Senator Chuck Grassley
Kathryn Keneally
Nominee, Assistant Attorney General (Tax), U.S. Department of Justice
Questions for the Record

1. In 2006, I authored changes to the longstanding whistleblower provisions at the IRS. The changes were made to incentivize whistleblowing on big-dollar tax fraud. A recent GAO report indicates that my efforts were successful. The IRS has received tips on more than 9,500 taxpayers from 1,400 whistleblowers in just five years. However, I remain concerned that the IRS, like the Justice Department with the False Claims Act revisions I authored in 1986, continues to treat whistleblowers like skunks at a picnic. For example, the IRS's offshore compliance programs likely would not have achieved the success it has without the information it received from a foreign bank employee. Yet, as I stated in a letter to the IRS Commissioner in June, 2010, I have serious doubts that the IRS effectively utilized the information provided to it by the UBS whistleblower. Information from whistleblowers should result in easy money for the IRS – which is really easy money for the federal government. In the UBS case, the Department of Justice sat on the information provided by the whistleblower for a very long time before acting on it. The IRS has a policy that whistleblower cases will not be prioritized over other audits.

    a. Do you agree with this policy?

Answer: The legislative changes enacted as part of the Tax Relief and Health Care Act of 2006 made important changes to the IRS whistleblower policy, most significantly by requiring the creation of an IRS Whistleblower Office and mandating payment to whistleblowers under the conditions set out in Section 7623(b) of the Internal Revenue Code. I believe that these provisions greatly strengthened the policy concerning whistleblowers, and created a valuable tool for tax enforcement. While I am not familiar with an IRS policy not to give whistleblower cases priority treatment, I believe that information provided to the IRS Whistleblower Office is very valuable to tax enforcement.

    b. What steps will you take to ensure the success of the IRS whistleblower program?

Answer: While I understand that the IRS whistleblower program functions as part of the IRS and not as part of the Department of Justice Tax Division, I believe that the whistleblower program is an important part of tax enforcement. If I am given the opportunity to serve as the Assistant Attorney General of the Tax Division, I will work diligently to further a strong working relationship between the Department of Justice Tax Division and the IRS, including the IRS Whistleblower Office.

    c. Attorney General Holder is aware of my concerns about whistleblower claims languishing at the Justice Department. Will you work with him to prioritize tax whistleblower cases?

Answer: If I am so fortunate as to be confirmed, I will communicate within the Department of Justice my respect for the IRS Whistleblower Office, and for the important role of whistleblower cases in tax enforcement.

2. On several occasions you have expressed opposition to the federal sentencing guidelines. In an article you wrote in the August 2004 edition of *White Collar Crime*, you used the sentence given to an executive of Dynergy Inc., who was indicted for accounting fraud, to argue that the sentencing guidelines have failed in their objective to create uniformity and proportionality in sentencing. You further argued that the "the current guideline system is not honest." Do you continue to have concerns about the sentencing guidelines? Please explain.

   Answer: I do not continue to have the concerns about the U.S. Sentencing Guidelines that I expressed in the August 2004 edition of *White Collar Crime.* I believe that judicial decisions since that time have remedied these concerns. I am in agreement with the original objective of the Guidelines to create uniformity and proportionality in sentencing. I began my practice before the enactment of the Guidelines, and had personal experience with the extreme variation in sentencing that occurred between similarly situated defendants prior to the Guidelines. I believe that the Guidelines as currently interpreted and applied strike a good balance between the pre-Guidelines failure of sentences to be uniform and proportionate, and the post-Guidelines anomalies discussed in my August 2004 article. I served for many years as a member of the Practitioners' Advisory Group to the U.S. Sentencing Commission. I have not been in general opposition to the Guidelines, but have instead worked for the improvement of the Guidelines.

3. As the Assistant Attorney General for the Tax Division will your views on the Guidelines inhibit you in any way from prosecuting suspected tax evaders to the full extent of the law?

   Answer: If I am confirmed, I will use and encourage the use of the tools available for effective tax enforcement, including the Guidelines. I hold no views, either with regard to the Guidelines or any other aspect of tax enforcement, that would inhibit me in any way from prosecuting suspected tax evaders to the full extent of the law.

4. You have been highly critical of DOJ Directive No. 128, which provides guidance for charging individuals with mail and wire fraud conspiracy in lieu of, or in addition to, criminal tax charges. As the Assistant Attorney General for the Tax Division will you seek to modify this directive? If so, how?

   Answer: I am in agreement with the general principles stated in Directive 128, and with the examples provided in Directive 128 concerning the types of circumstances that might warrant the authorization of charges in lieu of or in addition to tax charges. It is my view that, in the seven years since the issuance of Directive 128, the standards set out in Directive 128 have been applied with careful regard to the principles and goals of tax enforcement. I do not believe that the concerns that I expressed in the early period following the issuance of Directive 128 have been borne out by its implementation. In general, I do not believe in fixing something that does not appear to be broken. While there may be some extraneous language in

Directive 128 that could be stated more clearly, if I am confirmed as Assistant Attorney General for the Tax Division, I would not seek to change the core principles of Directive 128.

5. All federal agencies are facing budget cuts. As a result, these agencies, including the IRS and the Department of Justice, need to do a better job of allocating their resources to ensure the best bang for the buck. What are your recommendations for targeting these limited resources?

   Answer: It is of central importance that the Tax Division focus enforcement activity in a manner that fosters voluntary compliance with tax laws by all taxpayers. The Tax Division's Offshore Compliance Initiative is an excellent example of a program that has relied on civil and criminal tax enforcement to encourage large numbers of taxpayers to make voluntary disclosures of past wrongdoing. This initiative should be continued, and looked to as a model. It is also always important to pursue tax professionals who engage in tax evasion or abusive tax avoidance, for example through the promotion of fraudulent schemes, the preparation of false tax returns, or personal non-compliance. Civil and criminal enforcement against such tax professionals can have a broad impact in general and specific deterrence.

   The Tax Division must look to the IRS for case development and referrals. If I am confirmed, I will make every effort to foster a strong relationship between the Tax Division and the IRS, and to encourage the development of those cases that will have the greatest impact. In this regard, as previously stated, I will remain aware of the potential benefits of cases that can be developed through the IRS whistleblower program.

6. If confirmed, what will be your biggest challenges? How will you address those challenges?

   Answer: I believe that the previous question identified what will likely be the biggest challenge for the Tax Division: the effective allocation of increasingly limited resources for the greatest impact on tax compliance. If I am given the opportunity to serve as Assistant Attorney General for the Tax Division, I will work to prioritize those enforcement efforts, such as the Offshore Compliance Initiative, that will further this goal. If confirmed, I will also work to strengthen the good relationship between the Tax Division and the IRS, and to take the greatest advantage of IRS activities, such as its whisteblower program, to further tax enforcement.

7. What goals will you set for the first year on the job?

   Answer: If I am so fortunate as to be confirmed, my first goal will be to listen and to learn about the current enforcement efforts of the Tax Division. The Tax Division has currently identified the Offshore Compliance Initiative as its top litigation priority, and I agree with that position. I also believe that enforcement against tax professionals who promote fraudulent schemes, prepare false tax returns, or personally commit tax crimes, should be an enforcement priority, through criminal prosecution and civil enforcement, including injunction actions. I also recognize and, if confirmed, will be committed to enforcement against those who seek to undermine our tax system by wrongly denying the legitimacy of our tax laws .

8. Do you think that IRS Criminal Investigations should be permitted to work directly with US Attorneys instead of having DOJ Tax approval in most cases?

Answer: I strongly support the policy by which the Tax Division reviews and authorizes criminal tax charges. The tax system touches all U.S. citizens, residents, and those who earn income in this country. Ensuring that the tax laws are enforced fairly and consistently is central to the mission of the Tax Division. I have practiced in the Southern District of New York, where it is my understanding and has been my experience that there are many instances in which IRS Criminal Investigation works directly with the U.S. Attorney's Office in grand jury investigations of criminal tax cases. In jurisdictions, such as the Southern District of New York, that develop local prosecutorial tax expertise, this cooperative effort can be a valuable and efficient use of resources. I believe it remains important that the Tax Division retain the final authority to approve tax charges even in such circumstances.

9. How much time do you think is appropriate for IRS CI agents to spend on assisting Justice Department prosecutions that are not tax-related? What benefit does the Justice Department derive from using such assistance when such resources may be better used for tax enforcement? Aren't we robbing Peter to pay Paul by using resources for non-tax issues?

   Answer: The United States faces great challenges as a result of the tax gap, and IRS agents are on the front line of addressing this challenge. The first priority for IRS agents should be the fair and consistent enforcement of tax laws, to address the tax gap challenge and to ensure that those taxpayers who are in tax compliance can have confidence that there will be enforcement against those who are not in compliance. I believe, based on my experience, that IRS Criminal Investigation special agents are by training and experience among the very best in the world at investigating financial transactions and developing evidence of financial crime. There may be exceptional circumstances, such as anti-terrorism enforcement, when it may be appropriate that the skills of IRS agents be used to meet other national needs.

10. Do you believe that dual purpose summonses are appropriate?

    Answer: Yes. The Supreme Court determined in *Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310 (1985), that dual purpose summonses do not need to meet the requirements for John Doe summonses set out in Internal Revenue Code section 7609(f).

11. Due to the controversy surrounding the use of the term "tax protester", a recent Assistant AG for Tax coined the term "tax denier." Do you agree with this terminology and do you expect to use it?

    Answer: I agree wholeheartedly that enforcement against individuals who willfully refuse to accept the legitimacy of U.S. tax laws must be a priority. I also believe strongly that it is essential to use criminal and civil enforcement, including injunction actions, to stop those who promote schemes to encourage non-compliance with U.S. tax laws. I recognize the issues concerning the term "tax protester." In my view, the individuals who fall into the category defined as "tax deniers" or "tax defiers" are simply tax cheats. The terms "tax deniers" or "tax defiers" are fine terms. The important issue is that there be enforcement against such individuals, who are engaged in wrongful conduct, not free speech. I would like to note that while I have represented many individuals and companies in civil and criminal tax litigation,

because "tax deniers" or "tax defiers" insist on making arguments that have no basis in law, I have never represented anyone who falls in this category.

12. What changes would you suggest to the civil injunction program to combat abuse by preparers?

Answer: Enforcement against tax professionals who promote fraudulent schemes, prepare false tax returns, or personally commit tax crimes, should be an enforcement priority, through criminal prosecution and civil enforcement, including injunction actions. The past decade has seen a significant increase in the Tax Division's use of civil injunctions against tax fraud promoters and fraudulent return preparers. I understand that the Tax Division participates in IRS training classes and conferences to help IRS agents and attorneys learn how to conduct an investigation that leads to a successful injunction referral. Fostering this strong working relationship between the Tax Division and the IRS will benefit the civil injunction program and other areas of tax enforcement.

13. Do you believe the current number of such injunctions has a sufficient deterrent effect?

Answer: Civil injunctions have a strong deterrent effect, by shutting down the activities of tax fraud promoters and fraudulent return preparers, and also by sending a message that deters others from ever engaging in such activity. It is my understanding that the Tax Division is strongly committed to this enforcement tool, and I support that commitment. Because I am not at the Tax Division, I cannot say whether the current number of injunctions is sufficient, or whether more resources can and should be directed at this effort.

14. What role should the DOJ Tax Division have in distinguishing aggressive tax planning from obstruction of justice, i.e., KPMG and UBS?

Answer: The fair and consistent enforcement of the tax laws is a central part of the stated mission of the Tax Division. To meet this mission, the Tax Division must determine whether tax violations should be pursued through criminal or civil enforcement, or a combination of both. When aggressive tax planning results in the underpayment of tax, there should be civil enforcement to recover tax, interest, and appropriate penalties. When aggressive tax planning crosses the line into fraudulent activity, criminal prosecution may be appropriate, depending on the evidence and available prosecutorial resources. In either circumstance, the use of civil injunctions can be an effective general and specific deterrent. Obstruction of justice is a crime, and should be prosecuted as such.

15. How would you coordinate the activities of the Southern District of New York and other U.S. Attorneys' offices that are outside the direct supervision of the AAG for Tax? Do you think the tax function of the Southern District of New York should be placed under the supervision of the AAG for Tax?

Answer: If I am given the opportunity to serve as the Assistant Attorney General for the Tax Division, I would commit myself to fostering strong working relationships with local U.S. Attorney Offices. I have practiced in the Southern District of New York, and it has been my experience and observation that the U.S. Attorney's Office has a respectful and cooperative

relationship with the Tax Division in civil and criminal tax matters. In jurisdictions, such as the Southern District of New York, that develop local prosecutorial tax expertise, this cooperative effort can be a valuable and efficient use of resources. In these jurisdictions, the Tax Division currently retains the final authority to approve criminal tax charges, and I believe that it is important that the Tax Division continue to exercise this authority.

16. What is your view of the Cheek defense? Do you believe that willful ignorance should ever be a defense to a criminal charge?

    Answer: The principal criminal tax statutes include a requirement that it be shown that the defendant acted willfully, which the Supreme Court reiterated in *Cheek v. United States*, 498 U.S. 198 (1990), "requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty." I believe that it is important that criminal sanctions be imposed for criminal conduct. However, given the complexity of the tax laws, criminal sanctions should not be imposed as a result of a good faith mistake or ignorance with regard to the tax laws. For this reason, I agree with the inclusion of the willfulness element in the criminal tax laws, and the definition of willfulness in *Cheek*. Subsequent to *Cheek*, several Circuit Courts have held that *Cheek* does not preclude that the jury be instructed that a defendant cannot make himself "willfully blind" (or in other words, "willfully ignorant") to the requirements of the tax laws. Further, the Supreme Court in *Cheek* also held that willfulness did not permit a defendant who objectively understood the tax law to assert his disagreement with the tax law as a defense.

17. Please describe with particularity the process by which these questions were answered.

    Answer: I reviewed each question. When appropriate, I reviewed publicly available materials relating to the questions. As examples, I reviewed the legislation and the IRS statements concerning its whistleblower program, information available on the Tax Division's website, and case law discussed in these answers. I prepared a complete first draft of answers to these questions. I received and considered comments from representatives of the Department of Justice. I prepared my final answers and forwarded them to the Department. I understand that the Department will submit my answers to the Committee.

18. Do these answers reflect your true and personal views?

    Answer: Yes.

Written Questions of Senator Tom Coburn, M.D.
Nomination of Kathryn Keneally to be Assistant Attorney General, Tax Division
Department of Justice
United States Senate Committee on the Judiciary
November 22, 2011

1. What will be your strategy regarding the Department of Justice's approach to offshore tax evasion?

   Answer: The Tax Division has stated that its top litigation priority is civil and criminal enforcement against non-compliance with U.S. tax laws by taxpayers who use secret offshore bank accounts. I fully support the Tax Division's Offshore Compliance Initiative. It is important to encourage taxpayers to remedy past non-compliance through voluntary disclosure, and to pursue criminal prosecution and civil penalties against those in non-compliance. The public efforts by the Tax Division to obtain the disclosure of U.S. account-holders by foreign banks, through negotiations and enforcement, have resulted in record numbers of voluntary disclosures and a significant number of convictions. These efforts should be continued. In addition, the Internal Revenue Service has recently begun several initiatives to improve its examinations of international corporate tax matters and global high wealth taxpayers. If confirmed, I will work to further a strong relationship with the IRS, and thereby enable the Tax Division to continue to engage in effective civil and criminal tax enforcement in offshore and international matters.

2. How will the Department structure its negotiations with countries that are havens for tax evasion in order to gain important information to initiate criminal prosecutions?

   Answer: I understand and respect that the role of the Tax Division is to enforce tax laws, and that negotiations with other countries are the purview of the Treasury and State Departments. If I am confirmed as the Assistant Attorney General for the Tax Division, I will support initiatives that will aid civil and criminal enforcement against offshore tax evasion. If called upon, I will support efforts to improve the disclosure of information to combat offshore tax evasion.

3. The Tax Division employs over 350 attorneys in 14 civil, criminal and appellate sections. What management experience in your background has prepared you to lead the Tax Division? Please provide specific examples.

   Answer: I currently serve as the Vice Chair for Committee Operations for the American Bar Association Section of Taxation. In this position, I am responsible for overseeing the operations of over thirty committees that address issues concerning all areas of substantive tax and tax procedure, as well as the Section's committees on diversity, low income taxpayers, and pro bono services. In addition to the management experience that I have gained in this position, I have participated in meetings with and submissions of

comments to the Internal Revenue Service and the Treasury Department, as well as the Tax Division.

I previously served as chair of the ABA Section of Taxation's Committee on Standards of Tax Practice, which addresses ethical standards in tax practice, and as chair of the Section's Committee on Civil and Criminal Tax Penalties, which addresses issues relating to all aspects of criminal and civil tax controversy. During my tenure in as chair of each of these committees, membership participation increased by significant numbers.

I have also managed cases with large teams of lawyers. For example, I was the leader of a team of attorneys that represented over one hundred high-networth individuals in examinations before the Internal Revenue Service relating to listed transactions (tax shelters). The IRS examinations of these clients were conducted throughout the country over a period of several years. As part of this representation, I coordinated and led presentations to IRS personnel in connection with the drafting of a global settlement initiative, and led the legal team in representations before IRS Examinations and Appeals and in providing guidance to clients concerning settlement proposals. I would like to note that, although I have represented taxpayers before the IRS and in litigation concerning listed transactions or tax shelters, I have never structured, promoted, or advised a client to participate in these types of transactions, and I have instead advised strongly against participation in such transactions.

4. The Tax Division has an office under its civil section focused on the Court of Federal Claims, which "defends all tax suits filed in the United States Court of Federal Claims."

   a. Have you ever practiced before the Court of Federal Claims?

      Answer: I have not practiced before the Court of Federal Claims. I have represented taxpayers before the U.S. Tax Court and in U.S. district courts in matters involving tax issues that also fall within the jurisdiction of the Court of Federal Claims.

   b. If so, how many times have you appeared before the Court of Federal Claims?

      Answer: I have not practiced before the Court of Federal Claims.

   c. How many briefs or other documents have you filed with the Court of Federal Claims?

      Answer: I have not practiced before the Court of Federal Claims.

Questions for the Record from Senator Carl Levin
to
Kathryn Keneally, Esq., Nominee for
Assistant Attorney General for Tax Division, Department of Justice

1. For the past several years, the Department of Justice (DOJ) Tax Division has been engaged in a sustained effort to curtail offshore tax evasion, using civil and criminal proceedings to identify U.S. taxpayers with unreported accounts at foreign financial institutions. Among other measures, the Tax Division has prosecuted taxpayers with unreported accounts and unpaid taxes as well as bankers, attorneys, and other professionals who facilitated U.S. tax evasion.

a. If confirmed as Assistant Attorney General for the Tax Division, what priority would you place on that ongoing legal effort?

Answer: The Tax Division has currently identified the Offshore Compliance Initiative as its top litigation priority, and I agree with that position. I fully support the Tax Division's Offshore Compliance Initiative. It is important to encourage taxpayers to remedy past non-compliance through voluntary disclosure, and to pursue criminal prosecution and civil penalties against those in non-compliance. The public efforts by the Tax Division to obtain the disclosure of U.S. account-holders by foreign banks, through negotiations and enforcement, have resulted in record numbers of voluntary disclosures and a significant number of convictions. The Tax Division has also correctly and effectively focused enforcement efforts on the bankers, attorneys and other professionals who facilitated U.S. tax evasion. If confirmed, I will advocate that these efforts should be continued and must remain a priority.

b. What is your view of efforts by some foreign jurisdictions to provide a cash settlement in place of providing the names of U.S. taxpayers with unreported accounts in their jurisdictions?

Answer: The only information that I have concerning efforts by any foreign jurisdictions to provide a cash settlement in place of providing the names of U.S. taxpayers with unreported accounts comes from press reports. It is my view that cash settlements cannot serve the same law enforcement goals as obtaining the names of U.S. taxpayers with unreported accounts. It is essential that the Tax Division focus on enforcement that fosters voluntary compliance by taxpayers. When it became known that foreign banks would provide names of U.S. taxpayers with unreported accounts, a record number of taxpayers came forward to make voluntary disclosures. It was the fact that names might be disclosed that enabled the IRS to bring many thousands of taxpayers, and hundreds of millions of dollars, back into the tax system. It is also through the provision of names of U.S. taxpayers with unreported foreign bank accounts that the Tax Division has been able to prosecute criminal tax evasion.

2. In October 2000, a federal court approved a request by the Internal Revenue Service (IRS) to issue a John Doe summons to credit card companies to obtain the names of the holders of credit

cards issued by banks in three offshore tax havens, Antigua and Barbuda, the Bahamas, and the Cayman Islands. In 2001, you authored an article entitled, "Targeting Offshore Activities; The IRS's Next Step." In that article, you wrote that the IRS summons was unprecedented in scope and purpose and that the court's approval of the summons was "perfunctory," criticizing the court's determination that the IRS had met the three legal criteria for approval: that the IRS had identified an ascertainable class; the IRS had established that a reasonable basis existed to believe that the persons within that class may have violated tax laws; and the information sought by the subpoena was not readily available from other sources. You also noted the "extreme deference of the court in yielding to the IRS assertions," and called the summons a "fishing expedition," because it sought the records of all credit card holders at banks in the three offshore jurisdictions.

a. Do you still believe that the court's approval of the summons was perfunctory?

Answer: I believe that subsequent events proved the correctness of the John Doe summons in the investigation of the use of credit cards affiliated with offshore bank accounts to evade U.S. taxes. The October 2000 summons led to effective and significant tax enforcement. I also believe that the more recent use of John Doe summonses in connection with the enforcement efforts by the IRS and the Tax Division against the use of offshore bank accounts has been appropriate and highly effective.

b. You characterized the court as giving "extreme deference" to the IRS's assertions presented in its petition to the court. Do you believe that such deference was incorrect?

Answer: I believe that subsequent events proved the correctness of the John Doe summons in the investigation of the use of credit cards affiliated with offshore bank accounts to evade U.S. taxes. The October 2000 summons led to effective and significant tax enforcement. I also believe that the more recent use of John Doe summonses in connection with the enforcement efforts by the IRS and the Tax Division against the use of offshore bank accounts has been appropriate and highly effective.

c. You noted in the article that the IRS is required to petition and obtain approval for the issuance of a John Doe summons. Internal Revenue Code (IRC) Section 7609(h)(2) directs the IRS to proceed ex parte in the proceeding, and the statute expressly provides that the court shall make its determination "solely on the [IRS] petition and supporting affidavits." Do you disagree with the process established in IRC 7609(h)(2)? If so, what changes would you recommend in the statute?

Answer: I have no disagreement with the process established in IRC 7609(h)(2).

d. Do you still believe the summons issued by the IRS was a "fishing expedition"?

Answer: I believe that subsequent events proved the correctness of the John Doe summons in the investigation of the use of credit cards affiliated with offshore bank accounts to evade U.S. taxes. The October 2000 summons led to effective and significant tax enforcement. I also believe that the more recent use of John Doe summonses in connection with the enforcement efforts by the IRS and the Tax Division against the use of offshore bank accounts has been appropriate and highly effective.

e. If you were confirmed as Assistant Attorney General for the Tax Division, would you advocate against the issuance or use of similar types of summonses by the IRS?

Answer: No. If I am given the opportunity to serve as Assistant Attorney General for the Tax Division, I will use and encourage the use of the tools available for effective tax enforcement. The John Doe summons issued in October 2000 in connection with U.S. taxpayers who used credit cards affiliated with offshore bank accounts to evade U.S. taxes, and the more recent use of John Doe summonses in connection with the enforcement efforts by the IRS and the Tax Division against the use of offshore bank accounts, have demonstrated that such summonses can be highly effective in tax enforcement.

f. If confirmed as Assistant Attorney General for the Tax Division, would you advocate against DOJ supporting in court the IRS issuance of similar subpoenas?

Answer: No. If I am given the opportunity to serve as Assistant Attorney General for the Tax Division, I will use and encourage the use of the tools available for effective tax enforcement. The John Doe summons issued in October 2000 in connection with U.S. taxpayers who used credit cards affiliated with offshore bank accounts to evade U.S. taxes, and the more recent use of John Doe summonses in connection with the enforcement efforts by the IRS and the Tax Division against the use of offshore bank accounts, have demonstrated that such summonses can be highly effective in tax enforcement.

g. Do you believe that the John Doe summonses issued by the IRS against UBS Bank and HSBC Bank (subsequently withdrawn) were appropriate in scope? Were the reviews by the courts perfunctory? Did the courts give too much deference to IRS assertions contained in the petitions to the courts in support of those summonses?

Answer: I believe that John Doe summonses have been one of the most effective tools in the enforcement efforts by the IRS and the Tax Division against tax evasion through offshore bank accounts, and that John Doe summonses are a vital tool in tax enforcement. I have only a general familiarity with public reports concerning the proceedings surrounding the John Doe summonses against UBS Bank and HSBC Bank, and therefore cannot comment specifically concerning those proceedings. In conjunction with these John Doe summonses and other enforcement activities, the IRS announced two voluntary

disclosure initiatives, in 2009 and 2011, to provide U.S. taxpayers with offshore bank accounts an opportunity to avoid criminal liability and minimize penalties through voluntary disclosure. Based on my experience as a private practitioner representing taxpayers in the voluntary disclosure programs, I know that the publicity surrounding the John Doe summons proceedings, and the disclosure of account-holder names by foreign banks, was highly effective in motivating taxpayers to come into compliance.

h. As Assistant Attorney General for the Tax Division, would you advocate that any additional criteria or procedures be added to internal reviews by the IRS or DOJ before determining to seek judicial approval to serve, or seek enforcement of, a John Doe summons in a tax matter?

Answer: I have no reason to believe that additional criteria or procedures are necessary.

i. In the same article you were critical of IRS efforts to use Currency Transaction Reports (CTRs) and Cash Monetary Instrument Reports (CMIRs) to obtain information that could identify U.S. taxpayers who are failing to report offshore accounts, as required by law. The article suggested that the CTRs and the CMIRs were being misused by the IRS: "Now the IRS clearly hopes to use evidence developed through the debit and credit card records to tie taxpayers to currency transfers and foreign bank accounts. Instead of using the various reporting requirements to detect crime, the failure to have reported the transactions and the existence of offshore accounts will become the basis for criminal charges." Do you view the failure to report the existence of a foreign bank account on a federal tax form as a potential crime? Do you view the use of CTRs and CMIRs by the IRS to obtain information about unreported offshore accounts as inappropriate?

Answer: The willful failure to report the existence of a foreign bank account on a federal tax form is a crime. The willful failure to file CTRs and CMIRs, and willful conduct to cause CTRs and CMIRs not to be filed, are crimes. The use of CTRs and CMIRs has proven valuable to the IRS in tax enforcement, including in obtaining information about unreported offshore accounts.

It was not my intention that the referenced article suggest that CTRs and CMIRs were being misused by the IRS. The article was intended to alert the practitioner community of a change in the focus of the use of these forms in tax enforcement. To put the article in context, in 1999, the Webster Report had made significant findings that the IRS Criminal Investigation Division had moved from its core mission of tax enforcement, and that instead its resources had been diverted to drug enforcement. In 2000, IRS Criminal Investigation was reorganized and re-dedicated to tax enforcement as its primary mission. I am in general agreement with the conclusions of the Webster Report and the steps that were taken in response. The discussion in the article concerning CTRs and CMIRs was intended to report that these forms, which had previously been used to trace funds in

illegal activity such as drug enforcement, would now be the focus of criminal charges in tax cases.

j. As Assistant Attorney General for the Tax Division, would you advocate that the IRS not use information obtained through CMIRs and CTRs as a basis for bringing charges against taxpayers who fail to report offshore accounts?

Answer: No. If I am given the opportunity to serve as Assistant Attorney General for the Tax Division, I will use and encourage the use of the tools available for effective tax enforcement. CTRs and CMIRs have proven to be valuable law enforcement tools.

k. As Assistant Attorney General for the Tax Division, would you advocate against DOJ supporting in court charges brought by the IRS against taxpayers based upon information obtained through CTRs or CMIRs?

Answer: No. If I am given the opportunity to serve as Assistant Attorney General for the Tax Division, I will use and encourage the use of the tools available for effective tax enforcement. CTRs and CMIRs have proven to be valuable law enforcement tools.

3. In the late 1990s and early 2000s, the IRS initiated a concerted effort to stop the marketing and use of abusive tax shelters. The IRS targeted a particularly abusive class of shelters, called "Son of Boss," which were mass marketed, had no economic substance, and in some instances were supported by boiler plate tax opinions that contained blank spaces to fill in the names and details of the taxpayer. The IRS aggressively pursued taxpayers that used the shelters, as well as the lawyers and tax professionals who designed them and issued supportive opinions. In 2004, the IRS implemented a settlement initiative that enabled taxpayers who used the shelters to pay back taxes, interest and, if assessed, penalties and avoid litigation and possibly higher penalties. Those taxpayers who declined to participate in the initiative were denied access to the IRS appeals process and would have to contest tax and penalty assessments through litigation in the courts. In 2008, you co-authored an article that was critical of the IRS settlement initiative. The article characterized it as "a settlement initiative that deprived taxpayers of the right to go to IRS Appeals," stating that the IRS had taken "a broad brush approach to tax shelter enforcement" over the previous years. The article also accused the IRS of putting "a gloss ... on a range of transactions without consideration to the specific merits of any taxpayer's activities." It was also critical of DOJ's indictments of tax professionals who marketed the transactions. Yet, a number of those tax professionals -- including some attorneys -- subsequently pleaded guilty to, or were convicted of, criminal offenses. In addition, the IRS position on those shelters has been upheld in all cases tried through the Appellate level in the federal courts.

a. Do you still believe, in light of the facts associated with the "Son of Boss" shelters, and the IRS' record of success in court, that the IRS settlement initiative put "a gloss ... on a range of transactions without consideration to the specific merits of any taxpayer's activities"?

Answer: I believe that the IRS settlement initiative, followed by the criminal prosecutions and civil litigation efforts of the Department of Justice and the IRS, proved highly effective in addressing the challenges to the tax system created by the "Son of BOSS" shelters. The IRS faced a serious enforcement challenge in connection with the recent era of tax shelters, as documented by two significant and detailed reports of the Permanent Subcommittee on Investigations of the U.S. Senate Committee on Homeland Security and Government Affairs. Prominent accounting firms and law firms had put thousands of clients into structured transactions that were ultimately shown to serve no purpose other than tax avoidance or evasion. The IRS settlement initiatives were in general an effective means to resolve a large number of these cases. The IRS and the Tax Division have also engaged in significant and effective litigation against taxpayers who participated in abusive tax shelters, as well as civil injunction and penalty enforcement against tax shelter promoters, including attorneys and other tax professionals. It was also important that criminal charges be brought against the tax professionals, including lawyers and accountants, who engaged in fraudulent activity in developing, promoting, and implementing abusive tax shelters. These combined enforcement efforts addressed a serious challenge to the tax system, resulted in the recovery of billions of dollars in taxes, penalties and interest, and served general and specific deterrence goals.

While the language in the referenced article could have made the point more clearly, my main concern with the IRS settlement initiative was the IRS decision to eliminate review by IRS Appeals in "Son of BOSS" cases. IRS Appeals serves a vital, independent review function. In a number of settlement initiatives subsequent to the "Son of BOSS" settlement initiative, taxpayers were permitted to make presentations at IRS Appeals, in particular on penalty issues. It was my experience as a practitioner that this opportunity allowed taxpayers to feel that their positions had been given a fair hearing, and engendered confidence in the integrity of the tax system. Allowing taxpayers to proceed to IRS Appeals to address unique or unusual circumstances may also have had the beneficial effect of reducing the number of taxpayers who rejected settlement initiatives outright and elected engage in litigation, which imposed additional burdens on the IRS, the Tax Division, and the courts. If confirmed, I would respect the discretion of the IRS to determine its settlement initiatives, and would keep an open mind and give careful consideration to the use of settlement initiatives at all stages in cases handled by the Tax Division. I believe that my experience as a practitioner who has represented taxpayers before the IRS and the Tax Division may provide a helpful perspective on this and other issues.

I would like to note that, although I have represented taxpayers before the IRS and in litigation concerning listed transactions or tax shelters, I have never structured, promoted, or advised a client to participate in these types of transactions, and I have instead advised strongly against participation in such transactions.

b. As Assistant Attorney General for the Tax Division, would you advocate that the IRS await a judicial ruling regarding the validity of a tax shelter -- no matter how abusive that shelter may be -- before offering a settlement initiative like the "Son of Boss" settlement?

Answer: No. Settlement initiatives are a useful mechanism to resolve tax disputes, and can be used effectively at any stage in a proceeding, or at successive stages in a proceeding. If confirmed, I would respect the discretion of the IRS to determine the best use of this tool in its cases, and would keep an open mind and give careful consideration to the use of settlement initiatives at all stages in cases handled by the Tax Division.

c. As Assistant Attorney General for the Tax Division, would you advocate that DOJ not indict or take other legal action against tax professionals or attorneys who designed and marketed a tax shelter -- no matter how abusive that shelter may be -- before a judicial ruling on the validity of the shelter itself?

Answer: No. When there is evidence of criminal conduct, there is no reason to wait for the outcome of civil litigation concerning a tax shelter. Additionally, civil injunctions can be an important tool to stop such activities and to protect taxpayers and the public. In such cases, criminal and civil enforcement against tax professionals and attorneys serves important goals of general and specific deterrence. If confirmed, I will be guided by these principles.

d. As Assistant Attorney General for the Tax Division, would you advocate against the IRS establishing similar settlement conditions in the future? Would you oppose any settlement initiative that required a taxpayer to waive the right to an IRS appeal?

Answer: No. Settlement initiatives are a useful mechanism to resolve tax disputes, and can be used effectively at any stage in a proceeding, or at successive stages in a proceeding. The tax shelter industry posed a grave threat to the tax system, and the settlement initiatives served an important function in resolving a large number of cases in a challenging area of tax enforcement. If confirmed, I would respect the discretion of the IRS to determine the best use of this tool in its cases, and would keep an open mind and give careful consideration to the use of settlement initiatives at all stages in cases handled by the Tax Division.

IRS Appeals serves a vital, independent review function, and plays a valuable role in facilitating settlements. I believe that my experience as a practitioner who has represented taxpayers before the IRS and the Tax Division may provide a helpful perspective on this and other issues. If confirmed, I would keep an open mind and listen to and consider all views.

e. Would you advocate against DOJ supporting in court similar IRS settlement initiatives in the future?

Answer: No. The tax shelter industry posed a grave threat to the tax system, and the settlement initiatives served an important function in resolving a large number of cases in a challenging area of tax enforcement. If confirmed, I would respect the discretion of the IRS to determine the best use of this tool in its cases, and would keep an open mind and give careful consideration to the use of settlement initiatives at all stages in cases handled by the Tax Division.

4. In 2009, you co-authored an article that was highly critical of the First Circuit's decision in Textron Inc. and the IRS' approach to gaining access to corporate tax accrual work papers.

a. Do you still view corporate tax accrual work papers as attorney work product that should not be requested by the IRS?

Answer: I have never viewed corporate tax accrual work papers as attorney work product per se. In some circumstances, corporate tax accrual work papers may contain material that constitutes attorney work product. I am in agreement with the general principles set out in the IRS "Policy of Restraint," which is part of the Internal Revenue Manual.

b. If confirmed as Assistant Attorney General for the Tax Division, would you advocate that the IRS not request access to corporate tax accrual work papers or advocate that DOJ decline to enforce such a request in court?

Answer: No. If I am given the opportunity to serve as Assistant Attorney General for the Tax Division, I will use and encourage the use of the tools available for effective tax enforcement, including access to corporate tax accrual workpapers in the appropriate case. I also recognize that the issue of whether to enforce a request in court concerning corporate tax accrual work papers must include consideration of legal precedent on this issue, including the *Textron* decision.

c. As Assistant Attorney General for the Tax Division, would you advocate that any additional criteria or procedures be added to internal reviews by the IRS or DOJ before making a request for corporate tax accrual work papers or defending requests for such papers in court? If so, what changes would you advocate?

Answer: If I am given the opportunity to serve as Assistant Attorney General for the Tax Division, my first priority will be to listen and to learn about the current policies, practices, and enforcement efforts of the Tax Division. I am in agreement with the general principles set out in the IRS "Policy of Restraint," which is part of the Internal Revenue Manual. I am also aware that the litigation needs of the Tax Division may differ from and be broader than the needs of the IRS in an examination. I have an open mind on this and all issues.

5. The articles cited above are highly critical of IRS efforts to combat tax abuse and suggest that the reviewed IRS initiatives were too aggressive. If confirmed as Assistant Attorney General for the Tax Division, would you attempt to rein in those initiatives or similar future initiatives and, if so, in what ways?

Answer: Through my experience as a tax practitioner representing clients in matters before the IRS and the Tax Division, and in my review of public information available about the IRS and the Tax Division's current initiatives, I am familiar with a number of current tax enforcement initiatives. I am not aware of any on-going initiatives by the IRS or the Tax Division that I would seek to "rein in." I have the highest regard for the IRS and the Tax Division, and have expressed this regard many times in my writings and in public presentations. While I have had disagreements with specific actions taken by the IRS from time to time, I welcome this opportunity to state in the strongest terms that the role of the IRS is vital to the functioning of the United States. It has been my experience that IRS agents, IRS leadership, and the attorneys and leaders of the Tax Division are dedicated professionals who act with the best of intention in the service of the tax system. The tax gap is a serious challenge to the United States. The failure of some taxpayers to meet their obligations serves as a great unfairness to the majority of taxpayers who are in compliance. It is a privilege to be considered for the position of Assistant Attorney General for the Tax Division. To be given this opportunity to work with the dedicated professionals in the IRS and the Tax Division in this capacity would be a high responsibility and a true honor.