

in contempt for refusing to disclose agency records or information when following the instructions of his or her supervisor regarding the disclosure. As such, an agency's Touhy regulations are the instructions agency employees are to follow when those employees receive requests or demands to testify or otherwise disclose agency records or information.

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

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

Section 301.9000-1 Definitions

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

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

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

definition of "internal revenue records or information."

Section 301.9000-2 Considerations in Responding to a Request or Demand for IRS Records or Information

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

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

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

Section 301.9000-3 Prohibition on Disclosure of IRS Records or Information Without Testimony Authorization

The general rule is that, in response to a request or demand, an IRS officer, employee or contractor may not provide testimony or IRS records or information unless the Commissioner, or a delegate, gives instructions therefor. Such an instruction is called a "testimony authorization." A "testimony authorization" includes an instruction to testify or provide IRS records or

information in whole, in part or not at all. In the interim between receipt of a request or demand and the issuance of a testimony authorization, an IRS officer, employee or contractor may appear in person to advise that he or she is awaiting instructions (in the form of a testimony authorization).

Testimony authorizations are required, for the most part, in situations involving court or congressional testimony. There are, however, exceptions to the requirement of a testimony authorization. In an IRS matter in which the attorney or other representative of the government requests testimony, no testimony authorization is required. Similarly, this proposed regulation does not require a testimony authorization in an IRS matter in which the request or demand is for responses solely in writing, produced under the direction of government counsel, such as admissions, document production and written interrogatories to parties. Also, testimony authorization is not required if a former IRS officer, employee or contractor receives a request or demand for IRS records or information that involve general knowledge gained while employed or under contract with the IRS. Finally, testimony authorization also is not required if more specific procedures of the Commissioner apply to the disclosure. Such procedures include, for example, those relating to Freedom of Information Act (5 U.S.C. 552) or Privacy Act (5 U.S.C. 552a) requests, disclosures in accordance with 26 CFR 601.702(d), disclosures to state tax agencies pursuant to section 6103(d) of the Code, or disclosures to the United States Department of Justice pursuant to an *ex parte* order under section 6103(i)(1) of the Code.

Section 301.9000-4 Procedure in the Event of a Request or Demand for IRS Records or Information

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