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MEMORANDUM FOR MARY E. PIERCE
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FROM: Joseph W. Clark
Chief, Branch 3
(Collection, Bankruptcy and Summonses)

SUBJECT: Cable Communication Policy Act's Effect on the IRC § 7602
Summons Authority.

Facts:

The Service is currently pursuing a criminal investigation of taxpayer A. Although the Service has not determined whether to pursue charges for filing a materially false return or for criminal tax evasion, the Service has already collected sufficient evidence to prove the taxpayer has violated a criminal provision of the Internal Revenue Code ("IRC"). To determine the extent of unreported income, the Service has issued a summons to the taxpayer's cable provider for all of the subscriber's billing records. The cable company has refused to comply with the summons, citing the Cable Communication Policy Act ("the Act"). The Service now wishes to enforce the summons.

Issue:

The Act requires a governmental entity to obtain court approval before obtaining "personally identifiable information" ("PII") from a qualifying "cable operator". 47 U.S.C.S. § 551. The IRC grants the Service broad authority to summons information from third parties when investigating taxpayers. See generally 26 U.S.C.S. § 7602. If the Service attempts to summons a cable operator that is covered by the Act, does this section create additional requirements for the Service's administrative summons?

Conclusion:

The scope of 47 U.S.C.S. § 551 affects a summons issued pursuant to the authority in 26 U.S.C.S. § 7602. Accordingly, when summoning PII (as defined in section 551) about a taxpayer from a cable operator, the Service must reasonably suspect the taxpayer has violated a criminal provision of the tax code and must obtain a court order

prior to production of the documents.¹ However, if the cable company also provides either telephone or internet service, then the administrative summons alone will permit the Service to obtain information from the cable company relevant to the Internet or telephone service to the extent it would have been able to obtain information from an Internet service provider or a telephone company that did not deliver cable service. Additionally, if the information sought is not PII as defined in section 551, then there is no additional requirement for an IRC summons.

Legislative History:

Congress enacted the Act in 1984 to establish national policies and guidelines for the cable industry. In passing the Act, Congress noted that “cable systems, particularly those with a 'two-way' capability, have an enormous capacity to collect and store [PII] about each cable subscriber.” H.R. Rep. No.934, 98th Cong., 2d Sess. 29 (1984), U.S. Code Cong. & Admin. News 1984, p. 4655. “Subscriber records from interactive systems,” Congress noted, “can reveal details about bank transactions, shopping habits, political contributions, viewing habits and other significant personal decisions.” Id. Addressing this concern, Congress created privacy rights that “appl[y] to all individually identifiable information collected by a cable operator over the cable system regarding its subscribers, whether collected in the course of providing a cable service or other service to the subscribers.” Id. at 4713. Furthermore, “[t]his section governs the information practices of cable operators and is not intended to regulate the activities of those parties other than the cable operator who provide services over the cable system.” Id.

To address these concerns, Congress created a system that prevents disclosure except in limited circumstances.

Subsection (c) limits the disclosure of [PII] collected by a cable operator to those situations where such disclosure is necessary to render a cable service or to conduct a legitimate business activity related to a cable service; where authorized electronically or in writing by the subscriber; or where required by court order [provided the proper procedures have been followed]. Id. at 4715

The exceptions for government entities are governed by 47 U.S.C.S. § 551(h) and (c)(2)(D).² “Subsection (h) establishes limits on how government authorities may have access” to PII about subscribers. Id. at 4715. “The Congress is recognizing a right of privacy in personally identifiable information collected and held by a cable

¹ This order may be obtained in a proceeding to enforce the summons.

²The original version of section 551 only contained the exception currently codified in subsection (h). However, section 551 was amended in the USA Patriot Act of 2001, adding an additional exception. Pub. L. No. 107-56, 115 Stat. 272, § 211 (Oct. 26, 2001) (Codified in relevant part at 47 U.S.C.S. 551 § (c)(2)(D)).

company...[with a] standard ... based on the recommendations of the Privacy Protection Study Commission Report, ‘Personal Privacy in an Information Society’³ (See page 362).” *Id.* at 4716 (citation in original). In that report, the Commission discusses in some detail the Service’s summons power.⁴ The Commission in general concluded that “records in which an individual has an expectation of confidentiality should not be accessible to the government unless a compelling governmental interest, outweighing the individual’s interest to be free from government intrusion, can be shown.” *Personal Privacy* at 362.

Current Code Structure:

47 U.S.C.S. § 551 creates a self-contained privately enforceable scheme for the protection of cable subscriber privacy by providing, in pertinent part:

- (c) Disclosure of personally identifiable information
 - (1) Except as provided in paragraph (2) a cable operator shall not disclose personally identifiable information concerning any subscriber without the prior written or electronic consent of the subscriber concerned and shall take such actions as are necessary to prevent unauthorized access to such information by a person other than the subscriber or cable operator.
 - (2) A cable operator may disclose such information if the disclosure is-
 -
 - (B) subject to subsection (h) of this section, made pursuant to a court order authorizing such disclosure, if the subscriber is notified of such order by the person to whom the order is directed...
 -
 - (D) to a government entity as authorized under [18 U.S.C.S. §§ 2510 et seq., 2701 et seq., or 3121 et seq.,] except that such disclosure shall not include records revealing cable subscribers selection of video programming from a cable operator.

.....

³Hereafter “Personal Privacy”

⁴That report clearly contemplates the IRS summons power. For example the report notes that even though a taxpayer has been granted intervention rights under the IRC for 3rd party summonses, he has no actual ability to protect his privacy rights in information because “he has no legal interest to defend or to balance against the government’s desire for the record.” *Personal Privacy* at 360 to 361. The report discusses the Service’s broad ability to get at information using its administrative summons. *Id.* at 367. It then states that “the agents of the Internal Revenue Service, for example, have exercised their power to issue summonses in questionable and improper ways.” *Id.* at 370-371. Since Congress cites to a report that addresses the Service’s summons power, Congress apparently contemplated the effect of the Act on the Service.

- (h) Disclosure of information to governmental entity pursuant to court order
 Except as provided in subsection (c)(2)(D), a governmental entity may obtain personally identifiable information concerning a cable subscriber pursuant to a court order only if, in the court proceeding relevant to such court order—
- (1) such entity offers clear and convincing evidence that the subject of the information is reasonably suspected of engaging in criminal activity and that the information sought would be material evidence in the case; and
 - (2) the subject of the information is afforded the opportunity to appear and contest such entity's claim.

Of the sections cited in subsection (c)(2)(D), only U.S.C.S. 18 §§ 2701 et seq. is relevant to this discussion.⁵ Sections 2701 et seq. prevents unauthorized access to “electronic communications service” records. An electronic communications service is any entity that gives users “the ability to send or receive wire or electronic communications.” 18 U.S.C.S. § 2510(15). Wire communications include any “aural” communication that uses a switching station owned or operated by an entity involved in interstate or international trade (i.e. a telephone company). *Id.* at § (1). “Electronic communications” is defined in subsection (12) as:

any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce [with exceptions not relevant here].⁶

The electronic communications envisioned by this statute are specific communication between private businesses or individuals. Greek Radio Network of America, Inc. v. Vlasopoulos, 731 F. Supp. 1227, 1233 (E.D. PA 1990). Thus, as Congress stated in passing the USA Patriot Act, section 551(c)(2)(D):

clarifies that when a cable company is providing the services of a telephone company or internet service provider, that cable company must comply with the same laws governing the interception and disclosure of wire and electronic communications that currently apply to all other telephone companies or Internet service providers. The amendment *does not affect the current prohibition* under 631(h) of the Communications Act concerning the released records that reveal

⁵The other sections deal with actual interception and monitoring of a communication.

⁶Courts have rejected the argument that cable service is a transmission of “images” as envisioned in section 2510. See Cox Cable v. King, 582 F.Supp. 376 (N. D. OH 1983), Greek Radio Network of America, Inc. v. Vlasopoulos, 731 F. Supp. 1227 (E.D. PA 1990).

what a customer chooses to view. H.R. Rep. 236. 107th Cong., 1st Sess. 56-75 (2001) (emphasis in original).

Thus, if the cable company is also an Internet service provider, 18 U.S.C.S. § 2703 provides several exceptions to the general prohibition of releasing information. Most importantly (c)(2) states:

- (2) A provider of electronic communication service or remote computing service shall disclose to a governmental entity the—
- (A) name;
 - (B) address;
 - (C) local and long distance telephone connection records, or records of session times and durations⁷;
 - (D) length of service (including start date) and types of service utilized;
 - (E) telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address; and
 - (F) means and source of payment for such service (including any credit card or bank account number),
- of a subscriber to or customer of such service when the governmental entity uses an administrative subpoena authorized by a Federal or State statute ...

Application to 7602:

The only court to address whether the Service's summons power is covered by the Act is United States v. Cox Cable, 81 AFTR2d 2011 (N. D. Fla. 1998). In that case, the court was faced with a motion to quash an IRS summons because the Service had not obtained a court order pursuant to 47 U.S.C.S. § 551.⁸ The Service had summoned a summary of the monthly billing amounts for a four-year period. The court stated:

[The Act] was designed to protect cable subscribers from disclosure of information related to their personal viewing habits and their personal transactions, especially those that may be utilized surreptitiously for commercial

⁷Prior to 2001, Section 2703 permitted access to "toll billing records." The USA Patriot Act replaced this language with "local and long distance telephone connection records, or records of session times and durations." Pub. L. No. 107-56, 115 Stat. 272, § 210 (Oct. 26, 2001) (Codified in 18 U.S.C.S. 2703 § (c)(2)(C)). However, it is clear from the legislative history that the purpose of the amendment to subsection (c) was to expand the scope of records available to include the method of payments. See generally H.R. Rep. 236. 107th Cong., 1st Sess. 56-75 (2001). Thus, Chief Counsel believes the Service can continue to use administrative summonses for telephone and Internet billing records.

⁸In that case, the service did not assert that the information was not PII as envisioned by the code, thus the issue was not before the court.

purposes. In this case, the information that the IRS is seeking is not related to viewing habits, and will not be used for commercial purposes. Therefore, it does not appear to fall within the statute's scope. However, I also note that the plain language of Section 551(h) expressly prohibits governmental entities from seeking "personally identifiable information" from a cable company without first obtaining a court order.

The court further noted:

congress could have excluded the IRS from compliance with the Cable Subscriber Privacy Act in the same way that it did with the Right to Financial Privacy Act or the Privacy Act. However, the Cable Subscriber Privacy Act contains no such exclusionary provision, nor is there an expressed exclusion in the Internal Revenue Code. Additionally, I cannot read an implied exclusion for the IRS into the Cable Subscriber Privacy Act based on the exclusions found in other statutes. The Cable Subscriber Privacy Act is the most recent of these statutes, and according to the rules of statutory construction, "the statute last in time prevails as the most recent expression of the legislature's will." Although it is unlikely that Congress wanted to make the IRS subject to the Cable Subscriber Privacy Act, a plain reading of the statute suggests that it is.

Id (internal citations omitted). Ultimately, the court held that the Service's summons is included under the Act, but that the Service made a satisfactory showing to obtain a court order. Id.

This view is consistent with the history of the Act. As noted above, Congress cited the Personal Privacy report in discussing disclosure to government entities. This report had significantly addressed administrative summonses in general and the Service's power in particular. Thus, Congress most likely was aware of the Act's potential reach. Additionally, in the 2001 USA Patriot Act amendment to Section 551, Congress added an exclusion for administrative summonses when the cable company provides internet or telephone service to the taxpayer. Since: 1) the plain language of the statute would include section 7602, 2) it appears that the potential effect on the Service's ability to summons was apparently considered by Congress, and, 3) Congress has created a limited exclusion for the Service's summons when the cable company provides internet/telephone service, we believe the Service is bound by the requirements of 47 U.S.C.S. § 551 when summoning PII from a cable company. However, we note that if the taxpayer subscribes to either internet or telephone service through the cable company, the service may obtain whatever information they could obtain from either of those types of companies independently.

Definition of PII:

Although the service must follow 47 U.S.C.S. § 551 to obtain PII from a cable company, there are no additional requirements for obtaining information that does not qualify as

PII from a cable subscriber. PII is not expressly defined in the statute.⁹ In the past, the Service has taken the position that PII only includes information collected over a cable system. However, since the courts have twice rejected this position (albeit in the context of private litigants) and since Congress has since amended the Act to exclude certain information in the internet/telephone setting that presumably would not be collected over the cable system, we believe that PII is any information collected by the cable company that identifies a particular person regardless of the source of the information.

The earliest case to address the definition of PII was Warner v. American CableVision of Kansas City, 699 F. Supp. 851 (D. KS 1988). In Warner, a cable customer sued the cable operator under 47 U.S.C.S. § 551 alleging that the company had violated both the disclosure and record keeping provisions of the Act. The operator attempted to avoid liability by asserting that because the information gathered on its customers was not collected “through the cable system,” it was not PII and section 551 did not apply. The court rejected this argument stating:

defendant apparently bases its argument on a statement made in a preliminary House Report on the bill, which stated that the Act created privacy protection for “individually identifiable information collected by a cable operator *over the cable system.*” *Id.* at 76, 1984 U.S. Code Cong. & Admin. News at 4713 (emphasis added). However, the only place this limiting language appears in the Cable Act itself is at section 551(b)(1); that section limits the ability of cable operators to collect PII through the cable system. That section is unrelated to the provisions in question here: section 551(a)(1)'s disclosure requirements or section 551(e)'s record retention limitations. Defendant's argument is without merit. *Id.* at 853 to 854.

Additionally, the Tenth Circuit has addressed this issue in Scotfield v. TeleCable of Overland Park, 973 F.2d 874 (10th Cir. 1992). In Scotfield, the plaintiff alleged that the notices the cable company provided failed to adequately inform them of the nature of PII being maintained by the cable company as required by 47 U.S.C.S. § 551.¹⁰ *Id.* at 875. The cable company countered that the two letters it sent annually, when taken as

⁹The only “definition” contained in the code is a list of exclusions for certain types of information, none of which are relevant for a subsection (h) proceeding.

¹⁰Although not relevant to the Service, 47 U.S.C.S. § 551 (a) requires a cable company to notify the subscribers of information that is being collected about them. Subsection (d) requires the cable company to provide the subscriber with access to the PII collected and subsection (f) provides a private cause of action against the cable company for any violation. Additionally, (f) permits recovery of the greater of actual or statutory damages.

a whole, constituted adequate notice under the Act. *Id.* The lower court agreed with the plaintiff and awarded the statutory damages of \$1,000 for each year inadequate notice had been sent. *Id.* At 875.

On appeal, the district court agreed that the Act was applicable, but reversed the award of damages. The court first stated that TeleCable's system was not "two-way" and thus "TeleCable's system is capable only of transmitting television signals into subscriber homes." *Id.* at 877. "Therefore, TeleCable cannot 'use the cable system to collect [PII]' concerning its subscribers, and the limits found in section 551(b)¹¹ on the collection of [PII] are inapposite." *Id.* However, the court relying on the definition of cable service refused to limit the act to two-way cable services and went on to analyze whether TeleCable had provided sufficient notice to the subscriber of the type of PII it was collecting. *Id.* at 879. The Court stated the notice "disclosed that TeleCable maintained certain items of information, such as the name, address, and 'other personally identifiable information' [] such as billing and payment information, the number of television sets connected to cable, and the service option. Since all of the information that TeleCable collects is of this same nature, these illustrations were sufficient" to satisfy the notice requirement. *Id.* at 881. Since: 1) the court found that information could not be collected over the cable lines, 2) the notice requirement only applies to PII, and 3) the court held that the notice requirement was adequate, the court implicitly held that there is no requirement that information be collected over the cable network.

Finally, Congress amended the Act as part of the USA Patriot Act of 2001. As discussed above, Congress added certain exceptions for electronic communications services. Specifically, the code now permits access via an administrative summons to name, address and "source of payment for such service (including any credit card or bank account number)," when the cable company also provides internet or telephone services. 18 U.S.C.S. § 2703(c)(2).

In light of 1) the previous court holdings cited above, 2) the specific references to information that would presumably be collected at the creation of an account (and thus not collected over the system), and 3) a re-examination of the legislative history, we no longer believe that information must be collected over the cable system to constitute PII under the Act. Thus, the source of the information should not be considered in determining if an administrative summons can issue.

Enforcement proceedings:

In any case that 47 U.S.C.S. § 551 is applicable, we believe that a summons enforcement proceeding is an appropriate mechanism to obtain the "approval" required by the Act. The Act states that a government entity may get a court order for the information if "in the court proceeding relevant to such court order," 1) there is clear and

¹¹Subsection (b) limits the types of PII that may be collected over the cable system.

convincing evidence that suspect is reasonably suspected of criminal activity, 2) the PII sought is material to that activity and 3) the subject of the information is afforded the opportunity to appear and contest such entity's claims. 47 U.S.C.S. § 551(h). Since the Act does not define a particular forum, and because the United States District court has a general grant of jurisdiction to determine all matters that arise under the laws of the United States (See 28 U.S.C.S. § 1331), we believe a summons enforcement proceeding in a federal district court is adequate.

Standard of Proof:

As mentioned above, 47 U.S.C.S. § 551(h) requires that in a court proceeding in which the government seeks PII, the Government must establish a reasonable suspicion that the subscriber is engaging in criminal activity, and the subscriber must be afforded an opportunity to intervene. The plain language's requirement that there be a reasonable suspicion of criminal activity is consistent with the standard adopted in the recommendations of the Privacy Protection Study Commission Report, 'Personal Privacy in an Information Society' as cited by Congress (1977).¹² Thus, field counsel should be advised that cable records can only be obtained when the Service can prove there is a likelihood of a violation of a criminal provision of the IRC. In cases when there was either no return filed, or a return was filed but there is other evidence that it is materially inaccurate, the Service should be able to meet its burden of proof in court. The subscriber will then have to disprove the Service's claim, or the summons will be enforced. However, when conducting a purely civil investigation, the Service should attempt to obtain the desired information from sources other than the cable records.

Notice Requirements:

47 U.S.C.S. § 551(c) states that a cable operator shall not "disclose personally identifiable information concerning any subscriber ... and shall take such actions as are necessary to prevent unauthorized access to such information..." Subsection (h) states that in order for the government to obtain information, "the subject of the information [must be] afforded the opportunity to appear [in the court proceeding] and contest such entity's claim [of a reasonable suspicion of a crime]." Furthermore, subsection (a) requires the cable company to notify the subscriber of the limitations "with respect to the collection and disclosure of information by a cable operator and the right of the subscriber under subsections (f) and (h) to enforce such limitations."

There is nothing in the Act that requires the Service to inform the subscriber of proceedings for obtaining the information. Rather, the Act provides that if the proper judicial proceeding is not followed and the cable company releases information, the cable company has made an "unauthorized disclosure" as defined in subsection (c). Accordingly, the cable company has sole responsibility for preventing an unauthorized release of information. The cable company is responsible to: 1) file a motion to quash

¹² Interestingly, the study has extensive recommendation for administrative summonses that were not adopted in the code. *Id.* at 371.

the IRS summons, and 2) provide notice to the subscriber of any proceedings.¹³ The Service has no affirmative duty in this regard.

Remedy for Improperly Disclosed Information:

47 U.S.C.S. § 551 provides a civil remedy against the cable company for unauthorized disclosures in district court. Damages are set at the highest of actual damages, \$100 per day of violation, or \$1,000 per violation. *Id.* Subsection (f)(3) states “[t]he remedy provided by this section shall be in addition to any other lawful remedy available to a cable subscriber.” But for the Act, IRC § 7602 would clearly permit the Service to access this information. See generally; United States v. Powell, 379 U.S. 48 (1984) (establishing broad authority for IRS summons with only minimal limitations). Thus, assuming the Service follows appropriate procedures for summoning information, there would be no “other lawful remedy available” for the release of the information. The subscriber’s sole remedy for disclosure to the IRS by a cable company would lie in a civil action against the cable company.

If you have any questions regarding this matter, please contact

¹³Since suspicion of criminal activity must be shown, these cases will arise primarily in a criminal investigation in which the notice requirements of 7609 are exempted. IRC 7609 (c)(2)(E).