

PURPOSE

- (1) This transmits revised CCDM 38.1.1, Assistance to Criminal Investigation during Investigatory Stage; Prereferral Assistance, Visitations and Investigative Tools.

NATURE OF CHANGES

- (1) The reference to Tax Division Directive No. 52 in CCDM 38.1.1.3.1 (2) has been updated.
- (2) CCDM 38.1.1.3.1 (3), which describes the DOJ, Tax Division's exclusive authority to approve the use of search warrants involving disinterested third parties, has been revised to provide exceptions for (a) search warrants directed to providers of electronic communication services or remote computing services; and (b) search warrants directed to disinterested third parties owning storage space businesses or similar businesses. Such search warrants no longer require Tax Division approval, unless they relate to a person reasonably believed to be one of the individuals listed in CCDM 38.1.1.3.1 (2). This revision makes CCDM 38.1.1.3.1 (3) consistent with Tax Division Directive No. 52, revised March 17, 2008.

EFFECT ON OTHER DOCUMENTS

CCDM 38.1.1, dated October 1, 2007, is superseded.

AUDIENCE

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38.1.1
Prereferral Assistance, Visitations and Investigative Tools

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38.1.1.1
(10-03-2007)
Prereferral Assistance

- (1) Criminal Tax attorneys will be available, upon request, at any stage of an investigation for discussions with Criminal Investigation personnel for the purpose of rendering legal advice. Prereferral legal assistance is solely advisory in nature and its purpose is to provide guidance regarding legal issues that surface during an investigation.
- (2) Prereferral advice generally will be in the same manner as the request; e.g., if it is an oral request, the response can be oral, if a written request, the response will be written. If an oral response is given, a follow-up memorandum to the file will be prepared.
- (3) If a written response is prepared, a copy of the written response will be forwarded to the Area Counsel for review, approval, and signature before transmission to Criminal Investigation. If the Area Counsel has delegated signature authority, then Area Counsel will post review the written response.
- (4) Criminal Tax attorneys are encouraged to contact Criminal Tax Division Counsel for coordination with the office of Associate Chief Counsel (International) in cases where investigations concern individuals or entities that are foreign persons, United States citizens abroad, issues involving the international provisions of the Code or United States possessions, and in cases where documents, witnesses or other information are located outside of the United States.
- (5) Criminal Tax attorneys are encouraged to contact Criminal Tax Division Counsel for coordination with the office of Division Counsel/Associate Chief Counsel (TEGE) in cases where investigations concern individuals or entities within the purview of TEGE.

38.1.1.2
(08-11-2004)
**Criminal Investigation
Group Reviews and
Visitations**

- (1) Criminal Tax attorneys should visit Criminal Investigation personnel to conduct group reviews and visitations. The purpose of the reviews and visitations is to discuss and to address legal issues and concerns present in the cases in Criminal Investigation's inventory. Specifically, the Criminal Tax attorney and Criminal Investigation personnel should discuss any legal problems associated with the investigation, as well as Criminal Investigation's theory of prosecution. Legal impediments should be raised and discussed.
- (2) Where reasonably possible, these group reviews and visitations should be conducted once per quarter.

38.1.1.3
(08-11-2004)
**Search Warrant
Procedures**

- (1) The Fourth Amendment provides that the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. The Fourth Amendment protects individuals against unreasonable searches and seizures by the Government. The scope of this protection extends to any area in which an individual has a reasonable expectation of privacy. Further, the Fourth Amendment provides that all warrants shall be based upon probable cause and supported by oath or affirmation.
- (2) Rule 41 of the Federal Rules of Criminal Procedure contains the procedures for obtaining a warrant. Briefly, Rule 41 provides for the issuance of a warrant

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by a federal magistrate or a judge of a state court of record within the district where the property or person sought is located, upon request by a federal law enforcement officer or an attorney for the Government.

- (3) The warrant may be issued to seize:
 - Property that constitutes evidence of the commission of a crime
 - Contraband, the fruits of a crime, or things otherwise criminally possessed
 - Property designed or intended to be used as an instrumentality of a crime
 - People, when there is probable cause for their arrest
- (4) The warrant should be based upon a sworn affidavit that establishes the grounds for issuance. If the magistrate (federal officer) is satisfied that the grounds for the application exist or that there is probable cause to believe that they exist and approves the warrant, then the officer has ten days to execute the warrant. The search should be performed during the daytime (between 6:00 a.m. and 10:00 p.m.) unless the issuing authority has authorized execution at other times. The officer taking the property is required to provide a copy of the warrant and a receipt for the property taken. The return to the magistrate shall be made promptly and accompanied by a written inventory of the property taken.
- (5) Congress has empowered special agents to seek and to execute search warrants in their investigation of their statutes of jurisdiction. A search warrant is often indispensable in investigating criminal conduct related to violations of the tax code. As a general principle, special agents are guided in their use of search warrants by Criminal Investigation policies and procedures. Special agents are constrained by the requirements of the IRM regarding the tactical choice to use a search warrant, which requires them “to execute their law enforcement responsibilities by continually assessing... the probable impact of their enforcement activities on the image of the Service.” This directive is interpreted by both the Service and Criminal Investigation management as requiring Criminal Investigation to employ the least intrusive means needed in their investigations. Both Service and Department of Justice (DOJ) policy allow for the use of search warrants in tax and tax-related investigations “with restraint and only in significant tax cases.”
- (6) Criminal Investigation’s policy on search warrants is:
 - a. Prior to the approval of a search warrant enforcement action, Counsel will review all search warrants where a special agent is the affiant for the warrant.
 - b. This review will be conducted for warrants in both tax and money laundering investigations (including those investigated under the OCDEF program). Counsel’s review is required for search warrants obtained in both administrative and grand jury investigations.
 - c. Counsel will review the affidavit for the search warrant and the Enforcement Action Review Form. Subsequent to their review, the Criminal Tax attorney will provide written advice to the Special Agent in Charge (SAC) for the SAC’s consideration in the search warrant approval process.
- (7) Whenever the subject of a search warrant concerns an individual or entity within the purview of TEGE, Criminal Tax attorneys are encouraged to contact Criminal Tax Division Counsel for coordination with the Division Counsel/Associate Chief Counsel (TEGE).

- (8) Counsel will also conduct a post search warrant inventory review for all warrants obtained in tax and tax-related investigations. They will not conduct an inventory review for warrants obtained in pure money laundering investigations.
- (9) A search warrant authorizes a limited intrusion into an area protected by the Fourth Amendment. A neutral and detached magistrate (judicial officer) may, upon a finding of probable cause, issue a search warrant. The search warrant must specify with particularity the area/premises to be searched and the persons or things to be seized. This requirement of particularity prevents a general, exploratory rummaging in a person's belongings. The premises to be searched must be sufficiently described to enable the executing officers to ascertain and to identify it with reasonable certainty. Also, the persons or things to be seized must be specifically described, leaving nothing to the discretion of the executing officers.
- (10) The use of a search warrant by special agents may be authorized in criminal tax investigations and any other criminal investigation within the law enforcement jurisdiction of the Service. Criminal Investigation is required, however, to recognize that use of a search warrant in criminal investigations requires an evaluation of whether less intrusive means are reasonably available to acquire the evidence sought due to the invasive nature of the search warrant. Criminal Investigation has established a policy in accordance with the recommendations of the Webster Commission requiring special agents to analyze whether less intrusive means are reasonably available to acquire evidence sought in a proposed search warrant in all tax and tax-related investigations.
- (11) As set forth in the procedures below, Counsel formally reviews *all* CI search warrant applications in administrative and grand jury investigations where a special agent is the affiant. In providing advice on these matters, Counsel should always advise Criminal Investigation whether there is sufficient probable cause to support the warrant, and, if not, what information is needed to establish probable cause for the warrant. Counsel must also advise Criminal Investigation whether less intrusive investigative methods are reasonably available to acquire the evidence sought, but this determination is only required in tax and tax-related investigations.
- (12) Time is of the essence in all search warrant matters; therefore, Counsel should complete its review and advice as expeditiously as possible. Specific time requirements for completion, review, and rendering of advice should be determined on a case-by-case basis. In the event written advice cannot be provided within the time frame required, Criminal Tax attorneys may orally communicate advice to the SAC with the approval of the Area Counsel. All such advice must be memorialized in a memorandum to the SAC as soon as possible. A detailed explanation of the exigencies warranting the rendition of oral advice in the case must be set forth in the memorandum.
- (13) Criminal Tax attorneys do not attend or participate in the actual execution of the search, but they should be available by phone to answer questions that may arise during the search.
- (14) For all tax and tax-related search warrants, Criminal Tax attorneys must conduct a review of the seized property inventory prepared by Criminal Investi-

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gation to ensure the items seized are within the scope of the warrant and to identify any inconsistencies for Criminal Investigation.

38.1.1.3.1 (08-07-2008) Search Warrant Authorization

- (1) Authorization. All search warrants where a special agent is the affiant must be approved by the respective SAC prior to execution. The SAC is required to obtain the advice and assistance of Counsel in the preparation and review of all search warrants prior to referring them to the appropriate DOJ official for authorization.
- (2) DOJ authorization. DOJ authorization is required prior to execution of a search warrant in a tax or tax-related investigation. Pursuant to Tax Division Directive No. 52 (revised March 17, 2008), the Tax Division has delegated to US Attorneys the authority to approve certain Title 26 or tax-related Title 18 search warrants directed at the offices, structures, premises, etc. owned, controlled, or under the dominion of the subject or target of a criminal investigation. The Tax Division retains *exclusive authority* to approve search warrants directed at the offices, structures, or premises owned, controlled or under the dominion of a subject or target of an investigation who is:
 - An accountant
 - A lawyer
 - A physician
 - A local, state, federal, or foreign public official or political candidate
 - A member of the clergy
 - A representative of the electronic or printed news media
 - An official of a labor union
 - An official of an organization deemed to be exempt under IRC § 501(c)(3)
- (3) Investigations involving third parties. The Tax Division also retains *exclusive authority* to approve the use of search warrants in criminal investigations involving disinterested third parties, **with the exception of**:
 - a. search warrants directed to providers of electronic communication services or remote computing services and relating to a subject or target of a criminal investigation; and
 - b. search warrants directed to disinterested third parties owning storage space businesses or similar businesses and relating to a subject or target of a criminal investigation.

Note: Such search warrants no longer require Tax Division approval, unless they relate to a person reasonably believed to be one of the individuals listed in CCDM 38.1.1.3.1 (2). (See Tax Division Directive No. 52, revised March 17, 2008.)
- (4) Significant case policy. It is the policy of the IRS and the DOJ that search warrants will be utilized with restraint and only in significant criminal tax cases. The significance of a criminal tax case may be determined by a consideration of such factors as:
 - The amount of tax due
 - The nature of the fraud
 - The need for the evidence to be seized
 - The impact of the potential criminal tax case on voluntary compliance with the revenue laws

- (5) Sensitive Targets. The SAC is required to obtain the concurrence of the respective Director of Field Operations (DFO) for the execution of a search warrant directed at offices, structures or premises owned, controlled or under the dominion of a person defined below as a sensitive target. Search warrants requiring DFO concurrence must also be forwarded to the Associate Chief Counsel (CT) for review and advice.
- An accountant
 - A lawyer
 - A physician
 - A local, state, federal, or foreign public official or political candidate
 - A member of the clergy
 - A representative of the electronic or printed news media
 - An official of a labor union
 - An official of an organization deemed to be exempt under IRC § 501(c) or (d)
 - Disinterested third parties
- (6) All other search warrants are reviewed by Criminal Tax attorneys in field offices and approved by their respective Area Counsel or delegate.

38.1.1.3.2
(08-11-2004)
**Counsel Review and
Advice**

- (1) In view of the sensitivity of search warrants, and pursuant to Criminal Investigation policy, Counsel must make a complete and detailed review of the warrant and supporting documentation for the SAC, evaluating investigative necessity, legal sufficiency, and policy compliance. The Associate Chief Counsel (CT) and Headquarters attorneys are available for consultation with Criminal Tax attorneys in field offices, if desired.
- (2) In all cases, the Area Counsel (or delegate) should ensure the three-pronged probable cause test is met. The facts enumerated in the affidavit should clearly establish there is probable cause to believe:
1. A crime has been committed,
 2. The items sought may be seized by virtue of their connection with the crime, and
 3. The items sought are on the premises to be searched.

38.1.1.3.2.1
(08-11-2004)
**Non-Sensitive Target
Search Warrants**

- (1) The Criminal Tax attorney prepares a memorandum to the SAC discussing the merits of the warrant.
- (2) The memorandum must address the need for the warrant, the legal sufficiency of the warrant and supporting affidavit, and any policy concerns raised by the warrant. Question 5B on Criminal Investigation's Enforcement Action Review Form calls for a discussion concerning why other investigative methods cannot produce the evidence sought for tax and tax-related investigations. The SAC is required to evaluate whether the warrant represents the "least intrusive means" of acquiring the evidence. Counsel, consequently, must assist the SAC in making this determination. In doing so, Counsel should address whether there are other means available to obtain the records, i.e., whether the taxpayer would provide the records if asked to turn them over, whether a summons or subpoena could be used to get the records, and whether the records could be obtained from a third party.

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- (3) A copy of the search warrant, exhibits, and memorandum is forwarded to the Area Counsel. The Area Counsel reviews, approves, and signs the advisory memorandum. (Special Litigation Assistants, Senior Counsel, and attorneys who have been delegated signature authority may sign the memorandum and then forward a copy of the search warrant, exhibits, and memorandum to the Area Counsel).
- (4) The Area Counsel or the Special Litigation Assistants, Senior Counsel, and attorneys who have been delegated signature authority, shall forward a copy of all signed search warrant memoranda in both administrative and grand jury investigations to Headquarters for post review.

38.1.1.3.2.2
(08-11-2004)

Sensitive Target Search Warrants

- (1) The Criminal Tax attorney prepares a transmittal memorandum to the Associate Chief Counsel (CT) discussing the merits of the warrant and transmits the memorandum and search warrant package to the Area Counsel (or to the Associate Chief Counsel (CT) if signature authority is delegated). The memorandum must address the need for the warrant, the legal sufficiency of the warrant and supporting affidavit, and any policy concerns raised by the warrant. Area Counsel reviews, approves, and signs the transmittal memorandum and transmits the memorandum and complete search warrant package to Headquarters. (Special Litigation Assistants, Senior Counsel, and the attorney delegated signature authority may sign the memorandum.) If the complete search warrant package is not forwarded, review by the Associate Chief Counsel (CT) will be delayed pending receipt of the additional information.
- (2) The search warrant package consists of:
 - a. A draft search warrant and supporting affidavit,
 - b. A copy of an Enforcement Action Review form, and
 - c. A copy of the corresponding risk assessment for each specific location to be searched.
- (3) Once received in Headquarters, the transmittal memorandum and search warrant package are reviewed, and an advisory memorandum to the appropriate DFO is prepared. The memorandum must address the need for the warrant, the legal sufficiency of the warrant and supporting affidavit, and any policy concerns raised by the warrant. The advisory memorandum is forwarded to the Associate Chief Counsel (CT) for final review and approval.
- (4) The Associate Chief Counsel (CT) reviews, approves and signs the advisory memorandum and transmits the memorandum and search warrant package to the appropriate DFO through the Area Counsel.
- (5) The review at both the Associate Chief Counsel (CT) and the Tax Division will be a de novo review of the warrant for legal sufficiency and policy implications.

38.1.1.3.3
(08-11-2004)

Search Warrant Inventory Review for Tax and Tax-Related Search Warrants

- (1) After the execution of a tax or tax-related search warrant in which a special agent is the affiant, the Criminal Tax attorney, Senior Counsel, or SLA who reviewed the warrant package shall review the inventory prepared by Criminal Investigation to determine whether the items seized were within the scope of the warrant.
- (2) In the event that the Criminal Tax attorney identifies any issue with respect to the inventory or the scope of the seizure, he/she should consult with Criminal

Investigation and the DOJ prosecutor involved in the investigation to discuss and to resolve those issues. The Criminal Tax attorney should attempt to resolve any such issues regarding the inventory prior to drafting an inventory review memorandum to the SAC. In no event should the Criminal Tax attorney draft a memorandum critical of the scope of the seizure without raising that issue first with the case agent and the supervising prosecutor, and then, if it cannot be resolved, with the SAC and CT Area Counsel. If the issues cannot be resolved by speaking with the case agent and the supervising prosecutor, the Criminal Tax attorney should consult with his/her Area Counsel prior to drafting the inventory review memorandum.

- (3) Area Counsel shall review, approve, and sign the memorandum. If signature authority has been delegated to the attorney, Senior Counsel or SLA who reviewed the warrant, Area Counsel should be provided a copy of the memorandum for post review.
- (4) A copy of all inventory review memoranda should be forwarded to the Associate Chief Counsel (CT) for post review.

38.1.1.3.4
(08-11-2004)
**General Legal Guidance
and Issues**

- (1) The following is a suggested format for drafting or reviewing affidavits and warrants:
 - a. The premises to be searched should be described with specificity.
 - b. The property to be seized should be described as specifically as possible, and the relationship of any items described to the alleged violations should be explained in the affidavit.
 - c. The affidavit should be logically divided with paragraphs consecutively numbered.
 - d. The affidavit should incorporate by reference any diagrams, photographs or other exhibits that bear on probable cause.
 - e. The affidavit should set forth the affiant's experience and summarize the illegality and the sources of information and should state the affiant has probable cause to believe certain crimes have occurred and certain specified evidence of those crimes is on the premises.
 - f. Affidavits should address the credibility and reliability of any informants.
 - g. If affidavits are based on undercover contacts, information relative to these activities should be made available for review.
 - h. The affidavit should identify all targets.
 - i. The affidavit should set forth a description of the unlawful activities in a factual (not conclusory) manner followed by a factual discussion of location of the evidence and its relationship to the crime. Permissible inferences supported by the recited facts and circumstances may be included in this discussion.
 - j. Information in the warrant should be corroborated with records, tax returns, and other documents to the extent appropriate.

Note: See Exhibit 38.3.1-1, Search Warrant Check Sheet, at <http://publish.no.irs.gov/getpdf.cgi?catnum=39139>.

- (2) In some instances, evidence may be presented to the IRS by other federal agencies, or by state or local authorities that obtained the evidence through a search or arrest warrant, pen register, or wiretap. Counsel attorneys should evaluate the admissibility of such evidence before Criminal Investigation relies upon and utilizes the evidence in its search warrant affidavits.

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- (3) Search warrants advancing a permeated-with-fraud theory should set forth a detailed discussion of the information supporting this theory.

38.1.1.4
(08-11-2004)

Undercover Assistance

- (1) Approval of undercover operations. Criminal Investigation engages in undercover operations for the purpose of securing information and/or evidence relative to an investigation. Undercover operations are classified as either Group I or Group II. All Group I undercover operations must be approved by the Chief, Criminal Investigation. Group II undercover operations are approved by the Director of Field Operations.
- (2) Group I Undercover Operations. Group I undercover operations are those which exceed six months in duration and/or \$50,000 in recoverable funds or include one of the nineteen factors listed in IRM 9.4.8. All requests are reviewed by the Undercover Review Committee, which sits at Criminal Investigation Headquarters in Washington, D.C. The Headquarters' Undercover Review Committee is comprised of the Director, Operations Policy and Support (CI:OPS), the Director, Office of Special Investigative Techniques (CI:OPS:SIT), Associate Chief Counsel (CT), and the Deputy Assistant Attorney General, Tax Division.
- (3) Group II Undercover Operations. Group II undercover operations are those that do not meet the requirements of a Group I undercover operation. The Director of Field Operations is authorized to establish an Area Undercover Review Committee that includes the Area Counsel (CT), the Area Undercover Program Manager, and an Area Staff Analyst. The Area Undercover Review Committee is advisory in nature and recommends to the Director of Field Operations approval or disapproval of initial undercover requests, as well as significant deviations and extensions to ongoing undercover operations.
- (4) Criminal Investigation is required to consult the Criminal Tax attorney in all undercover operations.
- (5) The Criminal Tax attorney's role in an undercover operation is to render legal advice on all aspects of the operation, as well as attending all pre-operational and operational meetings.

38.1.1.5
(08-11-2004)

Electronic Surveillance

- (1) This subsection discusses authorization of assorted types of electronic surveillance under various statutes.

38.1.1.5.1
(08-11-2004)

Non-Consensual Monitoring of Wire/Oral Interception

- (1) Under 18 U.S.C. § 2510 (Title 1), courts may authorize electronic interception of the contents of wire and oral communications during the investigation of specific criminal offenses. See 18 U.S.C. § 2516 for the specific criminal offenses. This statute does not authorize the interception of wire and oral communications for Title 26 violations.
- (2) Statutes and IRS policy prohibit non-consensual monitoring of oral and wire communications for Title 26 purposes; however, the Service may receive Title I information. Law enforcement officers who obtain wiretap evidence are permitted to turn such evidence over to other law enforcement officers for the latter's use and special agents are considered investigative or law enforcement officers to whom information may be disclosed. Law enforcement officers are

permitted to use wiretap evidence in their official duties, such as issuing summonses, investigating tax offenses or preparing special agent reports. 18 U.S.C. § 2517.

- (3) Law enforcement officers are also permitted to use the evidence in a grand jury, in court or any other proceeding, or they may disclose it via testimony. Prior to such use, however, the law enforcement officers must obtain a derivative use order that must be based upon the court's finding that the evidence of the nonspecified crime (i.e., tax offense) was otherwise (or properly) intercepted. Failure to obtain such an order can result in dismissal of the case or liability for civil damages due to unauthorized disclosure. The derivative use order should be obtained as soon as practicable.
- (4) The Criminal Tax attorney reviews the validity of the Title I order and so advises the SAC in a memorandum. The US Attorney's office obtains the appropriate derivative use order for Criminal Investigation.

38.1.1.5.2
(08-11-2004)
**Electronic
Communications**

- (1) Electronic communications are those which do not contain the human voice at any point during the transmission and are defined 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, photo-electronic, or a photo-optical system that affects foreign or interstate commerce. This category includes systems such as digital/display pagers, electronic mail, electronic bulletin boards, computer-to-computer transmissions, telex transmissions, and fax transmissions.
- (2) Section 2516(3) of Title 18 of the United States Code allows for the interception of electronic communications when such interception may provide or has provided evidence of any federal felony, including Title 26 offenses. To intercept such communications, electronic communication intercept orders must be based upon an application and an affidavit. The Criminal Tax attorney reviews these affidavits for factual and legal sufficiency and so advises the SAC in a memorandum.
- (3) To ensure uniformity, the DOJ informed Congress that applications for interception of fax transmissions and pagers must be approved by the same DOJ officials who approve wire and oral interception applications and comply with 18 U.S.C. § 2518. Consequently, applications for pagers and facsimile transmissions should be coordinated through the Associate Chief Counsel (CT).

38.1.1.5.2.1
(08-11-2004)
**Stored Electronic
Communications - 18
U.S.C. § 2701 (Also
Known as Title II)**

- (1) Stored electronic communications and transactional records include storage of electronic messages both before and after transmission, backup copies retained for re-access by the recipient, and backup copies used by the communications company. Also included are Remote Computer Services, where electronic data is processed and/or stored by third-party computer service companies. Data is most often transmitted between these services and their customers by means of electronic communications.
- (2) The Service may gain access to such communications via authorization obtained pursuant to 18 U.S.C. § 2703, and the nature of the data sought will determine the type of authorization required.

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- (3) If the data has been stored for 180 days or less, a probable cause search warrant is required.
- (4) If data has been stored for more than 180 days or data is stored in a Remote Computer Service:
 - a. A probable cause search warrant is required, and notice is not required to the subscriber, or
 - b. A disclosure court order or grand jury/administrative trial subpoena is required, and notice is required to the subscriber.
- (5) The subscriber is usually notified of government access, unless, upon a showing of good cause, the court delays notice for not more than 90 days. The Government will reimburse computer service for reasonable expenses.
- (6) The Criminal Tax attorney should review the legal sufficiency and form of affidavit in support of an application for a court order and so advise the SAC.

38.1.1.5.3
(08-11-2004)

Consensual Monitoring

- (1) Definition. Consensual monitoring occurs when at least one party to a conversation agrees to have the conversation monitored using a device, such as a body bug (NAGRA), telephone bug (suction cup), room bug, or video bug. Because a party to the conversation consents to the recording of it, this activity does not implicate Title I. Consensual monitoring can take two forms: telephonic and non-telephonic. Neither form requires a court order, but prior DOJ or US Attorney approval is required.
- (2) Full Consent. If all participants consent to monitoring, authorization is unnecessary, regardless of whether it is telephonic or non-telephonic monitoring. See IRM 9.4.7.
- (3) Partial Consent. In telephonic and non-telephonic monitoring, if less than all participants consent to the monitoring, authorization must be obtained. See IRM 9.4.7.
- (4) Telephonic Monitoring. A Form 8041, Request for Authorization to Use Electronic Equipment and Consensual Monitoring, is used to request approval for telephonic monitoring. The request must be in writing before authorization is granted; however, if time does not permit, the request may be oral, with Form 8041 being submitted at the earliest practical time. The SAC has the authority to approve the requests and this authority may not be delegated. The Criminal Tax attorney will assist Criminal Investigation personnel when questions arise and review for legal sufficiency.
- (5) Non-telephonic Monitoring. To obtain authorization for non-telephonic monitoring, requests must be in writing on Form 8041. Oral requests are allowed if there is a bona fide emergency, but these must be confirmed in writing within two working days after the oral request is made. The form must note approval by an attorney for DOJ or the US Attorney's office, along with his/her name and position. The Criminal Tax attorney will assist Criminal Investigation personnel when questions arise and review for legal sufficiency.

38.1.1.5.3.1
(08-11-2004)

**Consensual Monitoring
Using
Beepers/Transponders/
Tracking Devices**

- (1) Beepers/transponders/tracking devices are one-way electronic/mechanical communication devices that emit a radio signal on a specific radio frequency. The radio signal can be received by special tracking equipment. It allows the user to trace the geographic location of the beeper. Such homing devices are used to monitor the physical whereabouts of the sending unit — the item that is monitored — such as an automobile, a person, or a container.
- (2) Electronic Tracking Devices (also known as beepers), can be used only in cases involving a felony violation or in wagering tax investigations if one of the following is present:
 - a. The person in lawful possession of the vehicle or personal property consents to the installation.
 - b. The vehicle is not located where a reasonable expectation of privacy exists, and the tracking device will be installed on the vehicle in a manner that would not violate a reasonable expectation of privacy.
 - c. Use of the device is authorized by court order.
- (3) The SAC, with the concurrence of the local US Attorney, may authorize consensual use of electronic tracking devices. The Criminal Tax attorney will assist Criminal Investigation personnel and review the request for legal sufficiency.
- (4) The SAC may allow special agents to apply for court orders authorizing the installation of an electronic tracking device. The Criminal Tax attorney will review the affidavit in support of the application for a court order authorizing the installation and use of an electronic tracking device for legal sufficiency and will prepare a memorandum so advising the SAC.
- (5) The law permits a federal court to issue orders for beepers authorizing their use even outside of the jurisdiction in which the device was installed. This will permit monitoring as the subject moves from district to district without reapplying for a separate order for each district. This section provides extra-jurisdictional effect to a court order, and covers movement both inside and outside of the United States. See 18 U.S.C. § 3117. The Criminal Tax attorney will review the affidavit and request for legal sufficiency and prepare a memorandum so advising the SAC.

38.1.1.5.3.2
(08-11-2004)

**Pen Registers and Trap
and Trace Devices
(Grabbers)**

- (1) A pen register is a mechanical device that is attached at a telephone junction box and records the actual numbers called (outgoing) from a particular line. In addition to recording the numbers called, a pen register is capable of recording the date, time and duration of each call. A trap and trace device (grabber) is a technique whereby the telephone company uses a switching system or facility to identify the source (telephone number) of an incoming call. Of course, the date, time and duration of the call can also be recorded by the telephone company. See 18 U.S.C. §§ 3121 through 3126.
- (2) Pen registers and trap and trace devices (grabbers) may be used by Criminal Investigation as investigative tools only when authorized by court order in cases involving felony violations and in wagering tax investigations. Pen registers and other types of telephone number recorders will not be used in investigations involving misdemeanor violations (other than wagering cases), such as altered documents cases under IRC § 7207 and general program cases, such as investigations of Questionable Refund Programs cases.

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38.1.1.6
(10-03-2007)
Summonses

- (1) Special agents have been delegated authority as individuals before whom a summoned person shall appear, and for the special agent to take testimony under oath of the person summoned, to set the time and place of examination, and to receive and to examine data produced in compliance with the summons.
- (2) Assistance to special agents in the summons process should focus on the *Powell* requirements. *United States v. Powell*, 379 U.S. 48 (1964). These provide that to be enforceable every summons must meet the following basic test for validity:

- a. Issued for a legitimate purpose;
- b. Seeks information that "may be relevant" to the investigation;

Caution: For third party summonses, the Service must establish a nexus between the third party and the taxpayer.

- c. Seeks information that is not already in the Service's possession; and
 - d. All administrative steps required by the Code have been followed.
- (3) Counsel retains referral authority for summons enforcement matters. These matters should be coordinated with the office of Associate Chief Counsel (Procedure & Administration), Branches 6 and 7. See CCDM 34.6.3, Summons Enforcement Actions (<http://publish.no.irs.gov/getpdf.cgi?catnum=39029>) and the Summons Handbook, beginning with IRM 25.5.1, for additional assistance.