

CC-2008-011

February 27, 2008

Subject: Limitations on Informant Contacts:
Current Employees and Taxpayer
Representatives

Cancel Date: Upon incorporation
into CCDM

Purpose

This Notice discusses the advice to be given to the Internal Revenue Service regarding the limitations on contacts with an informant (1) who is a current employee of a taxpayer and who is providing the Service with information regarding the informant's employer that has been obtained in the course of the informant's employment, or (2) who is acting as the taxpayer's representative in an examination or other proceeding pending before the Service. This Notice includes, but is not limited to, contacts with informants who have filed claims with the Service pursuant to I.R.C. § 7623. This Notice applies to the conduct of Counsel employees in dealing with informants in the categories described above at the administrative level or in litigation. The Service is in the process of issuing instructions to its employees that include a requirement to coordinate the current employee and taxpayer representative informant issues with Counsel, consistent with this Notice.

Informants Who are Current Employees of a Taxpayer

There is a long-standing line of cases that support the ability of the government to legally 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). This is often referred to as the "one bite" rule. In the context of Service and Counsel interaction with informants, staying within the bounds of the "one bite" rule protects the integrity of the adjustments that may result from a particular examination when current employee information has been used as part of the examination. There is a risk that, after the initial meeting between the informant and the Service, the acceptance of any information by the Service from an informant who is a current employee of a taxpayer could be perceived as encouraging or acquiescing to the informant's actions, which could make it difficult for the Service to avail itself of the "one bite" rule. If the Service

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cannot legally use information received from an informant, any adjustment that is dependent on that information or from information subsequently derived from that information may not be legally supportable.

The “one bite” rule is the operative rule for Service and Counsel employees regarding contacts with informants who are current employees of a taxpayer. The Service should be a “passive recipient” of the informant’s information. In the context of Service and Counsel activities, this means that at the initial meeting between that person and the Service, the Service must be prepared to accept any and all information to be provided by an informant who is a current employee of a taxpayer, and that there will be no subsequent meetings or contacts with that person after this initial meeting. This minimizes the risk that examination adjustments will have to be conceded because of the use of employer information that is improperly disclosed to the Service by the current employee.

After an initial meeting between a current employee who is an informant and the Service, in the rare circumstance when it is not clear that the initial meeting constituted the “one bite” under this Notice, the potential for any subsequent meeting with the informant, whether initiated by the Service or the informant, must be brought to the attention of the appropriate Division Counsel and the Associate Chief Counsel (Procedure and Administration). The Division Counsel and the Associate Chief Counsel (Procedure and Administration), in consultation with the Deputy Chief Counsel (Operations), will decide on a suitable course of action.

Informants as Taxpayer Representatives

Under no circumstances is it appropriate to accept any information from an informant in the informant’s capacity as an informant regarding a taxpayer (or related taxpayers) when the informant is also the taxpayer’s representative in any administrative matter pending before the Service, *e.g.*, an income tax examination, or in any litigation involving issues that the Service has an interest in (Tax Court and refund litigation, collections suits, summons enforcement actions, etc.). If a taxpayer’s representative makes a direct or indirect overture to the Service or Counsel about becoming an informant, *e.g.*, either orally or by filing a Form 3949 A, Information Referral, or Form 211, Application for Reward for Original Information, there will be no further dealings with that person as the taxpayer’s representative and the informant must be informed of this outcome immediately. Any information provided by the taxpayer’s representative in connection with an overture to become an informant cannot be used by Service or Counsel employees in any matter concerning the taxpayer (or related taxpayers). It will be the responsibility of the informant to attempt to explain the reason for being excluded from the matter as the taxpayer’s representative under these circumstances.¹ In addition, Service and Counsel employees should have no further dealings or contact with, or receive any further information from, the informant as an informant.

¹ This is not an application of the bypass rule found at IRM 4.11.55.3.

