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**From:**
**Sent:** Wednesday, November 12, 2008 2:57 PM
**To:**
**Cc:**
**Subject:** Summons follow up

Hi

As to corporate summons, look at Question IV.3 (page 10) of the FAQ Pertaining to Summons document I am attaching (this document can be found on the website and I have found it very helpful in the past):

**ATTACHMENT**

# Frequently Asked Questions (FAQs) Pertaining to Summonses

***Table of Contents***

## I. Summons Authority and Information that May be Summoned

1. What is the statutory authority for an IRS summons?

I.R.C. § 7602 authorizes the IRS to issue a summons to any person having information that "may be relevant" to its investigation. That authority permits the IRS to require a person to appear at a designated location and to produce books and records or give testimony under oath that will enable the IRS to:

- determine the accuracy of a return,
- determine liability for any internal revenue tax,
- to collect those taxes, or
- inquire into any offense relating to the administration or enforcement of the internal revenue code.

2. What information may be summoned?

The Service's summons authority is very broad. It authorizes the examination of any records or the taking of testimony under oath from witnesses that "may be relevant or material."

3. Are there differences between what the IRS may *require* and what the IRS may *request* through a summons, when documents or records were not in existence when the summons was served?

Yes. With few exceptions, an IRS summons, may only *require* the production of existing records. For example, a summons generally may not require a witness to produce an unfiled tax return that has not yet been prepared. IRM 25.5.4.2(5). On the other hand, a witness may be required at a summons interview to produce a handwriting exemplar. And a taxpayer that receives a summons under I.R.C. § 6038A must produce an English translation of the responsive foreign language documents to the IRS within 30 days. Treas. Reg. § 1.6038A-3(b)(3).

In its instructions to a summons the IRS should request a witness to produce a privilege log for records the witness fails to produce based upon the assertion of a privilege. Similarly, in its instructions to a summons or in a separate letter, the IRS may request that summoned material be produced in a specific electronic format, if it is simple for the taxpayer to convert the records to that format.

4. May the Service attach a list of questions to the summons for the witness to answer?

The Service cannot require the summoned person to create a document that responds to a list of questions, but the Service may compel live testimony from a summoned witness. When the IRS is seeking testimony from a witness in a complex case, it is a best practice for the IRS to describe with reasonable

particularity, in an attachment to the summons, the matters on which testimony is requested.

5. May the Service receive summoned documents in electronic format?

Yes, but I.R.C. § 7610 and the regulations do not provide reimbursement for electronically produced documents.

6. Can the Service require records in a preferred format (for example, electronically)?

The Service can only *request,* not demand, that records be produced in a certain format. A summons demands the production of records maintained in an existing format.

## II. Types of Summonses & Why It Matters

1. When the IRS is examining an entity taxpayer (e.g., a corporation) and issues a summons for testimony or records from an employee, do the procedures differ if the summoned party is a current or former employee?

Yes. A summons on a current employee of an entity taxpayer is treated as a first-party summons. I.R.C. § 7609(c)(2). As a result, the witness must answer the summons in 10 days and no notice of the summons is required to be given to any third parties identified within the summons. However, the taxpayer's counsel may attend the summons interview as the representative of the taxpayer's employee.

A summons upon a former employee of the entity taxpayer that is an ongoing business is treated as a third-party summons. The witness must be given at least 23 full days to answer, and notice of the summons is required to be given to the taxpayer and to any other third party identified within the summons. The entity taxpayer's counsel is not presumed, however, to have any right to attend the summons interview of the former employee.

A summons upon a former employee who is the designated custodian of the records of an entity taxpayer that is no longer in business is treated as a first-party summons. Similarly, if the entity taxpayer under audit is a TEFRA partnership, then a summons upon the Tax Matters Partner (TMP) for the TEFRA partnership years under examination would be treated by the IRS as a first-party summons. This is so even if the TMP for the partnership years under examination was no longer a managing partner or even a partner of the partnership at the time the summons was issued.

2. What type of summons may the IRS use to obtain an investor list(s) from a promoter who may be a "material advisor" with respect to a reportable transaction under I.R.C. §§ 6111 and/or 6112?

The IRS has three choices for obtaining such an investor list(s) from a promoter. First, the IRS may serve the promoter with a first-party summons in connection with a promoter penalty investigation of the promoter. This could also function as a "dual purpose" summons, since one purpose of the summons is to assist the promoter penalty investigation of the promoter, and the other purpose is to investigate the investors for their own potential federal tax liabilities. Second, if the IRS has a reasonable basis for believing that the investors in certain transactions may have failed to comply with the internal revenue laws, and if the other requirements of I.R.C. § 7609(f) are met, then the IRS (through DOJ) may seek approval from a U.S. district court to serve a John Doe summons upon the promoter for the appropriate investor list(s). Third, the Service may simultaneously or *in seriatim* both serve the first-party, dual purpose summons upon the promoter and also seek court approval to serve a John Doe summons upon the promoter. The John Doe summons option requires a higher showing by the IRS that the investor's transactions may not have complied with the tax laws and it requires a more extensive review by IRS executives, in addition to judicial review. But the John Doe summons has the potential advantage (when dealing with an uncooperative promoter) of suspending the assessment statutes of limitation for the unknown investors whose identities are sought. This will begin six months after the John Doe summons is served if the summons has not been complied with in full.

If the IRS is interested in obtaining documents and information from the promoter other than just the identities of the promoter's unknown investors, then the IRS will ordinarily seek the additional information from the promoter either through a first-party, dual purpose summons upon the promoter in connection with a promoter penalty investigation or through a third-party summons upon the promoter in connection with an IRS investigation of a particular known investor. For unknown investor assessment statutes of limitations still open on October 22, 2004, the effective date of I.R.C. § 6501(c)(10), the assessment statute may be suspended only if the unknown investor's transaction is a "listed" transaction or substantially similar to a listed transaction. However, unknown investor assessment statutes may be suspended by a John Doe summons after six months, whether or not the investor's transaction was a listed one.

## III. Legal Obstacles to Issuing a Summons

1. If the IRS is interested in obtaining from the promoter of a questionable tax strategy the names and other data of its participants, but the Service is unable to describe circumstances under which the promoter had registration/return filing or investor list maintenance responsibilities with respect to that strategy under I.R.C. §§ 6111 or 6112, may the IRS seek that information from the promoter using a dual purpose summons issued with regard to an I.R.C. §§ 6707 and 6708 promoter penalty investigation?

No. If there is no conceivable good faith basis for the promoter investigation, then there is no second purpose to support a "dual purpose" summons. Here there is only a single purpose - the investigation of the promoter's unknown investors. When the Service's only legitimate investigatory interest is in the unknown investors, then a John Doe summons must be used.

2. If the IRS has referred a tax shelter promoter to the Tax Division to conduct a criminal tax grand jury investigation, is the IRS barred by I.R.C. § 7602(d) from issuing or enforcing a: (i) third-party summons upon that promoter in connection with an IRS examination of one of the promoter's investors, seeking records and/or testimony from the promoter; or (ii) a John Doe summons upon the promoter to obtain a list of the promoter's unknown investors?

No. I.R.C. § 7602(d)(3) provides for a separate analysis and comparison of each taxable period and type of tax. See, examples in Treas. Reg. § 301.7602-1(c)(4)(ii). Since the known investor's potential income tax liability for which the third-party summons would be issued is not the same potential tax liability being investigated by the grand jury, section 7602(d)(3) is not an obstacle to that summons. Similarly, the tax liabilities of the unknown investors for which the John Doe summons would be issued are not the same potential tax liabilities for which the promoter is being investigated by the grand jury.

As a policy matter, however, the civil side investigator is required to coordinate with the CI counterpart to determine whether any part of the proposed civil summons has the potential to harm the criminal tax investigation. Sometimes CI may want to restrict civil tax contacts with the promoter with respect to a particular investor or set of transactions. Other times CI may have no concern with a third-party summons or John Doe summons upon the promoter for records only, including limited testimony on the extent of the promoter's search for requested records. And sometimes CI may have no concern at all with a third-party summons or John Doe summons for records and testimony from the promoter with respect to an investor or transaction under examination (e.g., if the investor or the John Does were not involved with one of the transactions that the grand jury is considering). In the case of a summons upon a promoter who is an individual, CI may also be concerned about how a Fifth Amendment defense of the summoned party would eventually play out.

3. If the summoned information "may be relevant" to the open tax years under investigation is the IRS precluded from asking for information regarding an already closed tax year, a tax year in Appeals, a tax year for which a notice of deficiency or Final Partnership Administrative Adjustment (FPAA) has already been issued, or a tax year already docketed in Tax Court or being handled by the Tax Division?

No. However, before using a summons to ask for prior year information that may be relevant for the open tax years under examination when there is an already docketed case for the prior year, it would be prudent for the IRS to consult with

the Government attorney for the docketed tax year to determine whether that information is already in the Government's possession. It would also be good idea to inquire whether the Government attorney objects to the proposed summons request for information that involves the prior docketed year.

4. May the IRS issue a "friendly" summons to a witness?

It depends upon what the IRS employee means by referring to the summons as a "friendly" summons. If the IRS employee means a summons that fails to comply fully with the Internal Revenue Code, then the answer is "no."

- A "dual purpose" summons that does not in fact relate to the person identified as the taxpayer on the summons, is not a summons that complies with the Internal Revenue Code. Such a summons needs to be treated as a de facto John Doe summons for which a U.S. district court's pre-approval to serve the summons is required. This is the case even if the witness indicates in advance that it would be willing to provide the information about unknown persons of interest to the IRS if the ("friendly") witness is first provided with an IRS summons. This does not mean the IRS could not provide the friendly witness with an informal request for the same information; the friendly, de facto John Doe summons that ignores the Code's criteria for approval of a John Doe summons is what the Code prohibits.

- A third party summons that an IRS agent agrees not to send to a noticee when it is otherwise required by I.R.C. § 7609(a) would also not comply with the Internal Revenue Code. For instance, when a revenue agent is seeking information from a third-party business that bought or sold goods or services to a taxpayer who is suspected of being a drug trafficker, the revenue agent may not agree to provide the third-party witness with an IRS summons (and a certificate under I.R.C. § 7609(i)(2)) but to omit providing the taxpayer with notice of the third-party summons because the witness is fearful of the taxpayer. However, the revenue agent could informally request the same information from the third-party witness and agree to make a "reprisal" determination (based upon the stated concerns of the witness) that notice of the third-party contact should not be provided by the IRS to the taxpayer, pursuant to I.R.C. § 7602(c)(3)(B).

If, by a "friendly" summons, the IRS employee means a third-party summons that the witness has stated in advance that it intends to honor without objection, then the stated intention of the witness to cooperate is information the IRS may properly consider in deciding whether to issue the summons. However, the IRS also needs to bear in mind that the third-party witness (at least in a civil tax exam case) is not the final arbiter of whether the summons will be complied with or resisted. The taxpayer and other statutory noticees may still timely petition to quash the summons, even though the witness indicates it may not resist complying with the summons for its own part.

- For instance, a former employee of a corporate taxpayer may indicate a willingness to turn over to the IRS, in response to a summons, detrimental information concerning advice the taxpayer's tax advisers gave the taxpayer about how to structure a transaction under audit or how to respond to an IRS request for information during an audit. Before deciding whether to issue the summons, it would be prudent for the IRS to weigh the likely outcome of a potential privilege dispute that the taxpayer may initiate to quash the summons.
- Similarly, an IRS employee may make a pre-summons contact with the ("friendly") manager of a U.S. branch of a multinational bank and be assured that the bank would honor a summons request for foreign based loan records of an unnamed U.S. taxpayer which was one of several parties involved in a transaction financed through a loan provided by a foreign branch of that bank. This pre-summons assurance from the U.S. manager, while a factor for the IRS to consider, does not mean the IRS should abandon efforts it would otherwise pursue to consider whether the summons meets the balancing test for seeking foreign-based records from a third party.

5. Is there any legal or IRS policy requirement that the IRS issue a "presummons letter" before serving a summons upon a taxpayer or other witness?

No, as a general rule there is no requirement for issuing a presummons letter, in addition to the customary IDRs and supplemental IDRs, before the IRS issues a summons to a witness. There is an exception that applies in international cases. See IRM 4.61.2.6.

6. What legal and IRM policy limitations on issuing and enforcing a summons for the periods that will be the subject of the statutory notice or FPAA should the IRS keep in mind when the assessment limitations period is about to expire and the IRS will issue the taxpayer a statutory notice of deficiency or FPAA shortly thereafter,?

First, there are no legal or IRS policy prohibitions on the IRS seeking to enforce a summons the IRS had *issued before* a statutory notice or FPAA was mailed to the taxpayer for the same taxpayer and tax years as the summons. It makes no difference whether this was done either after the IRS mails the statutory notice or FPAA or even after the taxpayer has filed a Tax Court petition with respect to the statutory notice or FPAA. Obtaining summoned information after the statutory notice or FPAA was mailed does mean, of course, that the material obtained at that time was not available to be considered in framing the IRS position in the statutory notice or FPAA, but is relevant to the positions the IRS has already taken or is needed to assert an increased deficiency in a pending Tax Court case. For this reason, especially with cases opened up by the IRS for exam with short assessment statues, it is not uncommon for the IRS to issue a series of summonses to the taxpayer or to third parties up until the mailing date of the

statutory notice or FPAA. This might occur even though the appearance date for the witness may be after the statutory notice or FPAA has been mailed and, if necessary, the summons could not be referred for enforcement to DOJ or ordered enforced by a court until some time after tax merits litigation concerning the tax years at issue may already be pending in the Tax Court.

Second, as a legal matter, the Tax Court has indicated that the absolute deadline on the IRS to issue a summons for the same taxpayer and tax years as a notice of deficiency or FPAA is the point when the taxpayer files a Tax Court petition in response to the notice of deficiency or FPAA. Ash v. Commissioner, 96 T.C. 459 (1991). The Tax Court views the issuance of a new summons after the taxpayer's petition has been filed as an improper attempt by the IRS to subvert the Tax Court's discovery rules. The IRS has directed its exam function agents to refrain from issuing a summons for the same taxpayer and tax years as a statutory notice (or FPAA) after the IRS issues (mails) its statutory notice (or FPAA). IRM 25.5.4.4.8(1). The CCDM recognizes there may be rare circumstances, where, after consultation with Counsel, a revenue agent may still issue a new summons during the gap period between mailing of the notice of deficiency or FPAA and the date that the taxpayer files a timely Tax Court petition. CCDM 35.4.3.1. For instance, if the revenue agent learns of a critical defect in the format or service of a previously served summons, then Counsel may suggest curing the defect by issuing a new, corrected summons to the witness, if that can be done before the taxpayer files a Tax Court petition.

Third, the exam function's issuance of the statutory notice or FPAA or the taxpayer's commencement of a Tax Court proceeding should not impair the ability of the criminal investigation function or the collection function to issue a legitimate summons for the same taxpayer and tax years. Similarly, an exam function agent may summon such information in connection with another taxpayer or with respect to other open tax years of the same taxpayer under exam. This might also come up if the IRS issued an early statutory notice to a taxpayer (e.g., a notice of deficiency arising from a Service Center information item matching program) and the taxpayer failed to file a timely Tax Court petition in response. If the IRS later opens a field exam of the taxpayer for additional items (e.g., a newly disclosed tax shelter transaction), and it decides to issue a summons before it sends the taxpayer a second statutory notice or a FPAA, then the first non-petitioned notice of deficiency does not represent an obstacle to the IRS issuing its intended summons during this time frame.

7. May the IRS issue a summons with respect to a taxpayer if it does not have an open case?

The absence of an open IRS case at the time the investigating function (e.g., exam, CI, or collection) issued the summons may lead a court to question whether the IRS has a legitimate purpose in issuing the summons. Of course, the IRS agent who issued the summons would be permitted an opportunity to offer any valid reason why the case opening procedures were not followed. John

Doe summonses are an exception, because the taxpayers whose identities are sought are unknown to the IRS

## IV. Summons Drafting Requirements & Tips

1. When the IRS is examining a partnership entity for potential promoter penalties and the partnership has undergone several changes in membership (partner) as well as the partnership's name, should a first-party IRS summons to the taxpayer list each of the different names for the partnership on the "In the matter of" and on the "To" lines of one summons, or should the IRS issue separate summonses, one to each of the differently named partnership entities?

The IRS should issue separate first-party summonses in this situation - one to each of the differently named partnership entities. This would counter any defense by the promoter/taxpayer that a different partnership than the one summoned existed during the time period that a particular transaction being asked about occurred. It would also counter any argument that the records of the subject transaction are being held by the custodian of records for a previous or later named partnership. These arguments are not entirely specious because different individual partners may be derivatively liable for paying the partnership's promoter penalty. It all depends on the time period in which the activity giving rise to the partnership promoter penalty occurred and who was a partner at that time. IRC 6103 prohibits the identification of each of the differently named taxpayer partnerships as the entity being examined on the same first party summons. However, the IRS could make each of the first-party summonses answerable at the same date and time. Thus, the summons interviews can be done concurrently if the individual responding to each of the three summonses is the same person, or successively if different individuals respond for each of the various partnerships.

2. How is a summons captioned with respect to a consolidated group under examination for income taxes?

Where the taxpayer is a consolidated group under examination for income taxes, the summons "In the Matter of" line should be captioned as shown on the group's Form 1120 return. Prior or subsequent names may also be recognized, such as: (1) "ABC, Inc. and Subsidiaries" (no change in the group); or (2) "XYZ, Inc. and Subsidiaries (formerly known as ABC, Inc and Subsidiaries)." The summons may be directed to any corporate officer of the parent corporation of the consolidated group. If the summons seeks testimony from a specific corporate officer, then the summons must be directed to and personally served on that individual. The summons should be captioned on the "To" line to the individual in her official capacity at the company [e.g., Jane Smith, President, XYZ, Inc.].

3. What are the differences and implications between captioning a summons for records and testimony to "Person A, as President of XYZ Corporation" versus a summons addressed to "XYZ Corporation?"

A summons addressed to "Person A, as President of XYZ Corporation," requires the President of XYZ Corporation to search or supervise a search for and produce any responsive and non-privileged records that are in the corporation's or in the officer's personal possession. The IRS can also expect the President to testify regarding matters personally known to such officer or discovered in the course of the records search the officer conducted or supervised. This summons could not require the corporation to produce another officer or employee who is more prepared to testify regarding the matters the IRS questions. On the other hand, if the summons is addressed to "XYZ Corporation" for records and testimony and the matters upon which testimony is desired are reasonably detailed within the summons, then the IRS may personally serve the summons upon any officer or managing agent of the corporation. The corporation's management must supervise a search for and produce any requested and non-privileged records in the possession of the corporation and its officers and employees. The IRS may expect to be able to take testimony from one or more persons designated by the corporation to testify as to matters known or reasonably available to the corporation, but the IRS is not able to require on the basis of this summons that the President be one of those persons designated by the corporation to give such testimony. The differences between the two differently addressed summonses are analogous to the differences between a deposition taken under F.R.C.P. 30(a)(1) and a deposition taken under F.R.C.P. 30(b)(6).

4. How should a summons to married taxpayers filing jointly and reflecting "flow though" tax treatment from an S corporation be captioned?

The summons should be captioned in the matter of H and W. The Service should direct the summons to the spouse who possesses the summoned information. The Service treats this as a third-party summons as to the other spouse, so notice is given under I.R.C. § 7609(a). Even when both spouses are summoned (by issuing and serving separate summonses), each spouse is given notice of the other spouse's summons. This procedure preserves each spouse's opportunity to move to quash the summons served on his or her spouse. However, the Service should not treat a summons served on one taxpayer spouse as a third party summons that will suspend the other spouse's assessment statute under I.R.C. § 7609(e)(2).

5. Should a summoned witness be provided with a list of every document the IRS has already obtained and be advised not to produce any document appearing on the attached list?

No. The not-already-in-IRS-possession element of Powell for summons enforcement does not require this degree of disclosure. If summons enforcement becomes necessary, the already possessed documents may be described in a more general way in the agent's declaration. There are several potential drawbacks to providing such details in the summons. First, the list is likely to be

incomplete, either through inadvertence or a desire not to disclose potential rebuttal evidence. That incompleteness may later lead to allegations of intentional IRS misrepresentation. Second, every separate copy of a document should be treated as a separate document, especially when there may be handwritten notes appearing on one copy of the document that do not appear on another copy. The version with handwritten notes may never be obtained by the IRS if it instructs the witness that it already has the document and the witness need not produce any of its copies. Third, if the attached list of already possessed documents contains the names or identifying initials of a number of third parties and the summons is a third party summons, then the IRS must provide notice of the summons to every one of the third parties identified.

On the other hand, there are some circumstances where the IRS may prudently want to reduce the potential volume of the same summoned documents. First, if the witness has previously produced a set of unredacted Bates numbered documents in response to an informal request for information or prior summons, then the IRS may state that the present summons is not requesting those specific documents again. Another example might occur where the IRS is already in possession of one complete and unredacted binder of closing documents for a transaction that was provided to each participant in the closing, and the IRS is now interested in obtaining a specific pre-closing or post-closing transaction document the new witness may possess. There the IRS may reference the closing binder for the transaction in sufficient detail and indicate that the summons does not require production of another copy of the documents in that specific binder. If a significant volume of records produced by a third party are relevant to several taxpayers, the Service in addressing I.R.C. § 6103 concerns (See Chief Counsel Notices 2006-003 and 2006-006) may identify the previously produced records and inform the third party that it is not necessary to reproduce these records if it confirms that they are one and the same.

6. In the context of a third-party summons, should the IRS request documents or information from the witness by reference to the taxpayer's "fiscal" year, e.g., for Corporation X's fiscal years 2001 and 2002?

No. A third party witness can not be expected to know the beginning and ending dates of the taxpayer's fiscal years for income tax return filing purposes. The summons should be drafted to refer to specific date ranges or to calendar years that include the fiscal year periods the IRS wants to know about.

7. Should an IRS summons be addressed to more than one witness, e.g. to "Partner A and Partnership ABC," in which Partner A is a partner?

No. An IRS summons should be directed to only one witness at a time. In the example, the IRS may either summon the partner or the partnership, but not both with the same summons.

8. Which Service employees may issue and serve summonses?

The authority to issue and serve a summons is detailed in Delegation Order No. 4.

9. May a Tax Fraud Investigation Assistant (TFIA) issue a CI summons and still fit within the exception for CI Summonses from the notice requirement of § 7609(a)?

No. While the TFIA may prepare and serve the summons, only the special agent is authorized to sign it as the issuing officer to make the summons a "criminal investigator" summons that qualifies for the I.R.C. § 7609(c)(2)(E) exception to the notice requirement. Issuing a summons and serving a summons are two distinct tasks. See Delegation Order No. 4, IRM 1.2.52.5. The delegation to serve a summons by a TFIA is contained in paragraphs 11 and 12.

10. Should the badge number of the IRS employee before whom a summoned witness is directed to appear be included on the summons form?

Yes, it is a "best practice" to supply the badge number following the employee's title and name, e.g. "You are hereby summoned and required to appear before Revenue Agent [First & Last Name], badge # XX-XXXXX, or his/her designee an officer of the [IRS] …." Although inclusion of the IRS employee badge number on the summons is a best practice, it is not a requirement of the Internal Revenue Code or Powell. Rather, RRA '98 section 3705(a), an off-Code provision, directs that any manually generated correspondence received by a taxpayer from the IRS or any IRS employee's personal or telephone contact with a taxpayer include disclosure of the IRS employee's unique identifying number.

11. Should a summons request that a witness produce a privilege log for any documents withheld from production on privilege grounds, even though the witness has not yet asserted a privilege?

If the witness is an attorney, an accountant, or a person who likely worked in concert with attorneys and/or accountants (e.g., a promoter of a technical tax shelter), then it's reasonable for the IRS to anticipate that the witness may assert the attorney-client privilege, the I.R.C. § 7525 privilege (in a civil tax case), and/or the work product doctrine in response to some part of a comprehensive IRS summons. As a best practice, the IRS should request a privilege log from such a witness within the Instructions for the Rider or Attachment to the summons. Similarly, if the taxpayer was an investor in a technical tax shelter for the years under examination (and likely received a tax opinion or tax advice with respect to such shelter) or if the summons specifically requests copies of any tax opinions or tax advice with respect to a transaction, then it's reasonable for the IRS to anticipate that the witness may assert a privilege to a summons concerning the transaction. Again, it would be a best practice for the instructions to include a request for production of a privilege log for any documents withheld on grounds of privilege.

12. When a summons directs a U.S. based third-party witness to produce documents or information concerning the involvement of its foreign parent, foreign subsidiaries, or other foreign affiliates, what limiting language should be inserted to clarify that the witness is not being asked to produce foreign-based documents?

Limiting instructions may be added to the summons, such as: "In responding to this summons, you are required to make a diligent search of the records and documents that are in your possession, custody, or control within the United States or that are accessible by you from the United States." Otherwise, if the summons clearly asks the witness to produce records of a specific foreign affiliate (e.g., any records of your United Kingdom, Canadian, or Cayman Islands branch or affiliate), then the pre-approval procedures, applying the "balancing test" for a summons for foreign based records, need to be followed. This requires referral of the summons to Branch 3 of Collection, Bankruptcy and Summonses, which will coordinate with Branch 7 of International and often consult with the Department of Justice.

13. If attaching a portion of a taxpayer's return (e.g., showing the amount of the tax refund sought by the taxpayer) to a third-party summons may facilitate more truthful answers from a reluctant third-party witness, may the IRS attach that portion of the return to a summons as a necessary disclosure for "investigative purposes" under I.R.C. § 6103(k)(6)?

No. Investigative purpose disclosures permitted under section 6103(k)(6) may include a taxpayer's "return information," under such conditions as Treasury Regulations may prescribe, but do not include disclosures of any parts of the taxpayer's actual tax "return."

14. Should a summons on its face imply or instruct that a witness may respond to the summons by mailing responsive records to a specific IRS address?

While some cooperative third parties (e.g., an entirely neutral bank) may not have a problem with responding to a summons drafted in this way, the power described in I.R.C. § 7602(a)(2) is for the IRS "to summon [any person] … *to appear before the [IRS]* at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony under oath, as may be relevant or material to such inquiry." The IRS has not issued any regulations under §§ 7602 or 7605 which address the issue of requesting a witness to respond to a summons by mail. In situations where the IRS would be satisfied with the witness simply mailing the responsive documents to a specified IRS office, it is a best practice to inform the witness of this option in a side letter that may accompany service of the summons, rather than within the body of the summons itself. This is especially true, where the summoned party is not expected to be cooperative or where there is no margin for error about the present summons being enforceable (e.g., the IRS plans to rely on the validity of

a third-party or John Doe summons to suspend an assessment statute of limitations after the passage of six months without compliance, or the IRS will soon be issuing a notice of deficiency to the taxpayer and may not be able to reissue the summons, if it is defective).

15. When a witness lives is in a city far from the issuing IRS employee, and there is a closer IRS office of the same operating division, should the summons direct the witness to attend the nearest office?

The place for appearance of a witness should generally be in the nearest city with an IRS office of the same IRS operating division (e.g., SBSE or LMSB) as the office issuing the summons. The issuing IRS operating division (e.g., LMSB) could also make arrangements for the summoned witness to appear at a closer-to-the-witness office of a different IRS operating division (e.g., SBSE). It is generally not reasonable for the IRS to require an unwilling witness in Chicago to travel to New York City to appear in response to a summons. The issuing office agent(s) may participate in the summons interview of the witness by speakerphone.
The IRS could also offer the summoned witness the option (in a side letter to the summons) of complying by mailing documents to the issuing IRS office.

16. The following summons questions relate to the examination of a TEFRA partnership: (a) how should the name of the taxpayer be styled in the summons; (b) to whom should notice of a third-party summons be given; (c) may the IRS designate who the records custodian is for the TEFRA partnership; and (d) should a summons to a current individual officer of a corporate Tax Matters Partner (TMP) be considered a first-party or a third-party summons?

(a) For the “In the matter of” line of the summons, the taxpayer should be identified as the partnership, rather than as the TMP, or as the partnership with a named TMP. (b) Actual notice of the third-party summons to the TEFRA partnership should be personally delivered or sent by certified mail to the last known address of the TMP. (c) The TMP may designate a custodian for the records of the partnership but the IRS can <u>not</u>. d) This would be considered a first-party summons.

17. (a) How should a summons be styled and to whom should it be directed in order to obtain information regarding a group of associated individuals who used several separately incorporated or separately formed limited liability companies under state law to promote abusive tax avoidance transactions (ATAT)? (b) Should the summons be directed to “X Group,” the promoter’s most commonly used doing-business-as trade name?

(a) It is possible that the IRS could establish nominee/alter ego status for a number of related entities that were used by a group of associated individuals to promote ATAT schemes. The better practice, however, would be to summon each known promoter entity in the related group separately and to summon the

individual principals of the related group. (b) No, using the "X Group" name for the taxpayers or the summoned parties is not appropriate because it is not a name that is recognized as existing under state law or in any returns filed with the IRS.

## V. Serving a Summons

1. How is a summons served on an individual?

If the individual to be summoned is not a "third party recordkeeper" with respect to the taxpayer, within the meaning of I.R.C. § 7603(b), then an attested copy of the summons may be "delivered in hand to the person to whom it is directed, or [may be] left at his last and usual place of abode." A summons to the individual may be properly served by leaving it at the individual's front door. The courts have rejected any further suggestion that an IRS summons left at an individual's last and usual place of abode must also be left with a resident of suitable age and discretion, as described in Federal Rule of Civil Procedure 4(e)(2).

2. How is a summons served on a business entity, such as a corporation, LLC, trust, or partnership?

Generally, service of a summons upon a business entity can only be made personally ("in hand") on an officer, member, or partner authorized to accept service on behalf of the business entity. The summons cannot be taped to the door (as is the case with an individual) because a business entity does not have a last and usual place of abode.

3. What if the individual taxpayer's last and usual place of abode is unknown?

I.R.C. § 7603(a) offers only two options for service of a summons upon an individual taxpayer: (1) service in hand; or (2) at the last usual place of abode. Even if an individual taxpayer is an "accountant" or an "attorney," the taxpayer would not be a "third party recordkeeper" with respect to his/her own records.

4. What if the last and usual place of abode is blocked by a gate?

As yet, there is no specific guidance in case law that the IRS can rely upon on this question. Until there is, it's best for an IRS employee to take a conservative position to ensure the summons will be valid and enforceable. The IRS should try to personally serve the witness at work or at some other location the witness regularly attends. We do not recommend leaving the summons at the gate – there is simply too great a likelihood that the summons will not reach the intended recipient, and thus be held unenforceable.

5. How should a summons be served on an individual who is incarcerated?

Similar to service of process under the Federal Rules of Civil Procedure, the Service should serve the summons at the incarcerated individual's last and usual place of abode (his family home) and also send a courtesy copy by registered or certified mail to the incarcerated individual.

6. If the receiver of a corporate taxpayer or of a third party is an attorney, may an IRS summons for records of the corporation be served on the receiver by certified mail, treating the receiver/attorney as a third-party recordkeeper under I.R.C. § 7603(b)?

No. For the attorney to be served with a summons by certified or registered mail under the special third-party recordkeeper provisions of the Code, the attorney would need to be the party from whom the records and/or testimony are sought (as opposed to the records/testimony being sought from the corporation the attorney represents). Also, the attorney's relationship to the records and/or testimony sought would need to be that of an attorney (as opposed to the role of a receiver for the corporation, who happens to be an attorney).

7. Can a summons be served by facsimile or other electronic means?

No. I.R.C. § 7603 does not authorize service by electronic means and summonses served in this fashion are not prima facie valid. However, if the summoned party expressly waives the personal service requirement of I.R.C. § 7603 in writing and affirmatively authorizes the IRS to serve summonses by fax or other means, the summons will not be unenforceable for lack of proper service.

8. What is the best practice for constructing a waiver of personal service that would permit service of a summons by fax or other electronic means?

As a best practice, the waiver of proper service should be entitled Waiver and Authorization, should be drafted on entity's letterhead, and should contain an express waiver by the entity of the service requirements of I.R.C. § 7603. The authorization by the entity to accept the service of IRS summonses by fax should identify a particular fax number (with any special instructions, such as an attention line). The authorization should be signed in the name of the entity by an authorized individual.

9. When a taxpayer moves to quash or intervenes in a third party summons enforcement case, will the taxpayer be allowed to complain of defects in the way the IRS served the summons upon the summoned third party?

No. Improper service of the summons is a claim that only the summoned party can complain. Otherwise, the witness would not be free to agree to accept service of a summons in a manner different from those described in the Code.

10. When the IRS is having difficulty locating a current address for an entity third-party witness (e.g., a corporation or LLC) that it is trying to serve with a summons, may the IRS properly serve the summons upon a person or entity that was a registered agent for the witness to be summoned during the time period when it engaged in the transactions that the IRS is scrutinizing?

Serving the registered agent of the entity witness in these circumstances carries a significant risk for non-enforcement of the summons. An IRS summons upon an entity should ordinarily be personally served upon one of the entity's current officers or managing agents. Registered agents, like the officers of an entity, do not serve in perpetuity and can not necessarily be expected to know details regarding a former client's dissolution or relocation. Moreover, serving an IRS summons upon an entity's registered agent is an untested procedure for the IRS at this point.

11. If a summons is directed to a particular named corporate officer and the IRS intends for that person to appear in response to the summons, may the IRS validly serve the summons upon a different corporate officer of the same corporation, in a different city or office from the named corporate officer?

No. Unless the corporate officer named in the summons formally agrees in advance to waive the requirements for proper service of the summons, the IRS should arrange to serve the summons personally upon the named corporate officer in the city where the corporate officer works (or may be found).

12. Should the IRS serve a summons upon a third-party promoter who has a professional status (e.g., attorney, accountant, or banker) listed among the categories of third-party recordkeepers in I.R.C. § 7603(b)(2), personally or by certified mail?

There may be some advantages in not treating the promoter as a third party recordkeeper and effecting service personally.

The IRS has interpreted the "third-party recordkeeper" categories as meaning the third-party witness was acting in the identified professional capacity toward the taxpayer with respect to the information sought by the summons. In the likely event of litigation with a third-party promoter over an issue of privilege, the IRS might take the position that the summoned third-party promoter was not actually retained in a professional tax advice rendering capacity by the taxpayer with respect to the information sought by the summons, but was instead involved in selling a product (e.g. to an investor taxpayer) or in a joint business venture (e.g., with respect to a co-promoter taxpayer). I.R.C. § 7610, Treas. Reg. § 301.7610-1, and relevant IRM provisions, do not distinguish between the fees and costs the IRS may be required to pay a third-party witness which is merely a third party and one which is a third-party recordkeeper, except where the IRS may be summoning the witness in a capacity described in § 7610(b)(2), e.g. where an

accountant is being summoned in his/her capacity as the taxpayer's power of attorney.

## VI. John Doe Summonses

1. What is a John Doe Summons?

A "John Doe" summons does not identify the person with respect to whose liability the summons is issued.

2. What is the "reasonable basis for believing that such person or group or class of persons may fail or may have failed to comply with any provision of any internal revenue law" requirement of I.R.C. § 7609(f)(2)?

While the Service does not have to establish facts that show probable cause, the courts require the Service to establish facts that amount to more than conclusory declarations of fact. The Service should establish the reason for believing a specific group of taxpayers is not properly reporting income. The Service may submit information that would explain why the "John Does" should be inherently suspected of noncompliance because they are, for example, customers of a barter exchange or bond holders who were erroneously told by the issuer that interest on their bonds was tax exempt. The Service may also offer affidavits indicating that it had examined tax returns of similar taxpayers and found a high incidence of improper reporting practices.

3. May the Service issue a "dual-purpose summons," rather than a John Doe summons, to learn the identity of the owner of a bank account into which the known taxpayer, who is being investigated by CI, has sent several large wire transfers of funds believed to be the proceeds of fraudulently obtained refunds?

Yes, a dual-purpose summons is used when the Service is investigating the liability of a known taxpayer identified in the heading of the summons and attempting to learn the identities or other information concerning other taxpayers that the Service wishes to investigate. Under Tiffany Fine Arts, the Service may use a dual purpose summons so long as all the information sought from the summoned party is of a nature that "may be relevant" to the Service's investigation of the taxpayer under investigation and the four requirements of Powell are met. Here the identity of the recipient of the taxpayer's payments "may be relevant" to the IRS investigation of the taxpayer.

## VII. Third-Party Summons Issues

1. Is a third-party summons a third-party contact?

Yes. IRM 25.5.4.5(4) indicates that serving a third-party summons is a third-party contact under I.R.C. § 7602(c), for a summons served for Exam or Collection purposes. Pre-contact notice to the taxpayer that third party contacts

may be made by the IRS must precede IRS service of a summons on a third party. Providing a copy of the third party summons to the taxpayer for exam summonses will satisfy the IRS post-contact recording and reporting requirement for the third party contact. IRM 4.11.5.7.5.1.

2. Who gets a third-party summons notice?

I.R.C. § 7609(a) requires the Service to provide timely notice to any person identified in the heading of the summons and to every person identified in any other part of the summons. This includes any person identified in any attachments to the summons (e.g. instructions, definitions, a list of requested records, a list of subjects or items on which testimony is sought, a list of documents currently in possession of the IRS). Section 7609(c) contains a set of exceptions to the notice requirement.

3. When the IRS serves a third party examination summons upon a bank and identities then known signatories of the summoned account, but shortly thereafter learns of another signatory on the account, does the Service need to give the previously unknown signatory "notice" of the summons?

No. Only the persons identified in the heading, body or an attachment to the summons needs to be given notice of a third party summons. IRC 7609(a).

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4. What should the IRS do if a third party provides records in compliance with an invalid third party summons for which notice was mistakenly not given?

Generally, the agent should immediately seal the records and reissue the third party summons with proper notice and exhaustion of the noticees' rights to petition to quash the summons. See IRM 25.5.4.3(7)-(8). However, the agent may be prohibited by law from pursuing that course of action where the tax years for which the summons was issued have now been petitioned to the Tax Court in response to a notice of deficiency.

5. If a foreign entity or individual with no U.S. tax return filing history is referred to in a routine third-party examination summons, how does the IRS provide the required notice to the foreign noticee?

The IRS agent should make a diligent search of the taxpayer's case file to determine if the foreign noticee's most recent address is found in an agreement or correspondence between the foreign noticee and the taxpayer. The IRS agent might also conduct internet research to find the noticee's "last known address" for purposes of providing notice under I.R.C. § 7609(a)(2). If the foreign noticee's last known address is found, the required notice should be served via registered mail. Neither personal service nor certified mail is an option for an overseas addressee. If the IRS is unable to locate any currently valid or last known address for the overseas noticee, the IRS also has the option under I.R.C. § 7609(a)(2) of leaving the notice copy with the summoned party itself.

6. For a third-party examination summons that does not name another particular third party within the body of the summons but requests a set of records that the IRS reasonably expects to contain the name of and relate to a transaction involving this unnamed other third party, is the IRS required to treat this unnamed third party as a required "noticee" for this summons?

No. For an ordinary third-party examination summons (i.e., not a John Doe summons), the IRS is only required to treat the taxpayer and other third parties actually identified in the body of the summons as required noticees under I.R.C. § 7609(a)(2).

7. If the body of a third-party examination summons does not contain the full name of another particular third party, but instead refers to a third party by initials such as "AB" that all parties to the transaction at issue understand to stand for "Alpha Beta Corporation," should the IRS treat Alpha Beta Corporation as a required noticee for the summons?

Yes. Using a third party's initials or an acronym for the third party in the body of the summons, is the same as identifying the third party in the summons. By contrast, referring to a third party in the summons generically by such labels as "buyer" or "seller" is not considered identifying that third party in the summons, even though the IRS, the taxpayer, and the summoned third party all know the actual identify of the "buyer" or "seller."

8. If a third-party examination summons identifies multiple individual members of a consolidated income tax group (e.g., ABC Holding Co., ABC Leasing, and ABC Finance) in the body of the summons, should the IRS provide just one notice of the summons to the parent of the consolidated income tax group or provide separate notices to each of the individual members?

The answer depends on whether the consolidated income tax group is the taxpayer under examination for which the summons was issued, or whether the individual members of the group identified in the examination summons are just other third parties that may have engaged in transactions with the taxpayer and the summoned third party. If the consolidated income tax group whose individual members may be specifically identified in the third-party summons is the taxpayer under examination, then the parent of the group is the sole "agent" for the group, under Treas. Reg. § 1.1502-77. In that case, the IRS need only give notice of the third-party summons to the parent of the group. If the group whose individual members are specifically identified in the third-party examination summons is not the taxpayer under examination, then receiving notice of the third-party summons is not necessarily a matter relating to the income tax liability of the group. In that situation, the parent of the group is not considered the agent of each member of the group for that purpose, which means that separate individual notices should be provided to ABC Holding, ABC Leasing, and ABC Finance in the example.

9. If an individual or entity (e.g., a promoter) has been referred by the IRS to DOJ for a criminal tax grand jury investigation, and that referred individual or entity is identified in the body of an IRS third-party summons to another third party (e.g., another promoter) with respect to the IRS investigation of another taxpayer (e.g., an investor), is there any legal or IRS policy obstacle to the IRS providing notice to that referred individual or entity of the third-party summons in which it has been identified?

I.R.C. § 7602(d) has no effect on IRS responsibility to notify the referred individual or entity that it has been identified in a third-party summons with respect to another taxpayer, when the referred individual or entity is not the taxpayer being investigated. If civil tax employees have identified a referred individual or entity in a third-party summons that has already been served, the IRS could choose to withdraw the summons. If the IRS does not choose to withdraw the summons, then timely notice of the summons to all persons so identified in the summons is required, whether or not CI might otherwise object

10. If the IRS issues a summons to a particular officer or employee of a corporate taxpayer and then provides a courtesy copy of that summons to the corporate taxpayer's power of attorney (POA) pursuant to the POA's standing request to receive notice of all summonses in the investigation of the taxpayer, is there any appreciable risk that providing the POA with that courtesy copy of the summons may cause a court to construe the summons as being a third-party summons of which the POA received notice?

No. It would be prudent for the IRS employee providing the POA with the courtesy copy of the summons to characterize it as a courtesy copy of a summons in a cover letter, but even mistakenly providing the taxpayer's POA with notice of a first-party summons does not make the summons a third-party summons. Mistakenly providing identified third parties in a first-party summons with notice of the first-party summons is more problematic, because of the disclosure implications and the identified third parties may attempt to commence a proceeding to quash the summons which the Government would then seek to dismiss on jurisdictional grounds.

11. If the Tax Matters Partner (TMP) of a TEFRA partnership under audit is a Limited Liability Company (LLC) and the IRS wants to summon the former managing member of that LLC, should the summons be treated as a first-party or as a third-party summons?

For notice purposes, assuming the LLC still exists and has a new managing member, it would be most prudent for the IRS to treat this summons on the former member of the LLC as a third-party summons. However, because of the uncertainty of that position, it would also be prudent for the IRS not to count on the summons being treated as a third-party summons for assessment statute suspension purposes under I.R.C. § 7609(e)(2).

12 (a). If a TEFRA partnership in a Chapter 11 bankruptcy has an appointed Chapter 11 trustee and the IRS must give "notice" of a third-party summons to the TEFRA partnership, should the "notice" be provided to a Tax Matters Partner (TMP) of the partnership or to the partnership's Chapter 11 bankruptcy trustee? (b) What should the IRS do where it concludes relatively soon after issuing the summons that it provided notice to the wrong representative of the TEFRA partnership?

(a). If the summons is issued with respect to an income tax examination of the TEFRA partnership in bankruptcy, then the real parties in interest are the partners of the TEFRA partnership. Notice of the third-party summons should therefore be provided to the partnership TMP for the income tax years at issue, since the TMP continues to represent the partners in this income tax examination (for which the bankruptcy estate will not owe a debt). If notice of the IRS third-party summons must be provided to the partnership for any other reason (e.g., the partnership in bankruptcy is being investigated by the IRS for potential pre-bankruptcy promoter penalties, or the partnership is just a third party that is identified within the summons to another third party), then the estate of the partnership in bankruptcy appears to be at least one of the true parties in interest, so notice should be provided to the partnership's Chapter 11 bankruptcy trustee.

(b). If the IRS discovers a defect in notice with sufficient time to reissue the summons, then it would be a best practice for the IRS to reissue the third-party summons, provide corrected notice of the reissued summons, and seal any records obtained in the interim in response to the prior summons until it is clear that no petition to quash the new summons has been timely filed.

13. What are the common types of IRS summonses for which no "notice" is required for persons identified within the summons?

The IRS summonses that do not require the IRS to give notice are referred to in I.R.C. § 7609(c)(2) and (3). These commonly include:

- A first-party summons - any summons directed to the taxpayer under investigation or an officer or employee of that taxpayer, pursuant to section 7609(c)(2)(A).
- Any John Doe summons pursuant to § 7609(c)(3).
- Any summons issued in aid of collection of an assessed tax liability or a liability reduced to judgment pursuant to § 7609(c)(2)(D)(i). This does <u>not</u> include, however, a summons to determine who is liable for the trust fund recovery penalty (TFRP) under § 6672.
- Any Title 26 summons issued by the IRS Criminal Investigation division to a third party which is not a third-party recordkeeper, pursuant to §§ 7609(c)(2)(E) and 7603(b).

Less common types of IRS summonses that are also excepted from the "notice" requirements of § 7609 include:

- A summons simply to determine whether or not the summoned party (e.g., a bank) made or kept any records regarding an identified person (e.g., the taxpayer), pursuant to § 7609(c)(2)(B).
- A summons to determine the identity of a person who had a numbered account with a bank or a similar financial institution, pursuant to § 7609(c)(2)(C).
- A summons to aid in the collection of an assessed tax liability or judgment from a transferee or fiduciary of the taxpayer, pursuant to § 7609(c)(2)(D)(ii).
- A summons for which the Government has received a court order allowing the suppression of notice on the grounds described in § 7609(g).

## VIII. Third-Party Recordkeepers

1. Other than those persons clearly listed in the statute, what are some examples of third-party recordkeepers under I.R.C. 7603(b)?

A casino may be a third-party recordkeeper if it extends credit to customers via a device similar to a credit card. For the person to be considered a "third-party recordkeeper" the extension of credit has to be linked to a physical device, like a credit card. Conversely, a person that extends credit without requiring the use of, or reference to, some physical object is not a third-party recordkeeper under I.R.C. § 7603(b)(2)(C).

## IX. Consensual Examination of Records

1. Where the third-party witness consents to the Service's request to examine its records, can the Service obtain those records without issuing a summons?

Yes. In some instances a financial institution may have the account holder sign a waiver (waiving their right to financial privacy under the Right to Financial Privacy Act). If a summons is issued, however, third-party notice under I.R.C. § 7609(a) applies, unless excepted by I.R.C. § 7609(c).

## X. Conducting Summons Interviews

1. May Chief Counsel attorneys participate in, and even take a leading role in, questioning witnesses summoned by the IRS?

Yes. See Treas. Reg. § 301.7602-1(b)(1) and (2), finalized March 31, 2005.

2. Where the IRS has summoned a third-party witness and the taxpayer has not filed a petition to quash the summons within the required time frame, is there any requirement that the IRS notify the taxpayer if the witness and the IRS agree to reschedule the original date of the IRS interview of the summoned witness?

No. The taxpayer has no right to be present during the IRS interview of the summoned third-party witness, so there is no requirement for the IRS to inform the taxpayer in advance of or after the IRS reschedules its summons interview with the witness. This is true so long as the taxpayer has already been afforded its right to timely petition to quash the third-party summons under I.R.C. § 7609(b)(2) and the taxpayer has not taken advantage of this statutory right to seek timely court review of the third-party summons before the IRS witness interview is permitted to take place.

3. Is there any legal requirement or policy reason for the IRS to inform a summoned witness that the information the witness provides in response to the summons may be used by the IRS in another current or future IRS exam?

No. There is no legal requirement or policy reason for the IRS to inform a witness that its answers may be used by the IRS in another case. Nor does the IRS have any obligation to inform a witness whether an IRS summons has been issued for a dual purpose of investigating the taxpayer named in the summons and other known or unknown persons. The IRS position is that neither the summoned witness nor a court has any general authority to impose conditions upon IRS use or distribution (consistent with I.R.C. § 6103 disclosure limitations) of the information the IRS has properly obtained through an enforceable IRS summons. United States v. Jose, 131 F.3d 1325 (9th Cir. 1997). Congress has, however, enacted a specific exception to this general rule by placing limitations on IRS summonses for computer software. I.R.C. § 7612.

## XI. Proceedings to Quash, Summons Enforcement & ASED Suspensions

1. What are the basic requirements for an enforceable summons?

Pursuant to I.R.C. § 7602 and United States v. Powell, 379 U.S. 48 (1964), every valid summons must be: (1) issued for a legitimate purpose; (2) seek information that "may be relevant" to the investigation; (3) seek information that is not already in the Service's possession (for example, if IRS Forms 1099, W-2, or W-4 can be retrieved from the Service Center, they should not be summoned); and (4) all administrative steps required by the Code have been followed.

2. If the IRS learns from a valid John Doe summons served upon a promoter asking for the identities of unknown investors who purchased a particular type of transaction from the promoter that some of the investors used a TEFRA partnership entity to make their investments in the transaction at issue, and more than six months pass without full disclosure of all of the investor identities, could the summoned party's lack of timely full compliance with the John Doe summons give the IRS more time on the assessment statue of limitations to examine the transaction?

Yes. If the individual or corporate investor's participation in the transaction was unknown to the IRS when the John Doe summons was served and if their three-year (or six-year) assessment statute was still open on the date that was six months after the John Doe summons was served (e.g., April 15 of the following year, for a John Doe summons served on October 15), then the investor's assessment statute will begin to be suspended for any time remaining after the six-month period of non-compliance until the summoned party complies in full with the John Doe summons. It would be prudent for the IRS to take a conservative approach (before the issue is resolved by regulation or litigation) to the length of an investor's assessment statute suspension where a particular investor is identified before the names of all of the other requested investors have been revealed to the IRS by the summoned party after six months. However, the IRS position is that the investor's assessment statute remains suspended until the date the IRS has determined in a reasonably expeditious manner that the summoned party has fully complied with the John Doe summons in all required respects. Where an individual or corporate partner's assessment statute for a year(s) remains open, for any reason, including the John Doe summons circumstances described above, the IRS position is that the period for commencing and concluding TEFRA partnership proceedings concerning that year(s) of the partner also remains open, pursuant to the reasoning of Rhone-Poulenc Surfactants and Specialties, L.P. v. Commissioner, 114 T.C. 533 (2000) and later cases that have adopted its reasoning.

3 (a). If a district court denies a petition to quash the summons or grants the IRS petition for enforcement, and the taxpayer appeals the district court's ruling but fails to obtain a stay of the order during the pending appeal, is there any reason for the IRS to delay going forward with rescheduling and conducting its interview of the third-party witness?
(b). What effect will the appeal have on the assessment statute?

(a). No. If the taxpayer or other participating noticee fails to seek and obtain a stay pending appeal of the district court order denying the petition to quash a third-party summons, the IRS should go forward with rescheduling the appearance of the witness and holding the summons interview of the third-party witness. If the petition to quash was dismissed by the district court on the jurisdictional grounds that it was not timely filed or perfected, then the IRS may provide the third-party witness with the certificate described in I.R.C. § 7609(i)(2). If the petition to quash was dismissed on its merits and the Government also sought and obtained an order for the summons to be enforced, then the third-party witness may be advised that it should be protected from any liability for its testimony and production of documents on account of its good faith reliance on the court order.

(b). The taxpayer's appeal of the district court order denying the petition to quash should continue to suspend the taxpayer's applicable assessment statute under I.R.C. § 7609(e)(1), notwithstanding the taxpayer's failure to obtain a stay pending appeal. However, this suspension of the taxpayer's assessment statute

could be of small comfort to the IRS if the third-party summons was a dual purpose one with respect to a suspected promoter, where the summons also sought the names of unidentified investors of the taxpayer that the IRS also wants to examine. This is because the assessment statutes of these persons who are not the taxpayer would not be suspended under either I.R.C. §§ 7609(e)(1) or (2) while the taxpayer's appeal continued. The taxpayer's appeal of the district court order would not be rendered moot by the compliance of the third-party witness with the summons in these circumstances. If the district court order is ultimately reversed on appeal, the courts may devise an appropriate remedy for the summoned party's earlier compliance with the summons.

4. Can the Service enforce a summons that seeks health records otherwise protected as private under the Health Insurance Portability and Accountability Act of 1996 (HIPAA)?

Yes. HIPAA contains a law enforcement exception that would allow enforcement of the administrative summons under I.R.C. § 7602(a). See Chief Counsel Notice 2004-034.

5. Can the Service enforce a summons that seeks educational records otherwise protected as private under the Family Educational Rights & Privacy Act (FERPA)?

Yes. While FERPA generally protects the privacy of "education records," it also provides an exception for a lawfully issued subpoena. The definition of a lawfully issued subpoena includes a summons issued by the Service.

## XII. Fees and Costs for Witnesses

1. May a summoned third party be reimbursed for expenses incurred in getting together summoned records?

Yes, under I.R.C. § 7610.

## XIII. Privileges and Other Restrictions on IRS Information Gathering

1. If an individual tax shelter promoter is not yet under criminal tax investigation or a prior criminal tax investigation against the individual has been abandoned with no charges brought, may the individual still be able to raise a good faith Fifth Amendment objection to producing summoned records or testimony?

Yes. The presence of a good faith basis for an individual asserting the Fifth Amendment does not depend on the existence of a current criminal tax investigation or indictment, but on whether the individual could reasonably conclude that the person's answers might incriminate the person. Double jeopardy limitations, a grant of immunity, or the expiration of all potential criminal

statutes of limitation are, instead, the types of events that may remove an individual's prior good faith fear of self-incrimination.

2. Is it always a good use of IRS/DOJ resources to compel a summoned individual witness to separately answer a series of questions in response to a blanket Fifth Amendment objection by the witness?

Blanket assertions of a Fifth Amendment fear of self-incrimination by a summoned witness who is an individual are invalid. The Government may obtain a court order requiring a summoned witness who is an individual to raise Fifth Amendment objections in response to particular separate questions from the IRS. However, if the IRS faces a blanket assertion of the Fifth Amendment by an individual summoned by the IRS and the summoned individual does appear to have a reasonable basis under the circumstances for fearing that almost any useful information to the IRS could incriminate the individual, then the IRS should evaluate whether it is a good use of IRS/DOJ resources to seek an order to require that such an individual assert a fear of self-incrimination in response to each of a series of related questions.