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# NOTES

## THE APPLICATION OF THE JOHN DOE SUMMONS PROCEDURE TO THE DUAL-PURPOSE INVESTIGATORY SUMMONS

### INTRODUCTION

In 1975 the Supreme Court, in *United States v. Bisceglia*,<sup>1</sup> upheld the authority of the Internal Revenue Service (IRS) to issue John Doe administrative summonses for the purpose of obtaining information from third parties regarding taxpayers whose identities are unknown.<sup>2</sup> In response to this decision and to safeguard the taxpayer's privacy,<sup>3</sup>

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1. 420 U.S. 141 (1975).

2. *Id.* at 150. The IRS began issuing John Doe summonses in the early 1970s. See *Jeopardy and Termination Assessments and Administrative Summonses: Hearings on S. 1205 Before the Subcomm. on Administration of the Internal Revenue Code of the Senate Comm. on Finance, 94th Cong., 1st Sess. 89 (1975)* (statement of Robert S. Fink, Esq.) [hereinafter cited as *Senate Hearings*]; Fink, *Internal Revenue Summons Power*, 38 Inst. on Fed. Tax'n § 19.02[6], at 19-16 (1980). In *Bisceglia*, upon notification from the Federal Reserve of the possibility of unpaid taxes, the IRS sought the identity of an individual who had deposited 400 decrepit \$100 bills in a commercial bank within a few weeks. 420 U.S. at 142-43. The summons was not incident to an ongoing investigation, but rather was the product of a hunch that such an investigation might be warranted. *Id.* Upon receipt of the summons, the bank officers refused to comply and the IRS brought an enforcement proceeding. *Id.* at 143-44. The Sixth Circuit determined that § 7602 of the Code did not authorize the use of a John Doe summons that does not identify the person subject to investigation. *Bisceglia v. United States*, 486 F.2d 706, 712-13 (6th Cir. 1973), *rev'd*, 420 U.S. 141 (1975). The Supreme Court reversed, holding that the language of § 7602 indicates a broad IRS summons power that authorizes the IRS to issue such John Doe summonses. 420 U.S. at 149-50. The Court stipulated, however, that § 7602 does not authorize the IRS to conduct "fishing expeditions" into the private affairs of bank depositors. *Id.* at 150-51.

3. *United States v. Tiffany Fine Arts, Inc.*, 718 F.2d 7, 11 (2d Cir. 1983); *United States v. Thompson*, 701 F.2d 1175, 1177, 1180 (6th Cir. 1983); *In re The Tax Liabilities of John Does*, 671 F.2d 977, 979 (6th Cir. 1982); Fink, *supra* note 2, § 19.02[6], at 19-19; Wesley, *Recent Developments Involving Administrative Summonses*, 1982 S. Ill. U.L.J. 41, 55, 57; see H.R. Rep. No. 658, 94th Cong., 2d Sess. 306-07 [hereinafter cited as H.R. Rep.], reprinted in 1976 U.S. Code Cong. & Ad. News 2897, 3202-03.

4. I.R.C. § 7609(f) (1976). The provision states:

Any summons described in subsection (c) which does not identify the person with respect to whose liability the summons is issued may be served only after a court proceeding in which the Secretary establishes that—

- (1) the summons relates to the investigation of a particular person or ascertainable group or class of persons,
- (2) there is a reasonable basis for believing that such person or group or class of persons may fail or may have failed to comply with any provision of any internal revenue law, and

Congress included section 7609(f) of the Internal Revenue Code (Code)<sup>4</sup> as part of the 1976 Tax Reform Act.<sup>5</sup> This section requires the Internal Revenue Service to obtain judicial approval before issuing a John Doe summons by establishing that the summons relates to the investigation of a particular person or ascertainable group of persons,<sup>6</sup> a reasonable basis for the investigation exists<sup>7</sup> and the information cannot practically be obtained from another source.<sup>8</sup> Section 7609(f) is not a separate summons power,<sup>9</sup> but rather is an additional requirement to a summons authorized under section 7602.<sup>10</sup> Thus, any IRS summons that does not identify the taxpayer under investigation must receive court approval prior to issuance.<sup>11</sup>

By requiring court approval for a John Doe summons, section 7609(f) limits the ability of the IRS to randomly examine the personal

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(3) the information sought to be obtained from the examination of the records (and the identity of the person or persons with respect to whose liability the summons is issued) is not readily available from other sources.

*Id.*

5. Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520 (codified in scattered sections of 26 U.S.C.).

6. I.R.C. § 7609(f)(1) (1976).

7. I.R.C. § 7609(f)(2) (1976).

8. I.R.C. § 7609(f)(3) (1976).

9. *United States v. Thompson*, 701 F.2d 1175, 1179 (6th Cir. 1983); *see* I.R.C. § 7609(c), (f) (1976 & Supp. V 1981). The court in *Thompson* suggested that the Eighth Circuit in *United States v. Barter Sys.*, 694 F.2d 163 (8th Cir. 1982), incorrectly interpreted § 7609(f) as a separate and distinct summons power. 701 F.2d at 1179 n.8. A careful examination of the *Barter* opinion, however, does not suggest such an interpretation. *See* 694 F.2d at 168. Rather, *Barter* merely holds that § 7609(f) does not apply to a § 7602 summons when the summons names a taxpayer.

*Id.*

10. *See United States v. Thompson*, 701 F.2d 1175, 1179 & n.8 (6th Cir. 1983); *United States v. Pittsburgh Trade Exch.*, 644 F.2d 302, 306 (3d Cir. 1981). Section 7602 of the Code empowers the IRS to discover all relevant and material information necessary to further a legitimate investigation of a taxpayer. I.R.C. § 7602 (1976). The "material and relevant" test of § 7602 does not question whether the information sought will contradict the taxpayer's return, but "whether the inspection sought 'might . . . [throw] light upon' the correctness of the taxpayer's returns." *Foster v. United States*, 265 F.2d 183, 186-87 (2d Cir.) (quoting *United States v. Siegel*, 263 F.2d 530, 533 (2d Cir. 1959)), *cert. denied*, 360 U.S. 912 (1959). The test does not require an affirmative showing of probable cause. *Id.* at 186; Fink, *supra* note 2, § 19.02[2], at 19-6; Kenderdine, *The Internal Revenue Service Summons to Produce Documents: Powers, Procedures, and Taxpayer Defenses*, 64 Minn. L. Rev. 73, 77 (1979).

11. I.R.C. § 7609(f) (1976); *see United States v. Brigham Young Univ.*, 679 F.2d 1345, 1346 (10th Cir. 1982), *vacated on other grounds*, 103 S. Ct. 713 (1983); *United States v. Pittsburgh Trade Exch.*, 644 F.2d 302, 305 (3d Cir. 1981); *In re Oil & Gas Producers Having Processing Agreements with Kerr-McGee Corp.*, 500 F. Supp. 440, 441 (W.D. Okla. 1980).

records of unknown taxpayers.<sup>12</sup> A dual-purpose summons that both furthers an investigation of a named taxpayer and results in the investigation of an unknown taxpayer, however, may allow the IRS to circumvent the requirements of section 7609(f).<sup>13</sup> For example, if the IRS issues a summons to a barter exchange naming the exchange partners as the subjects of the investigation, compliance with the summons may subject unknown exchange members to investigation. Because the summons names a taxpayer, it is unclear whether the IRS must comply with section 7609(f). Section 7609(f) is the sole provision safeguarding the unknown taxpayer's privacy from unnecessary governmental intrusion. Thus, the ability of the IRS to circumvent the provision through a dual-purpose summons could render the section 7609(f) safeguard ineffective.<sup>14</sup>

This Note addresses the issue whether the simultaneous investigation of a third-party recordkeeper and an unknown taxpayer excuses the IRS from compliance with the John Doe summons procedure provided in section 7609(f). Part I examines the statutory language and legislative history of section 7609(f) and finds that Congress designed the section to safeguard the privacy interests of the taxpayer, while minimizing the administrative burden on the IRS. Part II concludes that the John Doe summons proceeding must be followed whenever the IRS clearly intends to investigate an unknown taxpayer at the time of issuance of a summons to a known taxpayer.

## I. INTERPRETING SECTION 7609(f) OF THE INTERNAL REVENUE CODE

### A. *Statutory Analysis of Section 7609(f)*

Section 7609(f) applies to "any summons . . . which does not identify the person with respect to whose liability the summons is issued."<sup>15</sup> Section 7609(f) does not specifically mention a dual-purpose

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12. See *In re Oil & Gas Producers Having Processing Agreements with Kerr-McGee Corp.*, 500 F. Supp. 440, 443-44 (W.D. Okla. 1980); H.R. Rep., *supra* note 3, at 311, reprinted in 1976 U.S. Code Cong. & Ad. News, at 3207-08. In *Kerr-McGee*, a John Doe summons that sought copies of all oil-processing agreements that Kerr-McGee had entered into in a particular tax year failed because the IRS did not establish the possibility of a tax deficiency resulting from these transactions. 500 F. Supp. at 443. The court held that the John Doe summons in question was overbroad and constituted an impermissible "fishing expedition" into the private affairs of unknown individuals. *Id.* at 443-44.

13. See *United States v. Thompson*, 701 F.2d 1175, 1179 n.8 (6th Cir. 1983); *United States v. Barter Sys.*, 694 F.2d 163, 168 (8th Cir. 1982).

14. *Id.* An approach that excuses the IRS from complying with § 7609(f) in the case of a dual-purpose summons because the summons names a taxpayer may permit the IRS to abuse its investigative authority. The IRS could construe this approach to grant carte blanche in issuing such a summons merely by naming a known recordkeeper as the institutional recipient of the summons.

15. I.R.C. § 7609(f) (1976).

summons.<sup>16</sup> Moreover, the language of section 7609(f) is susceptible to different interpretations.

By introducing the section with the word "any," Congress conceivably sought to include dual-purpose summonses that have a secondary purpose of investigating unknown taxpayers, in order to prevent the circumvention of the provision through the addition of a named taxpayer to the summons.<sup>17</sup> Thus, when the institutional purpose of the IRS is to investigate the tax liabilities of both the unknown taxpayer and the third-party recordkeeper, the investigation of the unknown taxpayer arguably should invoke application of section 7609(f).<sup>18</sup>

In addition, section 7609(a) requires the IRS to notify a known party affected by a summons issued to a third-party recordkeeper.<sup>19</sup>

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16. See *id.*

17. See *United States v. Thompson*, 701 F.2d 1175, 1178-79 (6th Cir. 1983) (literal language of section 7609(f) triggered whenever the IRS clearly intends at the time of issuance of a summons to investigate an unknown taxpayer who will be revealed through compliance); H.R. Rep., *supra* note 3, at 307, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 3203 (because notice to the targeted taxpayer is impossible in the case of a John Doe summons, the IRS must receive court approval prior to issuance of a summons which fails to name the targeted taxpayer); *cf.* *United States v. Bisceglia*, 420 U.S. 141, 149 (1975) (phrase "any person" is not limited to a person whose identity is known); *Federal Deposit Ins. Corp. v. Winton*, 131 F.2d 780, 782 (6th Cir. 1942) ("any" is one of whatever kind or quantity); *Roedler v. Vandalia Bus Lines*, 281 Ill. App. 520, 523 (1935) (word "any" normally is construed as equivalent of "every" or "all"); *State v. Steenhoek*, 182 N.W.2d 377, 379 (Iowa 1970) (in statutory language, "any" is synonymous with "every" and "all"); *Shilbury v. Board of Supervisors*, 54 Misc. 2d 979, 982, 284 N.Y.S.2d 124, 129 (1967) (in statutory language, "any" means no limitation).

18. See *United States v. Thompson*, 701 F.2d 1175, 1178-79 (6th Cir. 1983).

19. I.R.C. § 7609(a) (1976); *Fink*, *supra* note 2, § 19.05, at 19-42. The right to notice to which the taxpayer is entitled under § 7609 does not apply to a summons issued to a third party that does not hold third-party recordkeeper status. *Kummer, Summonses and the 1976 Tax Reform Act*, 13 Wake Forest L. Rev. 773, 777 (1977). The statutory definition of recordkeeper includes banks, savings and loan associations, credit unions, consumer reporting agencies, brokerage firms, attorneys and accountants. I.R.C. § 7609(a)(3) (1976). Despite this broad language, proposed regulations state that third-party recordkeeper status exists only when the records are kept by the third party in its capacity as recordkeeper. 45 Fed. Reg. 55,765 (1980) (to be codified at 26 C.F.R. pt. 301) (proposed Aug. 21, 1980). When dealing with credit-card agencies, some courts have held that when the IRS summons business records not involving a customer's use of a credit card, the third-party company does not attain the status of third-party recordkeeper. *United States v. Exxon*, 450 F. Supp. 472, 476-77 (D. Md. 1978); *United States v. Connecticut Motor Club*, 43 A.F.T.R.2d (P-H) 79-460, 79-462 (D. Conn. 1978). In *United States v. Desert Palace, Inc.*, 43 A.F.T.R.2d (P-H) 79-1128 (D. Nev. 1979), the court held that a gambling casino's issuance of plastic cards that entitled customers to credit and to negotiate personal checks gave the gambling casino third-party recordkeeper status. *Id.* at 79-1129 to 79-1130. Likewise, in *United States v. New York Telephone Co.*, 644 F.2d 953 (2d Cir. 1981), the Second Circuit held that the telephone company is a third-party recordkeeper because it extends credit and issues credit cards to its customers. *Id.* at 960. These cases reflect a growing conflict concerning the definition

The known party has standing to intervene<sup>20</sup> and may have the court stay the summons pending resolution of any objections.<sup>21</sup> Because section 7609 protects the known taxpayer from infringement of his privacy resulting from a third-party summons, the unknown taxpayer arguably should be guaranteed an equivalent protection.<sup>22</sup>

By contrast, reference to a single, unknown "person" in describing a John Doe summons in the section<sup>23</sup> may permit the IRS to satisfy the statutory requirements by naming one known taxpayer as the subject of the investigation.<sup>24</sup> The Supreme Court, in *United States v. Euge*,<sup>25</sup> held that, absent an express statutory prohibition or substantial countervailing policies, the summons power of the IRS should be broadly construed.<sup>26</sup> Because section 7609(f) does not directly mention a dual-purpose summons and such provisions are construed broadly, the IRS may not need to obtain court approval prior to issuance.<sup>27</sup>

Statutory language, however, generally does not differentiate between singular and plural word forms.<sup>28</sup> This is particularly true when the statutory language abstractly prescribes a general rule for

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of a third-party recordkeeper and, consequently, the application of § 7609. See generally Fink, *supra* note 2, § 19.05[1] (growing body of litigation as to who is considered a third-party recordkeeper); Wesley, *supra* note 3, 51-52 (discussing ambiguities in statutory definition of third-party recordkeeper).

An exception to the § 7609(a) notice requirement exists when the IRS has reasonable cause to believe that giving notice may result in an attempt to conceal or destroy the taxpayer's records. I.R.C. § 7609(g) (1976). In addition, § 7609(a) does not apply when the IRS seeks to determine whether the business records of an identified individual have been kept, *id.* § 7609(a)(4)(B), the identity of a person having an account with the institution, *id.* § 7609(c)(2)(A), or the collection of tax from a person against whom an assessment has been made, *id.* § 7609(c)(2)(B).

20. I.R.C. § 7609(b)(1) (1976).

21. *Id.* § 7609(b)(2).

22. See *United States v. Thompson*, 701 F.2d 1175, 1180 (6th Cir. 1983); *United States v. Pittsburgh Trade Exch.*, 644 F.2d 302, 305 (3d Cir. 1981); H.R. Rep., *supra* note 3, at 307, reprinted in 1976 U.S. Code Cong. & Ad. News at 3203. See *infra* notes 44-51 and accompanying text.

23. I.R.C. § 7609(f) (1976).

24. *United States v. Tiffany Fine Arts, Inc.*, 718 F.2d 7, 12-13 (2d Cir. 1983); *United States v. Gottlieb*, 712 F.2d 1363, 1367-68 (11th Cir. 1983); *United States v. Barter Sys.*, 694 F.2d 163, 168 (8th Cir. 1982).

25. 444 U.S. 707 (1980).

26. *Id.* at 711; see, e.g., *United States v. Bisceglia*, 420 U.S. 141, 150 (1975) (broad construction of the IRS's summons authority is required "absent unambiguous directions from Congress"); *Donaldson v. United States*, 400 U.S. 517, 535-36 (1971) (limiting IRS's summons authority whenever a civil investigation may lead to a criminal prosecution would "stultify enforcement of federal law"); *United States v. Powell*, 379 U.S. 48, 53-54 (1964) (stringent interpretation of the IRS's summons authority "might seriously hamper" the Commissioner's investigatory power).

27. See *supra* note 16 and accompanying text.

28. See H. Black, *Handbook on the Construction and Interpretation of the Laws* § 76 (2d ed. 1911); F. McCaffrey, *Statutory Construction* § 20 (1953); 2A C. Sands, *Sutherland Statutory Construction* § 47.34 (4th ed. 1973).

future application.<sup>29</sup> If Congress had used the term "persons" in defining a John Doe summons, the IRS undoubtedly would not be excused from fulfilling section 7609(f) merely by naming a single taxpayer subject to an ongoing investigation.<sup>30</sup> Reference to a single unknown "person," therefore, is a tenuous basis upon which to alter the application of section 7609(f).<sup>31</sup> Because this ambiguity remains in the statutory language, however, an analysis of the legislative purpose of section 7609(f) is warranted.

### B. Legislative History of Section 7609(f)

The legislative history of section 7609(f) indicates that the provision faced little opposition in Congress and remained virtually intact as drafted.<sup>32</sup> The Joint Committee on Taxation (Joint Committee) stated that improvement of the administration of tax laws was a major goal of the Tax Reform Act of 1976.<sup>33</sup> The Joint Committee stressed the need for changes designed to strengthen taxpayer rights.<sup>34</sup> Further, emphasis was placed on the need for effective court review in limiting the ability of the IRS to issue administrative summonses.<sup>35</sup> The passage of section 7609(f) and the Joint Committee's emphasis on taxpayer rights indicate that amendments aimed at taxpayer rights were among the foremost congressional concerns in the 1976 Tax Reform Act.<sup>36</sup>

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29. 2A C. Sands, *supra* note 28, § 47.34; *see* *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 665 (1979) (change in statutory language from "Indian" to "Indians" does not indicate a change in meaning); *Barr v. United States*, 324 U.S. 83, 91 (1945) ("buying rate" is not limited to a single rate); *American Trucking Ass'ns v. ICC*, 697 F.2d 1146, 1152 (D.C. Cir. 1983) (in determining meaning of congressional acts, words importing the singular may extend to the plural); 1 U.S.C. § 1 (1982) ("In determining the meaning of any Act of Congress, . . . words importing the singular include and apply to several persons, parties, or things. . .").

30. *See* *United States v. Thompson*, 701 F.2d 1175, 1179-80 (6th Cir. 1983). *But see* *United States v. Tiffany Fine Arts, Inc.*, 718 F.2d 7, 13 (2d Cir. 1983) (criticizing *Thompson* for interpreting the term "person" to include *each* person with respect to whose liability the summons is issued).

31. *Cf.* *American Trucking Ass'ns v. ICC*, 697 F.2d 1146, 1152 (D.C. Cir. 1983) (use of singular noun "vehicle" should not disqualify owner of several vehicles from Motor Carrier Act exemption).

32. *Compare* H.R. 10,612, 94th Cong., 1st Sess. 764 (1975) (original House version of provision) *with* Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520, 1701-02 (codified as amended at 26 U.S.C. § 7609(f) (1976)).

33. Staff of Joint Comm. on Taxation, 94th Cong., 2d Sess., General Explanation of the Tax Reform Act of 1976 at 11 (Comm. Print 1976), *reprinted in* 1976-3 C.B. at 23 [hereinafter cited as Joint Comm. Explanation].

34. *Id.*, *reprinted in* 1976-3 C.B. at 23.

35. *Id.* at 11-12, *reprinted in* 1976-3 C.B. at 23-24.

36. *See id.*, *reprinted in* 1976-3 C.B. at 23-24; H.R. Rep., *supra* note 3, at 16, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 2911.

Congress recognized that a John Doe summons is a necessary tool in many legitimate IRS investigations.<sup>37</sup> At the same time, Congress believed that the use of the John Doe summons should not infringe unreasonably upon the privacy of the taxpayer.<sup>38</sup> Congress therefore adopted section 7609(f) as a means to prevent IRS "fishing expeditions"<sup>39</sup> when investigating unknown taxpayers.

During congressional hearings relating to the 1976 Tax Reform Act, witnesses voiced concern over the use of jeopardy and termination assessments and administrative summonses as harassment tactics against political activists.<sup>40</sup> Testimony revealed that the emergence of

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37. H.R. Rep., *supra* note 3, at 307, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 3203.

38. *Id.*, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 3203.

39. *See id.* at 310-11, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 3206-07. The House Report stated that:

[I]t is important to preserve the John Doe summons as an investigative tool which may be used in appropriate circumstances, [but] at the same time, the committee does not intend that the John Doe summons is to be available for purposes of enabling the Service to engage in a possible 'fishing expedition.'

*Id.* at 311, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 3207.

40. *See Senate Hearings, supra* note 2, at 230-34 (statement of Hope Eastman, Associate Director, ACLU); *id.* at 235-36 (statement of Jeff A. Schnepfer, Rutgers College). The history of politically motivated audits includes those aimed at the Communist Party from 1954 to 1964, the Kennedy-Johnson extremist groups in 1961, the Nixon "enemies" at various times during the Watergate era and Black Panther Party members. *Senate Hearings, supra* note 2, at 230-34 (statement of Hope Eastman, Associate Director, ACLU); *see Who's Snooping Into Your Tax Returns Now*, U.S. News & World Rep. 61, 61 (Aug. 11, 1975) (citing instances of congressional and other governmental examination of tax returns for political purposes).

A termination assessment is an IRS procedure whereby the Commissioner may determine prior to the expiration of the tax year or required date for filing that the collection of tax from a specified taxpayer may be in jeopardy. *Senate Hearings, supra* note 2, at 1 (statement of Sen. Floyd K. Haskell); Joint Comm. Explanation, *supra* note 33, at 357-58, *reprinted in* 1976-3 C.B. at 369-70; *see* I.R.C. § 6851 (1976). The IRS may then serve the taxpayer with a notice of termination of the tax year and demand immediate payment upon penalty of seizure and possible sale of the taxpayer's property. I.R.C. § 6851 (1976); Joint Comm. Explanation, *supra* note 33, at 357-58, *reprinted in* 1976-3 C.B. at 369-70. A jeopardy assessment is an IRS procedure whereby the Commissioner determines that a deficiency in tax payment exists and demands payment and levy on all property of the taxpayer so that collection of taxes will not be jeopardized by delay. *Senate Hearings, supra* note 2, at 2 (statement of Sen. Floyd K. Haskell); Joint Comm. Explanation, *supra* note 33, at 356-57, *reprinted in* 1976-3 C.B. at 368-69; *see* I.R.C. § 6861 (1976). Unlike the ordinary taxpayer, the taxpayer subject to a jeopardy assessment may be subject to collection while his case is pending in court. *See* I.R.C. § 6861 (1976). Although the IRS cannot sell the taxpayer's property under a jeopardy assessment, the taxpayer is deprived of the beneficial use of the property. *Senate Hearings, supra* note 2, at 2 (statement of Sen. Floyd K. Haskell). Congress altered these procedures in the Tax Reform Act of 1976 by providing for expedited administrative and judicial review of jeopardy and termination assessments. *See* Tax Reform Act of 1976, Pub. L. No. 94-



the John Doe summons was part of a growing trend of IRS surveillance of individuals, rather than an isolated instance of abuse of authority.<sup>41</sup> This testimony suggests that the enactment of section 7609 was a response to issues of individual privacy raised by this growth of administrative surveillance.<sup>42</sup> Under this view, the privacy interests of the unknown taxpayer affected by a dual-purpose summons should be a primary concern in analyzing the need for a procedural safeguard.<sup>43</sup>

While Congress did not specifically debate the merits of section 7609(f), it did debate its companion measure<sup>44</sup> that requires the IRS to notify a known taxpayer affected by a third-party summons of its service and permits the known taxpayer to intervene in district court.<sup>45</sup> Opponents of this companion provision argued that such an amendment would result in increased litigation involving administrative summonses<sup>46</sup> thereby "seriously jeopardizing the ability of the IRS

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455, 90 Stat. 1520, 1695-97 (codified at 26 U.S.C. §§ 6851, 7429 (1976)); Joint Comm. Explanation, *supra* note 33, at 359-64, *reprinted in* 1976-3 C.B. at 371-76.

41. *Senate Hearings*, *supra* note 2, at 88 (statement of Robert S. Fink, Esq.).

42. *See id.*; *United States v. Tiffany Fine Arts, Inc.*, 718 F.2d 7, 11 (2d Cir. 1983); *United States v. Thompson*, 701 F.2d 1175, 1180 (6th Cir. 1983); *In re The Tax Liabilities of John Does*, 671 F.2d 977, 979 (6th Cir. 1982); Fink, *supra* note 2, § 19.02[6], at 19-19.

43. *See* H.R. Rep., *supra* note 3, at 307, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 3203 (use of the third-party administrative summons should not infringe on the privacy of the unknown taxpayer); Joint Comm. Explanation, *supra* note 33, at 364-65, *reprinted in* 1976-3 C.B. at 376-77 (same). As such, § 7609(f) could be considered a remedial statute in that the provision was adopted to redress an area of past abuse, and the provision faced virtually no opposition in Congress. *See supra* notes 32-43 and accompanying text. A statute is considered remedial when it is enacted by a majority in order to remedy some practice considered to be improper, rather than when it is enacted as a compromise between groups of legislators. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. Chi. L. Rev. 800, 809 (1983); *see* 3 C. Sands, *supra* note 28, § 60.02, at 31 (remedial statute facilitates "the enforcement of rights and the redress of injuries"). A remedial statute should be liberally construed to advance the prescribed remedy. *International Nutrition, Inc. v. United States Dep't of Health*, 676 F.2d 338, 341 (8th Cir. 1982); *Chewning v. Schlesinger*, 471 F. Supp. 767, 774 (D.D.C. 1979); 3 C. Sands, *supra* note 28, § 60.01.

44. *See* 122 Cong. Rec. 25,920-26 (1976) (discussing various amendments to intervention requirement for known taxpayers).

45. I.R.C. § 7609(a)-(e), (g)-(h) (current version at 26 U.S.C. § 7609(a)-(e), (g) (1976 & Supp. V 1981) & 26 U.S.C.A. § 7609(h) (West Supp. 1983)). The notice-and-intervention safeguard for a known taxpayer is set out in § 7609 and encompasses a number of subsections. *See supra* notes 19-22 and accompanying text.

46. Letter from Rowland F. Kirks, Director of the Administrative Office of the United States Courts, to Hon. Russell B. Long (July 20, 1976), *reprinted in* 122 Cong. Rec. 23,388 (1976) [hereinafter cited as Kirks Letter]; Letter from Edward H. Levi, Attorney General, to Hon. Russell B. Long (July 21, 1976), *reprinted in* 122 Cong. Rec. 23,386 (1976) [hereinafter cited as Levi Letter]; *see* 122 Cong. Rec. 25,921 (1976) (statement of Sen. Pastore).

to administer the revenue laws in cases of noncompliance."<sup>47</sup> One government analyst stated that "[i]t is clear from the sheer magnitude of this investigatory program that even if only a relatively small proportion of the summonses results in new litigation, the impact upon the federal judiciary will be staggering and could be crippling."<sup>48</sup>

Despite some government opposition, Congress adopted this companion measure, recognizing that the burden imposed on the IRS was not sufficient to outweigh the need for protecting the known taxpayer's privacy interest.<sup>49</sup> Similarly, Congress did not intend that the burden on the IRS should thwart the privacy interests of the unknown taxpayer.<sup>50</sup> The legislative history states that when dealing with a single-purpose summons served on a third-party recordkeeper, either the notice-and-intervention safeguard for a known taxpayer or the John Doe safeguard for an unknown taxpayer must be invoked.<sup>51</sup> Thus, to conclude that Congress would want to exempt the unknown taxpayer who is the subject of a dual-purpose summons from similar protection is unreasonable. Because the notice-and-intervention safeguard is impractical, the IRS must comply with the John Doe administrative proceeding in the case of a dual-purpose summons.

Congress, however, did not intend to impose an undue burden on the IRS in obtaining court authorization prior to the issuance of a John Doe summons in enacting section 7609(f).<sup>52</sup> Proponents of the provision acknowledged that in balancing the interests underlying section 7609(f), protecting the privacy interests of the taxpayer might frustrate the collection of taxes from tax evaders.<sup>53</sup> Congress nonetheless believed that section 7609(f) created a necessary balance between

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47. Letter from William E. Simon, Secretary of the Treasury, to Hon. Russell B. Long (July 21, 1976), *reprinted in* 122 Cong. Rec. 23,386 (1976)

48. Kirks Letter, *supra* note 46, *reprinted in* 122 Cong. Rec. 23,388 (1976).

49. See H.R. Rep., *supra* note 3, at 307, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 3203; Joint Comm. Explanation, *supra* note 33, at 364-65, *reprinted in* 1976-3 C.B. at 376-77.

50. See *United States v. Thompson*, 701 F.2d 1175, 1180 (6th Cir. 1983); *United States v. Pittsburgh Trade Exch.*, 644 F.2d 302, 305 (3d Cir 1981); H.R. Rep., *supra* note 3, at 307, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 3203.

51. H.R. Rep., *supra* note 3, at 307, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 3203 (privacy problems are resolved if the notice-and-intervention safeguard or John Doe summons procedure is applied); Joint Comm. Explanation, *supra* note 33, at 365, *reprinted in* 1976-3 C.B. at 377 (John Doe summons proceeding enacted because notice requirement is impossible when unknown taxpayer is involved).

52. H.R. Rep., *supra* note 3, at 311, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 3207; Joint Comm. Explanation, *supra* note 33, at 370, *reprinted in* 1976-3 C.B. at 382.

53. 122 Cong. Rec. 25,922-23 (1976) (statements of Sens. Hruska & McClellan).

the taxpayer's privacy and effective IRS investigation.<sup>54</sup> If application of a John Doe administrative proceeding to a dual-purpose summons

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54. See *United States v. Tiffany Fine Arts, Inc.*, 718 F.2d 7, 11-12 (2d Cir. 1983); H.R. Rep., *supra* note 3, at 311, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 3207; Joint Comm. Explanation, *supra* note 33, at 369-70, *reprinted in* 1976-3 C.B. at 381-82.

55. In recent years, public concern has arisen regarding the effects of sophisticated data-gathering activities by government organizations. A. Miller, *The Dossier Society*, in *Privacy, A Public Concern* 102 (1975); see American Enter. Inst., *Privacy Protection Proposals* 1 (1979); Annual Chief Justice Earl Warren Conf. on Advocacy in the U.S., *Privacy in a Free Society* 28-29 (1974); D. Marchand, *The Politics of Privacy, Computers, and Criminal Justice Records* 4-5 (1980). As a result of recent advances in computer technology, one commentator has stated that "the same electronic sensors that can warn us of an impending heart attack might be used to locate us, track our movements, and measure our emotions and thoughts." A. Miller, *supra*, at 102. Government agencies gather an immense amount of information about individuals both through self-reported individualized data and information obtained from private sector recordkeepers. See *id.*; American Enter. Inst., *supra*, at 35. The dramatic increase in the number of data banks has raised the fear of the advent of a "dossier society." See American Enter. Inst., *supra*, at 1; A. Miller, *supra*, at 103. Governmental abuse of tax returns and tax procedures heighten these concerns. American Enter. Inst., *supra*, at 1.

Justice Douglas, in *Osborn v. United States*, 385 U.S. 323 (1966), stated:

We are rapidly entering the age of no privacy, where everyone is open to surveillance at all times; where there are no secrets from government. . . . The dossiers on all citizens mount in number and increase in size. . . . Taken individually, each step [of government intrusion] may be of little consequence. But when viewed as a whole, there begins to emerge a society . . . in which government may intrude into the secret regions of man's life at will.

*Id.* at 341-43 (Douglas, J., dissenting). The Supreme Court also has acknowledged that privacy encompasses not only an interest in making personal decisions without interference, but also an interest in not disclosing personal information. *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977) (dictum).

In addition, Congress has recently enacted a series of laws to prevent unnecessary governmental intrusion into the privacy of individuals. Freedman, *The Right of Privacy in the Age of Computer Data and Processing*, 13 Tex. Tech. L. Rev. 1361, 1374-78 (1982). Congress passed the Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896 (codified as amended at 5 U.S.C. §§ 552a-559 (1982)), in order to restrict government disclosure of personal information to third parties. S. Rep. No. 1183, 93rd Cong., 2d Sess. 1-2 (1974), *reprinted in* 1974 U.S. Code Cong. & Ad. News 6916, 6916-17 [hereinafter cited as Senate Report]; Note, *Federal Legislative Proposals for the Protection of Privacy*, 8 Fordham U.L.J. 773, 790 (1979-1980); see Note, *The Interest in Limiting the Disclosure of Personal Information: A Constitutional Analysis*, 36 Vand. L. Rev. 139, 147 (1983). The Act generally prohibits a federal agency from disclosing information about an individual to any person or other agency without the individual's consent. 5 U.S.C. § 552a(b) (1982). A government agency is prohibited from disclosing any record which is contained in its data banks without written consent of the individual affected by the disclosure except in certain enumerated circumstances. *Id.* In 1978, Congress passed the Right to Financial Privacy Act of 1978 which limits the federal government's access to individual records held by banks and financial institutions. Pub. L. No. 95-630, 92 Stat. 3697, 3697-710 (codified as amended at 12 U.S.C. §§ 3401-3422 (1982)). Most recently,

undermines this balance, such a safeguard should not be applied. An analysis of these policy considerations underlying section 7609(f) is therefore necessary.

C. *Balancing the Privacy Interest of the Taxpayer Against the Administrative Burden on the IRS*

In the realm of federal taxation, Congress must enact revenue laws that guard against the individual's loss of privacy<sup>55</sup> and yet maintain the efficiency of the IRS in curbing tax evasion.<sup>56</sup> The enactment of section 7609 is an example of this balancing process.<sup>57</sup> A third-party recordkeeper possesses a substantial amount of information regarding its customers; a checking account alone may reveal substantial personal information about the account holder.<sup>58</sup> To grant the IRS unlimited access to personal information when dealing with third-party recordkeepers, therefore, ignores the privacy interests of the taxpayer.

Recent judicial developments in the third-party summons area, however, raise questions as to the future efficacy of these privacy protections.<sup>59</sup> As a general rule, the IRS lacks the authority to issue a summons solely for research purposes.<sup>60</sup> Courts, however, have inter-

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Congress passed the Privacy Protection Act of 1980 which provides special protection for the news media against search and seizure of news media materials. Pub. L. No. 96-440, 94 Stat. 1879, 1879-83 (codified at 42 U.S.C. §§ 2000aa to 2000aa-12 (1982)). Such legislation evinces a substantial acknowledgement of an individual's interest in protecting against disclosure and dissemination of personal information. See, e.g., S. Rep. No. 874, 96th Cong., 2d Sess. 4-5 (1980), reprinted in 1980 U.S. Code Cong. & Ad. News 3950, 3950-52; H.R. Rep. No. 1383, 95th Cong., 2d Sess. 33 (1978), reprinted in 1978 U.S. Code Cong. & Ad. News 9273, 9305; Senate Report, *supra*, at 1-2, reprinted in 1974 U.S. Code Cong. & Ad. News 6916, 6916-17.

56. See H.R. Rep., *supra* note 3, at 310-12, reprinted in 1976 U.S. Code Cong. & Ad. News at 3206-08; Joint Comm. Explanation, *supra* note 33, at 364-65, 369-70, reprinted in 1976-3 C.B. at 376-77, 381-82; Kummer, *supra* note 19, at 800-01; Wesley, *supra* note 3, at 47.

57. See *supra* notes 37-54 and accompanying text.

58. See *Senate Hearings, supra* note 2, at 225 (statement of Hope Eastman, Associate Director, ACLU); *id.* at 86 (statement of Robert S. Fink, Esq.); Kirshner, *The Right to Financial Privacy Act of 1978—The Congressional Response to United States v. Miller: A Procedural Right to Challenge Government Access to Financial Records*, 13 U. Mich. J.L. Ref. 10, 10-11 (1979-80).

59. See *United States v. Thompson*, 701 F.2d 1175, 1179 n.8 (6th Cir. 1983); *United States v. Barter Sys.*, 694 F.2d 163, 168-69 (8th Cir. 1983).

60. *United States v. Humble Oil & Ref. Co.*, 488 F.2d 953, 962-63 (5th Cir. 1974), *vacated and remanded*, 421 U.S. 943, *aff'd on remand*, 518 F.2d 747 (5th Cir. 1975) (per curiam). In *Humble Oil*, the IRS sought information about taxpayers who had surrendered leases to a third-party company during the taxable year in question and information concerning the amounts of any lease bonuses that had been paid. *Id.* at 954. The court held that absent an investigation of a taxpayer the IRS lacks the authority to issue a summons. *Id.* at 954, 962. As a result of *Humble Oil*, it is unlikely that the IRS will ever again admit to the issuance of a John Doe summons purely for

preted this rule to permit the issuance of a summons for research purposes provided an ongoing, particularized investigation of a known or unknown taxpayer also exists.<sup>61</sup> Because the IRS is not bound by a probable cause requirement in issuing a summons,<sup>62</sup> it is likely that the use of these dual-purpose summonses will increase in the future.<sup>63</sup> As a result, the privacy safeguards in section 7609 should be complied with in order to limit the "fishing expeditions" that Congress sought to prevent.

The legislative history, however, reveals that Congress did not intend to impose an undue burden on the IRS in enacting section 7609.<sup>64</sup> Section 7609(f) establishes modest standards for the issuance of a John Doe summons:<sup>65</sup> The IRS must show that "a transaction has occurred, and that the transaction . . . is of such a nature as to be reasonably suggestive of the possibility that the correct tax liability

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research purposes. *Senate Hearings, supra* note 2, at 90 (statement of Robert S. Fink, Esq.)

61. *E.g.*, *United States v. Pittsburgh Trade Exch.*, 644 F.2d 302, 307-08 (3d Cir. 1981); *United States v. First Nat'l Bank*, 635 F.2d 391, 395-96 (5th Cir.), *cert. denied*, 452 U.S. 916 (1981); *United States v. Flagg*, 634 F.2d 1087, 1091-92 (8th Cir. 1980), *cert. denied*, 451 U.S. 909 (1981); *United States v. Island Trade Exch.*, 535 F. Supp. 993, 997 (E.D.N.Y. 1982).

62. See *supra* note 10.

63. More than 93 million individual returns were filed in 1980. 1980 Comm'r of Internal Revenue Ann. Rep. 9. Because of this large number, the IRS uses the Taxpayer Compliance Measurement Program (TCMP) and the Discriminant Function formula (DIF) to determine which returns should be audited. *United States v. Flagg*, 634 F.2d 1087, 1088-89 (8th Cir. 1980), *cert. denied*, 451 U.S. 909 (1981); Wesley, *supra* note 3, at 42. The DIF is a mathematical method that "assigns various weights to selected items entered on a return." Wesley, *supra* note 3, at 42. The returns are scored with the determination that those returns with the higher scores have a greater potential for error. *Id.* The TCMP is a "random selection system designed to measure and evaluate taxpayers' compliance characteristics." *Id.* TCMP results are used as a data pool for the development of the DIF. *Id.* The TCMP "aids the IRS in determining those areas of tax administration into which it should concentrate its limited enforcement resources." *Flagg*, 634 F.2d at 1089. The court in *Flagg* upheld the authority of the IRS to compel taxpayer cooperation in TCMP audits. *Id.* at 1092. Because the IRS is only bound by a relevance requirement and does not have to establish probable cause to investigate a taxpayer, see *supra* note 10, the requirement that a summons relate to an ongoing investigation of a taxpayer is easily met. See Kenderdine, *supra* note 10, at 76. This standard, therefore, provides no practical check on the investigatory power of the IRS. See *id.* As a result, the IRS is likely to increase its use of summonses primarily aimed at the collection of TCMP data.

64. See *supra* note 52 and accompanying text.

65. *United States v. Tiffany Fine Arts, Inc.*, 718 F.2d 7, 12 (2d Cir. 1983); see I.R.C. § 7609(f) (1976). Section 7609(h) vests jurisdiction in the district courts and provides that the judge make the determination in an ex parte proceeding solely on the petition and affidavits of the IRS. I.R.C. § 7609(h) (current version at 26 U.S.C.A. § 7609(h) (West Supp. 1983)).

with respect to that transaction may not have been reported."<sup>66</sup> As such, the requirements for issuance of a John Doe summons under section 7609(f) are merely a variation of the normal requirements for the enforcement of any IRS summons.<sup>67</sup>

Requiring a John Doe summons proceeding for all summonses directed at known third-party recordkeepers because such information might implicate unknown parties, however, could upset the balance that Congress established in section 7609(f).<sup>68</sup> Virtually any IRS summons may uncover information that could be used to identify and investigate an unknown party.<sup>69</sup> The existence of an ongoing investigation of a known taxpayer, therefore, arguably should excuse the IRS from complying with section 7609(f), regardless of the existence of a dual purpose.<sup>70</sup> If the IRS had to comply with section 7609(f) for every summons issued under section 7602, the "IRS would be shouldered with significantly greater administrative burdens than Congress intended."<sup>71</sup> Such a result would exacerbate the problem of swelling civil caseloads in the federal district courts.<sup>72</sup> This would be especially troublesome because section 7609(h)(3) generally requires an enforcement proceeding under section 7609 to take precedence on the docket over all other cases.<sup>73</sup> District courts could be forced to act as "reviewing administrators for . . . those well-financed litigants whose primary tactic is to retard the judicial process, delay the determination of their tax liability, and make litigation for the Government as expensive as possible."<sup>74</sup>

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66. H.R. Rep., *supra* note 3, at 311, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 3208.

67. *Compare* United States v. Powell, 379 U.S. 48, 57-58 (1964) (holding that the four elements of a prima facie showing by the IRS in an enforcement proceeding are: that the investigation is conducted pursuant to a legitimate purpose; the information is relevant to that investigation; the information is not already in the Commissioner's possession; and the other administrative steps required by the Code have been followed) with I.R.C. § 7609(f) (1976) (providing that the John Doe summons must relate to the investigation of a particular person or group, there is a reasonable basis for the investigation and the information cannot be obtained from another viable source).

68. United States v. Tiffany Fine Arts, Inc., 718 F.2d 7, 13 (2d Cir. 1983).

69. *Id.*

70. *Id.* at 13-14.

71. *Id.* at 13.

72. See Kirks Letter, *supra* note 46, *reprinted in* 122 Cong. Rec. 23,388 (1976) (addressing problems of increased litigation, delayed disposition of civil cases and increased burden on judicial resources likely to result from instituting administrative summons safeguards).

73. I.R.C. § 7609(h)(3) (current version at 26 U.S.C.A. § 7609(h)(3) (West Supp. 1983)). A proceeding brought to enforce a summons under § 7609, however, will not take precedence on the docket over cases the court considers more important. *Id.*

74. Levi Letter, *supra* note 46, *reprinted in* 122 Cong. Rec. 23,386 (1976).

## II. APPLYING SECTION 7609(f) TO THE "INTENDED" SECONDARY INVESTIGATION: A RECOMMENDATION

### A. *The Clear-Intent Test*

Neither a policy excusing the IRS from ever complying with the John Doe summons proceeding in the case of a dual-purpose summons that names a taxpayer subject to investigation nor a policy requiring the IRS to comply with section 7609(f) for every dual-purpose summons appears to reflect the congressional intent underlying section 7609(f).<sup>75</sup> To excuse the IRS from complying with section 7609(f) in the former situation would be to ignore the privacy interests of the unknown taxpayer and to permit the IRS to conduct the "fishing expeditions" that Congress sought to limit.<sup>76</sup> To adopt the latter approach, however, would be to require a John Doe proceeding for every IRS summons and thus severely hinder the administrative operations of the IRS.<sup>77</sup> In order to preserve a balance between the privacy of the individual and the administrative burden on the IRS, a practical policy that protects the targeted, unknown taxpayer, and at the same time, avoids an excessive administrative burden on the IRS must be implemented.

The IRS, therefore, should follow the John Doe summons proceeding whenever it clearly intends to investigate a taxpayer who will be identified through a recordkeeper's compliance with a summons.<sup>78</sup> An admission by the IRS that a summons issued to a third-party recordkeeper will likely result in the investigation of unknown parties would certainly indicate such an intent.<sup>79</sup> This determination, however,

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75. See *supra* notes 32-54 and accompanying text. In *United States v. Gottlieb*, 712 F.2d 1363 (11th Cir. 1983), Judge Anderson suggested a third possible approach which would permit the IRS to obtain the third-party records without satisfying the requirements of section 7609(f), while limiting the use of the records against the unknown taxpayer. *Id.* at 1368 n.13. Because this interpretation would hamper the effective enforcement of tax laws and had no statutory mandate, the court discarded it as unfeasible. *Id.*

76. See *supra* notes 37-39 and accompanying text.

77. See *supra* notes 68-74 and accompanying text.

78. This is the same analysis that the Sixth Circuit adopted in *United States v. Thompson*, 701 F.2d 1175 (6th Cir. 1983). *Thompson* involved an IRS attempt to summon the daily transaction sheets of a barter exchange. *Id.* at 1177. The IRS asserted that the daily transaction sheets that contained the names of individual exchange members were necessary to verify the information contained on other exchange records. *Id.* The IRS agent testified that these transaction sheets would also be used to identify barter members that the IRS wished to investigate. *Id.* The court denied issuance of the summons, absent IRS compliance with the John Doe summons proceeding, because of the clear intent of the IRS to investigate unknown taxpayers. *Id.* at 1180-81.

79. See *id.* at 1178-79.

should not rest solely upon the subjective intent of an individual agent (as to whether the institutional purpose of the summons is the investigation of the known or unknown taxpayer). Clear intent to investigate exists whenever the subsequent investigation of an unknown taxpayer is a motivating factor in the issuance of the summons.<sup>80</sup> Objective factors, such as the nature of the transaction underlying the investigation or established IRS policies labeling certain transactions or devices as potentially indicative of tax deficiency, therefore, are relevant in establishing clear intent.<sup>81</sup> For example, in a barter exchange setting in which the summons names the exchange partners, the unique and nontraditional features of the barter exchange may reveal a clear IRS intent to investigate the barter exchange members upon revelation of their identities.<sup>82</sup> Likewise, an established IRS policy labeling tax shelters as indicative of tax deficiency may reveal a clear IRS intent to investigate the clients of a holding company promoting tax shelters upon identification through a summons that names the company as the suspect party.<sup>83</sup>

The legislative history of section 7609 reveals that the main purpose of the section was to give the targeted taxpayer notice of the third-party summons so that he would be able to assert appropriate defenses.<sup>84</sup> Because unknown taxpayers do not have the option of opposing a John Doe summons in an enforcement proceeding, judicial supervision is the only viable alternative to protect an unknown taxpayer's privacy interests.<sup>85</sup> A refusal to comply with section 7609(f)

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80. *Id.* at 1181.

81. *See id.* (subjective factors alone are not adequate in determining intent).

82. *See id.* at 1175-77, 1181. A barter exchange acts as a clearinghouse for the purchase of goods and services by exchange members. *United States v. Gottlieb*, 712 F.2d 1363, 1364 (11th Cir. 1983); *United States v. Thompson*, 701 F.2d 1175, 1175-76 (6th Cir. 1983); *United States v. Barter Sys.*, 694 F.2d 163, 164 (8th Cir. 1982); *United States v. Pittsburgh Trade Exch.*, 644 F.2d 302, 303-04 (8th Cir. 1982). In a normal barter transaction, no cash changes hands. *Gottlieb*, 712 F.2d at 1364. Exchange members purchase goods from one another and payment consists of crediting and debiting the accounts of the respective members. *Id.* at 1364. The exchange partners retain a percentage of each transaction as a fee. *Id.* Members of bartering organizations must include the value of any trade credits received during the taxable year in their gross income. Rev. Rul. 80-52, 1980-1 C.B. 100.

83. *See United States v. Tiffany Fine Arts, Inc.*, 718 F.2d 7 (2d Cir. 1983). In *Tiffany Fine Arts*, the IRS sought the client list of a holding company engaged in promoting tax shelters. *Id.* at 8-9. The court held that the existence of an ongoing investigation of the holding company excused the IRS from complying with § 7609(f) despite a possible dual purpose to investigate the customers revealed through compliance with the summons. *Id.* at 13-14. Under a clear-intent test, an established IRS policy that labeled tax shelters as "suspect" might reveal a clear IRS intent to investigate the customers of Tiffany and require the IRS to comply with § 7609(f).

84. *See supra* notes 32-54 and accompanying text.

85. H.R. Rep., *supra* note 3 at 307, *reprinted in* 1976 U.S. Code Cong. & Ad. News, at 3203; Joint Comm. Explanation, *supra* note 33, at 365, *reprinted in* 1976-3 C.B. at 377.



merely because the recordkeeper is also the subject of an ongoing investigation would be in direct contravention of the legislative intent.<sup>86</sup> Moreover, opposition by the recordkeeper is not a viable check because no guarantee exists to ensure that the recordkeeper and the unknown taxpayer share the same interest in opposing the summons.<sup>87</sup> The requirement of a John Doe summons proceeding when the IRS clearly intends to investigate unknown taxpayers despite an ongoing investigation of the recordkeeper is therefore crucial to preserve the primary safeguards Congress established through enactment of section 7609.

Further, this interpretation satisfies the Supreme Court mandate in *Euge* requiring a clear directive from Congress or substantial countervailing policies to prevent a broad construction of the IRS summons power.<sup>88</sup> In enacting section 7609, Congress directed that either a notice-and-intervention safeguard for the known taxpayer or a John Doe summons proceeding safeguard for the unknown taxpayer must attach when the IRS issues a summons.<sup>89</sup> Because the IRS may clearly intend to investigate unknown taxpayers along with the named third-party recordkeeper, the clear-intent test is an effective solution to preserve the congressional directive announced through enactment of this section.<sup>90</sup>

In addition, the requirement of a John Doe proceeding when a clear IRS intent exists to investigate both a named and an unknown taxpayer does not unduly burden the IRS.<sup>91</sup> Under this test, section 7609(f) does not apply if such an established dual purpose does not exist,<sup>92</sup> the IRS is not aware that such investigation of the record-

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86. *United States v. Thompson*, 701 F.2d 1175, 1179 n.8 (6th Cir. 1983). See *supra* notes 32-54 and accompanying text.

87. See H.R. Rep., *supra* note 3, at 307, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 3203 (interest of third-party recordkeeper not subject to investigation is far less pressing than that of taxpayer under investigation); Joint Comm. Explanation, *supra* note 33, at 365, *reprinted in* 1976-3 C.B. at 377 (third-party recordkeeper not subject to investigation can challenge summons only for procedural defects). Although the interest of a third-party recordkeeper in opposing the dual-purpose summons may be similar to an unknown party's interest when the recordkeeper is also subject to IRS investigation, the recordkeeper's interest is likely to be less urgent when the institutional purpose of the summons is to investigate the unknown party revealed through the recordkeeper's compliance. See H.R. Rep., *supra* note 3, at 307, *reprinted in* 1976 U.S. Code Cong & Ad. News at 3203; Joint Comm. Explanation, *supra* note 33, at 365, *reprinted in* 1976-3 C.B. at 377.

88. *United States v. Euge*, 444 U.S. 707, 711 (1980). See *supra* notes 25-26 and accompanying text.

89. See *supra* notes 49-51 and accompanying text.

90. See *United States v. Thompson*, 701 F.2d 1175, 1179-80 (6th Cir. 1983).

91. *Id.* at 1180.

92. *Id.*

keeper will result in implicating third parties<sup>93</sup> or a dual investigation is only a remote possibility.<sup>94</sup> Further, a John Doe summons proceeding would not apply to a summons directed at a known taxpayer with the additional purpose of general research because such summons lacks a clear intent to investigate unknown parties.<sup>95</sup> Moreover, this approach would not unduly burden the IRS because the standards in section 7609(f) are modest.<sup>96</sup>

### B. *Procedural Aspects of the Clear-Intent Test*

Under this clear-intent test, if the IRS fails to comply with section 7609(f) in the case of a dual-purpose summons that has a secondary purpose of investigating an unknown taxpayer, the named third-party recordkeeper can validly refuse to surrender the information to the IRS.<sup>97</sup> The IRS then must initiate an enforcement proceeding in order to force the third-party recordkeeper to deliver the summoned information. Because section 7609(f) is an additional requirement to a summons issued under section 7602, rather than a separate summons power,<sup>98</sup> proof of IRS intent should be included in the initial IRS showing of compliance with requisite procedure.

In a section 7602 enforcement proceeding, the IRS must make a prima facie showing that the summons was issued pursuant to a legitimate purpose,<sup>99</sup> the information summoned is relevant to that purpose,<sup>100</sup> the IRS has followed the proper procedure<sup>101</sup> and the information sought is not in the government's possession.<sup>102</sup> Once the IRS makes an initial showing of compliance with these requirements, the burden rests with the taxpayer to challenge the summons and

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93. *Id.*

94. *Id.*

95. *See id.* at 1180. A clear IRS intent to investigate unknown taxpayers does not include situations when only a remote possibility of such investigations exists. *Id.* A summons issued with the institutional purpose of general research would generally seem to create only a remote possibility of further investigation of unknown parties.

96. *See supra* notes 64-66 and accompanying text.

97. A recipient of an IRS summons may refuse to comply with the summons when the IRS has failed to follow the proper procedure. *See United States v. Powell*, 379 U.S. 48, 57-58 (1964). Because § 7609(f) is an additional requirement to a § 7602 summons, rather than a separate summons power, *see supra* notes 9-10 and accompanying text, a third-party recordkeeper who receives a dual-purpose John Doe summons can validly refuse to comply with the summons when the IRS fails to follow the required John Doe summons procedure.

98. *See supra* notes 9-10 and accompanying text.

99. *United States v. Powell*, 379 U.S. 48, 57 (1964).

100. *Id.*

101. *Id.* at 58.

102. *Id.* at 57-58.

convince the court that deficiencies exist.<sup>103</sup> Because the existence of a clear intent is determinative of the existence of a John Doe summons under the proposed test, the IRS should be required to negate a clear intent to investigate as part of this preliminary showing.<sup>104</sup> The burden then should be on the named third-party recordkeeper seeking enforcement of section 7609(f) to prove that a clear intent did in fact exist.

#### CONCLUSION

Section 7609(f) can effectively safeguard the privacy interests of an unknown taxpayer who is subject to an IRS investigation. In light of the modest standards set forth in this section, interpreting section 7609(f) to include summonses that have a secondary intent of investigating an unknown taxpayer does not place an undue burden on the IRS. To preserve the balance established by Congress in enacting section 7609(f), the IRS must comply with a John Doe proceeding whenever it clearly intends to investigate a taxpayer whose identity will be revealed through a recordkeeper's compliance with a summons.

*Cecelia Kehoe Dempsey*

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103. *United States v. Thompson*, 701 F.2d 1175, 1178 (6th Cir. 1983); *United States v. Newman*, 441 F.2d 165, 169 (5th Cir. 1971).

104. See *supra* notes 99-102 and accompanying text.