Chief Counsel Advice

Training Materials

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Section 6110. Public inspection of written determinations.

(a) General rule.

Except as otherwise provided in this section, the text of any written determination and any background file document relating to such written determination shall be open to public inspection at such place as the Secretary may by regulations prescribe.

(b) Definitions.

For purposes of this section-

(1) Written determination. The term "written determination" means a ruling, determination letter, technical advice memorandum, or Chief Counsel advice. Such term shall not include any advance pricing agreement entered into by a taxpayer and the Secretary and any background information related to such agreement or any application for an advance pricing agreement.

(2) Background file document. The term "background file document" with respect to a written determination includes the request for that written determination, any written material submitted in support of the request, and any communication (written or otherwise) between the Internal Revenue Service and persons outside the Internal Revenue Service in connection with such written determination (other than any communication between the Department of Justice and the Internal Revenue Service relating to a pending civil or criminal case or investigation) received before issuance of the written determination.

(3) Reference and general written determinations.

(A) Reference written determination. The term "reference written determination" means any written determination which has been determined by the Secretary to have significant reference value.

(B) General written determination. The term "general written determination" means any written determination other than a reference written determination.

(c) Exemptions from disclosure.

Before making any written determination or background file document open or available to public inspection under subsection (a), the Secretary shall delete -

(1) the names, addresses, and other identifying details of the person to whom the written determination pertains and of any other person, other than a person with respect to whom a notation is made under subsection (d)(1), identified in the

written determination or any background file document;

(2) information specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy, and which is in fact properly classified pursuant to such Executive order;

(3) information specifically exempted from disclosure by any statute (other than this title) which is applicable to the Internal Revenue Service;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) information the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(6) information contained in or related to examination, operating, or condition reports prepared by, or on behalf of, of for use of an agency responsible for the regulation or supervision of financial institutions; and

(7) geological and geophysical information and data, including maps, concerning wells.

The Secretary shall determine the appropriate extent of such deletions and, except in the case of intentional or willful disregard of this subsection, shall not be required to make such deletions (nor be liable for failure to make deletions) unless the Secretary has agreed to such deletions or has been ordered by a court (in a proceeding under subsection (f)(3) to make such deletions.

(d) Procedures with regard to third party contacts.

(1) Notations. If, before issuance of a written determination, the Internal Revenue Service receives any communication (written or otherwise) concerning such written determination, any request for such determination, or any other matter involving such written determination from a person other than an employee of the Internal Revenue Service or the person to whom such written determination pertains (or his authorized representative with regard to such written determination), the Internal Revenue Service shall indicate, on the written determination open to public inspection, the category of the person making such communication and the date of such communication.

(2) Exception. Paragraph (1) shall not apply to any communication made by the Chief of Staff of the Joint Committee on Taxation.

(3) Disclosure of identity. In the case of any written determination to which paragraph (1) applies, any person may file a petition in the United States Tax Court or

file a complaint in the United States District Court for the District of Columbia for an order requiring that the identity of any person to whom the written determination pertains be disclosed. The court shall order disclosure of such identity if there is evidence in the record from which one could reasonably conclude that an impropriety occurred or undue influence was exercised with respect to such written determination by or on behalf of such person. The court may also direct the Secretary to disclose any portion of any other deletions made in accordance with subsection (c) where such disclosure is in the public interest. If a proceeding is commenced under this paragraph, the person whose identity is subject to being disclosed and the person about whom a notation is made under paragraph (1) shall be notified of the proceeding in accordance with the procedures described in subsection (f)(4)(B) and shall have the right to intervene in the proceeding (anonymously, if appropriate).

(4) Period in which to bring action. No proceeding shall be commenced under paragraph (3) unless a petition is filed before the expiration of 36 months after the first day that the written determination is open to public inspection.

(e) Background file documents.

Whenever the Secretary makes a written determination open to public inspection under this section, he shall also make available to any person, but only upon the written request of that person, any background file document relating to the written determination.

(f) Resolution of disputes relating to disclosure.

(1) Notice of intention to disclose. Except as otherwise provided by subsection (i), the Secretary shall upon issuance of any written determination or upon receipt of a request for a background file document, mail a notice of intention to disclose such determination or document to any person to whom the written determination pertains (or a successor in interest, executor, or other person authorized by law to act for or on behalf of such person).

(2) Administrative remedies. The Secretary shall prescribe regulations establishing administrative remedies with respect to-

(A) requests for additional disclosure of any written determination or any background file document, and

(B) requests to restrain disclosure.

(3) Action to restrain disclosure.

(A) Creation of remedy. Any person-

(i) to whom a written determination pertains (or a successor in interest, executor, or other person authorized by law to act for or on behalf of such person), or who has a direct interest in maintaining the confidentiality of any such written determination or background file document (or portion thereof),

(ii) who disagrees with any failure to make a deletion with respect to that portion of any written determination or any background file document which is open or available to public inspection, and

(iii) who has exhausted his administrative remedies as prescribed pursuant to paragraph (2),

may, within 60 days after the mailing by the Secretary of a notice of intention to disclose any written determination or background file document under paragraph (1), together with the proposed deletions, file a petition in the United States Tax Court (anonymously, if appropriate) for a determination with respect to that portion of such written determination or background file document which is to be open to public inspection.

(B) Notice to certain persons. The Secretary shall notify any person to whom a written determination pertains (unless such person is the petitioner) of the filing of a petition under this paragraph with respect to such written determination or related background file document, and any such person may intervene (anonymously, if appropriate) in any proceeding conducted pursuant to this paragraph. The Secretary shall send such notice by registered or certified mail to the last known address of such person within 15 days after such petition is served on the Secretary. No person who has received such a notice may thereafter file any petition under this paragraph with respect to such written determination or background file document with respect to which such notice was received.

(4) Action to obtain additional disclosure.

(A) Creation of remedy. Any person who has exhausted the administrative remedies prescribed pursuant to paragraph (2) with respect to a request for disclosure may file a petition in the United States Tax Court or a complaint in the United States District Court for the District of Columbia for an order requiring that any written determination or background file document (or portion thereof) be made open or available to public inspection. Except where

inconsistent with subparagraph (B), the provisions of subparagraphs (C), (D), (E), (F), and (G) of section 552(a)(4) of title 5, United States Code, shall apply to any proceeding under this paragraph. The Court shall examine the matter de novo and without regard to a decision of a court under paragraph (3) with respect to such written determination or background file document, and may examine the entire text of such written determination or background file document in order to determine whether such written determination or background file document or any part thereof shall be open or available to public inspection under this section. The burden of proof with respect to the issue of disclosure of any information shall be on the Secretary and any other person seeking to restrain disclosure.

(B) Intervention. If a proceeding is commenced under this paragraph with respect to any written determination or background file document, the Secretary shall, within 15 days after notice of the petition filed under subparagraph (A) is served on him, send notice of the commencement of such proceeding to all persons who are identified by name and address in such written determination or background file document. The Secretary shall send such notice by registered or certified mail to the last known address of such person. Any person to whom such determination or background file document pertains may intervene in the proceeding (anonymously, if appropriate). If such notice is sent, the Secretary shall not be required to defend the action and shall not be liable for public disclosure of the written determination or background file document (or any portion thereof) in accordance with the final decision of the court.

(5) Expedition of determination. The Tax Court shall make a decision with respect to any petition described in paragraph (3) at the earliest practicable date.

(6) Publicity of Tax Court proceedings. Notwithstanding sections 7458 and 7461, the Tax Court may, in order to preserve the anonymity, privacy, or confidentiality of any person under this section, provide by rules adopted under section 7453 that portions of hearings, testimony, evidence, and reports in connection with proceedings under this section may be closed to the public or to inspection by the public.

(g) Time for disclosure.

(1) In general. Except as otherwise provided in this section, the text of any written determination or any background file document (as modified under subsection (c)) shall be open or available to public inspection-

(A) no earlier than 75 days, and no later than 90 days, after the notice provided in subsection (f)(1) is mailed, or, if later

(B) within 30 days after the date on which a court decision under subsection (f)(3) becomes final.

(2) Postponement by order of court. The court may extend the period referred to in paragraph (1)(B) for such time as the court finds necessary to allow the Secretary to comply with its decision.

(3) Postponement of disclosure for up to 90 days. At the written request of the person by whom or on whose behalf the request for the written determination was made, the period referred to in paragraph (1)(A) shall be extended (for not to exceed an additional 90 days) until the day which is 15 days after the date of the Secretary's determination that the transaction set forth in the written determination has been completed.

(4) Additional 180 days. If-

(A) the transaction set forth in the written determination is not completed during the period set forth in paragraph (3), and

(B) the person by whom or on whose behalf the request for the written determination was made establishes to the satisfaction of the Secretary that good cause exists for additional delay in opening the written determination to public inspection,

the period referred to in paragraph (3) shall be further extended (for not to exceed an additional 180 days) until the day which is 15 days after the date of the Secretary's determination that the transaction set forth in the written determination has been completed.

(5) Special rules for certain written determinations, etc.
Notwithstanding the provisions of paragraph (1), the Secretary shall not be required to make available to the public –

(A) any technical advice memorandum and any related background file document involving any matter which is the subject of a civil fraud or criminal investigation or jeopardy or termination assessment until after any action relating to such investigation or assessment is completed, or

(B) any general written determination and any related background file document that relates solely to approval of the Secretary of any adoption or change of--

(i) the funding method or plan year of a plan under section 412,

(ii) a taxpayer's annual accounting period under section 442,

(iii) a taxpayer's method of accounting under section 446(e), or

(iv) a partnership or partner's taxable year under section 706,

but the Secretary shall make any such written determination and related background file document available upon the written request of any person after the date on which (except for this subparagraph) such determination would be open to public inspection.

(h) Disclosure of prior written determinations and related background file documents.

(1) In general. Except as otherwise provided in this subsection, a written determination issued pursuant to a request made before November 1, 1976, and any background file document relating to such written determination shall be open or available to public inspection in accordance with this section.

(2) Time for disclosure. In the case of any written determination or background file document which is to be made open or available to public inspection under paragraph (1)-

(A) subsection (g) shall not apply, but

(B) such written determination or background file document shall be made open or available to public inspection at the earliest practicable date after funds for that purpose have been appropriated and made available to the Internal Revenue Service.

(3) Order of release. Any written determination or background file document described in paragraph (1) shall be open or available to public inspection in the following order starting with the most recent written determination in each category:

(A) reference written determinations issued under this title;

(B) general written determinations issued after July 4, 1967; and

(C) reference written determinations issued under the Internal Revenue Code of 1939 or corresponding provisions of prior law.

General written determinations not described in subparagraph (B) shall be open to public inspection on written request, but not until after the written determinations referred to in subparagraphs (A), (B), and (C) are open to public inspection.

(4) Notice that prior written determinations are open to public inspection. Notwithstanding the provisions of subsections (f)(1) and (f)(3)(A), not less than 90 days before making any portion of a written determination described in this subsection open to public inspection, the Secretary shall issue public notice in the Federal Register that

such written determination is to be made open to public inspection. The person who received a written determination may, within 75 days after the date of publication of notice under this paragraph, file a petition in the United States Tax Court (anonymously, if appropriate) for a determination with respect to that portion of such written determination which is to be made open to public inspection. The provisions of subsections (f)(3)(B), (5), and (6) shall apply if such a petition is filed. If no petition is filed, the text of any written determination shall be open to public inspection no earlier than 90 days, and no later than 120 days, after notice is published in the Federal Register.

(5) Exclusion. Subsection (d) shall not apply to any written determination described in paragraph (1).

(i) Special Rules for Disclosure of Chief Counsel Advice.

(1) Chief Counsel Advice Defined.

(A) In general. For purposes of this section, the term "Chief Counsel advice" means written advice or instruction, under whatever name or designation, prepared by any national office component of the Office of Chief Counsel which-

(i) is issued to field or service center employees of the Service or regional or district employees of the Office of Chief Counsel, and

(ii) conveys-

(I) any legal interpretation of a revenue provision,

(II) any Internal Revenue Service or Office of Chief Counsel position or policy concerning a revenue provision,

(III) any legal interpretation of State law, foreign law, or other Federal law relating to the assessment or collection of any liability under a revenue provision.

(B) Revenue provision defined.- For purposes of subparagraph (A), the term "revenue provision" means any existing or former internal revenue law, regulation, revenue ruling, revenue procedure, other published or unpublished guidance, or tax treaty, either in general or as applied to specific taxpayers or groups of specific taxpayers.

(2) Additional documents treated as Chief Counsel Advice. The Secretary may by regulation provide that this section shall apply to any advice or instruction prepared and issued by the Office of Chief Counsel which is not described in paragraph (1).

(3) Deletions for Chief Counsel Advice. In the case of Chief Counsel advice open to public inspection pursuant to this section-

(A) paragraphs (2) through (7) of subsection (c) shall not apply, but

(B) the Secretary may make deletions of material in accordance with subsections (b) and (C) of section 552 of title 5, United States Code, except that in applying subsection (b)(3) of such section, no statutory provision of this title shall be taken into account.

(4) Notice of intention to disclose.

(A) Nontaxpayer-specific Chief Counsel Advice.-In the case of Chief Counsel advice which is written without reference to a specific taxpayer or group of specific taxpayers-

(i) subsection (f)(1) shall not apply, and

(ii) the Secretary shall, within 60 days after the issuance of the Chief Counsel advice, complete any deletions described in subsection (c)(1) or paragraph (3) and make the Chief Counsel advice, as so edited, open for public inspection.

(B) Taxpayer-specific Chief Counsel Advice. In the case of Chief Counsel advice which is written with respect to a specific taxpayer or group of specific taxpayers, the Secretary shall, within 60 days after the issuance of the Chief Counsel advice, mail the notice required by subsection (f)(1) to each such taxpayer. The notice shall include a copy of the Chief Counsel advice on which is indicated the information that the Secretary proposes to delete pursuant to subsection (c)(1). The Secretary may also delete from the copy of the text of the Chief Counsel advice any of the information described in paragraph (3), and shall delete the names, addresses, and other identifying details of taxpayers other than the person to whom the advice pertains, except that the Secretary shall not delete from the copy of the Chief Counsel advice that is furnished to the taxpayer any information of which that taxpayer was the source.

(j) Civil Remedies.

(1) Civil action. Whenever the Secretary-

(A) fails to make deletions required in accordance with subsection (c)(1) or (i)(3), or

(B) fails to follow the procedures in subsection (g) or (i)(4)(B), the recipient of the written determination or any person identified in the written determination shall have as an exclusive civil remedy an action against the Secretary in the United States Claims, which shall have jurisdiction to hear any action under this paragraph.

(2) Damages. In any suit brought under the provisions of paragraph (1)(A) in which the Court determines that an employee of the Internal Revenue Service intentionally or willfully failed to delete in accordance with subsection (c) or in any suit brought under subparagraph (1)(B) in which the Court determines that an employee intentionally or willfully failed to act in accordance with subsection (e), the United States shall be liable to the person in an amount equal to the sum of-

(A) actual damages sustained by the person but in no case shall be person be entitled to receive less than the sum of $1000, and

(B) the costs of the action together with reasonable attorney's fees as determined by the Court.

(k) Special provisions.

(1) Fees. The Secretary is authorized to assess actual costs-

(A) for duplication of any written determination or background file document open or available to the public under this section, and

(B) incurred in searching for and making deletions required under subsection (c)(1) or (i)(3) from any written determination or background file document which is available to public inspection only upon written request.

The Secretary shall furnish any written determination or background file document without charge or at a reduced charge if he determines that waiver or reduction of the fees is in the public interest because the furnishing such determination or background file document can be considered as primarily benefiting the general public.

(2) Records disposal procedures. Nothing in this section shall prevent the Secretary from disposing of any general written determination or background file document described in subsection (b) in accordance with established records disposition procedures, but such disposal shall, except as provided in the following

sentence, occur not earlier than 3 years after such written determination is first made open to public inspection. In the case of any general written determination described in subsection (h), the Secretary may dispose of such determination and any related background file document in accordance with such procedures but such disposal shall not occur earlier than 3 years after such written determination is first made open to public inspection if funds are appropriated for such purpose before January 20, 1979, or not earlier than January 20, 1979, if funds are not appropriated before such date. The Secretary shall not dispose of any reference written determination and related background file documents.

(3) Precedential status. Unless the Secretary otherwise determines by regulations, a written determination may not be used or cited as precedent. The preceding sentence shall not apply to change the Precedential status (if any) of written determinations with regard to taxes imposed by subtitle D of this title.

(l) Section not to apply.

This section shall not apply to-

(1) any matter to which section 6104 applies, or

(2) any-

(A) written determination issued pursuant to a request made before November 1, 1976, with respect to the exempt status under section 501(a) of an organization described in section 501(c) or (d), the status of an organization as a private foundation under section 509(a), or the status of an organization as an operating foundation under section 4942(j)(3),

(B) written determination described in subsection (g)(5)(B) issued pursuant to a request made before November 1, 1976,

(C) determination letter not otherwise described in subparagraph (A), (B), or (E) issued pursuant to a request made before November 1, 1976,

(D) background file document relating to any general written determination issued before July 5, 1967,

(E) letter or other document described in section 6104(a)(1)(B)(iv) issued before September 2, 1974.

(m) Exclusive remedy.

Except as otherwise provided in this title, or with respect to a discovery order made in connection with a judicial proceeding, the Secretary shall not be required by

any Court to make any written determination or background file document open or available to public inspection, or to refrain from disclosure of any such documents.

Note: Subsection (d) of section 3509 of the IRS Restructuring and Reform Act of 1998 provides as follows:

> **(d) EFFECTIVE DATES.-**
>
> **(1) IN GENERAL.-** Except as otherwise provided in this subsection, the amendments made by this section shall apply to any Chief Counsel advice issued more than 90 days after the date of the enactment of this Act.
>
> **(2) TRANSITION RULES.-** The amendments made by this section shall apply to any Chief Counsel advice issued after December 31, 1985, and before the 91st day after the date of the enactment of this Act by the offices of the associate chief counsel for domestic, employee benefits and exempt organizations, and international, except that any such Chief Counsel advice shall be treated as made available on a timely basis if such advice is made available for public inspection not later than the following dates:
>
> (A) One year after the date of the enactment of this Act, in the case of all litigation guideline memoranda, service center advice, tax litigation bulletins, criminal tax bulletins, and general litigation bulletins.
>
> (B) Eighteen months after such date of enactment, in the case of field service advice and technical assistance to the field issued on or after January 1, 1994.
>
> (C) Three years after such date of enactment, in the case of field service advice and technical assistance to the field issued on or after January 1, 1992, and before January 1, 1994.
>
> (D) Six years after such date of enactment, in the case of any other Chief Counsel advice issued after December 31, 1985.
>
> (3) DOCUMENTS TREATED AS CHIEF COUNSEL ADVICE.- If the Secretary of the Treasury by regulation provides pursuant to section 6110(i)(2) of the Internal Revenue Code of 1986, as added by this section, that any additional advice or instruction issued by the Office of Chief Counsel shall be treated as Chief Counsel advice, such additional advice or instruction shall be made available for public inspection pursuant to section 6110 of such Code, as amended by this section, only in accordance with the effective date set forth in such regulation.
>
> (4) CHIEF COUNSEL ADVICE TO BE AVAILABLE ELECTRONICALLY.- The Internal Revenue Service shall make any Chief Counsel advice issued more than

90 days after the date of the enactment of this Act and made available for public inspection pursuant to section 6110 of such Code, as amended by this section, also available by computer telecommunications within 1 year after issuance.

INTERNAL REVENUE SERVICE RESTRUCTURING AND REFORM ACT OF 1998

H.R. Conf. Rep. No. 599, 105th Cong. 2d Sess. 298-302 (June 24, 1998) (to accompany H.R. 2676)

Title III. Taxpayer Protection and Rights
...
F. Disclosures to Taxpayers

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...
9. Disclosure of Chief Counsel advice

Present Law

Section 6110 of the Code provides for the public inspection of written determinations, i.e., rulings, determination letters, and technical advice memoranda. The IRS issues annual revenue procedures setting forth the procedures for requests for these various forms of written determinations and participation in the formulation of such determinations.[21] [21]Under section 6110 and the regulations promulgated thereunder, the taxpayer who is the subject of a written determination can participate in the redaction of the documents to ensure that the taxpayer's privacy is protected and that sensitive private information is removed before the determination is publicly disclosed. In the event there is disagreement as to the information to be deleted, the section provides for litigation in the courts to resolve such disagreements.

One of the Office of Chief Counsel's major roles is to advise Internal Revenue Service personnel on legal matters at all stages of case development. The Office of Chief Counsel thus issues various forms of written legal advice to field agents of the IRS and to its own field attorneys that do not fall within the current definition of "written determination" under section 6110. Traditionally, field Counsel offices provided most of the assistance to the IRS, usually at IRS field offices, but since 1988, the National Office of Chief Counsel has been rendering more assistance to field Counsel and IRS offices. National Office of Chief Counsel assistance in taxpayer-specific cases is generally called "field service advice." The taxpayers who are the subject of field service advice generally do not participate in the process, leading some tax commentators to express concern that the field service advice process was displacing the technical advice process.

There has been controversy as to whether the Office of Chief Counsel must release forms of advice other than written determinations pursuant to the Freedom of Information Act

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[21] See e.g., Rev. Procs. 98-1 and 98-2.

FOIA). In Tax Analysts v. IRS, [22] the D.C. Circuit held that the legal analysis portions of field service advice created in the context of specific taxpayers' cases are not "return information," as defined by section 6103(b)(2), and must be released under FOIA. The court also found that portions of field service advice issued in docketed cases may be withheld as privileged attorney work product. However, some issues remain outstanding. Although the extent to which such materials must be released is still in dispute, it is clear that they are not expressly covered by section 6110. As a consequence, there exists no mechanism by which taxpayers may participate in the administrative process of redacting their private information from such documents or to resolve disagreements in court.

House Bill

No provision.

Senate Amendment

No provision.

Conference Agreement

In general

The conferees believe that written documents issued by the National Office of Chief Counsel to its field components and field agents of the IRS should be subject to public release in a manner similar to technical advice memoranda or other written determinations. In this way, all taxpayers can be assured of access to the "considered view of the Chief Counsel's national office on significant tax issues." [23] Creating a structured mechanism by which these types of legal memoranda are open to public inspection will increase the public's confidence that the tax system operates fairly and in an even-handed manner with respect to all taxpayers.

As part of making these documents public, however, the privacy of the taxpayer who is the subject of the advice must be protected. Any procedure for making such advice public must therefore include adequate safeguards for taxpayers whose privacy interests are implicated. There should be a mechanism for taxpayer participation in the deletion of any private information. There should also be a process whereby appropriate governmental privileges may be asserted by the IRS and contested by the public or the taxpayer.

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[22] 117 F.3d 607 (D.C. Cir. 1997).

[23] 117 F.3d at 617.

The provision amends section 6110 of the Code, establishing a structured process by which the IRS will make certain work products, designated as "Chief Counsel Advice," open to public inspection on an ongoing basis. It is designed to protect taxpayer privacy while allowing the public inspection of these documents in a manner generally consistent with the mechanism of section 6110 for the public inspection of written determinations. In general, the provision operates by establishing that Chief Counsel Advice are written determinations subject to the public inspection provisions of section 6110.

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Definition of Chief Counsel Advice

For purposes of this provision, Chief Counsel Advice is written advice or instruction prepared and issued by any national office component of the Office of Chief Counsel to held employees of the Service or the Office of Chief Counsel that convey certain legal interpretations or positions of the IRS or the Office of Chief Counsel concerning existing or former revenue provisions. For these purposes, the term "revenue provisions" includes, without limitation: the Internal Revenue Code itself; regulations, revenue rulings, revenue procedures, or other administrative interpretations or guidance, whether published or unpublished (including, for example, other Chief Counsel Advice); tax treaties; and court decisions and opinions. Chief Counsel Advice also includes legal interpretations of State law, foreign law, or other federal law relating to the assessment or collection of liabilities under revenue provisions.

Chief Counsel Advice may interpret or set forth policies concerning the internal revenue laws either in general or as applied to specific taxpayers or groups of specific taxpayers. The definition is, however, not meant to include advice written with respect to nontax matters, including but not limited to employment law, conflicts of interest, or procurement matters.

The new statutory category of written determination encompasses certain existing categories of advisory memoranda or instructions written by the National Office of Chief Counsel to field personnel of either the IRS or the Office of Chief Counsel. Specifically, Chief Counsel Advice includes field service advice, technical assistance to the field, service center advice, litigation guideline memoranda, tax litigation bulletins, general litigation bulletins, and criminal tax bulletins. The definition applies not only to the case-specific field service advice issued from the offices of the Associate Chief Counsel (International), Associate Chief Counsel (Employee Benefits and Exempt Organizations), and the Assistant Chief Counsel (Field Service), which were at issue in the Tax Analysts decision, but any case-specific or noncase-specific written advice or instructions issued by the National Office of Chief Counsel to field personnel of either the IRS or the Office of Chief Counsel.

Moreover, Chief Counsel Advice includes any documents created subsequent to the enactment of this provision that satisfy the general statutory definition, regardless of their name or designation. Chief Counsel Advice also includes any such advice or instruction even if the organizations currently issuing them are reorganized or reconstituted as part of any IRS restructuring.

The new subsection covers written advice "issued" to field personnel of either the IRS or the Office of Chief Counsel in its final form. With respect to Chief Counsel Advice, issuance occurs when the Chief Counsel Advice has been approved within the national office component of the office of Chief Counsel in which the Chief Counsel Advice was proposed, signed by the person authorized to do so (usually the Assistant Chief Counsel or a Branch Chief), and sent to the field. Chief Counsel Advice does not include written recordations of informal telephonic advice by the National Office of Chief Counsel to field personnel of either the IRS or the Office of Chief Counsel. Drafts of Chief Counsel Advice sent to the field for review, criticism, or comment prior to approval within the National

Office also need not be made public. However, Chief Counsel Advice may be treated as issued even if supplemental advice is contemplated. The Secretary is expected to issue regulations to clarify the distinction between issuance as it applies to Chief Counsel Advice and as it applies to other documents disclosed under section 6110.

The provision also allows the Secretary to promulgate regulations providing that additional types of advice or instruction issued by the Office of Chief Counsel (or components of the Office of Chief Counsel, such as regional or local Counsel offices) will be treated as Chief Counsel Advice and subject to public inspection pursuant to this provision. No inference shall be drawn from the failure of the Secretary to treat additional types of advice or instruction as Chief Counsel Advice in determining whether such advice or instruction is to be disclosed under FOIA.

As with other written determinations, Chief Counsel Advice may not be used or cited as precedent, except as the Secretary otherwise establishes by regulation.

Redaction process

Under this provision, Chief Counsel Advice will be redacted prior to their public release in a manner similar to that provided for private letter rulings, technical advice memoranda, and determination letters. Specific taxpayers or groups of specific taxpayers who are the subject of Chief Counsel Advice will be afforded the opportunity to participate in the process of redacting the Chief Counsel Advice prior to their public release.

In addition, the new provision affords additional protection for certain governmental interests implicated by Chief Counsel Advice. Information may be redacted from Chief Counsel Advice under sub-sections (b) and (c) of the Freedom of Information Act, 5 U.S.C.

sec. 552 (except, with respect to 5 U.S.C. sec. 552(b)(3), only material required to be withheld under a Federal statute, other than title 26, may be redacted), as those provisions have been, or shall be, interpreted by the courts of the United States. For those deletions that are discretionary, such as those under FOIA section 552(b)(5) it is expected that the Office of Chief Counsel and the IRS will apply any discretionary standards applicable to federal agencies in general or the Chief Counsel or the IRS in particular. [24]

Under new section 6110(i), as with current section 6110(c)(1), identifying details consisting of names, addresses, and any other information that the Secretary determines could identify any person, including the taxpayer's representative, will be redacted, after the participation of the taxpayer in the redaction process. In some situations, information included in a Chief Counsel Advice (other than a name or address) may not identify a person as of the time the advice is made open to public inspection, but that information, together with information that is expected to be disclosed by another source at a later date, will serve to identify a person. Consequently, in deciding whether a Chief Counsel Advice contains identifying information, the Secretary is to take into account information that

is available to the public at the time that the advice is made open to public inspection as well as information that is expected to be publicly available from other sources within a reasonable time after the Chief Counsel Advice is made open to public inspection. Generally, it is intended that the standard the IRS is to use in determining whether information will identify a person is a standard of a reasonable person generally knowledgeable with respect to the appropriate community. The standard is not, however, to be one of a person with inside knowledge of the particular taxpayer.

As under current section 6110, taxpayers who are the subject of Chief Counsel Advice, as well as members of the public, will be afforded the opportunity to challenge judicially the redaction determinations by the Secretary.

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[24] The current standards for the exercise of such discretion are set forth in the Internal Revenue Manual (part 1230, section 293(2)) and the Attorney General's October 4, 1993, Memorandum for Heads of Departments and Agencies.

Relation to present law

The public inspection of Chief Counsel Advice is to be accomplished only pursuant to the rules and procedures set forth in section 6110, as amended, and not under those of any other provision of law, such as FOIA. This provision is not intended to affect the disclosure under FOIA, or under any other provision of law, of any documents not included within the definition of Chief Counsel Advice in new sections 6110(i)(1) and (i)(2). The only FOIA exemption affected by this provision is 5 U.S.C. section 552(b)(3), to the extent that it incorporates section 6103 of the Code. The timetable and the manner in which existing Chief Counsel Advice may ultimately be open to public inspection shall be governed by this provision, except that the provision is inapplicable to Chief Counsel Advice that any federal district court has, prior to the date of enactment, ordered be disclosed. Disclosure of any documents that are subject to such a court order is to proceed pursuant to the order rather than this provision. Finally, no inference is intended with respect to the disclosure, under FOIA or any other provision of law, of any other documents produced by the Office of Chief Counsel that are not included in the definition of Chief Counsel Advice.

Effective date

The provision applies to Chief Counsel Advice issued more than ninety days after enactment. In addition, the provision contains certain rules governing disclosure of any document fitting the definition of Chief Counsel Advice issued after 1985 and before 90 days after the date of enactment by the offices of the associate chief counsel for domestic, employee benefits and exempt organizations, and international. It sets forth a schedule for the IRS to release such Chief Counsel Advice over a six year period after the date of enactment. Finally, additional advice or instruction that the Secretary determines by regulations to treat as Chief Counsel Advice shall be made public pursuant to this provision in accordance with the effective dates set forth in such regulations.

CHIEF COUNSEL ADVICE

FIELD TELECONFERENCE & NATIONAL OFFICE TRAINING

I. INTRODUCTION

The purpose of this document is to provide you with an overview of section 6110 of the Internal Revenue Code, as amended by section 3509 of the Internal Revenue Service Restructuring and Reform Act of 1998, which provides for the public inspection of National Office of Chief Counsel advice or instruction to field IRS or field Counsel offices. Section 6110, as amended, will result in the disclosure of a number of Counsel work products, such as Field Service Advice (FSAs), Service Center Advice (SCAs), Technical Assistance (to the field), Litigation Guideline Memoranda (LGMs), and various Bulletins. For purposes of section 6110, as amended, these work products will be defined as Chief Counsel Advice (CCAs).

This document is intended to afford you a brief explanation of the FOIA litigation and the IRS's commitment to a philosophy of maximum responsible public disclosure. Both have contributed to the new disclosure standards which should guide you in determining what information is to be disclosed and what information mayn be protected in CCAs. While we have attempted to provide you with this material for your ready reference, any questions not resolved should be directed to your managers.

II. BACKGROUND OF RECENT FOIA LITIGATION

Tax Analysts, Inc., a publisher of tax-related periodicals and other materials, brought suit in April 1994 under the Freedom of Information Act (FOIA), 5 U.S.C.
§ 552, to compel the IRS to disclose FSAs. FSAs are issued by certain National Office functions of the Office of Chief Counsel to advise and assist field Examination, Appeals, and district counsel offices by responding to their requests for advice in cases pertaining to specific taxpayers.

After the district court ordered that FSAs be released to the public, as the expression of the Service's "working law," the Government appealed. In July 1997, the United States Court of Appeals for the District of Columbia Circuit issued its opinion and order, largely adverse to the IRS. *Tax Analysts v. IRS*, 117 F.3d 607 (D.C. Cir. 1997). First, the court held that, while there was no doubt that FSAs relating to particular taxpayers contained at least some return information, FSAs did not constitute, in their entirety, return information. After an analysis of the use and context of the word "data" in the statutory definition of return information found at I.R.C. § 6103(b)(2), along with a comparison of FSAs and technical advice memoranda (TAMs), the court concluded that the legal analyses and conclusions of law contained in FSAs did not constitute "data" such that the analyses and conclusions were not return information under I.R.C. § 6103(b)(2) and must be disclosed to plaintiff.

Second, with respect to the IRS's claim that the FSAs were exempt from disclosure in their entirety pursuant to FOIA subsection 5, which incorporates the attorney-client, deliberative process, and attorney work product privileges, the court held that the legal conclusions provided by the National Office of Chief Counsel to field personnel constitute agency working law, even if those conclusions are not formally binding. Accordingly, the deliberative process privilege did not apply to FSAs since they were neither predecisional nor deliberative. The court also held that the attorney-client privilege did not apply to the extent the legal conclusions in the FSAs were based upon information obtained from taxpayers. However, the court did note that, to the extent that the FSAs revealed confidential information regarding the scope, direction, or emphasis of audit activity, such communications were covered by the attorney-client privilege. The appellate court found that the district court erred in confining the attorney work product privilege to the mental impressions, conclusions, opinions or legal theories of the attorney. The appellate court held that the attorney work product privilege also applied to factual materials prepared in anticipation of litigation. The D.C. Circuit remanded the case back to the district court for further consideration of, *inter alia*, other exemption claims.

On remand, the district court was faced with several issues, key among them the extent of material to be redacted from the FSAs as return information and attorney work product. By order dated April 30, 1998, the district court ordered that IRS redact only taxpayer identifiers from each portion of the FSAs (similar to the manner in which TAMs are edited under I.R.C. § 6110), relying heavily upon the court of appeals observation (117 F.3d at 616) that "[w]ith respect to the purposes of § 6103, Technical Advice Memoranda and FSAs amount to the same thing." 81 A.F.T.R.2d ¶ 98-661, slip op. at 5. The district court also held that, given the entire tenor of the appellate court's opinion that agency working law is disclosable under the FOIA, the appellate court could not have intended that the docketed FSAs be withheld in their entirety under the attorney work product privilege. Instead, the court held that, however work product is defined, a FOIA requester is entitled to agency working law (legal analysis and conclusions), as long as the mental impressions, conclusions, opinions, or legal theories of an attorney are protected. While the district court resolved the applicability of FOIA exemption (b)(7)(E), relating to law enforcement techniques and guidelines where disclosure could enable members of the public to circumvent the law, there remains outstanding the IRS's assertion of FOIA exemption (b)(3), in conjunction with tax treaty secrecy clauses, for portions of certain FSAs.

The IRS is currently defending two other types of technical assistances -- intra-National Office Counsel advice and advice written to IRS national – which are the subject of another FOIA lawsuit brought by Tax Analysts pending in the United States District Court for the District of Columbia. *Tax Analysts v. IRS*, No. 96-2285 (D.D.C.). The case has been fully briefed and is awaiting the district court's decision.

III. SECTION 3509 OF THE IRS RESTRUCTURING AND REFORM ACT OF 1998

Section 3509 of the IRS Restructuring and Reform Act of 1998 deals with the release of "Chief Counsel Advice" (CCAs). This provision was developed through discussions

Treasury and IRS had with Tax Analysts and other media stakeholders. The provision was designed to provide a structured process similar to that used for private letter rulings and technical advice, giving taxpayers an opportunity to request that information they consider confidential be deleted from the documents before they are made available to the public. The IRS may also delete information that it believes is privileged, based upon certain governmental interests, before providing the document either to the taxpayer or the public. There are procedures for both requests for additional deletions and judicial review of deletions. The category of documents known as CCAs is much broader than FSAs; it includes essentially all National Office Chief Counsel legal interpretations of the internal revenue laws (or related state, federal or foreign laws) provided to the field. These documents will be released to the public in paper form, as well as being placed on the IRS Web Site at www.irs.gov.efoia.

As a general proposition, the statute's disclosure obligations are prospective; however, for certain CCAs generated after December 31, 1985, the statute will require that they be available for public inspection on a staggered schedule over a six year time period. In addition to mandating the disclosure of CCAs, the provision also allows the IRS to issue regulations that would expand the types of documents subject to the structured release process. To date, the IRS has not issued regulations to expand the types of documents subject to the structured release process under section 6110.

IV. DISCRETIONARY DISCLOSURE POLICY

"The Internal Revenue Service will grant a request under the Freedom of Information Act (5 U.S.C. 552) for a record which is not prohibited from disclosing by law or regulation unless the record is exempt from required disclosure under the FOIA and public knowledge of the information contained in such record would significantly impede or nullify IRS actions in carrying out a responsibility or function, or would constitute an unwarranted invasion of personal privacy." IRM 1230, text 293(2).

This "harm" analysis has also been adopted by the Clinton Administration, as set forth in Attorney General Reno's October 1993 FOIA Memorandum to Department and Agency Heads: "In short, it shall be the policy of the Department of Justice to defend the assertion of a FOIA exemption only in those cases where the agency reasonably foresees that disclosure would be harmful to an interest protected by that exemption. Where an item of information might technically or arguably fall within an exemption, it ought not to be withheld from a FOIA requester unless it need be."

V. STANDARDS FOR DISCLOSURE AND EDITING OF CHIEF COUNSEL ADVICE

A. TAXPAYER IDENTIFYING INFORMATION

- The D.C. Circuit, in analogizing FSAs to TAMs, commented that "With respect to the purposes of § 6103, Technical Advice Memoranda and FSAs amount to the same thing" and "only a Janus-faced Congress would, in § 6110, order the IRS to disclose the

legal analysis portion of a Technical Advice Memorandum and then, in § 6103, order the IRS not to disclose the same portion of an FSA." Accordingly, the D.C. Circuit held that "legal analyses contained in FSAs are not 'return information' under § 6103, and the IRS's exemption 3 claim fails." 117 F.3d 607, 616 (D.C. Cir. 1997).

● On remand, the parties disagreed as to the manner in which FSAs would be redacted of "true return information," as defined by the D.C. Circuit. By order dated April 30, 1998, the district court determined that "the 'true return information' the D.C. Circuit held should be redacted from FSAs before release is the return information to be redacted from [TAMs] under § 6110(c)(1); *i.e.*, **the names, addresses, and other identifying details of the person to whom the written determination pertains and of any other person, other than a person with respect to whom a notation is made under subsection (d)(1) [third party contacts], identified in the written determination or any background file document.**" 81 A.F.T.R.2d ¶ 98-661, slip op. at 5 (emphasis added).

● According to the legislative history accompanying I.R.C. § 6110, as originally enacted and as amended, "identifying details consist of names, addresses, and any other information which the Secretary determines could identify any person, including the taxpayer's representative. In some situations, information included in a determination (other than a name or address) may not identify a person as of the time the determination is made open to public inspection, but that information, taken together with information that is expected to be disclosed by another source at a later date, will serve to identify a person. Consequently, in deciding whether a determination contains identifying information, the Secretary is to take into account information that is available to the public at the time that the determination is made open to public inspection as well as information that is expected to be publicly available from other sources within a reasonable time after the determination is made open to public inspection. Generally, it is intended that the standard the IRS is to use in determining whether information will identify a person is a standard of **a reasonable person generally knowledgeable with respect to the appropriate community.**[25] The standard is not, however, to be one of a person with inside knowledge of the particular taxpayer." *See, e.g.*, Joint Comm. Print, GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1976, Pub. L. 455, 94th Cong. 305 (1976); Conf. Report to accompany H.R. 2676, INTERNAL REVENUE SERVICE RESTRUCTURING AND REFORM ACT OF 1998, H.R. Rep. 105-599, 105th Cong., 2d Sess. (June 24, 1998). *See also*, Treas. Reg. § 301.6110-3(a)(1).

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[25] The appropriate community could be an industry or geographical community and will vary for the problem involved; *e.g.,* the "community" for a steel company will be all steel producers, but may also be the locale in which, *e.g.*, the main plant is to be located if the determination deals with a land transaction.

● The following are examples of items of information that are deemed taxpayer identifiers *per se* pursuant to I.R.C. § 6110(c)(1).

1. Taxpayer Name(s)
2. Taxpayer's Address (but not necessarily the taxpayer's location)
3. Taxpayer Identification Number
4. Court docket number
5. Policy numbers
6. Outside consultants (names of individuals, but not necessarily firms)
7. Authorized representative (names of individuals, but not necessarily firms)
8. "Brand name" product lines
9. References to another case involving the same taxpayer(s)
10. Beneficiaries
11. Patents and trademarks
12. Trade secrets
13. Any quotation from an opinion or searchable database (*i.e.,* SEC filings), if they are associated with the taxpayer

● The following are examples of items of information that may be taxpayer identifiers, given the particular facts and circumstances of the document and the timing of its public release.

1. Dollar figures (do not redact the $ sign)
2. Dates, including tax years
3. Percentages (do not redact the % sign)
4. Type of business, if unique or small industry
5. Shareholder information
6. Taxpayer location, including state of incorporation
7. Countries of operation
8. Region, district, city (including symbols), circuit court
9. References to state law
10. References to unique federal law that impacts few individuals or industries
11. Names of local IRS officers and employees
12. "Generic" product lines
13. Taxpayer hired consultants (firm names)
14. Firm(s) authorized to represent taxpayer
15. Any other information which could be cross referenced in other publicly available sets of information including electronic databases, such as LEXIS

B. ATTORNEY-CLIENT COMMUNICATIONS

● The D.C. Circuit, after rejecting the agency's assertion of attorney-client privilege to justify nondisclosure of FSAs in their entirety, acknowledged that "some FSAs may reveal confidential information transmitted by field personnel regarding 'the scope,

direction, or emphasis of audit activity.' Communications revealing such client confidences are in a different category than those we have been discussing [for which no attorney-client privilege attaches]. They are clearly covered by the attorney-client privilege, and the IRS may still assert the privilege with respect to particular portions of FSAs containing this sort of confidential government information." 117 F.3d at 619-620.

- On remand, the district court stated that "The Court of Appeals rules with a fair degree of specificity and clarity that FSAs with communications regarding 'the scope, direction, or emphasis of audit activity ... are clearly covered by the attorney-client privilege.' 117 F.3d at 619. When, in the next sentence, the Court of Appeals said that the 'the IRS may still assert the privilege with respect to particular portions of FSAs containing *this sort of confidential government information*", *id.* (emphasis added), it was clearly referring back to the phrase 'the scope, direction, or emphasis of audit activity' and was not creating, as IRS argues, some new open-ended category of government information to be withheld as attorney client privilege." 81 A.F.T.R.2d ¶ 98-661, slip op. at 7. Thus, the court rejected the assertion of the attorney-client privilege for any other types of confidential government information in FSAs.

- Examples of material redacted as attorney-client communications:

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C. ATTORNEY WORK PRODUCT

● The D.C. Circuit held that the district court's original order, permitting only the redaction of "text concerning 'the mental impressions, conclusions, opinions, or legal theories of an attorney,'" was too narrow. The circuit held that "the work product doctrine protects such deliberative materials but it also protects factual materials prepared in anticipation of litigation." The court continued, stating that "any part of an FSA prepared in anticipation of litigation, not just the portions concerning opinions, legal theories, and the like, is protected by the work product doctrine and falls under exemption 5." 117 F.3d at 620.

● On remand, Tax Analysts argued successfully that, notwithstanding the scope of the work product doctrine, the requester "is entitled to the agency working law, legal analysis, and conclusions, so long as the 'mental impressions, conclusions, opinions, or legal theories of an attorney' are protected." 81 A.F.T.R.2d ¶ 98-661, slip op. at 6.

● For purposes of the FSA litigation, the attorney work product privilege was asserted only for docketed FSAs; *i.e.,* those FSAs written in cases already in court (which should bear a docket number in the subject line), and those in bankruptcy. We did not claim attorney work product for any nondocketed FSAs, even where the IRS could have articulated a reasonable anticipation of litigation on a case-by-case basis. However, for purposes of CCAs, if it can fairly be stated that the document was prepared "primarily because of" litigation -- a "but for" test -- then the attorney work product privilege may attach. In addition to docketed CCAs, for example, documents written in cases designated for litigation may be subject to the attorney work product privilege. In contrast, documents ordinarily prepared in the course of the audit or collection stream, such as reviews of statutory notices, summonses, or information document requests, are generally not subject to the attorney work product privilege.

● Distinguish between neutral, "hornbook" discussions of law - consider this the agency working law (*i.e.,* analysis of statutory or case authority and conclusions) obligated to be disclosed - from the strategic analysis, mental impressions, conclusions, opinions,

or legal theories of an attorney which may be redacted as attorney work product.

- Examples of material redacted as attorney work product privileged are:

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D. (B)(7)(E) LAW ENFORCEMENT GUIDELINES, DISCLOSURE OF WHICH COULD ENABLE TAXPAYERS TO CIRCUMVENT THE LAW

- The district court ruled on several of the IRS's assertions of exemption (b)(7)(E), upholding several assertions but rejecting several others. The IRS has chosen not to appeal these ruling. In one instance, the court upheld the IRS's assertion of exemption (b)(7)(E) for a description of a systemic weakness in an IRS enforcement tool dealing with last known addresses. In another instance, however, the court held that assessments of litigating hazards or of the relative strengths and weaknesses of legal positions would not result in taxpayers circumventing the law and therefore were not covered by exemption (b)(7)(E). The court also rejected the assertion of exemption (b)(7)(E) for a suggestion that a district could choose in its discretion not to devote its resources to cases of small monetary consequence or involving few taxpayers.

- It is not asserted for matters publicly available, either through the IRM, CCDM, Chief Counsel Notices, or other forms of published guidance or information.

● It is not asserted for legal analysis that discusses vulnerabilities in the statute itself; rather, it may be asserted to withhold vulnerabilities in the IRS's processes and procedures for detecting noncompliance; tolerances that govern (as opposed to suggest) how the IRS's limited compliance resources are used; settlement criteria that would enable taxpayers to structure future transactions with the knowledge that the Service will routinely settle of a certain level, etc.

● Examples of matters withheld pursuant to exemption (b)(7)(E) are:

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E. OTHER FOIA EXEMPTIONS

● In addition to the redactions of taxpayer-identifying information to protect taxpayer confidentiality, and the redactions of attorney-client communications, attorney work product, and (b)(7)(E) information, as discussed above, section 3509 of the IRS Restructuring & Reform Act of 1998 also permits the redaction of certain types of information to protect taxpayer business or personal interests and certain legitimate governmental interests, borrowing from other FOIA exemptions. Key among them are:

▸ **Trade secrets & proprietary information** (Information ordinarily not introduced into the marketplace and which, if disclosed, could cause competitive harm to the owner) -- 5 U.S.C. § 552(b)(4)

▸ **Sensitive personnel, medical, or similar information** which, if disclosed, would constitute an unwarranted invasion of personal privacy (because the privacy interest outweighs the public interest, as reflective of how the agency transacts its business) -- 5 U.S.C. § 552(b)(6)

- **Law enforcement information which, if disclosed, could reasonably be expected to interfere with open examination, collection, criminal investigation, or judicial proceedings**; *e.g.,* reveal the scope, direction, and limits of the investigation or proceeding; reveal the identity of cooperating witnesses and/or informants; reveal physical and/or testimonial evidence gathered to date and the reliance placed by the government upon that evidence; reveal litigating strategies, strengths and weaknesses of the case; reveal transactions being investigated; and reveal the methods and subjects of surveillance. -- 5 U.S.C. § 552(b)(7)(A)

F. IRS's and the Administration's Discretionary Disclosure Policy

- Even if a privilege may be asserted under the law, the Government must then analyze whether the release of the information would be harmful. There is much room for agencies to apply this "foreseeable harm" standard within the realm of the deliberative process, attorney-client, and attorney work product privileges subsumed within FOIA exemption 5. The "harm" standard, by its very nature, requires that the agency consider the applicability of the exemption and its particular privilege on a case-by-case basis; through "consideration of the reasonably expected consequences of disclosure in each particular case."

- The Department of Justice's Office of Information and Privacy suggests that agencies consider the following factors as they assess the "harm" to its interests before invoking a discretionary FOIA exemption:

  - Factors to be considered in assessing "harm" before asserting deliberative process privilege:

    - the **nature of the decision** involved - some are inherently more sensitive or controversial than others;

    - the **nature of the decisionmaking process** itself - some decisions are more policy-oriented, rather than case-specific;

    - the **status of the decision** - if the decision is not yet made, then there could be far greater likelihood of harm from disclosure;

    - the **potential and significance for process impairment** - will disclosure actually diminish candor and adversely affect decisional quality?

    - **the age of the information** - the sensitivity of all information fades with the passage of time.

▸▸ Factors to be considered in asserting the attorney work product privilege:

▸ **the time element** - is the case still pending, or fully briefed, where the sensitivity of even the "core work product" has faded?

▸ **the litigation connection element** - even if the case from which the record arose is over, does the information remain sensitive due to other, similarly related or recurring litigation?

▸ **the substantive scope element** - distinguish between factual data and the mental impressions and strategies of the attorney; and

▸ **inherent sensitivity element** - notwithstanding the above, the information isn't sensitive in any event.

▸▸ Both sets of factors may be applicable to the "harm" analysis as it pertains to the assertion of the attorney-client privilege.

DISCRETIONARY DISCLOSURE POLICIES

INTERNAL REVENUE SERVICE:

"The Internal Revenue Service will grant a request under the Freedom of Information Act (5 U.S.C. 552) for a record which is not prohibited from disclosing by law or regulations unless the record is exempt from required disclosure under the FOIA and public knowledge of the information contained in such record would significantly impede or nullify IRS actions in carrying out a responsibility or function, or would constitute an unwarranted invasion of personal privacy."

IRM 1230-51, Internal Management Document System Handbook, text 293(2).

CLINTON ADMINISTRATION:

ATTORNEY GENERAL RENO'S FOIA MEMORANDUM
October 4, 1993

MEMORANDUM FOR HEADS OF DEPARTMENTS AND AGENCIES

SUBJECT: The Freedom of Information Act

President Clinton has asked each Federal department and agency to take steps to ensure it is in compliance with both the letter and the spirit of the Freedom of Information Act. Therefore, I hereby rescind the Department of Justice's 1981 guidelines for the defense of agency action in Freedom of Information Act litigation. The Department will no longer defend an agency's withholding of information merely because there is a "substantial legal basis" for doing so. Rather, in determining whether or not to defend a nondisclosure decision, we will apply a presumption of disclosure.

To be sure, the Act accommodates, through its exemption structure, the countervailing interests that can exist in both disclosure and nondisclosure of government information. Yet while the Act's exemptions are designed to guard against harm to governmental and private interests, I firmly believe that these exemptions are best applied with specific reference to such harm, and only after consideration of the reasonably expected consequences of disclosure in each particular case.

In short, it shall be the policy of the Department of Justice to defend the assertion of a FOIA exemption only in those cases where the agency reasonably foresees that disclosure would be harmful to an interest protected by that exemption. Where an item of information might technically or arguably fall within an exemption, it ought not to be withheld from a FOIA requester unless it need be (emphasis added).

It is my belief that this change in policy serves the public interest by achieving the Act's primary objective -- maximum responsible disclosure of government information -- while preserving essential confidentiality. Accordingly, I strongly encourage your FOIA officers to make "discretionary disclosures" whenever possible under the Act. Such disclosures are possible under a number of FOIA exemptions, especially when only a governmental interest would be affected. The exemptions and opportunities for "discretionary disclosures" are discussed in the Discretionary Disclosure and Waiver section of the "Justice Department Guide to the Freedom of Information Act." As that discussion points out, agencies can make discretionary FOIA disclosures as a matter of good public policy without concern for future "waiver consequences" for similar information. Such disclosures can also readily satisfy an agency's "reasonable segregation" obligation under the Act in connection with marginally exemption information, see 5 U.S.C. § 552(b), and can lessen an agency's administrative burden at all levels of the administrative process

and in litigation. I note that this policy is not intended to create any substantive or procedural rights enforceable at law.

In connection with the repeal of the 1981 guidelines, I am requesting that the Assistant Attorneys General for the Department's Civil and Tax Divisions, as well as the United States Attorneys, undertake a review of the merits of all pending FOIA cases handled by them, according to the standards set forth above. The Department's litigating attorneys will strive to work closely with your general counsels and their litigation staffs to implement this new policy on a case-by-case basis. The Department's Office of Information and Privacy can also be called upon for assistance in this process, as well as for policy guidance to agency FOIA officers.

In addition, at the Department of Justice we are undertaking a complete review and revision of our regulations implementing the FOIA, all related regulations pertaining to the Privacy Act of 1974, 5 U.S.C. § 552a, as well as the Department's disclosure policies generally. We are also planning to conduct a Department-wide "FOIA Form Review." Envisioned is a comprehensive review of all standard FOIA forms and correspondence utilized by the Justice Department's various components. These items will be reviewed for their correctness, completeness, consistency, and particularly for their use of clear
language. As we conduct this review, we will be especially mindful that FOIA requesters are users of a government service, participants in an administrative process, and constituents of our democratic society. I encourage you to do likewise at your departments and agencies.

Finally, I would like to take this opportunity to raise with you the longstanding problem of administrative backlogs under the Freedom of Information Act. Many Federal departments and agencies are often unable to meet the Act's ten-day time limit for processing FOIA requests, and some agencies -- especially those dealing with high-volume demands for particularly sensitive records -- maintain large FOIA backlogs greatly exceeding the mandated time period. The reasons for this may vary, but principally it appears to be a problem of too few resources in the face of too heavy a workload. This is a serious problem -- one of growing concern and frustration to both FOIA requesters and Congress, and to agency FOIA officers as well.

It is my hope that we can work constructively together, with Congress and the FOIA-requester community, to reduce backlogs during the coming year. To ensure that we have a clear and current understanding of the situation, I am requesting that each of you send to the Department's Office of Information and Privacy a copy of your agency's Annual FOIA Report to Congress for 1992. Please include with this report a letter describing the extent of any present FOIA backlog, FOIA staffing difficulties, and any other observations in this regard that you believe would be helpful.

In closing, I want to reemphasize the importance of our cooperative efforts in this area. The American public's understanding of the workings of its government is a cornerstone of our democracy. The Department of Justice stands prepared to assist all Federal agencies as we make government throughout the executive branch more open, more responsive, and more accountable.

DRAFT July 12, 1998

Office Symbols
Case Number

[**No initiator name**]

UILC: xxxx.xx-xx
xxxx.xx-xx

MEMORANDUM FORMAT

Internal Revenue Service National Office Field Service Advice

This Field Service Advice responds to your memorandum dated [insert date]. Field Service Advice is not binding on Examination or Appeals and is not a final case determination. This document is not to be cited as precedent.

LEGEND:

City	= City, State
X	= XYZ Company
Year 1	= 1993
Year 2	= 1994
w	= 2,825,000
x	= 25,000,000

ISSUE(S):

State the issue in clear, precise language. Whenever appropriate, state any additional issues that have been identified but were not specifically raised by the incoming correspondence.

CONCLUSION:

A specific statement as to the conclusion reached with respect to each issue. This conclusion must be written to leave no doubt as to its meaning and to make it clear it is based solely on the facts presented.

FACTS:

The statement of facts incorporated in the Field Service Advice should be set out concisely but without any sacrifice of clarity. The essential facts should be presented fully. Facts found in documents attached to the incoming statement may be included, but the documents themselves should not be incorporated by reference. Short quotations from the incoming statement may be used as an aid in definitely pinning down particular areas

when the conclusion depends on the interpretation of such language. Lengthy quotations from documents contained in the file should be avoided whenever practicable.

LAW AND ANALYSIS:

This part of the document should set forth clearly and concisely the pertinent law, regulations, published rulings of the Service, and case law or other precedent and the rationale to bridge between the issue, law and conclusion.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS:

This part of the document should explicitly include, as appropriate, a discussion of audit techniques, case development, legal precedent or other factual or tactical considerations that may pose litigation hazards. Be mindful that just because information is included in this portion of the document does not, by itself, warrant nondisclosure. The information must satisfy the exemption being asserted and, for discretionary exemptions, a determination that disclosure satisfies the “harm” standard.

If you have any further questions, please call (202) 622-xxxx [branch telephone number].

DEBORAH A. BUTLER

By: _____
REVIEWER'S NAME
Title
Branch

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:DOM:FS:PROC
TL-N-1493-98

UILC: 6501.08-02

date: February 23, 2001

to: District Counsel, Delaware-Maryland CC:SER:DEM:BAL

from: Assistant Chief Counsel (Field Service) CC:DOM:FS:PROC

subject: Internal Revenue Service National Office Field Service Advice

This Field Service Advice is in response to your memorandum dated March 12, 1998. Field Service Advice is not binding Examination or Appeals and is not a final case determination. Field Service Advice issued to Examination or Appeals is advisory only and does not resolve Service position on an issue or provide the final basis for closing a case. This document is not to be relied upon or otherwise cited as precedent.

LEGEND:

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Year 1 =
Year 2 =
Year 5 =

ISSUE:

Where the Service issues a statutory notice of deficiency, and the period of limitations provided by I.R.C. section 6501(a) would have expired but for that statutory notice, does the suspension provided by section 6503 affect the period of limitations so that a Form 872 executed by the Service and A during the suspension period is effective to hold open the period of limitations?

CONCLUSION:

Yes. Because the period of limitations was suspended by operation of section 6503, and the period of limitations remained open when the suspension took effect, the period of limitations did not independently expire, and was still open for Year 1 when the Form 872 was executed. Therefore the Form 872 is effective to hold the statute of limitations open.

FACTS:

Taxpayer A was examined. A and the Service were unable to agree with respect to the issues raised in the examination. Accordingly, during Year 5, a notice of deficiency was issued to A for Years 1 and 2. Because A filed a timely return for year 1, the period of limitations provided by section 6501(a) for that year was scheduled to expire on April 15, Year 5. The notice of deficiency was issued in Year 5 before the April 15 deadline. During the ninety days following the issuance of the notice of deficiency, A contacted the Service with additional information but did not file a petition in the United States Tax Court. Instead A submitted a Form 872, Consent to Extend the Time to Assess Tax, for Years 1 and 2, within 150 days of the issuance of the notice of deficiency. The Service accepted the Form 872. Rather than assessing the defaulted deficiency, the Service transferred the case to the Appeals Division for consideration. The Appeals Division became concerned that the period of limitations for Year 1 had expired, and requested the views of your office. Your office concluded that the period had expired, but requested our views in light of the Service's strenuous disagreement with that opinion.

LAW AND ANALYSIS:

I.R.C. section 6501(a) provides as a general rule that the amount of any tax must be assessed within three years of the filing of the taxpayer's return for the year, and that "no proceeding ... without assessment for the collection of such tax shall be begun after the expiration of such period."

Section 6501(c)(4), in pertinent part, provides:

> Where, before the expiration **of the time prescribed in this section** for the assessment of any tax ... both the Secretary and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon.

Section 6503(a)(1) provides, in pertinent part:

> The running of the period of limitations provided in section 6501 ... on the making of assessments ... in respect of any deficiency ... shall (after the mailing of a notice under section 6212(a)) be suspended for the period during which the Secretary is prohibited from making the assessment ..., and for 60 days thereafter.

Section 6213(a) provides that a taxpayer may petition the Tax Court for redetermination of a deficiency within 90 days of the mailing of the notice of deficiency. Section 6213(a) further prohibits the Secretary from assessing a deficiency which is the subject of a notice, until the notice has been mailed to the taxpayer, and the 90 day period for filing a petition has expired.

In Crawford v. Commissioner, 97 T.C. 302 (1991), the taxpayer was engaged in a hobby. He filed the proper forms to elect to postpone the determination regarding whether the activity was engaged in for profit for a five year test period. Pursuant to section 183(e)(4), after Crawford's election, the period for assessing tax with respect to Crawford's activity would "not expire before the expiration of two years after a return is due...for the last year in the test period." 97 T.C. at 304. During the first year after the test period, Crawford and the Service executed a Form 872, Consent to Extend the Time to Assess Tax. Before the extended period expired the Service mailed Crawford a notice of deficiency. Crawford petitioned the Tax Court, and alleged that the Form 872 was ineffective because it had been executed during the extended period provided by section 183(e)(4), rather that the three year period mandated by section 6501(c)(4). The Tax Court rejected this argument. Instead the Tax Court examined the legislative history of section 183(e), which it concluded evidenced a legislative intent to modify section 6501 (a) where a section 183(e) election had been made. The Tax Court stated:

> As a result, that modification must be taken into account, as if written into section 6501(a), when applying section 6501(a) in connection with a section 183 activity for which the election has been made. An agreement under section 6501(c)(4) would, by the same reasoning, be effective to extend the period of limitations provided for in section 6501(a), **notwithstanding that it was entered into after the normal 3-year period provided for in that section had run**, so long as it was entered into before the section 6501(a) period, **as extended by section 183(e)(4), had run**. Of course, it would be effective only with regard to assessments arising from deficiencies attributable to the section 183 activity.

97 T.C. at 307 (emphasis added). The Tax Court concluded that the period of limitations was open at the time the extension agreement was executed, and that the extension agreement was therefore effective.

We believe that the effect of section 6503 is similar to the effect of section 183(e)(4). Section 183(e)(4) was enacted to allow the period of limitations under section 6501(a) to be extended by operation of law where the Service required additional time to examine an activity's profit motive. Similarly the function of section 6503 is to suspend or defer the running of the period of limitations by operation of law while a taxpayer evaluates his options after receiving a statutory notice of deficiency. The suspension also furthers orderly administration by providing a definite time during which the Service may assess a deficiency and request payment after a taxpayer's Tax Court petition period has expired, since the Internal Revenue Code provides a taxpayer with a choice between the prepayment forum of the Tax Court and the postpayment forum of the refund suit. See also Ripley v. Commissioner, 105 T.C. 358, 361 (1995)(unexpired portion of original period of limitations "tacked" onto suspension period of section 6503, making notice of transferee liability timely.)

Your office concluded, based on the language of section 6501(c)(4) highlighted above, that an agreement to extend the period of limitations must be executed within the three year period provided by section 6501(a) to be effective. The taxpayer in Crawford took the same position, and the Tax Court rejected it. We believe the Tax Court's reasoning is correct. Moreover, our research discloses no announced Service policy to the contrary. The Service has structured its administrative practices to attempt to secure an extension of the period of limitations during that three year period. We believe the administrative practice of usually securing an extension within the original three year period of limitations is appropriate practice. However, we believe the Internal Revenue Code allows the Service to secure an extension agreement at any time provided that the period of limitations with respect to a year is open.

You called our attention to the amendment of section 6212(d), which was amended by the Technical and Miscellaneous Revenue Act of 1988, P.L. 100-647, to add the final sentence of the section. The sentence added by the amendment reads: "Nothing in this subsection shall affect any suspension of the running of any period of limitations during any period during which the rescinded notice was outstanding." The Committee Report regarding this provision of P.L. 100-647 indicates that the amendment was intended to clarify existing law. Therefore, contrary to your suggestion, the issuance of a statutory notice is the event triggering the section 6503 suspension, not the filing of a Tax Court petition.

The legislative history of original section 6212(d) stated that a rescinded statutory notice of deficiency was to be treated as if it never existed. Concern arose that a taxpayer could convince the Tax Court to regard a rescinded statutory notice as if it were invalid. A statutory notice which is invalid, or a nullity, is invalid for all purposes. See Coffey v. Commissioner, 96 T.C. 161 (1991); Carnahan v. Commissioner, T.C. Memo. 1991-168. A taxpayer could have argued that a rescinded statutory notice would not suspend the running of the period of limitations, based on the language of the legislative history. Since it may be necessary in some situations to issue a new statutory notice of deficiency after a rescission, the Service became concerned that absent the suspension of the period of limitations, it would be foreclosed from issuing a proper notice after a rescission. Accordingly, it requested and received the amendment to section 6212(d) quoted above. Since this provision indicates that the suspension period in section 6503 will operate to extend the section 6501 period within which a notice of deficiency may be issued, it follows that it also extends the section 6501 period within which a consent may be executed.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS:

We believe that if the Tax Court were presented with this case and asked by the taxpayer to rule that the period of limitations had expired, the Service would prevail. We believe the Tax Court would apply its Crawford reasoning in the government's favor. In our view, it is appropriate for the Service to accept an extension of the period of limitations in this case, for Appeals to consider additional information the examiner may have improperly disregarded. Every effort should be made to settle this matter without litigation so that the issue of the expiration of the period of limitations does not have to be litigated. However, if the Service is unable to reach an agreement, this office would support a litigation position in favor of the timeliness of the extension agreement.

If you have any further questions, please call (202) 622-7950.

DEBORAH A. BUTLER

By: _____
RICHARD G. GOLDMAN
Special Counsel (Tax Practice & Procedure)
Procedural Branch

Department of the Treasury
Internal Revenue Service

Notice 437A
OMB No.1545-0633

Taxpayer Name
Mailing Date
of this Notice
Last Date to Request
IRS Review
Last Date to Petition
Tax Court
Date Open to Public
Inspection

Section 6110 of the Internal Revenue Code, as amended, provides that Chief Counsel Advice will be open to public inspection after deletions are made. Chief Counsel Advice will be open to public inspection in the Freedom of Information (FOI) Reading Room, 1111 Constitution Avenue, N.W., Washington, D.C. 20224, where they may be read and copied by anyone interested. Chief Counsel Advice issued after [date] will also be available to the public on the IRS Website, http: //www.irs.ustreas.gov.

In accordance with section 6110, we intend to make this Chief Counsel Advice which pertains to you open to public inspection. Subsection 6110(i)(3) permits us to delete your taxpayer-identifying information in accordance with section 6110(c)(1), or other information falling within the Freedom of Information Act (FOIA)'s exemptions, 5 U.S.C. 552(b), or law enforcement exclusions, 5 U.S.C. 552(c).

Enclosed are two versions of the Chief Counsel Advice; both versions contain deletions of the names, addresses, and other identifying details of taxpayers other than yourself (of which you were not the source), and any other information exempt from public disclosure under the FOIA exemptions which protect various governmental interests. Because this information is exempt from public disclosure for reasons other than any relationship to your taxpayer privacy, personal or business interests, these deletions are not part of our request for your comments and input. Should you have concerns about these deletions, you, along with other members of the public, may request us to make additional portions of this Chief Counsel Advice public only after the Chief Counsel Advice is made open to public inspection in deleted form.

One version reveals to you, as indicated by the shaded text, the information pertaining to you that we propose to delete pursuant to section 6110(c)(1) or any applicable FOIA exemptions (*e.g.,* trade secrets or other proprietary information (5 U.S.C. 552(b)(4)) or personal information (5 U.S.C. 552(b)(6)), before making this Chief Counsel Advice available to the public. We are asking you to tell us whether these, or any other deletions, should be made to protect your privacy as a taxpayer or other personal or business interests covered by the FOIA exemptions.

If you agree with the proposed deletions of your information, you don't need to take any further action. We will place the "deleted version" in the National Office FOI Reading Room (and the IRS Website) on the "Date Open to Public Inspection" shown on this notice.

If you disagree with the proposed deletions of your information, please return the "shaded version" of the Chief Counsel Advice that contains your information and show, in brackets, any additional information you believe should be deleted pursuant to section 6110(c)(1). If you believe any other information should be deleted in accordance with any FOIA exemptions, also show, in brackets, this information. Include a statement supporting your position. Only material falling within section 6110(c)(1) or the FOIA may be deleted. Your statement should specify which of these categories is applicable with respect to each additional deletion you propose. Send the "shaded version," with additional deletions bracketed, and statement to:

Commissioner of Internal Revenue
Attention: CC:PA:T
Ben Franklin Station
P.O. Box 7604
Washington, D.C. 20044

It must be postmarked no later than the "Last Date to Request IRS Review" shown on this notice. We will give your submission careful consideration. If we feel we cannot make any or all of the additional deletions you suggest, we will so advise you no later than 20 days after we receive your submission. You will then have the right to file a petition in the United States Tax Court if you disagree with us. Your petition must be filed no later than the "Last Date to Petition Tax Court" shown on this notice, which is 60 days after the mailing date of this notice. If a petition is filed in the Tax Court, the disputed portion(s) of the Chief Counsel Advice won't be placed in the FOI Reading Room (or IRS Website) until after a court decision becomes final.

If no petition is filed in the Tax Court, "the deleted version" of the Chief Counsel Advice will be made open to public inspection on the date shown on this notice. If the transaction to which the Chief Counsel Advice relates will not be completed by then, you may request a delay of public inspection. See Treas. Reg. 301.6110-5(c)(2)(ii).

Additional Disclosure

After "the deleted version" of this Chief Counsel Advice is placed in the FOI Reading Room (or IRS Website), any person, including yourself, may request us to make additional portions of the Chief Counsel Advice open to public inspection. See Treas. Reg. 301.6110-5(d). If we receive a request that involves disclosure of your name, address, or taxpayer identifying number, we will deny the request and you won't be contacted. If we receive a request from another member of the public involving disclosure of anything other than names, addresses, or taxpayer identifying numbers, which you requested we delete, we will contact you before taking action.

Third Party Communications

"The deleted version" of this Chief Counsel Advice may contain the notation "Third Party Communication." This indicates that IRS received a communication (written or oral) regarding this Chief Counsel Advice from a person outside the IRS (other than you or your authorized representative). The date of the communication and the category of the person making the contact (such as "Congressional" or "Trade Association") will be indicated.

If you have any questions regarding this notice, please contact:

Chief, Disclosure Unit
Attention: CC:PA:T
Ben Franklin Station
Post Office Box 7604
Washington, D.C. 20044
(202) 622-7570

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minutes. If you have comments concerning the accuracy of this time estimate or suggestions for making this notice simpler, we would be happy to hear from you. You can write to the Tax Forms Committee, Western Area Distribution Center, Rancho Cordova, CA 95743-0001. Do not send your submission to this address. Instead, send it to: **Internal Revenue Service**, Attention: CC:PA:T, Ben Franklin Station, Post Office Box 7604, Washington, D.C. 20044.