Office of Chief Counsel
Internal Revenue Service
memorandum

CC:SDMurray
MASP-116479-19

date: May 22, 2020

to: David M. Tyree III
Section Chief
Technical Support Section, Specialty Programs Branch
Submission Processing, Customer Account Services
(Wage & Investment)

from: Stuart D. Murray
Special Counsel
(Office of the Chief Counsel)

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subject: Advice to a Program Manager requested and received from the Office of the Associate Chief Counsel (General Legal Services)

Attached is a memorandum of advice issued by General Legal Services that was previously emailed to Mr. Tyree and employees in his section.

Attachment (1)

Office of Chief Counsel
Internal Revenue Service
memorandum
CC:GLS:EGG:SSilberhorn
GLS-129724-19

date: January 29, 2020

to: Stuart D. Murray
Attorney, Division Counsel, Wage & Investment

from: Katie Bendoraitis
Acting Chief, Ethics & General Government Law Branch (General Legal Services)

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subject: Fee for “Qualified Disclosures” under § 2201 of the Taxpayer First Act

This memorandum responds to your request for guidance about the scope of the term “qualified disclosure,” as it is used in § 2201(d) of the Taxpayer First Act (TFA, Pub. L. 116-25). Under that provision, for a two-year period the IRS is required to assess a fee for “qualified disclosures” to cover the cost of any infrastructure and technology necessary to fully automate the qualified-disclosure process. Our office was asked to advise whether the term is limited to disclosures related to a taxpayer’s loan application, or whether it also covers other types of disclosures provided through the Income Verification Express Service (IVES) program. We also considered whether the IRS has authority, independent of § 2201(d), to increase the user fee for non-loan related IVES disclosures so that all IVES disclosures are charged a uniform rate.

[redacted]

BACKGROUND

A. Disclosures under the Current IVES Program

Section 6103(c) of title 26 of the U.S. Code authorizes the disclosure of return or return information to third parties, as designated by the taxpayer. The IRS processes these disclosures using the IVES program. According to the information provided to our office, the vast majority of IVES users are lenders (e.g., mortgage lenders) and lender representatives seeking to confirm the income of a borrower who has applied for a loan. *See* IVES program website, https://www.irs.gov/individuals/international-taxpayers/income-verification-express-service. A small portion of IVES users consist of non-lender entities seeking to verify taxpayer income and return information for other purposes, such as background checks, licensing, benefits eligibility, tax preparation, and insurance litigation.

IVES users submit their disclosure requests by fax, and receive disclosures electronically. *Id*. Thus, only the delivery portion of the IVES program is currently automated. The IRS imposes a $2.00 user fee for each IVES disclosure. *See* IVES FAQs, https://www.irs.gov/individuals/international-taxpayers/irs-income-verification-express-service-ives. This fee is imposed pursuant to the IRS's authority to charge "a reasonable fee" for disclosures of returns and return information under I.R.C. § 6103(p).

B. Changes Required by the Taxpayer First Act § 2201

The TFA was signed into law on July 1, 2019. Section 2201(a) of the TFA provides that "the Secretary of the Treasury or the Secretary's delegate . . . shall implement a program to ensure that any qualified disclosure (1) is fully automated and accomplished through the internet; and (2) is accomplished in as close to real-time as is practicable." TFA § 2201(a). With this mandate, Congress envisioned that borrowers would benefit from a fully-automated IVES program in the form of reduced administrative burden and cost. H. Rep. 116-39 at 84 (Apr. 9, 2019); *see also* JCX-15-19 at 54-55 (Apr. 1, 2019).

For purposes of § 2201(a), "qualified disclosure" is defined as "a disclosure under section 6103(c) of the Internal Revenue Code of 1986 of returns or return information by the Secretary to a person seeking to verify the income or creditworthiness of a taxpayer who is a borrower in the process of a loan application." TFA § 2201(b). To cover the cost of implementing a fully-automated program, for a two-year period prior to implementing a fully-automated program, § 2201(d) directs the IRS to collect a pre-implementation fee for "qualified disclosures":

> [T]he Secretary shall assess and collect a fee for qualified disclosures (in addition to any other fee assessed and collected for such disclosures) at such rates as the Secretary determines are sufficient to cover the costs related to implementing the program described in subsection (a), including the costs of any necessary infrastructure or technology.

In other words, the statute directs the IRS to recover from "qualified disclosures" the entire cost of developing a fully-automated disclosure program by the statutory deadline. Thus, if only a subset of IVES disclosures are "qualified disclosures" for which the agency must charge a pre-implementation fee, the IRS may adjust the amount of the fee to ensure its costs are fully covered. The Secretary (or his delegate) must implement a fully-automated program not later than one year after the close of this two-year period. TFA § 2201(a).

DISCUSSION

A. "Qualified disclosure"

Section 2201 expressly limits "qualified disclosures" to those that are requested for loan application purposes. Committee reports underlying the provision, however, clearly state that Congress intended for the term to cover all uses of the IVES program. [redacted]

[redacted]

As a rule, statutory construction begins with the text of the statute itself. *E.g.*, *Sebelius v. Cloer*, 569 U.S. 369, 376, (2013). Where a provision's language is plain and unambiguous, it should be applied according to its ordinary terms. *Id*. Courts generally will look to indicia of legislative purpose and other considerations only to the extent the statute is unclear or ambiguous. *See, e.g.*, *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 508-09 (1989).

Here, § 2201(b) defines "qualified disclosure" as a disclosure concerning "a taxpayer who is a borrower in the process of a loan application." Strictly read, this language limits the term to disclosures made for lending purposes, and thereby excludes disclosures that are requested for other purposes. The legislative history of § 2201, however, clearly indicates that Congress did not intend to limit "qualified disclosure" in this way. Congressional committee reports underlying the statute state that the term "'[q]ualified disclosure' is intended as a reference to the types of disclosures made under the current IVES program. *The provision is not intended to exclude current uses of the IVES program.*" H. Rep. 116-39 at 84 (emphasis added); *see also* JCX-15-19 at 55.

Whether to adopt an interpretation that relies on the statute's plain language as opposed to its legislative history is a policy call. There is at least some judicial precedent for using legislative history to construe arguably clear statutory text. For instance, in *United Steelworkers of America v. Weber*, the Supreme Court relied on the legislative history and the historical context of Title VII of the Civil Rights Act of 1964 to hold that the statutory prohibition on racial discrimination in employment did not prohibit race-conscious affirmative action programs. 443 U.S. 193, 201 (1979). In the Court's assessment, a literal reading of Title VII "would 'bring about an end completely at variance with the purpose of the statute,'" namely, to address employment discrimination against racial minorities. *Id*. at 202-03.

Here, the committee reports underlying § 2201 directly address the scope of "qualified disclosure" and state clearly that Congress did not intend to exclude non-loan related uses of IVES. [redacted].

Notwithstanding precedent such as *Weber*, however, federal courts generally hold that legislative history does not warrant the construction of a statute that is inconsistent with its plain terms. For example, in *City of Chicago v. Environmental Defense Fund*, the Supreme Court held that Congress's failure to list hazardous waste "generation" among the activities that were exempt by statute from certain federal regulations was dispositive, despite a committee report specifically identifying waste "generation" among the activities that Congress meant to exclude. 511 U.S. 328, 337 (1994). The Court explained that "it is the statute, and not the Committee Report, which is the authoritative expression of the law, and the statute prominently *omits* reference to generation." *Id*. at 337 (emphasis original).

[redacted]

[redacted]

B. Authority to increase user fee for non-"qualified disclosures"

[redacted] The IRS has independent statutory authority under I.R.C. § 6103(p) to charge "a reasonable fee" for income verification services. The $2.00 fee that the IRS currently charges for IVES disclosures is imposed pursuant to this authority.

Section 6103(p) does not define what constitutes a "reasonable" user fee. However, guidance concerning the implementation of user fees can be found in Office of Management and Budget (OMB) Circular A-25, which controls the assessment of fees by federal agencies under 31 U.S.C. § 9701, commonly referred to as the User Charge Statute. OMB Circular A-25, § 1. Circular A-25 instructs federal agencies to base user fees on the cost of services provided to the user. OMB Circular A-25, § 6. This is consistent with judicial precedent holding that fees assessed under the User Charge

Statute must be limited to reflect the agency's cost of rendering "a specific benefit . . . to a particular entity." *Florida Power & Light Co. v. United States*, 846 F.2d 765, 767 (D.C. Cir. 1999), cert. denied 490 U.S. 1045 (1989). This rule ensures that agencies do not assess charges amounting to taxation, a function reserved to Congress. *National Cable Television Ass'n v. United States*, 415 U.S. 336, 340-42 (1974). Looking to Circular A-25 for guidance, our office has advised that user fees charged under § 6103(p) must also be based on the cost of services provided to the user.

Consistent with this interpretation of "reasonable fee," the IRS may not establish different rates for similarly situated customers unless the disparate fees are justified by a difference in the cost of services provided. [redacted]

If you have any questions or if our office can be of further assistance, please contact Ashley Silberhorn at (202) 317-5662.