

Notice of Proposed Rulemaking

Testimony or Production of Records in a Court or Other Proceeding

REG-140930-02

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed amendments to the existing regulation that establishes the procedures to be followed by IRS officers and employees upon receipt of a request or demand for disclosure of IRS records or information. The purpose of the proposed amendments is to provide specific instructions and to clarify when the existing regulation does not apply because more specific procedures take precedence. The proposed amendments extend the application of

the regulation to former IRS officers and employees as well as to persons who are or were under contract to the IRS. The proposed amendments would affect current and former IRS officers, employees and contractors and persons who make requests or demands for disclosure.

DATES: Written or electronic comments and requests for a public hearing must be received by October 7, 2003.

ADDRESSES: Send submissions to: CC:PA:RU (REG-140930-02), room 5226, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered between the hours of 8 a.m. and 4 p.m. to CC:PA:RU (REG-140930-02), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC. Alternatively, taxpayers may submit electronic comments directly to IRS Internet site at: www.irs.gov/reg.

FOR FURTHER INFORMATION CONTACT: David Fish or J. Suzanne Sones, (202) 622-4590 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in this notice of proposed rulemaking has been submitted to the **Office of Management and Budget** for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collection of information should be sent to the **Office of Management and Budget**, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the **Internal Revenue Service**, Attn: IRS Reports Clearance Officer, W:CAR:MP:T:T:SP, Washington, DC 20224. Comments on the collection of information should be received by September 8, 2003. Comments are specifically requested concerning:

Whether the proposed collection of information is necessary for the proper performance of the functions of the IRS, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collection of information (see below);

How the quality, utility, and clarity of the information to be collected may be enhanced;

How the burden of complying with the proposed collection of information may be minimized, including through the application of automated collection techniques or other forms of information technology; and

Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of service to provide information.

The collection of information in this proposed regulation is in 26 CFR 301.9000–5(a). This information is required to enable the authorizing official to make an informed decision as to whether to grant a request or demand in a non-IRS matter. This information will be used to inform the authorizing official of the background of the non-IRS matter and to refine the scope of the testimony or disclosures sought. The collection of information is voluntary and required to obtain a benefit. The likely respondents are individuals, farms, business or other for-profit institutions, nonprofit institutions, and small businesses or organizations.

Estimated total annual reporting: 1,400 hours.

Estimated average annual burden hours per respondent: 1 hour.

Estimated number of respondents: 1,400.

Estimated annual frequency of responses: On occasion.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by section 6103 of the Internal Revenue Code (Code).

Background

This document contains proposed amendments to 26 CFR Part 301 under

5 USC 301. The existing regulation provides procedures for IRS officers and employees to follow upon receipt of a request or demand for disclosure of IRS records or information. Under this proposed regulation, current and former IRS officers, employees and contractors may not disclose IRS records or information without first receiving authorization to do so. To conserve valuable resources, the IRS carefully considers the nature and circumstances of a request or demand for IRS records or information prior to committing resources to fulfilling the request or demand. If the IRS is a disinterested party or has no affected interest with respect to a request or demand and would consider the commitment of resources to comply with the request or demand inappropriate, the IRS may deny the request or demand for IRS records or information. For example, the IRS may deny a request by private litigants for the expert testimony of an IRS employee as to the federal tax ramifications of various transactions based on information furnished by the private litigants. Such testimony could compromise the enforcement of the tax laws, should the IRS later conduct an examination of the tax consequences of the transactions.

The proposed regulation provides more specificity regarding the content of a request to allow an authorizing official to make an informed decision when authorizing or denying the request. Similarly, the proposed regulation provides more specific guidance to the authorizing officials, or to current or former IRS officers, employees or contractors, who receive requests or demands for IRS records or information, as to the circumstances for authorization or denial of such requests. Additionally, the proposed regulation applies to former IRS officers, employees or contractors whose previous access to IRS records or information may be the subject of such requests or demands. In such cases the IRS has an interest in protecting IRS records or information and should receive notice and have an opportunity to determine the extent to which disclosure should be permitted.

The existing regulation at 26 CFR 301.9000–1(f) provides guidance for IRS officers and employees in state liquor, tobacco, firearms, or explosives cases. This proposed regulation does not contain such a provision because Treasury

Department Order No. 120–01, effective July 1, 1972, transferred from the IRS to the United States Bureau of Alcohol, Tobacco and Firearms (ATF) those functions, powers and duties related to alcohol, tobacco, firearms and explosives. The ATF promulgated its own regulations guiding disclosure in testimony and in related matters, which can be found at 27 CFR 70.803. Effective January 24, 2003, the Homeland Security Act of 2002, Public Law 107–296, divided ATF into two new agencies, the Tax and Trade Bureau (TTB) in the Treasury Department and the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATFE) in the Justice Department. Section 1111(c)(1)–(c)(2) of the Homeland Security Act transferred to ATFE the authorities and functions of ATF, except for the authorities and functions of ATF relating to the administration and enforcement of chapters 51 and 52 and sections 4181 and 4182 of the Code, and title 27, USC. Section 1111(d)(1), (d)(3) of the Homeland Security Act provided that TTB shall administer the authorities and functions of ATF not transferred to ATFE. Treasury Department Order No. 120–01, effective January 24, 2003, designated TTB as the Alcohol and Tobacco Tax and Trade Bureau. The disclosure regulations found at 27 CFR 70.803 are still applicable to TTB.

The existing regulation contains a delegation of authority from the Secretary of the Treasury to the Commissioner of Internal Revenue (Commissioner) to respond to requests and demands for IRS records and information. This delegation has been deleted as unnecessary as it is contained in existing statutes and delegation orders. See, e.g., section 7804; Delegation Order 150–10.

This proposed regulation reflects changes in format and definitions to make it easier to understand and apply.

Explanation of Provisions

Overview

Under 5 USC 301, heads of Executive or military departments may prescribe regulations for, among other things, the custody, use, and preservation of the departments' records, papers, and property. Many departments and agencies have promulgated regulations under 5 USC 301 to

provide procedures for the disclosure of official records and information. Generally, these are termed Touhy regulations, after the Supreme Court's decision in *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951). In that case, the Supreme Court held that an agency employee could not be held in contempt for refusing to disclose agency records or information when following the instructions of his or her supervisor regarding the disclosure. As such, an agency's Touhy regulations are the instructions agency employees are to follow when those employees receive requests or demands to testify or otherwise disclose agency records or information.

This proposed regulation expands the definition of IRS officers and employees to include both current and former officers and employees. In addition, this proposed regulation extends to IRS contractors, including their current and former employees. IRS records or information known by these persons retains the character of government records or information, subject to the direction and control of the Commissioner, even after the employment or contractual relationship has ended. This proposed regulation provides current and former IRS officers, employees and contractors with a procedure to follow when they receive requests and demands for IRS records and information.

This proposed regulation is separated into six sections for ease of use.

§301.9000-1 Definitions

New definitions appear in this proposed regulation to delineate the difference in treatment between requests or demands for IRS records or information in (1) tax administration proceedings and other proceedings in which the IRS or an IRS officer or employee acting in his or her official capacity is a party; (2) matters that do not involve the IRS, such as civil litigation between private parties; and (3) congressional matters. The proposed terminology is "IRS matters," "non-IRS matters," and "IRS congressional matters," respectively. Previously, "IRS matters" were also called "referred cases."

By including former as well as current IRS officers and employees in the definition of "IRS officers and employees," this proposed regulation extends the reach of the proposed procedures. Similarly, a new

definition extends the proposed procedures to reach current and former "IRS contractors."

This proposed regulation defines "testimony authorization," the longstanding term for the instructions to the testifying employee or the employee providing the information, and "authorizing official," the employee with delegated authority to authorize testimony. In addition, this proposed regulation gives a more detailed definition of "internal revenue records or information."

§301.9000-2 Considerations in responding to a request or demand for IRS records or information

Testimony or disclosure of IRS records or information is not permitted if the testimony or disclosure would: violate a federal statute or rule of procedure, violate a tax treaty or convention of the United States, violate a federal regulation, or reveal classified national security information. This proposed regulation lists privileges that may be asserted in response to a request or demand.

This proposed regulation specifically mentions section 6103 of the Code, as that is the primary statute governing disclosure of IRS records and information. The majority of the records and information sought in both IRS and non-IRS matters are returns and return information protected by the confidentiality provisions of section 6103 of the Code.

This proposed regulation provides a list of factors to consider in deciding whether to authorize testimony or disclosure in non-IRS matters, because requests and demands in non-IRS matters divert resources from the administration of the internal revenue laws and related statutes. These factors generally are aimed at the effect compliance with the request or demand would have on the IRS's primary mission of enforcement of the internal revenue laws and related statutes. The factors include the IRS's anticipated commitment of time and anticipated expenditure of funds necessary to comply with the request or demand, the number of similar requests and their cumulative effect on the expenditure of IRS resources, the potential effect of a non-IRS matter on the administration of the internal revenue laws and related statutes, and the importance of the legal

issues presented. The IRS also considers practical problems with complying with a request or demand for IRS records or information.

§301.9000-3 Prohibition on disclosure of IRS records or information without testimony authorization

The general rule is that, in response to a request or demand, an IRS officer, employee or contractor may not provide testimony or IRS records or information unless the Commissioner, or a delegate, gives instructions therefor. Such an instruction is called a "testimony authorization." A "testimony authorization" includes an instruction to testify or provide IRS records or information in whole, in part or not at all. In the interim between receipt of a request or demand and the issuance of a testimony authorization, an IRS officer, employee or contractor may appear in person to advise that he or she is awaiting instructions (in the form of a testimony authorization).

Testimony authorizations are required, for the most part, in situations involving court or congressional testimony. There are, however, exceptions to the requirement of a testimony authorization. In an IRS matter in which the attorney or other representative of the government requests testimony, no testimony authorization is required. Similarly, this proposed regulation does not require a testimony authorization in an IRS matter in which the request or demand is for responses solely in writing, produced under the direction of government counsel, such as admissions, document production and written interrogatories to parties. Also, testimony authorization is not required if a former IRS officer, employee or contractor receives a request or demand for IRS records or information that involve general knowledge gained while employed or under contract with the IRS. Finally, testimony authorization also is not required if more specific procedures of the Commissioner apply to the disclosure. Such procedures include, for example, those relating to Freedom of Information Act (5 USC 552) or Privacy Act (5 USC 552a) requests, disclosures in accordance with 26 CFR 601.702(d), disclosures to state tax agencies pursuant to section 6103(d) of the Code, or disclosures to the United States Department of Justice pursuant to

an *ex parte* order under section 6103(i)(1) of the Code.

§301.9000–4 Procedure in the event of a request or demand for IRS records or information

This proposed regulation gives specific instructions to IRS officers, employees and contractors who receive requests or demands for IRS records or information. An IRS officer, employee or contractor who receives a request or demand for IRS records or information (except for requests or demands in United States Tax Court cases, in personnel, labor relations, government contract, or IRS congressional matters, or in matters related to informant claims or the rules of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (Bivens matters), or the Federal Tort Claims Act (FTCA)) shall notify promptly the IRS Disclosure Officer servicing the IRS officer's, employee's or contractor's geographic area and await instructions from an authorizing official.

In the case of a request or demand on behalf of a petitioner in a United States Tax Court case, IRS officers, employees and contractors shall notify promptly the IRS Chief Counsel attorney assigned to the case and await instructions from an authorizing official. In the case of a request or demand on behalf of an appellant, grievant, complainant or representative for IRS records or information in a personnel, labor relations, government contract, Bivens or FTCA matter, or a matter related to informant claims, IRS officers, employees or contractors shall notify promptly the IRS Associate Chief Counsel (General Legal Services) attorney assigned to the case. If there is no IRS Associate Chief Counsel (General Legal Services) attorney assigned to the case, the IRS officer, employee or contractor shall notify promptly the IRS Associate Chief Counsel (General Legal Services) attorney servicing the geographic area. The IRS officer, employee or contractor shall then await instructions from an authorizing official. In the case of a request or demand in an IRS congressional matter, the IRS officer, employee or contractor shall notify promptly the IRS Office of Legislative Affairs and await instructions.

If, in response to a demand for IRS records or information, an authorizing official has not had a sufficient opportunity to issue a testimony authorization, or determines that denial of the demand for IRS records or information is proper, the authorizing official shall request the attorney or other representative of the government to oppose such demand and respectfully inform the court, administrative agency or other authority, by appropriate action, that the authorizing official either has not yet issued a testimony authorization, or has issued a testimony authorization, to the IRS officer, employee or contractor, that denies permission, in whole or in part, to testify or disclose the IRS records or information. If the authorizing official denies a testimony authorization in whole or in part, the authorizing official shall request the attorney or other representative of the government to inform the court, administrative agency, or other authority of the reasons for not authorizing the testimony or the disclosure of the IRS records or information and to take such other action in opposition as may be appropriate (including, but not limited to, filing a motion to quash or a motion to remove to federal district court).

In addition to providing specific procedural instructions, this proposed regulation clarifies and updates the provision in the existing regulation pertaining to penalties that apply to IRS officers, employees and contractors in case of failure to follow the requirements of the proposed regulation.

§301.9000–5 Written statement required by party seeking testimony or disclosure of IRS records or information in non-IRS matters

This proposed regulation formalizes the practice of requiring a party who seeks testimony or disclosure of IRS records or information for use in any non-IRS matter to provide detailed information that would enable the authorizing official to make an informed decision whether to grant or limit the request or demand. Such information is necessary to inform the authorizing official of the factual background of the non-IRS matter. By contrast, generally the factual background information already is known to the authorizing official in an IRS matter. The factual background is also useful in refining the scope of the testimony or document production, thereby conserving

IRS resources and avoiding waste. For example, a request for testimony may be obviated by providing IRS records or information in a form admissible in court without need for the presence of an IRS officer or employee, or by submission of a declaration under penalty of perjury pursuant to 28 USC 1746.

This proposed regulation establishes requirements for a written statement setting forth particular information that will provide authorizing officials with the facts necessary to determine whether to grant or limit testimony or the disclosure of IRS records or information so as to comply with the law and conserve IRS resources. Parties in non-IRS matters sometimes serve process with extremely short time frames. The IRS will comply with such requests or demands only if the IRS has time to evaluate adequately the request. This proposed regulation establishes a reasonable time for compliance, generally, not less than fifteen (15) business days. Also, parties in non-IRS matters are sometimes unaware that a request or demand does not supersede the confidentiality accorded to returns and return information under section 6103 of the Code. This proposed regulation generally requires a statement of the applicable exception under section 6103 of the Code that would permit the disclosure of returns and return information for the purpose sought. The authorizing official may waive the requirement of a written statement for good cause.

§301.9000–6 Examples

This proposed regulation gives examples of testimony authorization situations that illustrate the principles of this proposed regulation.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has been determined that 5 U.S.C. 553(b), the Administrative Procedure Act, does not apply to these proposed regulations.

It is hereby certified that the collection of information in these regulations will not have a significant economic impact on a

substantial number of small entities. This certification is based upon the fact that of the estimated 1,400 requests received annually, less than 500 of those requests are estimated to be received from small entities. Moreover, the burden associated with complying with the collection of information in these regulations is estimated to be only 1 hour per respondent. Therefore, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 USC chapter 6) is not required.

Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small businesses.

Comments and Requests for a Public Hearing

Before these proposed regulations are adopted as final regulations, the IRS will consider any written (a signed original and eight (8) copies) or electronic comments that the IRS timely receives. The IRS and Treasury Department request comments on the clarity of the proposed rules and how they can be made easier to understand. All comments will be available for public inspection and copying. A public hearing will be scheduled if requested in writing by any person who timely submits a written comment. If a public hearing is scheduled, notice of the date, time, and place for the public hearing will be published in the **Federal Register**.

Drafting Information

The principal authors of this proposed regulation are David Fish and J. Suzanne Sones, Office of Associate Chief Counsel (Procedure & Administration), Disclosure & Privacy Law Division.

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Proposed Amendments to the Regulations

Accordingly, 26 CFR part 301 is proposed to be amended as follows.

PART 301—PROCEDURE AND ADMINISTRATION

Paragraph 1. The authority citation for Part 301 is amended by adding the following entries in numerical order to read as follows:

Authority: 26 USC 7805 * * *

Section 301.9000–1 also issued under 5 USC 301 and 26 USC 6103(q) and 7804;

Section 301.9000–2 also issued under 5 USC 301 and 26 USC 6103(q) and 7804;

Section 301.9000–3 also issued under 5 USC 301 and 26 USC 6103(q) and 7804;

Section 301.9000–4 also issued under 5 USC 301 and 26 USC 6103(q) and 7804;

Section 301.9000–5 also issued under 5 USC 301 and 26 USC 6103(q) and 7804;

Section 301.9000–6 also issued under 5 USC 301 and 26 USC 6103(q) and 7804;

* * *

Par. 2. Section 301.9000–1 is revised and §§301.9000–2 through 301.9000–7 are added to read as follows:

§301.9000–1 Definitions when used in §§ 301.9000–1 through 301.9000–6.

(a) *IRS records or information* means any material (including copies thereof) contained in the files (including paper, electronic or other media files) of the Internal Revenue Service (IRS), any information relating to material contained in the files of the IRS, or any information acquired by an IRS officer or employee, while an IRS officer or employee, as a part of the performance of official duties or because of that IRS officer or employee's official status with respect to the administration of the internal revenue laws or any other laws administered by or concerning the IRS. IRS records or information includes, but is not limited to, returns and return information as those terms are defined in section 6103(b)(1) and (2) of the Internal Revenue Code (Code), tax convention information as defined in section 6105 of the Code, information gathered during Bank Secrecy Act and money laundering investigations, and personnel records and other information pertaining to IRS officers and employees. IRS records and information also includes information received, generated or collected by an IRS contractor pursuant to the contractor's contract or agreement with the IRS. The term does not include records or information obtained by IRS officers and employees while under the direction and control of the United States

Attorney's Office during the conduct of a federal grand jury investigation. The term IRS records or information does include records or information obtained during the administrative stage of a criminal investigation (prior to the initiation of the grand jury), obtained from IRS files (such as transcripts or tax returns), or subsequently obtained by the IRS for use in a civil investigation.

(b) *IRS officers and employees* means all officers and employees of the United States appointed by, employed by, or subject to the directions, instructions, or orders of the Commissioner or IRS Chief Counsel and also includes such former officers and employees.

(c) *IRS contractor* means any person, including such person's current and former employees, maintaining IRS records or information pursuant to a contract or agreement with the IRS, and also includes former contractors.

(d) A *request* is any request for testimony of an IRS officer, employee or contractor or for production of IRS records or information, oral or written, by any person, which is not a demand.

(e) A *demand* is any subpoena or other order of any court, administrative agency or other authority, or the Congress, or a committee or subcommittee of the Congress, and any notice of deposition (either upon oral examination or written questions), request for admissions, request for production of documents or things, written interrogatories to parties, or other notice of, request for, or service for discovery in a matter before any court, administrative agency or other authority.

(f) An *IRS matter* is any matter before any court, administrative agency or other authority in which the United States, the Commissioner, the IRS, or any IRS officer or employee acting in an official capacity, or any IRS officer or employee (including an officer or employee of IRS Chief Counsel's office) in his or her individual capacity if the United States Department of Justice or the agency has agreed to represent or provide representation to the IRS officer or employee, is a party and that is directly related to official business of the IRS or to any law administered by or concerning the IRS, including, but not limited to, judicial and administrative proceedings described in section 6103(h)(4) and (l)(4) of the Code.

(g) An *IRS congressional matter* is any matter before the Congress, or a committee or subcommittee of the Congress, that is related to the administration of the internal revenue laws or any other laws administered by or concerning the IRS, or to IRS records or information.

(h) A *non-IRS matter* is any matter that is not an IRS matter or an IRS congressional matter.

(i) A *testimony authorization* is a written instruction or oral instruction memorialized in writing within a reasonable period by an authorizing official that sets forth the scope of and limitations on proposed testimony and/or disclosure of IRS records or information issued in response to a request or demand for such IRS records or information. A testimony authorization may grant or deny authorization to testify or disclose IRS records or information and may make an authorization effective only upon the occurrence of a precedent condition, such as the receipt of a consent complying with the provisions of section 6103(c) of the Code. To authorize testimony means to issue the instruction described in this paragraph (i).

(j) An *authorizing official* is a person with delegated authority to authorize testimony and the disclosure of IRS records or information.

§301.9000-2 Considerations in responding to a request or demand for IRS records or information.

(a) *Situations in which disclosure shall not be authorized.* Authorizing officials shall not permit testimony or disclosure of IRS records or information in response to requests or demands if—

(1) Testimony or disclosure of IRS records or information would violate a federal statute including, but not limited to, sections 6103 or 6105 of the Internal Revenue Code (Code), the Privacy Act of 1974 (5 USC 552a), or a rule of procedure, such as the grand jury secrecy rule, Fed. R. Crim. P. 6(e);

(2) Testimony or disclosure of IRS records or information would violate a specific federal regulation, including, but not limited to, 31 CFR 103.53;

(3) Testimony or disclosure of IRS records or information would reveal classified national security information, unless properly declassified;

(4) Testimony or disclosure of IRS records or information would reveal the identity of an informant; or

(5) Testimony or disclosure of IRS records or information would reveal investigatory records or information compiled for law enforcement purposes which would permit interference with law enforcement proceedings or would disclose investigative techniques and procedures, the effectiveness of which could thereby be impaired.

(b) *Assertion of privileges.* Any applicable privilege or protection under law may be asserted in response to a request or demand for testimony or disclosure of IRS records or information, including, but not limited to, the following—

- (1) Attorney-client privilege;
- (2) Attorney work product doctrine; and
- (3) Deliberative process (executive) privilege.

(c) *Non-IRS matters.* If any person makes a request or demand for IRS records or information in connection with a non-IRS matter, authorizing officials shall take into account the following additional factors in responding to such request or demand—

(1) Whether the requester is a federal agency, or a state or local government or agency thereof;

(2) Whether the demand was issued by a federal or state court, administrative agency or other authority;

(3) The potential effect of the case on the administration of the internal revenue laws or any other laws administered by or concerning the IRS;

(4) The importance of the legal issues presented;

(5) Whether the IRS records or information are available from other sources;

(6) The IRS's anticipated commitment of time and anticipated expenditure of funds necessary to comply with the request or demand;

(7) The number of similar requests and their cumulative effect on the expenditure of IRS resources;

(8) Whether the request or demand allows a reasonable time for compliance (generally, at least fifteen business days);

(9) Whether the testimony or disclosure is appropriate under the rules of procedure governing the case or matter in which the request or demand arises;

(10) Whether the request or demand involves expert witness testimony;

(11) Whether the request or demand is for the testimony of an IRS officer, employee or contractor who is without personal knowledge of relevant facts;

(12) Whether the request or demand is for the testimony of a presidential appointee or senior executive and whether the testimony of a lower-level official would suffice;

(13) Whether the procedures in §301.9000-5 have been followed; and

(14) Any other relevant factors that may be brought to the attention of the authorizing official.

§301.9000-3 Testimony authorizations.

(a) *Prohibition on disclosure of IRS records or information without testimony authorization.* Except as provided in paragraph (b) of this section, when a request or demand for IRS records or information is made, no IRS officer, employee or contractor shall testify or disclose IRS records or information to any court, administrative agency or other authority, or to the Congress, or to a committee or subcommittee of the Congress without a testimony authorization. However, an IRS officer, employee or contractor may appear in person to advise that he or she is awaiting instructions from an authorizing official with respect to the request or demand.

(b) *Exceptions.* No testimony authorization is required in the following circumstances—

(1) To respond to a request or demand for IRS records or information by an attorney or other government representative regarding an IRS matter;

(2) To respond solely in writing, under the direction of an attorney or other representative of the government, to requests and demands in IRS matters, including, but not limited to, admissions, document production, and written interrogatories to parties;

(3) To respond to a request or demand issued to a former IRS officer, employee or contractor for expert or opinion testimony if the testimony involves general knowledge (such as information contained in published procedures of the IRS or the IRS Office of Chief Counsel) gained while

the former IRS officer, employee or contractor was employed or under contract with the IRS; or

(4) If a more specific procedure established by the Commissioner governs the disclosure of IRS records or information. These procedures include, but are not limited to, those relating to: procedures pursuant to 26 CFR 601.702(d), Freedom of Information Act requests pursuant to 5 USC 552, Privacy Act of 1974 requests pursuant to 5 U.S.C. 552a, disclosures to state tax agencies pursuant to section 6103(d) of the Code, and disclosures to the United States Department of Justice pursuant to an *ex parte* order under section 6103(i)(1) of the Code.

§301.9000–4 Procedure in the event of a request or demand for IRS records or information.

(a) *Purpose and scope.* This section prescribes procedures to be followed by IRS officers, employees and contractors upon receipt of a request or demand in matters where a testimony authorization is or may be required.

(b) *Notification of the Disclosure Officer.* Except for requests or demands in United States Tax Court cases, in personnel, labor relations, government contract, or IRS congressional matters, or in matters related to informant claims or the rules of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (Bivens matters), or the Federal Tort Claims Act (FTCA), an IRS officer, employee or contractor who receives a request or demand for IRS records or information for which a testimony authorization is or may be required shall notify promptly the Disclosure Officer servicing the IRS officer's, employee's or contractor's geographic area. Such IRS officer, employee or contractor shall await instructions from the authorizing official concerning the response to the request or demand.

(c) *Requests or demands in United States Tax Court cases.* An IRS officer, employee or contractor who receives a request or demand for IRS records or information on behalf of a petitioner in a United States Tax Court case shall notify promptly the IRS Chief Counsel attorney assigned to the case. Such IRS Chief Counsel attorney shall notify promptly the authorizing official. The IRS officer,

employee or contractor who received such request or demand shall await instructions from the authorizing official.

(d) *Requests or demands in personnel, labor relations, government contract, Bivens or FTCA matters, or matters related to informant claims.* An IRS officer, employee or contractor who receives a request or demand, on behalf of an appellant, grievant, complainant or representative, for IRS records or information in a personnel, labor relations, government contract, Bivens or FTCA matter, or matter related to informant claims, shall notify promptly the IRS Associate Chief Counsel (General Legal Services) attorney assigned to the case. If no IRS Associate Chief Counsel (General Legal Services) attorney is assigned to the case, the IRS officer, employee or contractor shall notify promptly the IRS Associate Chief Counsel (General Legal Services) attorney servicing the geographic area. Such IRS Associate Chief Counsel (General Legal Services) attorney shall notify promptly the authorizing official. The IRS officer, employee or contractor who received such request or demand shall await instructions from the authorizing official.

(e) *Requests or demands in IRS congressional matters.* An IRS officer, employee or contractor who receives a request or demand in an IRS congressional matter shall notify promptly the IRS Office of Legislative Affairs. The IRS officer, employee or contractor who received such request or demand shall await instructions from the authorizing official.

(f) *Opposition to a demand for IRS records or information in IRS and non-IRS matters.* If, in response to a demand for IRS records or information, an authorizing official has not had a sufficient opportunity to issue a testimony authorization, or determines that the demand for IRS records or information should be denied, the authorizing official shall request the attorney or other representative of the government to oppose such demand and respectfully inform the court, administrative agency or other authority, by appropriate action, that the authorizing official either has not yet issued a testimony authorization, or has issued a testimony authorization, to the IRS officer, employee or contractor, that denies permission to testify or disclose the IRS records or information. If the authorizing official denies authorization in whole or in

part, the attorney or other representative of the government shall inform the court, administrative agency or other authority of the reasons the authorizing official gives for not authorizing the testimony or the disclosure of the IRS records or information or take such other action in opposition as may be appropriate (including, but not limited to, filing a motion to quash or a motion to remove to federal court).

(g) *Procedure in the event of an adverse ruling.* In the event such court, administrative agency, or other authority rules adversely with respect to the refusal to disclose the IRS records or information pursuant to the testimony authorization, or declines to defer a ruling until a testimony authorization has been received, the IRS officer, employee or contractor who has received the request or demand shall, pursuant to this section, respectfully decline to testify or disclose the IRS records or information.

(h) *Penalties.* Any IRS officer or employee who discloses IRS records or information without following the provisions of this section or §301.9000–3, may be subject to administrative discipline, up to and including dismissal. Any IRS officer, employee or contractor may be subject to applicable contractual sanctions and/or criminal penalties, including prosecution under 5 USC 552a(i), for willful disclosure in an unauthorized manner of information protected by the Privacy Act, or under section 7213 of the Code, for willful disclosure in an unauthorized manner of return information.

(i) *No creation of benefit or separate privilege.* Nothing in this section, and nothing in §§301.9000–1 through 301.9000–6, creates, is intended to create, or may be relied upon to create, any right or benefit, substantive or procedural, enforceable at law by a party against the United States. Nothing in these regulations creates a separate privilege or basis to withhold IRS records or information.

§301.9000–5 Written statement required for requests or demands in non-IRS matters.

(a) *Written statement.* A request or demand for IRS records or information for use in a non-IRS matter shall be accompanied by a written statement made by or on behalf of the party seeking the testimony or

disclosure of IRS records or information, setting forth—

(1) A brief description of the parties to and subject matter of the proceeding and the issues;

(2) A summary of the testimony, IRS records or information sought, the relevance to the proceeding, and the estimated volume of IRS records involved;

(3) The time that will be required to present the testimony (on both direct and cross examination);

(4) Whether any of the IRS records or information is a return or is return information (as defined in section 6103(b) of the Internal Revenue Code (Code)), or tax convention information (as defined in section 6105(c)(1) of the Code), and the statutory authority for the disclosure of such return or return information (and, if no consent to disclose pursuant to section 6103(c) of the Code accompanies the request or demand, the reason such consent is not necessary);

(5) Whether a declaration of an IRS officer, employee or contractor under penalties of perjury pursuant to 28 U.S.C. 1746 would suffice in lieu of deposition or trial testimony;

(6) Whether deposition or trial testimony is necessary where IRS records are authenticated under applicable rules of evidence and procedure;

(7) Whether IRS records or information are available from other sources; and

(8) A statement that the request or demand allows a reasonable time (generally, at least fifteen business days) for compliance.

(b) *Permissible waiver of statement.* The requirement of a written statement in paragraph (a) of this section may be waived by the authorizing official for good cause.

§301.9000–6 Examples.

The following examples illustrate the provisions of §§301.9000–1 through 301.9000–5:

Example 1. A taxpayer sues a practitioner in state court for malpractice in connection with the practitioner's preparation of a federal income tax return. The taxpayer subpoenas an IRS employee to testify concerning the IRS employee's examination of the taxpayer's federal income tax return. The taxpayer provides the statement required by §301.9000–5. This is a non-IRS matter. A testimony authorization would be required for the IRS employee to give such testimony. (In addition, the taxpayer would

be required to execute an appropriate consent under section 6103(c) of the Internal Revenue Code (Code)). The IRS generally opposes an IRS officer's, employee's or contractor's appearance in such cases because the IRS is a disinterested party with respect to the dispute and would consider the commitment of resources to comply with the subpoena inappropriate.

Example 2. In a state judicial proceeding concerning child support, the child's custodial parent subpoenas for a deposition an Internal Revenue Service (IRS) agent who is examining certain of the non-custodial parent's post-divorce federal income tax returns. This is a non-IRS matter. The custodial parent submits with the subpoena the statement required by §301.9000–5 stating as the reason for the lack of taxpayer consent to disclosure that the non-custodial parent has refused to provide the consent. (Both a consent from the taxpayer complying with section 6103(c) and a testimony authorization would be required prior to the IRS agent testifying at the deposition.) Should taxpayer consent be obtained, where appropriate, the IRS may provide a declaration and/or certified return information of the taxpayer. A deposition would be unnecessary under the circumstances.

Example 3. The chairperson of a congressional committee requests the appearance of an IRS employee before the committee and committee staff to submit to questioning by committee staff concerning the procedures for processing federal employment tax returns. This is an IRS congressional matter. Even though questioning would not involve the disclosure of returns or return information, the questioning would involve the disclosure of IRS records or information; therefore, a testimony authorization would be required. The IRS employee must contact the IRS Office of Legislative Affairs for instructions before appearing.

Example 4. The IRS opens a criminal investigation as to the tax liabilities of a taxpayer. This is an IRS matter. At some point during the criminal investigation, the IRS refers the matter to the United States Department of Justice, requesting the institution of a federal grand jury to investigate further potential criminal tax violations. Subsequently, the United States Department of Justice approves the request and initiates a grand jury investigation. The grand jury subsequently indicts the taxpayer, and the taxpayer subpoenas an IRS special agent for testimony regarding the investigation. The records and information collected during the administrative stage of the investigation, including the taxpayer's tax returns from IRS files, are IRS records and information. A testimony authorization is required for the IRS special agent to testify regarding this information. However, no IRS testimony authorization is required regarding the information collected by the IRS special agent when the IRS special agent was acting under the direction and control of the United States Attorney's Office in the federal grand jury investigation. That information is not IRS records or information within the meaning of §301.9000–1(a).

Example 5. The United States Department of Justice attorney representing the IRS in a suit for refund requests testimony from an IRS revenue agent. This is an IRS matter. A testimony authorization would not be required in order for the IRS revenue agent to testify because the testimony was requested by government counsel.

Example 6. A state assistant attorney general, acting in accordance with a recommendation from his state's department of revenue, is prosecuting a taxpayer under a state criminal law proscribing the intentional failure to file a state income tax return. The assistant attorney general serves an IRS employee with a subpoena to testify concerning the taxpayer's federal income tax return filing history. This is a non-IRS matter. This is also a state judicial proceeding pertaining to tax administration within the meaning of section 6103(h)(4) and (b)(4). As such, the procedures of section 6103(h)(4) apply. A testimony authorization would be required for the testimony demand in the subpoena.

Example 7. A former IRS revenue agent is requested to testify in a divorce proceeding. The request seeks testimony explaining the meaning of entries appearing on one of the parties' transcript of account which is already in the possession of the parties. This is a non-IRS matter. No testimony authorization is required because the testimony requested from the former IRS employee involves general knowledge gained while the former IRS revenue agent was employed with the IRS.

§301.9000–7 Effective date.

The provisions of §§301.9000–1 through 301.9000–6 apply to any request or demand for IRS records or information received by any IRS officer, employee or contractor on or after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**.

David A. Mader,
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of Internal Revenue.

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