Managing Third Party Contacts in an Examination

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(1) General notice.—An officer or employee of the Internal Revenue Service may not contact any person other than the taxpayer with respect to the determination or collection of the tax liability of such taxpayer **without providing reasonable notice in advance to the taxpayer that contacts with persons other than the taxpayer may be made.**

(2) Notice of specific contacts.—The Secretary shall periodically provide to a taxpayer a record of persons contacted during such period by the Secretary with respect to the determination or collection of the tax liability of such taxpayer. Such record shall also be provided upon request of the taxpayer.

(3) Exceptions.—This subsection shall not apply –

- (A) to any contact which the taxpayer has authorized;
- (B) if the Secretary determines for good cause shown that such notice would jeopardize collection of any tax or such notice may involve reprisal against any person; or
- (C) with respect to any pending criminal investigation.
Third Party Contacts: Collection
IRC 6304

**IRC 6304(a)(1):** Prohibits RA communications in “unusual” or inconvenient time or place.

**IRC 6304(a)(2):** Prohibits RA communications if POA in place

**IRC 6304(a)(3):** Prohibits RA communication at taxpayer’s place of employment if employer prohibits such communications.

**IRC 6304(b):** General prohibition of “any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with collection of any unpaid tax.”
“Potential Third Party Contacts. Generally, the IRS will deal directly with you or your duly authorized representative. However, we sometimes talk with other persons if we need information that you have been unable to provide, or to verify information we have received. **If we do contact other persons**, such as a neighbor, bank, employer, or employees, we will generally need to tell them limited information, such as your name. The law prohibits us from disclosing any more information than is necessary to obtain or verify the information we are seeking. Our need to contact other persons may continue as long as there is activity in your case. **If we do contact other persons, you have a right to request a list of those contacted.** Your request can be made by telephone, in writing, or during a personal interview.”
Challenges to Sufficiency of Publication 1

Testimony of Kathy Petronchak before the House of Representatives Committee on Small Business – September 14, 2016

- “[T]he IRS is not always effective in providing notice to taxpayers, often times only providing them Publication 1, Your Rights as a Taxpayer or some similar general notice at the beginning of the exam and not at or anywhere near the date of a third party contact. Such notice is useless and does not effectively apprise taxpayers that such contact will be made, to whom it will be made, or that the taxpayer can request a third party contact report from the IRS.”

- “Second, the Taxpayer Advocate Service found that the IRS did not first ask taxpayers for the information requested from third parties in 22.8 percent of examination cases. This is unacceptable given the extraordinarily important taxpayer privacy protections that go out the window with third party contacts.”

- “In our experience, it appears the IRS has seemingly been using these contacts on an increasing basis in general examinations where we represent the taxpayer, often times when the IRS already has the information they request from third parties, and other times when they haven’t even requested the information in the first place. Requesting the information from third parties in these situations is intrusive, burdensome and needless.”
Challenges to Sufficiency of Publication 1

**J.B. v. United States (9th Cir., February 2019)**

- “We reject a categorical approach to this question. We conclude that ‘reasonable notice in advance’ means notice reasonably calculated, under all the relevant circumstances, to apprise interested parties of the possibility that the IRS may contact third parties, and that affords interested parties a meaningful opportunity to resolve issues and volunteer information before third-party contacts are made. “

- “As an exception to the general rule that taxpayer records are to be kept confidential, we construe § 7602(a) narrowly in favor of the taxpayer and § 7602(c) broadly as a protective measure.”

- “Even if we were to consider legislative intent, however, we would find ample support for the proposition that Congress intended that the IRS provide notice reasonably calculated to apprise taxpayers that the IRS may contact third parties. “

- “A reasonable notice must provide the taxpayer with a meaningful opportunity to volunteer records on his own, so that third-party contacts may be avoided if the taxpayer complies with the IRS’s demand.”
Third Party Contacts: Exam – Taxpayer First Act

**Former Guidance.** Publication 1, Your Rights as A Taxpayer, met notice requirements. See IRM 25.27.1.3. 2019. Sec. 1206 Taxpayer First Act amended IRC 7602(c)(1).

**Interim Guidance.** July 26, 2019 Chief Counsel memo:
- Publication 1 no longer meets notice requirements.
- IRS must issue advance notice at least 45 days before contact with a third party.
- IRS must specify the time period in which it intends to contact a third party, not to exceed a year.
- IRS must state intent to actually contact a third party.
- Tax Periods must be identified
(1) **General notice:** An officer or employee of the Internal Revenue Service may not contact any person other than the taxpayer with respect to the determination or collection of the tax liability of such taxpayer unless such contact occurs during a period (not greater than 1 year) which is specified in a notice which—

(A) informs the taxpayer that contacts with persons other than the taxpayer are intended to be made during such period, and

(B) except as otherwise provided by the Secretary, is provided to the taxpayer not later than 45 days before the beginning of such period ...

(2) **Notice of specific contacts**

The Secretary shall periodically provide to a taxpayer a record of persons contacted during such period by the Secretary with respect to the determination or collection of the tax liability of such taxpayer. Such record shall also be provided upon request of the taxpayer.

(3) **Exceptions:** This subsection shall not apply—

(A) to any contact which the taxpayer has authorized;

(B) if the Secretary determines for good cause shown that such notice would jeopardize collection of any tax or such notice may involve reprisal against any person; or

(C) with respect to any pending criminal investigation.
Third Party Contacts: Exam – Strategies

**Authorized Representative.**
- Taxpayer’s right to representation and access to information.
- Cooperation. Cooperative approach to obtaining information.

**Verification.**
- 7602(c)(2). IRS shall periodically provide a record of persons contacted during specified period. Must provide upon request by taxpayer.
- FOIA. Periodically obtain documents via FOIA to verify.
Remedies for Violation of Third Party Contact Rules under I.R.C. § 7602(c)

The Harm: When IRS makes a third party-contact, the damage to the taxpayer’s reputation and business may already be done.

Remedies to Mitigate Harm:

■ No independent cause of action for violation of I.R.C. § 7602(c)
Remedies for Violation of Third Party Contact Rules under I.R.C. § 7602(c)

Remedies to Mitigate Harm (cont’d):

- **Taxpayer Advocate Service (TAS)**
  - I.R.C. § 7811- Taxpayer Assistance Orders ("TAO")- Administrative cease and desist order.
  - TAO binds the Service to act unless Taxpayer Advocate, Commissioner or Deputy Commissioner modifies or rescinds it.
  - Requirements for TAO- I.R.C. §§ 7811(a)- The Taxpayer is suffering or about to suffer significant hardship:
    - Immediate threat of adverse action
    - Delay of more than 30 days resolving an account problem
    - Will incur significant costs (including fees for representation)
    - Irreparable injury to or long-term adverse impact.
  - Examples of significant hardship at Treas. Reg. 301.7811-1(a)(4)(iv)
  - Request TAO by filing Form 911 with Local Taxpayer Advocate
Remedies to Mitigate Harm (cont’d):

- Complaint with Treasury Inspector General for Tax Administration (TIGTA)
  - Investigate violations that impact integrity of tax administration, including misconduct by IRS employees
  - *I.R.M. § 11.51.1.3.2.3- TIGTA Investigations of IRS Employees*
Remedies to Mitigate Harm (cont’d):

- **I.R.C. § 7431- Civil damage claim for wrongful disclosure under I.R.C. § 6103**
  - *Taxpayer must establish three elements:*
    - Unauthorized disclosure of the taxpayer’s return or return information
    - Disclosure made knowingly or by reason of negligence
    - Disclosure was in violation of I.R.C. § 6103
  - 2-year statute of limitations for action- *I.R.C. § 7431(d)*
  - Recoverable damages- Costs plus the greater of:
    - Statutory damages of $1,000
    - Actual damages
How Does a Taxpayer Make a Section 7602(c) Request?

- IRM 25.27.1.5 (10-19-2017) Provide Taxpayers with TPC List

1. Treas. Reg. 301.7602-2(e)(1) states that a taxpayer may request a record of contacts in any manner that the Commissioner permits.

2. Employees are responsible to ensure taxpayers understand their rights to receive post third-party contact reports. This may require explanation and assisting the taxpayer with requesting the report. A taxpayer can request a list of TPCs at any time. The request can be made either orally or in writing.

3. If a request for a list of TPCs is received in person or by telephone:
   A. Obtain the taxpayer's name, address, and TIN (taxpayer identification number).
   B. Advise the taxpayer that he or she should receive the TPC list by mail within 10 days.
   C. Immediately forward the taxpayer's name, address, and TIN to the TPC Coordinator.

4. If the request is received by mail, immediately forward the taxpayer's request to the TPC Coordinator. See IRM 25.27.1.4, Recording and Reporting TPC, paragraph 3 for additional guidance on TPC coordinator.
Making a Section 7602(c) Request, Continued

5. Taxpayers must submit a separate request for each list of contacts. Do not accept a blanket request for a list of future contacts.

Note: The Commissioner may set reasonable limits on how frequently taxpayer requests need to be honored.

6. The TPC Coordinator will research the request, prepare and mail Letter 3173.

7. Letter 3173 will list all TPCs other than those excluded due to fear of reprisal or other statutory basis:

   A. Made after January 18, 1999, or
   
   B. Made since the taxpayer received the latest periodic report of TPCs.

Note: Employees are required to advise the taxpayers of their rights to receive post third-party contact reports and explain to the taxpayers how to request the reports. This communication should be documented in the case file.
IRM 11.3.13.9.30 (04-19-2017) - Requests for Third Party Contact Information

1. IRC §7602(c) requires IRS employees to document certain third party contacts. Employees use Form 12175, Third Party Contact Report Form, to document these contacts.

2. In response to FOIA requests for Form 12175, neither confirm nor deny the existence of the form (Glomar response) in situations where:
   A. There has been a reprisal determination made with respect to the third party named in the form.
   B. There is no responsive record.
   C. It has been determined that disclosure would jeopardize the collection of any tax (but only so long as the jeopardy situation continues).

3. Assert FOIA exemptions (b)(3) in conjunction with IRC §6103(e)(7), (b)(7)(A) (where applicable), and (b)(7)(C) as the exemptions underlying the Glomar response.

4. You may provide the Form 12175 in situations where none of the above criteria apply.

   Note: Form 12175 is maintained in two different Privacy Act systems of records: non-reprisal (00.333) and reprisal (00.334). System of records 00.334 is exempt from the access provisions of the Privacy Act.

5. In response to FOIA requests for a list of third parties contacted with respect to the requester, the Disclosure employee must contact the Third Party Contact Coordinator. The Third Party Contact Coordinator information is found on the "Record Retrieval Resources" on the Disclosure SharePoint site.
Obtaining the Third Party Contact List, Forms 12175 and Memos of Interview

Administrative Requests

- FOIA Request
- Privacy Request
- Section 7602 Request to Agent
- Will Appeals be providing TPC Information Under Taxpayer First Act?

Consider FOIA Mediation
Obtaining the Third Party Contact List, Forms 12175 and Memos of Interview

**District Court Litigation**

- File a complaint for Declaratory Relief alleging
  - *Administrative Procedure Act ("APA"), 5 U.S.C. §701 et seq.;*
  - *Privacy Act (the "Privacy Act"), 5 U.S.C. § 552A(g)(1);*
  - *Internal Revenue Code 26 U.S.C. §6103, §7602(c) and §7803© &
  - *Mandamus Act, 28 U.S.C. § 1361*

- Note: Some Courts have held that I.R.C. §§ 6103, 7602(c) and 7803 do not provide private causes of action.
Other Section 7602(c) Based Litigation

Background

Taxpayer Advocate Service — 2015 Annual Report to Congress — THIRD PARTY CONTACTS: IRS Third Party Contact Procedures Do Not Follow the Law and May Unnecessarily Damage Taxpayers’ Businesses and Reputations:

When the IRS Contacts Third Parties, It Discloses Confidential Taxpayer Information Otherwise Protected Under IRC § 6103. . . . Some customers may decide to use other suppliers in light of the implication that the IRS suspects the taxpayer is a tax cheat or has unpaid tax liabilities. TAS’s study found the IRS made TPCs in 68.1 percent of its field collection cases and 8.5 percent of its field examination cases.
Other Section 7602(c) Based Litigation

TAS Conclusions:

When the IRS Contacts Third Parties, It Discloses Confidential Taxpayer Information Otherwise Protected Under IRC § 6103.

- In general, IRC § 6103 prevents IRS employees from disclosing confidential taxpayer information. If they unnecessarily disclose taxpayer information, the taxpayer may sue the IRS for damages.

IRC § 7431; IRM 11.3.1.6.4, Civil Liberty Under IRC § 7431 (May 24, 2005)

- However, IRS employees may disclose confidential return information to the extent necessary to conduct their official duties. For example, IRS employees may need to disclose to a taxpayer’s customers, employees, or colleagues that he or she is under investigation by the IRS to obtain information in connection with an examination or investigation.
Other Section 7602(c) Based Litigation

Unauthorized Collection Action

- See, e.g., IRC § 6103(k)(6); Treas. Reg. § 301.6103(k)(6)-1; IRM 4.2.5.3, Investigative Disclosures (July 29, 2011).

  In limited circumstances, a taxpayer may also seek to recover actual civil damages resulting from an IRS employee’s failure to follow procedures in connection with a third party contact. See, e.g., IRC §§ 7433 (damages for unauthorized collection actions by the IRS); 7433A (damages for unauthorized collection actions by contractors).

Note: § 7433 only authorizes damages for claims in connection with any collection of federal tax, and does not allow for damages for violations made during “the assessment or tax determination part of the process.” Miller v. United States, 66 F.3d 220, 222 (9th Cir. 1995). The assessment involves the decision to impose tax liability while the collection deals with the IRS attempting to collect the taxes owed.
Other Section 7602(c) Based Litigation

Wrongful Disclosure

- Taxpayers can also sue for damages if an IRS employee unnecessarily discloses taxpayer information protected by IRC § 6103. IRC § 7431; IRM 11.3.1.6.4, Civil Liberty Under IRC § 7431 (May 24, 2005).
- Taxpayer will want to take the depositions of everyone on the IRS TPC list and the Revenue Agent and/or Revenue Officer.

Tax Court

- Section 7602 is inapplicable with respect to R’s trial preparation activities.