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APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)
File Name: 18a0131p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 17-1869

[Filed July 5, 2018]

JODI C. HOHMAN; JHOHMAN, LLC; YOU GOT BUSTED BY ME, LLC; TERRY MILLER, *Plaintiffs-Appellants*,	)
v.	)
MAURICE EADIE, et al., *Defendants*,	)
UNITED STATES OF AMERICA; DEPARTMENT OF TREASURY; INTERNAL REVENUE SERVICE, *Defendants-Appellees*.	)

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 2:16-cv-11429—Matthew F. Leitman,
District Judge.

Argued: April 26, 2018

App. 2

Decided and Filed: July 5, 2018

Before: MERRITT, WHITE, and DONALD, Circuit Judges

COUNSEL

ARGUED: Stuart M. Schwartz, CLARK HILL PLC, Detroit, Michigan, for Appellants. Paul A. Allulis, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees. **ON BRIEF:** Stuart M. Schwartz, CLARK HILL PLC, Detroit, Michigan, for Appellants. Paul A. Allulis, Michael J. Haungs, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees.

OPINION

MERRITT, Circuit Judge. This appeal raises a highly technical issue arising from a potential conflict between the Internal Revenue Code and the Federal Right to Financial Privacy Act of 1978, 12 U.S.C. §§ 3401–3422.[1] The IRS issued two "John Doe" summonses without first obtaining approval in a federal district court as required by the Internal Revenue Code ("Code"), *see* I.R.C. § 7609(f). The IRS served the summonses on Chase Bank to obtain financial records relating to two limited liability companies ("LLCs"). Plaintiffs, the LLCs and subjects of the John Doe summonses, alleged that the IRS's use

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[1] Section 3423 was effective on May 24, 2018, after the initiation of this lawsuit.

of the John Doe summonses to obtain their financial records violated the Right to Financial Privacy Act ("Act"). The district court granted the government's motion to dismiss for lack of subject matter jurisdiction after determining that sovereign immunity barred Plaintiffs' claims under the Act. The issues on appeal are (1) whether the IRS is subject to the Act when it fails to follow its own procedures under the Code, and (2) whether LLCs fall within the Act's waiver of sovereign immunity. We **AFFIRM** the district court on sovereign immunity grounds.

I. FACTUAL AND PROCEDURAL BACKGROUND

The Internal Revenue Code permits the IRS to serve administrative summonses on third parties to produce records related to taxpayers whom the IRS is investigating. *See* I.R.C. § 7603. Generally, these summonses must identify the person whose records are sought. *See* I.R.C § 7609. However, the IRS may also serve a John Doe summons, which does not identify the person whose records are sought. I.R.C. § 7609(f). This type of summons may be served only after a federal district court proceeding in which the IRS 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

> (3) the information sought to be obtained. . . is not readily available from other sources.

Id.

On September 25, 2015, the IRS served a John Doe summons on Chase Bank that sought financial records for two separate accounts (the "First John Doe Summons"). Five days later, on September 30, the IRS served a second John Doe summons that sought financial records for a single account (the "Second John Doe Summons"). The three accounts involved were identified only by account numbers. The IRS failed to seek approval from a federal district court prior to issuing either of the John Doe summonses.

In October 2015, Chase Bank notified Jodi C. Hohman ("Hohman") and her company JHohman, LLC that it had received the First John Doe Summons from the IRS and that the summons sought records for accounts relating to them. On November 25, 2015, Hohman and JHohman, LLC filed a petition in federal district court to quash the summons. In the petition to quash, Hohman and JHohman, LLC argued that the First John Doe Summons did not meet the requirements listed in I.R.C. § 7609(f), which requires the IRS to obtain approval from a federal court before serving a John Doe summons.

In response to the petition to quash, the IRS produced sworn declarations from the IRS agents who had issued the First John Doe Summons. It attached a partially-redacted copy of the First John Doe Summons to the declarations. The document revealed the first account number listed on the summons, but the second account number was redacted. Hohman and JHohman,

LLC reviewed the document and determined that the first account number on that summons belonged to JHohman, LLC. Because the second account number remained masked, they were unable to determine who owned that account. Their subsequent investigation led them to believe that the second account either belonged to Terry Miller ("Miller"), individually, or his company, You Got Busted By Me, LLC ("Busted, LLC"). Miller is the sole member and owner of Busted, LLC.

The proceeding also revealed that the IRS had served the Second John Doe Summons on Chase Bank. The IRS attached an unredacted copy of the Second John Doe Summons to the declarations. Hohman and JHohman, LLC determined that the summons sought records relating to an account belonging to Hohman, individually. They later withdrew their petition to quash.

Plaintiffs Hohman, JHohman, LLC, Miller, and Busted, LLC (collectively, "Plaintiffs") filed suit against the United States, two IRS employees, and unnamed Jane and John Does, on April 20, 2016, alleging that the IRS violated the Right to Financial Privacy Act, the Privacy Act of 5 U.S.C. § 552a, the Fourth and Fifth Amendments of the Constitution, and the Internal Revenue Code's prohibition of the unauthorized disclosure of tax return information.

On June 24, 2016, the government moved to dismiss the complaint. After a hearing, the district court granted this motion in regards to the claims under the Privacy Act, the Fourth and Fifth Amendments, and the Code's prohibition of the unauthorized disclosure of return information. *Hohman v. Eadie*, No. 16-cv-11429, 2016 WL 10906875, at *1 (E.D. Mich. Nov. 7, 2016).

However, the district court denied the motion to dismiss as to the Right to Financial Privacy Act claim, which is the sole claim at issue on appeal. The court dismissed the IRS employees from the suit and held that the sole remaining defendant was the United States.

In its motion to dismiss, the government argued that the Right to Financial Privacy Act was inapplicable to claims arising out of the issuance of IRS summonses. Specifically, the United States's argument rests upon the following language from the Act: "Nothing in this chapter prohibits the disclosure of financial records in accordance with procedures authorized by Title 26 [the Internal Revenue Code]." 12 U.S.C. § 3413(c). According to the government, because the Internal Revenue Code authorizes the service of John Doe summonses, *see* I.R.C. § 7609(f), its service of such summonses in this case was "in accordance with procedures authorized by [the Code]," and, thus, exempt from the Act. The district court disagreed. *Hohman*, 2016 WL 10906875, at *2–3. It determined that the IRS's service of the John Doe summonses without prior judicial approval was not "in accordance with" the Code because it was fundamentally inconsistent with the procedures authorized by the Code. *Id.* Therefore, the court held that the service was not exempt from the Act and denied the motion as to the claim under the Act. *Id.* at *3.

On January 17, 2017, the United States filed a second motion to dismiss for lack of subject matter jurisdiction. The resolution of this motion is the only issue on appeal. The government contended that sovereign immunity divested the court of subject

matter jurisdiction over Plaintiffs' claim against the United States. Plaintiffs responded to the government's motion by arguing that the waiver of sovereign immunity applied and requested that the district court grant them jurisdictional discovery before ruling on the motion. Specifically, Plaintiffs asked to conduct discovery to determine whether Miller, individually, or Busted, LLC, owned the account whose account number was redacted in the First John Doe Summons. Plaintiffs also requested discovery to determine whether the IRS actually obtained any documents in response to the Second John Doe Summons, which sought documents related to an account owned by Hohman, individually. The district court authorized both discovery requests. *Hohman v. United States*, No. 16-cv-11429, 2017 WL 2954713, at *4–5 (E.D. Mich. July 11, 2017).

Additionally, Plaintiffs asked that the district court allow them to subpoena other banks where Hohman and Miller maintained accounts to determine whether the IRS had improperly subpoenaed these banks as well. Further, Plaintiffs requested to conduct discovery with respect to four other individuals whom, based on Plaintiffs' investigation, likely had John Doe summonses issued for their accounts, but were not parties to the lawsuit. The district court denied these discovery requests and instead chose to confine the discovery to Plaintiffs' accounts at Chase Bank because those accounts were the subject of the lawsuit and because the court wanted to limit discovery to allow it to answer the jurisdictional question.

After reviewing the documents produced by discovery, the district court determined that Busted,

LLC—not Miller, individually—owned the second account listed on the First John Doe Summons. Thus, the three accounts relating to the two summonses belonged to JHohman, LLC, Busted, LLC, and Hohman. The court also concluded that Chase Bank did not actually send the IRS any financial records or information relating to Hohman's individual account in response to the Second John Doe Summons. Because Hohman did not allege that the IRS actually obtained any financial records relating to an account owned by Hohman as required by section 3417 of the Act, the court determined that Hohman, individually, had failed to state a claim.[2] The district court also found that the United States was immune from the claims by JHohman, LLC and Busted, LLC because section 3417's waiver of sovereign immunity only covered claims by a "customer" as defined under the Act, and LLCs did not qualify as "customers." *Hohman*, 2017 WL 2954713, at *5–7. It subsequently granted the government's motion to dismiss. *Id.* at *7. Plaintiffs appeal.

II. ANALYSIS

Plaintiffs allege that the IRS's attempts to obtain their financial records through the use of John Doe summonses violated the Federal Right to Financial Privacy Act. They argue that contrary to the district court's holding, LLCs fall within the Act's waiver of sovereign immunity. Plaintiffs also claim that the district court abused its discretion in only granting them limited jurisdictional discovery. In response, the

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[2] The district court's determination that Hohman had failed to state a claim against the IRS is not at issue on appeal.

United States contends that IRS summonses are not subject to the Act, but even if this court disagrees, sovereign immunity still bars Plaintiffs' claims. The government also asserts that the district court properly denied the additional discovery requests given the broad nature of the inquiry and the lack of factual allegations regarding any summonses other than the two summonses at issue.

We review de novo the dismissal of a complaint for lack of subject matter jurisdiction. *Hamdi ex rel. Hamdi v. Napolitano*, 620 F.3d 615, 619 (6th Cir. 2010). We accept any factual findings the district court made unless the findings are clearly erroneous. *Davis v. United States*, 499 F.3d 590, 593–94 (6th Cir. 2007). Further, this court reviews a district court's decisions regarding discovery matters for abuse of discretion. *Dortch v. Fowler*, 588 F.3d 396, 400 (6th Cir. 2009). We "reverse only if we are firmly convinced of a mistake that affects substantial rights and amounts to more than harmless error." *Pressman v. Franklin Nat'l Bank*, 384 F.3d 182, 187 (6th Cir. 2004) (internal quotation and citation omitted).

A. Possible Remedies under the Internal Revenue Code

Section 7609 of the Internal Revenue Code establishes a system of notice and intervention rights for taxpayers whose information is within records subject to a third-party summons. However, when the IRS does not know the identity of a taxpayer and seeks to serve a John Doe summons, the IRS must first establish in a proceeding in federal district court that (1) the summons relates to the investigation of a particular person or ascertainable group; there is a

reasonable basis for believing that this person or group may have failed to comply with the Code; and (3) the information sought to be obtained is not readily available from other sources. I.R.C. § 7609(f). In the case at hand, the IRS did not follow the proper procedure when it failed to obtain court approval before issuing two John Doe summonses to Chase Bank.

The government contends in its brief that imposition of damages under the Act for violations of the Code would conflict with the Code's comprehensive damages scheme. Turning to relevant provisions of the Code, it appears that no monetary remedy is available under these circumstances, and the parties conceded this at oral argument. *See* I.R.C. §§ 7431–7435. The Code provision that comes the closest to providing a remedy for Plaintiffs in this case is I.R.C. § 7433. Section 7433 authorizes taxpayers to sue the government for damages sustained as a result of reckless, intentional, or negligent violations of the Code by IRS employees in connection with any collection of federal tax. This provision is the "exclusive remedy for recovering damages resulting from such actions." I.R.C. § 7433(a). However, section 7433 only authorizes damages for claims in connection with any *collection* of federal tax, and does not allow for damages for violations made during "the assessment or tax determination part of the process." *Miller v. United States*, 66 F.3d 220, 222 (9th Cir. 1995). The assessment involves the decision to impose tax liability while the collection deals with the IRS attempting to collect the taxes owed.

In *Shaw v. United States*, the Fifth Circuit stated that "based upon the plain language of the statute,

which is clearly supported by the statute's legislative history, a taxpayer cannot seek damages under § 7433 for improper assessment of taxes." 20 F.3d 182, 184 (5th Cir. 1994). It recognized that "[a]lthough in its early form the statute granted taxpayers the right to sue 'for damages in connection with the *determination* or *collection* of any Federal tax,' H.R. CONF. REP. NO. 100–1104, 100th Cong., 2d Sess. 228 (1988), *reprinted in* 1988 U.S.C.C.A.N. 4515, 5288 (emphasis added), Congress later deleted that portion of the statute that referred to determination of taxes." *Id.* Thus, it appears that Congress intended to provide a remedy for violations in the collection of tax, but not in the assessment and determination of tax. Plaintiffs do not have a monetary remedy under the Code.[3]

B. Background of the Right to Financial Privacy Act

The Right to Financial Privacy Act, 12 U.S.C. § 3401, was enacted as a response to *United States v. Miller*, 425 U.S. 435, 442 (1976), where the Supreme Court held that a customer of a financial institution had "no legitimate 'expectation of privacy'" and could not contest government access to financial records under the Fourth Amendment. "Congress intended the [Act] 'to protect the customers of financial institutions from unwarranted intrusion into their records while at

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[3] We note that while the Code does not appear to allow monetary remedies in this instance, IRS employees are subject to dismissal for violations of the Code for purposes of retaliating against, or harassing, a taxpayer. *See* I.R.C. § 7605(b). IRS employees are also subject to discharge and criminal prosecution for committing unlawful acts. I.R.C. § 7214(a).

the same time permitting legitimate law enforcement activity' by requiring federal agencies" to follow specified procedures when attempting to obtain a customer's financial records. *Neece v. IRS*, 922 F.2d 573, 575 (10th Cir. 1990) (quoting H.R. Rep. No. 95-1383, at 6 (1978), *reprinted in* 1978 U.S. Code. Cong. & Admin. News 9273, 9305, 9278).

The Act "outlines numerous restrictions on the disclosure of financial records held by bank employees and federal regulatory authorities." *In re Knoxville News-Sentinel Co., Inc.*, 723 F.2d 470, 476 (6th Cir. 1983). However, the Act is narrow and limits the types of customers to whom it applies and the kinds of records it protects. *See SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 745 (1984). In all, the Act seeks to balance the customers' right of privacy with law enforcement's need to obtain financial records based on legitimate investigations. *See Anderson v. La Junta State Bank*, 115 F.3d 756, 758 (10th Cir. 1997).

Plaintiffs bring their claims under section 3417 of the Act. That section creates a private cause of action for violations of the Act and waives the United States' sovereign immunity for certain claims by a "customer." It reads:

> **(a) Liability of Agencies or Departments of United States or Financial Institutions** Any agency or department of the United States . . . obtaining or disclosing financial records or information contained therein in violation of [the Act] is liable *to the customer* to whom such records relate in an amount equal to the sum of—

> (1) $100 without regard to the volume of records involved;
>
> (2) any actual damages sustained by the customer as a result of the disclosure;
>
> (3) such punitive damages as the court may allow, where the violation is found to have been willful or intentional; and
>
> (4) in the case of any successful action to enforce liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

12 U.S.C. § 3417 (emphasis added).

C. Whether the IRS is Subject to the Right to Financial Privacy Act

The Right to Financial Privacy Act prohibits government access to the financial records of a customer unless pursuant "to an administrative subpoena or summons which meets the requirements of section 3405" of the Act. 12 U.S.C. § 3402. In Plaintiffs' claims under section 3417, they allege that the IRS violated section 3405 when it served the John Doe Summonses without first satisfying certain conditions as required by that section. Section 3405 states that an agency may obtain financial records pursuant to an administrative summons only if—(1) there is reason to believe the records sought are connected to a legitimate law enforcement inquiry; (2) a copy of the summons is served on the customer prior to service on the financial institution along with a notice stating the nature of the inquiry and advising the

customer of his or her right to contest the summons in federal court; and (3) ten days have passed since service and the customer has not initiated a challenge in court. 12 U.S.C. § 3405. However, the Act provides an exception, which states: "Nothing in this chapter prohibits the disclosure of financial records *in accordance with* procedures authorized by [the Internal Revenue Code]." 12 U.S.C. § 3413(c) (emphasis added).

The parties dispute the meaning of the "in accordance with" language. When confronted with this question, the district court stated that from a plain reading, the exception only applies to IRS summonses issued "in accordance with" procedures under the Code. The court reasoned that because the IRS failed to follow the requisite Code procedures by issuing summonses without first obtaining approval in federal district court, it was subject to the provisions of the Act, including damages claims.

On appeal, Plaintiffs contend that the district court correctly determined that the plain meaning of this language is that the IRS has to act "in accordance with" the Code, or it is subject to the Act. In support, Plaintiffs cite *Neece v. IRS*, 922 F.2d 573, 577 (10th Cir. 1990). In *Neece*, the IRS made a similar argument when it asserted that it was allowed to informally review bank records under I.R.C. § 7602. The IRS referenced the same provision of the Act authorizing "disclosure of financial records in accordance with procedures authorized by [the Internal Revenue Code]." 12 U.S.C. § 3413(c). The Tenth Circuit disagreed and determined that while I.R.C. § 7602 permitted the IRS to issue a third-party summons, I.R.C. § 7609 set forth the procedure the IRS was required to follow. *Neece*,

922 F.2d at 577–78. The IRS had not followed the proper procedure under its own Code, and so the IRS was bound by the Act. *Id.* at 577.

In response, the government argues that the Act has no application to any activities carried out under the Code, including the issuance and enforcement of IRS summonses. In support, it cites the legislative history to argue that Congress indicated that this exception was intended to exempt IRS summonses generally because they are governed by their own privacy regime. It also contends that *Neece* is distinguishable because it involved an instance where the IRS obtained records informally, instead of through the issuance of a summons.

There are two possible ways to read the phrase "in accordance with." Congress either intended for this language to mean: (1) that the Code and not the Act governs the IRS, or (2) that the IRS must follow the procedures under the Code, or it is subject to the Act. A review of the relevant provision and legislative history indicates that Congress did not give any thought to or explain what it intended to have happen in a case like this. The House Committee Report states that under the exception, because IRS administrative summonses are already subject to the privacy safeguards of I.R.C. § 7609, they are exempted from the procedures of the Act. H.R. Rep. 95–1383, at 226 (1978).

Because we uphold the district court's ruling on sovereign immunity grounds, however, there is no need for us to resolve this issue.

D. Whether Limited Liability Companies Have Standing under the Act

The issue is whether the United States has waived its sovereign immunity to allow limited liability companies to sue under the Right to Financial Privacy Act. "The doctrine of sovereign immunity removes subject matter jurisdiction in lawsuits against the United States unless the government has consented to suit." *Beamon v. Brown*, 125 F.3d 965, 967 (6th Cir. 1997). "A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text." *Lane v. Pena*, 518 U.S. 187, 192 (1996). Further, courts must construe this waiver narrowly and resolve any ambiguities in favor of immunity. *United States v. Williams*, 514 U.S. 527, 531 (1995).

The relevant provision in 12 U.S.C. § 3417 states: "Any agency or department of the United States . . . obtaining or disclosing financial records or information contained therein in violation of [the Act] is liable *to the customer* to whom such records relate." A "customer" is defined under the Act as "any *person* or authorized representative of that person who utilized or is utilizing any service of a financial institution." 12 U.S.C. § 3401(5) (emphasis added). A "person" is defined as "an *individual* or a *partnership* of five or fewer individuals." 12 U.S.C. § 3401(4) (emphasis added). Thus, the question at hand is whether Plaintiffs, two LLCs, qualify as a "person," and therefore a "customer" with standing under the Act.

The district court reasoned that an LLC is not "an individual or a partnership of five or fewer individuals" and therefore not a "person." *Hohman*, 2017 WL 2954713, at *6. Thus, by strictly interpreting the

statute, it found that an LLC could not be a "customer" under the Act with standing to sue. *Id.* Other courts have confronted this question when different types of business entities have attempted to bring suit under the Act. We analyze these holdings below.

1. Sole Proprietorship

Courts have concluded that a sole proprietorship has standing under the Act. "It would strain the imagination to conclude that Congress intended to afford partnerships of five individuals the protections of the Act, but not sole proprietorships. A sole proprietorship is nothing more than a partnership of one." *Hunt v. U.S. SEC*, 520 F. Supp. 580, 604 (N.D. Tex. 1981); *see also United States v. Whitty*, 688 F. Supp. 48, 58 n.9 (D. Me. 1988) ("Unlike corporations, sole proprietorships are covered by the [Act].").

2. Limited Partnership

A limited partnership has also been held to be a "person" under the Act. *See Inspector Gen. of U.S. Dep't. of Agric. v. Great Lakes Bancorp*, 825 F. Supp. 790, 793 (E.D. Mich. 1993) ("Great Lakes"). In *Great Lakes*, the district court reasoned that "the plain language of the statute evinces an intent to include (rather than exclude) all types of partnerships." *Id.* Further, it thought that "[t]he fact that Congress recognizes the distinction between limited partnerships and general partnerships, and yet did not exclude the former from those who are included as 'persons' within the Act, signifies an intent to protect *all* 'partnerships (whether they are general partnerships, co-partnerships, or limited partnerships) of five or fewer individuals.'" The court determined that the

focus remains on the size of the partnership, not the type.[4]

3. Corporation

The courts that have confronted the question unanimously agree that corporations do not qualify as a "customer" within the meaning of the Act. *See Pittsburgh Nat. Bank v. United States*, 771 F.2d 73, 75–76 (3d Cir. 1985) (finding that by its terms, the Act only applies to the financial records of individuals and small partnerships, not corporations); *Spa Flying Service, Inc. v. United States*, 724 F.2d 95, 96 (8th Cir. 1984) ("[T]he Act unambiguously limits its protection to customers and small partnerships."); *Collins v. Commodity Future Trading Comm'n*, 737 F. Supp. 1467, 1477 (N.D. Ill. 1990) (same). Additionally, because a corporation has been held to not be a "customer" and therefore not an "individual" under the Act, *Great Lakes* also held "that a partnership comprised of one or more corporate partners is not a 'partnership of five of fewer *individuals*.'" *Great Lakes*, 825 F. Supp. at 794.

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[4] The government filed an additional citation after oral argument in regards to *Great Lakes*. It clarified that the case concerned only limited partnerships after this court asked whether the case applied to limited *liability* partnerships at oral argument. The government's position is that only general partnerships are included within the definition of the term "partnership" as used in the Act's definition of the term "person." It asserts that even if this court adopts the reasoning of *Great Lakes*, that reasoning would reach neither limited liability partnerships nor LLCs.

4. Limited Liability Company

Whether an LLC has standing under the Act is an issue of first impression in the circuit courts, and has only been addressed by two federal district courts. *See Flatt v. U.S. SEC*, 2010 WL 1524328, at *3 (S.D. Fla. Apr. 14, 2010); *Exchange Point LLC v. U.S. SEC*, 100 F. Supp. 2d 172, 176 (S.D.N.Y. 1999). The court in *Exchange Point*, which *Flatt* relied on, stated:

> Federal courts have recognized that a major difference in practice between a limited partnership and an LLC is the more extensive limitations in liability accorded to members of the latter. The LLC "need have no equivalent to a general partner, that is, an owner who has unlimited personal liability for the debts of the firm." *Cosgrove v. Bartolotta*, 150 F.3d 729 (7th Cir. 1998) (applying Wisconsin LLC law). Additionally, a member of an LLC is not subject to the same risks that he or she may become liable for the company's debts[.]

Exchange Point LLC, 100 F. Supp. 2d at 174. The court continued its discussion:

> In addition to the omission of any term that could encompass an LLC in the statutory definition of person in the [Act], the Court notes a key difference between an LLC and all of the entities that have been held to be persons under the [Act]: an LLC need not have any member or manager that is liable for the debts of the company, even in the case of a wholly owned LLC with only one member-manager.

Id. at 175. The *Exchange Point* court found "some substance in the argument that a single member LLC has many of the same attributes and privacy interests as a small partnership or sole proprietorship," but determined that the plain meaning of the statute "simply cannot countenance the inclusion of a limited liability company in the term 'individual or partnership of five or fewer individuals.'" *Id.* at 176.

Plaintiffs argue that the district court erred in failing to consider the congressional purpose behind the Act when determining the scope of Congress's waiver of sovereign immunity. They assert that the district court failed to consider the realities of LLCs, specifically single-member LLCs. Plaintiffs contend that *Exchange Point's* plain-meaning reasoning fails because single-member LLCs, are "disregarded" by the government for federal income tax purposes. If a single-member LLC does not elect to be treated as a corporation for taxation purposes, then the single member will be liable individually for the company's taxes. Plaintiffs contend that this leaves the single member as well as the LLC in need of protection under the Act.

Plaintiffs make substantive arguments that LLCs should be included within the definition of "customer" under the Act. Admittedly, a single-member LLC resembles individuals or partnerships covered under the Act. However, the district court properly recognized that "it is never [the Court's] job to rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have done had it faced a question that . . . it never faced." *Hohman*, 2017 WL 2954713, at *6 (quoting *Henson v.*

Santander Consumer USA Inc., 137 S. Ct. 1718, 1725 (2017)). Here, an LLC is plainly not within the plain meaning of the words "individual or a partnership of less than five individuals." Neither Plaintiffs nor this court may supplement the unambiguous statutory language. *Cf. Brackfield & Assocs. P'ship v. Branch Banking & Tr. Co.*, 645 F. App'x 428, 431 (6th Cir. 2016) (declining to adopt plaintiff's proposed approach to statutory construction because doing so would greatly broaden the interpretation of the Right to Financial Privacy Act).

Additionally, *Exchange Point* was correct in noting that an LLC, unlike other entities that have been held to be persons under the Act, need not have any member that remains liable for the company's debts, even in the case of a single-member LLC. While it is true that single-member LLCs, are "disregarded" by the government for federal income tax purposes, that fact does not overcome the limited liability aspect and strict textual approach that this court must apply when interpreting waivers of sovereign immunity. *See FAA v. Cooper*, 566 U.S. 284, 290 (2012) ("[A] waiver of sovereign immunity must be 'unequivocally expressed' in the statutory text."). In sum, we hold that an LLC does not fall under the Act's waiver of sovereign immunity and the district court correctly held that it lacked jurisdiction over Plaintiffs' claims.

E. Whether the District Court Properly Granted Limited Jurisdictional Discovery

Plaintiffs argue that the district court abused its discretion by unduly limiting the scope of discovery to Hohman and Miller individually and their respective individual accounts held at Chase Bank. As mentioned

previously, Plaintiffs requested to issue subpoenas to the other banks where Hohman and Miller maintain accounts to find out if the government improperly issued subpoenas to those banks as well. Plaintiffs also asked for discovery with respect to four other individuals who based on Plaintiffs' investigation, likely had "secret" John Doe summonses issued for their accounts. The district court chose to confine the discovery to the Plaintiffs' accounts at Chase Bank, the accounts that were the subject of the lawsuit, before ruling on the motion to dismiss.

Here, the district court specifically limited discovery to address the jurisdictional issues involved. That was within its discretion. The court allowed Plaintiffs access to the information necessary to establish their claims before ruling on the motion to dismiss. *See Anwar v. Dow Chem. Co.*, 876 F.3d 841, 854 (6th Cir. 2017) ("We have noted that a plaintiff should have access to information necessary to establish her claim, but that a plaintiff may not be permitted to 'go fishing'; the trial court retains discretion."). Further, the four other individuals who Plaintiffs believed likely had "secret" John Doe summonses issued for their accounts were not parties to the lawsuit and Plaintiffs make no argument that any information from them would relate to the narrow jurisdictional questions for which discovery was permitted. District courts maintain discretion to limit the scope of discovery, and the court did not make a mistake that affected Plaintiffs' substantial rights here.

III. CONCLUSION

For the reasons explained above, we affirm.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 16-cv-11429
Hon. Matthew F. Leitman

[Filed July 11, 2017]

JODI C. HOHMAN *et al.*,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

OPINION AND ORDER GRANTING DEFENDANT'S SECOND MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION (ECF #32)

In September 2015, the Internal Revenue Service served two so-called "John Doe" summonses on JP Morgan Chase Bank. The Internal Revenue Code requires the IRS to obtain federal court approval before serving such summonses, but the IRS did not do so here. The summonses directed Chase Bank to deliver to the IRS records related to three accounts, which

were identified only by account number. The three accounts belonged to Plaintiffs Jodi C. Hohman, JHohman LLC, and You Got Busted By Me LLC ("Busted LLC"). In this action, these three Plaintiffs and Plaintiff Terry Miller (the sole member and owner of Busted LLC) allege that the IRS's efforts to obtain their financial records through the use of the John Doe summonses violated the federal Right to Financial Privacy Act, 12 U.S.C. § 3401 *et seq*. (the "RFPA" or "Act"). Plaintiffs seek damages from the United States under that Act. The United States contends that its sovereign immunity bars Plaintiffs' RFPA claims. For the reasons stated below, the Court agrees, and it therefore **DISMISSES** Plaintiffs' claims.

I

A

The Internal Revenue Code authorizes the IRS to serve administrative summonses that compel third parties to produce documents related to taxpayers who are under investigation. *See* 26 U.S.C. § 7603. The Code generally requires that these summonses identify the person whose records are sought. *See* 26 U.S.C. § 7609. But one provision of the Code, 26 U.S.C. § 7609(f) ("Section 7609(f)"), allows the IRS to serve summonses that do not identify the person whose records are sought. Summonses issued under Section 7609(f) are known as John Doe summonses.

Section 7609(f) requires the IRS to obtain approval from a federal district court before serving a John Doe summons. *See id.* A federal court may approve such a summons only if it finds that:

> (1) the [John Doe] 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
>
> (3) the information sought to be obtained [by the John Doe summons] is not readily available from other sources.

Id.

B

This case is about two John Doe summonses that the IRS served in September 2015. First, on September 25, 2015, the IRS served on Chase Bank a John Doe summons that sought financial records for two separate accounts (the "First John Doe Summons"). (*See* Am. Compl. at ¶¶ 34, 37, ECF #36 at Pg. ID 500-01.) The accounts were identified only by account number. (*See id.*) Second, on September 30, 2015, the IRS served on Chase Bank a second John Doe summons that sought financial records for a single account (the "Second John Doe Summons"). (*See id.* at ¶¶ 53, 56, ECF #36 at Pg. ID 507-08.) Again, the account was identified only by account number. (*See id.*)

The IRS did not seek or obtain approval from a federal district court to issue either of the John Doe summonses. (*See id.* at ¶¶ 40, 78, ECF #36 at Pg. ID 502, 515.)

C

In October 2015, Chase Bank notified Hohman and her company Jhohman LLC[1] that it (Chase Bank) had received the First John Doe Summons from the IRS and that the summons sought records for accounts "relating" to them. (*Id.* at ¶34, ECF #36 at Pg. ID 500.) On November 25, 2015, Hohman and JHohman LLC filed a petition in this Court to quash the First John Doe Summons. (*See id.* at ¶50, ECF #36 at Pg. ID 506.) In their petition to quash, Hohman and JHohman LLC argued that the First John Doe Summons did not meet the requirements listed in Section 7609(f). *See* Petition to Quash, *Jodi C. Hohman et al. v. United States of America et al.*, 15-mc-51669, Docket #1 (E.D. Mich. Nov. 25, 2015).

During the proceedings on the petition to quash, the IRS produced sworn declarations from the IRS agents who had issued the First John Doe Summons (the "Declarations"). (*See* Am. Compl. at ¶51, ECF #36 at Pg. ID 506.) The IRS attached a copy of the First John Doe Summons to the Declarations. The copy was partially redacted. (*See id.* at ¶55, ECF #36 at Pg. ID 507.) It revealed the first account number listed on the summons but masked the second account number. (*See id.*)

Hohman and JHohman LLC reviewed the partially redacted First John Doe Summons and determined that the first account number on that summons belonged to JHohman LLC. (*See id.*) However, because

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[1] Hohman is the sole member and owner of JHohman LLC. (*See* Am. Compl. at ¶2, ECF #36 at Pg. ID 488.)

the second account number remained redacted, Hohman and JHohman LLC were unable to determine who owned that account. (*See id.*) Their subsequent investigation led them to believe that the second account belonged either to Miller, individually, or his company, Busted LLC. (*See id.* at ¶59, ECF #36 at Pg. ID 508.)

The Declarations also revealed for the first time that the IRS had served the Second John Doe Summons on Chase Bank. (*See id.* at ¶53, ECF #36 at Pg. ID 507.) The IRS attached an unredacted copy of the Second John Doe Summons to the Declarations. (*See id.* at ¶54, ECF #36 at Pg. ID 507.) Hohman and JHohman LLC reviewed that summons and determined that it sought records relating to an account belonging to Hohman, individually. (*See id.* at ¶56, ECF #36 at Pg. ID 508.)

D

On April 20, 2016, Plaintiffs filed this civil action. Plaintiffs' only remaining claims are against the United States under the RFPA.[2] (*See* Am. Compl. at

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[2] Earlier in this action, Plaintiffs brought claims against the United States and two IRS employees for violations of the RFPA, the Privacy Act (5 U.S.C. § 552a), the Fourth and Fifth Amendments to the United States Constitution, and the Internal Revenue Code's prohibition of the unauthorized disclosure of tax return information. (*See* Am. Compl. at ¶66 n.2, ECF #36 at Pg. ID 511, noting Plaintiffs' prior claims.) In a written order dated November 7, 2016, this Court dismissed all of Plaintiffs' claims other than their claims against the United States under the RFPA. (*See* ECF #27.) In the November 7, 2016 Order, the Court rejected the IRS's contention that Plaintiffs' RFPA allegations failed to state a claim on which relief could be granted. (*See id.* at Pg. ID

¶75, ECF #36 at Pg. ID 514.) The RFPA "accords customers of banks and similar financial institutions certain rights to be notified of and to challenge in court administrative subpoenas of financial records in the possession of banks." *SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 745 (1984).

Plaintiffs bring their RFPA claims under Section 3417 of the Act. That section creates a private cause of action for violations of the RFPA and waives the United States' sovereign immunity for certain claims by a "customer." It reads in relevant part:

> **(a) Liability of Agencies or Departments of United States or Financial Institutions** Any agency or department of the United States . . . obtaining or disclosing financial records or information contained therein in violation of [the RFPA] is liable *to the customer* to whom such records relate in an amount equal to the sum of—
>
> **(1)** $100 without regard to the volume of records involved;
> **(2)** any actual damages sustained by the customer as a result of the disclosure;
> **(3)** such punitive damages as the court may allow, where the

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308-313.) The Court did not address questions of sovereign immunity. (*See id.*) The IRS raised the sovereign immunity defense in its second motion to dismiss (*see* ECF #32), and the Court addresses that defense in this Opinion and Order.

> violation is found to have been willful or intentional; and
>
> **(4)** in the case of any successful action to enforce liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

12 U.S.C. § 3417 (emphasis added).

In Plaintiffs' claims under Section 3417, they allege that the IRS violated a separate provision of the RFPA, Section 3405, when it served the John Doe Summonses. (*See* Am. Compl. at ¶¶ 67-78, ECF #36 at Pg. ID 511-15.) Section 3405 establishes conditions that a government authority must satisfy before serving an administrative summons seeking financial records:

> A Government authority may obtain financial records . . . pursuant to an administrative subpoena or summons otherwise authorized by law only if –
>
> **(1)** there is reason to believe that the records sought are relevant to a legitimate law enforcement inquiry;
>
> **(2)** a copy of the subpoena or summons has been served on the customer . . . together with [a] notice which shall state with reasonable specificity the nature of the law enforcement inquiry [and shall inform the customer of his/her right to file

> a motion to quash the summons in a United States District Court]; and
>
> **(3)** ten days have expired from the date of service of the notice or fourteen days have expired from the date of mailing the notice to the customer and within such time period the customer has not filed a . . . motion to quash in an appropriate court . . ..

12 U.S.C. § 3405.

The first claim under Section 3417 is on behalf of Plaintiff JHohman LLC and the "Miller Plaintiffs" (a term from the Amended Complaint that appears to include both Busted LLC and Terry Miller, individually). These Plaintiffs allege that the IRS served the First John Doe Summons – and, through that summons, obtained documents related to their accounts – without satisfying any of the conditions listed in Section 3405.[3] (*See* Am. Compl. at ¶¶ 50, 55, 77 ECF #36 at Pg. ID 506-07, 513.)

The second claim under Section 3417 is brought by Plaintiff Jodi Hohman, individually. She alleges that

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[3] The RFPA includes an exception for the "disclosure of financial records in accordance with procedures authorized by the [Internal Revenue Code]." 12 U.S.C. §3413. For the reasons explained in the Court's November 7, 2016 Order, this exception does not apply here because Plaintiffs allege that the IRS served the First and Second John Doe Summonses in a manner that was *not* authorized by the Code. (*See* ECF #27 at Pg. ID 307-12.)

the IRS served the Second John Doe Summons – which sought documents from an account in her name – without satisfying any of the conditions required under Section 3405. (*See id.* at ¶ 71, ECF #36 at 513.) Hohman does not allege that that the IRS actually obtained any documents concerning her account through the service of the Second John Doe Summons.

E

On January 17, 2017, the United States moved, under Rule 12(b)(1) of the Federal Rules of Civil Procedure, to dismiss the RFPA claims for lack of subject-matter jurisdiction (the "Motion"). (*See* ECF #32.) The United States asserted, among other things, that it has sovereign immunity from Plaintiffs' claims and that this immunity deprives the Court of subject-matter jurisdiction.

The United States offered its sovereign-immunity arguments on a Plaintiff-by-Plaintiff basis. It separately explained why each of Plaintiffs could not pursue an RFPA claim. The United States' argument with respect to each Plaintiff was as follows:

1. **JHohman LLC**: The United States is immune from the RFPA claim by JHohman LLC because the immunity waiver in Section 3417 extends only to claims by "customers," as that term is defined by the RFPA, and a limited liability company is not a "customer" under that definition. (*See id.* at Pg. ID 350-56.)

2. **The "Miller Plaintiffs"**: The claim by the "Miller Plaintiffs" does not fall within Section 3417's sovereign immunity waiver because

the term "Miller Plaintiffs" is too indefinite. More specifically, that term does not distinguish between Miller (an individual) and Busted LLC (a limited liability company). If the claim is brought on behalf of Busted LLC, it falls outside of the Section 3417 sovereign immunity waiver because (for the reasons set forth immediately above) that waiver does not apply to limited liability companies. The claim should be dismissed unless Plaintiffs confirm that it is brought on behalf of Miller, individually, and not on behalf of Busted LLC. (*See id.* at Pg. ID 356-61.)

3. **Hohman Individually**: The United States is immune from the claim by Hohman individually because the waiver of sovereign immunity in Section 3417 applies to claims that a government authority "disclosed" or "obtained" financial records in violation of the RFPA, and Hohman does not allege that the IRS actually obtained or disclosed any records related to her account. (*See* ECF #32 at Pg. ID 30-31.)

Plaintiffs responded to the Motion in two ways. First, Plaintiffs argued that the waiver of sovereign immunity in Section 3417 *does* extend to limited liability companies such as Hohman LLC and Busted LLC.

Second, Plaintiffs requested that the Court grant them jurisdictional discovery before ruling on the Motion. Specifically, Plaintiffs asked to conduct discovery that would allow them to determine who –

Miller, individually, or Busted LLC – owned the account that was identified in the Amended Complaint as belonging to the "Miller Plaintiffs." Plaintiffs said that they could not make that determination without discovery because the account number for that account was redacted on the only copy of the First John Doe Summons in Plaintiffs' possession.

The Court authorized the requested discovery, but ordered that the responses to the discovery be returned to the Court (rather than to the parties) for confidentiality reasons. (*See* April 19, 2017, Order, ECF #39.) The discovery is now complete. The Court has reviewed the responses to Plaintiffs' discovery and has determined that Busted LLC – not Miller, individually – owned the second account listed on the First John Doe Summons.[4] Thus, the claim brought by the "Miller Plaintiffs" may be brought, if at all, only by Busted, LLC.[5]

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[4] The discovery process authorized by the Court worked as follows. First, on April 20, 2017, the Government filed a sealed, unredacted copy of the First John Doe Summons with the Court. (*See* ECF #40.) Second, on May 1, 2017, Plaintiffs filed a sealed list of account numbers for all of the accounts at Chase Bank held in their names. (*See* ECF #41.) Third, the Court compared the second account number listed on the First John Doe Summons to Plaintiffs' list and determined that the account number belonged to Busted LLC. (*See* Unredacted John Doe Summonses, ECF #40; List of Accounts, ECF #41.)

[5] Because discovery has confirmed that the IRS obtained documents from an account belonging to Busted LLC, not to Miller individually, Plaintiffs could not allege in good faith that the IRS obtained documents from Miller's account.

At the hearing on the Motion, Plaintiffs also requested discovery to determine whether the IRS obtained any documents in response to the Second John Doe Summons – the summons that sought documents related to an account owned by Hohman, individually. Specifically, Plaintiffs sought permission to serve a subpoena on Chase Bank for all of the documents (if any) that Chase Bank provided to the IRS in response to the Second John Doe Summons. Plaintiffs argued that Chase Bank's response to the subpoena would reveal whether Chase Bank had, in fact, produced documents related to any account(s) owned by Hohman individually. The Court granted that request but instructed that Chase Bank return all responsive documents directly to the Court for confidentiality reasons. (*See* April 19, 2017 Order, ECF #39.) The Court has reviewed Chase Bank's production and determined that Chase Bank did not send the IRS documents relating to Hohman in response to the Second John Doe Summons.[6]

II

With the Motion now fully briefed and argued and with discovery now complete, the Court is faced with the following issues for decision:

1. Does the waiver of sovereign immunity in Section 3417 extend to claims by limited liability companies such that JHohman LLC and Busted

[6] Chase Bank's production to the Court did contain documents relating to Hohman LLC and Busted LLC, but did not contain any documents relating to Hohman individually.

LLC may bring their RFPA claims against the United States?

2. Does the RFPA claim by Jodi Hohman, individually, fall within the waiver of sovereign immunity in Section 3417 even though the United States *did not obtain* any financial records relating to an account owned by Hohman?

The Court separately analyzes those issues below.

III

A

Subject-matter jurisdiction "refers to a tribunal's power to hear a case." *Pac. R. Co. v. Bhd. of Locomotive Engineers & Trainmen Gen. Comm. Of Adjustment, Cent. Region*, 558 U.S. 67, 81 (2009). Thus, issues of subject-matter jurisdiction "can never be forfeited or waived," and a party may challenge subject-matter jurisdiction at any time. *Id.* Where, as here, a defendant argues that allegations in a complaint are insufficient to create subject-matter jurisdiction, the Court must "take[] the allegations in the complaint as true" and dismiss the complaint if it does not set forth an adequate basis for jurisdiction. *Wayside Church v. Van Buren County*, 847 F.3d 812, 816-17 (6th Cir. 2017) (quoting *Gentek Bldg. Prods., Inc. v. Sherwin-Williams Co.*, 491 F.3d 320, 330 (6th Cir. 2007)).

B

"Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit. Sovereign immunity is jurisdictional in nature. Indeed,

the terms of the United States' consent to be sued in any court define that court's jurisdiction to entertain the suit." *FDIC v. Meyer*, 510 U.S. 471, 475 (1994) (internal citations and quotation marks omitted). "Jurisdiction over any suit against the Government requires a clear statement from the United States waiving sovereign immunity, together with a claim falling within the terms of the waiver. The terms of consent to be sued may not be inferred, but must be unequivocally expressed." *U.S. v. White Mountain Apache Tribe,* 537 U.S. 465, 472 (2003) (internal citations and quotation marks omitted). "Moreover, a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign." *Lane v. Pena*, 518 U.S. 187, 192 (1996).

For the reasons stated below, the Court concludes that it does not have subject-matter jurisdiction over Plaintiffs' RFPA claims because the claims do not fall within a waiver of the United States' sovereign immunity.

IV

The question before the Court is whether Plaintiffs' RFPA claims fall within the waiver of sovereign immunity in Section 3417. They do not.

A

The claims by JHohman LLC and Busted LLC do not fall within Section 3417's waiver of sovereign immunity because (1) as noted above, the waiver covers only claims by a "customer," as defined under the RFPA, and (2) limited liability companies, like JHohman LLC and Busted LLC, are not "customers."

The RFPA defines the term "customer" as "any person or authorized representative of that person who utilized or is utilizing any service of a financial institution, or for whom a financial institution is acting or has acted as a fiduciary, in relation to an account maintained in the person's name." 12 U.S.C. § 3401(5). And the RFPA defines "person" as "an individual or a partnership of five or fewer individuals." 12 U.S.C. § 3401(4).

A limited liability company is neither an individual nor a partnership of fewer than five individuals. Thus, a limited liability company is not a "person" under the RFPA, and because such a company is not a "person," it cannot be a "customer." Since Section 3417's waiver of sovereign immunity extends only to claims by a "customer," the United States is immune from RFPA claims by limited liability companies like Plaintiffs JHohman LLC and Busted LLC. *See Exchange Point LLC v. SEC*, 100 F. Supp. 2d 172, 176 (S.D.N.Y. 1999) (holding that a limited liability company could not sue under Section 3417 because it was not a "customer"); *Flatt v. U.S. SEC.*, 2010 WL 1524328, at *3 (S.D. Fla. Apr. 14, 2010) (same).

Plaintiffs resist this conclusion on two grounds. First, they argue that the Court should treat a limited liability company as a "customer" because, in many significant respects, such a company closely resembles a limited partnership that does qualify as a "customer." (*See* Pl.'s Resp. Br., ECF #35 at Pg. ID 451-52.) Plaintiffs contend, in essence, that there is no principled basis for treating a limited partnership, but not a limited liability company, as a "customer." (*See id.*) Plaintiffs add that limited liability companies did

not widely exist when Congress enacted the RFPA in 1978, and Plaintiffs insist that if Congress had been aware of such companies at that time, it would have included them in the RFPA's definition of "person" (and thereby made them "customers"). (*See id.*)

The problem for Plaintiffs is that the plain language of the RFPA does not state that a limited liability company is either a "person" or a "customer." Nor is there any ambiguity in the RFPA definitions of these two terms. The Court is simply not at liberty to expand the RFPA's unambiguous definitions of "person" and "customer" beyond their plain terms. *See Dodd v. U.S.*, 545 U.S. 353, 359 (2005) ("[Courts] are not free to rewrite a statute that Congress has enacted. 'When the statute's language is plain, the sole function of the courts . . . is to enforce it according to its terms.'" (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6 (2000)). Nor may this Court assume that Congress would have included limited liability companies within the RFPA's definitions of "person" and "customer" if it had been aware of limited liability companies at the time it enacted the RFPA. Indeed, "it is never [the Court's] job to rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have done had it faced a question that . . . it never faced." *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017).

This strictly textual approach is especially warranted here because the Court is interpreting a waiver of sovereign immunity. The United States Supreme Court has "said on many occasions that a waiver of sovereign immunity must be unequivocally

expressed in the statutory text," *F.A.A. v. Cooper*, 566 U.S. 284, 290 (2012) (collecting cases), and must "be strictly construed, in terms of its scope, in favor of the sovereign." *Lane*, 518 U.S. at 192. Simply put, the Court cannot rewrite the Section 3417 waiver of sovereign immunity to add claims by entities that Congress omitted. Plaintiffs must convince Congress, not the Court, to extend the Section 3417 waiver of sovereign immunity to limited liability companies.[7]

Second, JHohman LLC and Busted LLC argue that the Court should treat them as "individuals" (and, thus, as "persons" and "customers") under the RFPA because the IRS, itself, treats single-member limited liability companies as individuals for income tax purposes. (*See* Pl.'s Resp. Br., ECF #35 at Pg. ID 453-454.) They argue that "the Government's contradictory position of treating [single-member] LLCs as [individuals] for federal tax [] purposes, but as 'corporations' for purposes of RFPA protection, provides a mechanism for the Government to do an end run around the RFPA." (*Id.* at Pg. ID 454.) But the IRS's treatment of single-member limited liability companies for tax purposes does not give the Court license to alter the plain language of the RFPA to add limited liability companies to the definition of "person" or "customer." *See Dodd*, 545 U.S. at 359.

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[7] Congress has amended the definitions section of the RFPA five times without adding limited liability companies to the definition of "customer" or "person." *See* Pub. L. No. 101-73, §§ 744(b) and 941 (1989); Pub. L. No. 101-647, § 2596(c) (1990); Pub. L. No. 106-102, § 727(b)(1) (1999); Pub. L. No. 108-177, § 734(b) (2003); Pub L. No. 111-203, §1099(1) (2010).

In summary, a limited liability company is not a "customer" under the RFPA, and thus the RFPA claims by JHohmann LLC and Busted LLC do not fall within Section 3417's wavier of sovereign immunity. The Court therefore lacks subject-matter jurisdiction over those claims.

B

The RFPA claim by Hohman likewise does not fall within Section 3417's waiver of sovereign immunity. As described above, that waiver covers claims alleging that an agency or department of the United States "*obtain[ed] or disclos[ed]* . . . financial records or information" that relate to the "customer." 12 U.S.C. § 3417 (emphasis added). Hohman does not allege that the IRS actually obtained or disclosed any financial records or information from her account as a result of its issuance of the Second John Doe Summons. (*See* Am. Compl., ECF #36.) Moreover, given that Chase Bank did not produce any documents relating to Hohman in response to the Second John Doe Summons, she could not have alleged in good faith that the IRS obtained or disclosed any financial records related to that summons. Therefore, Hohman's claim does not fall within Section 3417's wavier of sovereign immunity. Because the United States has not waived its sovereign immunity for this claim, the Court lacks subject-matter jurisdiction.

V

For the reasons stated above, Plaintiffs' claims under the RFPA – the only remaining claims in this case – are dismissed for lack of subject-matter

jurisdiction. Accordingly, the Motion (ECF #32) is **GRANTED.**

IT IS SO ORDERED.

s/Matthew F. Leitman
MATTHEW F. LEITMAN
UNITED STATES DISTRICT JUDGE

Dated: July 11, 2017

I hereby certify that a copy of the foregoing document was served upon the parties and/or counsel of record on July 11, 2017, by electronic means and/or ordinary mail.

s/Holly A. Monda
Case Manager
(810) 341-9764

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 16-cv-11429
Hon. Matthew F. Leitman

[Filed July 11, 2017]

JODI C. HOHMAN et al.,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

In accordance with the Court's Order Granting in Part and Denying in Part Defendants' Motion to Dismiss dated November 7, 2016, and the Court's Opinion and Order Granting Defendant's Second Motion to Dismiss for Lack of Subject Matter Jurisdiction, dated July 11, 2017,

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of Defendants and against Plaintiffs.

DAVID J. WEAVER
CLERK OF COURT

By: s/Holly A. Monda
Deputy Clerk

Approved:

s/Matthew F. Leitman
MATTHEW F. LEITMAN
United States District Judge

Dated: July 11, 2017
Detroit, Michigan

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 16-cv-11429
Hon. Matthew F. Leitman

[Filed November 7, 2016]

JODI C. HOHMAN *et al.*,

Plaintiffs,

v.

MAURICE EADIE *et al.*,

Defendants.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS (ECF #12)

In this action, Plaintiffs Jodi C. Hohman, Jhohman, LLC, Terry Miller, and You Got Busted By Me, LLC (collectively, "Plaintiffs") bring claims against two Internal Revenue Service ("IRS") employees and the United States (collectively, "Defendants") arising out of Defendants' allegedly improper issuance of "John Doe" summonses.

Plaintiffs filed their original Complaint against Defendants on April 20, 2016. (*See* ECF #1.) Defendants thereafter filed a motion to dismiss (the "Motion"). (*See* ECF #12). Plaintiffs filed a response to the Motion on July 18, 2016 (the "Response"). (*See* ECF #16.) Plaintiffs attached a proposed Amended Complaint to the Response. (*See* ECF #16-2.)

On August 9, 2016, the Court held a telephonic status conference with counsel to discuss how to proceed in light of the proposed Amended Complaint. At the conclusion of the conference, the Court determined that, in the interest of efficiency, the Court would deem Plaintiffs' proposed Amended Complaint as having been filed and would treat the proposed Amended Complaint as the operative complaint in this action. The Court further concluded that it would treat the Motion as being directed against the Amended Complaint, and the Court permitted each party to file a supplemental brief with respect to the viability of the claims asserted in the Amended Complaint. (*See* Docket Minute Entry for August 9, 2016.)

The claims in the Amended Complaint are as follows: Count One alleges that Defendants violated the Right to Financial Privacy Act, 12 U.S.C. § 3401 *et seq*. (the "RFPA"); Count Two alleges that Defendants violated the Privacy Act, 5 U.S.C. § 552a; Count Three seeks declaratory and injunctive relief against the United States and asserts a claim under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), for alleged violations of Plaintiffs' constitutional and statutory rights; Count Four alleges that Defendants made unauthorized disclosures of return information in violation of 26 U.S.C. § 6103; and Count Five seeks a

writ of mandamus.[1] (*See* Amended Complaint, ECF #16-2.)

The Court held a hearing on the Motion on November 3, 2016. For the reasons explained on the record at the hearing, the Motion is **GRANTED IN PART** and **DENIED IN PART.** Specifically, the Motion is **DENIED** as to the RFPA claim in Count One of the Amended Complaint. The Motion is **GRANTED** as to Counts Two, Three, Four, and Five of the Amended Complaint, and the claims in those Counts are **DISMISSED**. In addition, the Amended Complaint is **DISMISSED AS TO THE INDIVIDUAL DEFENDANTS**, and the sole remaining Defendant is the United States of America.

During the hearing, the Court explained its reasons for denying the Motion as to the RFPA claim in Count One of the Amended Complaint. The Court adheres to and re-affirms that reasoning and wishes to briefly supplement it as follows. In the Motion, the Defendants argued that Plaintiffs' RFPA claim fails as a matter of law because the RFPA does not apply to the service of John Doe summonses. (*See* ECF #12 at 18-24, Pg. ID

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[1] The Amended Complaint contains two separate claims that are labeled "Count Five." The first "Count Five" pleaded in the Amended Complaint is Plaintiffs' demand for a writ of mandamus. (*See* ECF #16-2 at 35-36, Pg. ID 216-17.) As stated below, the Court dismisses this first "Count Five" that seeks a writ of mandamus. The second "Count Five" pleaded in the Amended Complaint seeks certification of a class action. (*See* ECF #16-2 at 38-41, Pg.ID 219-23.) As the Court stated on the record, it will not resolve the issue of class certification at this stage in the proceedings. Instead, Plaintiffs may file a separate motion seeking class certification.

81-87.) Defendants rested this argument primarily upon the following language from the RFPA: "Nothing in this chapter prohibits the disclosure of financial records in accordance with procedures authorized by Title 26." 12 U.S.C. § 3413(c). According to Defendants, since Title 26 of the United States Code authorizes the service of John Doe summonses, *see* 26 U.S.C. § 7609(f), their service of such summonses in this case was "in accordance with procedures authorized by Title 26," and, thus, exempt from the RFPA. Defendants insist that they acted "in accordance with the procedures authorized by Title 26" even though they failed to obtain judicial approval before serving the summonses, as specifically required by that Title. *See* 26 U.S.C. § 7609(f).

Defendants' argument that they acted "in accordance with procedures authorized by Title 26" even though they materially violated Title 26 is inconsistent with the plain meaning of the phrase "in accordance with." In a wide variety of contexts, federal courts have observed that a party acts "in accordance with" a law or rule when the party *follows* and/or *complies with* the law or rule.[2] Notably, the

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[2] *See, e.g., City of Cleveland v. Ohio*, 508 F.3d 827, 838 (6th Cir. 2007) (explaining that a federal agency action is "not in accordance with the law" when the action "is in conflict with the language of the statute relied upon by the agency"); *In Re Connors*, 497 F.3d 314, 319 (3d Cir. 2007) ("Thus, when the statute refers to 'a foreclosure sale that is conducted in accordance with applicable nonbankruptcy law,' it clearly refers to a foreclosure sale that *complies* with state-law procedures") (emphasis added); *Erlich v. United States*, 104 Fed. Cl. 12, 16 (Ct. Cl. 2012) ("Here, the Court has been given no reason to believe that in Section 317(b)(4) [of the Social Security Amendments of 1977] Congress used the phrase 'in

government has taken that very same position. In *Erlich v. United States*, 104 Fed. Cl. 12 (Ct. Cl. 2012), "the government argue[d] that under normal usage the phrase 'in accordance with'" was close "in meaning to 'in harmony with,'" and the government directed the court to a dictionary that defined the term "accordance" as "agreement, conformity...." *Erlich*, 104 Fed. Cl. at 16.

The case law referenced above and the government's prior interpretation of "in accordance with" support the Court's conclusion – explained on the record – that the Defendants' alleged service of the John Doe summonses without prior judicial approval was not "in accordance with" Title 26 because it was fundamentally inconsistent with that Title. And because the alleged service of the summonses was not "in accordance with procedures authorized by Title 26," that service is not exempt from the RFPA.

Moreover, service of a John Doe summons *without* prior judicial approval is plainly not a "procedure authorized by Title 26," and thus Defendants' alleged service of such summonses does not fit within the RFPA's exception for "authorized" tax collection procedures. *See Neece v. I.R.S.*, 922 F.2d 573, 577-78 (10th Cir. 1990) (holding that RFPA applied to an informal request for bank records by IRS because an

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accordance with' to mean anything other than the usual 'in agreement with' or 'in conformity with.'"); *First Graphics, Inc v. M.E.P. CAD, Inc.*, 2001 WL 755138, at *6 (N.D. Ill. June 29, 2001) (equating the term "comply" with "to act in accordance with standards or requirements").

informal request was not a "procedure authorized by Title 26").

In their briefing, Defendants argued that their service of the John Doe summonses fell within a second exception to the RFPA found in 12 U.S.C. § 3413(k)(2). That exception provides:

> (2) Nothing in this chapter shall apply to the disclosure by the financial institution of information contained in the financial records of any customer to any Government authority that certifies, disburses, or collects payments, where the disclosure of such information is necessary to, and such information is used solely for the purpose of-- (A) verification of the identity of any person or proper routing and delivery of funds in connection with the issuance of a Federal payment or collection of funds by a Government authority; or (B) the investigation or recovery of an improper Federal payment or collection of funds or an improperly negotiated Treasury check.

12 U.S.C. § 3413(k)(2). While it is theoretically possible that this exception could apply to Defendants' conduct, the Court cannot reach that conclusion now. The exception applies only to disclosures made for specifically-identified purposes and under certain specified circumstances, and there is no basis on the record before the Court to determine that the Defendants obtained Plaintiffs' financial information for one of those purposes or under those circumstances. The Court rejects Defendants' argument that the exception applies to *any* "'disclosure' of 'financial records' to a 'Government Authority that … collects

payments' – a category into which the IRS certainly fits – 'for the purpose of … collection of funds[.]'" (*See* ECF #12 at 22-23, Pg. ID 85-86.) The exception is not that broad. If discovery reveals that Defendants obtained Plaintiffs' records for a purpose set forth in this exception and under circumstances that otherwise satisfy the exception, Defendants may seek summary judgment on the basis of the exception.

One last point. In their briefing and at the hearing, the Defendants argued that the RFPA cannot sensibly be applied to service of a summons by the IRS because the standards governing the service of summonses under Title 26 differ from, and are inconsistent with, the standards for obtaining records under the RFPA. (*See* ECF #12 at 19-20, Pg. ID 82-83.) But Congress took great care in the RFPA to ensure that tax collectors would *not* be subjected to standards that were inconsistent with those under Title 26. As noted above, Congress provided that so long as tax collectors act "in accordance with procedures authorized by Title 26," they are exempt from (and need not worry about) the RFPA. Thus, if tax collectors comply with Title 26, they face no risk of being subjected to inconsistent standards under the RFPA; it is only when they fail to follow Title 26 that they may run afoul of the RFPA.

For all of the reasons stated on the record and the additional reasons set forth above, the Court declines to dismiss Plaintiffs' RFPA claim against the United States and dismisses all of the other counts of the Amended Complaint.

IT IS SO ORDERED.

s/Matthew F. Leitman
MATTHEW F. LEITMAN
UNITED STATES DISTRICT JUDGE

Dated: November 7, 2016

I hereby certify that a copy of the foregoing document was served upon the parties and/or counsel of record on November 7, 2016, by electronic means and/or ordinary mail.

s/Karri Sandusky (in the absence of Holly A. Monda)
Case Manager
(313) 234-5241

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 17-1869

[Filed September 20, 2018]

JODI C. HOHMAN; JHOHMAN, LLC; YOU GOT BUSTED BY ME, LLC; TERRY MILLER,	)
Plaintiffs-Appellants,	)
v.	)
MAURICE EADIE, ET AL.,	)
Defendants,	)
UNITED STATES OF AMERICA; DEPARTMENT OF TREASURY; INTERNAL REVENUE SERVICE,	)
Defendants-Appellees.	)

O R D E R

BEFORE: MERRITT, WHITE, and DONALD, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for

rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX E

12 U.S.C. § 3401 - Definitions

For the purpose of this chapter, the term—

(1) "financial institution", except as provided in section 3414 of this title, means any office of a bank, savings bank, card issuer as defined in section 1602(n) of title 15, industrial loan company, trust company, savings association, building and loan, or homestead association (including cooperative banks), credit union, or consumer finance institution, located in any State or territory of the United States, the District of Columbia, Puerto Rico, Guam, American Samoa, or the Virgin Islands;

(2) "financial record" means an original of, a copy of, or information known to have been derived from, any record held by a financial institution pertaining to a customer's relationship with the financial institution;

(3) "Government authority" means any agency or department of the United States, or any officer, employee, or agent thereof;

(4) "person" means an individual or a partnership of five or fewer individuals;

(5) "customer" means any person or authorized representative of that person who utilized or is utilizing any service of a financial institution, or for whom a financial institution is acting or has acted as a fiduciary, in relation to an account maintained in the person's name;

(6) "holding company" means—

(A) any bank holding company (as defined in section 1841 of this title); and

(B) any company described in section 1843(f)(1) of this title;

(7) "supervisory agency" means with respect to any particular financial institution, holding company, or any subsidiary of a financial institution or holding company, any of the following which has statutory authority to examine the financial condition, business operations, or records or transactions of that institution, holding company, or subsidiary—

(A) the Federal Deposit Insurance Corporation;

(B) the Bureau of Consumer Financial Protection;

(C) the National Credit Union Administration;

(D) the Board of Governors of the Federal Reserve System;

(E) the Comptroller of the Currency;

(F) the Securities and Exchange Commission;

(G) the Commodity Futures Trading Commission;

(H) the Secretary of the Treasury, with respect to the Bank Secrecy Act (Public Law 91–508, title I) [12 U.S.C. 1951 et seq.] and subchapter II of chapter 53 of title 31; or

(I) any State banking or securities department or agency; and

(8) "law enforcement inquiry" means a lawful investigation or official proceeding inquiring into a violation of, or failure to comply with, any criminal or civil statute or any regulation, rule, or order issued pursuant thereto.

12 U.S.C. § 3402 - Access to financial records by Government authorities prohibited; exceptions

Except as provided by section 3403(c) or (d), 3413, or 3414 of this title, no Government authority may have access to or obtain copies of, or the information contained in the financial records of any customer from a financial institution unless the financial records are reasonably described and—

(1) such customer has authorized such disclosure in accordance with section 3404 of this title;

(2) such financial records are disclosed in response to an administrative subpena or summons which meets the requirements of section 3405 of this title;

(3) such financial records are disclosed in response to a search warrant which meets the requirements of section 3406 of this title;

(4) such financial records are disclosed in response to a judicial subpena which meets the requirements of section 3407 of this title; or

(5) such financial records are disclosed in response to a formal written request which meets the requirements of section 3408 of this title.

12 U.S.C. § 3405 - Administrative subpena and summons

A Government authority may obtain financial records under section 3402(2) of this title pursuant to an administrative subpena or summons otherwise authorized by law only if—

(1) there is reason to believe that the records sought are relevant to a legitimate law enforcement inquiry;

(2) a copy of the subpena or summons has been served upon the customer or mailed to his last known address on or before the date on which the subpena or summons was served on the financial institution together with the following notice which shall state with reasonable specificity the nature of the law enforcement inquiry:

"Records or information concerning your transactions held by the financial institution named in the attached subpena or summons are being sought by this (agency or department) in accordance with the Right to Financial Privacy Act of 1978 [12 U.S.C. 3401 et seq.] for the following purpose: If you desire that such records or information not be made available, you must:

"1. Fill out the accompanying motion paper and sworn statement or write one of your own, stating that you are the customer whose records are being requested by the Government and either giving the reasons you believe that the records are not relevant to the legitimate law enforcement inquiry stated in this notice or any

other legal basis for objecting to the release of the records.

"2. File the motion and statement by mailing or delivering them to the clerk of any one of the following United States district courts:

"3. Serve the Government authority requesting the records by mailing or delivering a copy of your motion and statement to

"4. Be prepared to come to court and present your position in further detail.

"5. You do not need to have a lawyer, although you may wish to employ one to represent you and protect your rights.

If you do not follow the above procedures, upon the expiration of ten days from the date of service or fourteen days from the date of mailing of this notice, the records or information requested therein will be made available. These records may be transferred to other Government authorities for legitimate law enforcement inquiries, in which event you will be notified after the transfer."; and

(3) ten days have expired from the date of service of the notice or fourteen days have expired from the date of mailing the notice to the customer and within such time period the customer has not filed a sworn statement and motion to quash in an appropriate court, or the customer challenge provisions of section 3410 of this title have been complied with.

12 U.S.C. § 3413 - Exceptions

(a) Disclosure of financial records not identified with particular customers

Nothing in this chapter prohibits the disclosure of any financial records or information which is not identified with or identifiable as being derived from the financial records of a particular customer.

(b) Disclosure to, or examination by, supervisory agency pursuant to exercise of supervisory, regulatory, or monetary functions with respect to financial institutions, holding companies, subsidiaries, institution-affiliated parties, or other persons

This chapter shall not apply to the examination by or disclosure to any supervisory agency of financial records or information in the exercise of its supervisory, regulatory, or monetary functions, including conservatorship or receivership functions, with respect to any financial institution, holding company, subsidiary of a financial institution or holding company, institution-affiliated party (within the meaning of section 1813(u) of this title) with respect to a financial institution, holding company, or subsidiary, or other person participating in the conduct of the affairs thereof.

(c) Disclosure pursuant to title 26

Nothing in this chapter prohibits the disclosure of financial records in accordance with procedures authorized by title 26.

(d) Disclosure pursuant to Federal statute or rule promulgated thereunder

Nothing in this chapter shall authorize the withholding of financial records or information required to be reported in accordance with any Federal statute or rule promulgated thereunder.

(e) Disclosure pursuant to Federal Rules of Criminal Procedure or comparable rules of other courts

Nothing in this chapter shall apply when financial records are sought by a Government authority under the Federal Rules of Civil or Criminal Procedure or comparable rules of other courts in connection with litigation to which the Government authority and the customer are parties.

(f) Disclosure pursuant to administrative subpena issued by administrative law judge

Nothing in this chapter shall apply when financial records are sought by a Government authority pursuant to an administrative subpena issued by an administrative law judge in an adjudicatory proceeding subject to section 554 of title 5 and to which the Government authority and the customer are parties.

(g) Disclosure pursuant to legitimate law enforcement inquiry respecting name, address, account number, and type of account of particular customers

The notice requirements of this chapter and sections 3410 and 3412 of this title shall not apply when a Government authority by a means described in section 3402 of this title and for a legitimate law enforcement inquiry is seeking only the name, address, account

number, and type of account of any customer or ascertainable group of customers associated (1) with a financial transaction or class of financial transactions, or (2) with a foreign country or subdivision thereof in the case of a Government authority exercising financial controls over foreign accounts in the United States under section 4305(b) of title 50; the International Emergency Economic Powers Act (title II, Public Law 95–223) [50 U.S.C. 1701 et seq.]; or section 287c of title 22.

(h) Disclosure pursuant to lawful proceeding, investigation, etc., directed at financial institution or legal entity or consideration or administration respecting Government loans, loan guarantees, etc.

(1) Nothing in this chapter (except sections 3403, 3417 and 3418 of this title) shall apply when financial records are sought by a Government authority—

(A) in connection with a lawful proceeding, investigation, examination, or inspection directed at a financial institution (whether or not such proceeding, investigation, examination, or inspection is also directed at a customer) or at a legal entity which is not a customer; or

(B) in connection with the authority's consideration or administration of assistance to the customer in the form of a Government loan, loan guaranty, or loan insurance program.

(2) When financial records are sought pursuant to this subsection, the Government authority shall submit to the financial institution the certificate required by section 3403(b) of this title. For access

pursuant to paragraph (1)(B), no further certification shall be required for subsequent access by the certifying Government authority during the term of the loan, loan guaranty, or loan insurance agreement.

(3) After the effective date of this chapter, whenever a customer applies for participation in a Government loan, loan guaranty, or loan insurance program, the Government authority administering such program shall give the customer written notice of the authority's access rights under this subsection. No further notification shall be required for subsequent access by that authority during the term of the loan, loan guaranty, or loan insurance agreement.

(4) Financial records obtained pursuant to this subsection may be used only for the purpose for which they were originally obtained, and may be transferred to another agency or department only when the transfer is to facilitate a lawful proceeding, investigation, examination, or inspection directed at a financial institution (whether or not such proceeding, investigation, examination, or inspection is also directed at a customer), or at a legal entity which is not a customer, except that—

(A) nothing in this paragraph prohibits the use or transfer of a customer‘s financial records needed by counsel representing a Government authority in a civil action arising from a Government loan, loan guaranty, or loan insurance agreement; and

(B) nothing in this paragraph prohibits a Government authority providing assistance to a customer in the form of a loan, loan guaranty, or loan insurance agreement from using or transferring financial records necessary to process, service or foreclose a loan, or to collect on an indebtedness to the Government resulting from a customer's default.

(5) Notification that financial records obtained pursuant to this subsection may relate to a potential civil, criminal, or regulatory violation by a customer may be given to an agency or department with jurisdiction over that violation, and such agency or department may then seek access to the records pursuant to the provisions of this chapter.

(6) Each financial institution shall keep a notation of each disclosure made pursuant to paragraph (1)(B) of this subsection, including the date of such disclosure and the Government authority to which it was made. The customer shall be entitled to inspect this information.

(i) Disclosure pursuant to issuance of subpena or court order respecting grand jury proceeding

Nothing in this chapter (except sections 3415 and 3420 of this title) shall apply to any subpena or court order issued in connection with proceedings before a grand jury, except that a court shall have authority to order a financial institution, on which a grand jury subpoena for customer records has been served, not to notify the customer of the existence of the subpoena or information that has been furnished to the grand jury,

under the circumstances and for the period specified and pursuant to the procedures established in section 3409 of this title.

(j) Disclosure pursuant to proceeding, investigation, etc., instituted by Government Accountability Office and directed at a government authority

This chapter shall not apply when financial records are sought by the Government Accountability Office pursuant to an authorized proceeding, investigation, examination or audit directed at a government authority.

(k) Disclosure necessary for proper administration of programs of certain Government authorities

(1) Nothing in this chapter shall apply to the disclosure by the financial institution of the name and address of any customer to the Department of the Treasury, the Social Security Administration, or the Railroad Retirement Board, where the disclosure of such information is necessary to, and such information is used solely for the purpose of, the proper administration of section 1441 of title 26, title II of the Social Security Act [42 U.S.C. 401 et seq.], or the Railroad Retirement Act of 1974 [45 U.S.C. 231 et seq.].

(2) Nothing in this chapter shall apply to the disclosure by the financial institution of information contained in the financial records of any customer to any Government authority that certifies, disburses, or collects payments, where the disclosure of such information is necessary to, and such information is used solely for the purpose of—

(A) verification of the identity of any person or proper routing and delivery of funds in connection with the issuance of a Federal payment or collection of funds by a Government authority; or

(B) the investigation or recovery of an improper Federal payment or collection of funds or an improperly negotiated Treasury check.

(3) Notwithstanding any other provision of law, a request authorized by paragraph (1) or (2) (and the information contained therein) may be used by the financial institution or its agents solely for the purpose of providing information contained in the financial records of the customer to the Government authority requesting the information, and the financial institution and its agents shall be barred from redisclosure of such information. Any Government authority receiving information pursuant to paragraph (1) or (2) may not disclose or use the information, except for the purposes set forth in such paragraph.

(l) Crimes against financial institutions by insiders

Nothing in this chapter shall apply when any financial institution or supervisory agency provides any financial record of any officer, director, employee, or controlling shareholder (within the meaning of subparagraph (A) or (B) of section 1841(a)(2) of this title or subparagraph (A) or (B) of section 1730a(a)(2) of this title) of such institution, or of any major borrower from such institution who there is reason to believe may be acting in concert with any such officer, director, employee, or controlling shareholder, to the Attorney General of the

United States, to a State law enforcement agency, or, in the case of a possible violation of subchapter II of chapter 53 of title 31, to the Secretary of the Treasury if there is reason to believe that such record is relevant to a possible violation by such person of—

(1) any law relating to crimes against financial institutions or supervisory agencies by directors, officers, employees, or controlling shareholders of, or by borrowers from, financial institutions; or

(2) any provision of subchapter II of chapter 53 of title 31 or of section 1956 or 1957 of title 18.

No supervisory agency which transfers any such record under this subsection shall be deemed to have waived any privilege applicable to that record under law.

(m) Disclosure to, or examination by, employees or agents of Board of Governors of Federal Reserve System or Federal Reserve Bank

This chapter shall not apply to the examination by or disclosure to employees or agents of the Board of Governors of the Federal Reserve System or any Federal Reserve Bank of financial records or information in the exercise of the Federal Reserve System's authority to extend credit to the financial institutions or others.

(n) Disclosure to, or examination by, Resolution Trust Corporation or its employees or agents

This chapter shall not apply to the examination by or disclosure to the Resolution Trust Corporation or its employees or agents of financial records or information in the exercise of its conservatorship, receivership, or

liquidation functions with respect to a financial institution.

(o) Disclosure to, or examination by, Federal Housing Finance Agency or Federal home loan banks

This chapter shall not apply to the examination by or disclosure to the Federal Housing Finance Agency or any of the Federal home loan banks of financial records or information in the exercise of the Federal Housing Finance Agency's authority to extend credit (either directly or through a Federal home loan bank) to financial institutions or others.

(p) Access to information necessary for administration of certain veteran benefits laws

(1) Nothing in this chapter shall apply to the disclosure by the financial institution of the name and address of any customer to the Department of Veterans Affairs where the disclosure of such information is necessary to, and such information is used solely for the purposes of, the proper administration of benefits programs under laws administered by the Secretary.

(2) Notwithstanding any other provision of law, any request authorized by paragraph (1) (and the information contained therein) may be used by the financial institution or its agents solely for the purpose of providing the customer‘s name and address to the Department of Veterans Affairs and shall be barred from redisclosure by the financial institution or its agents.

(q) Disclosure pursuant to Federal contractor-issued travel charge card

Nothing in this chapter shall apply to the disclosure of any financial record or information to a Government authority in conjunction with a Federal contractor-issued travel charge card issued for official Government travel.

(r) Disclosure to the Bureau of Consumer Financial Protection

Nothing in this chapter shall apply to the examination by or disclosure to the Bureau of Consumer Financial Protection of financial records or information in the exercise of its authority with respect to a financial institution.

12 U.S.C. § 3417 - Civil penalties

(a) Liability of agencies or departments of United States or financial institutions

Any agency or department of the United States or financial institution obtaining or disclosing financial records or information contained therein in violation of this chapter is liable to the customer to whom such records relate in an amount equal to the sum of—

(1) $100 without regard to the volume of records involved;

(2) any actual damages sustained by the customer as a result of the disclosure;

(3) such punitive damages as the court may allow, where the violation is found to have been willful or intentional; and

(4) in the case of any successful action to enforce liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

(b) Disciplinary action for willful or intentional violation of chapter by agents or employees of department or agency

Whenever the court determines that any agency or department of the United States has violated any provision of this chapter and the court finds that the circumstances surrounding the violation raise questions of whether an officer or employee of the department or agency acted willfully or intentionally with respect to the violation, the Director of the Office of Personnel Management shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the agent or employee who was primarily responsible for the violation. The Director after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Director recommends.

(c) Good faith defense

Any financial institution or agent or employee thereof making a disclosure of financial records pursuant to this chapter in good-faith reliance upon a certificate by any Government authority or pursuant to the provisions of section 3413(l) of this title shall not be liable to the customer for such disclosure under this

chapter, the constitution of any State, or any law or regulation of any State or any political subdivision of any State.

(d) Exclusive judicial remedies and sanctions

The remedies and sanctions described in this chapter shall be the only authorized judicial remedies and sanctions for violations of this chapter.

26 U.S.C. § 7431 - Civil damages for unauthorized inspection or disclosure of returns and return information

(a) In general

(1) Inspection or disclosure by employee of United States

If any officer or employee of the United States knowingly, or by reason of negligence, inspects or discloses any return or return information with respect to a taxpayer in violation of any provision of section 6103, such taxpayer may bring a civil action for damages against the United States in a district court of the United States.

(2) Inspection or disclosure by a person who is not an employee of United States

If any person who is not an officer or employee of the United States knowingly, or by reason of negligence, inspects or discloses any return or return information with respect to a taxpayer in violation of any provision of section 6103 or in violation of section 6104(c), such taxpayer may bring a civil action for damages against such person in a district court of the United States.

(b) Exceptions

No liability shall arise under this section with respect to any inspection or disclosure—

(1) which results from a good faith, but erroneous, interpretation of section 6103, or

(2) which is requested by the taxpayer.

(c) Damages

In any action brought under subsection (a), upon a finding of liability on the part of the defendant, the defendant shall be liable to the plaintiff in an amount equal to the sum of—

(1) the greater of—

(A) $1,000 for each act of unauthorized inspection or disclosure of a return or return information with respect to which such defendant is found liable, or

(B) the sum of—

(i) the actual damages sustained by the plaintiff as a result of such unauthorized inspection or disclosure, plus

(ii) in the case of a willful inspection or disclosure or an inspection or disclosure which is the result of gross negligence, punitive damages, plus

(2) the costs of the action, plus

(3) in the case of a plaintiff which is described in section 7430(c)(4)(A)(ii), reasonable attorneys fees,

except that if the defendant is the United States, reasonable attorneys fees may be awarded only if the plaintiff is the prevailing party (as determined under section 7430(c)(4)).

(d) Period for bringing action

Notwithstanding any other provision of law, an action to enforce any liability created under this section may be brought, without regard to the amount in controversy, at any time within 2 years after the date of discovery by the plaintiff of the unauthorized inspection or disclosure.

(e) Notification of unlawful inspection and disclosure

If any person is criminally charged by indictment or information with inspection or disclosure of a taxpayer‘s return or return information in violation of—

(1) paragraph (1) or (2) of section 7213(a),

(2) section 7213A(a), or

(3) subparagraph (B) of section 1030(a)(2) of title 18, United States Code,

the Secretary shall notify such taxpayer as soon as practicable of such inspection or disclosure.

(f) Definitions

For purposes of this section, the terms “inspect”, “inspection”, “return”, and “return information” have the respective meanings given such terms by section 6103(b).

(g) Extension to information obtained under section 3406For purposes of this section—

(1) any information obtained under section 3406 (including information with respect to any payee certification failure under subsection (d) thereof) shall be treated as return information, and

(2) any inspection or use of such information other than for purposes of meeting any requirement under section 3406 or (subject to the safeguards set forth in section 6103) for purposes permitted under section 6103 shall be treated as a violation of section 6103.

For purposes of subsection (b), the reference to section 6103 shall be treated as including a reference to section 3406.

(h) Special rule for information obtained under section 6103(k)(9)

For purposes of this section, any reference to section 6103 shall be treated as including a reference to section 6311(e).

26 U.S.C.§ 7432 - Civil damages for failure to release lien

(a) In general

If any officer or employee of the Internal Revenue Service knowingly, or by reason of negligence, fails to release a lien under section 6325 on property of the taxpayer, such taxpayer may bring a civil action for damages against the United States in a district court of the United States.

(b) Damages

In any action brought under subsection (a), upon a finding of liability on the part of the defendant, the defendant shall be liable to the plaintiff in an amount equal to the sum of—

(1) actual, direct economic damages sustained by the plaintiff which, but for the actions of the defendant, would not have been sustained, plus

(2) the costs of the action.

(c) Payment authority

Claims pursuant to this section shall be payable out of funds appropriated under section 1304 of title 31, United States Code.

(d) Limitations

(1) Requirement that administrative remedies be exhausted

A judgment for damages shall not be awarded under subsection (b) unless the court determines that the plaintiff has exhausted the administrative remedies available to such plaintiff within the Internal Revenue Service.

(2) Mitigation of damages

The amount of damages awarded under subsection (b)(1) shall be reduced by the amount of such damages which could have reasonably been mitigated by the plaintiff.

(3) Period for bringing action

Notwithstanding any other provision of law, an action to enforce liability created under this section may be brought without regard to the amount in controversy and may be brought only within 2 years after the date the right of action accrues.

(e) Notice of failure to release lien

The Secretary shall by regulation prescribe reasonable procedures for a taxpayer to notify the Secretary of the failure to release a lien under section 6325 on property of the taxpayer.

26 U.S.C. § 7433 - Civil damages for certain unauthorized collection actions

(a) In general

If, in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service recklessly or intentionally, or by reason of negligence, disregards any provision of this title, or any regulation promulgated under this title, such taxpayer may bring a civil action for damages against the United States in a district court of the United States. Except as provided in section 7432, such civil action shall be the exclusive remedy for recovering damages resulting from such actions.

(b) Damages

In any action brought under subsection (a) or petition filed under subsection (e), upon a finding of liability on the part of the defendant, the defendant shall be liable to the plaintiff in an amount equal to the lesser of

$1,000,000 ($100,000, in the case of negligence) or the sum of—

(1) actual, direct economic damages sustained by the plaintiff as a proximate result of the reckless or intentional or negligent actions of the officer or employee, and

(2) the costs of the action.

(c) Payment authority

Claims pursuant to this section shall be payable out of funds appropriated under section 1304 of title 31, United States Code.

(d) Limitations

(1) Requirement that administrative remedies be exhausted

A judgment for damages shall not be awarded under subsection (b) unless the court determines that the plaintiff has exhausted the administrative remedies available to such plaintiff within the Internal Revenue Service.

(2) Mitigation of damages

The amount of damages awarded under subsection (b)(1) shall be reduced by the amount of such damages which could have reasonably been mitigated by the plaintiff.

(3) Period for bringing action

Notwithstanding any other provision of law, an action to enforce liability created under this section may be brought without regard to the amount in

controversy and may be brought only within 2 years after the date the right of action accrues.

(e) Actions for violations of certain bankruptcy procedures

(1) In general

If, in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service willfully violates any provision of section 362 (relating to automatic stay) or 524 (relating to effect of discharge) of title 11, United States Code (or any successor provision), or any regulation promulgated under such provision, such taxpayer may petition the bankruptcy court to recover damages against the United States.

(2) Remedy to be exclusive

(A) In general

Except as provided in subparagraph (B), notwithstanding section 105 of such title 11, such petition shall be the exclusive remedy for recovering damages resulting from such actions.

(B) Certain other actions permitted

Subparagraph (A) shall not apply to an action under section 362(h) of such title 11 for a violation of a stay provided by section 362 of such title; except that—

(i) administrative and litigation costs in connection with such an action may only be awarded under section 7430; and

(ii) administrative costs may be awarded only if incurred on or after the date that the bankruptcy petition is filed.

26 U.S.C. § 7434 - Civil damages for fraudulent filing of information returns

(a) In general

If any person willfully files a fraudulent information return with respect to payments purported to be made to any other person, such other person may bring a civil action for damages against the person so filing such return.

(b) Damages

In any action brought under subsection (a), upon a finding of liability on the part of the defendant, the defendant shall be liable to the plaintiff in an amount equal to the greater of $5,000 or the sum of—

(1) any actual damages sustained by the plaintiff as a proximate result of the filing of the fraudulent information return (including any costs attributable to resolving deficiencies asserted as a result of such filing),

(2) the costs of the action, and

(3) in the court's discretion, reasonable attorneys' fees.

(c) Period for bringing action

Notwithstanding any other provision of law, an action to enforce the liability created under this section may be brought without regard to the amount in

controversy and may be brought only within the later of—

(1) 6 years after the date of the filing of the fraudulent information return, or

(2) 1 year after the date such fraudulent information return would have been discovered by exercise of reasonable care.

(d) Copy of complaint filed with IRS

Any person bringing an action under subsection (a) shall provide a copy of the complaint to the Internal Revenue Service upon the filing of such complaint with the court.

(e) Finding of court to include correct amount of payment

The decision of the court awarding damages in an action brought under subsection (a) shall include a finding of the correct amount which should have been reported in the information return.

(f) Information return

For purposes of this section, the term "information return" means any statement described in section 6724(d)(1)(A).

26 U.S.C. § 7435 - Civil damages for unauthorized enticement of information disclosure

(a) In general

If any officer or employee of the United States intentionally compromises the determination or collection of any tax due from an attorney, certified public accountant, or enrolled agent representing a taxpayer in exchange for information conveyed by the taxpayer to the attorney, certified public accountant, or enrolled agent for purposes of obtaining advice concerning the taxpayer's tax liability, such taxpayer may bring a civil action for damages against the United States in a district court of the United States. Such civil action shall be the exclusive remedy for recovering damages resulting from such actions.

(b) Damages

In any action brought under subsection (a), upon a finding of liability on the part of the defendant, the defendant shall be liable to the plaintiff in an amount equal to the lesser of $500,000 or the sum of—

(1) actual, direct economic damages sustained by the plaintiff as a proximate result of the information disclosure, and

(2) the costs of the action.

Damages shall not include the taxpayer‘s liability for any civil or criminal penalties, or other losses attributable to incarceration or the imposition of other criminal sanctions.

(c) Payment authority

Claims pursuant to this section shall be payable out of funds appropriated under section 1304 of title 31, United States Code.

(d) Period for bringing action

Notwithstanding any other provision of law, an action to enforce liability created under this section may be brought without regard to the amount in controversy and may be brought only within 2 years after the date the actions creating such liability would have been discovered by exercise of reasonable care.

(e) Mandatory stay

Upon a certification by the Commissioner or the Commissioner‘s delegate that there is an ongoing investigation or prosecution of the taxpayer, the district court before which an action under this section is pending shall stay all proceedings with respect to such action pending the conclusion of the investigation or prosecution.

(f) Crime-fraud exception

Subsection (a) shall not apply to information conveyed to an attorney, certified public accountant, or enrolled agent for the purpose of perpetrating a fraud or crime.

26 U.S.C. § 7609 - Special procedures for third-party summonses

(a) Notice

(1) In general

If any summons to which this section applies requires the giving of testimony on or relating to, the production of any portion of records made or kept on or relating to, or the production of any computer software source code (as defined in 7612(d)(2)) with respect to, any person (other than the person summoned) who is identified in the summons, then notice of the summons shall be given to any person so identified within 3 days of the day on which such service is made, but no later than the 23rd day before the day fixed in the summons as the day upon which such records are to be examined. Such notice shall be accompanied by a copy of the summons which has been served and shall contain an explanation of the right under subsection (b)(2) to bring a proceeding to quash the summons.

(2) Sufficiency of notice

Such notice shall be sufficient if, on or before such third day, such notice is served in the manner provided in section 7603 (relating to service of summons) upon the person entitled to notice, or is mailed by certified or registered mail to the last known address of such person, or, in the absence of a last known address, is left with the person summoned. If such notice is mailed, it shall be sufficient if mailed to the last known address of the

person entitled to notice or, in the case of notice to the Secretary under section 6903 of the existence of a fiduciary relationship, to the last known address of the fiduciary of such person, even if such person or fiduciary is then deceased, under a legal disability, or no longer in existence.

(3) Nature of summons

Any summons to which this subsection applies (and any summons in aid of collection described in subsection (c)(2)(D)) shall identify the taxpayer to whom the summons relates or the other person to whom the records pertain and shall provide such other information as will enable the person summoned to locate the records required under the summons.

(b) Right to intervene; right to proceeding to quash

(1) Intervention

Notwithstanding any other law or rule of law, any person who is entitled to notice of a summons under subsection (a) shall have the right to intervene in any proceeding with respect to the enforcement of such summons under section 7604.

(2) Proceeding to quash

(A) In general

Notwithstanding any other law or rule of law, any person who is entitled to notice of a summons under subsection (a) shall have the right to begin a proceeding to quash such summons not later than the 20th day after the day such notice is given in the manner provided

in subsection (a)(2). In any such proceeding, the Secretary may seek to compel compliance with the summons.

(B) Requirement of notice to person summoned and to Secretary

If any person begins a proceeding under subparagraph (A) with respect to any summons, not later than the close of the 20-day period referred to in subparagraph (A) such person shall mail by registered or certified mail a copy of the petition to the person summoned and to such office as the Secretary may direct in the notice referred to in subsection (a)(1).

(C) Intervention; etc.

Notwithstanding any other law or rule of law, the person summoned shall have the right to intervene in any proceeding under subparagraph (A). Such person shall be bound by the decision in such proceeding (whether or not the person intervenes in such proceeding).

(c) Summons to which section applies

(1) In general

Except as provided in paragraph (2), this section shall apply to any summons issued under paragraph (2) of section 7602(a) or under section 6420(e)(2), 6421(g)(2), 6427(j)(2), or 7612.

(2) Exceptions

This section shall not apply to any summons—

(A) served on the person with respect to whose liability the summons is issued, or any officer or employee of such person;

(B) issued to determine whether or not records of the business transactions or affairs of an identified person have been made or kept;

(C) issued solely to determine the identity of any person having a numbered account (or similar arrangement) with a bank or other institution described in section 7603(b)(2)(A);

(D) issued in aid of the collection of—

(i) an assessment made or judgment rendered against the person with respect to whose liability the summons is issued; or

(ii) the liability at law or in equity of any transferee or fiduciary of any person referred to in clause (i); or

(E)

(i) issued by a criminal investigator of the Internal Revenue Service in connection with the investigation of an offense connected with the administration or enforcement of the internal revenue laws; and

(ii) served on any person who is not a third-party recordkeeper (as defined in section 7603(b)).

(3) John Doe and certain other summonses

Subsection (a) shall not apply to any summons described in subsection (f) or (g).

(4) Records

For purposes of this section, the term "records" includes books, papers, and other data.

(d) Restriction on examination of records

No examination of any records required to be produced under a summons as to which notice is required under subsection (a) may be made—

(1) before the close of the 23rd day after the day notice with respect to the summons is given in the manner provided in subsection (a)(2), or

(2) where a proceeding under subsection (b)(2)(A) was begun within the 20-day period referred to in such subsection and the requirements of subsection (b)(2)(B) have been met, except in accordance with an order of the court having jurisdiction of such proceeding or with the consent of the person beginning the proceeding to quash.

(e) Suspension of statute of limitations

(1) Subsection (b) action

If any person takes any action as provided in subsection (b) and such person is the person with respect to whose liability the summons is issued (or is the agent, nominee, or other person acting under the direction or control of such person), then the running of any period of limitations under section 6501 (relating to the assessment and collection of tax) or under section 6531 (relating to criminal prosecutions) with respect to such person shall be suspended for the period during which a proceeding,

and appeals therein, with respect to the enforcement of such summons is pending.

(2) Suspension after 6 months of service of summons

In the absence of the resolution of the summoned party's response to the summons, the running of any period of limitations under section 6501 or under section 6531 with respect to any person with respect to whose liability the summons is issued (other than a person taking action as provided in subsection (b)) shall be suspended for the period—

(A) beginning on the date which is 6 months after the service of such summons, and

(B) ending with the final resolution of such response.

(f) Additional requirement in the case of a John Doe summons

Any summons described in subsection (c)(1) 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

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

(g) Special exception for certain summonses

A summons is described in this subsection if, upon petition by the Secretary, the court determines, on the basis of the facts and circumstances alleged, that there is reasonable cause to believe the giving of notice may lead to attempts to conceal, destroy, or alter records relevant to the examination, to prevent the communication of information from other persons through intimidation, bribery, or collusion, or to flee to avoid prosecution, testifying, or production of records.

(h) Jurisdiction of district court; etc.

(1) Jurisdiction

The United States district court for the district within which the person to be summoned resides or is found shall have jurisdiction to hear and determine any proceeding brought under subsection (b)(2), (f), or (g). An order denying the petition shall be deemed a final order which may be appealed.

(2) Special rule for proceedings under subsections (f) and (g)

The determinations required to be made under subsections (f) and (g) shall be made ex parte and shall be made solely on the petition and supporting affidavits.

(i) Duty of summoned party

(1) Recordkeeper must assemble records and be prepared to produce records

On receipt of a summons to which this section applies for the production of records, the summoned party shall proceed to assemble the records requested, or such portion thereof as the Secretary may prescribe, and shall be prepared to produce the records pursuant to the summons on the day on which the records are to be examined.

(2) Secretary may give summoned party certificate

The Secretary may issue a certificate to the summoned party that the period prescribed for beginning a proceeding to quash a summons has expired and that no such proceeding began within such period, or that the taxpayer consents to the examination.

(3) Protection for summoned party who discloses

Any summoned party, or agent or employee thereof, making a disclosure of records or testimony pursuant to this section in good faith reliance on the certificate of the Secretary or an order of a court requiring production of records or the giving of such testimony shall not be liable to any customer or other person for such disclosure.

(4) Notice of suspension of statute of limitations in the case of a John Doe summons

In the case of a summons described in subsection (f) with respect to which any period of limitations has been suspended under subsection (e)(2), the

summoned party shall provide notice of such suspension to any person described in subsection (f).

(j) Use of summons not required

Nothing in this section shall be construed to limit the Secretary's ability to obtain information, other than by summons, through formal or informal procedures authorized by sections 7601 and 7602.