counsel, Procedure & Administration, Branch 6 (202) 622-7950 and Branch 7 (202) 622-4570.
- C. Procedure & Administration Subject Matter Directory may be found at:
<http://ccintranet.prod.irsounsel.treas.gov/OrgStrat/Offices/PA/Procedure%20and%20Administration%20Contacts/PA%20%20Realignment%20Br%201-7%207-10.pdf>
- D. Disclosure and Privacy Law Reference Guide may be found at:
<http://core.publish.no.irs.gov/pubs/pdf/50891i11.pdf>.
- E. Department of Justice Freedom of Information Act Guide & Privacy Act Overview may be found at: http://www.justice.gov/oip/04_3.html
- F. IRM 1.2.49, Delegation of Authorities for Communications, Liaison and Disclosure Activities (and Exhibit 1.2.49-2, Delegation Order 11-2 may be found at:
<http://core.publish.no.irs.gov/irm/p01/pdf/irm01-002-049--2010-10-12.pdf>.