

Signing Authority

This document is being issued in accordance with 19 CFR 0.1(a)(1), pertaining to the authority of the Secretary of the Treasury (or his/her delegate) to approve regulations related to certain customs revenue functions.

List of Subjects in 19 CFR Part 12

Cultural property, Customs duties and inspection, Imports, Prohibited merchandise.

Amendment to CBP Regulations

■ For the reasons set forth above, part 12 of title 19 of the Code of Federal Regulations (19 CFR part 12), is amended as set forth below:

PART 12—SPECIAL CLASSES OF MERCHANDISE

■ 1. The general authority citation for part 12 continues to read, and specific authority for new § 12.104j is added to read, as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States (HTSUS)), 1624;

* * * * *

Section 12.104j also issued under Pub. L. 108–429, 118 Stat. 2600; 19 U.S.C. 2612;

* * * * *

■ 2. Add a new § 12.104j to read as follows:

§ 12.104j Emergency protection for Iraqi cultural antiquities.

(a) *Restriction.* Importation of archaeological or ethnological material of Iraq is restricted pursuant to the Emergency Protection for Iraqi Cultural Antiquities Act of 2004 (title III of Pub. L. 108–429) and section 304 of the Convention on Cultural Property Implementation Act (19 U.S.C. 2603).

(b) *Description of restricted material.* The term “archaeological or ethnological material of Iraq” means cultural property of Iraq and other items of archaeological, historical, cultural, rare scientific, or religious importance illegally removed from the Iraq National Museum, the National Library of Iraq, and other locations in Iraq, since the adoption of United Nations Security Council Resolution 661 of 1990. CBP Decision 08–17 sets forth the Designated List of Archaeological and Ethnological Material of Iraq that describes the types of specific items or categories of

archaeological or ethnological material that are subject to import restrictions.

Jayson P. Ahern,

Acting Commissioner, U.S. Customs and Border Protection.

Approved: April 24, 2008.

Timothy E. Skud,

Deputy Assistant Secretary of the Treasury.

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 301

[TD 9395]

RIN 1545–BA31

Suspension of Statutes of Limitations in Third-Party and John Doe Summons Disputes and Expansion of Taxpayers' Rights To Receive Notice and Seek Judicial Review of Third-Party Summonses

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations relating to third-party and John Doe summonses. These final regulations reflect amendments to sections 7603 and 7609 of the Internal Revenue Code of 1986 made by the Internal Revenue Service Restructuring and Reform Act of 1998, the Omnibus Budget Reconciliation Act of 1990, the Technical and Miscellaneous Revenue Act of 1988, and the Tax Reform Act of 1986. These final regulations provide guidance relating to the manner by which summonses may be served on third-party recordkeepers, the expanded class of third-party summonses subject to notice requirements and other procedures, and the suspension of periods of limitations if a court proceeding is brought involving a challenge to a third-party summons, or if a third party's response to a summons is not finally resolved within six months after service. These final regulations affect third parties who are served with a summons, taxpayers identified in a third-party summons, and other persons entitled to notice of a third-party summons.

DATES: *Effective Date:* These regulations are effective April 30, 2008.

Applicability Date: For the date of applicability, see §§ 301.7603–1(f); 301.7603–2(c); 301.7609–1(d); 301.7609–2(c); 301.7609–3(e); 301.7609–4(d); and 301.7609–5(f).

FOR FURTHER INFORMATION CONTACT: Elizabeth Rawlins at (202) 622–3630 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document contains final regulations amending the Procedure and Administration Regulations (26 CFR part 301) under sections 7603 and 7609 of the Internal Revenue Code of 1986 (Code). The final regulations reflect amendments to sections 7603 and 7609 made by the Internal Revenue Service Restructuring and Reform Act of 1998 (Pub. L. 105–206, 112 Stat. 685) (RRA 1998), the Technical and Miscellaneous Revenue Act of 1988 (Pub. L. 100–647, 102 Stat. 3343) (TAMRA 1988), and the Tax Reform Act of 1986 (Pub. L. 99–514, 100 Stat. 2085) (TRA 1986). The final regulations also reflect changes made to section 6503(j) in the Omnibus Budget Reconciliation Act of 1990 (Pub. L. 101–508, 104 Stat. 1388) (OBRA 1990).

On July 21, 2006, the IRS published in the **Federal Register** a notice of proposed rulemaking (REG–153037–01; 71 FR 41377) that interprets the amendments to sections 7603 and 7609. Written comments from one commentator on several of the proposed sections were received. No request for a public hearing was received, nor was one held. The proposed regulations, as revised by this Treasury decision, are substantially adopted as final regulations.

As described more fully in the preamble to the proposed regulations, these regulations provide guidance relating to the manner in which summonses may be served on third-party recordkeepers, the expanded class of third-party summonses to which the notice requirements and other procedures apply, the suspension of a taxpayer's periods of limitations if that taxpayer petitions to quash a third-party summons or intervenes in a proceeding to enforce such a summons, and the suspension of a taxpayer's periods of limitations if a summoned third party does not finally resolve its response to a summons within six months after service of a summons.

Comments on the Proposed Regulations and Explanation of Changes

Section 301.7609–1(a)(2)—In General

Proposed § 301.7609–1(a)(2) provides that neither section 7609 nor the regulations “limit the IRS's ability to obtain information, other than by summons, through formal or informal procedures authorized by sections 7601 and 7602.” The commentator suggested that this provision be prefaced with the

phrase “[e]xcept as provided in section 7609 or Treasury Regulations” and further explained that section 7609 does contain provisions, such as section 7609(d), that limit the IRS’s ability to obtain information when a summons has been served.

This suggestion has not been adopted in the final regulations. Proposed § 301.7609–1(a)(2) is consistent with the language of section 7609(j), which provides: “Nothing in this section shall be construed to limit the [IRS’s] ability to obtain information, other than by summons, through formal or informal procedures authorized by sections 7601 and 7602.” Section 7609(j) and proposed § 301.7609–1(a)(2) are directed to situations in which the IRS has not issued a summons, but is instead seeking information through informal procedures authorized by sections 7601 and 7602. In these situations, section 7609 and the regulations do not apply.

Section 301.7609–2(a)(1)—Persons Entitled to Notice

Section 7609(a)(1) provides that notice of a third party summons shall be given to “any person (other than the person summoned) who is identified in the summons.” Proposed § 301.7609–2(a)(1) provides: “The only persons so identified are the person with respect to whose liability the summons is issued and any other person identified in the description of summoned records or testimony. For example, if the IRS issues a summons to a bank with respect to the liability of C that requires the production of account records of A and B, both of whom are named in the summons, the IRS must notify A, B, and C of the summons.”

The commentator suggested that the statutory phrase “any person * * * identified in the summons” should be interpreted more broadly to encompass persons to whom the summoned records relate who belong to a specifically identifiable class, but who are not identified by name in the summons. The commentator offered examples of persons described generically by phrases, such as “children” or “closely-held corporations in which the taxpayer is a shareholder.”

This suggestion has not been adopted in the final regulations. The requirement that an identified person be named in the summons is consistent with longstanding regulations under section 7609. Nothing in the statutory amendments to section 7609 since these regulations were promulgated suggests that Congress intended to change the meaning of this concept.

The commentator also suggested that the example in the proposed regulations

could be read to mean that a person named in a summons is only entitled to notice if that person’s records are sought from the third party. This reading is incorrect. The regulations do not condition the right to notice on a finding that the identified person’s records are sought. Instead, “any * * * person identified in the description of summoned records or testimony” is entitled to notice, as is the taxpayer with respect to whose liability the summons is issued.

Section 301.7609–3(a)—Duty of the Summoned Party

Proposed § 301.7609–3(a) provides: “Upon receipt of a summons, the summoned party must begin to assemble the summoned records. The summoned party must be prepared to produce the summoned records on the date on which the summons states that they are to be examined, regardless of the institution or anticipated institution of a proceeding to quash or the summoned party’s intervention in a proceeding to quash, as allowed under section 7609(b)(2)(C).”

The commentator suggested that proposed § 301.7609–3(a) is overbroad because the statutory provision on which it is based, section 7609(i)(1), is preceded by the heading: “Recordkeeper Must Assemble Records and Be Prepared To Produce Records.” The commentator concluded that section 7609(i)(1) can apply only to third-party recordkeepers. This conclusion is not supported by the statutory amendment to section 7609(i)(1) under RRA 98, which replaced the prior reference to “third-party recordkeeper” with the term *summoned party*. Thus, section 7609(i)(1) applies to all recipients of third-party summonses (other than certain excepted summonses under section 7609(c)(2)).

The commentator also suggested that proposed § 301.7609–3(a) is overbroad because the requirements of section 7609(i)(1) do not apply if a proceeding to quash is brought. Section 7609(i)(1), however, does not require the summoned party to produce the documents when a petition to quash has been filed but merely requires the summoned party to “assemble” and “be prepared to produce” them.

The commentator suggested that proposed § 301.7609–3(a) would infringe on the rights of those summoned persons who receive a vague or overbroad summons. This provision, however, does not preclude a summoned person from raising such a defense in a summons enforcement proceeding. Accordingly, the IRS and Treasury have concluded that these

suggestions provide no basis for adopting changes in the final regulations.

Section 301.7609–4(c)—Presumption No Notice of Proceeding To Quash Has Been Mailed

Section 7609(b) provides that any person entitled to notice of a summons may bring a proceeding to quash by filing a petition in district court and mailing notice of the petition to both the IRS and the summoned person within 20 days of the day the notice was given. Proposed § 301.7609–4(b)(3) provides that if a person fails to give proper and timely notice of the petition to quash, then that person has failed to institute a proceeding to quash and the district court lacks jurisdiction to hear the proceeding. Proposed § 301.7609–4(c) provides that “it is presumed that the notification [of the petition to quash] was not timely mailed if the copy of the petition was not delivered to the summoned person or to the person and office designated to receive the notice on behalf of the IRS within three days after the close of the 20-day period allowed for instituting a proceeding to quash.”

The commentator suggested that proposed § 301.7609–4(c) should be clarified to provide that the presumption of untimeliness would no longer apply “if a copy of the petition is subsequently received and it is determined that it was mailed prior to the close of the 20-day period.” Proposed § 301.7609–4(c) is identical, however, in all salient respects to a provision in the prior regulations that the IRS has administered since 1986 without controversy. In cases where the IRS has not received a copy of a petition to quash within three days after the close of the 20-day period, but it is later determined that a copy of the petition was timely mailed within the 20-day period, the IRS has halted the examination of summoned witnesses and records upon receiving a timely filed petition to quash, consistent with IRM provisions providing that, if a proceeding to quash is begun, no examination of summoned records is allowed until the court so orders.

Section 301.7609–5(e)(2)(i)—Intervention in an Enforcement Proceeding

Section 7609(e)(1) provides for the suspension of the statute of limitations with respect to a third-party summons “for the period during which a proceeding, and appeals therein, with respect to the enforcement of such summons is pending.” Proposed § 301.7609(e)(2)(i) provides: “If,

following issuance of an order to enforce a third-party summons, a collateral proceeding is brought challenging whether production made by the summoned party fully satisfied the court order and whether sanctions should be imposed against the summoned party for a failure to satisfy that order, the periods of limitations remain suspended until all appeals of the collateral proceeding are disposed of, or until the expiration of the period during which an appeal may be taken or a request for further review of the collateral proceeding may be made. Any collateral proceeding to the original proceeding shall be considered to be a continuation of the original proceeding."

The commentator suggested that including collateral proceedings and related appeals periods within the suspension period under section 7609(e)(1) goes beyond the statutory language and the IRS's authority to promulgate regulations. The statutory phrase "a proceeding, and appeals therein, with respect to the enforcement of such summons" connotes a category of court actions that are related to, but not limited to, a summons enforcement suit. Thus, section 7609(e)(1) is properly interpreted to encompass collateral proceedings and related appeals.

Section 301.7609-5(e)(3)—Final Resolution of the Summoned Third Party's Response to a Summons

Section 7609(e)(2)(B) suspends a taxpayer's periods of limitations on assessment and criminal prosecution "in the absence of the resolution of the summoned party's response to the summons" for a period beginning six months after service of the summons and ending on the date of "final resolution." Proposed § 301.7609-5(e)(3) provides that "final resolution" occurs when the summons or any summons enforcement order is fully complied with and all appeals are disposed of or the period for appeal or further review has expired. The proposed regulation further provides that the determination of whether there has been full compliance will be made within a reasonable time, given the volume and complexity of the records produced, after the later of the giving of all testimony or the production of all records requested by the summons. The proposed regulation additionally provides that the suspension shall continue if, following an enforcement order, collateral proceedings are brought challenging whether the summoned party fully satisfied the court order. The suspension will continue until the summons or the enforcement order is

fully complied with and the decision in the collateral proceeding becomes final, which occurs when all appeals are disposed of or when the period for appeal or further review has expired.

The commentator suggested that proposed § 301.7609-5(e)(3) be revised to reflect that the suspension under section 7609(e)(2) does not apply to a taxpayer who brings a proceeding to quash or who intervenes in an enforcement suit. This suggestion has not been adopted as the statutory structure already provides for the applicability of alternative suspension periods. This suggestion has also not been adopted as nothing prevents the suspension under section 7609(e)(2) from applying after the expiration of the suspension under section 7609(e)(1).

The commentator also suggested that the provisions concerning collateral proceedings be removed. This recommendation has not been adopted. The suspension will only terminate upon final resolution of the summoned person's response to the summons, and collateral proceedings, such as contempt proceedings, may be necessary to obtain a summoned third party's compliance with an enforcement order.

The commentator further suggested that the "operative fact" in determining whether final resolution has occurred should be the date of the summoned person's "actual compliance" with the summons, not "the Service's determination as to whether and when this has occurred." This suggestion has not been adopted because compliance can only be determined after the records are examined. The regulations provide that the determination of whether there has been full compliance will be made within a reasonable time, given the volume and complexity of the records produced, after the later of the giving of all testimony or the production of all records requested by the summons or required by any order enforcing any part of the summons. In addition, as stated in the preamble to the proposed regulations, the IRS intends to publish additional administrative procedures regarding the compliance determination in the Internal Revenue Manual. An aspect of these procedures will involve the creation of procedures by which taxpayers can inquire about the suspension of their periods of limitations under section 7609(e)(2).

Sections 301.7603-1(f); 301.7603-2(c); 301.7609-1(d); 301.7609-2(c); 301.7609-3(e); 301.7609-4(d); and 301.7609-5(f)—Effective/Applicability Date

The commentator suggested making these regulations applicable only to summonses issued after the date on

which they are published. This suggestion was not adopted because these regulations are interpretative of statutory provisions that have existed as law for several years.

Special Analyses

It has been determined that this final regulation is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations and, because these regulations do not impose a collection of information under the Paperwork Reduction Act (44 U.S.C. section 3501), the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply to these regulations. Pursuant to section 7805(f) of the Code, the regulations, when published previously in the Notice of Proposed Rulemaking, were submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal author of these regulations is Elizabeth Rawlins of the Office of the Associate Chief Counsel, Procedure and Administration, Internal Revenue Service.

List of Subjects in 26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

■ Accordingly, 26 CFR part 301 is amended as follows:

PART 301—PROCEDURE AND ADMINISTRATION

■ **Paragraph 1.** The authority citation for part 301 continues to read, in part, as follows:

Authority: 26 U.S.C. 7805 * * *

■ **Par. 2.** Section 301.7603-1 is revised to read as follows:

§ 301.7603-1 Service of summons.

(a) *In general*—(1) *Hand delivery or delivery to place of abode.* Except as otherwise provided in paragraph (a)(2) of this section, a summons issued under section 6420(e)(2), 6421(g)(2), 6427(j)(2), or 7602 shall be served by an attested copy delivered in hand to the person to whom it is directed, or left at such person's last and usual place of abode.

(2) *Summonses issued to third-party recordkeepers.* A summons issued under section 6420(e)(2), 6421(g)(2), 6427(j)(2), or 7602 for the production of records (or testimony about such records) by a third-party recordkeeper, as described in section 7603(b)(2) and § 301.7603–2, may also be served by certified or registered mail to the third-party recordkeeper's last known address, as defined in § 301.6212–2. If service to a third-party recordkeeper is made by certified or registered mail, the date of service is the date on which the summons is mailed.

(b) *Persons who may serve a summons.* The officers and employees of the Internal Revenue Service whom the Commissioner has designated to carry out the authority described in § 301.7602–1(b) to issue a summons are authorized to serve a summons issued under section 6420(e)(2), 6421(g)(2), 6427(j)(2), or 7602.

(c) *Effect of certificate of service.* The certificate of service signed by the person serving the summons shall be evidence of the facts it states on the hearing of an application for the enforcement of the summons.

(d) *Sufficiency of description of summoned records.* When a summons requires the production of records, it shall be sufficient if such records are described with reasonable certainty.

(e) *Records.* For purposes of this section and § 301.7603–2, the term *records* includes books, papers, or other data.

(f) *Effective/applicability date.* This section is applicable on April 30, 2008.

■ **Par. 3.** Section 301.7603–2 is added to read as follows:

§ 301.7603–2 Third-party recordkeepers.

(a) *Definitions*—(1) *Accountant.* A person is an accountant under section 7603(b)(2)(F) for purposes of determining whether that person is a third-party recordkeeper if, on the date the records described in the summons were created, the person was registered, licensed, or certified as an accountant under the authority of any state, commonwealth, territory, or possession of the United States, or of the District of Columbia.

(2) *Attorney.* A person is an attorney under section 7603(b)(2)(E) for purposes of determining whether that person is a third-party recordkeeper if, on the date the records described in the summons were created, the person was registered, licensed, or certified as an attorney under the authority of any state, commonwealth, territory, or possession of the United States, or of the District of Columbia.

(3) *Credit cards*—(i) *Person extending credit through credit cards.* The term *person extending credit through the use of credit cards or similar devices* under section 7603(b)(2)(C) generally includes any person who issues a credit card. The term does not include a seller of goods or services who honors credit cards issued by other parties but who does not extend credit through the use of credit cards or similar devices.

(ii) *Devices similar to credit cards.* An object is a device similar to a credit card under section 7603(b)(2)(C) only if it is physical in nature, such as a charge plate or similar device that may be tendered to obtain an extension of credit. Thus, a person who extends credit by requiring customers to sign sales slips without requiring the use of, or reference to, a physical object issued by that person is not a third-party recordkeeper under section 7603(b)(2)(C).

(iii) *Debit cards.* A debit card is not a credit card or similar device because a debit card is not tendered to obtain an extension of credit.

(4) *Enrolled agent.* A person is an enrolled agent under section 7603(b)(2)(I) for purposes of determining whether that person is a third-party recordkeeper if the person is enrolled as an agent authorized to practice before the Internal Revenue Service pursuant to Circular 230, 31 CFR Part 10.

(5) *Owner or developer of certain computer code and data.* An owner or developer of computer software source code under section 7603(b)(2)(J) is a third-party recordkeeper when summoned to produce a computer software source code (as defined in section 7612(d)(2)), or an executable code and associated data described in section 7612(b)(1)(A)(ii), even if that person did not make or keep records of another person's business transactions or affairs.

(b) *When third-party recordkeeper status arises*—(1) *In general.* Except as provided in paragraph (a)(5) of this section, a person listed in section 7603(b)(2) is a third-party recordkeeper for purposes of section 7609(c)(2)(E) and § 301.7603–1 only if the summons served on that person seeks records (or testimony regarding such records) of a third party's business transactions or affairs and such recordkeeper made or kept the records in the capacity of a third-party recordkeeper. For instance, an accountant is not a third-party recordkeeper (by reason of being an accountant) with respect to the accountant's records of a sale of property by the accountant to another person. Similarly, a credit card issuer is

not a third-party recordkeeper (by reason of being a person extending credit through the use of credit cards or similar devices) with respect to—

(i) Records relating to non-credit card transactions, such as a cash sale by the issuer to a holder of the issuer's credit card; or

(ii) Records relating to transactions involving the use of another issuer's credit card.

(2) *Examples.* The rules of paragraph (b)(1) of this section are illustrated by the following examples:

Example 1. V issues a credit card (the V card) that is honored by R, a retailer. When using the V card, C, a customer, signs a sales slip in triplicate. C, R, and V each retain one copy. Only the copy held by V is held by a third-party recordkeeper under section 7603(b)(2), even though R may issue its own credit card.

Example 2. R, a retailer, issues its own credit card (the R card) to C, a customer. When C makes a credit purchase from R using the R card, C signs a sales slip in duplicate. C and R each retain one copy. Because R keeps the copy in its capacity as credit card issuer, as well as in its capacity as a retailer, it is a third-party recordkeeper under section 7603(b)(2) with respect to its copy of the sales slip.

(c) *Effective/applicability date.* This section is applicable on April 30, 2008.

■ **Par. 4.** Sections 301.7609–1 through 301.7609–5 are revised to read as follows:

§ 301.7609–1 Special procedures for third-party summonses.

(a) *In general*—(1) Section 7609 requires the Internal Revenue Service (IRS) to follow special procedures when summoning a third party's testimony, records, or computer software source code. Except as provided in § 301.7609–2(b), the IRS must provide notice of a third-party summons to any person identified in the summons, other than the person summoned. A person entitled to notice of a third-party summons may intervene in any proceeding brought to enforce the summons or may bring a proceeding to quash the summons, regardless of whether they receive notice of the summons from the IRS pursuant to section 7609(a) and § 301.7609–2.

(2) Neither section 7609 nor the regulations hereunder limit the IRS's ability to obtain information, other than by summons, through formal or informal procedures authorized by sections 7601 and 7602.

(b) *Cross references.* See § 301.7609–2 for rules relating to persons who must be notified of a third-party summons and exceptions to the notification requirements. See § 301.7609–3 for rules relating to the rights and duties of

summoned parties. See § 301.7609–4 for rules relating to actions to quash a summons or to intervene in a summons enforcement proceeding. See § 301.7609–5 for rules relating to the suspension of periods of limitations.

(c) *Records.* For purposes of §§ 301.7609–1 through 301.7609–5, the term *records* includes books, papers, or other data.

(d) *Effective/applicability date.* This section is applicable on April 30, 2008.

§ 301.7609–2 Notification of persons identified in third-party summonses.

(a) *In general*—(1) *Persons entitled to notice.* Except as provided in § 301.7609–2(b), the Internal Revenue Service (IRS) shall give notice of a third-party summons to any person, other than the person summoned, who is identified in the summons. The only persons so identified are the person with respect to whose liability the summons is issued and any other person identified in the description of summoned records or testimony. For example, if the IRS issues a summons to a bank with respect to the liability of C that requires the production of account records of A and B, both of whom are named in the summons, the IRS must notify A, B and C of the summons.

(2) *Time for providing notice.* If notice is required by this paragraph, such notice must be given within three days of the date on which the summons is served on the third party, but no later than 23 days prior to the date fixed in the summons as the date on which the examination of the summoned person or records is scheduled.

(3) *Methods for serving notice.* Notice may be served by hand delivery to any person entitled to notice or by leaving notice at such person's last and usual place of abode. Notice also may be served by certified or registered mail to the person's last known address, as defined in § 301.6212–2. If service to a person entitled to notice is made by certified or registered mail, the date of service is the date on which the notice is mailed.

(4) *Content of the notice.* Notice required to be given to any person entitled to notice must be accompanied by a copy of the summons that has been served and must include an explanation of the right to bring a proceeding to quash the summons. The copy of the summons accompanying the notice is not required to contain the attestation that appears pursuant to section 7603 on the copy of the summons served on the summoned person.

(b) *Exceptions.* The IRS is not required to provide notice to persons

identified in the following third-party summonses:

(1) *Summons served on the taxpayer.* The IRS is not required to provide notice of a summons served on the person with respect to whose liability the summons was issued, or any officer or employee of such person.

(2) *Existence of records.* The IRS is not required to provide notice in the case of a summons issued to determine whether or not records of the business transactions or affairs of a person identified in the summons have been made or kept.

(3) *Numbered account or similar arrangement.* The IRS is not required to provide notice in the case of a summons issued solely to determine the identity of a person having a numbered account or similar arrangement with a bank or other institution. An account is a numbered account or similar arrangement within the meaning of this paragraph if it is an account through which a person may authorize transactions solely through the use of a number, symbol, code name, or other device not involving the disclosure of the person's identity. The term *person having a numbered account or similar arrangement* includes the person who opened the account and any person authorized to access the account or to receive records or statements concerning it.

(4) *Summonses in aid of the collection of liabilities*—(i) *In general.* The IRS is not required to provide notice in the case of a summons issued in aid of the collection of liabilities within the meaning of this paragraph if it is issued in connection with the collection of—

(A) An assessment or judgment against the person with respect to whose liability the summons is issued; or

(B) The liability determined at law or in equity of any transferee or fiduciary of a person described in paragraph (b)(4)(i)(A) of this section.

(ii) *Examples.* The rules of paragraph (b)(4) of this section are illustrated by the following examples:

Example 1. A third-party summons is issued to a bank to determine the amount held in an account in the name of A, against whom unpaid income taxes have been assessed. Notice of the summons is not required to be given to A or any other persons identified in the summons because the summons is issued in connection with the collection of taxes that have been assessed.

Example 2. A third-party summons is issued to determine whether assessments should be made against A, who is potentially liable for a trust fund recovery penalty under section 6672 with respect to the assessed but

unpaid withholding tax liability of employer E. The summons is captioned: In the matter of A. Notice of the summons must be provided to A and to any other persons identified in the summons because the summons was issued with respect to A's potential, unassessed liability under section 6672.

(5) *Summonses issued by a criminal investigator.* The IRS is not required to provide notice in the case of a summons issued by a criminal investigator to a person other than a third-party recordkeeper, as defined in section 7603(b). For purposes of section 7609(c)(2)(E), a summons issued by a criminal investigator is any summons issued as part of a criminal investigation by an IRS officer or employee having authority to conduct a criminal investigation and to issue a summons.

(6) *John Doe summons.* The IRS is not required to provide notice in the case of a John Doe summons issued under section 7609(f).

(7) *Summonses issued pursuant to a court order to prevent spoliation of evidence.* The IRS is not required to provide notice in the case of a summons for which a court determines there is reasonable cause to believe the giving of notice may lead to attempts to conceal, destroy, or alter records relevant to the examination, to prevent communication of information from other persons through intimidation, bribery, or collusion, or to flee to avoid prosecution, testifying, or production of records.

(c) *Effective/applicability date.* This section is applicable on April 30, 2008.

§ 301.7609–3 Duty of and protection for the summoned party.

(a) *Duty of the summoned party.* Upon receipt of a summons, the summoned party must begin to assemble the summoned records. The summoned party must be prepared to produce the summoned records on the date on which the summons states that they are to be examined, regardless of the institution or anticipated institution of a proceeding to quash or the summoned party's intervention in a proceeding to quash, as allowed under section 7609(b)(2)(C).

(b) *Disclosing summoned party not liable*—(1) *In general.* A summoned party, or an agent or employee thereof, who makes a disclosure of records or gives testimony as required by a summons in good faith reliance on the certificate of the Secretary (as defined in paragraph (b)(2) of this section) or an order of a court requiring production of records or giving of testimony, will not be liable for any claim arising from such disclosure brought by any customer, any

party with respect to whose tax liability the summons was issued, or any other person.

(2) *Certificate of the Secretary.* The Secretary may issue to the summoned party a certificate if the person with respect to whose liability the summons was issued expressly consents to the examination of the records summoned and the taking of testimony. The Secretary also may issue to the summoned party a certificate stating that—

(i) The 20-day period within which a person entitled to notice of the summons may institute a proceeding to quash the summons has expired; and

(ii) No proceeding has been instituted within that period.

(c) *Reimbursement of costs.*

Summoned third parties may be entitled to reimbursement of their costs of assembling and preparing to produce summoned records, to the extent allowed by section 7610 and § 301.7610-1.

(d) *Notification of suspension of periods of limitations in connection with a John Doe summons—(1)*

Requirement of notification. If any periods of limitations are suspended under section 7609(e)(2) and § 301.7609-5(d) with respect to a John Doe summons described in section 7609(f), the summoned party is required under section 7609(i)(4) to provide notice of such suspension to all persons with respect to whose liability the summons was issued.

(2) *Content of notification.* A summoned party required to notify a person of the suspension of the periods of limitations shall provide the following information to such person—

(i) A John Doe summons was served on the summoned party seeking records that may be relevant to the person's tax liability;

(ii) The date on which the summons was served;

(iii) The tax period(s) to which the summons relates;

(iv) Six months have passed since service of the summons and the summoned party's response to the summons has not been finally resolved;

(v) The periods of limitations under section 6501 (relating to assessment and collection) and section 6531 (relating to criminal prosecution), have been suspended; and

(vi) The date on which suspension of the periods of limitations under sections 6501 and 6531 began.

(3) *Time and manner of notification.* The notification must be made in writing and may be delivered in person, by mail sent to the address last known by the summoned party, or by use of

any electronic means of transmission. Notification should be made as soon as possible after the suspension of the periods of limitations begins. Failure by a summoned party to give notice of the suspension of periods of limitations as required by section 7609(i)(4) does not prevent the suspension of the periods of limitations under section 7609(e)(2).

(e) *Effective/applicability date.* This section is applicable on April 30, 2008.

§ 301.7609-4 Right to intervene; right to institute a proceeding to quash.

(a) *Intervention in proceeding with respect to enforcement of a summons.*

Under section 7609(b)(1), a person entitled to notice of a summons under section 7609(a) and § 301.7609-2 is entitled to intervene in any proceeding brought under section 7604 with respect to the enforcement of that summons.

(b) *Right to institute a proceeding to quash—(1) In general.* Under section 7609(b), a person entitled to notice of a summons under section 7609(a) and § 301.7609-2 may institute a proceeding to quash the summons in the United States district court for the district in which the summoned person resides or is found.

(2) *Requirements for a proceeding to quash.* To institute a proceeding to quash a summons, a person entitled to notice of the summons must, not later than the 20th day following the day the notice of the summons was served on or mailed to such person—

(i) File a petition to quash a summons in the name of the person entitled to notice of the summons in the proper district court;

(ii) Notify the Internal Revenue Service (IRS) by sending a copy of that petition to quash by registered or certified mail to the IRS employee and office designated in the notice of summons to receive the copy; and

(iii) Notify the summoned person by sending by registered or certified mail a copy of the petition to quash to the summoned person.

(3) *Failure to give timely notice.* If a person entitled to notice of the summons fails to give proper and timely notice to either the summoned person or the IRS in the manner described in this paragraph, that person has failed to institute a proceeding to quash and the district court lacks jurisdiction to hear the proceeding. For example, if the person entitled to notice mails a copy of the petition to the summoned person, but fails to mail a copy of the petition to the designated IRS employee and office, the person entitled to notice has failed to institute a proceeding to quash. Similarly, if the person entitled to notice mails a copy of such petition to

the summoned person but, instead of sending a copy of the petition by registered or certified mail to the designated IRS employee and office, the person entitled to notice provides the designated IRS employee and office the petition by some other means, the person entitled to notice has failed to institute a proceeding to quash.

(4) *Failure to institute a proceeding to quash.* If a person entitled to notice fails to institute a proceeding to quash within 20 days following the day the notice of the summons was served on or mailed to such person, the IRS may examine the summoned records and take summoned testimony following the 23rd day after notice of the summons was served on or mailed to the person entitled to notice.

(c) *Presumption no notice has been mailed.* Section 7609(b)(2)(B) permits a person entitled to notice to institute a proceeding to quash by filing a petition in district court and notifying both the IRS and the summoned person. Unless the person entitled to notice has notified both the IRS and the summoned person in the appropriate manner, the person entitled to notice has failed to institute a proceeding to quash. For the purpose of permitting the IRS to examine the summoned witnesses and records, it is presumed that the notification was not timely mailed if the copy of the petition was not delivered to the summoned person or to the person and office designated to receive the notice on behalf of the IRS within three days after the close of the 20-day period allowed for instituting a proceeding to quash.

(d) *Effective/applicability date.* This section is applicable on April 30, 2008.

§ 301.7609-5 Suspension of periods of limitations.

(a) *In general.* Except in the case of a summons that is a designated or related summons described in section 6503(j), the following rules relating to the suspension of certain periods of limitations apply to all third-party summonses subject to the notice requirements of section 7609(a) and to all John Doe summonses subject to the requirements of section 7609(f).

(b) *Intervention in an action to enforce the summons—(1) In general.* If a person entitled to notice of a summons under section 7609(a) and § 301.7609-2 with respect to whose liability the summons was issued, or such person's agent, nominee, or other person acting under the direction or control of the person entitled to notice, takes any action to intervene in a proceeding with respect to enforcement of such summons brought pursuant to section 7604, that person's periods of

limitations under sections 6501 (relating to assessment and collection) and 6531 (relating to criminal prosecutions) for the tax period or periods that are the subject of the summons are suspended for the period during which such proceeding is pending.

(2) *Action to intervene.* A person entitled to notice takes any action to intervene in a proceeding to enforce a summons within the meaning of § 301.7609-4(a) on the date when a motion to intervene is filed with the court.

(c) *Institution of a proceeding to quash a summons—(1) In general.* If a person entitled to notice of a summons under section 7609(a) and § 301.7609-2 with respect to whose liability the summons was issued, or such person's agent, nominee, or other person acting under the direction or control of such person, takes any action described in § 301.7609-4(b) to institute a proceeding to quash such summons, that person's periods of limitations under sections 6501 and 6531 for the tax period or periods that are the subject of the summons are suspended for the period during which such proceeding is pending.

(2) *Action to institute a proceeding to quash a summons.* A person entitled to notice takes any action to institute a proceeding to quash if he or she files a petition to quash the summons in any district court, regardless of whether the timely filing requirements of section 7609(b)(2)(A) or the notice requirements of section 7609(b)(2)(B) are satisfied. For example, a person entitled to notice takes an action to institute a proceeding to quash a summons for purposes of this section if that person files a petition to quash the summons in district court and notifies the summoned person by sending a copy of the petition by registered or certified mail, but fails to mail a copy of that notice to the appropriate Internal Revenue Service (IRS) person and office.

(d) *Summoned party's failure to finally resolve the response to a summons after six months from service—(1) In general.* If a third party's response to a summons for which the IRS was required to provide notice to persons identified in the summons, or to a John Doe summons described in section 7609(f), is not finally resolved within six months after the date of service of the summons, the periods of limitations are suspended under sections 6501 and 6531, for the person with respect to whose liability the summons was issued and for any person whose identity is sought to be obtained by a John Doe summons, for the tax period or periods that are the subject of

the summons. The suspension shall begin on the date which is six months after the service of the summons and shall end on the date on which there is a final resolution of the summoned party's response to the summons.

(2) *Example.* The rules of paragraph (d)(1) of this section are illustrated by the following example:

A John Doe summons is issued on April 1, 2004, to the promoter of a tax shelter and seeks the names of all participants in the shelter in order to investigate the participants' income tax liabilities for 2001 and 2002. The district court approves service of the summons on April 30, 2004, and the summons is served on the promoter on May 3, 2004. The promoter does not provide the names of the participants. The periods of limitations for the participants' income tax liabilities and criminal prosecution for 2001 and 2002 are suspended under section 7609(e)(2) beginning on November 3, 2004, the date which is six months after the date the John Doe summons was served until the date on which the promoter's response to the summons is finally resolved.

(e) *Definitions—(1) Agent, nominee, etc.* A person is the agent, nominee, or other person of a person entitled to notice under section 7609(a) and § 301.7609-2, and is acting under the direction or control of the person entitled to notice for purposes of section 7609(e)(1), if the person entitled to notice has the ability in fact or at law to cause the agent, nominee or other person, to take the actions permitted under section 7609(b).

(2) *Period during which a proceeding is pending—(i) Intervention in an enforcement proceeding.* The period during which the periods of limitations under sections 6501 and 6531 are suspended under section 7609(e)(1) begins on the date any person described in paragraph (b) of this section intervenes in an action to enforce the summons. The periods of limitations remain suspended until all appeals are disposed of, or until the expiration of the period during which an appeal may be taken or a request for further review may be made. The periods of limitations remain suspended for the period during which a proceeding is pending, regardless of compliance (or partial compliance) with the summons during that period. If, following issuance of an order to enforce a third-party summons, a collateral proceeding is brought challenging whether production made by the summoned party fully satisfied the court order and whether sanctions should be imposed against the summoned party for a failure to satisfy that order, the periods of limitations remain suspended until all appeals of the collateral proceeding are disposed of, or until the expiration of the period

during which an appeal may be taken or a request for further review of the collateral proceeding may be made. Any collateral proceeding to the original proceeding shall be considered to be a continuation of the original proceeding.

(ii) *Proceeding to quash a summons.* The period during which the periods of limitations under sections 6501 and 6531 are suspended under section 7609(e)(1) begins on the date any person described in paragraph (c) of this section files a petition to quash the summons in district court. The periods of limitations remain suspended until all appeals are disposed of, or until expiration of the period in which an appeal may be taken or a request for further review may be made. The periods of limitations remain suspended for the period during which a proceeding is pending, regardless of compliance (or partial compliance) with the summons during that period.

(iii) *Examples.* The rules of paragraph (e)(2) are illustrated by the following examples:

Example 1. A revenue agent issues a summons to A, an accountant for B, requiring production of records relating to B's income tax liabilities for 2002. The summons is served on A on March 1, 2004. B files a petition to quash the summons in district court on March 15, 2004. The district court dismisses B's petition on July 1, 2004. B fails to appeal this decision by filing a notice of appeal within 60 days from the date of the district court's order of dismissal. The revenue agent notifies A that B did not appeal the district court's order. A turns over all of the records requested in the summons. The periods of limitations applicable to B for 2002 under sections 6501 and 6531 are suspended under section 7609(e)(1) from March 15, 2004, the date B filed a petition to quash, until August 30, 2004, the last day on which B could have filed a notice of appeal.

Example 2. A revenue agent issues a summons to A, an accountant for B, requiring production of records relating to B's income tax liabilities for 2003. The summons is served on A on June 1, 2005. B files an untimely petition to quash the summons in district court on June 29, 2005. The district court dismisses B's petition on July 29, 2005. B does not file an appeal of the district court's order. The periods of limitations applicable to B for 2003 under sections 6501 and 6531 are suspended under section 7609(e)(1) from June 29, 2005, the date B filed an untimely petition to quash, until September 27, 2005, the last day on which B could have filed a notice of appeal.

(3) *Final resolution of the summoned third party's response to a summons.* For purposes of section 7609(e)(2)(B), final resolution with respect to a summoned party's response to a third-party summons occurs when the summons or any order enforcing any part of the summons is fully complied

with and all appeals or requests for further review are disposed of, the period in which an appeal may be taken has expired or the period in which a request for further review may be made has expired. The determination of whether there has been full compliance will be made within a reasonable time, given the volume and complexity of the records produced, after the later of the giving of all testimony or the production of all records requested by the summons or required by any order enforcing any part of the summons. If, following an enforcement order, collateral proceedings are brought challenging whether the production made by the summoned party fully satisfied the court order and whether sanctions should be imposed against the summoned party for a failing to do so, the suspension of the periods of limitations shall continue until the summons or any order enforcing any part of the summons is fully complied with and the decision in the collateral proceeding becomes final. A decision in a collateral proceeding becomes final when all appeals are disposed of, the period in which an appeal may be taken has expired or the period in which a request for further review may be made has expired.

(f) *Effective/applicability date.* This section is applicable on *April 30, 2008*.

Dated: April 17, 2008.

Linda E. Stiff,

Deputy Commissioner for Services and Enforcement.

Eric Solomon,

Assistant Secretary of the Treasury (Tax Policy).

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DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2550

RIN 1210-AB10

Default Investment Alternatives Under Participant Directed Individual Account Plans

AGENCY: Employee Benefits Security Administration, Department of Labor.

ACTION: Correcting amendments.

SUMMARY: The Department published in the **Federal Register** of October 24, 2007 (72 FR 60452), a final regulation providing relief from certain fiduciary responsibilities for fiduciaries of participant-directed individual account

plans who, in the absence of directions from a participant, invest the participant's account in a qualified default investment alternative. The final regulation implemented recent amendments to title I of the Employee Retirement Income Security Act of 1974 (ERISA) enacted as part of the Pension Protection Act of 2006, Public Law 109-280. The Department has determined that two paragraphs in the final regulation, and one statement in the **SUPPLEMENTARY INFORMATION**, require correction. Accordingly, this document corrects the final regulation by revising these paragraphs.

DATES: *Effective Date:* The amendments to the final regulation are effective on April 30, 2008.

Applicability Date: The amendments to the final regulation apply on and after December 24, 2007.

FOR FURTHER INFORMATION CONTACT:

Allison Wielobob, Office of Regulations and Interpretations, Employee Benefits Security Administration, (202) 693-8500. This is not a toll-free number.

SUPPLEMENTARY INFORMATION:

A. General

Section 624(a) of the Pension Protection Act of 2006 (Pension Protection Act) added a new section 404(c)(5) of ERISA. Section 404(c)(5)(A) of ERISA provides that, for purposes of section 404(c)(1) of ERISA, a participant in an individual account plan shall be treated as exercising control over the assets in the account with respect to the amount of contributions and earnings which, in the absence of an investment election by the participant, are invested by the plan in accordance with regulations prescribed by the Secretary of Labor. On October 24, 2007, the Department of Labor (Department) published a final regulation implementing the provisions of section 404(c)(5) of ERISA. A fiduciary of a plan that complies with the final regulation will not be liable for any loss, or by reason of any breach, that occurs as a result of investment in a qualified default investment alternative. The regulation describes the types of investments that qualify as default investment alternatives under section 404(c)(5) of ERISA.

B. Correcting Amendments

The Department has determined that one statement in the text of the **SUPPLEMENTARY INFORMATION** to the final regulation and two regulatory provisions require amendment.

1. Amendment of Supplementary Information Text

In the Supplementary Information, 72 FR at 60456, the Department provides an explanation of paragraph (c)(5)(ii) of the final regulation. This paragraph provides that any transfer or permissible withdrawal from a qualified default investment alternative resulting from a participant's or beneficiary's election to make such a transfer or withdrawal during the 90-day period beginning on the date of the participant's first elective contribution, or other first investment in a qualified default investment alternative, shall not be subject to any restrictions, fees or expenses, other than certain ongoing administrative and investment fees. The Department explained that this provision was intended to prevent the imposition of any restriction, fee, or expense on a transfer or permissible withdrawal of assets, whether assessed by the plan, the plan sponsor, or as part of an underlying investment product or portfolio. The Department also provided a few examples of restrictions that might inhibit a participant's or beneficiary's decision to withdraw, sell or transfer assets out of a qualified default investment alternative during this 90-day period. One of the cited examples was a "round-trip" restriction on the ability of the participant or beneficiary to reinvest within a defined period of time. The Department has concluded that the reference to "round-trip" restrictions was too broad and should not have been included as an example of an impermissible restriction. "Round-trip" restrictions, unlike fees and expenses assessed directly upon liquidation of, or transfer from, an investment, generally affect only a participant's ability to reinvest in the qualified default investment alternative for a limited period of time. This is not a restriction prohibited by paragraph (c)(5)(ii) of the final regulation. However, to the extent that a "round-trip" restriction would affect a participant's or beneficiary's ability to liquidate or transfer from a qualified default investment alternative or restrict a participant's or beneficiary's ability to invest in any other investment alternative available under the plan, it would be impermissible for purposes of paragraph (c)(5)(ii) of the final regulation.

2. Regulatory Text Amendments

The Department is also amending language in paragraph (e)(3) of the regulation, describing persons that may manage a qualified default investment alternative. In response to comments on