Office of Chief Counsel
Internal Revenue Service
Memorandum

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to: William F. Halley, Associate Area Counsel
CC:LM:HMT:NEW:1

from: Peter J. Devlin, Chief, Branch 3
(CC:PA:CBS:Br3)

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subject:

This Chief Counsel Advice responds to your request for assistance. This advice may not be used or cited as precedent.

LEGEND:

Taxpayer A .
Credit Rating Institution #1
Credit Rating Institution #2
The Investment

ISSUE

To what extent is the Service's summons authority affected by the journalist's privilege.

CONCLUSION

Any summons served on a member of the news media for which the Service would seek enforcement would have to satisfy the Department of Justice's policy published at 28 C.F.R. § 50.10, which requires the approval of the Attorney General, before any enforcement action could be brought. The salient elements of the policy that our case would have to satisfy are: (1) all reasonable attempts should be made to obtain

information from alternative sources; (2) the information sought must be essential, not peripheral or speculative, to the successful completion of a case of substantial importance; (3) the information summoned must be limited to the verification of published information, except under exigent circumstances, and (4) the summons should be directed at material information regarding a limited subject matter, should cover a reasonably limited period of time, and should avoid requiring the production of a large volume of unpublished material. Given that the Attorney General's authorization is required, it is certainly reasonable to conclude that the Chief Counsel's approval would be required before the case could be referred for enforcement.

FACTS

You have asked what position this office takes concerning the First Amendment journalistic privilege raised by Credit Rating Institution #1's and Credit Rating Institution #2's in response to our third-party summonses served on them in the matter of the Taxpayer A. This issue has arisen in the following context. In essence, the taxpayer claims that it invested in the investment . To test this claim, the Service issued third-party summonses to Credit Rating Institution #1 and Credit Rating Institution #2's, who raised the privilege.

LAW AND ANALYSIS

The First Amendment right of free speech encompasses a qualified journalist's privilege. The Supreme Court decided in Branzberg v. Hayes, 408 U.S. 665 (1972), that a reporter does not have a First Amendment privilege against testifying before a grand jury. The Branzberg rule, however, has not prevented several circuit courts from holding that the First Amendment encompasses at least a qualified journalistic privilege. In re Madden, 151 F.3d 125 (3d Cir. 1998); von Bulow by Auersperg v. von Bulow, 811 F.2d 136 (2d Cir. 1987); LaRouche v. National Broadcasting Co., 780 F.2d 1134 (4th Cir. 1986); Silkwood v. Kerr-McGee Corp., 563 F.2d 433 (10th Cir. 1977); Zerilli V. Smith, 656 F.2d 705 (D.C. Cir. 1981); Bruno & Stillman, Inc. v. Globe Newspaper Corp., 633 F.2d 583 (1st Cir. 1980); Miller v. Transamerican Press, 621 F.2d 721 (5th Cir. 1980); and Cervantes v. Time, Inc., 464 F.2d 986 (8th Cir. 1972).

As a preliminary matter, we conclude that Credit Rating Institution #1 and Credit Rating Institution #2 are fairly considered as being members of the news media. See Pan Am Corporation v. Delta Air Lines, Inc., 161 B.R. 577 (S.D. N.Y. 1993) (S&P entitled to the journalist's privilege because it regularly publishes periodicals containing subjective financial analysis and commentary for widespread distribution to the public at large). See also, In re Scott Paper Co. Securities Litigation, 145 F.R.D. 366 (E.D. Pa. 1992) (the court noted that it was uncontested that S&P is a member of the press and entitled to assert the privilege). Credit Rating Institution #1 rates and comments on the creditworthiness of public companies and their securities and disseminates that information to the public through its several periodicals. Credit Rating Institution #1

engages in highly specialized forms of news gathering and reporting, but it is news gathering. [1]

Only the Department of Justice can bring suit to enforce a summons, and the resolution of your question lies in the Department's policy in subpoenaing members of the media. For all practical purposes, an administrative summons that is ordered enforced by the court has the force and effect of a judicial subpoena; therefore, we see no distinction that would justify arguing that the Department's policy does not apply to a suit to enforce an administrative summons. In our view, it does apply.

The Department has a strict policy governing the circumstances under which it will sanction serving a member of the news media with a subpoena. That policy, set forth in 28 C.F.R. § 50.10, includes obtaining the express approval of the Attorney General. For your information and convenience, we have set forth below the critical elements of the policy that would apply to civil investigations. Given the scant fact pattern and the ongoing nature of your audit, it is impossible to state with certainty whether your case would or would not satisfy the elements. But given the stringent standards described below, it is unlikely that your case would fit within the Department's policy. The pertinent excerpts from 28 C.F.R. § 50.10 follow:

> Because freedom of the press can be no broader than the freedom of reporters to investigate and report the news, the prosecutorial power of the government should not be used in such a way that it impairs a reporter's responsibility to cover as broadly as possible controversial public issues. This policy statement is thus intended to provide protection for the news media from forms of compulsory process, whether civil or criminal, which might impair the news gathering function. In balancing the concern that the Department of Justice has for the work of the news media and the Department's obligation to the fair administration of justice, the following guidelines shall be adhered to by all members of the Department in all cases:
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> (a) In determining whether to request issuance of a subpoena to a member of the news media … the approach in every case must be to strike the proper balance between the public's interest in the free dissemination of ideas and information and the public's interest in effective law enforcement and the fair administration of justice.
>
> (b) All reasonable attempts should be made to obtain information from alternative sources before considering issuing a subpoena to a member of the news media, … .

[1] There is nothing in your fact pattern that suggests the rule of In re Fitch should be applied. American Savings Bank v. UBS Painewebber, Inc. (In re Fitch), 330 F.3d 104 (2d Cir. 2003) (Fitch found not to be a news gatherer and not entitled to the privilege in part because it only rated transactions when paid to do so by clients, unlike S&P, which rates nearly all public debt financing and preferred stock whether issued by S&P clients or not).

(c) Negotiations with the media shall be pursued in all cases in which a subpoena to a member of the news media is contemplated. These negotiations should attempt to accommodate the interest of the trial … with the interests of the media. Where the nature of the investigation permits, the government should make clear what its needs are in a particular case as well as its willingness to respond to particular problems of the media.

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(f) In requesting the Attorney General's authorization for a subpoena to a member of the news media, the following principles will apply:

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(2) In civil cases there should be reasonable grounds, based on nonmedia sources, to believe that the information sought is essential to the successful completion of the litigation in a case of substantial importance. The subpoena should not be used to obtain peripheral, nonessential, or speculative information.

(3) The government should have unsuccessfully attempted to obtain the information from alternative nonmedia sources.

(4) The use of subpoenas to members of the news media should, except under exigent circumstances, be limited to the verification of published information and to such surrounding circumstances as relate to the accuracy of the published information.

(5) Even subpoena authorization requests for publicly disclosed information should be treated with care to avoid claims of harassment.

(6) Subpoenas should, wherever possible, be directed at material information regarding a limited subject matter, should cover a reasonably limited period of time, and should avoid requiring production of a large volume of unpublished material. They should give reasonable and timely notice of the demand for documents. (Emphasis added.)

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

Even though your case is not fully developed and it is impossible to conclude that you could not meet the elements of the Department's policy, the stringent nature of the

elements make that unlikely. Before the Service attempts to qualify a case under these standards, it would have to exhaust all other reasonable avenues of inquiry. This would, at the least, encompass summoning every representative of the taxpayer, as well as every third party, that had any dealings with Credit Rating Institution #1 and Credit Rating Institution #2's on the issue of the taxpayer's credit rating and the effect of the Investment. The Service would have to convince the Department that the summoned information is "essential to the successful completion of the litigation in a case of substantial importance." This is a significantly high threshold to meet. The mere fact that large amounts of tax dollars are at stake may not satisfy this element, because the Department handles many seven and eight figure cases, but it seldom seeks information from the press.

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

Please call if you have any further questions.