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

OFFICE OF
CHIEF COUNSEL

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MEMORANDUM FOR VIRGINIA-WEST VIRGINIA DISTRICT COUNSEL

FROM: Alan C. Levine
Chief, Branch 1 (General Litigation)

SUBJECT: Last Chance Letters

This responds to your memorandum dated August 26, 1999. This document is not to be cited as precedent.

ISSUES:

1. Whether sending a "Last Chance Letter" for a collection summons directly to a represented taxpayer/summoned party violates the prohibition on direct contact in I.R.C. § 6304(a)(2).

2. Whether sending a "Last Chance Letter" with respect to any summons (collection, examination or criminal) to a represented summoned party is an ethical violation of the Model Rules of Professional Conduct Rule 4.2 and various state bar rules of ethics.

3. Whether sending a "Last Chance Letter" to a non-taxpayer summoned party with respect to a non-criminal summons would be a third party contact under I.R.C. § 7602(c).

4. Whether a TDI summons, seeking information to complete a return, issued by a revenue officer would be considered in "connection with the collection of any unpaid tax" for purposes of I.R.C. § 6304(a).

CONCLUSIONS:

1. If the represented party has executed an unmodified Power of Attorney form (Form 2848), that party has consented to direct written communications. Accordingly, there is no section 6304(a)(2) violation.

2. Although there would be no section 6304(a)(2) violation, sending a "Last Chance Letter" to a party represented by an attorney may be an unethical ex parte contact. Such contacts should, therefore, be avoided by Chief Counsel attorneys.

3. If none of the three exceptions of I.R.C. § 7602(c)(3)(A)-(C) apply, then the Service's procedure for sending a "Last Chance Letter" to a summoned third party is subject to the provisions of section 7602(c). Before sending a Last Chance Letter, the Service should ensure that the taxpayer has received reasonable notice. Also, the Service should record the contact on a Form 12175.

4. A summons served to determine whether a tax liability exists, i.e., before an assessment is recorded, is not an action taken "in connection with the collection of any unpaid tax."

FACTS:

In an earlier memorandum drafted by your office, you concluded that written communications may be sent by the Internal Revenue Service (the "Service") to taxpayers with authorized representatives, where such taxpayers and representatives have executed a Power of Attorney form (Form 2848), despite the restrictions upon communications found in I.R.C. § 6304(a)(2), discussed further below. Specifically, you concluded that the execution of the Form 2848 constitutes the taxpayer's consent to such direct communications. You further recommended, however, that the Form 2848 be modified to clarify that the taxpayer is consenting to receive collection communications. In particular, the Form 2848 does not presently provide the taxpayer with an option to elect not to receive such correspondence. These concerns will be more fully addressed below.

In the present memorandum, you raise several related questions that have arisen in your district pertaining to "Last Chance Letters", which are letters sent to summoned parties by District Counsel offices prior to seeking judicial enforcement of the summonses. First, you wish to clarify that sending a Last Chance Letter to a represented taxpayer who has executed a Form 2848 would not be a section 6304(a)(2) violation. Second, you conclude that sending a Last Chance Letter with respect to any summons (collection, examination, or criminal) to any summoned party represented by an attorney may be an ethical violation under Model Rules of Professional Conduct Rule 4.2 and various state bar rules of ethics. Third, you believe that sending a Last Chance Letter to a non-taxpayer summoned party with respect to a non-criminal summons would be a third party contact under I.R.C. § 7602(c).

In light of these conclusions, you have revised your Last Chance Letter procedures. Since you believe that it is standard practice in most District Counsel offices to send Last Chance Letters directly to summoned parties without consideration of the aforementioned issues, you also request that we review your new procedures and determine whether they are necessary under sections 6304(a)(2) and 7602(c) and Model Rule 4.2.

Your revised procedures provide that the District should inform District Counsel whether the summoned party is represented–i.e., the Power of Attorney form, Form 2848, is

filed with the Service--in any case referred to District Counsel for a Last Chance Letter. The nature of the representation should be indicated (attorney v. other recognized representative). The Last Chance Letter will then be sent to the representative, rather than to the summoned party, when the Service is aware of such representation. Third party contact procedures should be followed where the Last Chance Letter is sent to a non-taxpayer third party. The required notification must be given before such contact. Contacts should be tracked by completing Form 12175 and forwarding it to the Third Party Notice Coordinator.

Finally, you raise the additional issue of whether a TDI summons, issued by a revenue officer, seeking information from which to complete a return, would be considered in "connection with the collection of any unpaid tax" for purposes of I.R.C. § 6304(a). We have coordinated your advice request with the Office of Assistant Chief Counsel, General Legal Services, as that office has jurisdiction over the ethical questions raised in your second issue.

LAW AND ANALYSIS:

1. I.R.C. § 6304(a)(2)

We concur with the position taken in the earlier memorandum from your office. Where a taxpayer and his or her representative have executed a Power of Attorney form, Form 2848, sending a Last Chance Letter for a collection summons, or any other written collection communications, to that taxpayer does not violate section 6304(a)(2).

I.R.C. § 6304, Fair Tax Collection Practices, was added to the Internal Revenue Code (the "Code") pursuant to section 3466 of the Internal Revenue Service Restructuring and Reform Act of 1998 ("RRA 98"). Section 6304 makes certain provisions of the Fair Debt Collection Practices Act ("FDCPA") applicable to the Service, placing restrictions on certain communications with taxpayers and prohibiting abuse and harassment of taxpayers and third parties. In particular, section 6304(a) provides in relevant part that "without prior consent of the taxpayer ... the Secretary may not communicate with the taxpayer in connection with the collection of any unpaid tax ... (2) if the Secretary knows such person is represented by any person authorized to practice before the [IRS] ... unless such person fails to respond within a reasonable period of time ... or unless such person consents to direct communication with the taxpayer." (Emphasis added).

The counterpart section in the FDCPA, 15 U.S.C. § 1692c(a), contains comparable language. The FDCPA defines "communication" as "the conveying of information regarding a debt directly or indirectly to any person through any medium." 15 U.S.C. § 1692a(2). The stated purpose of the FDCPA is to "eliminate abusive debt collection practices by debt collectors ... ." 15 U.S.C. § 1692(e).

Thus, section 6304(a)(2) places restrictions upon communications, written or oral, with a represented taxpayer with respect to "the collection of any unpaid tax," unless (among

other reasons) that taxpayer has consented to such communications. The legislative history in RRA 98 is silent as to the meaning of this specific provision and as to what constitutes the "prior consent of the taxpayer."

We agree with the position taken in the earlier memorandum from your office that the execution of a Power of Attorney form, Form 2848, constitutes "prior consent of the taxpayer" to direct receipt of written communications, including Last Chance Letters for a collection summons. By executing such form, the taxpayer's representative is also consenting to such direct contact.

In relevant portion, Form 2848, line 7 states "Original notices and other communications will be sent to you and a copy to the first representative listed on line 2 unless you check one or more of the boxes below." The form then provides the following options: a) original to POA and copy to taxpayer; b) more than one representative to be sent copies; and c) no copies to representative.

Thus, under each option, the taxpayer receives either the original or a copy of all written communications from the Service. By completing the Form 2848 and line 7, without alteration, we think that the taxpayer (and representative) are clearly authorizing receipt by the taxpayer of written communications, including written communications in connection with the collection of an unpaid tax.

Your office additionally suggested the possibility of revising the present Form 2848 to further clarify the taxpayer's informed consent. In particular, the Form 2848 does not provide the taxpayer with the option to <u>not</u> receive any written collection correspondence, whether originals or copies. In other words, you suggest that it would provide further support for the position that the execution of Form 2848 and line 7 constitutes a taxpayer's consent to receive direct written collection communications from the Service if the taxpayer is provided with the full range of options, including the option to elect to not be provided with <u>any</u> such communications.

While we agree that such a modification could be made to emphasize that the taxpayer is making an informed consent to receive written correspondence pertaining to the collection of his or her unpaid tax liability, we think that such a modification is unnecessary at this time. From a practice standpoint, we would have concerns about taxpayers being deprived of any opportunity to exercise control over their representatives, the potential harm which could arise where taxpayer representatives fail to respond or take appropriate action in response to Service collection matters, and making taxpayer use of the Form 2848 more complex. In other words, while providing the taxpayer with the option to refuse receipt of certain written correspondence would allow the Service to avoid even the appearance of a section 6304(a) violation, we are not aware of any circumstances under which it would be ultimately beneficial to a taxpayer to exercise such an option. To the contrary, the exercise of such an option may be detrimental to a taxpayer.

In addition, we do not consider the issuance of these types of written correspondence or notices to a taxpayer to be the type of action section 6304(a)(2) was intended to restrict. As previously discussed, the stated purpose of the FDCPA is to eliminate abusive debt collection practices. It is not an abusive practice to ensure that a taxpayer is kept aware of the imminent possibility (with respect to the Last Chance Letter) of judicial enforcement of a summons. We think that the purpose of section 6304(a)(2) was to prevent bypassing a taxpayer's representative for the purpose of harassing or abusing the taxpayer with respect to collection of the tax liability. 1/

In cases addressing the application of the FDCPA counterpart of section 6304(a), 15 U.S.C. § 1692c(a)(2), some courts have read the underlying purpose of the FDCPA as a threshold for determining whether there has been a violation of that provision. For example, in Pearce v. Rapid Check Collection, Inc., 738 F. Supp. 334 (D.S.D. 1990), the court considered a letter sent to the plaintiff threatening suit after the debt collection company was aware she was represented by an attorney. The court noted that there was a "technical" FDCPA violation but that "[u]nder the facts, however, such violation is characterized as de minimus. It is not the type of conduct which the intent and purpose of the Act proscribes." Id. at 338. In Bieber v. Associated Collection Services, Inc., 631 F. Supp. 1410 (D. Kan. 1986), the alleged FDCPA violation was a telephone inquiry by a debt company as to whether the plaintiffs had filed bankruptcy, after learning that the plaintiffs were represented by an attorney. The court noted that, while it would have been better practice to hang up and call the attorney, the one additional communication was not the type of communication prohibited by the FDCPA. "Although there are no cases on point, it seems c(a)(2) was designed to prevent repeated phone calls and letters directly to the debtor after the debt collector knows that person to be represented by an attorney." Id. at 1417. But see Langley v. Scanlon, et al., 1993 U.S. Dist. LEXIS 17278 (D. Del. 1993) (court rejected "threshold" argument and disagreed that statute required more than a single "innocuous written communication" for a violation).

We do not consider the issuance of written correspondence to a represented taxpayer, ensuring that the taxpayer is kept appraised of potential collection actions, to be an abusive debt collection practice. Even if this were the type of action restricted by section 6304(a)(2), we think that the execution of a Power of Attorney form, Form 2848, constitutes the clear written consent of the taxpayer (and representative) to receive such correspondence. Accordingly, the issuance of a Last Chance Letter or other written collection correspondence to a taxpayer would not be a violation of the section 6304(a)(2) restrictions on direct communication. A proposed revision of the Form 2848, which contains no revisions pertaining to section 6304, has been recently circulated and is now in the final review stages. As previously discussed, we think it is unnecessary at

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1/ We further note that the argument that this is not the type of action contemplated by section 6304(a)(2) allows section 6304(a)(2) to be read consistently with other Code provisions which require written collection notices be given to the "taxpayer"–i.e., sections 6320, 6330 and 6331.

this time to modify the Form 2848 with respect to section 6304. We do not foreclose the possibility that some modification may be reconsidered at a later date, however. If such a modification were to be made, the revised instructions and/or publications should contain information which would fully inform taxpayers of the possible consequences of having collection notices and communications sent only to their representatives.

2. Ex Parte Contacts

The second issue raised by your office is whether sending a Last Chance Letter with respect to any summons (collection, examination or criminal) to a represented summoned party is an ethical violation of the Model Rules of Professional Conduct Rule 4.2 and various state bar rules of ethics. As previously discussed, Last Chance Letters are sent by District Counsel offices prior to seeking judicial enforcement of summonses. As further discussed below, although such action would not be a section 6304(a)(2) violation, sending a Last Chance Letter to a represented party may be an unethical ex parte contact, which should be avoided by Chief Counsel attorneys.

Office of Chief Counsel attorneys are subject to the professional codes of the bars in which they are admitted to practice as well as to the American Bar Association Model Rules of Professional Conduct. CCDM (30)485(2)(a). Many states and Federal courts have adopted the Model Rules of Conduct. ABA/BNA Lawyers' Manual on Professional Conduct §§ 01:3 - 01:49; Tannahill v. United States, 25 Cl. Ct. 149 (1992). American Bar Association Model Rule 4.2, Communication with Person Represented by Counsel, provides that "[i]n representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." Comment 3 to Model Rule 4.2 provides that it "applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract or negotiation, who is represented by counsel concerning the matter to which the communication relates." Comment 1 accompanying the model rule states that "parties to a matter may communicate directly with each other and a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so." "Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter." Id. Comment 2 provides that "[c]ommunications authorized by law also include constitutionally permissible investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings, when there is applicable judicial precedent that either has found the activity permissible under this Rule or has found this Rule inapplicable." While Model Rule 4.2 expressly applies to contacts by attorneys, Model Rule 5.3 prohibits lawyers from using nonlawyers to circumvent the Model Rules.

As noted above, there is an exclusion from Model Rule 4.2's direct contact prohibition where there is independent justification or legal authorization for the act–where the act is a "communication authorized by law." Thus it could be argued that, since the Service is authorized by IRC § 7602 to issue summonses in tax matters and enforcement in court proceedings is authorized by IRC § 7604, a Last Chance Letter is not subject to Model Rule 4.2 because there is independent justification or legal authorization. However, such an argument would be weak since these statutory provisions do not expressly authorize Government attorneys to handle such matters. While in a lengthy opinion on Model Rule 4.2, Formal Opinion 95-396 (July 28, 1995), the American Bar Association stated that government rules promulgated as regulations could constitute communications "authorized by law," we have been unable to find any regulations or other Service or Chief Counsel rules or procedures on Last Chance Letters.2/

Attempts by the Department of Justice to allow ex parte contacts by its attorneys with represented persons have been unsuccessful. Courts have uniformly held that the regulations issued by the Department of Justice at 28 C.F.R. Part 77, and their predecessor (the so-called "Thornburgh memorandum" issued on June 8, 1989) did not supersede traditional court imposed bar rules such as Model Rule 4.2. United States v. Lopez, 765 F. Supp. 1433 (ND Cal. 1991), vacated, 989 F.2d 1032 (9th Cir.), amended and superseded, 4 F.3d 1455 (9th Cir. 1993); United States v. Talao, No. CR-97-0217-VRW (N. Dist. Cal. June 17, 1999); United States ex. rel. O'Keefe v. McDonnell Douglas Corp. 132 F.3d 1252 (8th Cir. 1998) (Department of Justice regulations did not make contacts "authorized by law"). Eventually, these efforts by the Department resulted in the enactment of 28 U.S.C. § 530B by Congress. Essentially, it makes Department of Justice attorneys, including non-Justice attorneys serving as Special Assistant United States Attorneys (SAUSAs), "subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State." Id.; CCDM Notice N(34)000-52 (April 15, 1999). While these regulations only apply to Department of Justice attorneys, the legislation is indicative of Congress's view that Government attorneys should be subject to the conduct rules of courts and state bars–particularly with respect to communications with represented persons.

In view of the Office of Chief Counsel policy that its attorneys will adhere to the Model Rules, the court decisions prohibiting ex parte contacts by government attorneys with represented persons in violation of court rules such as Model Rule 4.2, and the recent legislation requiring Government attorneys to adhere to the rules of courts and state bars, such contacts should be avoided by Chief Counsel attorneys.

2/ ABA Formal Opinion 95-396, citing Chrysler v. Brown, 441 U.S. 281, 298 (1979), states that agency rules only qualify as "law" for purposes of Model Rule 4.2 if issued as a regulation in accordance with the procedural requirements imposed by Congress and are also rooted in a Congressional grant of authority.

In addition to the Model Code, you also requested our views on whether sending Last Chance Letters to a summoned party represented by an attorney would violate various state bar rules. Because of the large number of states it is impractical for this office to examine all jurisdictions. However, since most state codes are based on either the Model Rules or its predecessor, the ABA Model Code of Professional Responsibility, which contained a provision, DR 7-104(A)(1), substantially identical to Model Rule 4.2, most states would likely view direct contacts with represented parties to be improper.

Accordingly, we agree with your proposed procedures providing that the Last Chance Letter be sent directly to the representative, rather than to a represented taxpayer, to avoid an unethical ex parte contact.

3. Third Party Contacts

The next issue raised by your office is the applicability of the third party contact requirements to Last Chance Letters. In general, I.R.C. § 7602(c) requires the Service to give reasonable advance notice to a taxpayer before contacting third parties about the determination or collection of that taxpayer's liability. Procedurally, this is usually accomplished by sending a Form Letter 3164 to the taxpayer. Section 7602(c)(2) additionally requires the Service to maintain records of such contacts and provide them to the taxpayers periodically or upon request. This is usually done by recording the contacts on Forms 12175 and forwarding them to the third-party coordinator.

The advance notice requirement applies when the following elements are present. First, a Service officer or employee initiates a contact. Second, the contact is with a person other than the taxpayer. Third, the Service officer or employee identifies himself or herself. Fourth, the Service officer or employee identifies the taxpayer. Fifth, the contact is made with respect to the determination or collection of the taxpayer's liability. Sixth, none of three exceptions of section 7602(c)(3)(A)-(C) apply. The three exceptions include (1) third-party contacts authorized by the taxpayer, (2) instances in which notice of a third-party contact would jeopardize tax collection or might involve reprisal against any person, or (3) third-party contacts with respect to any pending criminal investigation.

When analyzed for the presence of the five elements, the scenario described in your memorandum involving Last Chance Letters sent to summoned parties clearly constitutes a third-party contact to which the advance notice and recordkeeping requirements of I.R.C. § 7602(c) apply. A Last Chance Letter sent to a summoned third party is a contact initiated by the Service, with a person other than the taxpayer, in which the Service's officer or employee identifies himself and identifies the taxpayer, and the contact is made with respect to the determination or collection of the taxpayer's liability. Also, in the fact pattern described in your memorandum, none of the three exceptions under section 7602(c)(3) apply. The inquiry was specifically limited to summonses not connected with a criminal investigation, and there are no indications that collection may be jeopardized, that any person may suffer reprisal, or that the

taxpayer authorized the contact. Accordingly, we conclude that the advance notice and recordkeeping requirements of I.R.C. § 7602(c)(3) do not apply. Having reached these conclusions, we advise the following.

If neither a Form Letter 3164 nor a copy of the summons has been sent to the taxpayer, then the Service should send Form Letter 3164 to the taxpayer prior to sending a Last Chance Letter to a summoned third party. Of course, a previously sent Form Letter 3164 will meet the reasonable advance notice requirement. A copy of the summons sent to the taxpayer pursuant to section 7609 may also satisfy the notice requirement of section 7602(c). 3/ However, the Service's procedure requires the Form Letter 3164 to be sent and that is clearly the preferred approach. Also, the Service should record the contact on Form 12175 and forward that form to the third-party coordinator. This process insures that the contact will be included in the periodic record of such contacts provided to the taxpayer as required by I.R.C. § 7602(c)(2). While the Service may have complied with the recordkeeping requirement of section 7602(c)(2) by sending the taxpayer a notice of the summons, which inherently constitutes a record of the contact, the better practice is also to record such contacts on a Form 12175.

Accordingly, we also concur with your office's proposed procedures requiring that third party contact requirements be followed with respect to Last Chance Letters sent to non-taxpayer summoned parties.

4. TDI Summonses

Finally, you have asked if a summons issued as a part of a tax delinquency investigation ("TDI summons") is considered an act of collection within the meaning of section 6304(a), which (as previously discussed) places restrictions on the circumstances in which the Service may communicate with a taxpayer "in connection with the collection of any unpaid tax." In concluding that it is not, we analogized to case law interpreting a similar provision in I.R.C. § 7433. Specifically, section 7433(a) provides a cause of action to taxpayers for damages if, inter alia, the Service recklessly, intentionally, or negligently violates the Code or the regulations "in connection with any collection of Federal Tax." This phrase is interpreted to encompass actions taken after the determination of a tax liability is completed. See Miller v. United States, 66 F.3d 220 (9th Cir. 1995), cert. denied, 517 U.S. 1103 (1996) (the Service's alleged erroneous jeopardy assessment could not be the basis of a section 7433 damages action because the act of assessing or determining a tax is not an act of collection). Based on this

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3/ Although the copy of the summons sent to the taxpayer pursuant to section 7609 might satisfy the reasonable advance notification requirement of section 7602(c) for future contacts with the summoned party, it would not satisfy that requirement for contacts made with other third parties.

reasoning, we conclude that a summons issued to investigate a potential, but unassessed, liability is not an act of collection for purposes of section 6304(a).

If you have any further questions, please call 202-622-3610.