Office of Chief Counsel
Internal Revenue Service
memorandum

Number: **201237018**
Release Date: 9/14/2012

CC:PA:07:ALMielke
POSTS-111474-11

UILC: 6103.03-00, 6103.08-01

date: June 29, 2012

to: Benjamin J. Mower
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from: Julie C. Schwartz
Senior Counsel
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subject: ARRA Section 1603 Compliance and OFAS Access to Return Information

This is in response to your request for advice on the captioned matter.

ISSUE

Whether the Department of the Treasury's Office of the Fiscal Assistant Secretary (OFAS) has access to returns and return information (tax information) in connection with administering the American Recovery and Reinvestment Act of 2009 section 1603 (ARRA section 1603) program.

CONCLUSION

In appropriate circumstances, and only where OFAS' duties in connection with administering the ARRA section 1603 program are related to tax administration, its officers and employees may have access to tax information as necessary for carrying out these functions. For all other circumstances, OFAS may seek a consent to disclosure under which ARRA section 1603 applicants would agree to IRS sharing tax information with OFAS.

FACTS

The American Recovery and Reinvestment Act of 2009 (ARRA) contains several provisions intended to provide incentives to developers and producers of renewable

energy. ARRA section 1603 allows applicants to elect to receive a grant, rather than a tax credit, when specified energy property is placed in service. Applicants can receive grants in the amount of either 10% or 30% of the basis of qualifying projects placed in service by the specified credit termination date. Tax credits for qualifying projects are available under IRC § 48. Taxpayers cannot accept a grant and take a tax credit for the same project.

Under a Compliance Initiative Project (CIP), the IRS will be examining a sampling of taxpayers that receive ARRA section 1603 grants. Examinations will focus on all aspects of tax compliance in this scenario, including, among other matters, whether the taxpayer has claimed a tax credit and received an ARRA section 1603 grant with respect to the same property; whether the taxpayer appropriately reduced its basis by 50% of the amount of the ARRA section 1603 grant; and whether the taxpayer's depreciable basis was appropriately stated. In a September 27, 2011 General Legal Advice Memorandum (GLAM), the Office of the Associate Chief Counsel (Passthroughs and Special Industries) addressed the issue of excessive grant payments under ARRA section 1603. The GLAM concluded that an excessive ARRA section 1603 grant payment is includible in income and the Service has three years from the date the return was filed to assess the amount disallowed.

The IRS has access to OFAS' ARRA section 1603 database, which includes all ARRA section 1603 applications, terms and conditions, and the supporting documentation submitted with the applications. OFAS also provides the IRS an annual list of ARRA section 1603 grant recipients as well as a quarterly list of those recipients who indicate to OFAS on their annual reports that they have claimed a tax credit with respect to applicable property. OFAS can neither direct nor request the IRS to examine a particular taxpayer, but can provide information to the IRS about particular taxpayers for the IRS' examination consideration.

The Code does not contain authority for the IRS to specifically recoup ARRA section 1603 grant overpayments but does allow the IRS to avail itself of all compliance and enforcement provisions in connection with the examination of tax credits, including, the ability to disallow or recapture the credit. In addition, the IRS is also responsible for ensuring that grant recipients properly account for the grant payment in the calculation of their taxes, i.e., recipients must reduce their basis by 50% of the grant. The IRS also has an enforcement interest in ensuring that grant applicants have properly stated their basis on their grant applications because the amount of basis claimed on the grant application is also the amount of basis used for depreciation purposes. The information gathered, collected or created by the IRS during its examination, including the information leading to the conclusion that the taxpayer may not be entitled to all or part of the grant, is tax information subject to IRC § 6103 confidentiality. IRC § 6103(b)(2).

While the IRS can determine a grant overpayment occurred and take action authorized by the Code such as including the overpayment in taxable income, OFAS is responsible for recapture of any erroneously awarded grant overpayments. OFAS has six years

from when the claim first accrues, usually when the overpayment is discovered, to seek recovery of such erroneous amounts. The IRS, through its CIP, is more likely than OFAS to discover a grant overpayment. OFAS would like the IRS to share this tax information with it so OFAS can use it to take action on recapture as appropriate. You have asked us to opine whether IRC § 6103(h)(1) affords OFAS access to tax information to conduct its recapture authority and, if not, whether OFAS can obtain consents to disclosure from all ARRA section 1603 program applicants allowing the IRS to share tax information with OFAS.

LAW AND ANALYSIS

IRC § 6103(h)(1)

IRC § 6103(a) provides that tax information "shall be confidential," and may be disclosed only as expressly authorized under the Code. The Code contains numerous exceptions to this confidentiality rule, including IRC § 6103(h)(1), which allows the inspection and disclosure of tax information to officers and employees of the Department of the Treasury where such inspection or disclosure is necessary for tax administration purposes. This means Treasury employees may have access to tax information if they have a "need to know" the information for tax administration reasons.

Tax administration is defined in IRC § 6103(b)(4) as

> (A) (i) the administration, management, conduct, direction, and supervision of the execution and application of the internal revenue laws **or related statutes** (or equivalent law or statutes of a State) and tax conventions to which the United States is a party, and
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> (ii) the development and formulation of Federal tax policy relating to existing or proposed internal revenue law, related statutes, and tax conventions, and
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> (B) includes assessment collection, enforcement, litigation, publication, and statistical gathering functions under such law, statutes or conventions.

(Emphasis added). Courts have held that the meaning of "tax administration" is sweeping. United States v. Mangan, 575 F.2d 32 (2nd Cir. 1978), cert denied, 439 U.S. 931 (1978); Tavery v. United States, 32 F.2d 1423 (10th Cir. 1994). *See*, also, First W. Gov't Sec.,Inc. v. United States, 796 F.2d 356, 360 (10th Cir.1986). The term "related statute" is not defined in the Code. Whether or not a statute is "related" to the internal revenue laws within the meaning of section 6103(b)(4) depends on the nature and purpose of the statute and the facts and circumstances in which the statute is being enforced or administered.

Given the interconnection between OFAS' responsibilities in the ARRA section 1603 program and the IRS' responsibilities under the Code for the same projects, some of

OFAS' program responsibilities under the ARRA section 1603 statute are related to tax administration. The administration of the ARRA program, established under I.R.C. § 48(d) with the tax credit and revised by the grant provisions that are not included in the Code, will unquestionably implicate and relate to the IRS's compliance activities under the Code with respect to the tax credit. There is a division of responsibilities between the two agencies responsible for the program. As noted earlier, the IRS enforces the prohibition against receiving a grant and a tax credit for the same property and is also responsible for ensuring that grant recipients properly account for the grant payment in the calculation of their taxes, i.e., recipients must reduce their basis by 50% of the grant. OFAS supports the online application process, reviews the application for eligibility and awards grant funds and is responsible for recapture of erroneously awarded grant overpayments. The IRS' examination, assessment and collection authority and action taken will directly relate to and impact any action OFAS elects to take regarding the same project and grant particularly with regard to OFAS' post-award grant compliance responsibilities. For example, if OFAS recaptures a grant overpayment and the Service had not earlier required the taxpayer to include the overpayment in taxable income, the overpayment would have been treated by the taxpayer as a non-taxable grant under section 48(d)(3)(A) and would not have been included in income. Thus, the taxpayer's taxable income would not be reduced by the grant recapture amount. If, on the other hand, the Service had determined that all or a portion of a grant was an overpayment and had made an adjustment adding the overpayment amount to gross income under the reasoning of the GLAM, any repayment to OFAS of the overpayment amount would then reduce the taxpayer's taxable income by the amount repaid.

While OFAS may *like* to know certain information in connection with its monitoring responsibilities, it is unclear whether it would have a *need* to know. There are certain compliance activities that OFAS conducts under the ARRA program that are so inextricably intertwined with the IRS' tax compliance activities that these activities are related to tax administration and officers and employees of OFAS may have access to tax information as necessary for carrying out these functions. While not free from doubt, we believe that an argument can be made that OFAS' responsibility for monitoring grant compliance, as opposed to its grant eligibility and award responsibilities, is so inextricably intertwined with, and related to, the IRS' tax compliance responsibilities as to constitute tax administration. As such, we believe that a reasonable argument may be made that ARRA section 1603 is a related statute with respect to the IRS's and OFAS's respective roles in ensuring that recipients do not accept grant funds and claim credits, and in ensuring that recipients reduce their basis by 50% of the grant amount in their tax filings. Accordingly, OFAS is authorized access to tax information under I.R.C. § 6103(h)(1) in connection with its compliance monitoring responsibilities only. In keeping with this statutory authority, access to tax information will be limited to those situations where OFAS' officers and employees have a need for the tax information in carrying out those official grant compliance monitoring responsibilities that arise out of, and are related to, the administration of the internal revenue laws. OFAS will have access only to that tax information it has a need to know

to conduct these activities. OFAS may only use the tax information to which it has access in connection with its grant compliance monitoring responsibilities.[1]

IRC § 6103(c) Consents

Section 6103(c) provides, generally, that, subject to the requirements and conditions set forth by the Secretary in regulations, tax information may be disclosed to persons designated by the taxpayer in a request for or consent to disclosure. Treas. Reg. § 301.6103(c)-1(a) et. seq., sets forth the relevant requirements for disclosures to designees. According to Treas. Reg. § 301.6103(c)-1(b), an authorization for disclosure must include the following items in a written document[2] pertaining solely to the authorization: (1) the taxpayer's identity (name, address, taxpayer identifying number) 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 return information to be disclosed; and (4) the taxable year or years covered by the return or return information. Treas. Reg. § 301.6103(c)-1(b)(1). The regulations also require that the taxpayer sign and date the written document. In addition, the regulations bar disclosure of a return or return information unless the written request for or written consent to disclosure is received by the IRS (or an agent or contractor of the IRS) within 120 days following the date upon which the written request was signed and dated by the taxpayer. Treas. Reg. § 301.6103(c)-1(b)(2); Prop. Treas. Reg. § 301.6103(c)-1(b)(2), 76 Fed. Reg. 14827 (Mar.18, 2011); Notice 2010-8, 2010-3 IRB 297.

To date, OFAS has on an ad hoc basis asked grant applicants to agree to consent to IRS sharing tax information compiled during examinations. For those situations in which OFAS's non-tax administration responsibilities (e.g., grant eligibility and award responsibilities) would benefit from access to tax information, OFAS may seek a consent to disclosure from grant applicants.

As we understand it, upon receipt of a consent, OFAS will verify the validity of the consent and upload the verified consent into the ARRA section 1603 database to which the IRS has unfettered access. In order to satisfy the requirement that the IRS receive the consent within 120 days following the date upon which the consent was signed and dated by the taxpayer/grantee, OFAS must upload the consent into the ARRA section 1603 database within 120 days of that date, noting the upload date on the system. Prior to disclosing the authorized tax information to OFAS, IRS will confirm a valid consent exists in the database. OFAS will be required to maintain the original consent, whether in paper or electronic form, for the time period specified by the IRS.

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[1] The return information in OFAS's possession remains confidential under I.R.C. § 6103(a).

[2] An authorization for disclosure (consent) may be also be done electronically. Treas. Reg. § 301.6103(c)-1(e)(1).

For coordination of consent matters or for questions regarding consent procedures, please contact Tim Christian, Disclosure Manager, Disclosure Program Operations, at [redacted] or [redacted].

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