Department of the Treasury	Internal Revenue Service	Office of Chief Counsel	**Notice**

CC-2010-004

February 17, 2010

Subject:	Clarification of CC Notice 2008-011 – Limitations on Informant Contacts: Current Employees and Taxpayer Representatives	**Cancel Date**:	Upon incorporation into the CCDM

Purpose

This Notice clarifies CC Notice 2008-011 as it applies to the advice to be given to the Internal Revenue Service as to the limitations on contacts with an informant who is a current employee of a taxpayer and who is providing the IRS with information regarding the informant's employer. This Notice also provides additional guidance relating to evidentiary issues that may arise when reviewing potentially privileged information provided by an informant. In addition, for purposes of convenience, this Notice restates the discussion in CC Notice 2008-011 regarding the advice to be given to the IRS regarding the limitations on contacts with an informant who is acting as the taxpayer's representative in an examination or other proceeding pending before the IRS. This Notice applies to, but is not limited to, contacts with informants who have filed claims with the IRS pursuant to I.R.C. § 7623. Finally, this Notice applies only to civil tax cases, whether at the administrative level or in litigation, and is intended to assist Chief Counsel attorneys in providing advice regarding contacts with informants in those cases. It does not apply to criminal matters. For guidance with respect to criminal matters, refer to IRM 9.4.2, Sources of Information.

Informants who are Current Employees of a Taxpayer

There is a long-standing line of cases that support the ability of the government to use information received from a private party, even if the private party obtained the information in an illicit or illegal manner, as long as the government is a passive recipient of the information and did not encourage or acquiesce in the private party's conduct. See, e.g., Burdeau v. McDowell, 256 U.S. 465 (1921). If the private party acts as an "instrument or agent" of the government, however, the Fourth Amendment, and its handmaiden the Exclusionary Rule, may apply and, as a result, a court may exclude the government's evidence. Whether an informant is an instrument or agent of the government is usually determined using a fact-intensive analysis that does not depend on any easily-identifiable objective criteria. Generally, courts focus on two factors: (1) the government's knowledge of, and acquiescence in, the search and seizure, and (2) the intent of the party conducting the search and seizure. See, e.g., United States v. Walther, 652 F.2d 788 (9th Cir. 1981). Courts applying the Walther two-part test have held for and against the application of the

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Exclusionary Rule, based on the particular facts at issue before them. Compare United States v. Feffer, 831 F.2d 734 (7th Cir. 1987) (holding that an employee did not act as a government agent in turning over company documents to the IRS) with Walther, supra (holding that an airline employee acted as a government agent in opening a case suspected of containing illegal drugs); see also United States v. Snowadzki, 723 F.2d 1427 (9th Cir. 1984) (holding that an individual acted on his own in illegally seizing documents from a co-worker and turning them over to the IRS).

In addition to whether the private party acted as an instrument or agent of the government, the potential application of the Exclusionary Rule to the IRS's use of information in a civil tax case will depend on the resolution of several other legal issues, including whether the target of the search had a reasonable expectation of privacy in the property searched. See Steagald v. United States, 451 U.S. 204 (1981).

In light of the foregoing discussion of case law and to protect the integrity of any proposed adjustments, the IRS should, to the extent possible, remain a passive recipient of information from informants. Interaction between the IRS and an informant, or actions by the IRS related to an informant's information, could be perceived as encouraging or acquiescing in the conduct of the informant and could thereby taint the information received from the informant. If the information is tainted in such a way that the IRS cannot legally use it, any adjustment that is dependent on the tainted information, or on any information derived from the tainted information, may not be legally supportable and may have to be conceded.

To minimize any increased risk associated with information and interactions with current employee informants, the IRS should be advised to adhere to the following rules and procedures.

Generally, the IRS should limit contact with a current employee informant to those circumstances when it will be considered under applicable case law as a passive recipient of information provided by an informant. Under this approach, the IRS should be advised to act as a passive recipient of information at an initial meeting with an informant and to accept any and all information provided by the informant at this initial meeting. The IRS's ability to receive information provided by a current employee informant, however, may also include, on a case-by-case basis, limited follow-up contacts, including debriefings,[1] initiated by the IRS to clarify the information previously submitted by the informant. The appropriate Operating Division Counsel should provide support to the IRS, as needed, with respect to these follow-up contacts and debriefings.

A current employee informant may submit additional information to the IRS following the initial submission. Depending on the facts and circumstances, the additional information may be received and used by the IRS. Generally, the IRS may receive and use supplemental information submitted by a current employee informant for the sole purpose of clarifying previously submitted information. For this purpose, supplemental information must reasonably relate to the previously submitted information, based on an analysis of all the facts and circumstances relating to the information and the IRS's contacts with the informant. In any case involving additional information submitted by a current employee informant, the IRS must coordinate the matter with the appropriate Operating Division Counsel. The Operating Division Counsel will consult with the Associate Chief Counsel (Procedure and Administration). The Deputy Chief Counsel (Operations) shall determine Counsel's position if the Operating Division Counsel and the Associate Chief Counsel (Procedure and Administration) disagree on whether the IRS should use

[1] Debriefing procedures applicable to civil cases are discussed at IRM 25.2.2.6.

the information. If Counsel concludes that the information may not, in fact, be supplemental to previously submitted information, as described above, or, based on an analysis of the risks of using the information, that the information should not be used by the IRS even if it is supplemental information, then an appropriate IRS Operating Division Executive will determine whether or how to proceed.

In certain circumstances, contacts with a current employee informant, whether initiated by the IRS or the informant, that are not clearly within the instructions described above, may also be considered on a case-by-case basis. These circumstances may arise, for example, when it is unclear whether a proposed contact would be an initial contact, a debriefing, or a subsequent contact, or when an informant submits additional information that relates to a new issue. Additional information that is submitted by a whistleblower, including a current employee informant, that relates to a new issue should be treated as a new claim that is subject to the procedures described in Notice 2008-4, 2008-2 I.R.B. 253 and any related IRM provisions. In these circumstances, the IRS must coordinate the matter with the appropriate Operating Division Counsel. The Operating Division Counsel will consult with the Associate Chief Counsel (Procedure and Administration). The Deputy Chief Counsel (Operations) shall determine Counsel's position if the Operating Division Counsel and the Associate Chief Counsel (Procedure and Administration) disagree on whether the IRS should use the information. If Counsel concludes that the IRS should not initiate a contact or use information based on its evaluation of the risks, then an appropriate IRS Operating Division Executive will determine whether or how to proceed.

Informants who are Current Representatives of a Taxpayer

Under no circumstances is it appropriate to accept any information from an informant regarding a taxpayer (or related taxpayers) when the informant is also that taxpayer's representative in any administrative matter pending before the IRS, e.g., an income tax examination, or in any litigation involving issues in which the IRS has any interest (Tax Court and refund litigation, collections suits, summons enforcement actions, etc.). If a taxpayer's representative makes a direct or indirect overture to the IRS or Counsel about becoming an informant, e.g., either orally or by filing a Form 3949A, Information Referral, or Form 211, Application for Reward for Original Information, there will be no further interaction with that person as the taxpayer's representative and the representative must be informed of this outcome immediately. It will be the responsibility of the taxpayer's representative to attempt to explain the reason for being excluded from the matter as the taxpayer's representative under these circumstances.[2] In addition, IRS and Counsel employees should have no further interaction or contact with, or receive any further information from, that taxpayer's representative as an informant.

The same rules apply and the same results are reached if an individual's status as an informant regarding a taxpayer (or related taxpayers) predates that individual's appearance as the taxpayer's representative in any administrative matter pending before the IRS or in litigation.

The appropriate Division Counsel and the Associate Chief Counsel (Procedure and Administration) must be notified immediately of any situation involving an informant or potential informant who is, or may become, the taxpayer's representative under the circumstances described above.

[2] This is not an application of the bypass rule found at IRM 4.11.55.3.

Evidentiary Matters

Counsel must be particularly sensitive to the privilege and confidentiality issues that may be present in cases involving informants. The use of potentially privileged information by the IRS can result in the inability to pursue an issue or an entire case.

For this reason, before using information provided by an informant, the IRS must determine whether the information is subject to a privilege and, if so, whether the taxpayer has waived the privilege. Moreover, the IRS needs to determine the extent of any privilege that may apply. In many cases in which a privilege does apply to information provided by an informant, portions of the information will nonetheless likely not be subject to the privilege. Whether information is subject to a privilege, and the extent of any such privilege, will depend on the particular facts and circumstances of the matter. Generally, it should be assumed that a current employee has access to information that may be subject to a privilege that has not been affirmatively waived by the taxpayer. If, in a particular case, the rules and procedures described above for current employee informant cases do not apply, then the IRS may conduct its own review of the information provided by an informant without the formal assistance of Counsel. The IRS will, however, coordinate with Counsel upon the identification of any potential privilege issue regardless of whether an informant is a current employee of the taxpayer.

If a current employee informant is an attorney, accountant, or other professional, the informant may violate a duty of confidentiality owed to his or her client by providing information to the IRS. In some cases, these ethical violations may affect the IRS's ability to use the information provided by the informant. The implications for the IRS of an informant's breach of an ethical duty will depend on the nature of the informant's ethical duty and the nature of the breach. Moreover, ethics rules that apply to the IRS and/or Counsel employees involved in a case may affect the ability of those employees to use the information and, as a consequence, may affect the IRS's ability to use the information. Finally, courts may impose limitations on the IRS's use of confidential information in litigation. See, e.g., In re Shell Oil Refinery, 143 F.R.D. 105 (E.D. La. 1992). Counsel should consider the potential impact of any applicable ethical duties in the course of its taint review.

Questions relating to issues addressed in this Notice should be directed to the Associate Chief Counsel (Procedure and Administration), Branch 6 at 202-622-7950 or Branch 7 at 202-622-4570.

/s/
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(Procedure and Administration)