**DEPARTMENT OF THE TREASURY**
**INTERNAL REVENUE SERVICE**
**WASHINGTON, D.C. 20224**

**OFFICE OF**
**CHIEF COUNSEL**

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MEMORANDUM FOR RAYMONA L. STICKELL, NATIONAL DIRECTOR,
MULTIMEDIA PRODUCTION DIVISION OP:FS:M

FROM: John B. Cummings.
Assistant Chief Counsel (Disclosure Litigation

SUBJECT: Undeliverable Refunds on Internet

This responds to your request for our advice as to the disclosure implications of augmenting the Service's existing undeliverable refund programs with an Internet application. Under the proposal, in addition to releasing to newspapers and other traditional media certain kinds of information on undeliverable refunds, the Service would publish that same information via the Internet.

Being a relatively new resource, the Internet and its potential were never contemplated by the drafters of existing statutes and regulations; its disclosure implications have not yet been addressed by Congress or the courts. We have concluded that the Internet does not constitute "press or other media" for purposes of I.R.C. § 6103(m)(1) and thus the Service should not rely on the Internet as another media outlet by which undeliverable refund data is released directly to the public. However, we believe that existing disclosure law would permit the Internet to be used indirectly to accomplish substantially the same objectives as the proposed application.

I. Background

I.R.C. § 6103 protects returns and return information from disclosure except as expressly authorized by a provision of Title 26 (the Code). "Return information" is defined by section 6103(b)(2) as including:

> a taxpayer's identity, the nature, source or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the [Service] with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense....

Information about undeliverable refunds is return information because it has been collected by the Service with respect to the tax liabilities and payments of particular taxpayers.

I.R.C. § 6103(m)(1) operates as an exception to the nondisclosure rule of section 6103 by permitting the Service to disclose to "the press and other media" the identity of taxpayers entitled to refunds where the purpose of such disclosure is to locate and notify such taxpayers when the Service, after reasonable effort and lapse of time, has been unable to locate such taxpayers. Specifically, section 6103(m)(1) provides:

> The Secretary may disclose taxpayer identity information[1] to the press and other media for purposes of notifying persons entitled to tax refunds when the Secretary, after reasonable effort and lapse of time, has been unable to locate such persons.

The authority to make such disclosures is delegated to District Directors and may be redelegated to Public Affairs Officers. Delegation Order 156 (Rev. 14), ¶ 8, IRM 1229, Handbook of Delegation Orders; IRM 1(19)32.31. Under this authority, the Service has long forwarded to newspapers and other traditional media the names and the city, state and zip code of the mailing addresses of taxpayers to whom undeliverable refunds are due.[2]

II. The Internet is not within the meaning of the statutory phrase, "press or other media" and so, standing alone, cannot be used as the means of publishing undeliverable refunds.

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[1] "Taxpayer identity" means a taxpayer's name, mailing address, and taxpayer identification number, or a combination thereof. I.R.C. § 6103(b)(6).

[2] The published items of information are the only ones covered by the Delegation Order. As noted above, the statutory definition of "taxpayer identity" is broader.

No legislative history or regulations under section 6103(m)(1) address the intended scope of the phrase "press or other media." We are aware, however, of one court decision that addresses the scope of the statutory phrase. The First Circuit, in rejecting a claim that a private citizen operating as a "skip tracer" who locates . individuals entitled to abandoned money and other property held by state and federal governments qualifies as the "press or other media," observed that "media" means traditional purveyors of news, with "press" referring to print media such as newspapers, and "other media" referring to "radio, television, and the like...." Aronson v. Internal Revenue Service, 973 F.2d 962, 967 (1st Cir. 1992), rev 'g, 767 F. Supp. 385 (D. Mass. 1991).

This interpretation is consistent with Manual provisions implementing the Service's existing programs to publicize undelivered refunds. IRM 6326.1(2) and (3) direct District Public Affairs Officers to "get lists publicized by as many media as possible to reach the affected taxpayers.... Publicity activities related to undelivered refund checks should involve a multi-media approach and not be confined to the daily and weekly print media."

Usage of the term "media" as referring to established organizations that disseminate information is also consistent with administrative and judicial interpretations of the Freedom of Information Act (FOIA) fee reduction available to any "representative of the news media" under 5 U.S.C. § 552(a)(4)(A)(ii)(II). The Service's Statement of Procedural Rules implementing the FOIA defines a news medium as "an entity that is organized and operated to publish or broadcast news to the public." 26 C.F.R. § 601.702(f)(3)(i)(B). Similarly, the corresponding Manual provisions state that representatives of the news media are "persons on the staff of established news media outlets," with the given examples comprising radio stations, television stations, wire services, and periodicals of general circulation. IRM 1272, Disclosure of Information Handbook, ¶ 521(4). As recently as September 1997, Treasury was using the narrow journalistic sense of "media" in disclosure regulations. Prop. Reg. § 301.6104(e)-3(f), Ex. 4, exempts "representatives of the news media" from those requesters that may be denied copies of exempt organization filings on grounds of harassment. Such an exemption would be meaningless if any user of the Internet could qualify as a media representative. The D.C. Circuit has held that a "representative of the news media is, in essence, a person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." National Security Archive v. Department of Defense, 880 F.2d 1381, 1387 (D.C. Cir. 1989); see also Tax Analysts v. Department of Justice, 965 F.2d 1092, 1095 (D.C. Cir. 1992) (Tax Analysts is a news medium for FOIA purposes because it is "in the business of disseminating information").

However impressive the Internet may be as a tool of mass communication, it is not in the nature of an entity in the business of disseminating news. Rather, the Internet has been judicially described as "a giant network which interconnects innumerable smaller groups of linked computer networks." American Civil Liberties Union v. Reno, 929 F.

Supp. 824, 830 (E.D. Pa. 1996) (subsequent history omitted). The Internet "is not a physical or tangible entity," and "no single entity -- academic, corporate, governmental or non-profit -- administers the Internet. It exists and functions as a result of the fact that hundreds of thousands of separate operators of computers and computer networks independently decided to use common data transfer protocols to exchange communications and information with other computers...." Id. at 830, 832. The Internet thus appears to be unlike the concept of "media" as used in section 6103(m)(1), at least given the limited number of legal interpretations that have developed to date.

We have carefully considered the fact that "media" also has a more general, non-journalistic meaning. In this broader sense, media (or a medium) can be any means or instrument of communication. The Random House College Dictionary 831 (1973). The Supreme Court has referred to the Internet as a "medium" in this sense. Reno v. American Civil Liberties Union, 117 S.Ct. 2329, 2344 (1997) (Communications Decency Act held unconstitutional in part as applied to Internet). However, nothing in existing law suggests that the broader concept is embraced by section 6103(m)(1); the limited authority under that provision, as discussed earlier, points to a narrower, more journalistic definition of "media."[3] Accordingly, we find no substantial legal support for qualification of the Internet as "press or other media" for purposes of section 6103(m)(1).

III. Certain alternative applications of the Internet would not violate I.R.C. § 6103.

A. Electronic transmission of refund data by the Service to the press and other traditional media would be authorized by I.R.C. § 6103(m)(1).

Section 6103(m)(1) does not limit the means used by the Service to disclose information to the press or other media.[4] The Service could electronically transmit (in a secure format) refund data to the press and other traditional media. The press or other media could then publish the data by any means, whether in print, via Internet sites, or otherwise. The use or republication of the return information by the press or other traditional media is not controlled by I.R.C. § 6103. See Aronson v. Internal Revenue Service, 767 F. Supp. 378, 385, n.8 (D. Mass. 1991) (subsequent history omitted) (dictum) ("[O]nce disclosure is made to the press the use of the information is totally uncontrolled.")

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[3] It bears emphasizing that the court in Aronson, supra, in reversing the decision of the district court that "there are several reasons to give the phrase, 'the press and other media,' a broad reading in the context of § 6103," 767 F. Supp. At 385, viewed "other media" more narrowly, referring to "radio, television, and the like." 973 F.2d at 967.

[4] Indeed, I.R.C. § 6103(b)(8) defines "disclosure" as "the making known [of return information] in any manner whatever."

B. The Service could issue an Internet notice of publication.

Whether or not the press or other media proceed to publish undeliverable refund data, the Service could announce to the public via Internet that a list of undeliverable refunds has been made available to specified press and other media outlets. Such a notice in itself would not constitute return information the disclosure of which is controlled by I.R.C. § 6103.

C. The Internet arguably can be used as a supplemental means of publication of refund information after that information has entered the public record.

Under the so-called "public record exception" to the general disclosure prohibition of section 6103, once the information is released to the press or other traditional media under section 6103(m)(1), the Service might take the position that whether or not the information is actually published, it has effectively entered the public record and lost its confidentiality, so the Service may freely republish it. Several circuits have addressed the question of whether the non-disclosure restrictions of section 6103 continue to apply to return information once it properly has been made available to the public as part of an authorized tax administration activity. However, this approach is not certain to withstand legal scrutiny, since the circuits have not reached a consistent conclusion on the issue.

The Ninth Circuit has held that once return information has been made public in a judicial tax proceeding, the non-disclosure restrictions no longer apply to that information. Lampert v. United States, 854 F.2d 335 (9th Cir. 1988); Schrambling v. United States, 937 F.2d 1485 (9th Cir. 1991). The Sixth Circuit has held that the return information disclosed by the filing of a notice of federal tax lien loses its confidentiality and is not protected by section 6103, noting that the very purpose of that vehicle was to put the public on notice. The Court emphasized that a notice of federal tax lien "is designed to provide public notice and is thus qualitatively different from disclosures made in judicial proceedings, which are only incidentally made public." Rowley v. United States, 76 F.3d 796, 801 (6th Cir. 1996). In an unpublished opinion, the Third Circuit has held that a press release did not contain unauthorized disclosures of return information because the information in the press release was public information. Barnes v. United States, 73 A.F.T.R.2d 94-1160 (3d Cir. 1994).

On the other hand, the Tenth and the Fourth Circuits have held that public disclosure of return information does not lift the non-disclosure bar on further disclosure of such information. Rodgers v. Hyatt, 697 F.2d 899 (10th Cir. 1983); Mallas v. United States, 993 F.2d 1111 (4th Cir. 1993). While the Seventh Circuit did not resolve the issue of

whether return information disclosed in court loses its confidentiality, it concluded that information in a court opinion is not return information and, when the source of the information disclosed is the court opinion, no violation has occurred. Thomas v. United States, 890 F.2d 18 (7th Cir. 1989). Citing Thomas, the Eighth Circuit has held that release of a court opinion to the press does not violate section 6103. Noske v. United States, 998 F.2d 1018 (8th Cir. 1993), opinion published at 1993 U.S. App. LEXIS 17480.

In Johnson v. Sawyer, 120 F.3d 1307 (5th Cir. 1997), the Fifth Circuit followed "the approach of the Fourth and Tenth Circuits, modified by the Seventh Circuit's "source' analysis." Under the Fifth Circuit's analysis, section 6103 is violated only when return information -- which is not a public record open to public inspection -- is the immediate source of the information claimed to be wrongfully disclosed.

In offering guidance on how to publicize the results of an indictment, conviction, or sentence, the Department of Justice concluded the section 6103 prohibitions on disclosure are source-based. Therefore, a press release, for example, should contain only information the immediate source of which is the public record of the judicial proceeding, and the press release should attribute the information to the public court record.[5] Thus, statements of facts that could have come from the IRS files should not be made unless attributed to a specific public source.

Similarly, where the public source is a statutorily authorized publication (the release to the press or other traditional media) whose very purpose is to put the public on notice of certain return information, republication of that information in a different format (Internet posting) should not violate section 6103 as long as the republication is drawn strictly from and attributed to the original publication. Such a position is supported by Rowley v. United States, 76 F.3d 796 (6th Cir. 1996), where the court held that return information lost its confidentiality once published in a notice of federal tax lien, a statutory collection procedure intended to put the public on notice; the Service's republication of the same information was held not to violate section 6103.

Once the undeliverable refund data is released to the press or other traditional media pursuant to section 6103(m)(1), whether or not the press or other media publish it, the Service might argue that the judicially created "public record" exception applies to a

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[5] For example: "according to the indictment, during the years 1993 and 1994, John Doe received income in excess of $100,000 which he failed to report on his income tax returns. The indictment further charges..."). Facts (including minor details) that do not appear in the indictment (such as the defendant's age, full name, and address) should not be included in the press release unless they are obtained from and attributed to public records.

supplemental Internet posting that clearly attributes the data to the media release as the immediate source; such a position would maintain that the Service may further publicize the information because it has effectively entered the public record and has lost its confidentiality. Indeed, we have been advised that it is the Service's practice to treat information released under section 6103(m)(1) as subject to disclosure to requesters under the FOIA.[6] Nevertheless, while it is possible that Internet republication of previously released data regarding undeliverable refunds would be upheld under a public record theory, the reliance on such a theory in this context, outside the setting of a specific FOIA request, is untested.

In summary, given the current state of the law, we believe it would be safest for all disclosures of undeliverable refund data by the Service to be made only to the press or other traditional media. Disclosures to the press and other traditional media, whether via Internet (in a secure format) or otherwise, are authorized by section 6103(m)(1). The Service may also safely use the Internet to notify the public of the fact of such a disclosure.

Finally, in the event the foregoing analysis does not afford you sufficient latitude to pursue desired Internet applications, consideration should be given to proposing legislative changes that would update section 6103 to reflect advances in technology. We note that a particularly appropriate vehicle for such proposals may be the pending Study of confidentiality of tax information as mandated by section 3802 of the Internal Revenue Service Restructuring and Reform Act of 1998.

If you have any questions or comments, please contact us at (202) 622-4570.

cc: Director, Public Affairs M:C:MR
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[6] Aronson, supra, involved a FOIA request. As the court observed: "The IRS had previously released. names and partial addresses (cities, states, and zip codes) to the press as part of its own efforts to find those taxpayers. It gave Aronson this same information." 973 F.2d at 963.