

Thompson & Knight

ATTORNEYS AND COUNSELORS



The New IDR Process: How to Prepare Your Boss

**TEI Dallas and Fort Worth Chapters
Chief Tax Officers' Conference**

May 19, 2014

Mary A. McNulty
mary.mcnulty@tklaw.com

Emily A. Parker
emily.parker@tklaw.com

www.tklaw.com

New IDR Process

- The IRS has the authority to examine any books, papers, records or other data that may be relevant or material to determining tax liability.



New IDR Process

- **Information Document Requests are issued to collect documents and information during examinations.**
- **The new process applies to IDRs issued by the Large Business & International Division.**

New IDR Process

- **June 18, 2013: Part One – Issuance of IDRs**
- **November 4, 2013: Part Two – Enforcement of IDRs**
- **February 28, 2014:**
 - **Incorporates and supersedes prior directives**
 - **Clarifies new processes**
 - **Effective beginning March 3, 2014**
 - **Outstanding IDRs must be reissued to conform to the new requirements**

Issuance of IDRs

- **Issue focused**
 - **One issue per IDR**
 - **Exception: IDR issued at beginning of examination that requests basic books and records and general information about a taxpayer's business**
- **Discussed with taxpayer before issuance**
- **Mutually-agreed upon response date**
 - **Exam must advise taxpayer whether the response is satisfactory by date noted on the IDR.**

Issuance of IDRs

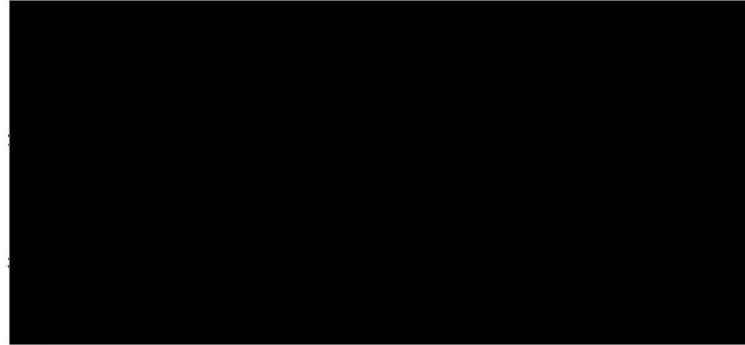
Form 4564	Department of the Treasury Internal Revenue Service Information Document Request	Request Number FP-088
To: [REDACTED]	Subject: Capital Gain - [REDACTED]	
	SAIN: 408-01	
	Submitted to: [REDACTED]	
	Dates of Previous Requests: 12/31/2013	

Description of Documents Requested:

If you have any questions with respect to this request, please contact the individual named below or the case manager. Either individual is willing to discuss the requested information.

The information requested relates to the [REDACTED]

Note: This IDR will be reviewed within 15 days and a response will be provided to you on whether the response satisfies my request.



Information Due By _____ At Next Appointment Mail In

FROM	Name and Title of Requestor [REDACTED], FP&T Examiner, Badge Number: [REDACTED]	Date:
	Office Location: 4050 Alpha Road, Dallas, Texas 75244 MC: 4020NDAL Tel: [REDACTED] Fax: [REDACTED]	

Form 4564

Page 1

IDR Response Best Practices by Taxpayers

- **Have document retention procedures in place, so records are readily obtainable**
- **Communicate with the IRS Exam team, especially about time constraints and availability of documents**
- **Review and comment on draft IDRs**
- **Keep IDR in draft form as long as possible**
 - **Exam is instructed to finalize the draft within 10 days.**

IDR Extensions

- **Exam may grant one extension per IDR**
- **Taxpayer fails to respond: Exam should discuss with taxpayer within 5 days of the due date and determine whether an extension is warranted.**
- **Taxpayer provides incomplete response: Exam should discuss with taxpayer within 5 days of the response date and determine whether an extension is warranted.**

IDR Extensions

- **Maximum extension is 15 days**
- **If an extension is granted and no additional information is received, IDR enforcement process begins immediately.**
- **If an extension is granted and additional information is received, IRS must review it within 15 days.**

New IDR Enforcement Process

- **Mandatory 3-Step Process**

1. **Delinquency Notice**

- Will apply only to IDRs that were issued under new procedures
- First issued on April 3, 2014

2. **Pre-Summons Letter**

3. **Summons**

New IDR Enforcement Process

- **Step 1: Delinquency Notice (Letter 5077)**
 - **Issue within 10 days of the IDR response date, as extended, or the additional 15 days for IRS review.**
 - **Include response date that is no more than 10 days from date of Delinquency Notice.**
 - **Territory Manager must approve any date beyond 10 days.**

New IDR Enforcement Process

- **Step 2: Pre-Summons Letter (Letter 5078)**
 - **Territory Manager will discuss next steps with taxpayer.**
 - **Territory Manager must sign.**
 - **Issue within 10 days of the due date of Delinquency Notice.**

New IDR Enforcement Process

- **Step 2: Pre-Summons Letter (Letter 5078)**
 - **Issue to taxpayer management official that is at least a level equivalent to the LB&I Territory Manager and a level above the taxpayer management official who received the Delinquency Notice – e.g., CFO.**
 - **Forewarn your boss to avoid surprise.**
 - **Be prepared for strained relationship with IRS.**

New IDR Enforcement Process

- **Step 2: Pre-Summons Letter (Letter 5078)**
 - **Response date is generally 10 days from date of Pre-Summons Letter.**
 - **A Director of Field Operations (DFO) must approve any date beyond 10 days.**
 - **DFO must be made aware of Pre-Summons Letter before issuance.**
 - **Letter should be discussed with IRS counsel before issuance.**

New IDR Enforcement Process

- **Step 3: Summons**
 - **If response is not provided by date in Pre-Summons Letter, steps will be taken to issue a summons.**
 - **Issuance of summons will be coordinated with IRS Counsel.**
 - **No set date by which the summons will be issued.**
 - **But if 45-75 days late in responding to IDR, summons may be issued.**

Countdown to Summons

No Extension	Extension and No Additional Response	Extension and Additional Response	Countdown to Summons
			IDR Due Date
5	5	5	No Response or Incomplete Response
N/A	15	15	Extension Granted
N/A	N/A	15	Additional Information Provided & Reviewed
10	10	10	Delinquency Notice Issued
10	10	10	Response Date
10	10	10	Pre-Summons Letter Issued
<u>10</u>	<u>10</u>	<u>10</u>	Response Date
<u>45</u>	<u>60</u>	<u>75</u>	Possible Summons Issuance – Number of Days Elapsed since IDR Due Date

Summons Enforcement Proceeding



Children,
let's settle this
like adults.



Summons Enforcement Proceeding

- **A summons is not self-enforcing.**
 - **Note Circular 230, § 10.20**
- **If due date for response passes, the DOJ must petition the district court where taxpayer resides to compel compliance.**
 - **Northern District of Texas**
 - **Court proceeding likely involves substantial delay**
 - **Additional burden on DOJ**
 - **Summons enforcement suits already make up 25% of all new lawsuits.**

Summons Enforcement Proceeding

- **Federal Rules of Civil Procedure apply.**
- **Procedures may vary – some courts have local rules that apply to summons enforcement proceedings.**
 - **Northern District of Texas Local Rule 16.1 exempts petitions for enforcement of IRS summons from scheduling and planning requirements of Fed. R. Civ. P. 16(b).**
 - **Fed. R. Civ. P. 16(b) requires, as soon as practicable, the judge to issue a scheduling order, which limits the time to join other parties, amend the pleadings, complete discovery, and file motions.**

Summons Enforcement Proceeding

- **Proceedings generally involve all of the following:**
 - **Complaint**
 - **Order to show cause**
 - **Taxpayer Answer, Responsive Pleadings and Motions**
 - **Hearing**
- **These proceedings are public, so be careful if you want tax return information to remain private.**

Summons Enforcement Proceeding

- **Complaint**
 - **Government files to institute the enforcement proceeding**
 - **Alleges that summons satisfies the four requirements for enforceability**
 - **Accompanied by an affidavit of the agent that issued the summons to support the allegations that the summons satisfies the four requirements for enforceability**
 - **Affidavit makes out a *prima facie* case for enforcement, which shifts the burden of proof to the taxpayer to prove one of the requirements is not met**

Summons Enforcement Proceeding

- **Complaint: To be enforceable by the court, the complaint must allege that the summons**
 - **Was issued in accordance with all the required administrative steps**
 - **Was issued for a proper purpose**
 - **Seeks information not already in the possession of the IRS**
 - **Seeks information relevant to the investigation**
- **Probable cause is not required.**

Summons Enforcement Proceeding

- **Order to Show Cause**
 - **Served on person summoned**
 - **Provides deadline for filing an answer, affidavits, motions or other responsive pleadings**
 - **Sets a hearing on the order to address issues raised by the pleadings**

Summons Enforcement Proceeding

- **Answer, Responsive Pleadings and Motions**
 - Taxpayer files an answer to respond to the allegations in the complaint.
 - If taxpayer does not contest allegations in the complaint, they will be deemed admitted.
 - A taxpayer should raise any objections to the summons enforcement in a pleading or motion before the hearing or they will be waived.
 - The taxpayer bears the burden of proof on any objections raised.

Summons Enforcement Proceeding

- **Common Taxpayer Objections**
 - **Information requested is privileged**
 - Attorney client, tax practitioner, or attorney work product
 - Required to submit privilege logs
 - Often submitted to special magistrate
 - Taxpayers are often successful
 - But time-consuming and expensive process
 - **Information requested is not relevant to the tax return**
 - Very difficult to show
 - Taxpayers are not usually successful

Summons Enforcement Proceeding

- **Common Taxpayer Objections**
 - **The documents requested do not exist**
 - Summons cannot be used to require the taxpayer to prepare or create documents, including a spreadsheet summarizing the taxpayer's records.
 - **Compliance would be overly burdensome**
 - **The government issued the summons for an improper purpose**
 - to harass the taxpayer
 - to coerce settlement

Summons Enforcement Proceeding

- **Hearing**

- **The government and taxpayer present arguments about the enforceability of the summons.**
- **After the hearing is completed, the district court will make the requisite findings of fact and conclusions of law, unless the court concludes further proceedings are necessary.**
 - **Evidentiary hearing**
 - **Discovery**
 - **Review by special magistrate**

Summons Enforcement Proceeding

- **Hearing**
 - **Most summons enforcement proceedings are of a summary nature.**
 - **Taxpayer can appeal the court's decision to the circuit court**
 - **Fifth Circuit for cases filed in the Northern District of Texas**

Summons Enforcement Proceeding

- **Evidentiary Hearing**
 - **District court can grant an evidentiary hearing.**
 - **Circuits differ on the standard to determine when an evidentiary hearing should be granted.**
 - ***Clarke* case pending in Supreme Court may resolve the circuit split.**

Summons Enforcement Proceeding

- **Clarke Case**

- **Facts**

- Taxpayer was under audit for its 2005 – 2007 tax years.
- Taxpayer had agreed to extend the statute of limitations twice, but declined to do so a third time.
- In September and October 2010, IRS issued summons to Michael Clarke, the taxpayer's CFO.
- In December 2010, just before the statute of limitations expired, IRS issued a FPAA that had been signed in August 2010.
- In February 2011, the taxpayer challenged the FPAA in Tax Court.

Summons Enforcement Proceeding

- **Clarke Case**

- **Clarke refused to comply with the summons, and the IRS sought enforcement in district court.**
- **Clarke asked the district court for an evidentiary hearing, alleging an improper purpose for issuing the summons related to (among other things) the**
 - **Possible use of the information in the examination of another taxpayer for which Clarke also served as CFO**
 - **Possible retaliation for the taxpayer's refusal to extend the statute of limitations**
 - **Circumvention of the Tax Court's rules on discovery**

Summons Enforcement Proceeding

- **Clarke Case**

- **District court rejected Clarke’s arguments and ordered enforcement of the summons.**
- **Clarke appealed, and the Eleventh Circuit reversed stating:**
 - **“in situations such as this, requiring the taxpayer to provide factual support for an allegation of improper purpose, without giving the taxpayer a meaningful opportunity to obtain such facts, saddles the taxpayer with an unreasonable circular burden, creating an impermissible ‘Catch 22.’”**
- **The Government appealed to the Supreme Court, and the Supreme Court granted cert.**

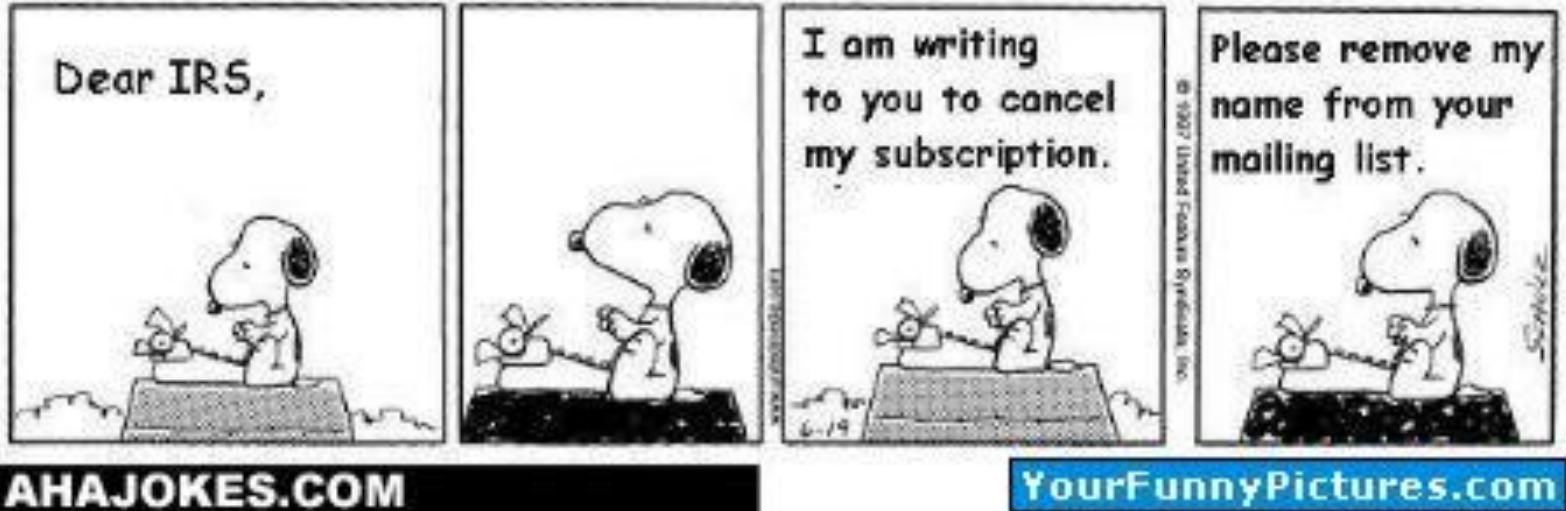
Summons Enforcement Proceeding

- **Clarke Case**

- **Government argues that the Eleventh Circuit's rule allows taxpayers to delay summons enforcement with baseless allegations of an improper purpose.**
- **Because more summons enforcement proceedings are likely under new IDR procedures, the government is particularly concerned about possible delays in enforcement proceedings.**
- **The Supreme Court's decision is expected by the end of June.**

How to Prepare Your Boss

- Unfortunately, the New IDR Process is not optional.



How to Prepare Your Boss

- **Document retention procedures become very important, as records need to be readily obtainable.**



“I have some paperwork to catch up. If I’m not back in two days, organize a search and rescue team!”

How to Prepare Your Boss

- **Rigid deadlines apply throughout the process.**
- **The IRS may grant only one 15-day extension per IDR.**
- **A pre-summons letter will be sent to him or her.**
- **A summons may be issued 45-75 days after you fail to respond to an IDR.**
- **You will be in court to defend.**
- **Court proceedings are public, so your tax return information may become public.**

How to Prepare Your Boss

- **A summons is difficult to quash, and you probably will lose.**
- **You will have the most success asserting privileges, but the process is expensive.**
- **The court proceeding may result in significant delay.**
- **The court proceeding becomes moot once you provide the requested information.**

The New IDR Process

Frank and Ernest



Copyright (c) by Thaves. Distributed from www.thecomics.com.

Thank You!



Mary A. McNulty
214.969.1187
mary.mcnulty@tklaw.com



Emily A. Parker
214.969.1502
emily.parker@tklaw.com