[JOINT COMMITTEE PRINT]

STUDY OF PRESENT-LAW TAXPAYER CONFIDENTIALITY AND DISCLOSURE PROVISIONS AS REQUIRED BY SECTION 3802 OF THE INTERNAL REVENUE SERVICE RESTRUCTURING AND REFORM ACT OF 1998

VOLUME I: STUDY OF GENERAL DISCLOSURE PROVISIONS

Prepared by the Staff

of the

JOINT COMMITTEE ON TAXATION

January 28, 2000

U.S. Government Printing Office
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JOINT COMMITTEE ON TAXATION

106th CONGRESS, 2nd SESSION

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INTRODUCTION

Section 3802 of the Internal Revenue Service Restructuring and Reform Act of 1998 (the "IRS Reform Act")[2] directs the Joint Committee on Taxation and the Department of the Treasury to undertake separate studies of the present-law disclosure provisions of the Internal Revenue Code, including provisions relating to tax-exempt organizations, and make any legislative and administrative recommendations they deem appropriate. The studies are due by January 22, 2000.

The staff of the Joint Committee on Taxation (the "Joint Committee staff") is publishing its study in three volumes. As set forth in more detail below, Volume I[3] contains the Joint Committee staff study relating to general disclosure provisions, Volume II[4] contains the Joint Committee staff study of disclosure rules relating to tax-exempt organizations, and Volume III,[5] contains reproductions of public comments received by the Joint Committee staff and reports prepared by the General Accounting Office ("GAO") for the Joint Committee staff in connection with the study.

Volume I contains the following: (1) an executive summary and a discussion of the methodology employed by the Joint Committee staff in conducting the study (Part One); (2) a description of the present-law rules relating to general disclosure provisions, including a discussion of sections 6103 and 6110 of the Internal Revenue Code (the "Code"), the Freedom of Information Act, and the Privacy Act (Part Two); (3) a discussion of the policies underlying confidentiality and disclosure of tax returns and return information (Part Three); (4) data and

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[2] Public Law 105-206, signed by the President on July 22, 1998 (H.R. 2676). For legislative history, see H.R. Rep. No. 105-599 (Conference Report), S. Rep. No. 105-174 (Senate Committee on Finance), and H.R. Rep. No. 105-364, Part 1 (House Committee on Ways and Means).

[3] Volume I may be cited as follows: Joint Committee on Taxation, *Study of Present-Law Taxpayer Confidentiality and Disclosure Provisions as Required by Section 3802 of the Internal Revenue Service Restructuring And Reform Act of 1998, Volume I: Study of General Disclosure Provisions* (JCS-1-00), January 28, 2000.

[4] Volume II may be cited as follows: Joint Committee on Taxation, *Study of Present-Law Taxpayer Confidentiality and Disclosure Provisions as Required by Section 3802 of the Internal Revenue Service Restructuring And Reform Act of 1998, Volume II: Study of Disclosure Provisions Relating to Tax-Exempt Organizations* (JCS-1-00), January 28, 2000.

[5] Volume III may be cited as follows: Joint Committee on Taxation, *Study of Present-Law Taxpayer Confidentiality and Disclosure Provisions as Required by Section 3802 of the Internal Revenue Service Restructuring And Reform Act of 1998, Volume III: Public Comments and General Accounting Office Reports* (JCS-1-00), January 28, 2000.

background information regarding the use of tax returns and return information obtained under present-law rules (Part Four); and (5) Joint Committee staff recommendations relating to general disclosure provisions (Part Five). Volume I also contains the following appendices: (1) a description of the legislative history of section 6103 (Appendix A); (2) information provided by the taxpayer in an advanced pricing agreement request (Appendix B); (3) Congressional resolutions authorizing disclosures to nontax writing committees (Appendix C); (4) a summary of public comments received by the Joint Committee staff relating to general disclosure provisions (Appendix D); and (5) a copy of the most recent annual disclosure report provided to the Joint Committee pursuant to section 6103 (p)(3)(C) (Appendix E).

Volume II of the study (relating to tax-exempt organizations) contains the following: (1) an executive summary (Part I); (2) a discussion of the methodology employed by the Joint Committee staff in conducting the study (Part II); (3) a description of present law and background information relating to disclosure rules applicable to tax-exempt organizations (Part III); (4) an economic analysis of the benefits of tax-exempt status (Part IV); (5) analysis of issues relating to the disclosure of information regarding tax-exempt organizations (Part V); and (6) Joint Committee staff recommendations to increase disclosure of information relating to tax-exempt organizations (Part IV). Volume II also contains the following appendices: (1) a description of the legislative history for the disclosure provisions applicable to tax-exempt organizations under section 6104 of the Code (Appendix A); (2) copies of IRS Annual Returns for Tax Exempt Organizations (Appendix B); and (3) a summary of public comments received by the Joint Committee staff relating to disclosure provisions regarding tax-exempt organizations (Appendix C).

Volume III contains reproductions of the public comments received by the Joint Committee staff in connection with the study and reproductions of two GAO reports prepared for the study at the request of the Joint Committee staff.

PART ONE: SUMMARY AND BACKGROUND

I. EXECUTIVE SUMMARY

A. Introduction

This study was performed pursuant to section 3802 of the Internal Revenue Service Restructuring and Reform Act of 1998 (the "IRS Reform Act"), which requires the Joint Committee on Taxation (the "Joint Committee") and the Department of the Treasury to conduct separate studies of the scope and use of provisions regarding taxpayer confidentiality and to report the findings of their studies, together with such recommendations as they deem appropriate, to the Congress not later than January 22, 2000. To satisfy this legislative mandate, the Joint Committee staff undertook an extensive study and review of the laws relating to disclosure of tax returns and return information, including relevant sections of the Internal Revenue Code of 1986 (the "Code");[6] the Freedom of Information Act, the Privacy Act, and the Taxpayer Browsing Act of 1997.

To assist in this study, the Joint Committee staff requested the General Accounting Office ("GAO") to review certain matters relating to the study, including who currently receives Federal tax returns and return information and the uses made of such information. The Joint Committee staff also obtained data from the Internal Revenue Service ("IRS"). The Joint Committee staff met with and consulted with representatives of various IRS functions and the Office of the Treasury Inspector General for Tax Administration. The Joint Committee staff solicited comments from interested parties. The Joint Committee staff reviewed the written comments submitted in response to its requests for comments and met with various interested parties.

B. Overview of Present Law

In general

There are three separate statutory regimes relevant to determining whether Federal tax returns and return information may (or must) be disclosed and, if the information is subject to disclosure, the rules applicable to the disclosure. These provisions are: (1) the Code; (2) the Freedom of Information Act; and (3) the Privacy Act. The interrelationship of these provisions is not always clear, and has generated litigation.

The Code

The Code contains three basic provisions that control the disclosure of returns and return information: sections 6103, 6104, and 6110. Prior to 1976, tax returns were considered public records, and were subject to disclosure pursuant to executive order. Due to concerns regarding

[6] References in this study to section or sec. refer to the Code, unless otherwise indicated.

the misuse of returns and return information, including misuse by the Nixon White House, section 6103 was amended in the Tax Reform Act of 1976. Section 6103 embodies the policy that returns are confidential, and provides that returns and return information may not be disclosed by the IRS, other Federal employees, State employees, and certain others having access to the information except as provided in section 6103. Section 6103 also contains a number of exceptions to this general rule of nondisclosure which authorize disclosure in particular circumstances. Section 6103 imposes recordkeeping and safeguard requirements to protect the confidentiality of returns and return information. Criminal and civil sanctions apply under the Code to the unauthorized disclosure or inspection of returns and return information.

Section 6104 provides for the public disclosure of certain information relating to tax-exempt organizations. This provision is discussed in detail in Volume II of this study.

With certain exceptions, section 6110 makes the text of any written determination issued by the IRS (and related background file document) available for public inspection. A written determination is any ruling, determination letter, technical advice memorandum, or Chief Counsel advice. Before making written determinations and background file documents available for public inspection, section 6110 requires the IRS to delete specific categories of information.

The Freedom of Information Act

The Freedom of Information Act ("FOIA"), enacted in 1966, established a statutory right to access government information. While the purpose of section 6103 is to restrict access to returns and return information, the basic purpose of the FOIA is to ensure that the public has access to government documents. In general, the FOIA provides that any person has a right of access to Federal agency records, except to the extent that such records (or portions thereof) are protected from disclosure by one of nine exemptions or by one of three special law enforcement record exclusions. This right is enforceable in court.

Returns and return information that cannot be disclosed under section 6103 cannot be disclosed under the FOIA.[7] However, persons seeking access to information have used the FOIA as an alternative method to attempt to compel disclosure of information arguably protected under section 6103. Cases involving tax information and the FOIA have primarily involved the disclosure of IRS guidance and the determination of what qualifies as "return information" under section 6103. FOIA litigation has resulted in the disclosure of IRS documents such as private letter rulings, general counsel memoranda, technical advice memoranda, and field service advice.

[7] Courts use two approaches to reach this result. Some courts have held that section 6103 preempts the FOIA. Most courts, however, have held that section 6103 meets the requirements of exemption 3 of the FOIA, which allows the withholding of information prohibited from disclosure by another statute if certain requirements are met.

The Privacy Act

The Privacy Act was enacted in 1974 to regulate the collection, use, dissemination, and maintenance of personal information about individuals by Federal agencies. The Privacy Act does not apply to persons other than individuals (e.g., corporations). The Privacy Act has four principal provisions. These provisions: (1) restrict the disclosure of personally identifiable records maintained by agencies; (2) allow individuals to access agency records maintained about the individual; (3) allow an individual to request amendment of agency records pertaining to the individual if the individual believes the records are not accurate, relevant, timely, or complete; and (4) require agencies to comply with statutory guidelines for collection, maintenance, and dissemination of records.

In general, the provisions of the Privacy Act prohibit the disclosure of an individual's records without the consent of the individual. "Routine uses" of information are not subject to this consent requirement. Disclosure pursuant to section 6103 is considered a routine use of information so that such disclosures are not subject to the Privacy Act's consent requirements. The Privacy Act permits an individual to sue for damages if an agency fails to comply with the Privacy Act. Courts disagree on whether the Privacy Act is preempted by section 6103.

C. Policy Issues Regarding Disclosure of Returns and Return Information

Determining whether to allow disclosure of returns and return information involves a balancing of sometimes competing policy objectives. In support of confidentiality are a taxpayer's right to privacy, the concern that disclosure will undermine voluntary compliance, the belief that the government should not disclose information that taxpayers are required by law to provide, and concerns regarding misuse of the information. On the other hand, a variety of State and Federal agencies seek access to Federal returns and return information in order to monitor compliance with both tax and nontax laws. In some cases, Federal returns and return information may be the best source of information needed by the agency.

The present-law rules regarding confidentiality and disclosure of returns and return information reflect a balancing of these competing policy objectives. As described above, the basic policy embodied in section 6103 is that returns and return information are confidential. This confidentiality is based on persons' right to privacy, as well as the view that voluntary compliance will be increased if taxpayers know that the information they provide to the government will not become public. Section 6103 also recognizes, however, that in some cases the need for returns and return information outweighs the policy of confidentiality. While providing access to returns and return information in certain cases, section 6103 still attempts to guard confidentiality by providing access only to the extent necessary and applying safeguards to prevent the misuse or subsequent disclosure of the information.

D. Data and Background Information Regarding the Use of Returns and Return Information

During the years 1997 and 1998, 37 Federal and 215 State agencies received taxpayer information under the provisions of section 6103. These agencies fall roughly into four categories: (1) Federal agencies; (2) State and local tax administration agencies; (3) State and local child support agencies; and (4) State and local welfare or public assistance agencies. Congress also requests returns and return information from the IRS. Detailed information regarding the use of such information and a discussion of safeguard efforts relating to such information are contained in Part Four, below.

E. Joint Committee Staff Recommendations

1. General recommendations relating to section 6103

General recommendations relating to exceptions to section 6103

- The staff of the Joint Committee recommends that new access to returns and return information should not be provided unless the requesting agency can establish a compelling need for the disclosure that clearly outweighs the privacy interests of the taxpayer.

- The Joint Committee staff also recommends that the IRS continue to monitor disclosures under present law to ensure that the information provided is tailored to the needs of the recipient.

Coordination of section 6103 with other disclosure provisions

- The staff of the Joint Committee recommends that all provisions authorizing access to returns and return information should be contained in the Code.

Matters made part of the public record

- The staff of the Joint Committee recommends that returns and return information properly made a part of public records (i.e., court records and lien filings) pursuant to Federal tax administration activities should not be protected by section 6103.

Access to working law of the IRS

- The staff of the Joint Committee recommends that all final written legal interpretations issued to IRS employees should be made publicly available to the extent that such interpretations: (1) affect a member of the public; and (2) are issued by the IRS or the IRS Chief Counsel.

Application of the FOIA to returns and return information

- The staff of the Joint Committee recommends that it be should be clarified that 6103 preempts the FOIA as to returns and return information. Thus, section 6103 would be the sole means by which returns and return information can be requested. The staff of the Joint Committee further recommends that the FOIA administrative provisions and opportunity for de novo judicial review should be incorporated into section 6103.

Tax treaties and tax information exchange agreements

- For tax information that is not return information under section 6103, the staff of the Joint Committee recommends that it should be clarified that tax treaties qualify under exemption 3 of the FOIA and under section 6110(c)(3). Similarly, the staff of the Joint Committee recommends that it should be clarified that tax information exchange agreements, as authorized by the Code, qualify under exemption 3 of the FOIA and under section 6110(c)(3). Thus, information exchanged pursuant to tax treaties and tax information exchange agreements would be protected from disclosure under the FOIA and section 6110 to the extent provided in such agreements.

Application of the Privacy Act to returns and return information

- The staff of the Joint Committee recommends that it should be clarified that sections 6103 and 7431 preempt the Privacy Act with respect to the disclosure of returns and return information and the remedy for unauthorized disclosure.

2. Reforms of current exceptions under section 6103

Disclosure of collection activities with respect to a joint return

- The staff of the Joint Committee recommends amending section 6103(e)(8) to permit the IRS to honor oral requests from a former spouse (or an authorized representative of the former spouse) regarding joint return collection activities.

Clarification of the scope of section 6103(h)(1): investigation of taxpayer representatives

- The staff of the Joint Committee recommends clarifying that an IRS employee's official duties do not include determining whether a taxpayer's representative is current in his or her tax filing obligations merely because the taxpayer is under audit.

Disclosure of criminal investigation

- The staff of the Joint Committee recommends that IRS special agents should be required

to identify themselves and the nature of their investigation when interviewing third parties.

Disclosure in judicial and administrative tax proceedings

- The staff of the Joint Committee recommends that when nonparty taxpayer returns and return information are to be disclosed pursuant to section 6103(h)(4)(A)-(C), the taxpayer should be given notice prior to the disclosure. The staff of the Joint Committee further recommends that only the portions of a nonparty return or return information that directly relate to the resolution of an issue in the proceeding should be disclosed in such proceeding. Finally, the staff of the Joint Committee recommends that the nonparty taxpayer should be given an opportunity to participate in the reduction process.

Investigative disclosure authority

- The staff of the Joint Committee recommends that section 6103(k)(6), regarding investigative disclosure authority, should be clarified to include personnel of the Office of the Treasury Inspector General for Tax Administration.[8]

Information related to offers in compromise

- The staff of the Joint Committee recommends that the IRS should not disclose the taxpayer identification number and street address of taxpayers who are parties to accepted offers in compromise.

Refund offset disclosures

- The staff of the Joint Committee recommends the repeal of section 6103(m)(2), relating to the Federal debt collection refund offset program, as the usefulness of this provision has been superceded by the Treasury Offset Program.

Disclosure to contractors

- The staff of the Joint Committee recommends that States receiving returns and return information should be required to: (1) conduct annual on-site safeguard reviews of all their contractors (if the duration of the contract is less than one year, a review would be conducted mid-way through the duration of the contract); and (2) submit the findings of such reviews to the IRS as part of their annual safeguard activity report, along with a certification that their contractors are in compliance with all safeguard restrictions. The certification should include the name of each contractor, a description of their contract

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[8] A technical correction making this change was included in section 1602(a) of the House version of H.R. 2488, 106th Cong. 1st Sess. (1999).

responsibility, and the duration of the contract.

- The staff of the Joint Committee recommends that the present-law disclosure rules for using contractors for nontax administration purposes should not be expanded.

Consent to authorize disclosure to third parties

- The staff of the Joint Committee recommends that the Code should prohibit a third party from requesting the execution of a consent that does not designate a recipient. The staff of the Joint Committee also recommends that the Code should prohibit a third party from requesting a taxpayer to execute a consent that will not be dated by the taxpayer at the time of execution.

- The staff of the Joint Committee recommends that all third parties, governmental or otherwise, receiving returns and return information under section 6103(c) should be required to: (1) ensure that the information received will be kept confidential; (2) use the information only for the purpose for which it was requested; and (3) not further disclose the information except to accomplish that purpose, unless a separate consent from the taxpayer is obtained.

Statistical disclosure authority for the Federal Trade Commission

- The staff of the Joint Committee recommends the repeal of the provision authorizing disclosures to the Federal Trade Commission for statistical purposes, as this information is no longer needed.

3. Unauthorized disclosure

- The staff of the Joint Committee recommends that the IRS notify the taxpayer at the time the Treasury Inspector General for Tax Administration administratively determines that the taxpayer's returns or return information have been unlawfully accessed or disclosed (rather than at the time of criminal indictment). In addition, the staff of the Joint Committee recommends that the IRS should provide, as part of its present-law public annual report to the Joint Committee, information regarding unauthorized disclosure and inspection of returns and return information. This information should include the number, status, and results of: (1) administrative investigations; (2) civil lawsuits brought under section 7431 (including settlement amounts or damages awarded); and (3) criminal prosecutions.

4. Public disclosure of nonfilers

- The staff of the Joint Committee does not recommend the publication of the identities of nonfilers by the Federal government at this time. In addition, the staff of the Joint

Committee recommends that States provide updated information to the Congress on their programs to publicize delinquent taxpayers

5. Undelivered refunds

- The staff of the Joint Committee recommends that it be clarified that the IRS is able to notify taxpayers of undelivered refunds via any means of mass communication, including the Internet.

II. STATUTORY MANDATE AND STUDY METHODOLOGY

A. Statutory Mandate for Study

Section 3802 of the IRS Reform Act requires the Joint Committee and the Department of the Treasury to conduct separate studies of the scope and use of provisions regarding taxpayer confidentiality and to report the findings of their separate studies, together with such recommendations as they deem appropriate, to the Congress not later than January 22, 2000.

Under the IRS Reform Act, the studies are to examine: (1) the present protections for taxpayer privacy; (2) any need for third parties to use tax return information; (3) whether greater levels of voluntary compliance may be achieved by allowing the public to know who is legally required to file tax returns, but does not file tax returns; (4) the interrelationship of the taxpayer confidentiality provisions in the Code with such provisions in other Federal law, including section 552a of Title 5 of the United States Code (commonly referred to as the "Freedom of Information Act"); (5) the impact on taxpayer privacy of the sharing of income tax return information for purposes of enforcement of State and local tax laws other than income tax laws, including the impact on taxpayer privacy intended to be protected at the Federal, State, and local levels under the Taxpayer Browsing Protection Act of 1997;[9] and (6) whether the public interest would be served by greater disclosure of information relating to tax-exempt organizations described in section 501 of the Code.

The House and Senate versions of the IRS Reform Act had similar provisions relating to the study.[10] The legislative history to both the House bill and the Senate amendment provide that "a study of the confidentiality provisions will be useful in assisting the Committee in determining whether improvements can be made to these provisions."

Neither the House nor Senate bill contained the requirement that the studies address disclosure of information relating to tax-exempt organizations. This provision was added in conference. There is no legislative history specific to this provision.

The Report of the National Commission on Restructuring the IRS, which formed the basis for many provisions in the IRS Reform Act, contains the following statement regarding access to tax return information:

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[9] Pub. L. No. 105-36.

[10] The House bill required the Joint Committee to conduct a study relating to items (1)-(3) described in the text. H.R. Rep. No. 105-364 (1998). The Senate amendment also required the Treasury Department to conduct a study, and added items (4) and (5). The Senate amendment provided that the studies should examine whether return information should be disclosed to a State unless the State has first notified personally in advance each person with respect to whom information has been requested. This provision was not adopted in conference.

> The Commission heard concerns regarding the scope and use of the provisions regarding taxpayer confidentiality. In light of the complexity of the issue and the need to balance a host of conflicting interests, including taxpayer privacy, the need for third parties to use tax return information, and the ability to achieve greater levels of voluntary compliance by allowing the public to know who does not file tax returns, Congress should study these rules.[11]

B. Joint Committee Staff Methodology for Study

To satisfy its legislative mandate, the Joint Committee staff undertook an extensive study and review of the laws relating to disclosure of returns and return information, including Code sections 6103, 6104, 6110, and related sections, the Freedom of Information Act, and the Taxpayer Browsing Protection Act of 1997.

To assist in its study, the Joint Committee staff requested that the GAO review: (1) which Federal, State, and local agencies receive returns and return information from the IRS; (2) the type of information they receive; (3) how those agencies use returns and return information; (4) what policies and procedures the agencies are required to follow to safeguard returns and return information; (5) how frequently IRS monitors agencies' adherence to the safeguarding requirements; and (6) the results of the IRS most recent monitoring efforts.

The Joint Committee staff also requested that the GAO determine: (1) which State and local governments are operating programs to publicly disclose the names of taxpayers that do not file tax returns or are delinquent in paying the income taxes they owe; (2) the differences, if any, among these programs; and (3) the State and local revenue office officials' views on whether their disclosure programs are improving compliance.

The GAO reviewed IRS data, conducted surveys of Federal and selected State and local agencies receiving taxpayer data, and interviewed State and local revenue office officials. The GAO included the results of its review in two reports prepared for the Joint Committee staff and provided[12] the survey responses to the Joint Committee staff.

At the request of the Joint Committee staff, the IRS Office of Chief Counsel provided

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[11] Report of the National Commission on Restructuring the Internal Revenue Service, *A Vision for a New IRS*, 49 (June 25, 1997). The Commission also recommended that media requests to the IRS under the FOIA be given priority for processing and appeals. The Commission recommended that this expedited process mirror the process established by the Department of Justice, which, according to the Commission, provides expedited processing for requests that promote public accountability, particularly when the information sought involves possible questions about the government's integrity which affect public confidence. *Id.*

[12] These reports may be found in Volume III of this study.

summaries of unauthorized disclosure cases in which the Government settled or lost the case for an amount exceeding $25,000. At the request of the Joint Committee staff, the Office of the Treasury Inspector General For Tax Administration ("TIGTA") provided statistics regarding alleged violations of the Taxpayer Browsing Protection Act of 1997.

The Joint Committee staff met with and orally consulted representatives of various IRS functions and TIGTA regarding the operation of sections 6103, 6104, and 6110. Representatives of the private sector and other governmental agencies (both Federal and State) provided the Joint Committee staff with oral comments.

The Joint Committee staff requested data and certain other information from the IRS, including data regarding tax-exempt organizations, information on returns and return information safeguard reviews, and information regarding response time to FOIA requests.

On August 17, 1999, the Joint Committee staff issued a press release asking interested parties to submit written comments and recommendations on issues relevant to the confidentiality of tax returns and return information. Specifically, the Joint Committee staff invited comments with respect to the following matters:

(1) the adequacy of present-law protections governing taxpayer privacy;
(2) the need, if any, for third parties, including those presently authorized under the Code, to use tax return information;
(3) whether greater levels of voluntary compliance can be achieved by allowing the public to know who is legally required to file tax returns but does not do so;
(4) the interrelationship of the taxpayer confidentiality provisions in the Internal Revenue Code with the Freedom of Information Act, the Privacy Act, and section 6110 of the Code;
(5) the impact on taxpayer privacy of sharing returns and return information for the purposes of enforcing State and local tax laws (other than income tax laws), including the impact on taxpayer privacy intended to be protected at the Federal, State, and local levels under the Taxpayer Browsing Protection Act of 1997; and
(6) the extent to which the current disclosure provisions provide taxpayers, exempt organizations, and tax practitioners with sufficient guidance.

The Joint Committee staff also invited comments on disclosure of information relating to tax-exempt organizations described in section 501 of the Code. Specifically, the Joint Committee staff invited comments with respect to the following matters:

(1) whether the public interest would be served by greater disclosure

of information with respect to organizations exempt from tax under section 501, and

(2) the extent to which the present-law disclosure provisions relating to such organizations assure accountability of such organizations to the public, the Internal Revenue Service, and other agencies that provide oversight.

Interested parties were requested to submit comments in writing to the Joint Committee on Taxation by October 1, 1999. The Joint Committee staff received written submissions from more than 50 commentators and received more than 10 written submissions relating specifically to tax-exempt organizations.[13] In addition, Joint Committee staff met with representatives of certain of the taxpayer groups and organizations with respect to their written comments.

[13] The comments relating to the general disclosure provisions are summarized in Appendix D of this Volume I. The comments relating to tax-exempt organizations are summarized in Appendix C of Volume II. All comments are reproduced in full in Volume III of this study.

PART TWO: PRESENT LAW

I. OVERVIEW OF PRESENT-LAW DISCLOSURE RULES

There are three separate statutory regimes relevant to determining whether returns and return information may (or must) be disclosed and, if the information is subject to disclosure, the rules applicable to the disclosure. These provisions are: (1) the Code, (2) the Freedom of Information Act ("FOIA"), and (3) the Privacy Act. The interrelationship of these provisions with respect to the disclosure of returns and return information has generated controversy and litigation. The following discussion summarizes each of these laws.

A. The Code

The Code contains three basic provisions that control the disclosure of returns and return information: sections 6103, 6104, and 6110. Present-law section 6103 originated in the Tax Reform Act of 1976 (the "1976 Act").[14] It sets forth the general rule that returns and return information are confidential. Section 6103 contains a number of exceptions to this general rule, which authorize disclosure under particular circumstances. Criminal and civil sanctions apply to the unauthorized disclosure of returns and return information.[15] Section 6103 imposes recordkeeping and safeguard requirements to protect the confidentiality of returns and return information.[16]

Under section 6103, a "return" includes any tax or information return, declaration of estimated tax, or claim for refund required by, or provided for, or permitted under the provisions of the Code, that is filed with the IRS.[17] "Return" includes any amendment or supplement to the filed return.[18]

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[14] Pub. L. No. 94-455 (1976). Prior to January 1, 1977, tax returns were public records open to inspection by executive order. The Tax Reform Act of 1976 amended section 6103 to exclude "returns" and "return information" from the category of public records and deemed them confidential.

[15] Section 7431 provides a civil remedy for unauthorized disclosure or inspection. Section 7213 makes unauthorized disclosure a felony. Section 7213A makes unauthorized inspection a misdemeanor.

[16] Sec. 6103(p).

[17] Sec. 6103(b)(1).

[18] This would include any schedules, attachments, or lists which are supplemental to, or part of, the filed return. Sec. 6103(b)(1).

The Code defines "return information" broadly. Return information includes the following information:

> (1) a taxpayer's identity, the nature, source or amount of income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, over assessments, or tax payments;
>
> (2) whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing;
>
> (3) any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense;[19] and
>
> (4) any part of any written determination or any background file document relating to such written determination which is not open to public inspection under section 6110.[20]

The term "return information" does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer.[21]

Returns and return information can only be disclosed as authorized by the Code.[22] Section 6103 contains many exceptions to the general rule that returns and return information cannot be disclosed. These exceptions include disclosure:

> (1) to a designee of the taxpayer upon the taxpayer's written request or consent;

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[19] Sec. 6103(b)(2)(A).

[20] Sec. 6103(b)(2)(B).

[21] Sec. 6103(b)(2).

[22] "Return and return information shall be confidential, **except as authorized by this title** – (1) no officer or employee of the United States . . . shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or employee. . ." Sec. 6103(a) (emphasis added). Thus, unless Title 26, i.e., the Code, authorizes the disclosure, no disclosure can be made.

(2) to a designated representative of any State agency, body or commission charged with the administration of State tax laws, upon the written request of the head of such agency;

(3) to persons having a material interest in the return;

(4) to Congressional committees;

(5) to the President and certain other persons;

(6) to officers and employees of the Treasury and Justice Departments for purposes of tax administration;

(7) to Federal officers or employees for the administration of nontax criminal laws;

(8) to Federal officers and employees for statistical use;

(9) to certain persons for tax administration purposes;

(10) to certain persons for purposes other than tax administration;

(11) taxpayer identity information for limited purposes;

(12) to contractors for purposes of tax administration; and

(13) to certain other persons with respect to certain taxes.[23]

Section 6110 of the Code provides for disclosure of written determinations. With certain exceptions, section 6110 makes the text of any written determination the IRS issues available for public inspection. A written determination is any ruling, determination letter, technical advice memorandum, or Chief Counsel advice. Once the IRS makes the written determination publicly available, the background file documents associated with such written determination are available for public inspection upon written request. The Code defines "background file documents" as any written material submitted in support of the request. Background file documents also include any communications between the IRS and persons outside the IRS concerning such written determination that occur before the IRS issues the determination.

Before making written determinations and background file documents available for public inspection, section 6110 requires the IRS to delete specific categories of sensitive

[23] The exceptions are contained in subsections (c) through (o) of section 6103. These exceptions are further discussed in Part Two, II., below.

information from them.[24] Special rules apply to the disclosure of third party contacts.[25]

Section 6110 also provides judicial and administrative procedures to resolve disputes over the scope of the information the IRS will disclose.[26] In addition, certain matters are exempt from the section 6110 public disclosure requirements, such as matters within the ambit of section 6104.[27] Any part of a written determination or background file that is not disclosed under section 6110 constitutes confidential "return information" under section 6103.[28]

Section 6104 contains rules providing for the pubic disclosure of information regarding tax-exempt organizations. Section 6104 and its interaction with the rules of section 6110 is discussed in Volume II of this study.

B. The Freedom of Information Act

The Freedom of Information Act ("FOIA"), which was enacted in 1966, established a statutory right to access government information.[29] "The basic purpose of [the] FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."[30] Generally, the FOIA provides that any person has a right of access to Federal agency records, except to the extent that such records, (or portions thereof) are protected from disclosure by one of nine exemptions or by one of three special law enforcement record exclusions. This right is enforceable in court.

Exemption 3 of the FOIA allows the withholding of information prohibited from disclosure by another statute if certain requirements are met. The majority of courts have held that section 6103 qualifies as an exemption 3 statute.

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[24] Section 6110(c) provides for the deletion of identifying information, trade secrets, confidential commercial and financial information, and other material.

[25] Sec. 6110(d).

[26] Sec. 6110(d)(3), (d)(4), (f), and (j).

[27] Sec. 6110(l).

[28] Section 6103(b)(2)(B) provides that the term "return information" means any part of any written determination or any background file document relating to such written determination (as such terms are defined in section 6110(b)) which is not open to public inspection under section 6110.

[29] 5 U.S.C. sec. 552.

[30] *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

Persons seeking access to information have used the FOIA as an alternative method to try to compel disclosure of information arguably protected from disclosure by section 6103. Prominent cases involving tax information and the FOIA have primarily involved the disclosure of IRS guidance and the determination of what qualifies as "return information." FOIA litigation has resulted in the disclosure of IRS documents such as private letter rulings, general counsel memoranda, technical advice memoranda, and field service advice. Pending FOIA lawsuits concern IRS documents such as closing agreements for certain tax-exempt organizations.

C. The Privacy Act

The Privacy Act was enacted in 1974 to regulate the collection, use, dissemination and maintenance of personal information by Federal agencies.[31] The Privacy Act applies only to records about individuals that are maintained in a "system of records."[32] The Privacy Act has four basic policy objectives:

(1) to restrict the disclosure of personally identifiable records maintained by agencies;

(2) to grant individuals increased rights of access to agency records maintained on themselves;

(3) to grant individuals the right to seek amendment of agency records maintained on themselves upon a showing that the records are not accurate, relevant, timely or complete; and

(4) to establish a code of "fair information practices," which requires agencies to comply with statutory norms for collection, maintenance, and dissemination of records.

The Privacy Act requires agencies to publish in the Federal Register "each routine use of the records contained in the system, including the categories of users and the purpose of such use." [33] Generally, section 6103 is cited as the routine use of returns and return information for Privacy Act purposes.[34]

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[31] 5 U.S.C. sec. 552a.

[32] A system of records is a group of records under the control of an agency from which information is retrieved by the name of the individual or by some other identifier assigned to that individual. 5 U.S.C. sec. 552a(a)(5).

[33] 5 U.S.C. sec. 552a(e)(4)(D).

[34] The most recent IRS publication of its systems of records and related routine uses may be found at 63 Fed. Reg. 69,842 *et seq.* (December 17, 1998).

The Privacy Act predated the 1976 Act amendments to section 6103 by two years. The legislative history of the 1976 Act indicates that the Congress recognized that tax records were especially sensitive and that the particular circumstances surrounding tax records were not considered in enacting the Privacy Act. Courts are divided on whether the Privacy Act applies to returns and return information or was preempted by the enactment of Code provisions relating to disclosure.

II. SECTION 6103 OF THE CODE

A. In General

Under section 6103(a), returns and return information are confidential and, except as provided by the Code, may not be disclosed by the following persons:[35]

(1) officers and employees of the United States;

(2) any officer or employee of any State, any local child support enforcement agency, or any local agency administering a program listed in section 6103(l)(7)(D) (i.e., certain programs under the Social Security Act, the Food Stamp Act, Title 38 of the United States Code, or certain housing assistance programs);

(3) any one-percent shareholder who is given access by the IRS (under sec. 6103) to a corporate return or return information (or any officer of employee of such shareholder);

(4) Federal, State, and local child support enforcement agencies and their agents (and officers and employees thereof);

(5) persons (and officers and employees thereof) who receive return information pertaining to the verification of employment status of Medicare beneficiaries and their spouses;

(6) persons (and officers and employees thereof) who receive return information for purposes of administering the District of Columbia Retirement Protection Act;

(7) tax administration contractors (and officers and employees thereof); and

(8) persons (and officers and employees thereof) receiving return information under the provisions of section 6103 relating to Federal claims, the overpayment of Federal Pell grants, and defaulted student loans.

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[35] The prohibition against disclosure of returns and return information applies to most, but not all persons who have access to such information under sec. 6103. For example, the prohibition does not apply to persons who receive return information pursuant to the taxpayer's consent under section 6103(c).

Section 6103(b) defines the operative terms for the section: return, return information, taxpayer return information, tax administration, State, taxpayer identity, inspection, disclosure, Federal agency and chief executive officer. A "return" means any tax return, information return, declaration of estimated tax, or claim for refund that is required or permitted by the Code and filed with the IRS on behalf of or with respect to any person, as well as any amendment or supplements to the return so filed.[36] The mere removal of the taxpayer's name from a return does not place it beyond the protection of section 6103.[37] Return information includes:

(1) a taxpayer's identity;

(2) the nature, source, or amount of the taxpayer's income, payments, receipts, deductions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments;

(3) whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing;

(4) any other data received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return, or with respect to the determination of the existence, or possible existence, of liability (or amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture or other imposition or offense;

(5) any part of any written determination or any background file document relating to such written determination which is not open to public inspection under section 6110; and

(6) any advance pricing agreement entered into by a taxpayer and the IRS and any background information related to such agreement or any application for an advance pricing agreement.[38]

Data that cannot be associated with, or otherwise identify, directly or indirectly, a

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[36] Sec. 6103(b)(1).

[37] *Church of Scientology v. IRS*, 484 U.S. 9 (1987).

[38] Sec. 6103(b)(2)(A) - (C). Section 521 of the Ticket to Work and Work Incentives Improvement Act of 1999, Pub. L. No. 106-170, amended section 6103 to provide that advanced pricing agreements and related background information are confidential return information under section 6103.

particular taxpayer is not return information.[39] Thus, statistical compilations meeting these conditions are excluded from the scope of return information.[40]

Section 6103 does not protect copies of returns retained by the taxpayer. The Code subjects only that information which is filed with the IRS to the rules of confidentiality.[41] For that same reason, information collected under grand jury subpoena, or by IRS agents assisting in a nontax grand jury proceeding that is not filed with the IRS falls outside the definition of return information.[42]

Return information that is filed with the IRS by or on behalf of the taxpayer constitutes "taxpayer return information."[43] Thus, taxpayer return information does not include information the IRS collects from a source other than the taxpayer or his or her representative. The distinction between "return information" and "taxpayer return information" is important for purposes of nontax criminal disclosures, discussed below.

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[39] Sec. 6103(b)(2).

[40] The IRS is not required to disclose standards used or to be used for the selection of returns for examination or the data used or to be used for determining such standards if the IRS determines that such disclosure would seriously impair assessment, collection or enforcement under the internal revenue laws. Sec. 6103(b)(2).

[41] *Stokwitz v. United States*, 831 F.2d 893 (9th Cir. 1987)(taxpayer's copies of his tax returns not subject to sec. 6103).

[42] *Baskin v. United States*, 96-2 USTC ¶ 50,424 (S.D. Tex. 1996); *Ryan v. United States*, 74 F.3d 1161 (11th Cir. 1996) (presence of IRS special agents assisting a grand jury does not convert grand jury information into return information). One court has suggested that information collected after the determination of tax liability has been made is not return information. *Kamman v. IRS*, 75 AFTR2d Par. 95-948, (9th Cir 1995) (holding that the IRS did not met its burden of proof that jewelry appraisals performed after the IRS had seized the property and the taxpayer had pled guilty to tax evasion constituted return information). This FOIA case suggests that once the taxpayer had pled guilty, the "determination" of tax liability referenced in section 6103(b)(2)(A) had already been made. Thus, the court's language suggests that information generated by the IRS after the determination as part of the collection process may not constitute return information. The case is not conclusive on this issue. The court in ruling for the FOIA requester, finding that the affidavit submitted by the IRS in support of its contention that jewelry appraisals performed after the taxpayer pled guilty was conclusory and, thus, an insufficient basis upon which to sustain the IRS's burden of proof.

[43] Sec. 6103(b)(3).

B. Consent and Material Interest Disclosures

1. Disclosure pursuant to taxpayer consent

Section 6103(c) allows the disclosure of returns and return information, subject to the requirements of the Treasury regulations, to any person designated by the taxpayer in a request for or consent to such disclosure.[44] It also permits disclosure to other persons at the taxpayer's request to the extent necessary to comply with a request for information or assistance made by the taxpayer to that other person. The IRS is not obligated to disclose information if it determines that such disclosure would seriously impair Federal tax administration.[45]

2. Material interest disclosures

Section 6103(e) concerns disclosures to persons with a material interest. This provision allows an individual to access his own return, and specific third parties to access the return of another taxpayer, upon written request.[46] Generally, return information is available to the same persons who may have access to a return.[47] The IRS is not obligated to disclose return information if it determines that such disclosure would seriously impair tax administration.[48]

Individual returns and joint returns

A taxpayer may access his or her own individual return. A spouse may access his or her spouse's individual return if the taxpayer and spouse have consented to report a gift as made one-half by the taxpayer and one-half by the spouse. A taxpayer's return is open to inspection by the taxpayer's child (or child's legal representative) to the extent necessary to comply with the provisions taxing the unearned income of certain children at the parents' marginal rate. If the taxpayer is legally incompetent, the applicable return is available upon written request to the committee, trustee or guardian of his or her estate.[49]

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[44] *See* Treas. reg. sec. 301.6103(c)-1 for the requirements for a valid consent or designation.

[45] Sec. 6103(c).

[46] Sec. 6103(e).

[47] Sec. 6103(e)(7).

[48] *Id.*

[49] Sec. 6103(e)(1)(A).

Either spouse may access a return filed jointly with the other spouse.[50]

Partnership returns

A partner may access the return of a partnership covering the period for which he or she was a partner.[51]

Returns of a corporation or subsidiary

Corporate and subsidiary returns are disclosable to:

(1) any person the board of directors or similar governing body designates by resolution;

(2) any officer or employee by written request of the principal officer;

(3) any one-percent shareholder of stock in the corporation;

(4) any shareholder of a foreign personal holding company to the extent the shareholder was a shareholder during any part of a period covered by such return and was required to include in his or her gross income undistributed foreign personal holding company income of such company;

(5) any shareholder of an S corporation during any period covered by such return for which the S election was in effect; or

(6) if the corporation is dissolved, any person authorized by State law to act for the corporation or any person the IRS finds to have a material interest which will be affected by information contained in the return.[52]

Return of an estate

The return of an estate is disclosable to: (1) the administrator, executor, or trustee of such estate; and (2) any heir at law, next of kin, or beneficiary under the will to the extent the IRS determines such person has a material interest that will be affected by information contained in

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[50] Sec. 6103(e)(1)(B).

[51] Sec. 6103(e)(1)(C).

[52] Sec. 6103(e)(1)(D).

the return.[53]

Return of a deceased individual

The return of a deceased individual is disclosable to: (1) the administrator, executor, or trustee of decedent's estate; and (2) any heir at law, next of kin, or beneficiary under the will of such decedent, or a donee of property, to the extent the IRS determines such person has a material interest that will be affected by information contained in the return.[54]

Return of a trust

The return of a trust is disclosable to: (1) any trustee of the trust; and (2) any beneficiary of such trust if the IRS determines such person has a material interest that will be affected by information contained in the return.[55]

Bankruptcy - Title 11 cases

A bankruptcy trustee in a Title 11 case or receiver may obtain the returns of the debtor with respect to whom the return is filed and prior year returns if the IRS determines that such trustee or receiver, in his or her fiduciary capacity, has a material interest that will be affected by information contained in the return.[56]

With respect to an individual's Title 11 case for which section 1398 applies (rules relating to individual Title 11 cases), any return for the debtor for the year the case commenced and prior years is disclosable to the trustee.[57] The debtor in such cases is allowed access to the return of the estate.[58] In involuntary cases, no disclosure may be made to the trustee until the court enters an order of relief, unless the court finds such disclosure is appropriate for determining whether an order of relief should be entered.[59]

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[53] Sec. 6103(e)(1)(E).

[54] Sec. 6103(e)(3).

[55] Sec. 6103(e)(1)(F).

[56] Sec. 6103(e)(4).

[57] Sec. 6103(e)(5)(A).

[58] Sec. 6103(e)(5)(B).

[59] Sec. 6103(e)(5)(C).

Joint deficiency collection activity

When a deficiency is assessed with respect to a joint return, upon written request, the IRS discloses whether the IRS has attempted to collect such deficiency from the other individual, the general nature of such collection activities, and the amount collected.[60] This provision applies if the individuals who filed the joint return are no longer married or no longer reside in the same household. The provision does not apply if the deficiency may not be collected by reason of section 6502 (i.e., the period for collection has expired).

Trust fund recovery penalty liability

If the IRS has determined that more than one person is liable for the penalty under section 6672 (trust fund recovery penalty), upon written request by one of those persons, the IRS discloses the name of any other person determined to also be liable.[61] The IRS also discloses whether the IRS has attempted to collect such deficiency from such other person, the general nature of such collection activities, and the amount collected.

Attorney in fact

Upon a written request, a return is disclosable to an attorney in fact for any of the persons listed in the above categories.[62] The authorization of the attorney in fact must be in writing. The availability of the return is subject to the same restrictions placed upon the person on whose behalf the attorney in fact is acting.

C. Tax Administration Disclosures

1. State officials

General rules for disclosure

Section 6103(d) permits certain disclosures to State tax officials and State and local law enforcement agencies. Returns and return information with respect to certain taxes are open to inspection by or disclosure to State officials responsible for the administration of State tax law and their authorized representatives. The IRS is permitted to withhold information in the event it determines that the disclosure would identify a confidential informant or seriously impair any

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[60] Sec. 6103(e)(8).

[61] Sec. 6103(e)(9).

[62] Sec. 6103(e)(6). An attorney-in-fact is an attorney or other individual designated by another person in writing to act on behalf of that person in the performance of any act or acts described in the written document.

civil or criminal tax investigation. The information available to the State tax administration authority also is available to the agency of the State responsible for auditing State revenues and programs.

A prerequisite to disclosure is a written request by the head of the agency, body or commission. The IRS maintains standing agreements with the States and the District of Columbia for disclosure of returns and return information. The basic agreement, Agreement on Coordination of Tax Administration, provides for the mutual exchange of returns and return information between a specific State tax agency and the IRS.[63] Its provisions encompass the required procedures and safeguards. The implementing agreement supplements the basic agreement by specifying the detailed working arrangements and items to be exchanged, including tolerances and criteria for selecting those items, as agreed to by the State tax agency and the IRS.[64] The courts have generally rejected taxpayers' assertions that returns and return information may only be disclosed by the IRS in response to an individualized request.[65]

Generally, return and return information are not available to a State taxing agency for any period for which there is not a contract between the State and the Secretary of Health and Human Service ("HHS") regarding the availability and use of death information. Such contracts require the State to furnish HHS with death certificates and related information. The contract cannot contain any restriction on use of such death certificates or other information by HHS, except that the contract may provide that such information only be used to ensure that Federal benefits or payments are not erroneously paid to deceased individuals.[66]

Disclosure relating to reimbursement of State and local authorities

Under section 7624, the IRS may reimburse State and local law enforcement agencies for costs of an investigation that contributes to the recovery of Federal taxes with respect to illegal drug activities (or related money laundering). The reimbursement is capped at 10 percent of the Federal taxes recovered. Under section 6103(d), the IRS is permitted to disclose the amount of taxes recovered to the State and local law enforcement agencies that may receive a payment

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[63] This agreement is executed by the Commissioner of Internal Revenue and the head of a State tax agency. *See* Internal Revenue Manual, Disclosure of Official Information Handbook, 1.3.32.2(4) and 1.3.32.5 (August 19, 1998).

[64] *See* Internal Revenue Manual, Disclosure of Official Information Handbook, 1.3.32.6 (August 19, 1998).

[65] *Taylor v. United States*, 106 F.3d 833 (8th Cir. 1997); *Long v. United States*, 972 F.2d 1174 (10th Cir. 1992); *Smith v. United States*, 964 F.2d 630 (7th Cir. 1992).

[66] This provision does not apply to States that were not party to this type of HHS contract as of July 1, 1993. Sec. 6103(d)(4)(C).

under section 7624.

Combined Federal/State reporting demonstration project

The Taxpayer Relief Act of 1997[67] created a five-year demonstration project to test the feasibility of expanding combined Federal and State tax reporting. Under this demonstration project, Montana taxpayers are to report State and Federal employment tax information on one form. In connection with this project, the IRS is permitted to disclose to the State of Montana taxpayers' names and addresses, taxpayer identification numbers, and signatures.[68] The general prohibition of disclosure of return information by a State agency (section 6103(a)(2)), disclosure by the IRS to another agency without demonstration of adequate safeguards (section 6103(p)(4)), and the criminal unauthorized disclosure and inspection provisions (sections 7213 and 7213A) do not apply to disclosures and inspections made for this project.

Regulation of tax return preparers

State agencies regulating tax return preparers may receive taxpayer identity information (name, mailing address, and taxpayer identification number) for tax return preparers and information as to whether penalties have been assessed against such preparer under the Code. The information is provided upon written request of the head of the State agency regulating tax return preparers. Use of the information is limited to purposes of regulation, licensing, or registration of income tax return preparers.[69]

2. Department of Justice

In matters involving tax administration, section 6103(h)(2) permits the Department of Justice to have access to returns and return information for purposes of Federal grand jury proceedings or proceedings before any Federal or State court.[70] In order to receive a taxpayer's return or return information, one of the following three requirements must be met:

(1) the taxpayer is or may be a party to the proceeding or the proceeding arose out of or in connection with determining the taxpayer's civil or criminal liability, or the collection of such civil liability, as imposed by the Code;

(2) the treatment of an item reflected on the return relates or may relate to the

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[67] Pub. L. No. 105-34, sec. 976 (1997).

[68] Sec. 6103(d)(5).

[69] Sec. 6103(k)(5). The IRS believes no disclosures are being made under this provision.

[70] Sec. 6103(h)(2).

resolution of an issue in the proceeding or investigation; or

(3) such return or return information relates or may relate to a transactional relationship between a person who is or may be a party to the proceeding and the taxpayer which affects, or may affect, the resolution of an issue in such proceeding or investigation.[71]

If the requirements for receiving returns and return information are met, the Department of Justice may have access to the return and return information of third parties as well as of the taxpayer who is a party to the proceeding.

Section 6103(h)(3) provides two methods by which the Department of Justice may secure the returns and return information described above for its use in tax administration proceedings. First, on its own motion, the IRS may make disclosures to the Department of Justice for cases the IRS has referred to the Department of Justice, and for cases described in subchapter B of Chapter 76 of the Code (e.g., civil actions for refund, unauthorized disclosure of returns and return information, unauthorized collection actions).[72] Second, the Department of Justice may obtain returns and return information for tax administration cases initiated by the Department of Justice (rather than referred to the Department of Justice by the IRS).[73] In the latter circumstance, the Department of Justice must make a written request that (1) identifies the person whose return or return information is sought, and (2) sets forth the need for the disclosure.[74] The request must be made by the Attorney General, Deputy Attorney General, or Assistant Attorney General.[75]

The Tax Division, an office within the Department of Justice, handles criminal and civil causes of action under the Code, damage actions involving IRS employees,[76] FOIA and Privacy Act cases involving the IRS, and any other case or matter properly referred to the Tax Division.

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[71] Sec. 6103(h)(2)(A) through (C).

[72] Sec. 6103(h)(3)(A).

[73] Sec. 6103(h)(3)(B).

[74] *Id.*

[75] *Id.*

[76] Such damage actions include "*Bivens* actions" for the violation of a taxpayer's constitutional rights. In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Supreme Court held that a Federal agent who had violated the Fourth Amendment could be held liable for damages despite the absence of a Federal statute authorizing such a remedy. In *Bivens*, Federal officials, not the Federal government, were held liable under the cause of action from the Constitution.

Attorneys and employees of the Tax Division use returns and return information to prepare for and engage in civil litigation involving the internal revenue laws. They also use returns and return information to decide whether to authorize criminal prosecution in cases involving tax administration and in conducting related investigations and trials of such cases.[77]

Generally, the IRS transmits to the Tax Division the entire administrative file of those case. The administrative file includes tax returns, transcripts of accounts, agents' reports, and other exhibits gathered during an audit or investigation. Once a case is pending, the Tax Division supplements this information through formal discovery allowed by the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure. Informal means, such as letters requesting information, are also used.

According to the Tax Division, no adequate source of tax returns or return information exists to replace the information gathered by the IRS in its investigations. "It would be impossible to duplicate the information in the [administrative] file in an accurate, timely, efficient or cost effective manner from any other available source."[78]

3. Disclosures in judicial and administrative tax proceedings

Under section 6103(h)(4), returns and return information may be disclosed in Federal or State judicial or administrative tax proceedings. A return or return information may be disclosed in a proceeding pertaining to tax administration if one of the following four conditions is satisfied:

(1) the taxpayer is a party to the proceeding or the proceeding arose out of, or in connection with, determining the taxpayer's civil or criminal liability, or the collection of such civil liability, in respect of any tax imposed under the Code;

(2) the treatment of an item reflected on such return is directly related to the resolution of an issue in the proceeding;

(3) the return or return information directly relates to a transactional relationship between a person who is a party to the proceeding and the taxpayer which directly affects the resolution of an issue in the proceeding; or

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[77] Returns and return information are also used by the Tax Division to decide whether to authorize criminal prosecutions in cases *not* related to tax administration and in conducting trials and related investigations in such cases. In such nontax criminal cases, sec. 6103(i) authorizes access to returns and return information upon a court issuing an *ex parte* order. Sec. 6103(i) is discussed elsewhere in this section.

[78] Department of Justice, Tax Division, response to GAO Survey of Federal Agencies Receiving Taxpayer Data, response number 2401.

(4) disclosure is required by order of a court pursuant to section 3500 of title 18, United States Code, or rule 16 of the Federal Rules of Criminal Procedure.[79]

The rules relating to disclosure in judicial and administrative tax proceedings are narrower than the rules that authorize disclosures to the Department of Justice i.e., they require that a more strict test be met before the disclosure may be made in a tax proceeding. A return of a taxpayer not a party to the proceeding, may be disclosed to the Department of Justice if the return "may relate to" the resolution of an issue.[80] In contrast, the similar provision relating to disclosure in judicial and administrative proceedings requires that the third-party return "directly relate to" the resolution of an issue.[81]

The Code does not define what constitutes a "judicial or administrative proceeding pertaining to tax administration." Judicial authority is divided on whether an IRS audit constitutes an administrative proceeding for these purposes.[82]

Section 6103(h)(4) gives the option of disclosing an entire return or the return information once its conditions are met.[83] There are no restrictions on the use of returns or return

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[79] Sec. 6103(h)(4)(A) through (D). Returns and return information will not be disclosed under (1), (2), or (3), above, if it is determined that such disclosure would identify a confidential informant or seriously impair a civil or criminal tax investigation. Sec. 6103(h)(4). Under Rule 16 of the Federal Rules of Criminal Procedure a defendant in a criminal trial must be permitted to inspect and copy or photograph books, papers, or documents that are in the government's possession, custody, or control, and which are material to the defendant's defense. Section 3500 of Title 18 ("Jencks Act") concerns pretrial statements of government witnesses in Federal criminal cases. On motion of the defendant, the court will order production of such statements given to the government which are related to the content of the witness' testimony. In Federal criminal tax cases, "Jencks" statements are disclosable under section 6103(h)(4)(D) regardless of whether the "item" or "transactional relationship" tests are met. The statute provides that the court, in issuing the order, is "to give due consideration to congressional policy favoring the confidentiality of returns and return information as set forth in [the Code]." Sec. 6103(h)(4)(D).

[80] Sec. 6103(h)(2)(b).

[81] Sec. 6103(h)(4)(b).

[82] *Compare First Western Gov't Securities v. United States*, 796 F.2d 356 (10th Cir. 1986) and *Nevins v. United States*, 88-1 USTC (CCH) ¶ 9919 (D. Kan. 1987) (an audit is an administrative tax proceeding) with *Mallas v. United States*, 993 F.2d 1111 (4th Cir. 1993) (an audit is not an administrative proceeding for purposes of subsection (h)(4)).

[83] The prefatory language of section 6103(h)(4) provides:

information disclosed pursuant to section 6103(h)(4). Nor is the IRS required to notify nonparty taxpayers or give taxpayers the opportunity to participate in the redactions, if any, of their return or return information. The legislative history to section 6103 indicates that it was intended that only those relevant portions of a return should be disclosed.[84] However, an unpublished Tenth Circuit opinion has held that once the conditions of section 6103(h)(4) have been met, the statutory language authorizes the disclosure of the entire return, not just the pertinent parts.[85]

4. Department of the Treasury

Section 6103 permits Treasury employees who have an official "need to know," to have access to returns and return information for their official tax administration duties.[86] "Treasury employees" include IRS employees and employees of the Office of Chief Counsel. "Tax administration" means:

> (1) the administration, management, conduct, direction, and supervision of the execution and application of the internal revenue laws or related statutes (or equivalent laws and statutes of a State) and tax conventions to which the United States is a party, the development and formulation of Federal tax policy relating to existing or proposed internal revenue laws, related statutes, and tax conventions, and
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> (2) includes assessment, collection, enforcement, litigation, publication, and statistical gathering functions under such laws,

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> (4) Disclosure in judicial and administrative tax proceedings. A *return or return information* may be disclosed in a Federal or State judicial or administrative proceeding pertaining to tax administration, but only– . . . .

(emphasis added).

[84] S. Rep. No. 94-938 at 326.

[85] *Conklin v. United States*, 61 F.3d 915 (table), 1995 U.S. App. LEXIS 20410 (10th Cir. 1995).

[86] Section 6103(h)(1) provides:

> (1) Department of the Treasury.–Returns and return information shall, without written request, be open to inspection by or disclosure to officers and employees of the Department of the Treasury whose official duties require such inspection or disclosure for tax administration purposes.

statutes, or conventions.[87]

Requests to the IRS for returns and return information can come from a variety of sources within the Department of the Treasury. For example, the Office of the Assistant Secretary (Tax Policy) and its subordinate offices request returns and return information from the IRS to assist in the formulation of Federal tax policy.[88]

In addition, requests are made by the Bureau of Alcohol, Tobacco and Firearms, the Financial Management Service, the U.S. Customs Service, the Secret Service, and the Treasury Inspector General for Tax Administration ("TIGTA"), to assist those offices in carrying out certain tax administration duties. The Bureau of Alcohol, Tobacco and Firearms is responsible for administering and enforcing Federal tax laws relating to excise taxes on alcohol, tobacco, and firearms.[89]

The Financial Management Service handles undelivered, lost, or stolen tax refund checks.[90] In settling refund claimant matters referred by the IRS, Financial Management Service may need returns or return information.[91] Other IRS programs also involve Financial Management Service receiving information under the authority of section 6103(h)(1).[92]

The U.S. Customs Service collects excise taxes levied under Subtitle E (chapters 51 and 52 of the Code) on imports of tobacco products and paraphernalia, distilled spirits, wine and beer.[93] Generally, the U.S. Customs Service's tax administration functions will not require access to returns and return information obtained under other provisions of the Code. Customs or import duties on goods entering the United States are not internal revenue taxes. Therefore, collection of these duties does not constitute tax administration duties for purposes of section 6103(h)(1).[94]

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[87] Sec. 6103(b)(4).

[88] Internal Revenue Manual, Disclosure of Official Information Handbook, 1.3.22.8(1) (August 19, 1998).

[89] Internal Revenue Manual, Disclosure of Official Information Handbook, 1.3.22.8.1 (August 19, 1998).

[90] *Id.* at 1.3.22.8.2.

[91] *Id.*

[92] *Id.*

[93] *Id.* at 1.3.22.8.3.

[94] *Id.*

Under section 495 of Title 18, the Secret Service investigates stolen, forged, altered, and fraudulently negotiated tax refund checks.[95] These investigations are for tax administration purposes. Investigations of forged U.S. Treasury checks, other than refund checks, are not.[96] Generally, original documents will not be released to the Secret Service by the IRS unless an original return is needed for ink, handwriting, or other laboratory analysis.[97]

The IRS Reform Act created the office of TIGTA, which replaced the IRS Office of Chief Inspector. The TIGTA, established on January 18, 1999, has approximately 1,000 auditors, investigators, and support staff.[98]

The TIGTA's Office of Audit conducts independent performance and financial audits of IRS programs, operations, and activities. The TIGTA's Office of Investigations investigates complaints and allegations of misconduct relating to the IRS. The Strategic Enforcement Division within the Office of Investigations enforces the Taxpayer Browsing Protection Act of 1997 and investigates both unauthorized accesses of IRS computer systems by IRS employees and attempted accesses by individuals outside the IRS. [99] TIGTA has access to returns and return information to perform these functions.

5. IRS Oversight Board

The IRS Reform Act created the IRS Oversight Board to oversee the IRS. Generally, the IRS Oversight Board, any IRS Oversight Board member, and any detailee of such Board, are not entitled to returns or return information. An exception exists for reports containing such information, made by the Commissioner or TIGTA, to assist the IRS Oversight Board in, and for the sole purpose of, carrying out its duties.[100]

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[95] *Id.* at 1.3.22.10(1).

[96] *Id.* at 1.3.22.10(8).

[97] *Id.* at 1.3.22.10(10).

[98] *See* <http://www.treas.gov/tigta/message_ig.htm> for a description of TIGTA's functions.

[99] The Taxpayer Browsing Protection Act, (Pub. L. No. 105-35), was enacted on August 5, 1997. It made the willful unauthorized inspection of returns and return information illegal. Sec. 7213A.

[100] Sec. 6103(h)(6). The IRS Oversight Board is not yet in existence. The Board is to be comprised of nine members, six drawn from the private sector. The other three members are to be the IRS Commissioner, the Treasury Secretary (or Deputy Secretary) and one full-time Federal employee or representative of employees. The IRS Reform Act requires that private sector Board

6. Other tax administration disclosures

In addition to identifying specific recipients of return information, section 6103 also permits the IRS to make certain miscellaneous disclosures for tax administration purposes. These include:

Offers in compromise.--The general public has access to return information to permit the inspection of accepted offers in compromise.[101]

Outstanding liens.--The amount of an outstanding tax lien is available to those persons who have an interest in the property subject to the lien or intend to obtain such right.[102]

Correction of misstatements.--Upon approval by the Joint Committee on Taxation, the IRS may disclose return information with respect to a specific taxpayer to correct a misstatement of fact published or disclosed with respect to such taxpayer's return or any transaction of the taxpayer with the IRS.[103]

Disclosure by internal revenue officers and employees for investigative purposes.--In such manner as prescribed by regulation, IRS personnel may disclose return information in connection with their official duties relating to any audit, collection activity, or civil or criminal tax investigation, or any offense under the internal revenue laws. Such disclosure may only be made to the extent necessary in obtaining information not otherwise reasonably available with respect to the correct determination of tax, liability for tax, or the amount collected or with respect to the enforcement of any other provision of the Code.[104]

Disclosure of excise tax registration.--To permit the effective administration of subtitle D of the Code (Miscellaneous Excise Taxes), the IRS may disclose the name, address, and registration number of each person who is registered under any provision of Subtitle D

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members and the Federal employee or employee representative Board member be appointed by the President with the advice and consent of the Senate. The final nomination was announced by the White House on January 27, 2000.

[101] Sec. 6103(k)(1).

[102] Sec. 6103(k)(2).

[103] Sec. 6103(k)(3).

[104] Sec. 6103(k)(6).

and the registration status of any person.[105]

Disclosure to administer section 6311 (payment of tax by commercially acceptable means).--The IRS may disclose returns or return information to financial institutions and others to the extent necessary to administer payments of tax by commercially acceptable means. Disclosures made other than to accept checks and money orders are governed by written procedures promulgated by the IRS.[106]

7. Foreign governments

A competent authority of a foreign government that has an income tax or gift and estate tax convention or other convention or bilateral agreement relating to the exchange of tax information with the United States may access returns or return information, but only to the extent provided in such agreement.[107] Thus, section 6103 incorporates by reference the terms of such agreements.

8. Social Security Administration and Railroad Retirement Board

The Social Security Administration and the Railroad Retirement Board may receive return information for purposes of carrying out responsibilities for withholding tax under section 1441 from social security or railroad retirement benefits of nonresident aliens. The information is limited to that relating to the address and status of an individual as a nonresident alien or as a citizen or resident of the United States. Such disclosure is made upon written request of the payor agency.[108]

D. Congress and the GAO

Section 6103 provides Congressional committees and the GAO access to returns and return information under certain conditions and restrictions.

1. House Committee on Ways and Means, Senate Committee on Finance, and the Joint Committee on Taxation

Upon written request of the chairman of the House Committee on Ways and Means, the

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[105] Sec. 6103(k)(7).

[106] Sec. 6103(k)(9).

[107] Sec. 6103(k)(4). *See* Part Two, III., below, for a discussion of section 6103 and tax treaties.

[108] Sec. 6103(h)(5).

chairman of the Senate Committee on Finance, or the chairman of the Joint Committee on Taxation, such committee may receive returns and return information.[109] Unless the taxpayer consents otherwise, a return or return information that identifies, directly or indirectly, any taxpayers may be furnished to such committee only in closed executive session.[110] The IRS may also disclose returns and return information upon the written request of the Chief of Staff of the Joint Committee on Taxation.[111]

Section 6103 authorizes the chairman of the House Committee on Ways and Means, the chairman of the Senate Committee on Finance, the chairman of the Joint Committee on Taxation, and the Chief of Staff of the Joint Committee on Taxation to designate examiners and agents to whom disclosure of returns and return information may be made.[112] For example, GAO routinely is designated as the agent of the Chief of Staff of the Joint Committee on Taxation to receive returns and return information for purposes of conducting investigations.[113]

2. Other committees

By a resolution of the Senate or House, other committees may be specially authorized to inspect returns and return information.[114] The resolution must specify the purpose for which the return or return information is to be furnished and that such information cannot be reasonably obtained from any other source.[115] Then, upon written request of the committee chair, the IRS

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[109] Sec. 6103(f)(1).

[110] *Id.*

[111] Sec. 6103(f)(2).

[112] Sec. 6103(f)(4)(A).

[113] The Joint Committee on Taxation also has authority under other provisions of the Code to obtain returns and return information. Under section 6405, the Joint Committee on Taxation reviews proposed refunds in excess of $1 million. The Joint Committee on Taxation receives return information regarding such refund cases to fulfill its obligations under this provision. As necessary for an investigation by the Joint Committee on Taxation of the administration of internal revenue taxes, the Code also authorizes the Chief of Staff of the Joint Committee on Taxation to obtain "tax returns and information" from the IRS. Sec. 8023(a). The IRS is to furnish such returns and information to the Chief of Staff together with a brief report, with respect to each return, as to any IRS action taken or proposed as a result of any audit of the return. *Id.*

[114] Sec. 6103(f)(3). Concurrent resolutions are required for joint committees other than the Joint Committee on Taxation.

[115] *Id.*

will provide the return or return information to the committee when sitting in closed executive session.[116] A maximum of four agents or examiners of such committee or subcommittee may inspect returns and return information on their behalf.[117]

3. Whistle blowers

Section 6103 permits any person who has or had access to returns or return information to disclose such information to the following committees or their designated agents: the House Committee on Ways and Means, the Senate Committee on Finance, the Joint Committee on Taxation, and the Joint Committee's Chief of Staff.[118] The disclosure may be made if the person believes that the return or return information may relate to possible "misconduct, maladministration or taxpayer abuse."[119]

4. GAO

Returns and return information are available to GAO personnel. The IRS discloses such information upon request of the Comptroller General for the purposes of auditing the IRS, the Bureau of Alcohol, Tobacco and Firearms, or for conducting an audit of procedures and safeguards regarding the confidentiality of returns and return information under section 6103(p)(6).[120]

GAO personnel may also have access to returns and return information obtained by other Federal agencies to the extent necessary to audit a program or activity if the audit is authorized by law and there is a written request of the Comptroller General to the head of such agency.[121] If this information is insufficient to complete the audit, the Comptroller General can request from the Secretary returns and return information of the type received by the agency being audited to the extent necessary to complete the audit.[122] Within 90 days of the close of the audit, the Comptroller makes a report to Joint Committee describing the audited agency's use of returns

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[116] *Id.*

[117] Sec. 6103(f)(4)(B).

[118] Sec. 6103(f)(5).

[119] Sec. 6103(f)(5).

[120] Sec. 6103(i)(7)(A).

[121] Sec. 6103(i)(7)(B)(i).

[122] Sec. 6103(i)(7)(B)(ii).

and return information, with appropriate recommendations.[123]

In order for GAO to access returns and return information for these audits, it must provide written notification of the audit to the Joint Committee.[124] Within 30 days of this written notification, the Joint Committee, by a vote of two-thirds of its members, may deny GAO's access to returns and return information with respect to such audit.[125]

E. The President and Executive Agency Tax Checks

Section 6103(g) provides exceptions to the general rules of confidentiality for certain disclosures to the President and certain other persons. Disclosure of returns and return information may be made to the President and/or certain named employees of the White House Office upon the personally signed written request of the President. The President (or authorized representative of the Executive Office) and the head of a Federal agency also may make a written request for a "tax check" with respect to prospective appointees, with the IRS notifying the taxpayer of such request.

Under section 6103(g)(2), a "tax check" is limited to the inquiry as to whether:

(1) an individual has filed income tax returns for the last 3 years;

(2) has failed to pay any tax within 10 days after notice and demand in the current or preceding 3 years;

(3) has been assessed a negligence penalty within this time period;

(4) has been or is under criminal tax investigation (and the results of that investigation); or

(5) has been assessed any civil penalty for fraud.[126]

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[123] Sec. 6103(i)(7)(B)(iii).

[124] Sec. 6103(i)(7)(C)(i).

[125] Sec. 6103(i)(7)(C)(ii).

[126] Sec. 6103(g)(2). According to the IRS, no tax check disclosures are being made under this provision. Instead, tax check disclosures are being made pursuant to the consent provisions of section 6103(c)(which allows disclosure of returns and return information pursuant to designation by a taxpayer), discussed above. *See, e.g.,* Joint Committee on Taxation, *Disclosure Report for Public Inspection Pursuant to Internal Revenue Code Section 6103(p)(3)(C) for Calendar Year 1998* (JCX-19-99) April 29, 1999.

The President and any Federal agency head requesting returns and return information under section 6103(g) are obligated to make quarterly reports to the Joint Committee on Taxation identifying the subject taxpayer, the returns and return information involved, and the reasons for such requests. Presidential requests relating to current executive branch officers and employees at the time of the request are excluded from the reporting requirements.[127]

F. Nontax Criminal Investigations

Section 6103 provides several exceptions to allow the disclosure of returns and return information for the enforcement of Federal nontax criminal laws.

1. Access by *ex parte* court order

A Federal agency enforcing a nontax criminal law must obtain an *ex parte* court order to receive a return or return information submitted by the taxpayer (or his or her representative).[128] Only the Attorney General, Deputy Attorney General, Assistant Attorney Generals, United States Attorneys, Independent Counsels, or an attorney in charge of an organized crime strike force may authorize an application for the order.[129]

For a judge or magistrate to grant such an order, the application must demonstrate that:

(1) there is reasonable cause to believe, based upon information believed to be reliable, that a specific criminal act has been committed;

(2) there is reasonable cause to believe that the return or return information is or may be relevant to a matter relating to the commission of such act;

(3) the return or return information is sought exclusively for use in a Federal criminal investigation or proceeding concerning such act, and;

(4) the information sought cannot reasonably obtained, under the

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[127] Sec. 6103(g)(5).

[128] Sec. 6103(i)(1). Because the order is *ex parte*, the subject of the investigation has no rights of notice or participation in the process.

[129] Sec. 6103(i)(1)(B).

circumstances, from another source.[130]

Section 6103(i)(5) permits an agency to obtain, by *ex parte* court order, the return and return information of an individual who is a fugitive from justice. The application for an *ex parte* order must establish that a Federal felony arrest warrant has been issued and the taxpayer is a fugitive from justice, the return or return information is sought exclusively for locating the fugitive taxpayer, and reasonable cause exists to believe the information will help locate the fugitive.[131] Only the Attorney General, Deputy Attorney General, Assistant Attorney Generals, United States Attorneys, Independent Counsels, or an attorney in charge of an organized crime strike force may authorize an application for this order.[132] Once a court grants the application for an *ex parte* order, the return information may be disclosed to any Federal agency exclusively for purposes of locating the fugitive individual.[133]

2. Access by written request

Federal agencies can obtain return information received from a source other than the taxpayer or his or her representative without a court order. Accordingly, no court order is necessary to obtain information relating to the taxpayer filed with the IRS by third parties, such as the taxpayer's employer or banks. For nontax criminal purposes, the head of a Federal agency and other persons specifically identified by section 6103 may make a written request for returns and return information that was not provided to the IRS by the taxpayer or his representative.[134] The written request must contain: the taxpayer's name, address, and taxpayer identification number; the taxable period for which the information is sought; the statutory authority under which the criminal investigation or proceeding is being conducted; and the reasons why such disclosure is or may be relevant to the investigation. Unlike taxpayer supplied return information, the requesting agency does not have to demonstrate that the information sought is not reasonably available elsewhere.

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[130] *Id.*

[131] Sec. 6103(i)(5)(B).

[132] *Id.*

[133] Sec. 6103(i)(5)(A).

[134] In addition to the head of a Federal agency, the Inspector General, Attorney General, Deputy Attorney General, Associate and Assistant Attorney Generals, Director of the Federal Bureau of Investigation, the Administrator of the Drug Enforcement Agency, United States Attorney, Independent Counsel or any attorney in charge of a criminal division organized crime strike force may make a written request. Sec. 6103(i)(2).

3. IRS disclosure of return information concerning possible criminal activities and emergencies

Section 6103 permits the IRS to disclose return information (other than information provided to the IRS by the taxpayer) evidencing a crime.[135] The IRS may make the disclosure in writing to the head of a Federal agency charged with enforcing the laws to which the crime relates.[136] Return information may also be disclosed to apprise Federal law enforcement of the imminent flight of any individual from Federal prosecution.[137]

In cases of imminent danger of death or physical injury to an individual, section 6103 permits the IRS to disclose return information to Federal and *State* law enforcement agencies.[138] The statute does not grant authority, however, to disclose return information to *local* law enforcement, such as city, county, or town police.

4. Disclosure of returns filed relating to cash transactions over $10,000

Any Federal agency, State or local government agency, or foreign government agency may have access, upon written request, to the information contained in returns filed under section 6050I.[139] This return, Form 8300, captures business cash transactions exceeding $10,000. This provision cannot be used to obtain used disclosures for tax administration purposes.[140]

G. Statistical Use

Section 6103(j) permits the disclosure of returns and return information for statistical use. The information received under this section can only be redisclosed in a form that cannot identify the taxpayer, unless it is being provided to the taxpayer. The following describes the general types of statistical uses of return information.

Department of Commerce

Upon written request by the Secretary of Commerce, returns and return information are

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[135] Sec. 6103(i)(3)(A).

[136] *Id.*

[137] Sec. 6103(i)(3)(B)(ii).

[138] Sec. 6103(i)(3)(B)(i).

[139] Sec. 6103(l)(15).

[140] *Id.*

available to the Bureau of the Census. Return information is available to the Bureau of Economic Analysis as provided by regulation for the purpose of structuring censuses, national economic accounts, and related statistical activities.[141]

Federal Trade Commission

Upon written request of the Chairman of the Federal Trade Commission, return information of a corporation is available to the Division of Financial Statistics of the Bureau of Economics as prescribed by regulation to the extent necessary for legally authorized surveys of corporations. According to the IRS, this section is obsolete because the Federal Trade Commission no longer performs these economic surveys.[142]

Department of the Treasury

Upon written request setting forth the reason why the information is needed, returns and return information are available to the Department of the Treasury for certain statistical uses. The request must be signed by the head of the bureau or office within the Department of the Treasury needing the information for preparing economic studies or financial forecasts, projections, analysis, statistical studies, and conducting related activities. This disclosure authority is for purposes other than tax administration.[143]

Department of Agriculture

Returns and return information are available to Department of Agriculture personnel for the purpose of structuring, preparing, and conducting the Census of Agriculture pursuant to the Census of Agriculture Act of 1997.[144] The disclosure is made upon written request of the

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[141] Treas. reg. sec. 301.6103(j)(1)-1(c). Such information includes Statistics of Income transcript edit sheets regarding designated categories of corporations and microfilm records regarding corporate returns as needed. Treas. reg. sec. 301.6103(j)(1)-1(c)(1). The Social Security Administration can redisclose to the Bureau of Economic Analysis a limited amount of corporate return information that it receives from the IRS. Treas. reg. sec. 301.6103(j)(1)-1(c)(2).

[142] General Accounting Office, *Taxpayer Confidentiality: Federal, State, and Local Agencies Receiving Taxpayer Information,* (GAO-GGD-99-164, August 1999) at 25.

[143] Sec. 6103(j)(3).

[144] This Act transferred the responsibility for the Census of Agriculture from the Bureau of the Census to the Department of Agriculture.

Secretary of Agriculture in accordance with Treasury regulations.[145]

H. Administrative Uses of Returns And Return Information

Returns and return information may be disclosed to Federal agencies for specific administrative purposes. Section 6103 authorizes the following agencies by name to receive returns and return information for administrative purposes.

Social Security Administration

Several provisions of section 6103 authorize disclosures to and by the Social Security Administration. Upon written request, the IRS may disclose returns and return information related to:

(1) taxes imposed by chapter 2 of the Code (self employment), chapter 21 of the Code (Federal Insurance Contributions Act) and chapter 24 of the Code (Collection of Income Tax at Source) to administer the Social Security Act; and

(2) a plan to which part I of subchapter D of chapter 1 (relating to pension, profit sharing and stock bonus plans) applies for carrying out section 1131 of the Social Security Act, limited to return information described in section 6057(d).[146]

The Commissioner of Social Security can redisclose information received under these provisions to State and local child support enforcement agencies with respect to social security account numbers, net earnings from self employment, wages, and payments of retirement income. Such disclosure is to be made only for purposes of establishing and collecting child support obligations and locating individuals with such obligations.[147]

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[145] Sec. 6103(j)(5).

[146] Sec. 6103(l)(1)(A) and (B). Section 6057 relates to the annual registration, voluntary reports, and notification of change in status made by pension plans. Section 6057(d) provides that the Secretary of the Treasury is to transmit copies of any statements, notifications, reports or other information obtained under this section to the Commissioner of Social Security.

[147] Sec. 6103(l)(8). No disclosures are being made under this provision, instead the Social Security Administration makes disclosures to the Federal Office of Child Support Enforcement on behalf of the IRS. General Accounting Office, *Taxpayer Confidentiality: Federal, State and Local Agencies Receiving Taxpayer Information* (GAO-GGD-99-164, August 1999) at 37.

To reduce duplication in processing and increase efficiency, section 6103 permits the IRS and the Social Security Administration to process and share information returns.[148] This program is known as Combined Annual Wage Reporting program. The largest segment of this activity is the Social Security Administration's processing of wage data submitted by employers (Forms W-2). Section 6103 permits the disclosure of information returns to the Social Security Administration to enable the Social Security Administration to provide mortality information for epidemiological and similar research.[149]

Section 6103(m)(7) permits the IRS to disclose to Social Security Administration personnel the mailing address of any taxpayer who is entitled to receive a social security account statement pursuant to 1143(c) of the Social Security Act. The Social Security Administration is to use this information for purposes of mailing such statement to the taxpayer.

Section 6103(l)(7) permits the Commissioner of Social Security to redisclose return information it received from the IRS relating to net earnings from self employment, wages, and payments of retirement income to any Federal, State, or local agency administering any of the following nine program categories:

(1) a State program funded under part A of title IV of the Social Security Act;

(2) medical assistance provided under a State plan approved under title XIX of the Social Security Act;

(3) supplemental security income benefits provided under title XVI of the Social Security Act, and Federally administered supplementary payments of the type described in section 1616(a) of such Act (including payments pursuant to an agreement entered into under section 212(a) of Public Law 93-66);

(4) any benefits provided under a State plan approved under title I, X, XIV, or XVI of the Social Security Act (as those titles apply to Puerto Rico, Guam, and the Virgin Islands);

(5) unemployment compensation provided under a State law described in section 3304 of the Code;

(6) assistance provided under the Food Stamp Act of 1977;

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[148] Sec. 6103(l)(5)(B).

[149] Sec. 6103(l)(5).

(7) State-administered supplementary payments of the type described in section 1616(a) of the Social Security Act [42 USCS sec. 1382e(a)] (including payments pursuant to an agreement entered into under section 212(a) of Public Law 93-66);

(8) (a) any needs-based pension provided under chapter 15 of Title 38, United States Code, or under any other law administered by the Secretary of Veterans Affairs;
(b) parents' dependency and indemnity compensation provided under section 1315 of Title 38, United States Code;
(c) health-care services furnished under sections 1710(a)(1)(I), 1710(a)(2), 1710(b), and 1712(a)(2)(B) of Title 38, United States Code; and
(d) compensation paid under chapter 11 of Title 38, United States Code, at the 100 percent rate based solely on unemployability and without regard to the fact that the disability or disabilities are not rated as 100 percent disabling under the rating schedule; and

(9) any housing assistance program administered by the Department of Housing and Urban Development that involves initial and periodic review of an applicant's or participant's income, except that return information may be disclosed under this clause only on written request by the Secretary of Housing and Urban Development and only for use by officers and employees of the Department of Housing and Urban Development with respect to applicants for and participants in such programs.[150]

Section 6103 allows the IRS to disclose return information relating to unearned income upon written request from any Federal, State, or local agency administering these same programs.[151] The disclosures under this section are only for purposes of determining the eligibility for, or the correct amount of, benefits under these programs.[152]

Section 6103(l)(10) permits the Commissioner of Social Security to redisclose return information relating to net earnings from self employment, wages, and payments of retirement income to the Office of Management and Budget for purposes of administering the Federal

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[150] Sec. 6103(l)(7)(D).

[151] Sec. 6103(l)(7)(B).

[152] Sec. 6103(l)(7)(C).

Employees Retirement System (chapters 83 and 84 of Title 5) only.

For purposes of administering the District of Columbia Retirement Protection Act of 1997, section 6103(l)(16) permits the Commissioner of Social Security to redisclose specified return information.

For purposes of determining the extent to which any Medicare beneficiary is covered under any group health plan, the IRS may disclose filing status and taxpayer identity information concerning a Medicare beneficiary to the Commissioner of Social Security. If married, the name and taxpayer identification number of the spouse also is provided. The request must be in writing. The Commissioner of Social Security may redisclose to the Administrator of the Health Care Financing Administration ("HCFA") the name and taxpayer identification number of a medicare beneficiary who received wages from a qualified employer above a specified amount and, if such a beneficiary is married, the name and taxpayer identification number of the spouse. The name, taxpayer identification number, and address of each qualified employer may also be disclosed.

The HCFA Administrator may further redisclose to the qualified employer the name and taxpayer identification number of the individual having received wages from the employer for purposes of determining the period during which such employee or employee's spouse was covered under a group health plan. For purposes of presenting a claim to a group health plan for which Medicare benefits were paid, the HCFA Administrator may disclose to the plan the taxpayer identification number of the spouse or employee covered by the plan during the period the plan was the primary plan. The HCFA may also disclose such information to an agent so that the agent may make the disclosures to the group health plan and qualified employer.[153]

Railroad Retirement Board

The Railroad Retirement Board ("RRB") can receive returns and return information with respect to taxes imposed by the Railroad Retirement Tax Act (chapter 22 of the Code).[154] The RRB is to use this information for purposes of administering the Railroad Retirement Act.

Under section 6103(l)(1), the RRB receives copies of "Employer's Annual Railroad Retirement Tax Returns" and "Employee Representative's Quarterly Railroad Retirement Tax Returns."[155] Within the RRB, the Tax Collection and Reconciliation Section of the Bureau of

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[153] Sec. 6103(l)(12).

[154] Sec. 6103(l)(1)(C).

[155] Internal Revenue Service, Document 6630, *Safeguard Review Report - Railroad Retirement Board*, 2 (October 1995).

Fiscal Operations ("TCRS") receives these returns and is the major user of these returns.[156] TCRS uses the returns to compare amounts reported to the RRB as contributions towards retirement plans.[157] The Audit and Compliance Division and the Office of Inspector General also use these returns for routine audit purposes and for fraud investigations.[158]

Department of Labor and Pension Benefit Guaranty Corporation

The IRS may disclose returns and return information to the Department of Labor and the Pension Benefit Guaranty Corporation to the extent necessary to administer the Employee Retirement Income Security Act of 1974, as amended.[159]

Department of Education

Disclosure of return information to carry out income contingent repayment of student loans

The IRS may disclose taxpayer identity information, filing status, and adjusted gross income to the Department of Education upon written request of the Secretary of Education. This information is to be used to establish the appropriate repayment amount, contingent on income, for an applicable student loan.[160] According to the IRS, no disclosures have been made under this provision.[161] It is the understanding of the Joint Committee staff that the IRS has interpreted section 6103 to exclude contractors used by the Department of Education from eligibility for disclosure of return information under this provision. As a result, the Department of Education obtains taxpayer information by consent of the taxpayer under section 6103(c), rather than under section 6103(l)(13).[162]

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[156] *Id.*

[157] *Id.*

[158] *Id.*

[159] Sec. 6103(l)(2).

[160] Sec. 6103(l)(13).

[161] General Accounting Office, *Taxpayer Confidentiality: Federal, State, and Local Agencies Receiving Taxpayer Information* (GAO-GGD-99-164, August 1999) at 28, n.2.

[162] *Id.*

Individuals who owe an overpayment of Federal Pell grants or who have defaulted on student loans administered by the Department of Education

For purposes of locating a taxpayer to collect an overpayment of a Federal Pell grant or to collect payments on a defaulted student loan, the IRS may disclose the mailing address of the taxpayer to the Department of Education. To assist in locating the defaulting taxpayer, the Department of Education may redisclose the mailing address to the personnel of certain lenders, States, nonprofit guarantee agencies, and educational institutions whose duties relate to the collection of such student loans.[163]

Higher Education Act Amendments of 1998

The Higher Education Act Amendments of 1998 ("Higher Education Act") authorized the Department of Education to confirm with the IRS four discrete items of return information.[164] This disclosure is to verify information reported by applicants on student financial aid applications. The Higher Education Act, however, did not amend the Code to permit disclosures for this purpose. Because returns and return information may not be disclosed unless authorized by the Code,[165] the disclosure provided for by the Higher Education Act may not be made unless the taxpayer consents to the disclosure under section 6103(c).

Department of Health and Human Services ("HHS")

Blood Donor Locator Service

Upon written request, the IRS can disclose to the Blood Donor Locator Service, a department within HHS, a taxpayer's mailing address.[166] The purpose of this disclosure is to enable the Blood Donor Locator Service to locate donors to inform them of the possible need for medical care and treatment related to acquired immune deficiency syndrome.[167] The law requires the Treasury Department to destroy all blood donor records in its possession after disclosure to the Blood Donor Locator Service.[168]

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[163] Sec. 6103(m)(4).

[164] Pub. L. No. 105-244, sec. 483 (1998).

[165] Sec. 6103(a).

[166] Sec. 6103(m)(6)(A).

[167] Sec. 6103(m)(6)(B).

[168] Sec. 6103(m)(6)(C).

Defaulted student loans

The IRS can disclose to HHS the mailing address of a taxpayer who has defaulted on a student loan administered by HHS.[169] To assist in locating the defaulting taxpayer, HHS may redisclose the mailing address to the personnel of certain eligible lenders and schools whose duties relate to the collection of such student loans.

United States Customs Service

The IRS may make disclosures to the United States Customs Service to the extent necessary in (1) ascertaining the correctness of any entry in audits of imports and exports or (2) other actions to recover any loss of revenue, or to collect duties, taxes and fees, determined to be due and owing as a result of such audits. The IRS makes the disclosure upon written request of the United States Customs Service and as prescribed by regulation. The information is limited to return information relating to taxes imposed by chapter 1 (normal taxes and surtaxes) and chapter 6 (consolidated returns).[170]

National Archives and Records Administration

For purposes of appraisal of IRS records for destruction or retention, returns and return information can be disclosed upon written request of the Archivist of the United States.[171] This applies to requests made after July 22, 1998.

National Institute for Occupational Safety and Health

For the purpose of locating individuals who are or have been exposed to occupational hazards in order to determine the status of their health or to inform them of the possible need for medical care or treatment, the IRS may disclose a taxpayer's mailing address to the National Institute for Occupational Safety and Health.[172]

Department of the Treasury - personnel and claimant representative matters

The IRS may disclose returns and return information for use in an administrative action

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[169] Sec. 6103(m)(5)(A).

[170] Sec. 6103(l)(14). *See also* General Accounting Office, *Taxpayer Confidentiality: Federal, State, and Local Agencies Receiving Taxpayer Information,* (GAO-GGD-99-164, August 1999) at 28.

[171] Sec. 6103(l)(17).

[172] Sec. 6103(m)(3).

or proceeding affecting the personnel rights of a current or former Treasury employee, or any person whose rights are affected by an administrative action or proceeding under 31 USC section 330 (regarding practice before the Department of the Treasury). Such disclosure may be made to the current or former employee, the affected person, or his or her authorized representative only if the IRS determines the return or return information is or may be relevant and material to the action or proceeding. Disclosure can be made to Department of the Treasury personnel for use in such proceedings as necessary to advance or protect the interests of the United States.[173]

District of Columbia Retirement Protection Act Trustee

Disclosure of return information may be made for purposes of administering the District of Columbia Retirement Protection Act of 1997.[174] Any duly authorized officer or employee of the Department of Treasury, a Trustee (as defined in the District of Columbia Retirement Protection Act), designated officer or employee of a Trustee, or actuary engaged by such Trustee, may have access upon written request to specified return information.[175] Disclosure is limited to those whose official duties require such disclosure and the disclosed information is to be used solely for the purpose of determining an individual's eligibility for, or the correct amount of benefits under, the District of Columbia Retirement Protection Act. Disclosure may be made by the Commissioner of Social Security. To the extent the information is not available from the Social Security Administration, the IRS may make the disclosure.

The return information disclosed under this provision may be redisclosed in a judicial or administrative proceeding relating to an individuals's eligibility for, or the determination of the correct amount of, benefits under the District of Columbia Retirement Protection Act.[176] The return information available under this provision relates to the amount of wage income, the name, address, and identifying number of payors of wage income, the taxpayer's identity, and the occupational status reflected on any return filed by, or with respect to, any individual whose eligibility for or correct amount of benefits under the District of Columbia Retirement Protection Act is being determined.[177]

I. Miscellaneous Disclosures

The following is a description of miscellaneous disclosures authorized by section 6103.

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[173] Sec. 6103(l)(4).

[174] Pub. L. No. 105-33, sec. 11,001 et. seq. (1997).

[175] Sec. 6103(l)(16)(A).

[176] Sec. 6103(l)(16)(B).

[177] Sec. 6103(l)(16)(A).

Such disclosures include disclosures of undelivered refund information, disclosures to collect Federal claims, disclosures of refund offsets, disclosures to welfare agencies for benefit determinations, disclosures for child support enforcement, disclosures to determine credit worthiness of Federal loan applicants, and disclosures to tax administration contractors.

Disclosure of taxpayer identity information for undelivered refunds and federal claims

The IRS may disclose to the press and other media taxpayer identity information for purposes of notifying persons entitled to tax refunds, when the IRS's reasonable efforts to locate such persons have been unsuccessful.[178] The IRS discloses the name, city, State, and zip code to the press for this purpose.

The mailing address of a taxpayer can be disclosed to Federal agency personnel for purposes of locating such taxpayer to collect or compromise a Federal claim against the taxpayer.[179]

Disclosure that applicant for Federal loan has tax delinquent account

The IRS may disclose whether an applicant for a loan under any included Federal loan program has a tax delinquent account upon written request of the head of the Federal agency administering the program.[180] An included Federal loan program means any program under which the United States or a Federal agency makes, guarantees, or insures loans.[181] This disclosure is only to be made as necessary to determine the creditworthiness of the applicant.[182]

Disclosure of return information to Federal, State, and local child support enforcement agencies

The IRS may disclose to Federal, State, and local child support enforcement agencies specified items of return information upon written request in connection with an individual's child support obligations to be established or enforced pursuant to the Social Security Act and with respect to the individual to whom such obligation is owing.[183] The enforcement agency may

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[178] Sec. 6103(m)(1).

[179] Sec. 6103(m)(2)(A).

[180] Sec. 6103(l)(3)(A).

[181] Sec. 6103(l)(3)(C).

[182] Sec. 6103(l)(3)(B).

[183] Sec. 6103(l)(6)(A).

redisclose to an agent authorized to carry out such programs the address and social security number of such individual and the amount of any overpayments otherwise payable to such individual that have been withheld to offset past-due child support.[184] The information obtained under this provision may only be used to the extent necessary in establishing and collecting child support obligations and locating individuals owing such obligations.[185]

Disclosure of certain information to agencies requesting a reduction of overpayments

Section 6402(c) allows the collection of past-due support from overpayments owed to a taxpayer. Section 6402(d) allows the collection of debts owed to Federal agencies. Section 6402(e) allows the collection of past-due State income tax obligations from a State resident. The IRS may disclose to agencies seeking an offset against overpayments owed to a taxpayer:

(1) taxpayer identity information of the taxpayer against whom the offset was or was not made;

(2) the fact that a reduction was or was not made;

(3) the amount of the reduction;

(4) whether such person filed a joint return and the identity of the spouse with whom such joint return was filed; and

(5) the fact (and amount) that a payment was made to the spouse on the basis of a joint return.[186]

Use of this information is restricted to collecting the debt and the defense of any litigation or administrative proceeding resulting from the reduction made under section 6402(c), (d), or (e).[187]

Disclosure to certain other persons (tax administration contractors)

Section 6103(n) allows the IRS to disclose return information to the extent necessary in connection with the processing, storage, transmission, and reproduction of such returns and return information, the programming, maintenance, repair, testing and procurement of

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[184] Sec. 6103(l)(6)(B).

[185] Sec. 6103(l)(6)(C).

[186] Sec. 6103(l)(10)(A).

[187] Sec. 6103(l)(10)(B).

equipment, and the providing of other services, for purposes of tax administration.[188]

Disclosure of returns and return information with respect to alcohol, tobacco, and firearms taxes and wagering taxes

To the extent required by their official duties, Federal agency personnel are permitted access to returns and return information with respect to taxes on alcohol, tobacco, and firearms imposed by subtitle E of the Code.[189]

Section 4424 (rather than section 6103) governs access to returns and return information relating to wagering taxes imposed by chapter 35 of the Code. Under section 4424, such returns and return information are only disclosable in connection with the administration or civil or criminal enforcement of any tax imposed by the Code.[190]

J. Procedures and Recordkeeping

Section 6103(p) requires the IRS to keep a standardized system of permanent records on the use and disclosure of returns and return information. However, these recordkeeping requirements do not apply in certain situations, such as return or return information open to the public generally (accepted offers-in-compromise, amounts of outstanding liens, etc.), disclosures to the Department of Treasury or Department of Justice for tax administration and litigation purposes, disclosures to persons with a material interest, taxpayer consent disclosures, disclosures to the media of taxpayer identity information, and disclosure to contractors.[191]

Federal and State agencies that receive returns and return information are required to also maintain a standardized system of permanent records on the use and disclosure of that information.[192] Maintaining such records is a prerequisite to obtaining and continuing to obtain returns and return information. Such agencies must also establish procedures satisfactory to the IRS for safeguarding the information it receives. The IRS is required to review the safeguards established by such agencies on a regular basis.

Section 6103 requires the IRS to make reports to the Joint Committee on Taxation each year on all requests and reasons therefore received for the disclosure of returns and return

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[188] Sec. 6103(n).

[189] Sec. 6103(o)(1).

[190] Sec. 6103(o)(2).

[191] Sec. 6103(p)(3)(A).

[192] Sec. 6103(p)(4).

information.[193] As a separate section to be disclosed publicly, the IRS is required to provide a listing of all agencies receiving returns and return information, the number of cases in which disclosure was made to them during the year, and the general purposes for which the requests were made.[194] The IRS must also file annual reports with the House Committee on Ways and Means, the Senate Committee on Finance, and the Joint Committee on Taxation regarding procedures and safeguards followed by recipients of returns and return information.[195]

K. Criminal and Civil Penalties for the Unauthorized Disclosure of Returns and Return Information

1. Criminal disclosure

Under section 7213, criminal penalties apply to: (1) willful unauthorized disclosures of returns and return information by Federal and State employees and other persons; (2) the offering of any item of material value in exchange for a return or return information and the receipt of such information pursuant to such an offer; and (3) the unauthorized disclosure of return information received by certain shareholders under the material interest provision of section 6103.[196] Under section 7213, a court can impose a fine up to $5,000, up to five years imprisonment, or both, together with the costs of prosecution.[197] If the offense is committed by a Federal employee or officer, the employee or officer will be discharged from office upon conviction.[198] Federal law also makes it a crime for a Federal employee or officer to disclose

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[193] Sec. 6103(p)(3).

[194] *See, e.g.,* Joint Committee on Taxation, *Disclosure Report for Public Inspection Pursuant to Internal Revenue Code Section 6103(p)(3)(C) for Calendar Year 1998* (JCX-19-99), April 29, 1999; Joint Committee on Taxation, *Disclosure Report for Public Inspection Pursuant to Internal Revenue Code Section 6103(p)(3)(C) for Calendar Year 1997* (JCX-47-98), June 16, 1998; Joint Committee on Taxation, *Disclosure Report for Public Inspection Pursuant to Internal Revenue Code Section 6103(p)(3)(C) for Calendar Year 1996* (JCX-38-97), July 14, 1997.

[195] Sec. 6103(p)(5).

[196] Sec. 6103(e)(1)(D)(iii) provides permits one-percent shareholders to access corporate returns.

[197] Note, however, that 18 U.S.C. section 3571 authorizes a fine of not more than $250,000 upon an individual being convicted of a felony. 18 U.S.C. sec. 3571(b)(3).

[198] Sec. 7213(a)(1).

confidential information.[199]

2. Criminal inspection

The willful and unauthorized inspection of returns and return information can subject Federal and State employees and others to a maximum fine of $1,000 up to a year in prison, or both, in addition to the costs of prosecution.[200] If the offense is committed by a Federal employee or officer, the employee or officer will be discharged from office upon conviction.[201]

3. Civil remedies under the Code

If a Federal employee makes an unauthorized disclosure or inspection, a taxpayer can bring suit against the United States in Federal district court.[202] If a person other than a Federal

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[199] 18 U.S.C. sec. 1905 provides:

> Disclosure of confidential information
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> Whoever, being an officer or employee of the United States or of any department or agency thereof, any person acting on behalf of the Office of Federal Housing Enterprise Oversight, or agent of the Department of Justice as defined in the Antitrust Civil Process Act (15 U.S.C. 1311-1314), publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined under this title, or imprisoned not more than one year, or both; and shall be removed from office or employment.

[200] Sec. 7213A. Note, however, that 18 USC sec. 3571 authorizes a fine of not more than $100,000 upon an individual being convicted of a Class A misdemeanor. 18 USC sec. 3571(b)(5). Section 1030 of Title 18 also penalizes whoever "intentionally accesses a computer without authorization or exceeds authorized access and thereby obtains . . . (B) information from any department or agency of the United States. . ." 18 U.S.C. sec. 1030.

[201] Sec. 7213A(b)(2).

[202] Sec. 7431(a)(1).

employee makes an unauthorized disclosure or inspection, suit may be brought directly against such person.[203] No liability results from a disclosure based on a good faith, but erroneous, interpretation of section 6103.[204] A disclosure or inspection made at the request of the taxpayer will also relieve liability.[205]

Upon a finding of liability, a taxpayer can recover the greater of $1,000 per act of unauthorized disclosure (or inspection), or the sum of actual damages plus, in the case of an inspection or disclosure that was willful or the result of gross negligence, punitive damages.[206] The taxpayer may also recover the costs of the action and, if found to be a prevailing party, reasonable attorney fees.[207]

The taxpayer has two years from the date of the discovery of the unauthorized inspection or disclosure to bring suit.[208] The IRS is required to notify a taxpayer of an unauthorized inspection or disclosure as soon as practicable after any person is criminally charged by indictment or information for unlawful inspection or disclosure.[209]

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[203] Sec. 7431(a)(2).

[204] Sec. 7431(b)(1).

[205] Sec. 7431(b)(2).

[206] Sec. 7431(c)(1).

[207] Sec. 7431(c)(2) and (3).

[208] Sec. 7431(d).

[209] Sec. 7431(e).

III. EXCHANGE OF INFORMATION UNDER TAX TREATIES

In general

Disclosure of returns or return information to foreign tax authorities generally is prohibited under section 6103. However, section 6103(k)(4) permits disclosure to the competent authority of a foreign government that has an income tax or gift and estate tax treaty (or other treaty or bilateral agreement relating to the exchange of tax information) with the United States, but only to the extent provided in, and subject to the terms and conditions of, such treaty or bilateral agreement. In addition, under section 274(h)(6)(C), the United States may enter into agreements with certain Caribbean countries providing for exchange of information. Such agreements are treated as income tax treaties for purposes of the disclosure exception under section 6103(k)(4).

U.S. tax treaties typically contain articles governing the exchange of information. These exchange of information articles serve one of the principal purposes of a tax treaty -- to prevent tax avoidance or tax evasion. These articles generally provide for the exchange of information between the tax authorities of the two countries when such information is necessary for carrying out provisions of the treaty or of their domestic tax laws. Individuals referred to as "competent authorities" are designated by each country to make written requests for information and to receive information.[210]

The exchange of information articles typically cover information relating to taxes to which the treaty applies, but can also apply to other taxes (e.g., sales taxes) not covered by the treaty. Many of the treaties permit the exchange of information even if the taxpayer involved is not a resident of one of the treaty countries. The exchange of information articles may be similar to, or represent a variation on, Article 26 of the 1996 U.S. model income tax treaty (the "U.S. model"), which is described below.

Tax treaties contain limitations on the obligations of the countries to supply information. In this regard, the obligation to exchange information under the treaties typically does not require either country to carry out measures contrary to its laws or administrative practices, or to supply information that is not obtainable under its laws or in the normal course of its administration, or that would reveal trade secrets or other information the disclosure of which would be contrary to public policy.

Information that is received under the exchange of information articles is subject to

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[210] The U.S. competent authority is the Secretary of the Treasury or his delegate. The U.S. competent authority function has been delegated to the Commissioner of Internal Revenue, who has redelegated the authority to the Assistant Commissioner (International). On interpretive issues, the latter acts with the concurrence of the Associate Chief Counsel (International) of the IRS.

secrecy clauses contained in the treaties. In this regard, the country requesting information under the treaties typically is required to treat any information received as secret in the same manner as information obtained under its domestic laws. In general, disclosure is not permitted other than to persons or authorities involved in the administration, assessment, collection or enforcement of taxes to which the treaty applies. For example, disclosure can be made to legislative bodies, such as the tax-writing committees of the Congress, and the General Accounting Office for purposes of overseeing the administration of U.S. tax laws.

Information may be exchanged between treaty countries under the exchange of information articles in several different ways. Information can be exchanged upon request for specific tax information concerning particular persons or transactions. Automatic exchanges of information provide a treaty country with information regarding mutually agreed upon categories of cases in accordance with mutually agreed upon procedures. Once these mutual agreements have been reached, the exchange of information occurs automatically, without the necessity of a further specific request. Spontaneous exchanges of information (i.e., without request by the other country) also may be permitted under some treaties in specified circumstances.

Each treaty specifies the purposes for which information may be exchanged. There is significant variation among U.S. tax treaties in the scope of the purposes for which information may be exchanged. A few treaties have a very narrow scope, permitting the exchange of information only with respect to tax fraud or for use in a criminal investigation or prosecution. On the other hand, most have a broad scope, permitting information to be exchanged pursuant to competent authority proceedings for the purpose of avoiding double taxation, during simultaneous examinations of multinational taxpayers, or even for purposes of carrying out any domestic tax law, regardless of whether the treaty partner providing the information has a similar domestic tax. In general, the United States pursues the broadest scope of exchange of information that it can obtain from a treaty partner in its treaty negotiations.

Many U.S. tax treaties also contain administrative assistance provisions which provide the extent to which a treaty country is obligated to collect taxes on behalf of the other country. The collection provisions in the treaties typically provide for collection assistance to ensure that treaty benefits are not going to unintended beneficiaries.

In addition to the exchange of information articles in U.S. tax treaties, exchange of information provisions are contained in tax information exchange agreements entered into between the United States and another country. In addition, information may be exchanged pursuant to the Convention on Mutual Administrative Assistance in Tax Matters developed by the Council of Europe and the Organization for Economic Cooperation and Development (the "Multilateral Mutual Assistance Convention"), which limits the use of exchanged information and permits disclosure of such information only with the prior authorization of the competent

authority of the country providing the information.[211] Moreover, the United States has entered into various mutual legal assistance treaties with other countries, which can be used to obtain tax information in criminal investigations.

For calendar year 1998, there were 1,386,388 disclosures of tax returns and/or return information to a foreign country tax treaty authority under section 6103(k)(4) (relating to disclosures to a competent authority of a foreign government that has a tax treaty with the United States), compared with 2,555,797,076 of total disclosures under section 6103 for that year.[212]

Description of exchange of information article in the U.S. model

Article 26 of the U.S. model provides for the exchange of information which is relevant to carry out the provisions of the treaty or the laws of the two countries concerning all taxes imposed by the two countries' national governments, including taxes imposed on residents of third countries. Exchange of information under the U.S. model includes information relating to the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes to which the treaty applies.

Information that is received under the exchange of information article is subject to a secrecy clause contained in the U.S. model. Under the U.S. model, any information exchanged is to be treated as secret in the same manner as information obtained under the domestic laws of the country receiving the information. The exchanged information may be disclosed only to persons or authorities (including courts and administrative bodies) involved in the assessment, collection, or administration of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes to which the treaty applies, or to persons or authorities involved in the oversight of the above functions. Persons or authorities receiving exchanged information can use the information only for such purposes. Persons involved in the administration of taxes include legislative bodies, such as the tax-writing committees of the Congress, and the General Accounting Office, for purposes of overseeing the administration of U.S. tax laws. Exchanged information may be disclosed in court proceedings or in judicial decisions.

The U.S. model contains limitations on the obligations of the countries to supply information. A country is not required to carry out administrative measures at variance with the laws and administrative practice of either country (including the income tax treaty of which the

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[211] The U.S. Senate ratified the Multilateral Mutual Assistance Convention, subject to certain reservations, in September 1990. The Multilateral Mutual Assistance Convention entered into force on April 1, 1995, and has been signed by the following countries: Denmark, Finland, Iceland, the Netherlands, Norway, Sweden, and the United States.

[212] See Joint Committee on Taxation, *Disclosure Report for Public Inspection Pursuant to Internal Revenue Code Section 6103(p)(3)(C) for Calendar Year 1998* (JCX-19-99), April 29, 1999.

article is a part), or to supply information that is not obtainable under the laws or in the normal course of the administration of either country, or to supply information that would disclose any trade, business, industrial, commercial, or professional secret or trade process, or information the disclosure of which would be contrary to public policy.

The U.S. model also contains a provision addressing the authority to obtain information from third parties (commonly referred to as the "bank secrecy provision"). This provision of the U.S. model provides that a country has the authority to obtain and provide information held by financial institutions, nominees, or persons acting in a fiduciary capacity. This information must be provided to the requesting country notwithstanding any laws or practices of the requested country that would otherwise preclude acquiring or disclosing such information.

Upon an appropriate request for information, the U.S. model provides that the requested country (the country receiving the request for information) is to obtain the information in the same manner and to the same extent as if its tax were at issue, notwithstanding that the requested country may not, at that time, need such information for purposes of its own tax. The competent authority of the other country is, if possible, to provide the information in the form requested. Specifically, the competent authority of the requested country is to provide depositions of witnesses and authenticated copies of unedited original documents (including books, papers, statements, records, accounts, and writings) to the same extent that they can be obtained under the laws and administrative practices of the requested country in the enforcement of its own tax laws. The competent authority of the requested country must allow representatives of the other country (the country requesting the information) to enter the requested country in order to interview individuals and examine books and records with the consent of the persons subject to the examination.

With respect to assistance in collection of tax, the U.S. model provides that the countries are to endeavor to collect such amounts on behalf of the other country as may be necessary to ensure that benefits of the treaty are not going to persons not entitled to those benefits. The collection provision does not impose on either treaty country the obligation to carry out administrative measures that would be contrary to its sovereignty, security, or public policy.

Not all the existing U.S. tax treaties provide for as comprehensive information exchange or administrative assistance as the U.S. model.

Description of exchange of information articles in treaties with certain countries

Below is a description of the exchange of information articles contained in the U.S. income tax treaties with Canada, Germany, Japan, and the United Kingdom. These countries were chosen for illustration because a significant amount of information is exchanged between these countries and the United States.

Canada

Article XXVII of the U.S.-Canada income tax treaty (as specifically amended by Article 16 of the Third Protocol to the treaty) addresses the exchange of information between the United States and Canada.[213] Article XXVII of the U.S.-Canada treaty provides for the exchange of information that is relevant for carrying out the provisions of the treaty or the domestic laws of the United States and Canada concerning the taxes covered by the treaty (insofar as taxation under those domestic laws is not contrary to the treaty). The article expands the applicable taxes for purposes of the exchange of information provision to any taxes imposed by the United States or Canada (including, for example, excise taxes and goods and services taxes) and other taxes to which any other provision of the treaty applies, but only to the extent that the information is relevant for purposes of that provision. The article also provides that information can be exchanged with respect to persons not covered by the treaty, such as persons not resident in the United States or Canada.

Under the U.S.-Canada treaty, any information exchanged is to be treated as secret in the same manner as information obtained under the taxation laws of the country receiving the information. The exchanged information is to be disclosed only to persons or authorities (including courts and administrative bodies) involved in the assessment or collection of, the administration and enforcement in respect of, or the determination of appeals in relation to the taxes to which the treaty applies. In a departure from the U.S. model, the treaty entitles the United States and Canada to share information received from the other country with persons or authorities involved in the assessment, collection, administration, enforcement, or appeals of state, provincial, or local taxes substantially similar to the taxes covered generally by the treaty. Any persons or authorities receiving exchanged information can use the information only for such purposes. It is understood by the United States and Canada that the legislative bodies involved in the administration of taxes, including their agents, such as the General Accounting Office, could have access to such information as they consider necessary to carry out their oversight responsibilities. Exchanged information may be disclosed in public court proceedings or in judicial decisions.

The treaty also permits the United States and Canada to release exchanged information to an arbitration board established pursuant to the treaty to the extent such information is necessary for carrying out the arbitration. The members of the arbitration board are subject to the same

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[213] The Convention Between the Untied States of American and Canada with Respect to Taxes on Income and Capital was signed on September 26, 1980, and entered into force on August 16, 1984 (the "U.S.-Canada treaty"). The U.S.-Canada treaty has been amended by the First Protocol (signed June 14, 1983, and entered into force contemporaneously with the treaty on August 16, 1984), the Second Protocol (signed on March 28, 1984, and entered into force contemporaneously with the treaty on August 16, 1984), the Third Protocol (signed on March 17, 1995, and entered into force on November 9, 1995), and the Fourth Protocol (signed on July 29, 1997, and entered into force on December 16, 1997).

limitations on disclosure as the national governments.

If the United States or Canada requests information under the exchange of information article, the treaty provides that the other country is to endeavor to obtain the information to which the request relates in the same way as it if its own taxation were involved, notwithstanding that it may not itself need such information at that time. In addition, the country requested to obtain information is to endeavor to provide the information in the particular form requested, such as depositions of witnesses and copies of unedited original documents (including books, papers, statements, records, accounts or writings), to the same extent that such depositions and documents can be obtained under the laws and administrative practices of that country with respect to its own taxes.

The U.S.-Canada treaty also contains limitations on the obligations of the United States and Canada to supply information. Neither the United States nor Canada is required to carry out administrative measures at variance with the laws and administrative practice of either country, or to supply information that is not obtainable under the laws or in the normal course of tax administration of either country. Neither country is required to supply information that would disclose any trade, business, industrial, commercial or professional secret or trade process, or information the disclosure of which would be contrary to public policy.

With respect to assistance in collection of tax, Article XXVI (mutual agreement procedure) of the U.S.-Canada treaty provides that the United States and Canada are to endeavor to collect such amounts of tax on behalf of the other country as may be necessary to ensure that the relief granted by the treaty does not inure to the benefit of persons not entitled to such relief. The assistance in collection provision does not impose on either treaty country the obligation to carry out administrative measures of a different nature from those used in the collection of its own tax or which would be contrary to its public policy. This assistance in collection provision is substantially similar to the U.S. model. In addition, Article XXVI A of the U.S.-Canada treaty provides a separate assistance in collection provision that is broader than the U.S. model.[214] Under Article XXVI A, the United States and Canada generally are to undertake to lend assistance to each other in collecting all categories of taxes collected by or on behalf of the government of either country, together with interest, costs, additions to such taxes, and civil penalties.[215]

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[214] Article XXVI A was added by Article 15 of the Third Protocol to the treaty.

[215] The U.S. model does not include a separate assistance in collection article similar to Article XXVI A. The assistance in collection article in the U.S.-Canada treaty is similar, however, to the provision on assistance in recovery of tax claims in the Multilateral Mutual Assistance Convention. The United States ratified that convention subject to a reservation that the United States will not provide assistance in the recovery of any tax claim, or in the recovery of an administrative fine for any tax. The special and unusually compatible relationship between the United States and Canada was viewed as justifying the inclusion of such a provision in the

Germany

Article 26 of the U.S.-Germany income tax treaty provides for the exchange of information that is necessary to carry out the provisions of the treaty or the laws of the two countries concerning taxes covered by the treaty (insofar as taxation thereunder is not contrary to the treaty).[216] The United States and Germany may exchange diplomatic notes under which they may exchange information for the purposes of national taxes imposed by either country but not otherwise covered under the treaty.

Any information exchanged pursuant to the U.S.-Germany treaty is to be treated as secret in the same manner as information obtained under the domestic laws of the country receiving the information. The exchanged information may be disclosed only to persons or authorities (including courts and administrative bodies) involved in the assessment, collection, or administration of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes to which the treaty applies. Persons or authorities receiving exchanged information can use the information only for such purposes.

Persons involved in the administration of taxes include legislative bodies, such as the tax-writing committees of the Congress, and the General Accounting Office, for purposes of overseeing the administration of U.S. tax laws. Exchanged information may be disclosed in public court proceedings or in judicial decisions, unless the competent authority of the country supplying the information objects.

Like the U.S. model, the U.S.-Germany treaty contains limitations on the obligations of the countries to supply information. A country is not required to carry out administrative measures at variance with the laws and administrative practice of either country, or to supply information that is not obtainable under the laws or in the normal course of the administration of either country, or to supply information that would disclose any trade, business, industrial, commercial, or professional secret or trade process, or information the disclosure of which would be contrary to public policy.

Upon an appropriate request for information, the U.S.-Germany treaty provides that the requested country is to obtain the information to which a request relates in the same manner and to the same extent as if its tax were at issue. The competent authority of the requested country is,

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U.S.-Canada treaty. *See, Report of the Senate Foreign Relations Committee on the Revised Protocol Amending the Income Tax Convention with Canada*, S. Exec. Rep. No. 104-9, 104th Cong., 1st Sess. (1995).

[216] The Convention Between the United States of America and the Federal Republic of Germany for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital and to Certain Other Taxes was signed on August 29, 1989, and entered into force on August 21, 1991 (the "U.S.-Germany treaty").

if possible, to provide the information in the form requested. Specifically, the competent authority of the requested country will provide depositions of witnesses and authenticated copies of unedited original documents (including books, papers, statements, records, accounts, and writings) to the same extent that such depositions and documents can be obtained under the laws and administrative practices of that country in the enforcement of its own tax laws.

With respect to assistance in collection of tax, the U.S.-Germany treaty provides that the countries are to endeavor to collect such amounts of tax on behalf of the other country as may be necessary to ensure that benefits of the treaty are not going to persons not entitled to those benefits. The collection provision does not impose on either treaty country the obligation to carry out administrative measures that are of a different nature from those used in the collection of its taxes or that would be contrary to its sovereignty, security, or public policy.

Japan

Article 26 of the U.S.-Japan income tax treaty provides for the exchange of information which is pertinent to carrying out the provisions of the treaty or preventing fraud or fiscal evasion in relation to the taxes which are covered by the treaty.[217] Any information that is exchanged pursuant to the treaty must be treated as secret and may be disclosed only to persons (including a court or administrative body) concerned with the assessment, collection, enforcement, or prosecution in respect of the taxes to which the treaty applies. Exchanged information also may be disclosed in the course of a court proceeding.

The U.S.-Japan treaty limits the obligations of the countries to supply information. Neither country is required to carry out administrative measures that are at variance with its laws or administrative practice, supply particulars that are not obtainable under the laws or in the normal course of the administration of either country, or supply information that discloses any trade, business, industrial, commercial, or professional secret or trade process, or information, the disclosure of which would be contrary to public policy. This disclosure standard is generally considered to be the same as that used by the respective countries in the enforcement of their own laws through administrative and judicial means.

Information may be exchanged pursuant to the exchange of information article either on a routine basis or upon request by reference to a particular case. The competent authorities are to agree upon a list of information that is to be exchanged on a routine basis. At least annually, the competent authorities are to advise one another of any additions to or amendments of the laws that concern the taxes which are covered by the treaty. In addition, each country must provide the other with the texts of all published material that interprets the treaty under its laws, whether in the form of regulations, rulings, or judicial decisions.

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[217] The Convention Between the United States of America and Japan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income was signed on March 8, 1971, and entered into force on July 9, 1972 (the "U.S.-Japan treaty").

With respect to assistance in the collection of taxes, Article 27 of the U.S.-Japan treaty provides that each country must endeavor to collect such taxes imposed by the other country in order to ensure that any exemption or reduced rate of tax granted under the treaty is not enjoyed by persons who are not so entitled. This collection provision does not impose upon either treaty country the obligation to carry out administrative measures that would be contrary to its sovereignty, security, or public policy.

United Kingdom

Article 26 of the U.S.-United Kingdom income tax treaty provides for the exchange of information which is available under the respective tax laws of the country and which is necessary to carry out the provisions of the treaty or to prevent fraud or the administration of statutory provisions against legal avoidance in relation to the taxes to which the treaty applies.[218]

Under the U.S.-United Kingdom treaty, any information exchanged is to be treated as secret, but may be disclosed to persons or authorities (including courts and administrative bodies) concerned with the assessment, collection, enforcement or prosecution in respect of the taxes to which the treaty applies. No information may be exchanged which would disclose any trade, business, industrial, or professional secret or any trade process.

With respect to assistance in the collection of taxes, the U.S.-United Kingdom treaty provides that the countries are to endeavor to collect such amounts on behalf of the other country as may be necessary to ensure that benefits of the treaty are not going to persons not entitled to those benefits. The United Kingdom is regarded as fulfilling this obligation by the continuation of its existing arrangements to ensure that relief from U.S. tax under the treaty is not going to persons not entitled to those benefits. The treaty countries are not obligated to carry out administrative measures that are of a different nature from those used in the collection of its own tax or that would be contrary to its sovereignty, security, or public policy. In determining the administrative measures to be carried out, each country may take into account the administrative measures and practices of the other country in recovering taxes on behalf of the first-mentioned country.

Under the U.S.-United Kingdom treaty, the competent authorities of the two countries are

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[218] The Convention Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains was signed on December 31, 1975 and entered into force on April 25, 1980 (the "U.S.-United Kingdom Treaty"). The U.S.-United Kingdom treaty has been amended by the First Protocol (signed August 26, 1976, and entered into force contemporaneously with the treaty on April 25, 1980), the Second Protocol (signed on March 31, 1977, and entered into force contemporaneously with the treaty on April 25, 1980), and the Third Protocol (signed on March 15, 1979, and entered into force contemporaneously with the treaty on April 25, 1980).

to consult to cooperate and advise each other in implementing the exchange of information article.

IV. APPLICATION OF SECTION 6103 TO INFORMATION IN THE PUBLIC RECORD

A. Introduction

Congress enacted section 6103 to protect taxpayers' reasonable expectation of privacy in information provided to the government through the voluntary assessment system.[219] Section 6103 provides that "returns and return information shall be confidential and except as authorized by this title . . . [none of the identified persons] shall disclose any return or return information obtained by him . . ."[220] A taxpayer can sue the United States government for the unauthorized disclosure and /or inspection of returns and return information.[221] Section 6103 does not expressly address the disclosure of returns and return information made a part of the public record.

Returns and return information become part of the public record in many ways. For example, returns and return information introduced in judicial proceedings constitutes publicly available court records.[222] As another example, notices of Federal tax lien filed with the county recorder alert the public of the IRS' interest in a taxpayer's property.[223]

The courts are divided on whether section 6103 applies to publicly disclosed returns and return information. Some courts have strictly interpreted section 6103, applying it despite the information's public availability. Other courts have found that returns and return information found in the public record loses its confidential status so that a person disclosing it does not violate section 6103. Still other courts have looked to the source of the information being disclosed. These courts find that section 6103 does not protect returns and return information taken directly from a public source, while information taken directly from IRS records remains protected.

The following discussion describes in detail the holdings in the various Federal Circuit Courts with respect to the applicability of section 6103 to information that is part of the public record.

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[219] S. Rep. No. 94-938 at 317 (1976).

[220] Sec. 6103(a).

[221] Sec. 7431.

[222] *See, e.g.,* sec. 7461 regarding the publicity of U.S. Tax Court proceedings.

[223] *See* sec. 6323(f) regarding where to file notices of Federal tax lien.

B. The Ninth and Sixth Circuits: Section 6103 Does Not Protect Public Domain Information

The Ninth Circuit has expressed the view that section 6103 protects only the disclosure of *confidential* returns and return information. "Once tax return information is made a part of the public domain, that taxpayer may no longer claim a right of privacy in that information."[224]

In *Lampert v. United States*,[225] the Ninth Circuit decided three district court cases on appeal (*Lampert v. United States*,[226] *Peinado v. United States*,[227] and *Figur v. United States*[228]). Each of the cases related to the issuance of press releases by the Federal government concerning certain taxpayers. In *Lampert*, the government filed an action seeking to enjoin the defendant's promotion and sale of abusive tax shelters. The U.S. Attorney and the IRS later issued press releases relating to the action. In *Peinado*, the U.S. Attorney issued press releases announcing that the defendant pled guilty to tax evasion and was sentenced. In *Figur*, the U.S. Attorney issued a press release summarizing the tax evasion charges against the defendant.

In each of these cases, section 6103 authorized the initial disclosure of information in a judicial proceeding. A later disclosure (press release) not specifically authorized by section 6103 then followed the authorized disclosure. The taxpayers, alleging the press releases wrongfully disclosed confidential information, sued for unauthorized disclosure of tax return information under section 7431. The trial court found that the disclosures of return information in press releases, though unauthorized, were made in good faith; the appellate court found the press releases disclosed no return information protected by section 6103.

The Ninth Circuit held that "if a taxpayer's return information is lawfully disclosed in a judicial proceeding . . . [t]he information is no longer confidential and may be disclosed again without regard to section 6103."[229] Once tax return information is made part of the public

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[224] *Lampert v. United States*, 854 F.2d 335, 338 (9th Cir. 1988), *cert. denied*, 490 U.S. 1034 (1989).

[225] *Id*.

[226] 87-1 USTC ¶ 9361 (N.D. Cal. 1987), *aff'd on other grounds*, 854 F.2d 335, 338 n.2 (9th Cir. 1988).

[227] 669 F. Supp. 953 (N.D. Cal. 1987), *aff'd*, 854 F.2d 335 (9th Cir. 1988).

[228] 662 F. Supp. 515 (N.D. Cal. 1987), *aff'd*, 854 F.2d 335 (9th Cir. 1988).

[229] *Lampert*, 854 F.2d at 337-38.

domain, the court said, the taxpayer may no longer claim a right of privacy in that information.[230]

The Ninth Circuit followed up its opinion in *Lampert* with its decision in *William E. Schrambling Accountancy Corp. v. United States.*[231] In that case, the IRS disclosed tax return information in notices of Federal tax liens, which the IRS recorded in the county recorder's office. In one instance, the taxpayer had also disclosed the information in his petition for bankruptcy. The IRS subsequently disclosed the information in Federal tax levies that the IRS had no authority to issue.[232]

In *Schrambling*, the Ninth Circuit again ruled that the disclosure of return information that is not confidential does not violate section 6103. The court found that the recorded tax lien destroyed the confidentiality of the tax return information it contained. The district court had tried to distinguish filing a lien from publicizing tax return information in judicial proceedings. The Ninth Circuit rejected the distinction, finding that recording the information in the county recorder's office gave the information greater public exposure than court proceedings.[233] As a result, the Ninth Circuit found that the tax return information disclosed was no longer confidential and, therefore, the improper levies did not violate section 6103.[234]

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[230] *Id.*

[231] 937 F.2d 1485, 1489 (9th Cir. 1991), *cert. denied*, 502 U.S. 1066 (1992).

[232] One set of levies was issued in violation of the bankruptcy automatic stay (a bankruptcy petition operates as a stay of any collection, assessment, or recovery of a claim against a debtor arising prior to the commencement of the bankruptcy case). The IRS issued the other set of levies without giving proper notice to the taxpayer.

[233] "Indeed, the purpose of recording the lien, unlike including the information in court documents, is to place the public on notice of the lien. The act of recording 'provides constructive notice of the contents of the documents creating the [lien].'" [citations omitted]. *Id.* The Ninth Circuit felt that the public record status of court documents is incidental to the proceeding, while the purpose of recording a tax lien is to give notice to the public.

[234] *See also, Tanoue v. United States*, 904 F. Supp. 1161, 1167 (D. Hawaii 1995):

> The Ninth Circuit held in Lampert that once return information is lawfully disclosed in a court proceeding, a directive to keep the information confidential is moot. 854 F.2d at 338. It does not follow that once the existence of a document, or certain information contained in the document, has been made public the entire document or other related information is similarly released. See Husby v. United States, 672 F. Supp. 442, 444 (N.D. Cal. 1987) (limiting the right of subsequent disclosure of return information to only that information actually disclosed in the

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The Sixth Circuit has agreed with the Ninth Circuit regarding the status of tax return information disclosed by recording a Federal tax lien. In *Rowley v. United States*,[235] the IRS disclosed the taxpayers' return information during an attempted sale of their property. However, the taxpayers had not received proper notice of the IRS' intent to levy. The taxpayers sued. They alleged that the disclosure of their tax return information during the course of the attempted sale of their property was wrongful. According to the taxpayers, the disclosure was wrongful because the IRS did not give the taxpayers adequate notice of the government's intent to levy.[236] The government countered that the IRS had merely republished what the recorded notice of Federal tax lien had already made public.[237]

The Sixth Circuit held that once a taxpayer's return information becomes part of the public domain through the filing and recording of a judicial lien, it loses its confidentiality.[238] Thus, the Sixth Circuit concluded that section 6103 does not protect such information if it is republished by the IRS for tax administration purposes.[239] Since the IRS had disclosed information that was already part of the public domain, the court found no liability for unauthorized disclosure. The court believed its approach "[struck] the proper balance between a taxpayer's reasonable expectation of privacy and the government's legitimate interest in disclosing tax return information to the extent necessary for tax administration functions."[240]

C. The Fourth Circuit: No Public Record Exception to Section 6103

The Fourth Circuit has taken a view opposite to that of the Ninth and Sixth Circuits. In *Mallas v. United States*,[241] the court held that the United States can be liable for the unauthorized disclosure of tax return information that has previously been made a part of the public record. In *Mallas*, the IRS distributed reports to tax shelter investors notifying them of the plaintiffs' criminal convictions. After the convictions were reversed, the IRS continued to distribute these reports without modification. The plaintiffs sued for the unauthorized disclosure of return

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[234](...continued)
judicial proceedings).

[235] 76 F.3d 796 (6th Cir. 1996).

[236] *Id.* at 798.

[237] *Id.*

[238] *Id.* at 801.

[239] *Id.*

[240] *Id.* at 802.

[241] 993 F.2d 1111 (4th Cir. 1993).

information. Arguing that the plaintiffs' convictions were a matter of public record, the government contended that republication of the information was not a disclosure.

Disagreeing, the Fourth Circuit stated, "Congress strictly circumscribed the contexts in which government officers or employees may disclose such information. Unless the disclosure is authorized by a specific statutory exception, section 6103(a) prohibits it."[242] The court further noted that it was aware of no exception "permitting the disclosure of 'return information' simply because it is otherwise available to the public."[243]

D. Other Circuits: Section 6103 Protection Depends on the Source

The following discussion summarizes the holdings of other circuits with respect to the application of section 6103 to public records. These circuit courts have generally taken the position that the application of section 6103 to public records depends on the source of the information.

1. Seventh Circuit

In *Thomas v. United States*,[244] the plaintiff refused to pay his income taxes, contending that wages were not taxable income because he had received them in exchange for work of equal value. He contested the matter in Tax Court and lost. Beyond the deficiency, the court assessed a frivolous suit award against the plaintiff. The Tax Court's opinion was published.

The IRS prepared a press release about the case and mailed it to the plaintiff's hometown newspaper. The newspaper published the release verbatim.[245] The release and the newspaper article contained information drawn from the Tax Court opinion.

Alleging that the IRS wrongfully disclosed his tax return information, the plaintiff sued.

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[242] 993 F.2d at 1120.

[243] *Id.*

[244] 890 F.2d 18 (7th Cir. 1989).

[245] The item stated under the headline "Thomas Loses Appeal in US Tax Court":

> Paul F. Thomas, 2509 Nagawicka Road, Hartland, lost his appeal to the U.S. Tax Court, and as a result, will owe more than $15,448 in taxes and penalties for 1980 and 1981, plus $2,000 in damages awarded to the government because his suit was frivolous.

Thomas, 890 F.2d at 19.

The Seventh Circuit pointed out that the information did not come from the plaintiff's tax return, at least not directly. Instead, the information was drawn from the Tax Court's opinion. The Seventh Circuit noted that section 6103 authorized the judge to disclose return information in its opinion and the plaintiff did not contest this authority.[246] While section 6103 prohibits the disclosure of return information unless expressly authorized under section 6103, the court found that section 6103 did not prohibit the disclosure of Tax Court opinions. The court espoused an independent source test for section 6103 protection:

> We believe that the definition of return information comes into play only when the immediate source of the information is a return, or some internal document based on a return . . . and not when the immediate source is a public document lawfully prepared by an agency that is separate from the Internal Revenue Service and has lawful access to tax returns. The Tax Court is such an agency.[247]

Thus, if the document is public and prepared by another agency with lawful access to tax returns, section 6103 does not protect it. As a result, the Seventh Circuit held that the press release, drawn from the Tax Court opinion, did not violate section 6103.

Under the Seventh Circuit's standard, section 6103 would still protect information contained in a filed notice of Federal tax lien, despite being in the public domain.[248] Since the IRS, and not an agency separate from the IRS, prepared the notice, republication of the information would violate section 6103 under the Seventh Circuit's standard.

2. Tenth Circuit

In *Rice v. United States*,[249] another case involving an IRS press release, the Tenth Circuit adopted the reasoning of the Seventh Circuit's *Thomas* case. The plaintiff in *Rice* had been convicted of various tax offenses. Consistent with its policy of publicizing successful tax prosecutions, the IRS issued two press releases. One release reported the conviction. The other release reported the prison sentence. Mr. Rice sued, alleging that the government had wrongfully disclosed his tax return information in the press releases.

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[246] Section 6103(h)(4) permits the disclosure of returns and return information in judicial proceedings pertaining to tax administration.

[247] *Thomas*, 890 F.2d at 21.

[248] The Seventh Circuit noted that it is a legal fiction that "every item of information contained in a public document is known to the whole world, so that further dissemination can do no additional harm to privacy." *Thomas*, 890 F.2d at 21.

[249] 166 F.3d 1088 (10th Cir. 1999), *cert. denied*, 120 S.Ct. 334 (October 12, 1999).

In preparing the press releases, the IRS public affairs officer reviewed the indictment, attended the trial and sentencing, and researched the possible criminal penalties for the crimes. Thus, the court concluded that all the information used to prepare the releases came from public documents and proceedings.[250] The Tenth Circuit held that, because the information came from public sources, the plaintiff's claim that the government's press release violated section 6103 must fail.[251]

In coming to this decision, the Tenth Circuit distinguished its prior decision in *Rodgers v. Hyatt*.[252] In that case, the court rejected the government's argument that the in-court disclosure of tax return information precluded a taxpayer from complaining about any subsequent disclosure of that information.

Rodgers involved an IRS employee's disclosure to a third party. Prior to the disclosure at issue, the employee had testified at a summons enforcement hearing involving the taxpayer. In response to questions from the taxpayer's own counsel, the IRS employee testified that: (1) the IRS was investigating the correctness of tax due from the taxpayer for certain years; (2) the IRS suspected that the taxpayer's returns were incorrect based upon certain allegations that the taxpayer had not reported all of the income received; and (3) there were allegations, based on information from the local sheriff's department and the FBI, that the taxpayer was dealing in stolen oil and not reporting the income received from its sale.[253]

Two months later the IRS employee conducted an interview of two businessmen. During that interview, the IRS employee mentioned that the taxpayer was rumored to be involved in stealing oil.[254] The taxpayer sued for the unauthorized disclosure of return information.

A taxpayer has no reasonable expectation of privacy in matters that are a matter of public record, the IRS employee argued.[255] The IRS employee emphasized that the taxpayer caused this information to become a part of the public record through questioning the revenue officer at the

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[250] *Id*. at 1091.

[251] *Id.*

[252] 697 F.2d 899 (10th Cir. 1983).

[253] *Rodgers*, 697 F.2d at 900.

[254] *Id.*

[255] At the time this suit was brought, a taxpayer could sue an IRS employee directly under former section 7217.

summons enforcement proceeding.[256] Once this information was made known in the court proceeding, the IRS employee argued, it lost its confidentiality and was no longer subject to the protection of section 6103.[257]

The IRS employee compared the lawsuit to a tort for invasion of privacy. There can be no invasion of privacy with respect to information that already is a matter of public record.[258] Thus, the IRS employee argued that it was untenable to hold that a disclosure of such public information could give rise to an action for damages.[259]

The Tenth Circuit dismissed the IRS employee's "loss of confidentiality" argument, finding it of no consequence.

> The fact that Mr. Hyatt had given prior "in court" testimony relative to the alleged rumors and allegations which likely removed them from their otherwise "confidential" cloak, did not justify Hyatt's violation of the requirement that he, as an officer of the United States, is prohibited from disclosing "return information" absent express statutory authorization.[260]

The Tenth Circuit focused on whether section 6103 authorized the disclosure to the two businessmen under the provision for investigative disclosures.[261] The court found that the

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[256] *Rodgers*, 697 F.2d at 903.

[257] *Id.*

[258] *Id*.

[259] *Id.*

[260] *Id.* at 906.

[261] Section 6103(k)(6) provides:

> **Disclosures by internal revenue officers and employees for investigative purposes.** -- An internal revenue officer or employee may, in connection with his official duties relating to any audit, collection activity, or civil or criminal tax investigation or any other offense under the internal revenue laws, disclose return information to the extent that such disclosure is necessary in obtaining information, which is not otherwise reasonably available, with respect to the correct determination of tax, liability for tax, or the amount to be collected or with respect to the enforcement of any other provision of this title. Such disclosures shall be made only in such situations and under such conditions as the Secretary

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requirements of that provision were not satisfied and therefore the disclosure was unauthorized.[262]

The Tenth Circuit stated that its decision in *Rice* regarding disclose based on public records was not contrary to *Rodgers*. According to the *Rice* opinion, implicit in the court's decision to uphold the jury verdict in *Rodgers* was a finding that the IRS employee had not obtained his information from the court hearing, a public proceeding.[263] Instead, the IRS employee had obtained the information from internal documents based on the taxpayer's tax return. "Thus, under both *Thomas* and *Rodgers*, whether information about a taxpayer may be classified as [return information] invoking application of [section] 6103 turns on the immediate source of the information."[264]

3. Fifth Circuit

The Fifth Circuit addressed the public record issue in *Johnson v. Sawyer*.[265] That case also involved IRS-issued press releases that reported a criminal conviction. The Fifth Circuit declined to follow the Ninth and Sixth Circuits' lead in establishing a public record exception to section 6103. Instead, the Fifth Circuit held that if the immediate source of the information claimed to be wrongfully disclosed is statutorily defined tax return information, the disclosure violates section 6103. Under this test, the IRS violates section 6103 regardless of whether that information has been previously disclosed (lawfully) in a judicial proceeding.

In reviewing the decisions of the other circuits, the Fifth Circuit noted that all of the courts concur that section 6103 contains no express exception permitting the disclosure of tax return information previously disclosed in open court. Citing Supreme Court precedent, the Fifth Circuit stated that it must follow the plain meaning of section 6103 unless it would lead to a

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[261](...continued)
may prescribe by regulation.

[262] The Tenth Circuit found that the IRS employee did not disclose the allegation of stolen oil to get any information from the two businessmen. The court noted that the IRS employee did not pursue a line of questioning to elicit the businessmen's knowledge of the allegations. Further, the court noted that the IRS employee had no reason to believe that these men had any knowledge or information regarding the alleged thefts prior to the meeting. Concluding that the disclosures were not made to obtain information under the conditions of section 6103(k)(6), the court found the disclosures unauthorized. *Rodgers* 697 F.2d at 904-906

[263] *Rice*, 166 F.3d at 1091.

[264] *Id.*

[265] 120 F.3d 1307 (5th Cir. 1997).

result so bizarre that Congress "could not have intended it."[266] In determining whether its interpretation would lead to a bizarre result, the Fifth Circuit looked to the provisions of the statute and the legislative history.

The court noted that when drafting section 6103, the Congress considered the possibility that tax return information might be otherwise available to the public.[267] It pointed to section 6103(p)(4) as an example. That section sets forth recordkeeping and security requirements for agencies receiving tax return information. However, these recordkeeping and security requirements "shall cease to apply with respect to a return or return information if, and to the extent that, such return or return information is disclosed in the course of any judicial or administrative proceeding and made a part of the public record thereof."[268] Section 6103(p)(4), the court stated, shows that when the Congress drafted section 6103, it considered the possibility that tax return information might be otherwise available to the public.[269]

In connection with section 6103(p)(4), the Senate Finance Committee noted: "The record-keeping requirements would not apply in certain situations, including disclosure of returns and return information open to the public generally."[270] The Fifth Circuit found it significant that the committee report did not say that the general rule of nondisclosure does not apply if the information is open to the public.[271] Thus, the court concluded that the failure to include an exception for public record tax return information was not unintentional.[272]

To distinguish between confidential (private) and public tax return information, the court asserted, would fly in the face of section 6103.[273] The statute makes no such distinction. According to the Fifth Circuit, the statute protects more than confidential or private tax return information. "In enacting section 6103 as a prophylactic ban, the Congress was determining that a taxpayer has a statutorily created 'privacy' interest in all his tax return information, despite the

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[266] *Johnson*, 120 F.3d at 1319 quoting *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991); *United States v. Turkette*, 452 U.S. 576, 580 (1981) ("absurd results are to be avoided").

[267] *Johnson*, 120 F.3d at 1321.

[268] Sec. 6103(p)(4).

[269] *Johnson*, 120 F.3d at 1321.

[270] S. Rept. No. 94-938, at 343 (1976).

[271] *Johnson*, 120 F.3d at 1321.

[272] *Id.*

[273] *Id*. at 1322.

fact that some of it is not entirely 'secret'."[274] The court found that the general rule of confidentiality in section 6103 does not disappear simply because the tax return information has been disclosed in the public record.[275] The Fifth Circuit noted that the Supreme Court found a privacy interest in publicly disclosed information included in a data base that was the subject of a Freedom of Information Act request.[276]

The court disapproved the Ninth and Sixth Circuit's decisions "to balance a taxpayer's reasonable expectation of privacy with the government's legitimate interest in disclosing tax return information to the extent necessary for tax administration functions."[277] Quoting the Fourth Circuit, it noted, "It is for Congress . . .'to strike a balance' between these interests [and it] has done so in section 6103 without articulating [this] exception."[278] "We are a federal appellate court, not a super-legislature; we are not vested with plenary authority to re-evaluate the

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[274] *Johnson*, 120 F.3d at 1323. In an earlier appeal of this case, the Fifth Circuit had explained this view, stating:

> Plainly, Congress was not determining that all the information on a tax return would always be truly private and intimate or embarrassing. Rather, it was simply determining that since much of the information on tax returns does fall within that category, it was better to proscribe disclosure of all return information, rather than rely on ad hoc determinations by those with official access to returns as to whether particular items were or were not private, intimate or embarrassing. Because such determinations would inevitably sometimes err, ultimately a broad prophylactic proscription would result in less disclosure by return handlers of such sensitive matters than would a more precisely tailored enactment.

Johnson v. Sawyer, 47 F.3d 716, 735 (footnote omitted) (5th Cir. 1995)(en banc).

[275] *Johnson*, 120 F.3d at 1323.

[276] *United States Dep't of Justice v. Reporters Committee For Freedom of the Press*, 489 U.S. 749, 770 (1989). *Reporters Committee* involved a third party's Freedom of Information Act request for an individual's "rap sheets" (criminal convictions) that the FBI had compiled as part of a database. In supporting the decision to deny access, the Supreme Court found that the individual had a privacy interest in such information. The Court noted that there was a vast difference in privacy interests between information scattered among various courthouses throughout the country and a centralized database of such information.

[277] *Johnson*, 120 F.3d at 1322.

[278] *Id.* quoting *Mallas*, 993 F.2d 1121.

policy choices made by our elected representatives."[279]

The government argued that if the court interpreted section 6103 to bar the disclosure of matters of public record, such interpretation would be at odds with the Supreme Court's decision in *Cox Broadcasting Corp. v. Cohn*.[280] *Cox Broadcasting* involved a civil action based on a Georgia statute that made it a misdemeanor to publicize or broadcast a rape victim's name.[281] A reporter, present in court when several rape defendants pled guilty, learned the victim's name from examining the indictments, which were available for his inspection in the courtroom.[282] He later broadcast a news report about the court proceedings, and the report named the victim.[283] The Supreme Court concluded that Georgia could not "impose sanctions on the publication of truthful information contained in official court records."[284]

The Supreme Court noted: "What transpires in the court room is public property . . . Those who see and hear what transpired can report it with impunity."[285] It also observed that accurate reports of judicial proceedings enjoy special protection under the First Amendment.

The Fifth Circuit found no First Amendment implications to its decision in *Johnson*.[286] It noted that Federal employees are not reporters. They have no First Amendment duty to report on criminal proceedings or other government documents. Furthermore, the media's source in *Cox Broadcasting* was court documents, not information protected by a nondisclosure statute, such as section 6103. The Fifth Circuit observed that because of its finding that a section 6103 violation occurs only when return information, which is not a public record open to public inspection, is the immediate source of the information claimed to be wrongfully disclosed, the First Amendment concerns in *Cox Broadcasting* are not implicated.[287]

In addition, the Fifth Circuit pointed out that the Supreme Court was not addressing the

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[279] *Johnson*, 120 F.3d at 1322.

[280] 420 U.S. 469 (1975).

[281] *Cox Broadcasting*, 420 U.S. at 471-72.

[282] *Id*. at 472-73.

[283] *Id*. at 473-74.

[284] *Id*. at 495.

[285] *Id*. at 492 (quoting *Craig v. Harney*, 331 U.S. 367 (1947)).

[286] *Johnson*, 120 F.3d at 1324

[287] *Id.*

issue present in *Johnson*, noting the disclaimer in the *Cox Broadcasting* opinion:

> Appellants have contended that whether they derived the information in question from public records or instead through their own investigation, the First and Fourteenth Amendments bar any sanctions from being imposed by the State because of the publication. Because appellants have prevailed on more limited grounds, we need not address this broader challenge. . . .[288]

The Fifth Circuit then applied its immediate source test to the facts before it. The court found that the press releases wrongfully disclosed four items of information: the taxpayer's middle initial, his age, his home address, and his occupation.[289] Neither the public affairs officer nor the special agent, who helped prepare the press releases, had attended the taxpayer's criminal trial nor had they reviewed a transcript of the proceedings before preparing the releases. Instead the information came from the taxpayer's file or from the special agent's memory of the criminal investigation.[290] Thus, the Fifth Circuit concluded, under its immediate source test, the IRS had violated section 6103. Although the case was remanded for a new trial because the trial judge erroneously instructed the jury, the IRS settled the *Johnson* case for $3.5 million dollars.[291]

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[288] *Cox Broadcasting*, 420 U.S. at 497 n. 27.

[289] *Johnson*, 120 F.3d at 1326.

[290] *Id.* at 1325.

[291] A more detailed factual description of the *Johnson* case is found in Part Four, V.B., below, regarding the IRS's success and failure in defending unauthorized disclosure lawsuits.

V. SECTION 6110 OF THE CODE

A. Scope and Definitions

Despite a broad policy of confidentiality with respect to tax returns and return information, certain types of information are required to be made publicly available under section 6110 or the Freedom of Information Act ("FOIA").[292] Section 6110 has its origin in two FOIA lawsuits requiring the IRS to disclose private rulings.[293] It had been argued that the private ruling system had developed into a body of secret law known only to a few members of the tax profession.[294] While the cases required the IRS to disclose the rulings, questions regarding what parts of a ruling file should be published, whether the rulings should be available as precedent, and what procedures should be established to allow taxpayers to claim that certain material should not be disclosed, were left unanswered.[295] These issues were addressed in section 6110.

Section 6110 provides that the text of any written determination and related background file document is open to public inspection.[296] The IRS is required to redact certain material before making these documents publicly available.[297] In addition, certain material is outside the scope of section 6110. Closing agreements do not constitute written determinations.[298] Section 6110 also does not apply to matters within the scope of section 6104.[299] Certain written

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[292] The Freedom of Information Act is discussed in brief in Part Two, II.B., above, and in detail in Part Two, VI., below.

[293] *Tax Analysts & Advocates v. IRS*, 505 F.2d 350 (D.C. Cir. 1974); *Fruehauf Corp. v. IRS*, 75-2 USTC ¶ 16,189 (6th Cir. 1975).

[294] H.R. Rep. No. 94-658, at 314 (1975). For a discussion of FOIA lawsuits involving IRS guidance, both before and after the enactment of section 6110, *see* Part Two, VI.C., below.

[295] *Id.*

[296] Sec. 6110(a). A background file document is available upon written request to any person requesting a copy of the related written determination. Sec. 6110(e).

[297] Sec. 6110(c).

[298] *See* S. Rep. No. 94-938, at 307 (1976); H.R. Rep. No. 94-658, at 316 (1976).

[299] Sec. 6110(l)(1). The Treasury regulations deem the following section 6104 material exempt from section 6110 requirements:

> Matters within the ambit of section 6104 include: Any application filed with the Internal Revenue Service with respect to the qualification or exempt status of an

(continued...)

determinations issued in response to pre-November 1, 1976, requests also are not covered by section 6110.[300]

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[299](...continued)
organization, plan, or account described in section 6104(a)(1), whether the plan or account has more than 25 or less than 26 participants; any document issued by the Internal Revenue Service in which the qualification or exempt status of an organization, plan, or account described in section 6104 (a)(1) is granted, denied or revoked or the portion of any document in which technical advice with respect thereto is given to a district director; any application filed, and any document issued by the Internal Revenue Service, with respect to the qualification or status of master, prototype, and pattern employee plans; the portion of any document issued by the Internal Revenue Service in which is discussed the effect on the qualification or exempt status of an organization, plan, or account described in section 6104(a)(1) of proposed transactions by such organization, plan, or account; and any document issued by the Internal Revenue Service in which is discussed the qualification or status of an organization described in section 509(a) or 4942(j)(3), but not including any document issued to nonexempt charitable trusts described in section 4947(a)(1).

Treas. reg. sec. 301.6110-1(a).

[300] Section 6110(l) provides:

(l) Section not to apply. This section shall not apply to–

(1) any matter to which section 6104 applies, or
(2) any--
(A) written determination issued pursuant to a request made before November 1, 1976, with respect to the exempt status under section 501(a) of an organization described in section 501(c) or (d), the status of an organization as a private foundation under section 509(a), or the status of an organization as an operating foundation under section 4942(j)(3),
(B) written determination described in subsection (g)(5)(B) issued pursuant to a request made before November 1, 1976,
(C) determination letter not otherwise described in subparagraph (A), (B), or (E) issued pursuant to a request made before November 1, 1976,
(D) background file document relating to any general written determination issued before July 5, 1967, or
(E) letter or other document described in section 6104(a)(1)(B)(iv)

(continued...)

While a written determination may not be cited or used as precedent, such determinations provide insight into the current thinking of the IRS.[301] Thus, such determinations are useful in tax planning and controversy matters. Section 6110 is the exclusive method to obtain written determinations for taxpayers other than tax-exempt organizations.[302] The public, however, has continued to use the FOIA to obtain other forms of guidance arguably falling outside the section 6110 definition of a written determination.[303]

The term written determination means a ruling, determination letter, technical advice memorandum or Chief Counsel advice.[304] The meaning of these terms, as well as the term background file document, is discussed below.

Ruling

A ruling is a written statement issued by the IRS National Office to a taxpayer or the taxpayer's authorized representative.[305] It generally recites the relevant facts, sets forth the applicable provisions of law, and shows the application of the law to the facts.[306]

Technical advice memorandum

The IRS National Office issues a "technical advice memorandum" to an IRS District Director in connection with the examination of a taxpayer's return or consideration of a taxpayer's claim for refund or credit.[307] Generally, a technical advice memorandum states the

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[300](...continued)
issued before September 2, 1974.

Sec. 6110(l).

[301] Sec. 6110(k)(3).

[302] Sec. 6110(m).

[303] FOIA litigation to obtain IRS guidance is discussed in Part Two, VI.C., below.

[304] Sec. 6110(b)(1).

[305] Treas. reg. sec. 301.6110-2(d).

[306] Treas. reg. sec. 301.6110-2(d).

[307] Treas. reg. sec. 301.6110-2(f).

relevant facts, sets forth the applicable law, and states a legal conclusion.[308]

Determination letter

An IRS District Director issues a "determination letter" in response to a written inquiry from an individual or organization that applies principles and precedents previously announced by the IRS National Office to the particular facts involved.[309]

Chief Counsel advice

Any IRS National Office component of the Office of Chief Counsel can issue Chief Counsel advice to IRS field or service center employees or regional or district employees of the Office of Chief Counsel.[310] Chief Counsel advice by definition conveys: (1) a legal interpretation of a revenue provision, (2) the IRS or Chief Counsel position or policy concerning a revenue provision, or (3) a legal interpretation of any law (Federal, State, or foreign) relating to the assessment or collection of liability under a revenue provision.[311] The definition of Chief Counsel advice does not encompass advice issued from one National Office component of the Office of Chief Counsel to another.

Background file document

A background file document includes the underlying request for a written determination, and any written material submitted in support of the request by the person whom or on whose behalf the request for a written determination was made.[312] It also includes any third party contacts relating to the request received by the IRS before issuance of the written determination.[313]

B. Exemptions from Disclosure

Before publicly releasing any written determination or background file document, the IRS must delete identifying details of the person about whom the written determination pertains.

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[308] Treas. reg. sec. 301.6110-2(f).

[309] Treas. reg. sec. 301.6110-2(e).

[310] Sec. 6110(i)(A)(i).

[311] Sec. 6110(i)(A)(ii).

[312] Sec. 6110(b)(2); Treas. reg. sec. 301.6110-2(g)(1)(ii).

[313] Sec. 6110(b)(2).

Certain other information, similar to that exempted from disclosure by the FOIA, must also be deleted.[314]

Upon issuance of a written determination, or upon receipt of a request for a background file document, the IRS will mail a notice of intention to disclose to any person to whom the written determination pertains.[315] The notice will include a copy of the text of the written determination or background file document which indicates the material that the IRS proposes to delete, any substitutions proposed therefor, and any third party notations to be placed on the written determination. Additionally, the notice will state that the document will be open to public inspection and will inform the recipient of their right to contest the scope of deletions.

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[314] Section 6110(c) provides the exemptions for disclosure:

(1) the names, addresses, and other identifying details of the person to whom the written determination pertains and of any other person, other than a person with respect to whom a notation is made under subsection (d)(1) (relating to third party contacts), identified in the written determination or any background file document;

(2) information specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy, and which is in fact properly classified pursuant to such Executive order;

(3) information specifically exempted from disclosure by any statute (other than this title) which is applicable to the Internal Revenue Service;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) information the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(6) information contained in or related to examination, operating, or condition reports prepared by, or on behalf of, or for use of an agency responsible for the regulation or supervision of financial institutions; and

(7) geological and geophysical information and data, including maps, concerning wells.

[315] Sec. 6110(f)(1); Treas. reg. sec. 301.6110-5(a)(1).

Generally, written determinations and related background files generally must be made available for disclosure no earlier than 75 days, and no later than 90 days, after the mailing of the notice of intention to disclose.[316]

C. Procedures with Regard to Third Party Contacts

If a third party communicates with the IRS regarding a written determination before issuance of the determination, the IRS must indicate in the written determination the category of such person and the date of the communication.[317] The requirement does not apply to communications from the Chief of Staff of the Joint Committee on Taxation.[318] Third party communications also do not include communications between the IRS and the Department of Justice regarding a pending civil or criminal case or investigation.[319] Under the Treasury regulations, any person can ask the IRS to disclose the identity of the third party who made a communication.[320]

In addition, any person can go to court to compel the IRS to disclose the identity of the person to whom the written determination pertains.[321] The proceeding must be commenced within 36 months after the first day the written determination becomes public.[322] The person whose identity is the subject of such proceeding is given notice of the proceeding and the right to intervene (anonymously, if appropriate).[323]

If the court finds that the evidence permits a reasonable conclusion that (1) an impropriety occurred or (2) undue influence was exercised with respect to the written determination, the court will order the disclosure of the identity of the person to whom the written determination pertains.[324] Further, the court may order the IRS to disclose any other portions of the written determination that were exempt from disclosure pursuant to section 6110(c), if disclosure is in

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[316] Sec. 6110(g)(1)(A).

[317] Sec. 6110(d)(1).

[318] Sec. 6110(d)(2).

[319] Sec. 6110(d)(1).

[320] Treas. reg. sec. 301.6110-4(a).

[321] Sec. 6110(d)(3).

[322] Sec. 6110(d)(4).

[323] Sec. 6110(d)(3).

[324] *Id.*

the public interest.[325]

D. Resolution of General Disclosure Disputes

Upon issuance of any written determination, or upon receipt of a written request for a background file document, the IRS must send a notice of intention to disclose such documents.[326] The IRS sends the notice to the subject of the determination. After exhausting his or her administrative remedies, a person who has a direct interest in keeping any part of the determination confidential may file a petition in Tax Court to restrain disclosure.[327] Within 15 days of receiving the petition to restrain disclosure, the IRS must notify any person to whom the determination pertains of the petition and the right to intervene.[328] Receipt of such notice precludes a person from subsequently filing their own petition to restrain disclosure with respect to the same written determination or background file document.[329]

Any person who has exhausted his or her administrative remedies may also seek an order, from the Tax Court or the District Court for the District of Columbia, requiring that a written determination or background file (or part thereof) be made available for public inspection.[330] Within 15 days after receipt of the petition, the IRS must notify all persons identified by name and address in the written determination or background file document of the proceeding. These persons have a right to intervene in the proceeding. If the IRS sends such notice, the IRS is not required to defend the action and is not be liable for the public disclosure of the subject written determination or background file document required by the final decision of the court.

E. Special Rules Applicable to Chief Counsel Advice

Section 6110(i)(3) governs the redactions that the IRS can make to Chief Counsel advice. Generally, the IRS can delete details from a Chief Counsel advice that would identify a taxpayer.[331] The IRS can make other redactions consistent with subsections (b) and (c) of the

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[325] *Id.*

[326] Sec. 6110(f)(1).

[327] Sec. 6110(f)(2) and (3).

[328] Sec. 6110(f)(3)(B).

[329] Sec. 6110(f)(3)(B).

[330] Sec. 6110(f)(4).

[331] Section 6110(i)(3)(A) eliminates that applicability of all but one the exemptions of 6110(c)(3). Exemption 1 of section 6110(c)(3) is applicable to Chief Counsel advice. This (continued...)

FOIA (exemptions and exclusions). In applying exemption 3 of the FOIA (relating to statutes specifically excluding disclosure), the IRS cannot use a provision of the Code to justify a deletion.[332] The information redacted from the Chief Counsel advice is treated as return information, subject to the rules of section 6103.[333]

For Chief Counsel advice written with respect to a specific taxpayer or group of specific taxpayers, the IRS must mail a notice of intention to disclose and proposed redactions to each taxpayer.[334] This must be done within 60 days of issuance of the Chief Counsel advice.

For Chief Counsel advice that is written without reference to a specific taxpayer or group of specific taxpayers, no notice of intention to disclose is required.[335] Within 60 days after the issuance of the Chief Counsel advice, IRS must complete any required deletions and make the edited advice available to the public.[336]

Failure to comply with the provisions regarding disclosure of Chief Counsel advice can subject the IRS to civil action by the taxpayer in the United States Claims Court.[337] Such action can result in the award of damages to the taxpayer.[338]

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[331](...continued)
exemption allows the IRS to remove the name, address, and other identifying details of the person to whom the written determination pertains and of any other person, except a third party contact.

[332] Sec. 6110(i)(3)(B).

[333] Return information includes "any part of any written determination or background file document relating to such written determination . . . which is not open to public inspection under section 6110." Sec. 6103(b)(2)(B).

[334] Sec. 6110(i)(4)(B).

[335] Sec. 6110(i)(4)(A)(i)

[336] Sec. 6110(i)(4)(A)(ii)

[337] Sec. 6110(j)(1).

[338] Sec. 6110(j)(2).

VI. THE FREEDOM OF INFORMATION ACT ("FOIA")

A. Overview

The FOIA, enacted in 1966, embodies a policy of broad disclosure of government documents when production is properly requested. "The basic purpose of [the] FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."[339] The disclosure-oriented purpose of the FOIA contrasts with the purpose of section 6103, which was amended in 1976 to preserve the confidentiality of return and return information.[340]

The FOIA requires agencies to publish in the Federal Register: (1) descriptions of agency organization and office addresses; (2) statements of the general course and method of agency operation; (3) rules of procedure and descriptions of forms; and (4) substantive rules of general applicability and general policy statements.[341] Under the FOIA, agencies must also make available for public inspection and copying:

(1) final opinions made in the adjudication of cases;

(2) statements of policy and interpretations adopted by an agency, but not published in the Federal Register;

(3) administrative staff manuals that affect the public;

(4) copies of records released in response to FOIA requests that an agency determines, due to their subject matter, have been or will likely be the subject of further requests; and

(5) a general index of released records the agency has determined have been or will likely be the subject of further requests.[342]

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[339] *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

[340] Prior to 1976, returns had been generally classified as public records. *See* Appendix A for a detailed discussion of the legislative history of section 6103.

[341] 5 U.S.C. sec. 552(a)(1).

[342] 5 U.S.C. sec. 552(a)(2).

An exception applies for materials promptly published and offered for sale.[343]

All other "records" of a Federal agency may be requested under the FOIA.[344] Section 602.702(c) of the Treasury regulations sets forth the process that a party must follow to receive IRS information. Generally, requestors submit their written requests at the location of the requested documents (i.e., the appropriate IRS district or regional office, IRS service or compliance center, IRS computing center or IRS National Office). The requestor must reasonably describe the records sought. This means that an employee familiar with the subject matter could find such a record based on the requester's description.

By statute, the IRS has twenty days (excluding Saturdays, Sundays, and legal holidays) to respond to a FOIA request. The IRS can respond by either providing the records sought, or notifying the requestor of the reasons why the IRS is denying access and the right to appeal such denial.[345] If the requestor appeals, the IRS has twenty days to rule on such appeal.[346] Currently, the IRS Office of the Assistant Chief Counsel (Disclosure Litigation) reviews appeals. If the IRS upholds the denial on appeal, the IRS notifies the requestor of his or her right to seek judicial review in a United States District Court.[347]

B. Interaction of the FOIA and Section 6103

1. Exemption 3 of the FOIA and section 6103

Introduction

The FOIA recognizes that the release of certain types of information could harm legitimate governmental and private interests. Thus, an agency may withhold (i.e., deny access to) a requested document if it falls within one of nine statutory exemptions,[348] or three special

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[343] *Id.*

[344] 5 U.S.C. sec. 552(a)(3).

[345] 5 U.S.C. sec. 552(a)(6)(A)(i).

[346] 5 U.S.C. sec. 552(a)(4)(A)(ii). The average FOIA to the IRS request takes six months to process and appeals can take nearly a year. National Commission on Restructuring the Internal Revenue Service, *Report of the National Commission on Restructuring the Internal Revenue Service: A Vision for a New IRS* at 47 (June 25, 1997).

[347] 5 U.S.C. sec. 552(a)(4)(A)(ii).

[348] 5 U.S.C. sec. 552(b)(1) through (9).

law enforcement exclusions (which rarely apply to the IRS).[349] The statutory exemptions include:

(1) Matters specifically authorized and properly classified under executive order to be kept secret in the interest of national defense or foreign policy;

(2) Internal personnel rules and practices;

(3) Information specifically exempted from disclosure by a statute either: (A) leaving no discretion as to withholding; or (B) establishing criterion for withholding;

(4) Trade secrets and commercial or financial information of a privileged or confidential nature;

(5) Interagency or intra-agency memoranda;

(6) Personnel, medical, or similar files, the disclosure of which would constitute a clearly unwarranted invasion of privacy;

(7) Investigatory records compiled for law enforcement purposes the disclosure of which would impede an investigation, endanger a life, or threaten harm to evidence;

(8) Certain records prepared by or for an agency responsible for the regulation or supervision of financial interests; or

(9) Geological and geophysical information and data concerning wells.[350]

Section 6103 prohibits the disclosure of "any return or return information" except as

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[349] These three exclusions authorize Federal law enforcement agencies to treat certain criminal investigatory records as not subject to the FOIA. Exclusion (c)(1) applies to FOIA requests for criminal investigations records if the subject of the investigation is unaware of its pendency and disclosure would interfere with the investigation. 5 U.S.C. sec. 552(c)(1). Exclusion (c)(2) applies to FOIA requests by a third party for records maintained under the name and identifier of a confidential informant. 5 U.S.C. sec. 552(c)(2). Exclusion (c)(3) applies to records generated by the FBI relating to foreign intelligence, counterintelligence, or international terrorism. 5 U.S.C. sec. 552(c)(3).

[350] 5 U.S.C. sec. 552(b)(1)-(9).

authorized by the Code.[351] Courts have approved the withholding of return information in response to FOIA requests under two theories based on section 6103. The first theory is that section 6103 qualifies as an exemption 3 (see (3) above) statute under the FOIA. The second theory is that the FOIA has no applicability to the release of returns and return information. Under this theory, section 6103 is the sole governing standard. The court cases adopting these theories are discussed below.

Return information received from a tax treaty partner is exempt from FOIA disclosure under a treaty secrecy clause, in addition to being exempt based on section 6103. In general, a treaty secrecy clause requires the country requesting information under the treaty to treat any information received as secret in the same manner as information obtained under its domestic laws. Usually a treaty secrecy clause also provides that disclosure is not permitted other than to persons or authorities involved in the administration, assessment, collection or enforcement of taxes to which the treaty applies. The exchange of information pursuant to tax treaties is discussed in Part Two, III., below.

Discussion of cases holding that section 6103 is an exemption 3 statute under the FOIA

Most courts have held that section 6103 qualifies as an exemption 3 statute under the FOIA because, in conformity with subpart B of exemption 3, section 6103 sets forth "criteria for withholding."[352] For example, section 6103 allows a taxpayer to access his or her return information to the extent the IRS determines that the "disclosure would not seriously impair tax administration."[353] A designee of the taxpayer can receive the taxpayer's return or return information if the taxpayer consents to such disclosure and the IRS determines that the

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[351] Sec. 6103(a).

[352] *Aronson v. IRS*, 973 F.2d 962, 964-65(1st Cir. 1992)(The tax statute falls squarely within exemption 3); *Long v. IRS*, 891 F.2d 222, 224 (9th Cir. 1989) (holding that the deletion of taxpayer's identification does not alter confidentiality of section 6103 information); *DeSalvo v. IRS*, 861 F.2d 1217, 1221 (10th Cir. 1988) (Section 6103, including exceptions is an exemption 3(B) statute); *Grasso v. IRS*, 785 F.2d 70, 77 (3d Cir. 1986) (same); *Long v. IRS*, 742 F.2d 1173, 1179 (9th Cir. 1984)(same); *Ryan v. ATF*, 715 F.2d 644, 645 (D.C. Cir. 1983)(same); *Currie v. IRS*, 704 F.2d 523, 527-28 (11th Cir. 1983)(same); *Williamette Indus. v. United States*, 689 F,2d 865, 867 (9th Cir. 1982)(same); *Chamberlain v. Kurtz*, 589 F.2d 827, 843 (5th Cir. 1979) (same). *See also, Church of Scientology of California v. IRS*, 484 U.S. at 11 (the parties agreed that section 6103 of the Code is the sort of statute referred to by the FOIA in 5 U.S.C. sec. 552(b)(3) relating to matters that are "specifically exempted from disclosure by statute . . ." so the court did not have to rule on the issue); *Linsteadt v. IRS*, 729 F.2d 998, 1000 (5th Cir. 1984)(holding that sec. 6103 is an exemption statute as described in subpart A of exemption 3).

[353] Sec. 6103(e)(7).

"disclosure would not seriously impair tax administration." [354]

Furthermore, section 6103(b)(2) exempts from disclosure standards used for the selection of returns for examination or data used for determining such standards if the IRS determines the disclosure "will impair assessment, collection, or enforcement of the internal revenue laws."[355] For example, the disclosure of differential function ("DIF") scores has been found to impair the IRS's enforcement of tax laws because such information would enable a taxpayer to learn how the IRS selects returns for audits. [356]

With respect to returns and return information of persons other than the taxpayer, some courts have held that section 6103 is an exemption statute as described in subpart A of exemption 3 because it leaves no discretion as to withholding of information.[357] For example, a third party ordinarily is not entitled to another taxpayer's return information through a FOIA request.[358] Thus, a next door neighbor could not gain access to a taxpayer's return through a FOIA request.

Discussion of cases holding that section 6103 preempts the FOIA

One court of appeals and several district courts have held that treating section 6103 as an exemption 3 statute under the FOIA is not necessary.[359] These courts hold that section 6103 essentially preempts the FOIA as it relates to returns and return information. Under this theory, section 6103 operates as the exclusive standard governing the disclosure or nondisclosure of returns and return information. The leading case under this theory is *Zale Corp. v. IRS.*[360]

In *Zale*, the FOIA requester, Zale Corporation, was under investigation by the IRS. It made several FOIA requests to obtain access to the investigative materials, computations,

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[354] Sec. 6103(c).

[355] Sec. 6103(b)(2).

[356] *See, e.g., Gillin v. IRS*, 980 F.2d 819, 822 (1st Cir. 1992) (holding that differential function (DIF) scores, used to identify return most in need of audit, are exempt from disclosure).

[357] *Freuhauf Corp. v. IRS*, 566 F.2d 574, 578 n.6 (6th Cir. 1977); *DeSalvo*, *supra*, 861 F.2d at 1221 n.4.

[358] *Martin v. IRS*, 857 F.2d 722 (10th Cir. 1988) (partner not entitled to protests filed by other partners with respect to their individual liabilities).

[359] *Zale Corp. v. IRS*, 481 F. Supp. 486 (D.D.C. 1979); *King v. IRS*, 688 F.2d 488, 495 (7th Cir. 1982); *Green v. IRS*, 556 F. Supp. 79, 82-83 (N.D. Ind. 1982) *aff'd*, 734 F.2d 18 (7th Cir. 1984); *Watson v. IRS*, 538 F. Supp. 817, 818 (S.D. Tex. 1982).

[360] *Zale Corp. v. IRS*, 481 F. Supp. 486 (D.D.C. 1979).

witness statements and theories of the IRS.[361] After protracted negotiations between the IRS and Zale Corporation, the Court had to address the release of 4,000 pages of documents in dispute.[362]

Although neither Zale Corporation nor the IRS raised the issue, the court embarked upon an analysis of statutory construction. The court noted that the Congress amended exemption 3 of the FOIA to narrow its scope three weeks before it amended section 6103.[363] It cited the rule that "absent a clear indication to the contrary, specific legislation will not be controlled or modified by the more general . . . nor will the later provision be nullified in light of the earlier."[364] The court then pointed to the comprehensive scheme for releasing information to discrete identified parties under section 6103. According to the court, the statutory language did not suggest that the Congress was "in any way concerned with promoting or protecting public disclosure of tax return data."[365] Instead section 6103 "represents Congress' effort to strike a proper balance between a citizen's reasonable expectation of privacy, . . . and the government's need for return information in implementing effective tax administration."[366]

The structure of disclosure to discrete groups under section 6103 contrasts sharply with the general rule under the FOIA to release information to the public at large with no showing of need. Citing the Senate committee report for section 6103, the court asserted that the Congress was aware of the FOIA when it was drafting section 6103. The Congress showed no intent, however, to allow the FOIA to "supercede, negate or frustrate the clear purpose of 6103."[367] The court declined to decide that the "generalized strictures of FOIA" took precedence over the particularized disclosure scheme. It stated that such a ruling would render section 6103 an exercise in legislative futility. The court concluded that absent contrary Congressional intent, section 6103 must be viewed as the sole standard governing the release of returns and return

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[361] *Zale Corp,* 481 F. Supp. at 487.

[362] *Id.*

[363] With regard to exemption 3, the FOIA initially provided that disclosure was not required for matters that are "specifically exempted from disclosure by statute." 5 U.S.C. sec. 552(b)(3). An amendment of this statute by the Sunshine Act, Pub. L. No. 94-409 (March 13, 1977), narrowed the exemption by adding subparts (A) and (B), stated above, as qualifications as to the requirements of an exempting statute.

[364] *Zale Corp.*, 481 F. Supp. at 488.

[365] *Id*. at 489.

[366] *Id., citing* S. Rep. No. 94-938, at 317-318.

[367] *Zale Corp.*, 481 F. Supp. at 489.

information.[368]

This holding primarily affects the standard of review a court must apply to an IRS decision to withhold documents. It substitutes the *de novo* review required by the FOIA with the less stringent review standard under the Administrative Procedures Act.[369] The Administrative Procedures Act standard is highly deferential to agency decisions, requiring the court to find that the IRS abused its discretion to overturn the withholding of information. "The Court must accept the Service's determination in this area of its acknowledged experience and technical competence so long as the determination is rational and has support in the record."[370] In contrast, an agency generally has the burden of justifying nondisclosure in a FOIA case. The agency must sustain its burden by submitting detailed affidavits that identify the documents at issue and explain why they fall under the claimed exemption.[371]

Under the *Zale* decision, the IRS may be relieved of certain procedural requirements, such as the twenty-day time limitation for responding to FOIA requests, and the duty to segregate and release nonexempt information. If the FOIA does not apply to requests for returns and return information, then it cannot impose these requirements.

2. Exemption 5 of the FOIA

Exemption 5 of the FOIA exempts inter- or intra- agency memoranda or letters that would not be available by law to a private party in litigation with the agency. This exemption incorporates the attorney-client privilege, attorney work product privilege, and an executive or governmental privilege. The Supreme Court has held that exemption 5 of the FOIA does not apply to final agency action.[372] Courts have limited exemption 5 to pre-decisional and deliberative documents and have held that it does not apply to post-decisional documents that explain the basis for final agency action. Post-decisional documents are considered to be the

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[368] *Id.* at 490.

[369] 5 U.S.C. sec. 706.

[370] *Zale Corp.*, 481 F. Supp. at 490.

[371] Most FOIA cases are resolved through motions for summary judgment, rather than a trial with live witnesses. An example of a case in which the IRS's affidavit did not sustain its burden is *Kamman v. IRS*, 56 F.3d 46, 49 (9th Cir. 1995)(holding that the IRS affidavit failed to establish that an appraisal of a taxpayer's jewelry done as part of IRS efforts to collect the taxpayer's tax liability was "return information"; the appraisal was ordered disclosed to the third party FOIA requestor).

[372] *NLRB v. Sears Roebuck & Co.*, 421 U.S. 132 (1975).

"secret law" the FOIA was designed to bring to light.[373] A conflict arises when the "secret law" is embodied in a document relating to a specific taxpayer's case before the IRS. This conflict is discussed *infra* in connection with the litigation over IRS internal guidance.

3. Exemption 7 of the FOIA

Exemption 7 of the FOIA protects records or information compiled for law enforcement purposes. It provides that the FOIA does not apply to matters that are:

> (7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, or information provided by a confidential source during the course of a criminal investigation, (E) would disclose techniques and procedures for law enforcement investigations or would disclosure guidelines for law enforcement investigation if such disclosure could reasonably be expected to risk circumvention of the law or (F) could reasonably be expected to endanger the life or physical safety of any individual[.][374]

The IRS asserts this exemption most frequently when a taxpayer makes a request for his file to find out more about the IRS's investigation of him. With respect to open investigatory files, or portions of such files, the IRS asserts exemption 7(A), above, as grounds for withholding. This FOIA exemption permits withholding on the basis that disclosure will interfere with the ongoing investigation.[375] The types of documents withheld from disclosure under this exemption include those that would:

(1) give the nature and direction of the government's case;

(2) the type of evidence being relied upon;

(3) identity of witnesses or informants;

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[373] *See Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 867 (D.D.C. 1980).

[374] 5 U.S.C. sec. 552(b)(7).

[375] The IRS also asserts exemption 3 of the FOIA in these cases. Section 6103(e)(7) is the statutory basis for the exemption 3 assertion. Section 6103(e)(7) allows the IRS to withhold return information relating to the taxpayer requestor when it determines that disclosure would seriously impair tax administration.

(4) specific transactions being investigated; and

(5) the scope and limits of the government's investigation.[376]

As an example, if an IRS special agent made copies of selected checks of the taxpayer being investigated which would show an issue being developed or pursued by the IRS, the IRS could withhold those checks under exemption 7(A). Generally, copies of verbatim statements made by the taxpayer, the taxpayer's return, and correspondence and other material voluntarily submitted by the taxpayer to the IRS are not withheld from disclosure.[377]

C. FOIA Lawsuits Regarding Internal IRS Guidance

Any formal guidance on the application of the Code aids the taxpaying public, its tax advisors, and those charged with administering the tax laws. The IRS and the Treasury Department issue various types of written guidance to assist in the understanding of the Code. Such guidance includes regulations, revenue procedures, and revenue rulings. This type of guidance is generic in that it is not directed to a specific taxpayer.

FOIA litigation has successfully disclosed sources of guidance that were applicable to members the general public but were being used by the IRS for internal use only. These include private letter rulings, general counsel memoranda, technical advice memoranda, and field service advice. There continue to be FOIA requests and litigation involving additional types of guidance that are not disclosed to the public. When litigation involves the possible disclosure of guidance that is taxpayer specific, the competing interests of taxpayer privacy, the public's right to know how the IRS is interpreting and administering the tax laws, and the IRS's ability to protect its decision making process must be balanced.

Pre-section 6110 FOIA litigation over guidance

Prior to the enactment of 6110 and the revision of 6103,[378] the IRS litigated FOIA cases over the disclosure of private letter rulings and technical advice memoranda. At issue was

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[376] Internal Revenue Manual, Disclosure of Official Information Handbook, Open Investigatory Files, 1.3.13.6.1(11) (August 19, 1998).

[377] However, exceptions may apply when these documents have been marked or highlighted by an IRS agent to show items of importance. In such cases, the document may be partially or wholly withheld under exemption 7.

[378] At the time of these cases, section 6103 permitted access to tax returns only upon executive order. No counterpart to present law section 6110 existed. Instead, litigants utilized the FOIA provision that requires agencies to make available to the public "interpretations which have been adopted by the agency." 5 U.S.C. sec. 552(a)(2)(B).

whether private rulings were exempt from disclosure under the FOIA because they constituted tax returns (or return information) under the Code. Both the Court of Appeals for the District of Columbia and the Sixth Circuit held that private rulings were not covered by section 6103 and were subject to disclosure.[379] The courts split, however, on the issue of whether technical advice memoranda were open to the public.[380] The common thread running through these decisions is that these documents constituted statements of policy and interpretations that had been adopted by the IRS. "It is well established that information which either creates or provides a way of determining the extent of substantive rights and liabilities constitutes a form of law that cannot be withheld from the public."[381]

Enactment of section 6110

In response to the decisions in Court of Appeals for the District of Columbia and the Sixth Circuit, section 6110 was enacted.[382] Congress agreed with the courts that private letter rulings should be made public.[383] In doing so the Congress noted that it had been argued that the private ruling system had developed into a body of secret law known only to a few members of the tax profession.[384] Although at that time, the IRS had proposed procedural rules providing for the publication of private rulings, the Congress determined that it was necessary to address additional issues that had arisen after the court decisions.[385] Such issues included the extent to which a ruling file should be published, whether private rulings should be available as precedent for other taxpayers, and what procedures should be established to allow taxpayers to claim that protected material should not be disclosed.[386]

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[379] *Tax Analysts & Advocates v. IRS*, 505 F.2d 350 (D.C. Cir. 1974); *Fruehauf Corp. v. IRS*, 75-2 U.S.T.C. ¶ 16,189 (6th Cir. 1975).

[380] In *Fruehauf*, the court held that technical advice memoranda are open to inspection to the extent intended for issuance to a taxpayer. In *Tax Analysts*, the court held that a technical advice memorandum was part of a tax return and therefore, not open to inspection under the FOIA.

[381] *Tax Analysts*, 505 F.2d at 353 *citing Sterling Drug, Inc. v. FTC*, 450 F.2d 698 (1971); *American Mail Line, Ltd. v. Gulick*, 411 F.2d 696 (1968).

[382] Pub. L. No. 94-455, sec. 1201 (1976).

[383] H.R. Rep. No. 94-658 at 315 (1975).

[384] *Id.* at 314.

[385] *Id.*

[386] *Id.*

Taxation With Representation Fund v. IRS

The enactment of section 6110 did not eliminate FOIA litigation with respect to IRS guidance. In 1981, the Taxation With Representation Fund ("TRWF") sued under the FOIA to make public General Counsel Memoranda ("GCMs"), Technical Memoranda ("TMs"), and Actions on Decision ("AODs").[387]

GCMs are legal memoranda prepared by the Office of Chief Counsel in response to a formal request for legal advice from the former IRS Office of the Assistant Commissioner (Technical). GCMs were primarily prepared by the former IRS Office of Chief Counsel Interpretive Division in connection with the review of proposed private letter rulings, proposed technical advice memoranda and proposed revenue rulings. GCMs contained lengthy legal analysis of the substantive issue, and recommendations and opinions of the IRS Office of Chief Counsel. GCMs were intended for IRS use only. GCMs were used by IRS Chief Counsel staff attorneys to insure consistency, avoid duplication of research, provide a reference source, and update earlier memoranda when a position on an issue is sustained, modified, or changed within the Office of Chief Counsel.

TMs summarized and explained regulations. Prior to FOIA litigation for their release, they accompanied every draft regulation forwarded by the IRS to the Department of Treasury for final determination. TMs served to help decision makers understand the regulations they accompanied. TMs generally explained the proposed rules, provided background information, stated the issues involved, identified controversial legal or policy questions, and discussed the approach taken by the draftsperson. The former IRS Office of Chief Counsel's Legislation and Regulations Division prepared TMs. They were then approved by the IRS Chief Counsel and the former IRS Assistant Commissioner (Technical). The IRS Office of Chief Counsel maintained a file of TMs pertaining to regulations published in final form for research purposes.

AODs are legal memoranda that are prepared when the IRS loses a case in court. It sets forth the issue which was decided against the government, a brief discussion of the facts, and reasoning behind the recommendation to "acquiesce" or "nonacquiesce" in (follow or not follow) a court decision. A "nonacquiescence" means that the IRS will not be bound by a court decision in disposing of other cases, except in the circuit of issuance. The AOD contains the IRS Chief Counsel view on the correct interpretation of the law of a given case. AODs are used by the IRS Office of Chief Counsel for research and guidance.

In opposing the release of these documents, the government argued that they were protected by the deliberative process privilege. The deliberative process privilege protects "confidential intra-agency advisory opinions disclosure of which would be injurious to the

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[387] *Taxation With Representation Fund v. IRS*, 646 F.2d 666 (D.C. Cir. 1981).

consultative functions of government."[388] The privilege protects documents reflecting advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated, as well as other subjective documents that reflect the personal opinions of the writer prior to the agency's adoption of a policy.[389] Exemption 5 of the FOIA, which encompasses the deliberative process privilege, only protects pre-decisional and deliberative communications.[390] It does not protect the "working law" of an agency.[391] A document that is pre-decisional may lose its exempt status if "adopted formally or informally, as the agency position on an issue or is used by the agency in its dealings with the public." [392]

In *Taxation With Representation Fund*, the D.C. Circuit held that the deliberative process privilege did not protect GCMs, AODs, and TMs.[393] The court found that the IRS had adopted informally these documents as final statements of agency policy. The documents functioned as the "working law of the agency" because they were used as interpretive guides and research tools. Thus, in 1981, the court ordered GCMs, TMs, and AODs to be disclosed.[394]

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[388] *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 148 (1975).

[389] *NLRB v. Sears, Roebuck & Co.*, 421 U.S. at 150.

[390] *Missouri ex rel. Shorr v. United States Army Corps of Engineers*, 147 F.3d 708, 710 (8th Cir. 1998) (exemption permits nondisclosure of documents that are both predecisional and deliberative).

[391] *NLRB v. Sears, Roebuck & Co.*, 421 U.S. at 152-153.

[392] *Coastal States Gas Corp. v. Dep't. of Energy*, 617 F.2d 854 (D.C. Cir. 1980). In *Coastal States*, the documents in dispute were memoranda from regional counsel to auditors working in Department of Energy field offices. These memoranda were issued in response to requests for interpretations of regulations with respect to a particular set of facts encountered by field agents while conducting audits. The Department of Energy claimed that these memoranda were protected from disclosure pursuant to exemption 5 of the FOIA because they were not "formal" interpretations of the regulations, nor were the interpretations "binding" on the audit staff. 617 F.2d at 859. The court rejected that argument, finding that the opinions were routinely used by agency staff as guidance in conducting their audits, and were retained and referred to as precedent.

[393] *Taxation With Representation Fund*, 646 F.2d at 683-684.

[394] The court exempted from disclosure GCMs that were never distributed or revised to reflect the final decision, TMs pertaining to regulations never approved, and AODs recommending appeals, finding that these documents retained their predecisional and deliberative character. The court also excluded documents if a final decision had yet to be made. *Taxation*

(continued...)

Post-FOIA litigation decline in public guidance

In 1980, the IRS issued 372 GCMs; in 1993 and 1994 the IRS issued one GCM.[395] Three GCMs were issued in 1995.[396] In 1980 the IRS issued 172 AODs.[397] In 1993 and 1994, only five AODs were issued.[398] The IRS issued 16 AODs in 1995.[399]

Congress enacted section 6110, which made private letter rulings and technical advice memoranda subject to public disclosure, in 1976. The number of technical advice memoranda dropped from 1,127 in 1980 to 182 in 1995.[400] The number of private letter rulings stayed in the 5,000s from 1980 to 1985, then dropped into the 3,000s from 1987 to 1990, and into the 2,000s in the 1990s.[401]

It should be noted that some of the divisions of the Office of Chief Counsel that used to issue some of the named advice no longer exist. For example, the Interpretive Division and Legislation and Regulations Division no longer exist. This may account for the decrease in the named guidance; on the other hand, it may not, in that their functions have been taken over by other Chief Counsel divisions.

Because the need for guidance has not lessened, the above statistics have led some to conclude that guidance that should be made public is still being issued but under other names. As the FOIA litigation continues, more forms of IRS internal guidance have come to light.

Field Service Advice litigation

Under the FOIA, Tax Analysts sued to compel the IRS to disclose Field Service Advice

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[394](...continued)
With Representation Fund, 647 F.2d at 681-682.

[395] Meadows, Peter J. and Dobrovir, William A., *Who Killed Guidance*, Doc. 96-27723, 96 TNT 201-53 (October 15, 1996).

[396] *Id.*

[397] *Id.*

[398] *Id.*

[399] *Id.*

[400] *Id.*

[401] *Id.*

memoranda ("FSAs").[402] FSAs are prepared by attorneys in the IRS National Office of the Office of Chief Counsel. They are prepared in response to requests from IRS field personnel for legal guidance, usually with respect to issues relating to a particular taxpayer.[403] FSAs usually contain a statement of issues, facts, legal analysis and conclusions. The primary purpose of FSAs is to ensure that IRS field personnel apply the law correctly and uniformly.

Tax Analysts prevailed in the litigation. The district court concluded that FSAs were "statements of policy and interpretations which have been adopted by the agency" and ordered the IRS to provide the FSAs to Tax Analysts.[404] The government appealed the ruling. The D.C. Circuit, however, did not address the issue of whether FSAs are "statements of policy and interpretations which have been adopted by the agency" that the FOIA requires an agency to make public. Instead, the circuit court determined that FOIA provision 552(a)(3) applied. This provision requires an agency to produce reasonably described agency records in response to a request unless the documents are exempt from disclosure.

The IRS claimed that FSAs relating to individual taxpayers were exempt from disclosure in their entirety because they are "return information" under section 6103. Conceding that individual FSAs contained some return information, the court had to decide whether the legal interpretations and analyses contained therein were

> any other data received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return, or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax interest fine or other imposition or offense.[405]

Tax Analysts contended that the legal interpretations of statutes, rules, regulations and judicial opinions, and the legal conclusions flowing from them, are not "data." Tax Analysts contended that section 6103 protects only "facts," such as the taxpayer's identity, income, and deductions or the fact that the taxpayer is under civil or criminal investigation. The IRS asserted that data includes legal conclusions and analyses as well as facts, and includes everything generated by the IRS with respect to the liability of the taxpayer.

The court stated, "we are hard pressed to find any reason derived from [section] 6103 in

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[402] *Tax Analysts v. IRS*, 117 F.3d 607 (D.C. Cir. 1997).

[403] For purposes of this discussion "IRS field personnel" means IRS district or service center employees and regional or district employees of the IRS Office of Chief Counsel.

[404] *Tax Analysts v. IRS*, 1996 U.S. Dist. LEXIS 3259, 96-1 U.S.T.C. (CCH) ¶50,205, (D.D.C. March 15, 1996).

[405] Sec. 6103(b)(2)(A).

favor of the IRS's interpretation. The IRS has offered none. It simply slaps [section] 6103 on the table and tells us that everything in an FSA, every line, every word, is immune from disclosure."[406] The court noted that the specific items mentioned in 6103(b)(2)(A) are not only factual but unique to the particular taxpayer.[407] The court stated that legal analyses cannot be viewed as unique to a particular taxpayer.[408]

> If the Office of Chief Counsel renders an interpretation of a certain section in the tax code, whether in an FSA or elsewhere, that interpretation should apply to all other taxpayers who are, in material respects, similarly situated. Treating like cases alike is, we have said, "the most basic principle of jurisprudence." [citation omitted][409]

At the same time Congress enacted section 6103, it enacted 6110, which, among other things, requires the disclosure of technical advice memoranda (discussed above). The court found no material differences between technical advice memoranda and FSAs. Both, the court asserted, are means by which the IRS National Office of the Office of Chief Counsel provides field offices with advice about the tax laws in response to questions regarding specific factual situations. Section 6110 requires that the IRS disclose a written determination after deleting identifying details and certain other information.[410] The court found it hard to believe that Congress would require the disclosure of the legal analysis of a technical advice memorandum and then in section 6103 order the IRS not to disclose the same portion of an FSA.[411] Thus, legal analyses contained in FSAs are not return information, the court concluded.[412]

Noting that the purpose of FSAs is the promotion of uniformity throughout the country on significant legal issues, the court found FSAs to be agency law.[413] The court pointed to the fact that the documents were routinely used and relied upon by IRS field personnel. FSAs are statements of the legal position of the IRS and therefore, the court reasoned, cannot be viewed as pre-decisional. They reflect the law the agency is applying to the public. Thus, the court rejected

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[406] *Tax Analysts v. IRS*, 117 F.3d at 615.

[407] *Tax Analysts v. IRS*, 117 F.3d at 614.

[408] *Id.*

[409] *Id*.

[410] Sec. 6110(a), (c).

[411] *Tax Analysts v. IRS*, 117 F.3d at 616.

[412] *Id.*

[413] *Tax Analysts v. IRS*, 117 F.3d at 617-618.

the IRS's arguments that FSAs are protected by the deliberative process privilege.

The IRS also asserted the attorney-client privilege for FSAs. It contended that FSAs are confidential communications between the attorneys in the Office of Chief Counsel and their clients (the requesters) and are based upon confidential information relayed from the requesters to the attorneys. Disagreeing with the IRS, the court found that when the legal conclusions are based on information obtained from the taxpayer, the privilege does not apply.[414] However, the court did permit the IRS to assert the privilege for matters concerning "the scope, direction, or emphasis of audit activity," as this was not information received from the taxpayer.[415] It also permitted the IRS to assert the privilege of attorney work product.[416] Finally, the court remanded the case to the district court to pass upon assertions of privilege based on treaty secrecy, law enforcement techniques, and unwarranted invasion of personal privacy.[417]

Addition of Chief Counsel advice to section 6110

In response to the FSA litigation, the Congress again stepped in to resolve outstanding issues regarding the ability of taxpayers to participate in the redaction of their information from FSAs.[418] The Congress created the umbrella term "Chief Counsel advice" to encompass written advice issued from any national office component of the IRS Office of Chief Counsel to IRS field personnel. Chief Counsel advice encompasses advice or instructions that convey legal interpretations or positions of the IRS or the IRS Office of Chief Counsel concerning revenue provisions or laws relating to the assessment and collection of any liability under a revenue provision.[419] A redaction process was established for these documents to protect taxpayer privacy.[420]

Post-FSA disputes

The dispute over IRS internal guidance has not ended with the litigation over FSAs and

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[414] *Tax Analysts v. IRS*, 117 F.3d at 619.

[415] *Tax Analysts v. IRS*, 117 F.3d at 620.

[416] *Id.* The attorney work product privilege protects documents and memoranda prepared by or at the direction of an attorney in contemplation of litigation. *See Hickman v. Taylor*, 329 U.S. 495, 509-10 (1947).

[417] *Tax Analysts v. IRS*, 117 F.3d at 620.

[418] Pub. L. No. 105-206, sec. 3509 (1998).

[419] Sec. 6110(i)(1)(A).

[420] Sec. 6110(i)(3).

the amendment of section 6110 to include Chief Counsel advice. The IRS has been criticized by the court for redacting too much from its FSAs.[421] The depositions of IRS Chief Counsel officials in the FSA litigation revealed many types of internal guidance being used by the IRS. A recent letter from Tax Analysts to the IRS lists seventeen items that are either in litigation or the subject of a pending FOIA request or administrative appeal.[422]

D. Advance Pricing Agreements

Public Law 106-170[423] amended section 6103 to provide that advance pricing agreements ("APAs") and related background information are confidential return information under section 6103. Related background information includes: the request for an APA, any material submitted in support of the request, and any communication (written or otherwise) prepared or received by the IRS in connection with an APA, regardless of when such communication is prepared or received. Protection is not limited to agreements actually executed; it would include material received and generated in the APA process that does not result in an executed agreement.

Further, present law provides that APAs and related background information are not "written determinations" as that term is defined in section 6110. Therefore, the public inspection requirements of section 6110 do not apply to APAs and related background information. A document's incorporation in a background file, however, is not grounds for not disclosing an otherwise disclosable document from a source other than a background file.

The Treasury Department is required to prepare and publish an annual report on the status of APAs. The annual report must contain the following information:

(1) information about the structure, composition, and operation of the APA program office;
(2) a copy of each current model APA;
(3) statistics regarding the amount of time to complete new and renewal APAs;
(4) the number of APA applications filed during such year;
(5) the number of APAs executed to date and for the year;
(6) the number of APA renewals issued to date and for the year;
(7) the number of pending APA requests;
(8) the number of pending APA renewals;
(9) the number of APAs executed and pending (including renewals and renewal

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[421] *Tax Analysts v. IRS*, 84 AFTR2d ¶ 99-5245 (D.D.C. September 3, 1999).

[422] Letter from William A. Dobrovir, Attorney for Tax Analysts, to Margo Stevens, Deputy Assistant Chief Counsel (Disclosure Litigation) (March 30, 1999) *reprinted in* 24 *The Exempt Organization Tax Review* 325 (May 1999).

[423] Pub. L. No. 106-170 (1999).

requests) that are unilateral, bilateral and multilateral, respectively;
(10) the number of APAs revoked or canceled, and the number of withdrawals from the APA program, to date and for the year; and
(11) the number of finalized new APAs and renewals by industry.[424]

In addition, the report must contain general descriptions of:

(1) the nature of the relationships between the related organizations, trades, or businesses covered by APAs;
(2) the related organizations, trades, or businesses whose prices or results are tested to determine compliance with the transfer pricing methodology prescribed in the APA;
(3) the covered transactions and the functions performed and risks assumed by the related organizations, trades or businesses involved;
(4) methodologies used to evaluate tested parties and transactions and the circumstances leading to the use of those methodologies;
(5) critical assumptions;
(6) sources of comparables;
(7) comparable selection criteria and the rationale used in determining such criteria;
(8) the nature of adjustments to comparables and/or tested parties;
(9) the nature of any range agreed to, including information such as whether no range was used and why, whether an inter-quartile range was used, or whether there was a statistical narrowing of the comparables;
(10) adjustment mechanisms provided to rectify results that fall outside of the agreed upon APA range;
(11) the various term lengths for APAs, including rollback years, and the number of APAs with each such term length;
(12) the nature of documentation required; and
(13) approaches for sharing of currency or other risks.

The IRS is required to describe, in each annual report, its efforts to ensure compliance with existing APAs. The first report is required to cover the period January 1, 1991, through December 31, 1999. The Treasury Department may not include any information in the report that would have been deleted under section 6110(c) if the report were a written determination as defined in section 6110. Additionally, the report may not include any information which could be associated with or otherwise identify, directly or indirectly, a particular taxpayer. The Secretary is expected to obtain input from taxpayers to ensure proper protection of taxpayer information and, if necessary, utilize its regulatory authority to implement appropriate processes

[424] This information was previously released in IRS Publication 3218, "IRS Report on Application and Administration of I.R.C. Section 482."

for obtaining this input.[425]

The legislative history to this provision provides that the provision relating to APAs is not intended to discourage the Treasury Department from issuing other forms of guidance, such as regulations or revenue rulings, consistent with the confidentiality provisions of the Code.

[425] For purposes of section 6103(a), the report requirement is treated as part of the Code so as to authorize the disclosure of return information in such report.

VII. THE PRIVACY ACT

A. Overview

In 1974, the Congress found that a Federal agency's collection, use, maintenance, and dissemination of personal information directly affect the privacy of individuals.[426] While essential to the efficient operation of government, the Congress noted that the increasing use of technology greatly magnified the harm to individual privacy that can occur from any collection, maintenance, use, or dissemination of personal information.[427] The Watergate crisis served as a catalyst for the Congress to enact privacy protections to safeguard against invasive actions, such as the "White House enemies list" of President Nixon, the wiretapping of phones of government employees and news reporters, and the improper surveillance of individuals.[428]

The purpose of the Privacy Act is to safeguard an individual's personal privacy against unwarranted invasions through the misuse of Federal records.[429] Generally, with specified exceptions, the Privacy Act prohibits an agency from disclosing an individual's records without that individual's consent.

The Privacy Act contained no specific provisions relating to tax returns. Two years after enactment of the Privacy Act,[430] section 6103 was amended to make returns and return information confidential. In contrast to the Privacy Act's general applicability to agency records, section 6103 focuses solely on tax returns and return information. A comparison of the Privacy Act and section 6103 reveals that while similar, the disclosure provisions of section 6103 are more detailed and allow less disclosure than the Privacy Act. The overlap of the two statutes and the fact that they were enacted within a two-year period have caused the courts to disagree on whether section 6103 preempts the Privacy Act as it relates to returns and return information.

Privacy Act rules

The Privacy Act has four principal provisions, which:

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[426] Pub. L. No. 93-579, sec. 2(a)(1) (1974).

[427] Pub. L. No. 93-579, sec. 2(a)(2) (1974).

[428] H.R. Rep. No. 93-1416 *reprinted in* House Comm. on Gov't Operations and Senate Comm. on Gov't Operations, 94th Cong. 2d Sess., *Legislative History of the Privacy Act of 1974 - S. 3418 (P.L. 93-579) Source Book on Privacy* at 301 (1976).

[429] Pub. L. No. 93-579, sec. 2(b) (1974).

[430] S. Rep. No. 94-938 at 318 (1976).

(1) restrict the disclosure of personally identifiable records maintained by agencies;[431]

(2) allow individuals to access agency records maintained about them;[432]

(3) allow an individual to request amendment of agency records pertaining to themselves when they believe the records are not accurate, relevant, timely or complete;[433] and

(4) require agencies to comply with statutory guidelines for collection, maintenance, and dissemination of records.[434]

The Privacy Act also permits an individual to sue for damages when an agency fails to comply with any provision of the Act.[435]

Rights under the Privacy Act

Only individuals have rights under the Privacy Act. The individual must be a citizen of the United States or an alien lawfully admitted for permanent residence.[436] The parent of any minor, or the legal guardian of any individual whom a court of competent jurisdiction has declared incompetent, may act for such minor or individual.[437]

Private corporations, organizations, partnerships, estates, or trusts do not have Privacy Act rights.[438] Similarly, deceased individuals, executors, and next of kin of deceased individuals

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[431] 5 U.S.C. sec. 552a(b).

[432] 5 U.S.C. sec. 552a(d)(1).

[433] 5 U.S.C. sec. 552a(d)(2).

[434] 5 U.S.C. sec. 552a(c), (e) and (f).

[435] 5 U.S.C. sec. 552a(g).

[436] 5 U.S.C. sec. 552a(a)(2).

[437] 5 U.S.C. sec. 552a(h).

[438] *St. Michael's Convalescent Hospital v. California*, 643 F.2d 1369, 1373 (9th Cir. 1981).

do not have Privacy Act rights.[439] Authorities disagree on whether the Privacy Act applies to an individual in his entrepreneurial capacity (e.g., sole proprietor).[440]

Agencies subject to the Privacy Act

The Privacy Act restriction on the maintenance, collection, and dissemination of records apply only to Federal agencies. Thus, the Privacy Act does not cover legislative and judicial branch entities.[441] State and local government agencies and private entities are not subject to the Privacy Act, even if they receive Federal funds.[442]

Records subject to the Privacy Act

The Privacy Act applies only to those records an agency maintains in a "system of records." The term "record" means any item or collection of information about an individual that an agency maintains, which contains that individual's name, identifying number, symbol or other identifying particular, such as fingerprint, voice print or photograph.[443] A "system of records" consists of: (1) a group of records, (2) under agency control, and (3) from which information is retrieved by an individual's name or by some other identifying number, symbol or particular

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[439] OMB Guidelines, 40 Fed. Reg. 28,948, 28,951 (1975); *Crumpton v. United States*, 843 F. Supp. 751, 756 (D.D.C. 1994) *aff'd on other grounds sub nom., Crumpton v. Stone*, 59 F.3d 1400 (D.C. Cir. 1995).

[440] OMB Guidelines, 40 Fed. Reg. at 28,951; *Shermco Industries v. Secretary of the United States Airforce*, 452 F. Supp. 306, 314-15 (N.D. Tex. 1978) (accepting "entrepreneurial capacity" distinction) *rev'd and remanded on other grounds*, 613 F.2d 1314 (5th Cir. 1980); *Metadure Corp. v. United States*, 490 F. Supp. 1368, 1372-74 (S.D.N.Y. 1980); *Florida Med. Ass'n v. HEW*, 479 F. Supp. 1291, 1307-11 (M.D. Fla. 1979); *St. Michael's Convalescent Hospital*, 643 F.2d at 1373 (sole proprietorships are not individuals.).

[441] Agency is defined as "any Executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the [federal] Government (including the Executive Office of the President) or any independent regulatory agency." 5 U.S.C. sec. 552(f) incorporated by reference in Privacy Act sec. 552a(1).

[442] *Ortez v. Washington County*, 88 F.3d 804 (9th Cir. 1996); *Gilbreath v. Guadelupe Hospital Foundation*, 5 F.3d 785, 791 (5th Cir. 1993); *Marmarella v. County of Westchester*, 898 F. Supp. 236, 237-38 (S.D.N.Y. 1995). Note that section 7 of the Privacy Act (which is part of the public law but not part of Title 5 of the United States Code) places limitations on the ability of State and local agencies to require the disclosure of a social security number as a condition for receiving some legal right, benefit or privilege. Pub. L. No. 93-579, sec 7.

[443] 5 U.S.C. sec. 552a(a)(4).

assigned to the individual.[444]

B. Requests Under the Privacy Act

Requests for access to records

Only the subject of a record can make a request for access to such record under the Privacy Act.[445] An individual cannot make a request under the Privacy Act for a record about another person.[446] An exception exists for a legal guardian or parent requesting reports for a declared incompetent or minor.[447] The Privacy Act does not require an agency to make available information compiled in reasonable anticipation of a civil action or proceeding.[448]

The Privacy Act does not set a time limit for an agency to respond to a request for access or require an administrative appeal of the denial of access. A requestor may bring a civil action against the agency for injunctive relief.[449] Separate procedures are specified for requesting access to IRS records.[450]

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[444] 5 U.S.C. sec. 552a(a)(5).

[445] 5 U.S.C. sec. 552a(d)(1) provides:

> Each agency that maintains a system of records shall – (1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence.

[446] However, if information about a third party is contained in the individual requestor's record, the individual is entitled to the full record. *Voelker v. IRS*, 646 F.2d 332, 333-35 (8th Cir. 1981). A request for records about a third party may be made under the FOIA. 5 U.S.C. sec. 552. In addition, section 6103(e) allows certain persons with a material interest to access the returns and return information of third parties.

[447] 5 U.S.C. sec. 552a(h).

[448] 5 U.S.C. sec. 552a(d)(5). This provision is similar to the work-product privilege. *See Martin v. Office of Special Counsel*, 819 F.2d 1181, 1187-89 (D.C. Cir. 1987).

[449] 5 U.S.C. sec. 552a(g)(1)(B), (3)(A).

[450] 31 CFR sec. 1.26 and 31 CFR Part 1, Subpart C, Appendix B.

Amendment requests

Requests

Beyond inspecting records, the Privacy Act allows an individual to request that a record that is not accurate, relevant, timely, or complete be corrected.[451] The right to seek correction applies only to records subject to the Privacy Act.[452] The individual can only correct errors that pertain to that individual. An agency must acknowledge receipt of an amendment request under the Privacy Act within 10 days (excluding Saturdays, Sundays and legal public holidays) and rule promptly on the request.[453]

Denial of request and appeal

If the agency agrees with the request, the agency must make the corrections promptly.[454] Otherwise, the agency must inform the requestor of the agency's refusal to amend the record, the reason for refusing to amend the record, the procedures for requesting a review of the denial, and the name and address of the official responsible for reviewing the denial.[455] If the requestor appeals, the agency has 30 days (excluding Saturdays, Sundays and legal public holidays) to complete its review of the denial and render a final determination.[456] If the agency denies the appeal, it must inform the requestor of the right to judicial review.[457] A requestor also has the right to place in the agency file a concise statement of disagreement with the information that was the subject of the request for amendment.[458]

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[451] 5 U.S.C. sec. 552a(d)(2).

[452] Note that section 7852(e) precludes the application of the amendment provisions either directly or indirectly to determine the existence or possible existence of liability (or amount thereof) of any person for any tax, penalty interest, fine forfeiture, or other imposition or offense to which the provisions of the Code apply. *England v. Comm'r*, 798 F.2d 350, 351-52 (9th Cir. 1986).

[453] 5 U.S.C. sec. 552a(d)(2)(A).

[454] 5 U.S.C. sec. 552(d)(2)(B)(i).

[455] 5 U.S.C. sec. 552a(d)(2)(B)(ii).

[456] 5 U.S.C. sec. 552a(d)(3).

[457] 5 U.S.C. sec. 552a(d)(3).

[458] 5 U.S.C. sec. 552a(d)(3).

C. Privacy Act Disclosure Exceptions and Section 6103 Counterparts

Under the Privacy Act, an agency generally may not disclose an individual's record without the written consent of that individual.[459] This general rule has twelve exceptions, most of which have detailed counterparts in section 6103. These exceptions make it possible to disclose personal information about individuals without obtaining their consent.

Need to know

The Privacy Act permits disclosures to "officers and employees of an agency which maintains the record who need the record in performance of their duties."[460] This section permits disclosures within an agency for official business purposes. This provision is analogous to section 6103(h)(1), which allows Department of Treasury personnel to access returns and return information for the performance of their tax administration duties.

FOIA disclosures

If the FOIA requires release of a document covered by the Privacy Act, the Privacy Act will not prevent its disclosure.[461] The FOIA requires the release of a document in response to a FOIA request if the document does not qualify for an exemption or exclusion. Thus, if an agency receives a FOIA request for a record covered by the Privacy Act and no FOIA exemption applies, then the agency "is required under section 552 of this Title [Title 5]" to disclose the information to the FOIA requester.[462]

Routine use

An agency does not need an individual's consent before making a disclosure pursuant to a routine use.[463] With respect to the disclosure of a record, routine use means "the use of such record for a purpose which is compatible with the purpose for which it was collected."[464] The Privacy Act requires agencies to publish in the *Federal Register* "each routine use of the records

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[459] 5 U.S.C. sec. 552a(b).

[460] 5 U.S.C. sec. 552a(b)(1).

[461] 5 U.S.C. sec. 552a(b)(2). This section of the Privacy Act permits disclosure if "required under section 552 of this title[.]"

[462] *Id.*

[463] 5 U.S.C. sec. 552a(b)(3).

[464] 5 U.S.C. sec. 552a(a)(7).

contained in the system, including the categories of users and the purpose of such use." [465] The most recent publication of IRS systems of records and related routine uses may be found at 63 Fed. Reg. 69,842 *et seq*. (December 17, 1998).

Section 6103 governs the routine use of returns and return information. The IRS can share returns and return information with State taxing authorities, certain Federal agencies, such as the Department of Justice, and others pursuant to section 6103 without the taxpayer's consent.[466] Thus, disclosures of an individual's return and return information in accordance with section 6103 satisfy the Privacy Act's routine use exception.

Bureau of the Census

The Privacy Act allows nonconsensual disclosures to the Bureau of the Census to plan or carry out a census survey or related activity under Title 13.[467] Similarly, under section 6103(j)(1)(A), the Bureau of the Census has access to returns and return information for structuring censuses, and related statistical activities. However, the Bureau of Census cannot disclose such returns or return information except in a form which cannot be associated with, or otherwise identify directly or indirectly, a particular taxpayer.[468]

Statistical research

The Privacy Act permits disclosures for statistical research without obtaining consent of the individual. Section 552a(b)(5) of the Privacy Act provides for disclosure "to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record and the record is to be transferred in a form that is not individually identifiable."

Section 6103(j) allows four named agencies, the Departments of Commerce, Treasury, and Agriculture, and the Federal Trade Commission, to access returns and return information for

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[465] 5 U.S.C. sec. 552a(e)(4)(D).

[466] *See, e.g.*, sec. 6103(d) (State taxing authorities), sec. 6103(h)(2) (Department of Justice), and sec. 6103(j) (statistical use by the Departments of Commerce, Agriculture, Treasury and the Federal Trade Commission).

[467] 5 U.S.C. sec. 552a(b)(4).

[468] Sec. 6103(j)(4). Title 13 also prohibits the Bureau of the Census from making any publication "whereby the data furnished by any particular establishment or individual can be identified." 13 U.S.C. sec. 9(a); *Balridge v. Shapiro*, 455 U.S. 345 (1982).

statistical purposes.[469] Although these agencies may receive returns and return information in a form which identifies the taxpayer, the agencies can only reveal such information in a form that cannot be associated, directly or indirectly, with a particular taxpayer.[470]

National Archives and Records Administration

Under the Privacy Act, the National Archives and Records Administration can receive Privacy Act protected records without consent. Section 552a(b)(6) of the Privacy Act provides for disclosure:

> to the National Archives and Records Administration as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Archivist of the United States or the designee of the Archivist to determine whether the record has such value.

This provision's counterpart can be found in section 6103(l)(17). This section allows National Archives and Records Administration to receive returns and return information to appraise records for retention or destruction.[471]

Civil and criminal law enforcement requests

The Privacy Act permits disclosures to Federal law enforcement agencies for both civil and criminal purposes. In addition, a Federal agency, upon written request, may disclose a record to State or local government agencies for a civil or criminal law enforcement activity.[472] The provision permits disclosure if the disclosure is

(1) to another agency or to an instrumentality;

(2) of any governmental jurisdiction within or under the control of the United States;

(3) for a civil or criminal law enforcement activity if law authorizes the activity; and

(4) if the head of the agency or instrumentality has made a written

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[469] Sec. 6103(j)(1), (2), (3) and (5).

[470] Sec. 6103(j)(4).

[471] Sec. 6103(l)(17).

[472] OMB Guidelines, 40 Fed. Reg. 28,948, 28,955 (1975).

> request to the agency that maintains the record, which specifies: (a) the particular portion needed and (b) the law enforcement activity for which they seek the record.[473]

Section 6103 limits the use of returns and return information for civil and criminal purposes in a manner more restrictive than the Privacy Act. Civil use of returns and return information is limited to proceedings pertaining to tax administration.[474] Such information is available to Department of Justice personnel to prepare for a tax administration proceeding.[475] If the taxpayer is not a party to the proceeding, the IRS may provide returns and return information to the Department of Justice if: (1) the treatment of an item reflected on the return may relate to the resolution of an issue in the proceeding or investigation, or (2) there may be a transactional relationship between the taxpayer and a person who may be a party to the proceeding which may affect the resolution of an issue in the proceeding or investigation.[476] For nontax criminal investigations and proceedings, an *ex parte* court order is needed to obtain returns and return information provided by or for the taxpayer to the IRS.[477] Information from a source other than the taxpayer may be obtained upon written request to the IRS.[478]

Health or safety of an individual

The Privacy Act permits disclosure without consent "to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if, upon disclosure, notification is transmitted to the last known address of such individual."[479] Section 6103's counterpart to this provision is narrower in that disclosure of return information is limited to a Federal or State law enforcement agency in circumstances involving "imminent danger of death

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[473] 5 U.S.C. sec. 552a(b)(7).

[474] Sec. 6103(h)(2) and (4).

[475] Sec. 6103(h)(2).

[476] Sec. 6103(h)(2). Section 6103(h)(4) allows the disclosure of returns and return information in a proceeding pertaining to tax administration if the taxpayer is a party to the proceeding; the treatment of an item on the return is directly related to the resolution of an issue in the proceeding; such return or return information directly relates to a transactional relationship between the taxpayer and a party to the proceeding which directly affects the resolution of an issue in the proceeding; or to the extent required by court order under 18 U.S.C. section 3500 or Rule 16 of the Federal Rules of Criminal Procedure.

[477] Sec. 6103(i)(1).

[478] Sec. 6103(i)(2).

[479] 5 U.S.C. sec. 552a(b)(8).

or physical injury" to an individual.[480]

The Congress

The House of Representatives, the Senate, and, to the extent of matter within its jurisdiction, any committee, subcommittee, or joint committee may have access to a record covered by the Privacy Act without consent.[481] This exception does not authorize disclosures to individual members of Congress acting on their own or for a constituent.[482]

The House of Representatives, the Senate, and, in contrast, under section 6103, the House Committee on Ways and Means, the Senate Committee on Finance, and the Joint Committee on Taxation may receive returns and return information upon request of the respective chairperson.[483] The Chief of Staff of the Joint Committee on Taxation also may receive returns and return information upon request.[484] Nontax committees may receive returns and return information upon committee approval of the request, an authorizing resolution of the House or Senate, and a written request of the committee chairperson.[485]

The General Accounting Office

An agency may disclose an individual's records "to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the General Accounting Office."[486] The GAO may also have access to returns and return information under section 6103(i)(7).

Court order

The Privacy Act provides that an agency may provide records pursuant to a court order

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[480] Sec. 6103(i)(3)(B)(i).

[481] 5 U.S.C. sec. 552a(b)(9).

[482] OMB Guidelines, 40 Fed. Reg. 28,948, 28,955 (1975)

[483] Sec. 6103(f)(1).

[484] Sec. 6103(f)(2).

[485] Sec. 6103(f)(3).

[486] 5 U.S.C. sec. 552a(b)(10).

without an individual's consent.[487] When an agency makes an individual's record available to any person under compulsory legal process (including a court order), the agency must make reasonable efforts to notify such individual when such process becomes a matter of public record. The Privacy Act does not set standards for issuing a court order.

Section 6103 differs from the Privacy Act in that it provides standards for a court to issue an order. For example, before issuing an order for the disclosure of return information received by the IRS from the taxpayer, the court must find (1) that a specific crime has been committed; (2) that there is reasonable cause to believe that the return or return information may be relevant to a matter relating to the commission of such act; and (3) the information is sought exclusively for use in a criminal investigation or proceeding concerning such act and unavailable from another source.[488]

Debt Collection Act

The Privacy Act allows disclosure without consent to a consumer reporting agency in accordance with 31 U.S.C. section 3711(f). Section 3711(f) concerns the Federal government's collection of a claim under any law except the Code. Section 6103(m)(2)(B) permits the IRS to disclose a taxpayer's mailing address to a consumer reporting agency for preparation of commercial credit reports in accordance with 31 U.S.C. sections 3711, 3717, and 3718.

D. Other Privacy Act Provisions

Accountings of certain disclosures

Each Federal agency must keep an accounting of disclosures, reflecting the date, nature, and purpose of each disclosure without the individual's consent.[489] The agency must also keep a record of the name and address of the person or agency to whom disclosure was made.[490] These rules do not apply to disclosures required by the FOIA or intra-agency (need to know)

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[487] 5 U.S.C. sec. 552a(b)(11). The Court of Appeals for the District of Columbia has ruled that a subpoena routinely issued by a court clerk, such as a Federal grand jury subpoena, is not a "court order" within the meaning of this exception because it is not specifically approved by a judge. *Doe v. DiGenova*, 779 F.2d 74, 77-85 (D.C. Cir. 1985).

[488] Sec. 6103(i)(1)(B).

[489] 5 U.S.C. sec. 552a(c)(1).

[490] 5 U.S.C. sec. 552a(c)(1).

disclosures.[491] The agency keeps the accounting for five years or the life of the record, whichever is longer.[492] Except accountings of civil or criminal law enforcement disclosures, an individual is entitled upon request to obtain an accounting of the disclosure of his record.[493]

An agency must inform a person or agency to which they have disclosed a record of any correction or notation of a dispute made in accordance with the amendment provisions.[494] This requirement applies if an accounting of the disclosure is made.[495]

Exemption from disclosure

Privacy Act sections 552a(j) and (k) allow the head of an agency to exempt certain kinds of systems of records from the Privacy Act's access and amendment provisions. Section 552a(j) concerns general exemptions for Central Intelligence Agency records and criminal law enforcement records.[496] Privacy Act section 552a(k) contains seven exemptions for records pertaining to national security, law enforcement material not covered by Privacy Act section 552a(j), Presidential security, statistical records, background and personnel investigative files identifying a confidential source, testing and examination material for appointments and promotions, and evaluation material used to determine potential for promotion in the armed services.[497]

Record maintenance

Agencies may maintain only that information about an individual that is relevant and necessary to accomplish an agency purpose required under a statute or executive order.[498] Information should be collected directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under

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[491] 5 U.S.C. sec. 552a(c)(1). The accounting requirements also do not apply to certain disclosures of returns and return information made under the authority of specified subsections of section 6103. Sec. 6103(p)(3).

[492] 5 U.S.C. sec. 552a(c)(2).

[493] 5 U.S.C. sec. 552a(c)(2).

[494] 5 U.S.C. sec. 552a(c)(4).

[495] 5 U.S.C. sec. 552a(c)(4).

[496] 5 U.S.C. sec. 552a(j).

[497] 5 U.S.C. sec. 552a(k).

[498] 5 U.S.C. sec. 552a(e)(1).

Federal programs.[499]

The Privacy Act requires that the agency ensure that the records are "accurate, relevant, timely, and complete" when used in making a determination about an individual.[500] Agency records must also be accurate, complete, timely and relevant for agency purposes prior to dissemination to another agency.[501] An agency may not maintain records describing how an individual exercises his First Amendment rights unless authorized by statute or pertinent to an authorized law enforcement activity.[502]

Privacy Act notice

The Privacy Act requires each agency that maintains a system of records to inform each individual whom it asks to supply information of:

(1) the authority which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary;

(2) the principal purpose or purposes for which the agency intends to use the information;

(3) the routine uses which may be made of the information; and

(4) the effects, if any, of not providing all or any part of the requested information.[503]

The agency provides this notice either on the form used to collect the information or on a separate form that the individual can retain.[504]

Judicial review

The Privacy Act gives an individual a civil remedy in U.S. district court when an agency:

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[499] 5 U.S.C. sec. 552a(e)(2).

[500] 5 U.S.C. sec. 552a(e)(5).

[501] 5 U.S.C. sec. 552a(e)(6).

[502] 5 U.S.C. sec. 552a(e)(7).

[503] 5 U.S.C. sec. 552a(e)(3).

[504] 5 U.S.C. sec. 552a(e)(3).

(1) refuses to grant access to a record,

(2) refuses to correct or amend a record,

(3) fails to maintain a record with accuracy, relevance, timeliness or completeness, or

(4) fails to comply with any other provision of the Privacy Act. [505]

A court can provide injunctive relief for amendment and access lawsuits.[506] For accuracy and other Privacy Act violations that are intentional and willful, a court can award damages.[507]

Criminal penalties

The Privacy Act provides criminal penalties for agency personnel who knowingly and willfully disclose protected records to any person not entitled to receive them.[508] It also prescribes penalties for agency personnel who maintain systems of records without complying with the Privacy Act's notice requirements.[509] Criminal penalties maybe imposed on any person who knowingly and willfully requests a record under false pretenses.[510] Violations of these provisions is a misdemeanor and subjects the perpetrator to a fine of up to $5,000.[511]

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[505] 5 U.S.C. sec. 552a(g)(1).

[506] 5 U.S.C. sec. 552a(g)(2)(A) and (3)(A).

[507] 5 U.S.C. sec. 552a(g)(4). Compare with section 7431, which provides a civil remedy for the unauthorized disclosure or inspection of returns and return information. The disclosure or inspection under section 7431 need only be knowing and negligent, rather than willful. Under section 7431(a), no injunctive relief is available, only damages. Sec. 7431(c).

[508] 5 U.S.C. sec. 552a(i)(1).

[509] 5 U.S.C. sec. 552a(i)(2).

[510] 5 U.S.C. sec. 552a(i)(3).

[511] 5 U.S.C. sec. 552a(i). Compare the criminal penalty under section 7213 for the unauthorized disclosure of returns and return information under which it is a felony punishable by a fine of up to $5,000 and or five years imprisonment. The unauthorized inspection of returns and return information is a misdemeanor punishable by a $1,000 fine and one year imprisonment. Sec. 7213A.

E. Interaction of Section 6103 and the Privacy Act

The Privacy Act was enacted in 1974 and covers agency records in general. In 1976, section 6103 was amended to establish a detailed framework for the disclosure of returns and return information. The issue of whether the later-enacted and more specific section 6103 preempts the Privacy Act as to tax records has divided the courts.

Lake v. Rubin

The D.C. Circuit has held that district courts lack jurisdiction to grant a taxpayer relief under the Privacy Act when the IRS fails to release the taxpayer's information to him.[512] *Lake v. Rubin* involved the consolidated appeals of 138 complaints filed by different individuals alleging the same cause of action. The lead case is a representative example of the group. Thomas and Rose Lake made an access request under the Privacy Act[513] for the disclosure of information explaining "adverse determinations" made by the IRS regarding their tax liability.[514] The Lakes alleged that the IRS failed to comply with their request. As a result, they sued the IRS seeking injunctive and declaratory relief, in addition to damages. The district court dismissed their suit for lack of jurisdiction under section 7852(e).[515] The D.C. Circuit Court of Appeals affirmed the district court's dismissal but on a different theory. It found that the specific provisions of section

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[512] *Lake v. Rubin*, 162 F.3d 113 (D.C. Cir. 1999).

[513] 5 U.S.C. section 552a(d)(1) requires Federal agencies, upon the request of the individual, to furnish information pertaining to that individual contained in the agency's system of records.

[514] 162 F.3d at 114.

[515] The district court dismissed the cases because it felt that section 7852(e) deprived it of jurisdiction. Section 7852(e) provides that certain provisions of the Privacy Act cannot be applied directly or indirectly to the determination of the existence or possible existence of liability (or amount thereof) of any person for any tax, penalty interest, fine forfeiture, or other imposition or offense to which the Code applies. The Privacy Act provisions specified by section 7852(e) are (d)(2), (3) and (4) (amendment provisions), and (g) (civil remedies for an agency's failure to comply with a provision of the Privacy Act). The Lakes, however, made an access, not amendment, request under (d)(1) of the Privacy Act, a provision not mentioned in section 7852(e). The Lakes argued that the section 7852(e) reference to subsection (g) should be read only to preclude suits to enforce the amendment provisions of the Privacy Act. While the D.C. Circuit did not agree with the district court's grounds for dismissal, it did not reverse the district court. Instead it affirmed on the basis that section 6103 is the exclusive means by which individuals may obtain tax records relating to them.

6103 governed the sort of information requested by the Lakes.[516]

The court noted that section 6103 was amended to protect the privacy of tax return information and to regulate the disclosure of this material. The court referred to the Seventh Circuit's decision in *Cheek v. IRS*.[517] In *Cheek*, the Seventh Circuit held that 6103, "although not explicitly amending the Privacy Act, was apparently intended to override any inconsistent provisions of prior statutes, including the Privacy Act."[518] The Seventh Circuit concluded that section 6103 represents the exclusive statutory route for taxpayers to gain access to their returns.[519]

Like the Seventh Circuit, the D.C. Circuit found support for this view in the Senate report accompanying the 1976 Act.[520] The Senate report notes that the enactment of the Privacy Act had an impact on the disclosure of returns and return information.[521] However, Congress did not focus on the unique aspects of tax returns in the Privacy Act.[522]

> . . . the committee felt that return and return information should generally be treated as confidential and not subject to disclosure except in those limited situations delineated in the newly amended section 6103 where the committee decided that disclosure was warranted.[523]

The D.C. Circuit also pointed out that section 6103(e)(7) limits the disclosure of return information to those circumstances where disclosure "would not seriously impair federal tax

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[516] *Lake*, 162 F.3d at 116.

[517] *Cheek v. IRS*, 703 F.2d 271 (1983).

[518] *Cheek*, 703 F.2d at 271.

[519] *Cheek*, 703 F.2d at 272. The court in *Cheek* also found that section 6103 preempted the FOIA *citing King v. IRS*, 688 F.2d 488 (7th Cir. 1982)(disclosure of tax return information is governed by section 6103 rather than by the FOIA). "[I]t would make no sense to hold that section 6103 was exclusive as regards the Freedom of Information Act but not as regards the Privacy Act. We hold that it is exclusive as to both." *Cheek*, 703 F.2d at 272.

[520] *Lake*, 162 F.3d at 116.

[521] *Id.* at n.3 *quoting* S. Rep. No. 94-938, at 318 (1976).

[522] *Id.*

[523] *Id.*

administration." No counterpart exists in the Privacy Act.[524] "This strongly suggests that Congress intended section 6103 to be the exclusive means by which individuals may obtain tax records relating to them."[525] The court noted that there are many other differences between the precise treatment of return and return information under section 6103 and the imprecise regulation of agency records under the Privacy Act.[526]

Based on the above, the court determined that the section 6103 specific provisions, rather than the Privacy Act general provisions, control the disclosure of the information requested by the Lakes. According to the D.C. Circuit, individuals seeking "return information" must do so pursuant to section 6103 rather than the Privacy Act.[527]

Sinicki v. United States Department of Treasury

In *Sinicki*, the plaintiff, Ms. Sinicki, alleged that the IRS violated the Privacy Act by disclosing her tax records.[528] Ms. Sinicki, an IRS employee, alleged that the IRS placed her tax records in her personnel file. The government moved to dismiss the case. Among its theories, the government argued that the more specific section 6103 had superceded the Privacy Act. The court in *Sinicki* did not accept this argument.

The court stated that the Privacy Act on its face applies to IRS disclosures of return information. Pointing to the same Senate report referred to in *Lake*, the *Sinicki* court noted that the Congress expressly acknowledged that the Privacy Act applied to the disclosure of return information.[529] The government argued that the Privacy Act was repealed by implication as to returns and return information. The court responded to this argument by stating that courts disfavor repeals by implication. Further, under *Posadas* and *Germain*, section 6103 should only repeal the Privacy Act to the extent it presents an irreconcilable conflict. The court found no conflict between section 6103 and the Privacy Act. It also stated that 6103 is not a substitute for the Privacy Act because section 6103 only covers that portion of the Privacy Act that applies to tax returns.

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[524] *Lake*, 162 F.3d at 116.

[525] *Lake*, 162 F.3d at 116.

[526] *Id.*

[527] *Id.*

[528] *Sinicki v. United States Department of Treasury*, 1998 U.S. Dist. LEXIS 2015 (S.D.N.Y. February 24, 1998). Ms. Sinicki also alleged that the IRS violated section 6103.

[529] "In addition to the provisions of the Internal Revenue Code . . . the Privacy Act of 1974 . . . affect[s] the disclosure of tax information." *Sinicki*, 1998 U.S. Dist. LEXIS 2015, *9 (Feb. 24, 1998) *quoting* S. Rep 94-938 (1976).

Several provisions of section 6103 and other tax related provisions expressly exclude the Privacy Act.[530] The court used these provisions to illustrate that the Congress was fully aware that the Privacy Act applied to returns and return information. Nonetheless, the Congress chose not to repeal the Privacy Act with respect to returns and return information except for those provisions mentioned.

The court noted that other courts have applied the Privacy Act to tax return disclosures without addressing whether section 6103 preempts it.[531] Acknowledging arguments on both sides, the court stated that "the language, structure, purpose, and legislative history of section 6103 do not make manifest and clear a legislative intent to repeal the Privacy Act as it applies to tax return information."[532]

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[530] Secs. 6103(d)(4)(B)(ii), 6103(p)(3)(A), and 7852(e).

[531] *Taylor v. United States*, 106 F.3d 833 (8th Cir. 1997); *Long v. IRS*, 891 F.2d 222 (9th Cir. 1989); and *S. R. Mercantile Corp. v. Maloney*, 909 F.2d 79, 81 (2d Cir. 1990). *See also, Scrimgeour v. IRS*, 149 F.3d 318 (4th Cir. 1998).

[532] *Sinicki*, 1998 U.S. Dist. LEXIS 2015, *8 (Feb. 24, 1998).

PART THREE: DISCLOSURE POLICY

I. THE NEED FOR CONFIDENTIALITY

The IRS has a significant amount of information about U.S. taxpayers. Through the filing of tax returns, information received from third parties, and its own audits and investigations, the IRS has "a data source of unparalleled detail and completeness."[533]

Pre-1976 law described income tax returns as "public records," but executive orders and regulations approved by the President controlled access to the information.[534] Agencies could, at that time, access returns and return information almost at their own discretion if it was for an official business purpose.[535] The IRS was at risk of becoming the Federal government's central information clearinghouse.[536] A question arose as to whether the virtually unfettered access to returns and return information unnecessarily intruded into the privacy of taxpayers. To address these issues, section 6103 was amended in the Tax Reform Act of 1976 to deem returns and return information confidential and regulate access to such information by statute.

Taxpayers have a justifiable expectation of privacy in the extensive information they furnish to the IRS under penalty of fine or imprisonment.[537] This justifiable expectation of privacy was breached in the Watergate era. Prior law afforded the President broad discretion to determine who had access to returns and return information. Hearings revealed that the Nixon Administration was using information obtained from the IRS in connection with an "enemies list."[538] The President's ability to control the dissemination of returns and return information was eliminated when section 6103 was amended. The statutory change made returns and return

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[533] Statement of William E. Simon, *Public Hearings Before the Committee on Finance, United States Senate, on H.R. 10612, Part I*, 100 (March 17, 18, 19, and 22, 1976).

[534] Sec. 6103(a) (1975).

[535] Joint Committee on Taxation, *General Explanation of Tax Reform Act of 1976 (H.R. 10612, 94th Cong. P.L. 94-455)* 329 (December 29, 1976) (JCS-33-76).

[536] S. Hrg. 98-898, Statement of Donald C. Alexander, Hearing Before the Subcommittee on Oversight of Government Management of the Committee on Governmental Affairs, 98th Cong. (2d Sess.) 51 (June 6, 1984).

[537] Joseph J. Darby, *Section IV: Confidentiality and the Law of Taxation*, 46 Am. J. Comp. L. 577 (1998).

[538] S. Rep. No. 94-938 at 317 (1976).

information confidential, only to be disclosed as authorized by statute.[539]

The Federal tax system is based on voluntary compliance. Many observers believe that the degree of voluntary compliance is directly affected by the degree of confidentiality given the information that is provided to the IRS. Privacy advocates argue that a taxpayer is more willing to comply with the tax laws if he or she knows the information will be treated as confidential.[540]

Some have argued that disclosure of return information may decrease a taxpayer's willingness to comply with the tax law. For example, one study showed an increase in nonfiling by those taxpayers whose refunds had been offset for child support the year before.[541] Thus, some privacy advocates maintain that tax administration suffers when return information is disclosed for a nontax purpose.

If returns and return information were publicly available, it would invite a variety of intrusions into a taxpayer's privacy. Business competitors could use the information to gain economic advantage. The available information, which could include names, addresses, social security numbers and financial holdings, could be used to establish credit fraudulently and run up debts in the taxpayer's name.[542] A lack of confidentiality could also facilitate the use of return information for political gain. In light of the seriousness of these problems, few advocate the public disclosure of all returns and return information.

When section 6103 was amended in 1976, an attempt was made to strike a balance between confidentiality and the need to disclose returns and return information for legitimate purposes. Determining the most appropriate way to balance these two considerations has been an issue that has faced the Congress when further amendments were made to this provision.

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[539] Sec. 6103(a).

[540] ". . . every American takes upon himself the job of tax reporting and enforcing the law, and 99% of them do a fantastic job. But the minute we tell that individual understand this, you are not only reporting for the purpose of collecting taxes, but for any other reason, believe me the system will start to break down . . .if it is revenue you are concerned about, . . . the greater that confidentiality, the greater the amount of revenue you will collect." Statement of Senator Haskell, 122 Cong. Rec. S 12589 (July 27, 1976).

[541] Testimony of Roscoe L. Egger, Jr., Hearing Before the Subcommittee on Oversight and Government Management of the Committee on Governmental Affairs, S. Hrg. 98-898, 98th Cong. 2d Sess. 10 (June 6, 1984). Another study, however, stated that these results may have been overstated. General Accounting Office, *Refund Offset Program Benefits Appear to Exceed Costs* (GAO/GGD-91-64, May 14, 1991) at 3.

[542] General Accounting Office, *Internal Revenue Service: Results of Fiscal Year 1998, Financial Statement Audit* (GAO/T-AIMD-99-103, March 1, 1999) at 8 and 11.

II. THE NEED FOR DISCLOSURE

Although returns and return information are confidential, that confidentiality is not absolute. Numerous exceptions to confidentiality exist. For example, the IRS can disclose returns and return information to a large number of State and Federal agencies for a variety of purposes, many unrelated to tax administration.[543]

For instance, the IRS can disclose return information to assist with defaulted student loans, collecting child support, and verifying eligibility for needs-based government benefit programs.[544] Agencies can receive return information for statistical research and for the location of persons exposed to hazardous substances and the AIDS virus to inform them of the need to seek medical treatment.[545]

While some agencies are specifically identified by name in the statute, section 6103 does not identify every agency that can receive return information. Instead it identifies the specific purposes under which the IRS can disclose return information, such as for Federal debt collection.[546] Thus, it is not readily apparent from looking at the statute the multitude of agencies that have access to information of the taxpayer through the IRS. Over 37 Federal agencies and 215 State agencies have access to returns or return information.[547]

The need to disclose returns and return information for Federal tax administration is easily understood. IRS personnel need access to returns and return information to do the job of collecting taxes, auditing returns, and otherwise enforcing the Internal Revenue Code.[548] Tax-writing committees of Congress need returns and return information to have a factual foundation for formulating tax policy and related legislation.[549] The same is true for the Treasury

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[543] The exceptions to the general rule of confidentiality are found in subsections (c) through (o) of section 6103.

[544] Sec. 6103(m)(4) and (5) (student loans); (l)(8) (child support); and (l)(7) (needs-based programs).

[545] Sec. 6103(j) (statistical research); (m)(6) (Blood Donor Locator Service).

[546] Sec. 6103(m)(2).

[547] General Accounting Office, *Taxpayer Confidentiality: Federal, State, and Local Agencies Receiving Taxpayer Information* (GAO-GGD-99-164, August 1999) at 5.

[548] Sec. 6103(h)(1).

[549] Sec. 6103(f).

Department.[550]

The Department of Justice represents the IRS in most civil and criminal tax matters.[551] Without returns and return information the Department of Justice cannot properly prosecute or defend a tax case. Therefore, section 6103 provides the Department of Justice with access to returns and return information to prepare and investigate tax cases.[552]

The Congress enacted other exceptions for a variety of reasons. One of these is a desire for cost effectiveness and to prevent fraud and abuse of government programs. Return information is available to verify income eligibility for needs-based programs, such as food stamps.[553] This exchange of information helps prevent payments to persons ineligible for benefits.[554] On the other hand, the return information may not reflect the current income status of a taxpayer, upon which eligibility is normally based. There are some instances in which return information could be as much as two years old.[555]

Obtaining information from the IRS for statistical purposes is thought to be more cost effective for Federal agencies than collecting the information themselves. The Bureau of the Census, Bureau of Economic Analysis, Federal Trade Commission, and the Department of Agriculture all have access to return information for statistical purposes.[556] In connection with the 1976 Act, the Bureau of the Census did a study of the effect of totally barring it from

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[550] Sec. 6103(h)(1).

[551] The Chief Counsel represents the Commissioner of the Internal Revenue Service in litigation before the United States Tax Court.

[552] Sec. 6103(h)(2) and (3).

[553] Sec. 6103(l)(7).

[554] For example, the Congressional Budget Office estimated that by disclosing return information to the Veteran's Administration to verify eligibility, the government would save $28 million for fiscal year 1991 and $743 million for fiscal years 1991 through 1995. Conference Committee Report, Pub. L. No. 101-508 (Omnibus Budget Reconciliation Act of 1990).

[555] ". . . [U]nearned income received by the IRS from banks, . . . can be anywhere from 2 to 14 months old when it's reported to you, the IRS. By the time you complete your processing of the file, that could be another 10 months or so, in the case of unearned income data. The question then becomes whether outdated information is a problem for agencies in determining whether or not someone qualifies for being a recipient of government benefits." Statement of Senator Cohen, *Hearing Before the Subcommittee on Oversight of Government Management of the Committee on Governmental Affairs*, 98th Cong. (2d Sess.), S. Hrg. 98-898 15 (June 6, 1984).

[556] Sec. 6103(j).

receiving information from the IRS. It found that such a prohibition would cause the cost of collecting data to increase significantly, while decreasing the quality of the statistics developed.[557]

As an alternative to using returns and return information, the Congress could require persons to provide the information directly to the agencies preparing the statistical studies. However, this would place an increased burden on the provider by having to provide the same information more than once.

The exceptions to confidentiality also reflect a Congressional desire to further social policy goals. For example, disclosure can be made to assist in collecting child support.[558] Mailing address information from the IRS can be used by the Blood Donor Locator Service to notify blood donors that they may have the AIDS virus.[559] Section 6103 enables the National Institute for Occupational Safety and Health to locate persons exposed to hazardous substances through the use of information from the IRS.[560] These uses of return information are unrelated to Federal tax administration.

States and large cities receive return information from the IRS to administer their tax laws.[561] There is a long history of sharing returns and return information with the States. At the time of 1976 Act, many States had only a few of their own auditors. They relied on information from the IRS to enforce their own laws. Receipt of return information enables State taxing authorities to determine discrepancies between State and Federal income tax returns (e.g. reported income). The Congress also thought it would be appropriate for large cities that impose an income tax to have access to returns and return information to the same extent as the States do.[562] Therefore, large cities (defined for this purpose as those with a population in excess of 250,000) have access to returns and return information.

Other exceptions to confidentiality involve access for the purpose of furthering nontax

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[557] S. Doc. 94-266, *Report on Administrative Procedures of the Internal Revenue Service to the Administrative Conference of the United States*, 98th Cong. 2d Sess., at 884 (October 1975).

[558] Sec. 6103(l)(6).

[559] Sec. 6103(m)(6).

[560] Sec. 6103(m)(3).

[561] Sec. 6103(d).

[562] *See* S. Rep. No. 99-313 at 213 (1986).

Federal criminal investigations.[563] The Department of Justice and other Federal agencies can receive returns and return information for nontax Federal law enforcement. Congress believed that ability of the Department of Justice to access returns and return information was important to fight white collar crime, organized crime, and other violations of the law.[564] Such access is not without some restrictions.[565] The Department of Justice needs an *ex parte* court order to obtain the taxpayer's return or information provided by or on behalf of the taxpayer.[566] Other information amassed by the IRS is available upon written request, subject to certain criteria.[567] The IRS is also able to notify the appropriate agency of violations of Federal criminal law indicated by information other than that provided by or for the taxpayer.[568]

As can be seen from the foregoing, returns and return information are used for a wide variety of purposes. Whether these uses are appropriate depends on how the role of the IRS within the government is viewed. Some have advocated that the IRS should focus only on one thing: tax administration. Under this view, all nontax exceptions, with the possible exception of

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[563] Sec. 6103(i).

[564] Statement of Senator Long, 122 Cong. Rec. S 12590 (July 27, 1976).

[565] William J. Anderson, Director, General Government Division, GAO, noted that section 6103 may have inadvertently caused an increase in grand jury cases:

> The disclosure statute also appears to be responsible in part for a decline in IRS's participation in strike force cases and a recent increase in reliance on the grand jury investigative process. . . . Soon after the enactment of the disclosure statute, Justice attorneys apparently decided that the most effective way to coordinated with IRS special agents throughout an investigation was to get one or more IRS employees assigned as agents of a grand jury. As a grand jury agent, an IRS employee may develop tax information and discuss the applicable cases with the responsible Justice attorney.

Statement of William J. Anderson, Director, General Government Division, General Accounting Office, before the Subcommittee on Oversight of the House Committee on Ways and Means (December 14, 1981).

[566] Sec. 6103(i)(1).

[567] Sec. 6103(i)(2). Under section 6103(i)(2)(B), the request must state the name and address of the taxpayer, the taxable period to which the return information relates, the statutory authority under which the proceeding or investigation is being conducted, and the specific reason(s) why the disclosure may be relevant to such proceeding or investigation.

[568] Sec. 6103(i)(3)(A).

those related to nontax crimes, should be repealed.[569] Others view the IRS as part of one government, so that the information the IRS has should be used to the government's benefit. Advocates of this view tend to favor permitting access to returns and return information information for the broadest range of purposes. The current exceptions to confidentiality that are enumerated in section 6103 represent, in general, a view somewhere between the two extremes. While there are a number of statutory exceptions to confidentiality, many additional exceptions have been proposed but not enacted. The Congress has generally attempted to balance the expectation of privacy with the competing policy goals of efficient use of government resources, the public health and welfare, and law enforcement.

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[569] For example, former IRS Commissioner Donald Alexander advocated repealing the following nontax exceptions:

(1) sec. 6103(m)(2)(B) - disclosure of a taxpayer's identity for purposes of preparing commercial credit reports;

(2) sec. 6103(m)(4) - disclosure of identities of individuals who have defaulted on student loans;

(3) sec. 6103(i)(3)(A), (B)(ii) and (5) - disclosure to apprise officials of possible violations of Federal criminal law or imminent flight from Federal prosecution; and disclosure to locate fugitives from justice,

(4) sec. 6103(l)(3) - disclosure of information regarding applicants for Federal loans;

(5) sec. 6103(l)(6) and (8) - disclosure to Federal, State, and local child support enforcement agencies; and

(6) sec. 6103(l)(7) - disclosure to Department of Agriculture and State food stamp agencies.

Letter of Donald C. Alexander to William S. Cohen, Chairman, Subcommittee on Oversight of Government Management, Committee on Governmental Affairs (June 12, 1984) *reprinted in* Hearing Before the Subcommittee on Oversight of Government Management of the Committee on Governmental Affairs, 98th Cong. 2d Sess., 221 (June 6, 1984).

PART FOUR: DATA AND BACKGROUND INFORMATION REGARDING THE USE OF RETURNS AND RETURN INFORMATION

I. INTRODUCTION

In the IRS Reform Act, the Congress directed the Joint Committee to examine the " . . . need for third parties to access tax return information."[570] During 1997 and 1998, thirty-seven Federal and 215 State agencies received taxpayer information under the provisions of section 6103.[571] These agencies fall roughly into four categories: (1) Federal agencies, (2) State and local tax administration agencies, (3) State and local child support agencies, and (4) State and local welfare or public assistance agencies. The Congress itself also requests returns and return information from the IRS. The following sections contain a detailed discussion of the uses of returns and return information by these entities.

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[570] Pub. L. No. 105-206 sec. 3802(2) (1998).

[571] General Accounting Office, *Taxpayer Confidentiality: Federal, State, and Local Agencies Receiving Taxpayer Information* (GAO-GGD-99-164, August 1999) at 5. (Hereinafter "GAO Fed/State Report").

II. USE OF RETURNS AND RETURN INFORMATION BY FEDERAL AGENCIES

To assist the Joint Committee in this study, the GAO conducted a survey of Federal agencies receiving returns and return information. Among other things, the GAO asked the agencies to describe how they use returns and return information.

A. Debt Collection and Refund Offset

For the majority of the responding agencies, the need for return information arose out of their participation in the tax refund offset program before 1999 (when modifications to the program took effect).[572] This program applied a refund due a taxpayer to past-due child support and debts the taxpayer owed an agency.[573]

The program required that the agency seeking the offset make a reasonable attempt to notify the taxpayer that the debt is past due and will be subject to refund offset if not paid.[574] A reasonable attempt to notify the taxpayer generally required the agency to use the most recent address information obtained from the IRS under sections 6103(m)(2), (4) or (5).[575] Thus, the tax refund offset program required agencies to obtain a taxpayer's mailing address from the IRS as part of the program.

Upon written request, the IRS could inform the agency seeking the offset that an offset had been made. The IRS could also reveal the amount of the offset, whether the taxpayer had filed a joint return, and the fact and amount of a payment to the taxpayer's spouse resulting from a joint return.[576]

Effective January 1, 1999, the Financial Management Service began administering the refund offset program. The Financial Management Service is part of the Department of Treasury. It handles Federal government collections and disbursements of funds.

The tax refund offset program was merged into the centralized administrative offset program, Treasury Offset Program. This program matches government-wide payment data with government-wide debt data. If an individual has an outstanding debt and is receiving Federal

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[572] Seventy-five percent of the Federal agencies cited this as the purpose for receiving return information. GAO Fed/State Report at 9.

[573] Sec. 6402(c) and (d).

[574] Treas. reg. sec. 301.6402-6(c)(4).

[575] Treas. reg. sec. 301.6402(d).

[576] Sec. 6103(l)(10).

money, the individual is notified that his or her Federal payment can be withheld to pay off the debt.[577]

Generally, agencies do not receive return information from the Financial Management Service.[578] The Treasury Offset Program continues to require pre-offset notice to the debtor; however, the agency need not use IRS mailing address information. An agency can satisfy the requirement of a reasonable attempt to notify the debtor if it uses the current address information contained in the agency's records related to the debt.[579] The source of the money withheld is not revealed to the agencies, only the fact that an offset was made.[580] Because of the change in the offset program, several agencies indicated that they no longer needed taxpayer information.[581] GAO indicated that 34 percent of the Federal agencies surveyed said they were participating in the Treasury Offset Program and no longer needed to receive return information from the IRS.[582]

B. Nontax Criminal Investigations

Returns and return information is used in investigating money laundering, fraud, embezzlement, organized and white collar crime, tracing the proceeds of criminal activity, and in preparing an asset or net worth analysis of the subject under investigation.[583] As discussed

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[577] GAO Fed/State Report at 10.

[578] 31 C.F.R. sec. 285(k).

[579] 31 C.F.R. sec. 285.2(d)(2)(i). Nonetheless, an agency can still use IRS address information if they so desire.

[580] GAO Fed/State Report at 10.

[581] GAO Fed/State Report at 10.

[582] GAO Fed/State Report at 10. According to the IRS, as of June 1999, the following agencies were still requesting taxpayer address information: Health & Human Services (Parent Locator, Child Support Enforcement); Veteran's Administration; Department of Education; Railroad Retirement Board (last request - January 1999); Department of Justice (last request - September 1998); Defense Financial Accounting Service (last request - August 1998); Air Force Financial Exchange (last request - August 1998); Navy Financial Exchange (last request -August 1998); FEMA (last request - September 1998); U.S. Customs Service (last request - March 1999); Agriculture (Food and Nutrition) (last request August 1998); Agriculture (Rural Management Administration) (last request - August 1998); Marine Financial Exchange (last request - September 1998). Telephone interview, IRS Government Liaison and Disclosure, Office of Tax Checks and Safeguards (September 28, 1999).

[583] According to the GAO survey responses the following agencies used returns and (continued...)

above, in Part Two, II., section 6103 permits, with varying restrictions, Federal agencies to obtain returns and return information for nontax criminal investigation purposes.[584] This section provides information regarding the number of disclosures made pursuant to this authority, as follows: (1) disclosures made pursuant to an *ex parte* court order; (2) disclosures made upon written request; (3) affirmative IRS disclosures in emergencies or to report Federal criminal activity; (4) disclosures to locate fugitives from justice, and (5) disclosure of Forms 8300 relating to cash transactions exceeding $10,000.

Access by *ex parte* order: information submitted to the IRS by the taxpayer or his representative

A Federal agency enforcing a nontax law must obtain an *ex parte* court order to receive a return or return information submitted by the taxpayer (or the taxpayer's representative).[585]

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[583](...continued)
return information for criminal investigations: Office of Independent Counsel (David Barrett); Office of Independent Counsel (Donald C. Smaltz); Central Intelligence Agency (Counter Intelligence Center - Financial Investigations Branch); United States Secret Service (Investigative Support Division); U.S. Postal Inspection Service; U.S. Department of Labor (Office of Inspector General/Office of Investigations); Department of Justice (Office of Professional Responsibility, U.S. Attorneys' Offices, Antitrust Division, Tax Division, and the Federal Bureau of Investigation), U.S. Department of Agriculture (Office of the Inspector General), Social Security Administration (Office of the Inspector General), and U.S. Customs Service (Office of Investigations).

[584] Sec. 6103(i).

[585] Sec. 6103(i)(1). Because the order is *ex parte*, the subject of the investigation has no rights of notice to or participation in the process.

During calendar year 1998, the IRS made 22,858 disclosures under this provision. The disclosures break down as follows:

Agency	Number of Disclosures
U.S. Attorneys	13,212
Drug Enforcement Agency	3,084
Federal Bureau of Investigation	4,526
Other	2,036

Source: Internal Revenue Service[586]

Return information other than taxpayer return information - by written request

Federal agencies can obtain return information received from a source other than the taxpayer or the taxpayer's representative without a court order for nontax criminal investigation purposes. Information from a source other than the taxpayer may include items such as whether the taxpayer filed a tax return, bank records obtained from the bank, and information from a third-party witness.[587] Agencies use the written request provision significantly less than the *ex parte* court order provision. Only four agencies utilized this provision in 1998. During that year, the IRS made 222 disclosures under the written request provision. The disclosures break down as follows:

Agency	Number of Disclosures
U.S. Attorneys	184
Drug Enforcement Agency	30
Customs	6
Federal Trade Commission	2

Source: Internal Revenue Service[588]

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[586] Joint Committee on Taxation, *Disclosure Report for Public Inspection Pursuant to Internal Revenue Code Section 6103(p)(3)(C) for Calendar Year 1998* (JCX-19-99) April 29, 1999 (hereinafter "JCX-19-99"). This report is reprinted in Appendix E.

[587] *See* Internal Revenue Manual, Disclosure of Official Information Handbook, 1.3.28.2.2, Examples of Other than Taxpayer Return Information (August 19, 1998).

[588] JCX 19-99, *supra*.

IRS disclosure of return information concerning possible criminal activities or emergencies

Section 6103 permits the IRS to disclose return information (other than taxpayer return information) evidencing a crime to the head of a Federal agency charged with enforcing the laws to which the crime relates.[589] Return information also may be disclosed to apprise Federal law enforcement of the imminent flight of any individual from Federal prosecution.[590]

During the calendar year 1998, the IRS made 101 disclosures under the criminal activity or emergency circumstances provision.[591] Thirty-six disclosures were made to the Department of Justice, two disclosures were made to the Federal Bureau of Investigation, and sixty-three disclosures were made to other agencies.[592]

Disclosure to locate fugitives from justice

Section 6103(i)(5) permits an agency to obtain, by *ex parte* court order, the return and return information of an individual who is a fugitive from justice. During calendar year 1998, the IRS made only one disclosure under this provision.[593] That disclosure was to the Secret Service.[594]

Disclosure of returns filed under section 6050I (relating to cash transactions over $10,000)

Under section 6050I, any person engaged in a trade or business who receives more than $10,000 in cash in one transaction (or in two or more related transactions) is required to report the receipt of cash to the IRS on Form 8300 (Report of Cash Payments Over $10,000 Received in a Trade or Business). Federal agencies may upon written request obtain Form 8300 from the IRS, which includes information on business transactions exceeding $10,000.[595] In response to the GAO survey, agencies receiving this information, such as the Central Intelligence Agency ("CIA"), stated that Form 8300 information is unique and not obtainable elsewhere (except by

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[589] Sec. 6103(i)(3)(A).

[590] Sec. 6103(i)(3)(B)(ii).

[591] JCX-19-99, *supra*.

[592] *Id.*

[593] JCX-19-99, *supra*.

[594] *Id.*

[595] The IRS is not required to keep statistics on requests made under this provision. Sec. 6103(p)(3).

subpoena or search warrant served on the business filing the Form 8300).[596] The U.S. Customs Service indicated that "tax return and Form 8300 information is the most useful as it is detailed and filed under oath."[597]

C. Statistical Use

The Bureau of the Census and the Bureau of Economic Analysis use returns and return information for statistical purposes. The three other departments/agencies with authority to use returns and return information for statistical purposes under section 6103(j) are the Federal Trade Commission, Department of Treasury, and Department of Agriculture. A review of the IRS disclosure reports covering the period 1993 through 1998 shows that these three departments did not exercise this authority during this five-year period.[598]

Bureau of Economic Analysis ("BEA")

The BEA is an agency of the Department of Commerce. The BEA produces and disseminates economic statistics to provide up-to-date information regarding economic activity. Such activity includes U.S. economic growth, regional economic development, and the U.S. position in the world economy.[599]

The BEA's national economic accounts provide a quantitative view of the production, distribution, and use of the country's output.[600] One of the most widely known measures is the gross domestic product or "GDP." The BEA also prepares estimates of the country's tangible

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[596] U.S. Central Intelligence Agency response to GAO Survey of Federal Agencies Receiving Taxpayer Data, response number 4801. The CIA reported that it receives this information on a monthly basis.

[597] U.S. Customs Service (Office of Investigations) response to GAO Survey of Federal Agencies Receiving Taxpayer Data, response number 1401. The Customs Service reported that in the past two years it has obtained seven Forms 8300. *Id.*

[598] According to the IRS, the Federal Trade Commission no longer performs economic surveys of corporations, making section 6103(j)(2) obsolete. GAO Fed/State Report at 25. The Department of Agriculture only recently received its disclosure authority as part of the Census of Agriculture Act of 1997. The Department of Treasury has access to returns and return information for its tax administration duties under section 6103(h)(1).

[599] *See* <http://www.bea.doc.gov/bea/role.htm>

[600] *Id.*

wealth and input-output tables that show how industries interact.[601]

Regional economic accounts provide estimates and analyses of personal income, population, and employment for states, metropolitan areas, and counties.[602] The BEA also estimates the gross state product.[603]

International economic accounts include international transactions accounts (balance of payments).[604] The BEA provides estimates of U.S. direct investment abroad and foreign direct investment in the U.S.[605]

The BEA draws on many sources of information in preparing the estimates of GDP and its accounts of U.S. national income and product.[606] IRS data is the primary source for estimating corporate profits, income of unincorporated businesses, net interest, depreciation and rental income.[607] BEA also uses the return information to prepare the input-output data needed for tracing the industrial effects of alternative policies and economic movements.[608]

To compute national income, BEA uses return information of individual companies to adjust sales and profits from a cash to accrual basis.[609] Access to returns and return information also allows BEA to distinguish changes in profits due to tax reporting changes from those attributable to real economic factors, such as a decline or growth in sales volume.[610]

In response to the GAO survey, the BEA noted that no other information could be substituted for return information. According to the BEA, alternative data is not as

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[601] *Id.*

[602] *Id.*

[603] *Id.*

[604] *Id.*

[605] *Id.*

[606] Bureau of Economic Analysis, Response to GAO Survey of Federal Agencies Receiving Taxpayer Data, response number 4501.

[607] *Id.*

[608] *Id.*

[609] *Id.*

[610] *Id.*

comprehensive, is based on financial rather than tax accounting, and varies in consolidation and industry classification.[611] Return information, the agency said, is vital to accomplishing BEA's mission.[612]

Bureau of the Census

Like the BEA, the Bureau of the Census is part of the Department of Commerce. It collects and provides data about the people and economy of the United States. It is the largest statistical agency of the Federal government.[613] The Bureau of the Census conducts:

(1) the constitutionally mandated (Art. 1, Sec. 2) Census of Population and Housing every ten years for apportioning seats in the House of Representatives,
(2) eight censuses related to economic entities and State and local governments every five years, and
(3) more than 100 demographic and economic surveys on a monthly, quarterly and annual basis.[614]

The data the Bureau of the Census collects describes the country's population, housing, businesses, governmental finances, foreign trade, and other vital characteristics. Such data assists in the fiscal and policy decisions of Federal, State, local, and tribal governments, business leaders, trade associations, and academicians.[615]

The Bureau of the Census receives both business and individual returns and return information.[616] Business returns and return information is used to provide proxy measures of receipts, employment, payroll, and other information for small businesses and current business name, address, filing requirements and other information for the universe of businesses.

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[611] *Id.*

[612] *Id.*

[613] U.S. Bureau of the Census, 1998 Financial Report at 2 (July 1999).

[614] *Id.*

[615] *Id.*

[616] *See* Treas. reg. sec. 301.6103(j)(1)-1(b) for a list of return information that can be disclosed to the Census. The Social Security Administration is also permitted under the regulations to disclose all information from the Form SS-4 (Application for Employer Identification Number) and specific information from the Form 1040, Schedule SE (Self-Employment Tax). Treas. reg. sec. 301.6103(j)(1)-1(b).

Individual returns and return information is used for post census population estimates, to develop methodological estimates of income and poverty for States and counties, as well as for research and evaluation of the coming census and selected survey data.

Like the BEA, the Bureau of the Census asserts that no reasonable alternatives to returns and return information exist. According to the Bureau of the Census, IRS data is unique and is the most complete of any administrative record source. The Bureau of the Census has explored using data from the Social Security Administration, Health Care Financing Administration, Selective Service System, Housing and Urban Development, and the Indian Health Service.[617] It has found that these files do not provide as complete coverage as returns and return information.[618] The Bureau of the Census has also explored the use of State data, but problems with comparability and accessibility render this substitute unacceptable.[619]

Currently, the Bureau of the Census is conducting a match with Bureau of Labor Statistics ("BLS") data to determine the comparability of the Bureau of the Census business register with the BLS register.[620] At this point, substantial research and evaluation is still required to determine the completeness of the BLS register.[621] At present, it is unknown whether the BLS register can adequately provide employment and payroll data for small business.[622] In addition, according to the Bureau of the Census, the BLS register does not provide any information about business receipts.[623]

Overall, the Bureau of the Census believes that the ability to use return information eliminates the prohibitive cost and substantial respondent burden that would be imposed if the Bureau of the Census were required to collect the information directly from respondents.[624] The Bureau of the Census also notes that returns and return information enable it to assess the quality

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[617] Bureau of the Census (Admin. Rec. Res. Planning, Research & Evaluation Division) response to GAO Survey of Federal Agencies Receiving Tax Data, response number 1801.

[618] *Id.*

[619] *Id.*

[620] Bureau of the Census (Economic Planning and Coordination Division), response to GAO Survey of Federal Agencies Receiving Tax Data, response number 1802.

[621] *Id.*

[622] *Id.*

[623] *Id.*

[624] Letter from Director, Bureau of the Census, to Associate Director, Tax Policy and Administration Issues, GAO (May 20, 1999).

of the responses to the censuses and surveys.[625]

D. Other Nontax Administration Purposes

1. Department of Labor and Pension Benefit Guaranty Corporation

The IRS discloses return information to the Pension Benefit Guaranty Corporation ("PBGC") and the Department of Labor for purposes of administering titles I and IV of the Employee Retirement Income Security Act of 1974 ("ERISA").

Pension Benefit Guaranty Corporation

The PBGC is a Federal government corporation created by Title IV of ERISA.[626] Its purpose is to encourage the growth of defined benefit pension plans, provide timely and uninterrupted payment of pension benefits, and keep pension insurance premiums at the lowest level necessary to carry out the PBGC's obligations.[627] A defined benefit plan provides a specified monthly benefit at retirement, often based on a combination of salary and years of service.[628] The PBGC protects the retirement incomes of about 42 million U.S. workers in more than 44,000 defined benefit pension plans.[629] The PBGC pays monthly retirement benefits up to a guaranteed maximum to more than 209,000 retirees in pension plans that have terminated.[630] The maximum pension benefit guaranteed by PBGC is set by law and adjusted yearly.[631]

The PBGC uses return information to obtain financial, net worth, and ownership information on companies and individuals that may be liable to the PBGC to the extent their terminated pension plans are underfunded.[632] Often these companies are in bankruptcy or no

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[625] *Id.*

[626] *See* <http://www.pbgc.gov/about.htp>

[627] *Id.*

[628] *See* <http://www.pbgc.gov/mission.htp>

[629] *Id.*

[630] *Id.*

[631] *Id.*

[632] PBGC response to GAO Survey of Federal Agencies Receiving Taxpayer Data, response number 0901.

longer in existence. As a result, the records of these companies may no longer exist.[633] The PBGC uses the information to decide whether to terminate a pension plan and to determine the plans' controlled group members, which also are liable for the pension plan.[634] In addition, the information is used to locate individuals that are due a pension benefit from PBGC.[635]

In addition to return information, the PBGC obtains information from the following sources: plan and company records, tax returns obtained from individuals and companies, online data services such as CDB Infotek, Dunn and Bradstreet, Lexis-Nexis, Information America, Bloomberg, and other sources.[636] The PBGC also obtains information from the Department of Labor and the Social Security Administration.[637]

Department of Labor

The Pension & Welfare Benefits Administration ("PWBA") assists in the regulation of private sector employee benefit plans under Title I of ERISA.[638] It relies on employee benefit plan returns and individual returns to carry out the PWBA's ERISA responsibilities.[639] The Plan Benefits Security Division has primary litigation authority for enforcement of ERISA on behalf of the PWBA.[640] Returns and return information are used to determine a defendant's source of income and the ability to make restitution.[641] Although data is available from the taxpayer, the Plan Benefits Security Division believes that such data may lack the accuracy and completeness of a return filed with the IRS.[642]

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[633] *Id.*

[634] *Id.*

[635] *Id.*

[636] *Id.*

[637] *Id.*

[638] Department of Labor (Pension and Welfare Benefits Administration), response to GAO Survey of Federal Agencies Receiving Taxpayer Data, response number 2601.

[639] *Id.*

[640] Department of Labor (Solicitor of Labor -Plan Benefits Security Division), response to GAO Survey of Federal Agencies Receiving Taxpayer Data, response number 2801.

[641] *Id.*

[642] *Id.*

2. Social Security Administration - receipts

Administration of the Social Security Act.--Disclosure of returns and return information can be made to the Social Security Administration ("SSA"). The SSA receives such information to assist the SSA in carrying out its responsibilities under the Social Security Act. Such responsibilities concern: (1) taxes imposed by Titles 2, 21, and 24 of the Social Security Act,[643] and (2) notification of deferred vested benefits.[644]

Section 6103 also permits the SSA to disclose information returns to comply with a request regarding whether the SSA records show an individual as dead or alive for epidemiological or similar research. The Secretary of Health and Human Services must find that such research may contribute to a national health interest.[645]

Combined annual wage reporting.--The SSA and the IRS use wage information and other data to administer their programs. To reduce duplication in processing and increase efficiency, section 6103 permits the IRS and SSA to exchange information to process and share information.[646] The largest single activity in this program is the SSA's processing of wage data submitted by employers (Forms W-2). Employers transmit this information to the SSA either electronically or on paper. The SSA processes this information and transfers the information electronically and on microfilm to the IRS.

The SSA and the IRS use this information to determine whether employee, employer, and wage data are correct, and whether employers are submitting information as legally required.[647] They use the data to correct entity information (individual and employer names, tax identification numbers, and addresses), to identify "non filers," and to match amounts reported on Forms W-2s with an Employer's Quarterly Federal Tax Return (Form 941) and other employer returns.

FICA and Medicare reconciliation.[648]--The SSA uses returns and return information to resolve differences between the Federal Insurance Contribution Act wage amount and Medicare wage amount contributions on which taxes have been collected by the IRS and FICA and

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[643] Sec. 6103(l)(1)(A).

[644] Sec. 6103(l)(1)(B).

[645] Sec. 6103(l)(5)(A). *See also* sec. 1106(d) of the Social Security Act.

[646] Sec. 6103(l)(5)(B). *See also* sec. 232 of the Social Security Act (42 U.S.C. sec. 432) which authorizes the program.

[647] GAO Fed/State Report at 26.

[648] This is also part of the Combined Annual Wage Program.

Medicare wage amounts processed by the SSA.[649] The SSA resolves the reported earnings discrepancies based on a comparison with IRS records.[650]

Medicare secondary payer project.–Return information can be disclosed by IRS to the SSA and by the SSA to the Health Care Financing Administration ("HCFA") to administer the Medicare program.[651] The common name for this type of disclosure is the Medicare Secondary Payer Project.[652]

The purpose of this disclosure is to identify the employment status of Medicare beneficiaries to determine if medical care is covered by group health plans.[653] It permits the IRS to provide the SSA with identity information, filing and marital status, and spouse's name and Social Security number for specific years for any Medicare beneficiary identified by the SSA.[654] It also permits the SSA to disclose to HCFA the names and Social Security numbers of Medicare beneficiaries receiving wages above a specified amount.[655] Additionally, it permits HCFA to disclose certain return information to qualified employers and group health plans.[656]

SSA Initiated Personal Earnings and Benefit Estimate Statement ("SIPEBES").--Section 6103 permits the IRS to disclose to the SSA a taxpayer's mailing address.[657] This disclosure is made to facilitate the SSA's annual mailing of Personal Earnings and Benefit Estimate Statements (social security account statements).[658] The SSA noted that it was unaware of any

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[649] Social Security Administration, response to GAO Survey of Federal Agencies Receiving Tax Data, responses number 1209.

[650] *Id.*

[651] GAO Fed/State Report at 28.

[652] *Id.*

[653] *Id.*

[654] Sec. 6103(l)(12)(A).

[655] Sec. 6103(l)(12)(B).

[656] Sec. 6103(l)(12)(C).

[657] Sec. 6103(m)(7).

[658] *See* sec. 1143(c) of the Social Security Act.

other source of address information that was controlled by social security number.[659] Social security numbers are the main data element used by the SSA to secure address data.[660]

Continuous Work History Sample.--Under the Continuous Work History Sample Program, a one-percent sample of the U.S. population's social security related data, wage information, and self-employment data is collected.[661] The data is used:

(1) for studies to monitor trends that may affect social security programs,

(2) as a model to assist in determining the effects of proposed program changes, including proposed legislation and administrative changes, and

(3) to assess funding requirements related to trust funds and the budget.[662]

According to the Social Security Act, no other source is available to the SSA to achieve these purposes.[663] For SSA program purposes, the agency asserts that the main source of earnings information should be from Forms W-2, other direct sources or the IRS, as program policy is based on this data.[664] The SSA did note, however, that for special studies it has used data from the Bureau of Labor Statistics and the Bureau of the Census.[665]

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[659] Social Security Administration, response to GAO Survey of Federal Agencies Receiving Taxpayer Data, response number 1204.

[660] *Id.*

[661] GAO Fed/State Report at 25.

[662] GAO Fed/State Report at 25-26. See also Privacy Act System of Records Notice Number 09-60-0159, 47 Fed. Reg. 45589 (October 13, 1982). The SSA obtains this information under the authority of section 6103(l)(1) and (5). GAO Fed/State Report at 25.

[663] Social Security Administration, response to GAO Survey of Federal Agencies Receiving Taxpayer Data, response number 1205.

[664] *Id.*

[665] *Id.*

Social Security Benefit Determinations.--The SSA uses return information to establish entitlement to and the correct amount of benefits due a claimant.[666] For example, such information is useful in verifying eligibility for Supplemental Security Income benefits provided to the aged, blind and disabled individuals.[667] Other than relying on the voluntary reporting of the individual regarding income and resources, the SSA is aware of no other source for this information.[668]

SSA Office of Inspector General.--The Office of the Inspector General uses returns and return information for the following purposes:

(1) to investigate possible criminal civil violations of the Social Security Act and Title 18 of the United States Code;

(2) to perform audit tests of the SSA's earnings records systems to verify the accuracy of the earnings and payroll data received by the SSA; and

(3) to perform audit tests of the SSA's benefit calculation and payment systems.[669]

The SSA Office of the Inspector General receives this information on a case-by-case basis and as needed.

3. Redisclosures of return information by the SSA

Child support enforcement

The IRS can disclose taxpayer information to Federal, State, and local child support

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[666] Social Security Administration, response to GAO Survey of Federal Agencies Receiving Tax Data, response numbers 1206, 1208, and 1211. The common name for this program is the "1099 program." Section 6103 authorize the IRS to disclose "unearned income" to SSA to assist in administering the "supplemental security income benefits provided under title XVI of the Social Security Act . . ." Sec. 6103(l)(7)(B) & (D).

[667] Social Security Administration, response to GAO Survey of Federal Agencies Receiving Taxpayer Data, response number 1206.

[668] Social Security Administration, response to GAO Survey of Federal Agencies Receiving Taxpayer Data, response numbers 1206, 1208, and 1211.

[669] Social Security Administration, response to GAO Survey of Federal Agencies Receiving Taxpayer Data, response number 1212.

enforcement agencies.[670] These disclosures, pursuant to section 6103(l)(6), are for the purpose of locating persons owing child support and establishing and collecting such support.[671] The IRS has delegated to the SSA the IRS authority to make such disclosures.[672] Under this arrangement, the SSA makes disclosures directly to the Office of Child Support Enforcement ("OSCE"), a Federal agency, on behalf of the IRS.[673]

The OSCE oversees child support enforcement at the Federal level.[674] It acts as a coordinator for most programs involved with child support enforcement.[675] The OCSE conducts data matches with the SSA to locate non-custodial parents who owe child support.[676] The purposes of these matches is to obtain addresses, social security numbers, wage and asset information of the non-custodial parent.[677]

The OCSE uses many sources of information to locate non-custodial parents and enforce child support orders against them.[678] Such sources include the National Directory of New Hires

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[670] Sec. 6103(l)(6).

[671] Sec. 6103(l)(6)(C).

[672] GAO Fed/State Report at 26. The SSA has direct authority to disclose information to State and local child support agencies, but not to other Federal agencies. Sec. 6103(l)(8).

[673] GAO Fed/State Report at 26. Section 6103(p) authorizes the IRS to make return information available "in the form of written documents, reproductions of such documents, films or photo impressions, or electronically produced tapes, disks, records, or *by any other mode or means which the Secretary determines necessary or appropriate . . .*" Sec. 6103(p)(2)(B) (emphasis added). The Secretary has interpreted the highlighted language as authority for another Federal agency to make a disclosure of return information on behalf of the IRS when that information is more readily available from the other agency. Treas. Reg. sec. 301.6103(p)(2)(B)-1(a). The Treasury regulation presumes that the disclosing agency has properly received return information from the IRS under a provision of section 6103. *Id.*

[674] GAO Fed/State Report at 26.

[675] *Id.*

[676] Social Security Administration, response to GAO Survey of Federal Agencies Receiving Taxpayer Data, response number 1201.

[677] *Id.*

[678] Department of Health and Human Services (Administration for Children and Families - Office of Child Support Enforcement), response to GAO Survey of Federal Agencies Receiving (continued...)

and data matches against the records of the SSA, Department of Defense, Veteran's Administration and other Federal agencies.[679] Nonetheless, in many cases, the IRS has information that the OSCE states it cannot obtain from any other source.[680] As an example, the OCSE cited the ability to obtain information on individuals who work as independent contractors or are not otherwise paid wages.[681]

Benefit determinations

Section 6103 authorizes the SSA to disclose net earnings from self-employment, wages, and payments of retirement income to Federal, State and local agencies administering certain benefit programs.[682] These disclosures enable the agencies to determine eligibility for, or the correct amount of, benefits under such programs.[683] This disclosure is called the Beneficiary and Earnings Data Exchange Program.[684] For example, the SSA discloses information to State agencies for the purpose of administering certain programs under the Social Security Act or the Food Stamp Act of 1977.[685]

Housing and Urban Development

The Department of Housing and Urban Development ("HUD") is the Federal agency

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[678](...continued)
Taxpayer Data, response number 0701.

[679] *Id.* Under the Directory of New Hires system, every employer must send information about new hires and quarterly wages to State child support agencies. State officials gather the data, along with information on unemployment benefits and child support cases and forward it to the Administration for Children and Families (ACF). ACF then uses its computers to sort and send back to State authorities reports about individuals obligated to pay child support. Robert O'Harrow, Jr., *Database Raises Privacy Question*, The Washington Post, 26A (June 27, 1999).

[680] Department of Health and Human Services (Administration for Children and Families - Office of Child Support Enforcement), response to GAO Survey of Federal Agencies Receiving Taxpayer Data, response number 0701.

[681] *Id.*

[682] Sec. 6103(l)(7)(A).

[683] Sec. 6103(l)(7)(C).

[684] GAO Fed/State Report at 27.

[685] Social Security Administration, response to GAO Survey of Federal Agencies Receiving Taxpayer Data, response number 1202.

responsible for national policy and programs that (1) address the housing needs of the United States, (2) improve and develop the country's communities, and (3) enforce fair housing laws.[686] Tenant income is a major factor which can affect the eligibility for, and the amount of, housing assistance a family receives and the amount of subsidy that HUD pays.[687]

HUD may use return information from the IRS and the SSA for the purposes of determining eligibility for, or the correct amount of, benefits for any housing assistance program that involves initial and periodic review of income.[688] HUD uses return information in the agency's computer matching program, Tenant Eligibility Verification System.[689] This system assists HUD in increasing the availability of rental assistance to individuals meeting the program's requirements, identifying and recouping excessive rental assistance and deterring future abuses of assisted rental programs.[690]

HUD indicated that past experience demonstrated that the use of State wage data is

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[686] *See* <http://www.hud.gov/qaintro.html>

[687] "Under HUD's Section 8 and Low Rent Public Housing programs and most other HUD rental assistance programs, tenants are generally required to pay 30 percent of their anticipated income towards rent, with HUD providing the balance of the rental payments. New applicants and existing tenants are to provide income information which is used in determining the amount of rent they are to pay. Tenants are also required to recertify their income on an annual basis, and in certain other circumstances, i.e. when there is a significant increase in household income. The applicants' or tenants' failure to disclose all of their income or the housing agencies', owners' or agents' failure to recertify the tenants for rental assistance may result in the Department paying a greater rental subsidy than would be required." Internal Revenue Service, Document 6630, *Safeguard Review Report - Department of Housing and Urban Development,* at 1(November 1997) *quoting* U.S. Department of Housing and Urban Development, *Nationwide Sample of Assisted Households to Estimate Unreported Income, Excessive Housing Assistance and the Effects of HUD Subsidies Phase I, A Joint Project of the Office of Public and Indian Housing, the Office of Housing, Office of the Chief Financial Officer and the Office of Information Technology* (April 17, 1997).

[688] U.S. Department of Housing and Urban Development (Real Estate Assessment Center), response to GAO Survey of Federal Agencies Receiving Taxpayer Data, response number 2301. Sec. 6103(l)(7)(D)(ix).

[689] U.S. Department of Housing and Urban Development (Real Estate Assessment Center), response to GAO Survey of Federal Agencies Receiving Taxpayer Data, response number 2301.

[690] *Id.*

effective.[691] However, HUD asserts that the use of return information is much more efficient, effective and economical than use of State wage data.[692] According to HUD, "major technical and administrative requirements severely limit its potential usage."[693]

Veteran's Affairs

Return information regarding self employment and certain information from third parties, supplied by the IRS to the SSA, may be redisclosed to the Department of Veteran's Affairs ("VA"). These disclosures are made to determine eligibility for needs-based pension and parents' dependency and indemnity compensation and VA health care services.[694]

Office of Personnel Management

The SSA and the Office of Personnel Management ("OPM") conduct an annual computer match program to identify individuals receiving disability retirement benefits who have exceeded their earnings limitation.[695] The return information is compared with the earnings reported to OPM by disability retirees for the given tax year.[696] OPM asserts that no other source of data would allow OPM to accomplish the same purposes.[697] It asserts that data received directly from the retiree would not be as credible.[698]

4. U.S. Customs Service

The responsibilities of the U.S. Customs Service ("Customs") include:

(1) collecting roughly $20 billion annually in revenue from duties on

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[691] *Id.*

[692] *Id.*

[693] *Id.*

[694] Sec. 6103(l)(7)(D)(viii).

[695] GAO Fed/State Report at 28; Office of Personnel Management (Office of Systems, Finance and Administration), response to GAO Survey of Federal Agencies Receiving Taxpayer Data, response number 0801.

[696] Office of Personnel Management (Office of Systems, Finance and Administration), response to GAO Survey of Federal Agencies Receiving Taxpayer Data, response number 0801.

[697] *Id.*

[698] *Id.*

imports;

(2) protecting U.S. borders against the illegal importation of narcotics and other contraband;

(3) enforcing laws intended to prevent illegal trade practices and to prevent the export of high technology products and weapons; and

(4) processing more than 450 million persons entering the United States each year.[699]

Section 6103(l)(13) permits the IRS to disclose return information to Customs to audit evaluations of imports and exports, to take other actions to recover any loss of revenue or collection of duties, taxes, and fees determined to be due and owing as a result of such audits.[700] Customs uses return information to reconcile expenses reported to the IRS (applicable to foreign purchases) to figures reported to Customs at the time of entry.[701] Customs also uses return information to determine if costs of goods sold as reported to the IRS is consistent with that reported to Customs.[702] With regard to transfer pricing, Customs finds useful the analysis done by the IRS to determine whether the transfer price between related parties is acceptable.[703] The information is also useful to determine whether profit and general expenses are consistent with the industry for valuation purposes.[704]

When difficulties have been encountered in receiving data from a company under audit, Customs will request return information from the IRS as a last resort.[705] This occurs when a company is unresponsive, fails to cooperate, or the data received from the company is unreliable.[706] During the last seven years, Customs made six requests for return information of a

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[699] *See* <http://www.customs.gov/about/meet.htm>

[700] Sec. 6103(l)(14). GAO Fed/State Report at 28.

[701] Department of Treasury (U.S. Customs Service - Regulatory Audit Division), response to GAO Survey of Federal Agencies Receiving Taxpayer Data, response 1301.

[702] *Id.*

[703] *Id.*

[704] *Id.*

[705] *Id.*

[706] *Id.*

specific taxpayer.[707] All of these requests were made in 1994 and 1995.[708]

E. Federal Agency Safeguard Issues

The following is a summary of the kinds of safeguard discrepancies reported by Federal agencies in response to GAO's Survey of Federal Agencies Receiving Taxpayer Data. The GAO noted that the discrepancies generally were procedural deficiencies and did not result in known unauthorized disclosures of return information.[709] The agencies involved have stated that they would take corrective actions in response to the discrepancies found and the recommendations made by the IRS.[710]

Storage issues

The IRS safeguard reviews revealed a variety of situations in which an agency improperly stored return information in ways that might result in the information being obtained and divulged by unauthorized personnel. Files with return information were left out on desks, or in open bins, overnight or over the weekend. During nonbusiness hours, agencies left file cabinets with return information unlocked, and recycle bins contained documents showing taxpayer identification numbers. Some Federal agencies had not yet established secure places to store return information. For example, some agencies did not store IRS record tapes in locked cabinets. In some cases, the employees' building keys also opened the Federal taxpayer information room, so no restriction existed on which employees could access the information. Storage cabinets had broken locks that the agency needed to replace. Data storage tapes either should have been kept in a locked container or kept continuously under the control of an authorized employee. Additionally, some agencies failed to secure properly internal reports that contain return information. Finally, some agencies failed to label clearly the information they received as "return information."

Disposal of return information

There were problems with the way some agencies disposed of return information when it was no longer needed. Some agencies failed to keep a list of written procedures for the destruction of return information. Others failed to shred documents properly. Logs of destroyed return information were not kept, or the logs did not contain enough details about the destroyed information. General files that contained return information were retired to the Federal Records

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[707] *Id.*

[708] *Id.*

[709] GAO Fed/State Report at 14.

[710] *Id.*

Center ("FRC") without destruction of the return information.

Physical security

The IRS safeguard reviews revealed situations in which outsiders could enter government offices or computer systems and obtain return information. Agencies did not secure stairway fire exit doors leading into offices. They had not changed the combination to data storage areas in more than a year. Often, individuals responsible for keys to taxpayer information cabinets leave their keys unsecured on their desks. Return information was left in the mail room when it was unattended. In places where the agency keeps a front door unlocked during business hours, the agency failed to keep locked the room that has return information. Furthermore, back doors were propped open for employees to reenter quickly after breaks. Some agencies used private contractors in situations that do not meet Code requirements for authorizing contractors to have access to return information. Return information was also made available to private contractors who do not need the information for the performance of their contracts.

Unsecured transfer of return information

The IRS safeguard reviews revealed situations in which agencies transmitted return information physically or electronically in unsecured ways. Specific examples include the lack of sufficiently sophisticated encryption software, and transmission of return information among offices without proper safeguarding protections, and delivering documents containing return information without double-sealed envelopes or without an acknowledgment receipt.

Recordkeeping deficiencies

Federal agencies are supposed to keep records of the employees access return information to deter unauthorized use of that information. However, the IRS safeguard reviews revealed deficiencies in this area. Lists of employees authorized to have access to return information have not been maintained. Sometimes, agency logs of access to return information have been unclear about which employees had access. Some agencies failed to keep records regarding access to data, or had destroyed all documentation of access to return information. Finally, the disappearance or loss of return information was not always reported.

Computer security

The IRS found a variety of ways in which computer security precautions are inadequate. Often, security access to return information stored in computer files was not restricted only to authorized employees. Furthermore, agencies' computer systems failed to have regularly scheduled password changes, (e.g., every 90 to 180 days). Sometimes, IRS data tapes were not properly erased before disposal. Reports containing return information were printed on shared printers in the office. Some computer systems did not have automatic timeout features (shutting down after a defined period of inactivity). Some employees entered their office computer

systems from home, requiring them to transmit user IDs and passwords over phone lines. These communications should have been encrypted with Smart Card technology or some other form of encryption. Contract maintenance personnel carried a diagnostic computer in and out of some agency offices. The IRS advised the agencies to buy their own diagnostic computers so maintenance personnel can not carry out return information. The IRS also advised agency computer processing centers to start using "memory reuse" features on their computer systems so that return information processed in one particular computing job can not be read by the next user of the computer system. In other instances, the agencies failed to maintain an audit trail of computerized accesses to return information.

Employee awareness

Safeguard inspections revealed that in some instances employees were not reminded of the criminal and civil penalties for unauthorized access to return information. The IRS advised agencies that their computer screens and work areas should have warning labels about the accessability of return information. Not all offices of a particular agency were subject to the agency's internal inspections process.

III. CONGRESSIONAL INQUIRIES RELATING TO RETURNS AND RETURN INFORMATION

A. Individual Members of Congress

Under section 6103, taxpayers can designate a third party to receive their returns and return information.[711] If the taxpayer asks a third party for assistance on tax matters, including a Member of Congress, Treasury regulations permit disclosure upon IRS receipt of a written request that clearly identifies the designee and describes the tax matters in question.[712]

The IRS receives numerous Congressional inquiries on behalf of taxpayers who have sought the assistance of Members of Congress with respect to the taxpayer's dealings with the IRS.[713] Usually, the taxpayer has not provided a separate authorization or executed a power of attorney authorizing the Member of Congress to receive the taxpayer's return information. Instead, the taxpayer has written to the Member of Congress, who in turn writes to the IRS and usually encloses the taxpayer's incoming correspondence.

In accordance with Treasury regulations, the IRS treats the taxpayer's letter as authorizing the disclosure to the Member of Congress if the letter is signed, dated, and indicates the following:

(1) the taxpayer's identity, name, address, or social security number or employer identification number, or any combination thereof, that enables the IRS to clearly identify the taxpayer;

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[711] Section 6103(c).

[712] Treas. reg. sec. 301.6103(c)-1(b).

[713] The IRS National Director Legislative Affairs provided the following statistics regarding the number of congressional inquiries received by the IRS during the past three years:

Year	Inquiries Received
1997	2,003
1998	1,733
1999 (through September)	552

The National Director estimates that 90 to 95 percent of these inquiries are constituent inquiries involving the disclosure of a constituent's return information to the inquiring Member of Congress. Interview, National Director Legislative Affairs, Internal Revenue Service (September 24, 1999).

(2) the identity of the person to whom disclosure is to be made, e.g., the letter from the taxpayer is addressed to the Member of Congress making the inquiry; and

(3) sufficient facts to enable the IRS to determine the nature and extent of the information or assistance requested and the return information to be disclosed.[714]

B. Congressional Staff and Others

The IRS construes correspondence to include disclosures to a congressional staff person if the Congressman's inquiry identifies that person or the person is known to be the Congressman's staff person for handling constituent tax inquiries.[715]

Generally, the IRS does not treat as a valid waiver of taxpayer confidentiality a congressional inquiry which attaches a courtesy copy of a taxpayer letter addressed to another Member of Congress.[716] The IRS responds to the inquiry, however, if in the letter the taxpayer specifically requests the assistance of the Member who forwarded the correspondence to the IRS and the letter meets the other requirements for a valid authorization.[717]

If a Member of Congress does not enclose a copy of the taxpayer's correspondence or include other written authorization from the taxpayer, the IRS communicates directly with the taxpayer or requests that the Member obtain authorization from the constituent.[718] Similarly, the IRS cannot respond to a Member's telephone inquiries for specific taxpayer information without a copy of the taxpayer's correspondence or other written authorization.[719]

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[714] Internal Revenue Manual, Disclosure of Official Information Handbook, 1.3.4.2.1(1), Inquiry Accompanied by Taxpayer's Correspondence (August 19, 1998).

[715] *Id.*

[716] Internal Revenue Manual, Disclosure of Official Information Handbook, 1.3.4.2.1(2), Inquiry Accompanied by Taxpayer's Correspondence (August 19, 1998).

[717] *Id.*

[718] Internal Revenue Manual, Disclosure of Official Information Handbook, 1.3.4.2.2(1), Inquiry Without Taxpayer's Correspondence (August 19, 1998).

[719] Internal Revenue Manual, Disclosure of Official Information Handbook, 1.3.4.2.3(1), Inquiry Accompanied by Taxpayer's Correspondence (August 19, 1998).

C. Committees of Congress

House Ways and Means Committee, Senate Committee on Finance, and Joint Committee on Taxation

Under section 6103, the House Committee on Ways and Means, the Senate Committee on Finance, and the Joint Committee on Taxation may receive returns and return information upon the request of the chairperson of such committee.[720] Unless the taxpayer consents otherwise, return information which identifies, directly or indirectly, any taxpayer may be furnished to the committee only in closed executive session.[721] The IRS also may disclose returns and return information upon the request of the Chief of Staff of the Joint Committee.[722]

Section 6103 authorizes the chairman of the House Committee on Ways and Means, the Senate Committee on Finance, the Joint Committee on Taxation, and the Chief of Staff of the Joint Committee to designate examiners and agents to whom disclosure of returns and return information may be made.[723] For example, the GAO could be designated as an agent of the Joint Committee for purposes of conducting an investigation involving access to returns and return information.

Other committees

By a resolution of the Senate or House, other committees may be specially authorized to inspect returns and return information.[724] The resolution must specify the purpose for which the returns and return information are to be furnished and that such information cannot be reasonably obtained from any other source.[725] Then, upon written request of the committee chair, the IRS provides the returns and return information to the committee when sitting in closed executive session.[726] A maximum of four agents or examiners of such committee or subcommittee may

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[720] Sec. 6103(f)(1).

[721] *Id.*

[722] Sec. 6103(f)(2).

[723] Sec. 6103(f)(4)(A).

[724] Sec. 6103(f)(3). Concurrent resolutions are required for joint committees other than the Joint Committee on Taxation.

[725] *Id.*

[726] *Id.*

inspect returns and return information on their behalf.[727]

The Congress has very rarely authorized a nontax writing committee's access to returns and return information. Based on the Joint Committee staff research, only 10 resolutions regarding disclosure to nontax committees have been passed since 1976.[728]

Joint Committee review of refunds in excess of $1 million

Under section 6405, the Joint Committee reviews proposed refunds in excess of $1 million. The Joint Committee receives return information regarding such refund cases to fulfill its obligations under this provision.

Additional Joint Committee powers to obtain returns and return information

In addition to section 6103 authority, the Code authorizes the Chief of Staff of the Joint Committee to obtain "tax returns and information" from the IRS as necessary for an investigation by the Joint Committee of the administration of internal revenue taxes.[729] The IRS is to furnish such returns and information to the Chief of Staff together with a brief report, with respect to each return, as to any IRS action taken or proposed as a result of any audit of the return.[730]

Whistle blowers

Section 6103 permits persons who have or had access to returns and return information to disclose such information to the following committees or their designated agents: the House Committee on Ways and Means, the Senate Committee on Finance, the Joint Committee and the Joint Committee's Chief of Staff.[731] The disclosure may be made if the person believes that the return or return information may relate to possible "misconduct, maladministration or taxpayer abuse."[732]

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[727] Sec. 6103(f)(4)(B).

[728] *See* Appendix C for a listing of those resolutions.

[729] Sec. 8023(a).

[730] *Id.*

[731] Sec. 6103(f)(5).

[732] Sec. 6103(f)(5).

D. GAO

Returns and return information are available to GAO personnel. The IRS discloses such information upon request of the Comptroller General for the purposes of auditing the IRS, the Bureau of Alcohol Tobacco and Firearms, or for conducting a 6103(p)(6) audit (relating to audits of procedures and safeguards regarding the confidentiality of returns and return information).[733]

GAO personnel also may have access to returns and return information obtained by other Federal agencies to the extent necessary to audit a program or activity authorized by law and upon written request of the Comptroller General to the head of such agency.[734] If this information is insufficient to complete the audit, the Comptroller can request from the Secretary of the Treasury returns and return information of the type received by the agency being audited to the extent necessary to complete the audit.[735] Within 90 days of the close of the audit, the Comptroller General makes a report to the Joint Committee describing the audited agency's use of return information, with appropriate recommendations.[736]

In order for the GAO to access returns and return information for these audits, it must provide written notification of the audit to the Joint Committee.[737] Within thirty days of this written notification, the Joint Committee, by a vote of two-thirds of its members, may deny the GAO access to returns and return information with respect to such audit.[738]

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[733] Sec. 6103(i)(7)(A).

[734] Sec. 6103(i)(B)(i).

[735] Sec. 6103(i)(B)(ii).

[736] Sec. 6103(i)(B)(iii).

[737] Sec. 6103(i)(C)(i).

[738] Sec. 6103(i)(C)(ii).

IV. USE OF RETURNS AND RETURN INFORMATION BY STATE AND LOCAL AGENCIES

A. Introduction

State and local agencies receiving information under section 6103 generally fall into three categories. These categories are: tax administration agencies, child support enforcement agencies, and agencies administering public assistance programs. This section describes how State agencies use the return information they receive, as well as actions taken by States to safeguard that information against unauthorized disclosure. The information reported in this section is based primarily on surveys of State and local agencies receiving taxpayer data performed by the GAO at the request of the Joint Committee staff ("GAO Survey"). The surveys asked these agencies to describe in detail how they use return information, what other sources of information are available which would allow the agency to accomplish the same purposes, and whether the agency had a need for the taxpayer data that it had received. The surveys also asked questions regarding safeguard reviews, safeguard discrepancies discovered either internally or by the IRS, and the efforts made to correct such deficiencies.[739]

B. Tax Administration Agencies

1. State income tax purposes

Most States with an income tax conform their income tax to the Federal income tax to some degree. Many States base their income tax on Federal adjusted gross income. This approach is commonly known as a "piggyback" system. Other methods of conforming with the Federal income tax are also used. Some State income taxes are based on Federal taxable income and some are calculated as a percentage of Federal tax liability. Return information is useful to States in administering their own income taxes, even in the few States that do not conform to the Federal income tax system. [740]

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[739] In responding to GAO's survey, many of the agencies either self-identified problems or attached the findings of IRS safeguard inspections. The Joint Committee staff did not independently verify the responses or conduct any safeguard inspections of its own for purposes of the study.

[740] The following State income taxes use Federal adjusted gross income: Arizona, California, Connecticut, Delaware, District of Columbia, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Missouri, Montana, Nebraska, New Mexico, New York, Ohio, Oklahoma, Oregon, Virginia, West Virginia, and Wisconsin. The following State income taxes are based on Federal taxable income: Colorado, Hawaii, Idaho, Minnesota, North Carolina, South Carolina, and Utah. In the following States, the State income tax is calculated as a percentage of Federal tax liability: North Dakota, Rhode

(continued...)

States use return information to administer their income taxes in a variety of ways. For example, the exchange of return information enables States to monitor changes in Federal tax liability or other information reported on the Federal return that may affect State tax liability. This exchange of information allows States to identify persons who are required to file a State return but have not done so. States can identify taxpayers who have underreported their income on their State income tax returns. Return information can be used to identify potential levy sources, potential audit candidates, and to verify information reported on State income tax returns.

Some cities, such as St. Louis and Kansas City, impose an income-based tax on their residents and taxpayers working in the city. These cities receive income tax audit reports from the IRS when adjustments are made to wages or self-employment income.

2. Tax purposes other than State income tax

Even States without an income tax[741] find return information useful in administering other taxes, such as estate taxes, excise taxes, sales taxes, and taxes on some limited forms of income. Some of the information used may be specific to the State tax imposed, such as the use of Federal estate tax information to administer State estate tax laws. Return information can also be useful in administering other types of taxes. In general, return information can be used to discover discrepancies in reporting, as a discovery tool to determine if a taxpayer should be paying a State tax, to verify taxpayers' addresses, and to identify potential levy sources to pay outstanding taxes. Some of the specific types of taxes imposed by various States, and the uses by States of return information in administering those taxes, are discussed below.

Texas has no individual income tax, but imposes sales and inheritance taxes. Texas receives Federal estate and gift audit reports, income information (such as Forms 1099) and transcripts of business tax returns.

Wyoming also does not have an individual income tax, but its Department of Transportation enforces fuel tax laws. The IRS provides Wyoming with fuel tax adjustment results.

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[740](...continued)
Island, and Vermont. U.S. Advisory Commission on Intergovernmental Relations, *Significant Features of Fiscal Federalism,* 1995. Federation of Tax Administrators, *Individual Income Tax Starting Points* (January 1, 1999).

[741] Alaska, Florida, Nevada, South Dakota, Texas, Washington, and Wyoming do not have an income tax. New Hampshire and Tennessee impose taxes on certain interest and dividends. Federation of Tax Administrators, *Individual Income Tax Starting Points* (January 1, 1999).

Florida has an intangible property tax that imposes a tax on income generated from stocks, bonds and similar property. Dividend income reported on Schedule B of a taxpayer's Federal return is used to verify amounts the taxpayer reported for purposes of the Florida intangible property tax. Similarly, the State of Washington has a interest and dividends tax for which return information is useful.

Vermont administers a property tax circuit breaker program that is based on income.[742] Generally, a State "circuit breaker program" provides property tax relief for low-income senior citizens and disabled persons. Return information assists in verifying qualification for the program and the proper amount of tax due.

The State of Washington has a business and occupational tax. Return information is useful in determining whether a business should be paying this tax to the State.

Copies of Federal estate tax returns (Form 706), Federal closing letters, and statements of audit changes provide information that identify estates that have not complied with a State's estate tax law. Other typical estate tax information received from the IRS includes the decedent's date of death, net taxable estate, State death tax credit and executor's name and address.[743] The date of death identifies the last date for filing an estate tax return.[744] It also provides the year of death used to determine the correct unified credit amount.[745] The net taxable estate is used to calculate the State death tax credit.[746] The amount of State death tax credit reported on Form 706 is the amount that should have been remitted to the State.[747] The executor's name and address permits the State to contact the executor regarding compliance with State law.[748]

3. Tax modeling and statistical use

States use return information in modeling efforts to redesign compliance processes and

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[742] Vermont Department of Taxes, response to GAO Survey of State and Local Agencies Receiving Taxpayer Data, response number 1901.

[743] California State Controller's Office (Division of Collections - Bureau of Tax Administration), response to GAO Survey of State and Local Agencies Receiving Taxpayer Data, response number 0401.

[744] *Id.*

[745] *Id.*

[746] *Id.*

[747] *Id.*

[748] *Id.*

programs within the State tax collection agency.[749] Return information forms the basis of statistical analysis and budgetary purposes.[750]

4. Regulation of State return preparers

State agencies regulating tax return preparers can receive taxpayer identity information (name, mailing address and taxpayer identification number) and information as to whether penalties under sections 6694, 6695, or 7216 have been assessed against such preparer.[751] According to the IRS, no disclosures are being made under this provision.[752]

C. Child Support Agencies

Section 6103(l)(6) allows the IRS to disclose taxpayer information to Federal, State, and local child support enforcement agencies. These disclosures are to be made for the purposes of establishing and collecting child support, as well as for locating individuals owing such obligations. The SSA, while permitted to disclose return information to State and local child support enforcement agencies, currently does not do so under the authority granted it by section 6103. Instead, the SSA makes disclosures to the Office of Child Support Enforcement ("OCSE"), a Federal agency, on behalf of the IRS.[753] The OCSE then provides the information to the State and local child support enforcement agencies.

In response to the GAO survey, agencies reported that other sources besides return information are available to and used by State and local agencies in enforcing child support laws. One of these sources is the Directory of New Hires, created by the Personal Responsibility and

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[749] *See, e.g.*, Kansas Department of Revenue (Compliance Management), response to GAO Survey of State and Local Agencies Receiving Taxpayer Data, response number 2401.

[750] *See, e.g.*, Rhode Island Department of Administration (Division of Taxation), response to GAO Survey of State and Local Agencies Receiving Taxpayer Data, response number 3201.

[751] Sec. 6103(k)(5).

[752] Interview of IRS Office of Government Liaison and Disclosure (August 20, 1999). Other state uses of return information, such as the Montana Demonstration Project, and disclosures for purposes of state alcohol laws are discussed in the overview of section 6103, *supra* Part Two, II, of this study.

[753] *See* Part Four, II.D.3, above, for a discussion of the SSA's child support disclosures to OCSE.

Work Opportunity Reconciliation Act of 1996[754] ("Personal Responsibility Act"). The Directory of New Hires includes basic information on every person hired in the United States. Pursuant to the Personal Responsibility Act, this information is reported by employers to a centralized repository in every State; States in turn report their data to the Federal government.[755] Thus, child support agencies now operate data bases that permit rapid wage garnishment in an increasing number of child support cases, including interstate cases.[756]

For locating delinquent parents, several of the State child support agencies acknowledged that other resources besides return information are available. These sources include a state's motor vehicle administration, the Directory of New Hires, credit bureaus, public assistance records, utility companies and prison records.

One agency indicated that to establish, enforce, and collect child support, the information needed has to be currently valid and likely to be valid in the future.[757] Because the return information provided is always at least a year old, some agencies felt the age of the information diminished its value.[758] Nonetheless, many of the survey responses indicated that no adequate alternative to return information existed, especially with regard to the location of a delinquent parent's assets.[759]

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[754] Pub. L. No. 104-193 (1996).

[755] *Id.*

[756] *Id.*

[757] Illinois Department of Public Aid (Division of Child Support Enforcement), response to GAO Survey of State and Local Agencies Receiving Taxpayer Data, response number 0601.

[758] *Id.*; Florida Department of Children and Families (Child Support Enforcement Program), response to GAO Survey of State and Local Agencies Receiving Taxpayer Data, response number 702.

[759] *E.g.*, Responses to GAO Survey of State and Local Agencies Receiving Tax Data: Connecticut Department of Social Services (Bureau of Child Support Enforcement), response number 0101; Florida Department of Children and Families (Economic Self-Sufficiency Services - Program Office Information Systems), response number 701; Nebraska Department of Health and Human Services (Child Support Enforcement Unit and State Child Support Enforcement Program), response number 1601; Nevada State Child Support Enforcement Program, response number 1701; Kentucky Cabinet for Families and children (Community Based Services, Division of Child Support) response number 2501.

D. Public Assistance and Benefit Program Disclosures

The IRS and the SSA can disclose return information to State and local agencies administering certain programs under the Social Security Act, the Food Stamp Act of 1977, title 38 of the U.S. Code, or certain housing assistance and benefits programs.[760] The most common programs administered by the states are Temporary Assistance for Needy Families and Medicaid.

The purpose of these disclosures is to determine the eligibility for, or the amount of, benefits under the specified programs. The agencies receive wage and self-employment information from the SSA and unearned income information (Forms 1099) from the IRS.

Most of the State public assistance agencies surveyed by the GAO stated that no alternative sources exists for this income verification information. Some noted that information can be obtained from the State tax authority, banks, or other financial institutions, which may be more current. Nonetheless, they asserted that this information is not as complete as return information and would be difficult and inefficient to match against their benefit recipient database. Further, the public assistance agencies note that return information is useful if income is earned in or assets are located in other States.

E. State Efforts to Safeguard Returns and Return Information

1. State taxing authorities

The following is a summary of the safeguard deficiencies reported by the State taxing authorities in response to the GAO's Survey of State and Local Agencies Receiving Tax Data. Almost all of the surveyed State taxing authorities reported some discrepancy of one type or another. Most of the States indicated that the discrepancies had been, or were in the process of being, corrected.

Storage issues

The most frequently cited safeguard violation involved the State taxing authorities' failure to store return information in a secure manner. Some States failed to keep paper documents in locked file cabinets when not in use. Inspections uncovered cabinets without locks or improperly functioning locks. Some of the cabinets being used were not marked clearly as containing return information. Access to the keys to such cabinets were not controlled adequately. In one instance, a file clerk was observed taking a cabinet key from an absent tax employee's desk drawer to search the cabinet for a file. Safeguard inspections also revealed that return information was commingled with other data in files not properly marked as containing return information.

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[760] Sec. 6103(l)(7).

Physical security

Safeguard inspections also uncovered other deficiencies in physical security. Such deficiencies include inadequate monitoring of visitors, failure to check briefcases and containers upon entrance and exit, inadequate access restrictions for areas containing return information, and inadequate building security in general. Some tax employees were granted access beyond normal business hours without a need for such access. In one instance, 120 people had access to a room housing computers with access to return and the combination for the room's look had never been changed.

Recordkeeping deficiencies

The State tax agencies also experienced record keeping deficiencies. Logs of data received were not kept up to date or were not standardized. One State failed to track use, dissemination and destruction of return information. A few States failed to document safeguard inspections that they had conducted internally.

Computer security

All automated information systems and networks that process, store, or transmit return information must meet or exceed the requirements for Controlled Access Protection ("C2").[761] To meet C2 requirements, the operating security features of the system must have the following minimum requirements: a security policy, accountability (secured from unauthorized access), assurance (all access controls and other security features must be implemented and working when installed), and documentation.[762]

The two acceptable methods of transmitting return information electronically are encryption and the use of guided media.[763] Encryption involves altering data objects in a way that the objects become unreadable until deciphered.[764] Guided media uses protected microwave

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[761] Internal Revenue Service, Publication 1075, *Tax Information Security Guidelines for Federal, State and Local Agencies* at 17 (1998). These guidelines are based on the *Department of Defense Trusted Computer System Evaluation Criteria*, DOD 5200.28-STD (commonly called the "Orange Book"), OMB Circular A-130, Appendix III and Treasury Directive 71-10.

[762] *Id.*

[763] *Id.* at 19.

[764] *Id.*

transmissions, or end to end fiber optics.[765]

The GAO survey revealed that the IRS had discovered numerous discrepancies regarding computer security. In cases in which violations were found, the IRS admonished the States to provide greater computer security. The IRS recommendations to correct violations include (1) stressed the need for individual identification and passwords for tax employees; (2) auto-aging passwords (i.e. passwords that expire after a certain period) and passwords that contain numbers or special characters; (3) the installation of warning screens on computers with access to Federal return information so that the user would be warned of the civil and criminal penalties for unauthorized access; and (4) the establishment of audit trails (a computer log of access to return information) and computer programs, such as EARL,[766] to detect unauthorized access.

Employee awareness

Safeguard inspections revealed that in some instances employees were not reminded of the criminal and civil penalties for unauthorized access to return information. In one instance the warning given referred to an obsolete Code section. In its written safeguard reviews, the IRS stressed to the State taxing authorities the need to make employees aware of the Taxpayer Browsing Protection Act through annual reminders, and warning screens on computers.

Unused Federal returns and return information

Safeguard procedures require that State agencies request only information they need.[767] The IRS found that a few of the State taxing authorities were requesting information that was not being used. For example, one State taxing authority requested business data but did not have a computer matching program in place to utilize that data. In another instance, the IRS recommended that a record of Federal revenue agent reports received be kept to determine any reason for possible non use. One State taxing authority was not using the CP2000 extract[768] although it had requested it. The IRS recommended that another State monitor its CP2000

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[765] *Id.*

[766] "EARL" stands for Electronic Audit Research Log. It is an automated tool to monitor and detect unauthorized access to computer data. General Accounting Office, *Confidentiality of Tax Data: IRS Implementation of the Taxpayer Browsing Protection Act* (GAO/GGD-99-43, March 1999) at 3.

[767] Internal Revenue Service, Publication 1075, *Tax Information Security Guidelines for Federal, State and Local Agencies* 23 (1998)("Agencies must evaluate the need for return information before the data is requested or disseminated.").

[768] The "CP2000 extract" is used to identify under-reported income. It reflects adjustments made by matching return amounts to amounts reported by third party payers.

request to determine if the dollar tolerance needed to be adjusted.

2. State child support agencies

In response to the GAO's survey, State child support agencies reported having to correct safeguard discrepancies similar to that of the State taxing agencies. Such discrepancies include: failure to keep return information in a secured cabinet; inadequate or non-standardized record keeping; a need to increase employee awareness of penalties for unauthorized access; and failure to adequately label files containing return information.

As to computer security, the IRS recommended changes such as the installation of a warning that appears upon logging in that discusses the penalties of unauthorized disclosure, and the use of a non-alpha character in passwords to deter guessing. In one instance, the IRS found that a child support agency allowed an excessive number of consecutive unsuccessful log-ins (25) before freezing out a user.

The survey response indicated that the child support agencies were not properly disposing of return information upon the conclusion of its use. Several responses indicated that shredders had been purchased to correct this discrepancy.

Child support agencies also disclosed information to their contractors beyond what is statutorily permitted.[769] Because the contractor disclosure issue reaches beyond child support enforcement agencies and was specifically identified by the IRS as a matter of continuing concern, it is discussed separately in Part Five, Section II.H., of this study.[770]

3. State public assistance agencies

In response to the GAO's survey, State public assistance agencies most often cited the proper disposition of return information as a safeguard discrepancy. Such discrepancies involved not having an agency witness present for the destruction of return information and failing to keep a log accounting for the destruction of the material. State public assistance agencies also experienced storage discrepancies, such as failing to keep return information in a secure place, not accounting for keys, not marking case files as containing return information, and placing reports containing return information in open and unrestricted mailboxes. Other physical security problems included having the cleaning staff clean after work hours and failing to change the combination lock when an employee is terminated or transfers.

These agencies also noted that, in the past, they had failed to perform internal safeguard

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[769] *See* section 6103(l)(6)(B), limiting contractor access to the address, social security number, and amount of tax refund offset due to past due child support.

[770] *See* Part Five, II.H. of this study for recommendations regarding contractors.

inspections, and needed increase employee awareness of the penalties for the unauthorized disclosure and access of return information.

In the area of computer security, the IRS admonished State public assistance agencies to completely erase return information before transferring components out of the system. Other problems noted included the inability to monitor authorized access for anomalies, the need to review audit trails daily, and allowing too many unsuccessful logins before locking a user out of the system. The IRS also noted a need to encrypt return information to protect the transmission from unauthorized disclosure.

In its calendar year 1998 report to the Joint Committee, the IRS singled out the use of contractors by child support agencies as an area of emerging concern.[771] One survey response revealed that several county attorneys contracted their services to the Child Support Enforcement Unit ("CSEU"). These attorneys are not employees of the CSEU; rather they are independent contractors. As such, their access to return information is limited to the three items available to child support contractors. The CSEU had allowed the attorneys to access return information beyond those items. A similar problem arose with other private contractors.
This study sets forth its discussion and recommendations regarding contractors in Part Five of this study, below.

4. State efforts to prevent unauthorized inspection of return information ("browsing")

The staff of the Joint Committee received comments from more than 20 States regarding their use of return information. Of those comments, 17 mentioned the efforts they were taking to protect taxpayer confidentiality. Generally, the States are emphasizing confidentiality awareness. The State agencies conduct training classes to inform employees about IRS confidentiality standards, or have employees view a videotape of an IRS training class on the subject, and employee handbooks include discussions of confidentiality rules.

Generally, the IRS has emphasized to the States the need to have a computer program that detects unauthorized access by authorized users ("UNAX" or "browsing").[772] Such programs produce an audit trail that permits after-the-fact analysis of computer access.[773] Alabama has in place a Tracking and Control System that detects UNAX. Colorado uses its accounts receivable

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[771] Internal Revenue Service, *Report on Procedures and Safeguards Established and Utilized by Agencies for the Period January 1 through December 31, 1998* at 1 (June 4, 1999).

[772] A discussion of the programs the IRS uses, such as EARL and ATLAS, on its own computer systems is discussed in Part Four, V.A., below, of this study (concerning unauthorized disclosure and inspection of returns and return information by the IRS).

[773] General Accounting Office, *Confidentiality of Tax Data: IRS Implementation of the Taxpayer Browsing Protection Act*, (GAO/GGD-99-43, March 1999) at 6.

file as a control against browsing. If an account is not on the accounts receivable file but the audit trail indicates the account has been accessed, it will be the subject of further investigation. Florida is "working to develop programs to aid in discovery of UNAX violations." Virginia says its records are auditable (although they are not currently audited). Minnesota indicated that its current systems and limited resources prevent it from implementing proactive programs to detect UNAX. Texas asserts that its records are protected against UNAX because return information is not maintained on computers.

Confidentiality education efforts alone have not deterred IRS employees from browsing. Establishing an active audit program to detect UNAX that is compatible with the State systems could require a monetary outlay. Nonetheless, without an active detection program, State employees who are browsing may never be caught.

V. ENFORCEMENT EFFORTS REGARDING UNAUTHORIZED DISCLOSURE AND INSPECTION OF RETURNS AND RETURN INFORMATION BY THE IRS

This section discusses enforcement actions taken with respect to allegations of unauthorized disclosure and inspection of returns and return information by IRS employees. Part A of this section discusses actions taken with respect to allegations of unauthorized inspection (commonly referred to as "browsing") subject to criminal penalties. Part B discusses civil litigation with respect to both unauthorized disclosure and unauthorized inspection.

A. Unauthorized Inspection

1. Overview

Over several years, the GAO reported on the need for the IRS to improve safeguards against the unauthorized access of taxpayer data by IRS employees. In 1993, the GAO noted that the IRS did not adequately monitor the activities of employees with authority to read and change taxpayer files.[774] In 1995, the GAO noted that although the IRS had taken some steps to restrict account access, the IRS still lacked sufficient safeguards to prevent and detect unauthorized access.[775] The GAO reported on similar IRS shortcomings in April of 1997. For example, the GAO noted that the IRS did not: (1) monitor all employees with access to automated systems nor monitor data for evidence of unauthorized access; (2) consistently investigate cases involving unauthorized access; and (3) consistently discipline employees who accessed return information without authorization.[776] These concerns about unauthorized access culminated in enactment the Taxpayer Browsing Protection Act of 1997 ("TPBA"), which makes unauthorized inspection a misdemeanor.[777]

Responsibility for investigating allegations of unauthorized access rests with the Treasury Inspector General for Tax Administration.[778] During the period August 5, 1997, through August 4, 1999, 585 unauthorized access ("browsing") cases were initiated. The administrative

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[774] General Accounting Office, *IRS Information Systems Weaknesses Increase Risk of Fraud and Impair Reliability of Management Information* (GAO/AIMD-99-34, Sept. 22, 1993).

[775] General Accounting Office, *Financial Audit: Examination of IRS Fiscal Year 1994 Financial Statements* (GAO/AIMD-95-141, Aug. 4, 1995).

[776] General Accounting Office, *IRS Systems Security: Tax Processing Operations and Data Still at Risk Due to Serious Weaknesses* (GAO/AIMD-97-49, Apr. 8, 1997).

[777] Pub. L. No. 105-35 (1997).

[778] Prior to the creation of the TIGTA by the IRS Reform and Restructuring Act, the now-defunct IRS Office of the Chief Inspector handled these investigations.

investigation in 394 of those cases has concluded. One hundred ninety-eight (198) investigations resulted in administrative findings that unauthorized access had occurred (substantiated cases). The types of employees involved in the substantiated cases involve: auditors and tax examiners (77), collection (48), Taxpayer Service (31), clerical (19), Criminal Investigation Division (3), Management (6), Professional/Technical (2), and other (12). None of these investigations involved State employees.

2. Prosecutions for unauthorized inspection of returns and return information

The TIGTA (or his predecessor, the IRS Chief Inspector) referred 162 substantiated cases to the U.S. Attorneys in the appropriate district for prosecution. Fourteen referrals were still pending as of September 29, 1999. The respective U.S. Attorneys declined to prosecute 127 cases. Twenty-one cases were accepted for prosecution.

The status of the twenty-one cases referred for prosecution as of September 29, 1999, is as follows:

Status of Cases Accepted for Prosecution:	
Guilty Verdict	5
Summons in Lieu of Arrest[779]	1
Pre-Trial Diversion[780]	4
Deferred Prosecution	1
Charges Brought by Indictment	6
Charges Brought by Information	4

Source: Treasury Inspector General for Tax Administration.

The TIGTA informed the staff of the Joint Committee that his office had not encountered any resistance from U.S. Attorneys in prosecuting cases. Nonetheless, according to the TIGTA, in some judicial districts, the U.S. Attorneys have indicated that they are not interested in

[779] "Summons in lieu of arrest" means that a court issued a summons for the violator to appear in court to be charged instead of the police effecting an arrest. Interview, Office of the Inspector General for Tax Administration, Treasury Department (October 8, 1999).

[780] "Pretrial diversion" means that instead of being tried for the crime, the violator is required to perform some other act. If properly completed, the criminal case will be dropped. Interview, Office of the Inspector General for Tax Administration, Treasury Department (October 8, 1999).

prosecuting unauthorized access cases unless the violations involve:

(1) financial gain by the subject employee,

(2) financial loss to the U.S. government, or

(3) a disclosure of returns or return information to a third party.

Seven U.S. Attorney offices have issued "blanket declinations" covering all cases not meeting these criteria. The failure of U.S. Attorney offices to prosecute more than 80 percent of substantiated cases seems counter to the TIGTA comments that it has not encountered resistance to prosecution. The impact of the decisions not to prosecute substantiated cases on compliance with the TPBA is unclear.

After consulting with the U.S. Attorney's Legislative Affairs Office, the staff of the Joint Committee learned that no national guidelines on prosecuting browsing cases exist. Instead, each U.S. Attorney develops, usually in consultation with the referring agency (in this case the TIGTA or the former Office of the IRS Chief Inspector), prosecution guidelines, as they would do for any other crime. They take into account resources, jury appeal, and whether other noncriminal sanctions are available and provide sufficient punishment.

Present law does not require the presence of any of these factors for a criminal violation. The failure to prosecute cases not meeting the criteria imposed by some U.S. Attorneys means that many violations will not be prosecuted, such as those involving pure "curiosity" seekers. This approach may conserve resources for more egregious criminal violations, such as those involving harm. On the other hand, the lack of national guidelines could lead to uneven administration and prosecution. Since the IRS is a nationwide agency, different U.S. Attorneys could treat similar violations differently. In addition, the low levels of prosecution may lessen the impact Congress intended the TPBA to have.

3. Administrative action

Administrative action on browsing cases is taken by the IRS after the respective U.S. Attorney makes its decision on whether to decline or accept a case for prosecution. The IRS took the following administrative action against the employees involved in substantiated cases:

Administrative Action Taken on Substantiated Investigations:	
Closed - No Action Taken	9
Oral or Written Reprimand/Admonishment	4
Suspended/Reduction in Grade	12
Removed, Terminated, or Other Action	36
Pending Administrative Action (as of 9-29-99)	88
Employee Resigned Prior to Adjudication	37

Source: Treasury Inspector General for Tax Administration.

4. Steps taken by the IRS to prevent unauthorized access to returns and return information[781]

The IRS has developed a four-point program regarding unauthorized access. The program focuses on deterring, preventing, and detecting unauthorized access, and administering penalties for these violations. According to the GAO, the age of the IRS's computer systems and budget constraints make it difficult for the IRS to prevent and detect effectively unauthorized access by computer in the near-term. Thus, the IRS's primary efforts to address the unauthorized access problem have focused on employee awareness. The relatively few cases accepted for prosecution could potentially undercut this effort. However, consistent discipline in the form of removal, combined with employee awareness of the disciplinary actions taken, should be an effective deterrent.

Deterring unauthorized access

To discourage employees from trying to access taxpayer data without authorization, the IRS has embarked upon a vigorous campaign of agency-wide awareness. The IRS replaced the term "browsing" with "UNAX" (short for the willful unauthorized access of taxpayer records). Centering on the theme "Stop UNAX in its Tracks," the IRS now requires annual all-employee

[781] Information for this section was taken from General Accounting Office, *Confidentiality of Tax Data: IRS' Implementation of the Taxpayer Browsing Protection Act* (GAO/GGD-99-43) and *Strategic Plans and Budget of the Internal Revenue Service, 1999 Joint Return*, 106th Cong. 1st Sess. (JCS-4-99) May 25, 1999 at 85-87.

briefings on the policy and penalties of unauthorized access.[782] To ensure that managers give a consistent message in these briefings, the agency developed UNAX videos and guides. It also started using a UNAX certification form, which all employees sign to acknowledge attendance at the awareness briefings and receipt of the guides. A hotline, steering committee, and support team dedicated to UNAX are available to answer UNAX questions. The IRS also posts questions, issues, and answers on a UNAX bulletin board.

To try to insure consistent disciplinary action for UNAX, the IRS clarified its unauthorized access policy. Absent any extenuating circumstances, the IRS will remove an employee for proven instances of unauthorized access. The IRS has also updated the warning notices that appear on the screen when an employee uses a computer to access taxpayer records.

Besides the annual briefings, the IRS has also updated its training modules for employees who access taxpayer records as part of their official duties. As of January 1999, more than 43,000 employees had received this supplemental training.

Preventing unauthorized access

According to the IRS, the most effective way to prevent unauthorized access is to build controls into automated systems that prevent employees from accessing return information unnecessarily. The IRS, however, acknowledges that it cannot modify its current systems to restrict access to a "need to know" basis so that information is available only for work-related purposes. According to the IRS, it will be several years before it can modernize systems to restrict employee access to return information to work-related reasons and detect unauthorized accesses almost as they happen.

In the short-term, the IRS has implemented other changes. The IRS has incorporated blocks into the systems to prevent employees from accessing their own records. It has improved user identification, passwords, and system file controls. Managers certify their employees' access rights, and quarterly reviews align users actual work with their access rights. The IRS is also working on streamlining its employee background investigation process.

Detecting unauthorized access

Centralized Case Development Center

The Centralized Case Development Center ("CCDC"), a part of TIGTA, investigates all allegations of unauthorized access. The CCDC identifies all potential cases of unauthorized access and determines whether they warrant further investigation. Its staff includes forensic data analysts, security analysts, computer programmers, and criminal investigators. Before the CCDC became operational in February 1998, each of the ten IRS service centers conducted its own

[782] These briefings began in 1998.

investigation and analysis. This led to inconsistent case development, and the need for CCDC.

Automated investigation tools

The Integrated Data Retrieval System ("IDRS") is the IRS' primary database for return information. In 1994, the IRS implemented an automated tool, Electronic Audit Research Log ("EARL"), to detect unauthorized access to data on IDRS. EARL, however, had limitations. Because each service center developed its own computer programs, EARL's output was not uniform. Most of the leads identified by EARL required labor intensive investigation to decide whether an unauthorized access took place.

In February 1999, the IRS employed the Audit Trail Lead Analysis System ("ATLAS") to replace EARL. According to the IRS, ATLAS provides better unauthorized access detection capabilities. Because ATLAS is a national system, it is not subject to modification by the service centers. The IRS believes the ATLAS system will produce better leads than those produced by EARL. For example, EARL could only match the first six letters of an employee's name with the name of the taxpayer whose account was accessed. According to the IRS, ATLAS can do an exact match of names. The IRS believes the increased precision of the name match should produce leads more indicative of a potential unauthorized access.[783]

The GAO reports that the IRS has done little to detect access to systems other than IDRS. It is estimated that the IRS uses 130 other systems. EARL and ATLAS do not analyze these systems. Instead, the IRS depends on the supervisors of employees using non-IDRS systems to be alert for unauthorized access. The IRS plans to correct this deficiency as part of its long-term modernization efforts. It also is considering the feasibility of applying ATLAS to additional systems.

Administering penalties

The IRS established a policy that any proven UNAX violation requires discharge from employment. To eliminate the inconsistencies in case handling, the IRS centralized several key functions within a Centralized Adjudication Unit ("CAU"). Among its duties, CAU tracks and reports on the status of all unauthorized access cases; prepares paperwork for all cases; and advises management on the administration of discipline. The Systems Standards and Evaluation

[783] Of the 5,468 total leads received between October 1, 1997, and November 30, 1998, EARL's match of the first six characters accounted for 3,793. However, of those 3,793, only 67 resulted in a referral for further investigation. General Accounting Office, *Confidentiality of Tax Data: IRS Implementation of the Taxpayer Browsing Protection Act* (GAO/GGD-99-43, March 31, 1999).

Office has management oversight over the program.[784]

B. Summary of Civil Litigation Regarding Unauthorized Disclosure and Inspection by the IRS

Overview

Over the last five years, the government has settled or lost 24 unauthorized disclosure cases,[785] costing the government more than $12 million, plus an undetermined amount in attorneys fees and other costs.[786] It has won ninety-seven cases.[787]

This study extensively examined thirteen of these cases. Of these thirteen cases, seven involved employees of the IRS Criminal Investigation Division.[788] The remaining cases involved the following types of IRS employees: public affairs officers, a computer analyst, a revenue agent, a taxpayer service representative, a revenue officer, a Service Center photocopy unit, a chief of special procedures, and a district director.[789] For purposes of this summary, the thirteen cases have been divided into four categories: circular letter cases, press release/news media cases, other third parties, and browsing (unauthorized inspection).

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[784] The Systems Standards and Evaluation Office has the overall responsibility for security and privacy within the IRS.

[785] The period covered by this summary is January 1, 1994, through April 30, 1999.

[786] The Privacy Act restricts the ability of the IRS and the Department of Justice to disclose to the public the terms of settlement in cases involving individuals. 5 U.S.C. sec. 552(b). The IRS and the Department of Justice, however, are permitted to disclose this information to the Joint Committee pursuant to 5 U.S.C. sec. 552a(b)(9). The Privacy Act does not place any restrictions on the Joint Committee's use of this information once it is received.

[787] This figure does not include twenty-three cases that were dismissed by stipulation, voluntarily by the plaintiff, or for lack of prosecution at the district court level. It does include three cases won on appeal.

[788] Although these and other unauthorized disclosure cases involve the Criminal Investigation Division's special agents, a recent review of the IRS's Criminal Investigation Division found no systematic abuse. "Neither was any evidence found of systematic or repeated disclosure violations (Section 6103) . . ." William H. Webster, *Review of the Internal Revenue Service's Criminal Investigation Division*, 32 (April 1999).

[789] Some cases involved employees from more than one IRS function.

Circular letter cases

A circular letter is a form letter sent by the Criminal Investigation Division. It is used when a large group of persons needs to be contacted, for example, a doctor's patients or tax shelter investors.

Barrett v. United States

Barrett v. United States[790] has its origins in a 1979 audit of a plastic surgeon's 1977 and 1978 corporate and personal tax returns. When the initial audit showed a $100,000 discrepancy between the doctor's books and his bank records, the IRS transferred the matter to its Criminal Investigation Division.

Two of the doctor's former employees informed the IRS that the doctor skimmed cash payments from his patients. The IRS special agent assigned to the case[791] determined that it would be necessary to find out from the doctor's patients the amount each had paid the doctor, and whether they paid any part in cash.

The special agent sent circular letters to 386 of the doctor's patients. In addition to the tax years under investigation, the special agent sent letters to persons who were the doctor's patients in the 1976, 1979, and 1980. The letters stated that the IRS Criminal Investigation Division was investigating the doctor and requested information regarding the nature and amount of the fees paid to the doctor. The post office was unable to deliver 126 of the letters.

The doctor sued, alleging that the IRS wrongfully revealed to his patients that he was under criminal investigation. Initially, on summary judgment, the district court concluded that the special agent had made an authorized disclosure. The court based its ruling on the provision of section 6103 that permits investigative disclosures. This provision permits the disclosure of return information to the extent necessary to obtain information not otherwise reasonably available.[792]

Reversing, the Court of Appeals for the Fifth Circuit found that there was a factual issue concerning whether the disclosures in the circular letters were necessary.[793] The circuit court also found a factual issue about whether the information sought was otherwise reasonably available. The case was remanded for trial to decide these issues.

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[790] 917 F. Supp. 493 (S.D. Tex. 1995).

[791] Special agents are employees of the Criminal Investigation Division.

[792] Sec. 6103(k)(6).

[793] *Barrett v. United States*, 795 F.2d 446 (5th Cir. 1986).

After a bench trial, the district court found that the disclosures did not violate section 6103.[794] Another appeal to the Fifth Circuit followed.[795] Again the circuit court reversed. Rejecting the government's arguments, the circuit court held that the IRS did not need to disclose the fact of criminal investigation to inform the patients receiving the letters of the severe consequences of the investigation. Nor was the disclosure necessary to convey to the recipients the need to exercise appropriate care in responding to the letters. Therefore, the circuit court found the disclosure unauthorized.

The circuit court also held that the special agent's actions fell outside the good faith exception to unauthorized disclosure liability.[796] The IRS manual required that the special agent obtain the approval of the Chief of Criminal Investigation before sending out circular letters. The special agent did not obtain this approval. He also did not review section 6103 or the applicable provisions of the manual prior to mailing the circular letters. Using an objective good-faith test, the circuit court found that a reasonable IRS agent would not have violated the express provisions of the manual. As a result, the circuit court found that the special agent did not act in good faith. The circuit court returned the case to the district court to decide the proper amount of damages.

On remand, the district court awarded[797] the doctor $260,000 ($1,000 for each of the 260 letters not returned to the IRS as undeliverable).[798] Both the district court and circuit court, upon yet another appeal, denied the doctor's request for actual and punitive damages.[799]

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[794] *Barrett v. United States*, 93-1 U.S.T.C. (CCH) ¶ 50,291, 1993 U.S. Dist. LEXIS 5114, (S.D. Tex. 1993).

[795] *Barrett v. United States*, 51 F.3d 475 (5th Cir. 1995).

[796] Sec. 7431(b)(1).

[797] As discussed in Part Two, II.K. above, section 7431 authorizes statutory damages of $1,000 per each act of wrongful disclosure. Sec. 7431(c).

[798] *Barrett v. United States*, 917 F. Supp. 493 (S.D. Tex. 1995).

[799] *Barrett v. United States*, 100 F.3d 35 (5th Cir. 1996). The taxpayer's motion for rehearing *en banc* was also denied. *Barrett v. United States*, 105 F.3d 335 (5th Cir. 1997). No criminal charges or indictments were ever brought against the doctor as the result of the IRS investigation. *Barrett v. United States*, 51 F.3d 475, 476 n. 3 (5th Cir. 1995).

Reddy v. United States

In *Reddy v. United States*,[800] a special agent mailed circular letters to many of the taxpayer's patients during a criminal investigation. The letters sought billing and payment information. The heading and self-addressed return envelopes contained the organizational identifier "Criminal Investigation Division." Summonses issued to third parties also contained the words "Criminal Investigation Division."

The taxpayer alleged that the inclusion of "Criminal Investigation Division" in the letters, envelopes, and summonses wrongfully revealed the fact that the taxpayer was under criminal investigation. Because the letters did not comply with the Internal Revenue Manual provisions governing the use of circular letters, the government settled the case for $126,000 ($1,000 for each letter mailed and not returned undeliverable).

Marre v. United States

In *Marre v. United States*,[801] the taxpayer founded a corporation to build solar-heated greenhouses. In 1985, the IRS began a criminal investigation of both the taxpayer and his wholly-owned corporation for allegedly aiding and assisting in the filing of false tax returns. The IRS believed that the taxpayer marketed the greenhouses as a tax shelter, sold investors an interest in the greenhouses, and then failed to construct complete greenhouses. According to the IRS, the owners took fraudulent deductions for incomplete, nonfunctional greenhouses.

As part of the investigation, the special agent interviewed various investors, promoters, suppliers, and employees of the corporation. In interviews and letters, the special agent revealed that the IRS was conducting a criminal investigation of the taxpayer and his corporation for allegedly assisting in the filing of false returns concerning the greenhouses.

The special agent also sent circular letters to the investors and certain suppliers. In the circular letters to the investors, the special agent identified the taxpayer as the sole target of the investigation. He also warned that any deductions taken for the greenhouses would be fraudulent. An attached questionnaire contained statements to the effect that the taxpayer had been dishonest with investors when he represented that he would furnish complete greenhouses.

The taxpayer and the corporation sued the United States seeking damages for the wrongful disclosure of tax return information. According to the district court, the special agent had made 215 unauthorized disclosures: 88 disclosures via circular letters to investors, 23 disclosures to the corporation's suppliers, 10 disclosures to promoters, and 94 other disclosures. The district court declined to award actual damages to the taxpayer. Because no actual damages

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[800] 99-8065 (S.D. Fla.).

[801] 117 F.3d 297 (5th Cir. 1997).

were awarded, the court held that the law prohibited it from awarding punitive damages. It also found that because the corporation ceased doing business before the special agent made the disclosures, it could not recover damages. Thus, the district court awarded $215,000 in statutory damages for the 215 unauthorized disclosures. It also awarded attorney fees and costs of $326,182.62.

On appeal, the Fifth Circuit found that the corporation, though defunct, could recover damages.[802] It affirmed the district court's decision not to award actual damages. It also affirmed the decision not to award punitive damages, as the court held the conduct did not warrant such damages. Finally, the circuit court reduced the attorney fee award to those amounts incurred under a contingent fee arrangement. The circuit court returned the case to the district court to reconsider the corporation's claim for damages and attorney fees.

On remand, the parties agreed that the corporation was entitled to $110,000 in statutory damages. The district court awarded attorney fees to the corporation, but the Fifth Circuit reversed the award on appeal.[803] The Fifth Circuit also ruled that the IRS could offset the damage awards against outstanding tax liabilities.

Press release or news media cases

The next series of cases involve unauthorized disclosures made to the news media. In each instance the government settled the case, either before the case went to trial or following an adverse district court decision.

Erhard v. United States

In *Erhard v. United States,*[804] the IRS filed notices of Federal tax lien in several counties in which the IRS thought the taxpayer owned property. Following the filings, the media began contacting IRS Public Affairs. In response to those inquiries, IRS Public Affairs officers confirmed the publicly-filed liens and said that the IRS had filed the liens to protect the government's interests. Statements attributed to IRS Public Affairs, which appeared in several California newspapers, were picked up by wire services and appeared in newspapers elsewhere in the United States.

The taxpayer sued, alleging that IRS Public Affairs improperly disclosed his return information in statements to the press. The government asserted that the information disclosed was based on matters of public record, i.e., the filed notices of Federal tax lien and Tax Court

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[802] *Marre v. United States,* 38 F.3d 823 (5th Cir. 1994).

[803] *Marre v. United States,* 117 F.3d 297 (5th Cir. 1997).

[804] 93-0725 (D.D.C.).

proceedings. In addition, the government contended that some news sources had misquoted IRS Public Affairs. Despite these arguments, the government settled the matter before trial for $209,000.

Johnson v. Sawyer

Johnson v. Sawyer[805] involves litigation stemming from two IRS press releases. The taxpayer was a corporate executive charged with tax evasion. The taxpayer's employer assured him that, if there was no publicity that would embarrass the company, he could continue as an executive. Accordingly, prior to entering a plea, the taxpayer's attorney and the prosecuting Assistant United States Attorney agreed to preserve the taxpayer's relative anonymity. The "Defendant Information" sheet gave the address of the taxpayer's attorney as the defendant's address. The taxpayer's formal name was used rather than the nickname by which he was known to friends and business acquaintances and which he used to sign correspondence. The documents filed in court concerning the criminal proceeding did not mention the taxpayer's employment.

The "no publicity" agreement was not communicated to the IRS. On the day the court filed the judgment of conviction and sentence, a public affairs officer for the IRS prepared a press release about the conviction.[806] The press release included the taxpayer's home address, the name of his employer, and his position with the company. The press release was approved and mailed out to media outlets.[807]

The public affairs officer prepared the press release from information provided by the investigating special agent. Neither the public affairs officer nor the agent had attended the taxpayer's hearing or possessed any of the court documents.

Two days after the IRS press release was issued a journalist called the taxpayer's employer to ask about the taxpayer's conviction. Also on that day, the IRS realized that the press release contained incorrect information: the taxpayer had only been charged for one year, not two as stated in the release, and he was not charged with claiming false business deductions or altering documents as alleged in the release. The public affairs officer informed the media outlets that the release contained incorrect information and requested that the media outlets not issue the release.

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[805] 120 F.3d 1307 (5th Cir. 1997).

[806] The taxpayer pled guilty to income tax evasion (an underpayment of approximately $3,500 for one year). He was sentenced to six months confinement, suspended, and one-year supervised probation.

[807] Although the prosecuting Assistant United States Attorney could not recall discussing the release, the special agent testified that he read the release to the Assistant United States Attorney and he approved it.

Although advised by IRS counsel not to send out a second release, the IRS issued a revised press release. The second release had almost the same text as the first, but the incorrect information was eliminated. The IRS sent the second release to the same 21 media outlets that received the first release.

The taxpayer informed the company president of the first press release, who in turn notified the other board members. The company asked the taxpayer to resign from his executive and board member position. He was reassigned to another position at significantly diminished compensation.

In 1983, two years after the issuance of the press releases, the taxpayer sued the individual IRS employees for the wrongful disclosure of tax return information.[808] He also amended his suit to include a negligent supervision claim against the United States under the Federal Tort Claims Act ("FTCA"). The court severed the suit against the individuals from the FTCA claim.

After resolving motions to dismiss and for summary judgment, the FTCA claim was tried in 1990. The district court awarded the taxpayer $10 million under the FTCA. A panel of the Fifth Circuit initially affirmed this judgment. However, upon a rehearing by the entire court, the circuit court reversed and remanded the case with instructions to dismiss that claim. The taxpayer then went forward with his unauthorized disclosure claim. A trial on this claim was held in 1996.

The jury awarded the taxpayer $9 million ($6 million in actual damages and $3 million in punitive damages). In 1997, the court of appeals again reversed the district court, based on an erroneous jury instruction, and remanded the case for a new trial. Prior to the scheduled retrial, the case settled for $3.5 million.

Quinn v. United States

In 1994, the taxpayer in *Quinn v. United States*[809] ran unsuccessfully for political office. During his campaign, a local newspaper reporter asked the taxpayer whether he had filed his tax returns. Media sources subsequently reported that he had failed to file income tax returns for several years. As a result, the taxpayer sued the IRS and a security company, alleging that the IRS had wrongfully revealed the plaintiff's return information to the media.

An investigation by the Office of the Chief Inspector revealed that an IRS employee had

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[808] Under section 7431's predecessor, former section 7217, a taxpayer could sue a Federal employee directly. In 1982, the law was changed to substitute the United States as the liable party.

[809] 95-12535EFH (D. Mass.).

accessed the taxpayer's tax account using the Integrated Data Retrieval System ("IDRS").[810] The employee did not access the information in furtherance of the employee's official duties. The employee, a Tax Examining Assistant in the IRS Criminal Investigation Division, worked part time for a security investigative firm.

Circumstantial evidence suggested that the employee had revealed the taxpayer's return information to the media but no direct evidence of the disclosure existed. In answering the complaint, the government admitted that the employee had revealed to himself, without authorization, the taxpayer's return information. The matter was settled for $140,000, with each defendant paying $70,000.

Ward v. Swanson

In *Ward v. Swanson,*[811] the taxpayer sued the government for five allegedly wrongful disclosures of return information. The court, however, found that the taxpayer had proved only three. All three involved disclosures IRS employees made to the news media: (1) the disclosure of return information by the District Director and the Chief of Special Procedures during a live radio talk show; (2) the disclosure of a "fact sheet" regarding the taxpayer's dispute with the IRS to a television show, and (3) a revenue officer's disclosure of return information in a letter to the editor, which the newspaper published.

The letter to the editor included the following statements:

> If you and your son want to enjoy the privileges of living in this society you must also take some personal responsibility for being citizens of this society. One of those responsibilities is to pay your share of the bill . . . People like you and your son are the biggest problem our society faces . . . You are a classic deadbeat freeloader. If you don't like it here, go to the Netherlands, Ecuador or Britain.

The case arose out of a jeopardy assessment and seizure made by the IRS. Both the taxpayer and the IRS discussed the matter with the news media. The taxpayer had executed a consent which authorized the IRS to disclose the taxpayer's return information. Specifically, the consent allowed the IRS to disclose return information "to any person to the extent the Internal

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[810] IDRS is the primary system that IRS employees use to research and update taxpayer accounts. It gives IRS employees instantaneous visual access to certain taxpayer accounts. The systems' capabilities include: (1) researching account information, (2) entering transactions, such as adjustments and name or address changes, (3) entering collection information for storage or processing in the system, and (4) automatically generating notices to taxpayers and other output. General Accounting Office, *Tax Administration: Uses of and Problems With IRS' Non-Master File,* (GAO/GGD-99-42 April 1999) at 6 fn. 6.

[811] 973 F. Supp. 996 (D. Colo. 1997).

Revenue Service deems necessary in connection with any matter pertaining to this information" which is published, broadcast, discussed or otherwise disseminated in the public record. In making the radio and fact sheet disclosures, the IRS employees relied on this consent.

Section 6103(c) permits the IRS to disclose returns and return information to a person designated by the taxpayer.[812] The court noted that the quoted language of the consent did not specify a particular person to whom disclosure was authorized. Instead, the ultimate disclosure decision rested solely with the IRS, not the taxpayer. As a result, the court found that the consent did not meet the specificity requirements of section 6103(c).[813] In other words, the taxpayer had not designated a specific person in the consent, making the consent invalid. Because the IRS employees made the radio show and fact sheet disclosures based upon the invalid consent, the court found the disclosures to be unauthorized.

The court found that the revenue officer's letter to the editor contained return information obtained by the revenue officer in his capacity as a revenue officer. Finding no authority for such a disclosure, the court ruled that the revenue officer made an unauthorized disclosure in the letter.

For mental distress, emotional damages and humiliation, the court awarded the taxpayer $75,000 for the three unauthorized disclosures. In addition, the court found that the revenue officer was grossly negligent in writing the letter to the editor. As a result, the court awarded the taxpayer $250,000 in punitive damages. The court also awarded the taxpayer attorney fees.

The government filed a post trial motion to alter or amend the judgment. While that motion was pending, the government settled the case for $425,000.

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[812] Section 6103(c) provides:

> **(c) Disclosure of returns and return information to designee of the taxpayer.**
>
> The Secretary may, subject to such requirements and conditions as he may prescribe by regulations, disclosure the return of any taxpayer or return information with respect to such taxpayer, to such person or persons as the taxpayer may designate in a request for or consent to such disclosure, or to any other person at the taxpayer's request to the extent necessary to comply with a request for information or assistance made by the taxpayer to such other person. However, return information shall not be disclosed to such person or persons if the Secretary determines that such disclosure would seriously impair Federal tax administration.

[813] This ruling, unpublished, was made in response to the government's motion for summary judgment.

Unauthorized disclosures to other third parties

Bayview Farms v. IRS

Form 4506 (Request for Copy of Tax Forms), when properly completed and executed, permits taxpayers to request a copy of their return. It also permits the IRS to send returns to other persons designated by the taxpayer. In Bayview Farms v. IRS, an IRS Service Center Photocopy Unit released the returns of the taxpayer-plaintiffs in response to 43 Forms 4506, which were accompanied by court subpoenas.[814]

The IRS received the requests from an attorney who was not entitled to receive the returns released to him. The attorney did not represent any of the taxpayer-plaintiffs, but represented a client in litigation with one of the taxpayers. He did not provide any evidence that he or his client possessed a statutorily recognized material interest that would permit him to receive the information.[815]

Upon learning of the wrongful disclosures, the taxpayers wrote to the IRS Office of Chief Inspector to stop the ongoing release of the returns. The letter was forwarded through several offices before being assigned to an inspector in Washington, D.C. Meanwhile, the Service Center continued to release tax returns.

Seeking $10 million in punitive and actual damages, the taxpayers sued for the unauthorized disclosure of their returns. The government conceded that section 6103 did not authorize the Service Center disclosures. A bench trial was held on the issue of damages. The court concluded that the disclosures resulted from simple negligence, not gross negligence or willfulness. As a result, the court did not award punitive damages. Nor did the court award any actual damages. It did award $61,000 in statutory damages (roughly $1,000 per return improperly disclosed).

The taxpayers appealed the district court's denial of punitive damages. The Fourth Circuit affirmed that denial.

Lancon v. United States

In Lacon v. United States,[816] the taxpayer, Leonard Lancon, had been involved in litigation over a dispute involving a closely-held corporation (the "Corporation") with another

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[814] 149 F.3d 318 (4th Cir. 1998).

[815] Section 6103(e) permits the disclosure of returns and return information to specifically identified parties deemed to have a material interest in the information.

[816] 92-3499 (S.D. Tex.).

shareholder, Steven Ely. Irvin Levy was a party to the shareholder litigation. Marcus Faubion, an attorney, represented Mr. Levy in the shareholder litigation.

Mr. Lancon reported to the IRS Office of the Chief Inspector a conversation that Mr. Ely had with Mrs. Lancon regarding the Lancon's 1991 tax return. According to Mr. Lancon, Mr. Ely recited to Mrs. Lancon specific information, which he could have obtained only from the IRS. Mr. Lancon further alleged that Mr. Ely had admitted to obtaining the confidential return information of attorney Marcus Faubion.

Mr. Lancon said an employee of the Corporation, Billy Kynard, had on several occasions said that his wife could obtain information from the IRS. According to Mr. Lancon, Mr. Ely attempted to use the information to force a settlement of their civil litigation.

The Lancons sued the government, alleging that Margaret Kynard, an IRS employee, had revealed their 1991 tax return information to her husband, Corporation employee Billy Kynard. The Lancons further alleged that Billy Kynard then revealed this information to his employer, Mr. Ely.

Margaret Kynard was a Computer Analyst in the Examination Division. An investigation by the Office of the Chief Inspector revealed that Mrs. Kynard had accessed the Lancon's tax account and had printed transcripts of the return information. These accesses were not in furtherance of her official duties.

On answering the complaint, the government acknowledged that Mrs. Kynard had accessed the Lancon's tax account. The government further acknowledged that Margaret Kynard had disclosed the Lancons' return information to her husband.

The Lancons amended their complaint to add Messrs. Faubion and Levy as plaintiffs. The amended complaint alleged that Margaret Kynard disclosed Marcus Faubion's tax return and Form W-2 information to Mr. Ely. The IRS confirmed that Mrs. Kynard had accessed Mr. Faubion's tax account and that such accesses were not in connection with her official duties.

Prior to trial, the government settled the case. The Lancons received $100,000. Marcus Faubion received $2,000.

Mallas v. United States

Beginning in 1977, the taxpayers in *Mallas v. United States*[817] promoted a tax shelter program based on deductions from participation in coal mining and leasing enterprises. After a criminal investigation by the IRS, the taxpayers were indicted on 35 counts of fraud and tax evasion. In 1984, a jury convicted the two men on 14 of those counts. The IRS subsequently

[817] 993 F.2d 111 (4th Cir. 1993).

prepared and distributed to investors in the taxpayers' program "pro forma revenue agent reports" ("RARs"). The RARs described the scheme, the two promoters' convictions, and advised that the IRS disallowed the losses claimed through the program.

The Fourth Circuit reversed the taxpayers' convictions as based on an "unsubstantiated theory of tax law." Without modification or amendment to reflect the reversed convictions, the IRS continued to distribute the RARs. In 1988, the taxpayers and wholly-owned corporations sued in district court. They alleged violations of their constitutional rights, of the Privacy Act, and unauthorized disclosures of their tax return information under section 7431. The court dismissed the corporate claimants. It dismissed all claims but those for unauthorized disclosure of return information. It allowed the taxpayers to seek only statutory damages ($1,000 per disclosure), dismissing the claims for actual and punitive damages.

The district court then found the government liable for 73 unlawful disclosures regarding the two taxpayers and awarded them $73,000 each. On appeal, the Fourth Circuit affirmed in part and reversed in part, holding that the government was liable for unauthorized disclosure.

The circuit court rejected the government's arguments that: (1) it had not disclosed return information; (2) no "disclosure" had occurred; and (3) the protection for tax administrative proceedings in section 6103(h)(4)(C) protected its distribution of the RARs.

The circuit court held that the information distributed by the IRS was return information under the broad definition contained in section 6103(b)(2)(A). In particular, the circuit court noted that the RARs revealed the identities of the taxpayers "in the context of summarizing the 'determinations' of the IRS's tax fraud investigation, and the ensuing prosecutions."

Although the taxpayers' convictions were otherwise available to the public, the RARs described, with specificity, the financing scheme that underlay the convictions. The circuit court found this to be a disclosure of return information.

Additionally, the circuit court found that section 6103(h)(4)(C)'s exception for administrative proceedings did not protect the disclosures. Section 6103(h)(4)(C) permits the disclosure of returns or return information in a judicial or administrative proceeding pertaining to tax administration if the information to be disclosed: (1) directly relates to a transactional relationship between the taxpayer and a party to the proceeding; and (2) directly affects the resolution of an issue in the proceeding.[818]

Disagreeing with other courts, the Fourth Circuit stated that an audit is not an administrative proceeding. Furthermore, the circuit court held that the information disclosed did not "directly relate[...] to a transactional relationship" between a party to the proceeding and the taxpayers.

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[818] Sec. 6103(h)(4)(C).

The circuit court also upheld the district court's determination of the number of disclosures. It rejected the government's argument that a single RAR sent to two married investors represented only a single disclosure.

The circuit court remanded the case to the district court to decide the issue of punitive damages. On remand, the district court denied punitive damages.[819]

Jones v. United States

In *Jones v. United States*,[820] a special agent told a confidential informant that "a search warrant [is] going to be executed. Be cautious over the next several days, and if there [are] any problems that occur[...] or anything that [you] perceive[...] as a threat from anyone at [the taxpayers' corporation], . . . let [me] know."[821] The special agent made the disclosure out of a desire to protect the confidential informant.

This disclosure triggered a sequence of events that resulted in the end of the taxpayers' business. Based on an anonymous tip, a local news station covered the seizure and broadcast it on the evening news. Suppliers who had extended credit to the corporation required the taxpayers to pay for their products in cash on delivery. Customers canceled contracts. The corporation laid off workers.[822] The taxpayers' moved their operations from an office building to an apartment.[823] The unauthorized disclosure was made on January 31, 1990. By December 3, 1990, Jones Oil had ceased doing business. It closed its books on December 31, 1990.[824] The taxpayer's alleged that their social standing within the community fell and that their health was

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[819] *Mallas*, 75 AFTR2d 534 (M.D.N.C. 1994).

[820] 9 F. Supp.2d 1119 (D. Neb. 1998).

[821] *Jones v. United States*, 9 F. Supp.2d at 1119. The court found that this statement was return information because it was tantamount to notifying the informant that the tax returns of the taxpayer and the corporation were "subject to other investigation or processing" as defined by section 6103(b)(2). *See Jones v. United States*, 898 F. Supp. 1360, 1379-80 (D. Neb. 1995).

[822] The staff was reduced from as many as 60 workers to as few as three. *Jones*, 9 F. Supp.2d at 1127.

[823] *Jones*, 9 F. Supp.2d at 1127.

[824] *Jones*, 9 F. Supp.2d at 1127.

affected as well.[825] The husband became ill and his wife contemplated suicide.[826] The taxpayers sued the government for the unauthorized disclosure of return information.

First, a district court found that the special agent had made an unauthorized disclosure of return information.[827] Nonetheless, the court also found that the agent made the disclosure in good faith, so that the government was not liable for the disclosure.[828] The Eighth Circuit Court of Appeals disagreed, finding that the district court had erroneously place the burden of proving bad faith on the taxpayers.[829] On remand, the district court found that the government failed to prove that the agent made the disclosures based on a good faith but erroneous interpretation of section 6103.[830]

The court awarded the taxpayers $5.4 million, primarily for the collapse of their corporation.[831] For their emotional distress, the two taxpayers received $250,000 and $75,000, respectively.[832] Finding that the special agent did not willfully or with gross negligence reveal return information, the court declined to award punitive damages.

The taxpayers have appealed the punitive damages and attorney fee aspects of the district court's decision. The United States has appealed the district court's finding that the agent did not act in good faith and the court's valuation of the corporation. The appeals are pending before the Eighth Circuit.

Payne v. United States

Payne v. United States[833] originated in an IRS criminal investigation. The special agent contacted many of the taxpayer's clients, business associates, friends, relatives, and employees of

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[825] *Jones*, 9 F. Supp.2d at 1133-34.

[826] *Jones*, 9 F. Supp.2d at 1134.

[827] *Jones v. United States*, 898 F. Supp. 1360 (D. Neb. 1995).

[828] *Id*. at 1387-88.

[829] *Jones v. United States*, 97 F.3d 1121, 1124-25 (8th Cir. 1996).

[830] *Jones v. United States*, 954 F. Supp. 191, 195 (D. Neb. 1997).

[831] *Jones*, 9 F. Supp.2d at 1153.

[832] *Id*. at 1152.

[833] *Payne v. United States*, No. H-93-1738 slip op. at 24 (S.D. Tex. March 19, 1999).

State and local law enforcement agencies.[834] The special agent revealed many items of return information to these persons, including that the taxpayer was under criminal investigation.[835] He also questioned witnesses about whether the taxpayer used or sold drugs.[836] The summonses and letters issued by the special agent showed on their face that the taxpayer was under criminal investigation.[837]

The taxpayer's law practice experienced a significant drop in gross receipts because of these disclosures. Former clients testified that they would not use the taxpayer's services again or refer other clients to the taxpayer because of the outstanding criminal investigation.

Section 6103(k)(6) permits IRS personnel to make investigative disclosures of return information to third parties when disclosure is necessary to obtain information not otherwise available.[838] The court found that the agent did not properly determine that the information was not otherwise available before contacting the third parties. Thus, the court concluded the disclosures were unauthorized. The court also concluded that the special agent's unauthorized disclosures caused the decline in clients and client referrals. For damage to his law practice, the court awarded the taxpayer $1,536,680.[839]

The court found the special agent's conduct egregious.[840] Without first giving the taxpayer the opportunity to provide the information, the agent made third party contacts. The court also noted that the special agent had made devastating disclosures regarding the taxpayer's suspected involvement in illegal drugs to the taxpayer's clients, business associates, friends and relatives. "Such a statement or inquiry by an officer of the United States would definitely ruin a person's reputation."[841] An IRS agent has discretion to reveal return information to the extent

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[834] *Id.* at 18.

[835] *Id.* at 18.

[836] *Id.* at 5, 8, and 19. At trial, the agent could not identify who initially told him the taxpayer sold drugs or whether the revelation occurred in a formal or information interview. Id. at 19.

[837] *Id.* at 18.

[838] Sec. 6103(k)(6).

[839] *Payne,* slip op. at 24.

[840] *Id.* at 24.

[841] *Id.* at 25.

that the information is necessary and not otherwise reasonably available.[842] In the court's opinion, the special agent grossly abused that discretion. The agent failed to satisfactorily explain to the court his conclusion that Payne was insincere in his willingness to cooperate with him. He also admitted that his conduct violated the IRS manual and regulations. Thus, finding that the disclosures were done willfully or with gross negligence, the court awarded the taxpayer an additional $1,000 in punitive damages.[843]

On December 10, 1999, the district court awarded the plaintiff $105,361.00 in legal fees and costs. Final judgment for the plaintiff, in the amount of $1,643,041, was entered on December 13, 1999. The period for appeal to the Fifth Circuit has not yet expired.

Browsing (unauthorized inspection)

In *McNeil v. United States*,[844] the taxpayers' complaint alleged that a Taxpayer Service Representative ("TSR") made willful unauthorized disclosures of their tax returns and return information for various tax years. An investigation by the Office of the Chief Inspector confirmed that the TSR had accessed the taxpayers' tax account using the IDRS. The TSR did not access the information to accomplish his official duties.

The government admitted that the employee wrongfully inspected the taxpayer's return information and as a result, disclosed the plaintiff's return information. Prior to trial, the government settled the case for $30,000.

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[842] Sec. 6103(k)(6).

[843] *Payne*, slip op. at 25.

[844] 98-CV-2647 (N.D. Tex.).

PART FIVE: JOINT COMMITTEE STAFF RECOMMENDATIONS

The Joint Committee staff believes that the general and specific recommendations contained in this Part of the study will improve and rationalize the rules relating to confidentiality of taxpayer information. This Part addresses recommendations with respect to the specific issues raised in the legislative history of the IRS Reform Act. In addition, this Part contains recommendations developed by the Joint Committee staff as a consequence of the research for this study and in response to recommendations received by the Joint Committee staff during the course of the study.

In this Part, the Joint Committee staff makes recommendations that certain exceptions to the general rule of confidentiality contained in section 6103 should be repealed. The Joint Committee staff makes recommendations to clarify the extent of permissible disclosure of returns and return information under certain circumstances. The Joint Committee staff makes recommendations regarding the interactions of present-law disclosure rules and other applicable laws (such as the FOIA and the Privacy Act). This Part also discusses the issue of public disclosure of persons failing to file returns.

I. GENERAL RECOMMENDATIONS RELATING TO SECTION 6103

A. General Recommendations Relating to Exceptions to Section 6103

The staff of the Joint Committee recommends that new access to returns and return information should not be provided unless the requesting agency can establish a compelling need for the disclosure that clearly outweighs the privacy interests of the taxpayer.

The Joint Committee staff also recommends that the IRS continue to monitor disclosures under present law to ensure that the information provided is tailored to the needs of the recipient.

In collecting information for this study, the Joint Committee staff received a number of recommendations seeking to expand further the disclosure of returns and return information. Some of the disclosures related to tax administration purposes, while others were matters of administrative convenience for nontax agencies.

In assessing the need to expand the exceptions to section 6103, the Joint Committee staff believes that, in order to adequately protect taxpayer confidentiality, the requesting agency should be required to establish a compelling need for the disclosure. Such a compelling need generally would not exist unless the requesting agency establishes that the disclosure of returns and return information is the *best* means by which to satisfy that need.

In conducting the study, the Joint Committee staff also received information indicating

that, in some cases, there may be disclosure of returns and return information under present-law rules that is broader than necessary to meet the needs of the requesting agency. For example, the Joint Committee staff learned that some State tax authorities had requested information they could not use. As another example, return information is not as current as it needs to be to assist in the collection of child support and, thus, is not the best means to obtain information for such purposes. The Joint Committee staff believes that it is inconsistent with the objective of protecting taxpayer confidentiality to provide information to a recipient that cannot use the information or does not need the information for the purpose for which it was disclosed. The Joint Committee staff recommends that the IRS continue to assess an authorized recipient's need for the return information and tailor access accordingly.

B. Coordination of Section 6103 with Other Disclosure Provisions

The staff of the Joint Committee recommends that all provisions authorizing access to returns and return information should be contained in the Code.

Under present law, section 6103 provides that the Code is the only law under which returns and return information can be disclosed. Nevertheless, some attempts have been made to require disclosure outside of the Code.[845] Without Code authorization, the IRS cannot comply with the directive, which causes frustration both for the IRS and the agency seeking the information. Attempts to provide for disclosure outside the Code also can lead to confusion as to the law, because the relevant law would be contained in more than one title of the United States Code. The Joint Committee staff recommends that the Code should remain the sole means by which disclosure of returns and return information is authorized.

C. Matters Made Part of the Public Record

The staff of the Joint Committee recommends that returns and return information properly made a part of public records, i.e., court records and lien filings, pursuant to Federal tax administration activities should not be protected by section 6103.

Under present law, the courts are divided as to the applicability of section 6103 to returns and return information properly made a part of the public record. Inconsistent holdings among

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[845] *See, e.g.*, the discussion in Part Two, II.H., of this study regarding the Higher Education Act Amendments. *See also* Treasury Directive 55-01 section 10(a), which contemplates, among other things, disclosing the status of ongoing investigations to witnesses and victims. The Assistant Commissioner (Criminal Investigation) is identified specifically as one of the officials responsible for implementing this directive. The status of an ongoing criminal tax investigation and the fact of such investigation are confidential return information within the meaning of section 6103(b)(2). Section 6103 contains no exception that would authorize such return information disclosures to a witness or victim.

the various circuit courts results in uneven application of the law. The Joint Committee staff believes that a consistent approach to the treatment of returns and return information within the public record will reduce uncertainty under present-law section 6103 and eliminate unnecessary litigation.

The Joint Committee staff believes that the principles of taxpayer confidentiality should not extend to returns and return information that have been properly made a part of the public record as a result of Federal tax administration, i.e., the filing of a notice of Federal tax lien or court proceedings. Because such returns and return information are already a part of the public record and available to anyone who chooses to see them, the Joint Committee staff does not believe that further disclosure undermines the general principle of taxpayer confidentiality. Thus, the Joint Committee staff believes that the prohibition on disclosure under section 6103 should not apply to returns and return information properly within the public record as the result of tax administration.

In order for returns and return information to be considered to be properly within the public record, the court filing or lien disclosure that makes the return or return information part of the public record must be authorized. For example, the IRS could not erroneously file a notice of tax lien and then claim public record for its subsequent disclosure of that same information.[846]

D. Access to Working Law of the IRS

The staff of the Joint Committee recommends that all final written legal interpretations issued to IRS employees should be made publicly available to the extent that such interpretations: (1) affect a member of the public; and (2) are issued by the IRS or the IRS Chief Counsel.

The Joint Committee staff recommends that the IRS (including the Office of IRS Chief Counsel[847]) should be required to disclose all written legal interpretations issued to IRS and

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[846] The courts are divided on whether an erroneous levy or lien is actionable as both an unauthorized disclosure of return information (section 7431) and an unauthorized collection action (section 7433). *Compare Venen v. United States*, 38 F.3d 100 (3d Cir. 1994); *Wilkerson v. United States*, 67 F.3d 112 (5th Cir. 1995); *Huff v. United States*, 10 F.3d 1440 (9th Cir. 1993); and *Farr v. United States*, 990 F.2d 451 (9th Cir. 1993) with *Rorex v. Traynor*, 771 F.2d 383 (8th Cir. 1985), and *Maisano v. United States*, 908 F.2d 408 (9th Cir. 1990). *See also* Robert P. Butts, *IRS Liability for Wrongful Disclosures Made in the Process of Tax Collection: Should the Validity of the Underlying Collection Activity Be Considered?* 102 Dick. L. Rev. 67 (1997)("the tolerance level for wrongful disclosures during the actual collection should be lower than that for IRS mistakes in disclosing taxpayer information during the actual investigative stages").

[847] This would include the operating division counsels created under the current IRS

(continued...)

Treasury Department employees affecting a member of the public.

The Joint Committee staff believes that the working law of the IRS should be publicly available. Such interpretations should not be limited to issuances from certain IRS offices (such as the IRS National Office or an IRS district office) but should also include issuances from other offices, such as from District Counsel, which are currently not covered by the definition of Chief Counsel advice. The Joint Committee staff also believes that when one division of the IRS Office of the Chief Counsel requests legal advice on a subject matter within the jurisdiction of another Chief Counsel division, that intra-office advice should be disclosed once the final advice is given if it was incorporated in the outgoing advice. The Joint Committee staff recognizes the necessity of free flow of information and opinions in the decision-making process. However, once a decision is made, it affects a member of the public. The public is entitled to know of the rules being applied in its dealings with the IRS and the underlying rationale for the course of action.

Guidance should be disclosed if it represents the working law of the IRS (informally or formally adopted) in its dealings with taxpayers. For disclosure purposes, it should not matter whether the advice is flowing from the IRS National Office to the IRS district offices, between IRS National Office functions, from District Counsel to IRS district personnel, or from the IRS to the Treasury Department. Similarly, it should not matter what a particular advice vehicle is called. In other words, when guidance is relied upon, could be reasonably expected to be relied upon, or is issued by the IRS for use by any IRS and Treasury Department employee for purposes of their interactions with taxpayers, it should be disclosed. The disclosure should be affirmative and the IRS should not wait for a FOIA request to make the information public. Without such disclosure, advice that is wholly within the IRS might never come to light because the public would be unaware of its existence.

It is not intended that drafts should be subject to disclosure. Nor is it intended that advice given in the course of the decision-making process should be made available prior to the conclusion of that process. However, advice that is provided or written with a belief that it will be used by the recipient (or others with access to such item) in his or her dealings with taxpayers should be disclosed. In addition, disclosure of advice cannot be avoided merely because the advise is labeled as preliminary.

For example, if the Assistant Chief Counsel (Income Tax and Accounting) requests advice from the Assistant Chief Counsel (General Litigation) about a matter within General Litigation's responsibility, it is not anticipated that Income Tax and Accounting would ignore the advice given by General Litigation in formulating its decision. To the contrary, it is anticipated that such advice would be incorporated in the final product. As a result, both the final product issued by Income Tax and Accounting and the advice given by General Litigation should be

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[847](...continued)
reorganization.

subject to disclosure at the time the final product is issued.

The Joint Committee staff recognizes that this recommendation represents a significant change to the public's access to internal communications. Nonetheless, the Joint Committee staff believes the public's interest in ensuring the uniform application and interpretation of the law outweighs administrative issues and privacy concerns of particular taxpayers that may arise from such disclosures. In order to address privacy concerns, the Joint Committee staff recommends that taxpayers should be allowed to participate in the redaction process in the manner set forth under present-law section 6110.

E. Application of the FOIA to Returns and Return Information

The staff of the Joint Committee recommends that it should be clarified that section 6103 preempts the FOIA as to returns and return information. Thus, section 6103 would be the sole means by which returns and return information can be requested. The staff of the Joint Committee further recommends that the FOIA administrative provisions and opportunity for de novo judicial review should be incorporated into section 6103.

While the courts have tried to harmonize section 6103 and the FOIA through FOIA exemption 3, it is an imperfect fit. The purpose of the FOIA is to provide information about agency operations. In contrast, the purpose of section 6103 is to maintain the confidentiality of returns and return information of a taxpayer. The FOIA provides information to the general public without a showing of need. The intended use of the information or the requester's identity generally has no bearing on who has access to agency records under the FOIA. On the other hand, section 6103 only permits disclosure of returns and return information if the person seeking the information meets certain criteria. Thus under section 6103, examining the identity of the person requesting returns or return information is a prerequisite to disclosure.

The core purpose of the FOIA is to contribute significantly to public understanding of the operations or activities of the government.[848] Taxpayer representatives often use the FOIA as an alternate means to obtain information the IRS has collected in building its case against their clients.[849] Very little, if any, information about IRS operations, however, is gleaned from the

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[848] *United States Department of Defense v. Federal Labor Relations Authority*, 510 U.S. 487 (1994).

[849] When a lawsuit is commenced in court, a taxpayer may use discovery mechanisms, such as interrogatories, document production requests, and depositions, as provided by the Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure, or Tax Court rules. These rules, however, do not apply prior to the commencement of a lawsuit, i.e., to the administrative process before the IRS.

release of a specific taxpayer's return or return information in response to a FOIA request.[850] The disclosure of returns and return information of specific taxpayers is not consistent with the main purpose of the FOIA.

In keeping with its general recommendation that all disclosure authority be contained in the Code, the staff of the Joint Committee recommends that it should be clarified that the FOIA does not apply to returns and return information. The substantive rules for disclosure are already contained in section 6103. In addition, section 6103(p)(2) provides for copies of returns and return information to be furnished, upon written request, to any person who is authorized to receive it under section 6103.[851] Furthermore, the need for persons to make FOIA requests should be diminished by the Joint Committee staff recommendation to broaden the scope of section 6110.

The staff of the Joint Committee recognizes that the FOIA has several important administrative provisions that are not contained in section 6103. These include response time limitations and administrative appeal of the IRS decision to withhold documents. The FOIA also affords a requester the opportunity for *de novo* judicial review by a U.S. District Court. The staff of the Joint Committee recommends that these provisions should be incorporated into section 6103. This will provide persons seeking disclosure of returns and return information with the same administrative protections and remedies currently available to them under FOIA.

F. Tax Treaties and Tax Information Exchange Agreements

For tax information that is not return information under section 6103, the staff of the Joint Committee recommends that it should be clarified that tax treaties qualify under exemption 3 of the FOIA and under section 6110(c)(3). Similarly, the staff of the Joint Committee recommends that it should be clarified that tax information exchange agreements, as authorized by the Code, qualify under exemption 3 of the FOIA and under section 6110(c)(3). Thus, information exchanged pursuant to tax treaties and tax information exchange agreements would be protected from disclosure under the FOIA and section 6110 to the extent provided in such agreements.

Under present law, return information protected from disclosure by section 6103(a) includes any information on income or deductions or other data received by the Secretary with

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[850] For example, under the FOIA, the IRS released the returns of computer programmers to a company that disputed whether the programmers had worked for the company as employees or independent contractors. *See* George Guttman, *Confidentiality Collides with Defense in Employment Tax Case*, 67 Tax Notes 18 (April 3, 1995); and David Cay Johnston, *Privacy Concerning Taxes? Maybe Not in Ohio*, New York Times at D4 (March 14, 1995).

[851] Sec. 6103(p)(2).

respect to the determination of the tax liability of any person.[852] Return information also includes any written determination not disclosed under section 6110.[853] Thus, return information exchanged under tax treaties and tax information exchange agreements is not subject to disclosure. However, the law is less clear regarding information or other data exchanged under tax treaties and tax information exchange agreements which is not return information.

In general, tax treaties and tax information exchange agreements contain secrecy clauses. A tax treaty secrecy clause requires the country requesting information under the treaty to treat any information received as secret in the same manner as information obtained under its domestic laws. Usually a treaty secrecy clause also provides that disclosure is not permitted other than to persons or authorities involved in the administration, assessment, collection or enforcement of taxes to which the treaty applies.[854]

Exemption 3 of the FOIA exempts from disclosure matters that are:

> (3) specifically exempted from disclosure by statute . . ., provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

Section 6110 (c) requires the IRS to withhold from a written determination information "specifically exempted from disclosure by any statute [other than the Code] which is applicable to the Internal Revenue Service."[855]

The Supremacy Clause of the United States Constitution provides that United States treaties are "the supreme law of the land":

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the land; and Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any

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[852] Sec. 6103(b)(2)(A).

[853] Sec. 6103(b)(2)(B).

[854] The exchange of information pursuant to tax treaties is discussed at Part Two, III, of this study.

[855] Sec. 6110(c)(3).

State to the Contrary notwithstanding.[856]

Thus, the Constitution places treaties on equal footing with statutes. Recent litigation raised the issue as to whether tax treaties qualify as statutes for purposes of the FOIA.[857] To the extent there exists any ambiguity regarding whether tax treaties qualify as statutes for the purposes of the FOIA, the staff of the Joint Committee recommends that it should be clarified that such treaties qualify as exemption 3 statutes. The secrecy clauses of tax treaties provide a criteria for withholding information exchanged pursuant to the treaty as required by exemption 3. Further, when the government has obligated itself in good faith not to disclose the information it receives from a treaty partner, it must be able to honor such obligation.

Section 6110(c)(3) contains a provision similar to FOIA exemption 3. The staff of the Joint Committee recommends that it should be clarified that tax treaties qualify as statutes for purposes of this provision.

Sections 274(h)(6)(C) and 927(e)(3) specifically provide the Secretary of the Treasury the authority to enter into tax information exchange agreements. This eliminated the need for Senate ratification, which is required for a tax treaty. In addition, all tax information exchange agreements are required to include specific non-disclosure provisions which provide that

> information received by either country will be disclosed only to persons or authorities (including courts and administrative bodies) involved in the administration or oversight of, or in the determination of appeals in respect of, taxes of the United States, or the beneficiary country and will be used by such persons or authorities only for such purposes.[858]

Thus, like tax treaties, tax information exchange agreements provide criteria for withholding the information exchanged. Although not a treaty, these agreements have a status equivalent to statutory or treaty law.[859] Thus, the staff of the Joint Committee recommends that it should be clarified that tax information exchange agreements qualify under exemption 3 of the FOIA and under section 6110(c)(3).

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[856] U.S. Const. Art. VI. cl. 2.

[857] *Tax Analysts v. IRS*, No. 1:94-cv-923 (GK) (D.D.C.) (involving, *inter alia*, the disclosure of Field Service Advice issued by the IRS Office of the Associate Chief Counsel (International)). This issue is still pending before the district court.

[858] Sec. 274(h)(6)(C)(i).

[859] *See Banquero v. United States*, 93-2 USTC 50,411 at 89,237 (S.D. Tex. 1993), *aff'd*, 18 F.3d 1311 (5th Cir. 1994) (holding that the Mexico tax information exchange agreement "is the law of the land and is constitutional").

While the Joint Committee staff recommendation only specifically applies to tax treaties and tax information exchange agreements, the Joint Committee staff anticipates that other similar agreements exist which should also receive protection from disclosure.[860] The Joint Committee staff requests that the Secretary submit a list and description which should be considered for protection from disclosure.

G. Application of the Privacy Act to Returns and Return Information

The staff of the Joint Committee recommends that it should be clarified that sections 6103 and 7431 preempt the Privacy Act with respect to the disclosure of returns and return information and the remedy for unauthorized disclosure.

There is uncertainty under present law regarding the application of the Privacy Act and sections 6103 and 7431 with regard to access to returns and return information and damage remedies for unauthorized disclosure of returns and return information.[861] Some courts have held that section 6103 preempts the access provisions of Privacy Act. [862] Other courts have applied the Privacy Act to return disclosures, often without addressing whether the later-enacted section 6103 preempts the Privacy Act, thereby allowing taxpayers to sue for damages resulting from the unauthorized disclosure of returns and return information under both the Privacy Act and section 7431.[863] Because the law is not clear on these issues, the law is applied differently in different jurisdictions. Providing statutory clarification would provide for consistent application of the law and eliminate the need for further litigation regarding these issues.

The Joint Committee staff recommends that it should be clarified that section 6103 preempts the Privacy Act as it relates to returns and return information. Applying the rules of section 6103 rather than the Privacy Act to the disclosure of returns and return information will protect the privacy rights sought to be protected by the Privacy Act and will provide clarity in an uncertain area of the law. Both laws have similar purposes, to protect privacy rights. While the

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[860] For example, tax implementation agreements entered into with U.S. possessions as well as the Convention on Mutual Administrative Assistance in Tax Matters are two agreements which likely should be protected from disclosure.

[861] For a detailed discussion of this issue, see Part Two, VII, above.

[862] *See, e.g., Lake v. Rubin*, 162 F.3d 113 (D.C. Cir. 1999); and *Cheek v. IRS*, 703 F.2d 271 (7th Cir. 1983)(holding that section 6103, although not explicitly amending the Privacy Act, was intended to override any inconsistent provisions of prior statutes, including the Privacy Act).

[863] *See e.g., Taylor v. United States*, 106 F.3d 833 (8th Cir. 1997); *Long v. IRS*, 891 F.2d 222 (9th Cir. 1989); *Scrimgeour v. IRS*, 149 F.3d 318 (4th Cir. 1998); and *Sinicki v. United States Department of Treasury*, 1998 U.S. Dist. LEXIS 2015 (S.D.N.Y. February 24, 1998).

Privacy Act has a general set of rules applicable to all types of government records, section 6103 has a specific regime tailored to the disclosure of returns and return information. Thus, the later-enacted section 6103 displaced the need for the application of the more general rules of the Privacy Act to such information.

The Joint Committee staff also recommends that it should be clarified that section 7431 preempts the Privacy Act as it relates to the unauthorized disclosure of returns and return information. Taxpayers can enforce the privacy rights embodied in the provisions of section 6103 through the civil remedy provision of section 7431. This approach is consistent with the legislative history to section 7431, which indicates that the Congress believed it was creating the only remedy for unauthorized disclosure of returns and return information and that the Privacy Act did not apply to such disclosure:

> The committee also decided to *establish* a civil remedy for any taxpayer damaged by an unlawful disclosure of returns and return information. The cause of action would extend to any disclosure of return or return information which is made in violation of section 6103.[864]

Further, the Privacy Act requires that the Privacy Act violation be willful, while section 6103 requires a lower threshold, imposing liability for a negligent unauthorized disclosure, as well as a knowing unauthorized disclosure.[865] Thus, taxpayers are afforded greater protection under section 7431.

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[864] S. Rep. No. 94-938 at 348 (emphasis added).

[865] *Compare* 5 U.S.C. sec. 552a(g)(1)(D) and (g)(4) with sec. 7431(a).

II. REFORMS OF CURRENT EXCEPTIONS UNDER SECTION 6103

A. Disclosure of Collection Activities with Respect to a Joint Return

The staff of the Joint Committee recommends amending section 6103(e)(8) to permit the IRS to honor oral requests from a former spouse (or an authorized representative of the former spouse) regarding joint return collection activities.

Section 6103(e) concerns disclosures to persons with a material interest. Section 6103(e)(7) permits the IRS to disclose return information to the same persons who may have access to a return under the other provisions of section 6103(e). Pursuant to this section 6103(e)(7) and section 6103(e)(1)(B), either spouse may obtain return information regarding a joint return. This includes collection information. Requests for information pursuant to this section do not have to be in writing.

In response to concerns that former spouses were not able to obtain information regarding collection activities relating to a joint return, the Taxpayer Bill of Rights 2 added section 6103(e)(8).[866] When a deficiency is assessed with respect to a joint return, upon written request, section 6103(e)(8) permits the IRS to disclose: (1) whether the IRS has attempted to collect such deficiency from the other individual; (2) the general nature of such collection activities; and (3) the amount collected.[867] This provision applies if individuals who filed the joint return are no longer married or no longer reside in the same household. Requests under this section must be in writing.

To eliminate the discrepancy between these provisions, the Joint Committee staff recommends that the written request requirement under section 6103(e)(8) should be eliminated for disclosure of collection activities with respect to a joint return.

B. Clarification of the Scope of Section 6103(h)(1): Investigation of Taxpayer Representatives

The staff of the Joint Committee recommends clarifying that an IRS employee's official duties do not include determining whether a taxpayer's representative is current in his or her tax filing obligations merely because the taxpayer is under audit.

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[866] "The IRS doe not routinely disclose collection information to a former spouse that relates to tax liabilities attributable to a joint return that was filed when married." Joint Committee on Taxation, *General Explanation of Tax Legislation Enacted in the 104th Congress* (JCS-12-6), December 18, 1996 at 29.

[867] Sec. 6103(e)(8).

Under section 6103(h)(1), returns and return information are, without written request, open to inspection by or disclosure to officers and employees of the Department of the Treasury, including IRS employees, whose official duties require such inspection or disclosure for tax administration purposes. The IRS Director of Practice (and employees) are IRS employees for purposes of section 6103(h)(1). The Director of Practice has the responsibility to:

(1) act upon applications for enrollment to practice before the IRS;
(2) act upon appeals from decisions denying applications for enrollment to practice before the Bureau of Alcohol, Tobacco and Firearms ("BATF"); and
(3) institute disciplinary proceedings when taxpayer representatives (such as attorneys, accountants, and enrolled agents) have engaged in disreputable conduct or are believed to have violated any laws or regulations governing practice before the IRS or the BATF.[868]

Under the Internal Revenue Manual, activities relating to claimant representation before the IRS constitute tax administration.[869] Thus, disclosures needed to accomplish these activities are covered by section 6103(h)(1).

The Office of the Assistant Chief Counsel (Disclosure Litigation) recently issued an opinion stating that it was appropriate for a local IRS office to examine tax records to determine whether taxpayer representatives who submit Form 2848 (Power of Attorney) are current in their tax obligations.[870] The opinion concluded that section 6103(h)(1) permits local IRS employees to access IDRS to determine whether a taxpayer's representative is current in his or her tax obligations:

> Here, the local IRS Office will be accessing IDRS to ascertain whether practitioners have possibly engaged in disreputable conduct under 31 C.F.R. section 10.51(d), including the willful failure to file a Federal tax return. Once the local office determines that a practitioner may not be current in his/her income tax obligations, a referral may be made to the Office of the Director of Practice for investigation. It is our understanding that the mere nonfiling of tax returns comes within the definition of willful failure to file, and that such failure could result in the practitioner's suspension or disbarment by the Office of the Director of Practice. Thus, the accessing of IDRS by the Service to determine if a practitioner

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[868] Internal Revenue Manual, Disclosure of Official Information Handbook, sec. 1.3.22.5.1 (August 19, 1998).

[869] *Id.* at 1.3.22.5.1(3).

[870] *Disclosure Provisions Don't Bar IRS Access to Integrated Data Retrieval System*, Tax Notes Today, 1999 TNT 200-54 (October 18, 1999).

has violated 31 C.F.R. section 10.5(d), is authorized under section 6103(h)(1). [footnote omitted]. [871]

The Joint Committee staff recommends clarifying that the official duties of an IRS employee do not include determining whether a taxpayer's representative is current in his or her tax filing obligations merely because the employee is participating in an audit of the taxpayer. The official duties of the IRS employee concern the tax affairs of the taxpayer, not the taxpayer's representative. The taxpayer is under audit, not the taxpayer's representative. Whether the representative has filed his or her returns ordinarily has no bearing on the IRS's determination of the liability of the taxpayer. Therefore, the staff of the Joint Committee believes that accessing IDRS in order to make such a referral should be outside the scope of section 6103(h)(1) and should be so clarified. This recommendation is not intended to affect the scope of the official duties of the employees of the Director of Practice.

An IRS employee should make a referral to the Director of Practice, if the employee has reason to believe the taxpayer's representative has engaged in inappropriate behavior. However, an IRS employee should not affirmatively seek out wrongdoing by the taxpayer's representative in order to make a referral to the Director of Practice.

C. Disclosure of Criminal Investigation

The staff of the Joint Committee recommends that IRS special agents should be required to identify themselves and the nature of their investigation when interviewing third parties.

IRS special agents are investigating agents of the IRS Criminal Investigation Division ("CID") and investigate tax crimes. In *Gandy v. United States,* the court held that a special agent makes an unauthorized disclosure of return information when the agent identifies himself or herself as such during interviews of third parties.[872]

In *Gandy,* at the beginning of an interview of a third party witness, the IRS special agents introduced themselves by displaying their badges and credentials to the witness. They then stated the following (in similar or substantially similar form):

"My name is , and I am a Special Agent with the Criminal Investigation Division of the Internal Revenue Service, and we are conducting an investigation of [the taxpayer's name]; or

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[871] *Id*. at ¶ 6.

[872] *Gandy v. United States*, 1999 U.S. Dist. LEXIS 1029, 99-1 USTC ¶ 50,237 (E.D. Tex. January 15, 1999).

> My name is , and I am a Special Agent with the Criminal Investigation Division of the Internal Revenue Service, and we are conducting a criminal investigation of [the taxpayer's name]."

When the special agents conducted telephone interviews, or served summonses on third parties, they introduced themselves in a similar manner. The court found that regardless of whether the special agents noted that the investigation was "criminal," they revealed that the IRS was conducting a criminal investigation of the taxpayer by identifying themselves as special agents with the CID. The fact of criminal investigation is return information protected by section 6103. Thus, it can only be disclosed as permitted by an exception to section 6103's general rule of confidentiality.

Section 6103(k)(6) permits IRS employees to disclose return information for investigative purposes as prescribed by regulation. Treasury regulations provide that, in connection with the performance of official duties relating to any criminal investigation, an IRS employee is authorized to disclose taxpayer identity information (as defined in section 6103(b)(2)), the fact that the inquiry pertains to the performance of official duties, and the nature of the official duties in order to obtain necessary information relating to the performance of official duties.[873]

The Handbook for Special Agents contains a section on investigative disclosures. Section 348.3, entitled "Disclosures for Investigative Purposes" states:

> Special agents are specifically authorized by IRC 6103(k)(6) to disclose return information to the extent necessary to gather data which may be relevant to a tax investigation. Situations in which special agents may have to make such disclosures in order to perform their duties arise on a daily basis. For example, this occurs whenever they contact third parties believed to have information pertinent to a tax investigation.

IRS continuing professional education ("CPE") materials also indicate that special agents may disclose the name of the taxpayer under investigation and the fact of investigation. Those materials give the following example:

> You contact a taxpayer's customer regarding the purchases the customer made from the taxpayer during the year under investigation. You usually can obtain the information by disclosing the taxpayer identity and the fact of the investigation.[874]

The special agents in *Gandy,* believed that it was necessary to disclose to third party witnesses the fact that the taxpayer was under investigation to obtain the desired information.

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[873] Treasury reg. sec. 301.6103(k)(6)-1.

[874] *Gandy v. United States,*1999 U.S. Dist. LEXIS 1029, at *7.

Focusing on section 6103(k)(6) which requires that the disclosure be necessary to obtain the information, the court found that section 6103 did not authorize the disclosure of the nature of the investigation. The court found that the fact that the taxpayer was under criminal investigation was not necessary to obtain information from a witness. This ruling precludes special agents from identifying themselves to persons other than the taxpayer as employees of the CID and from stating that they are conducting a criminal investigation of the taxpayer.

Despite finding that the special agents had made unauthorized disclosures, the court did not hold the government liable for those disclosures. Instead, the court found that the special agents made the disclosures in good faith. Under section 7431, no liability attaches for disclosures made based on a good faith, but erroneous, interpretation of section 6103.[875] In determining whether the agents acted in good faith the court articulated standard:

> Whether a reasonable IRS agent would be acquainted with the statute, and his own agency's interpretation of the statute as reflected in its regulations and manuals. *Huckaby v. United States Department of Treasury, Internal Revenue Service,* 794 F.2d 1041, 1048 (5th Cir. 1986).

The court found that the CPE materials, mentioned above, suggested that disclosing the taxpayer's name and the fact of investigation is always necessary. The Treasury regulation and IRS handbook were consistent with this interpretation. The court noted that it is "difficult to imagine a situation in which a special agent could obtain information from a third party witness without at least identifying himself to the witness, as well as identifying the taxpayer about whom the agent seeks information."[876] Thus, finding that the special agents were trained to believe that section 6103(k)(6) permitted this disclosure, the court found that the agents made the disclosures based on a good faith, but erroneous, interpretation of section 6103.

As a result of this court decision, the IRS has instructed its special agents not to identify themselves as special agents within the judicial Eastern District of Texas. The special agents in the remainder of the country still do so. However, if agents from another part of the country need to contact a witness in that district of Texas, they cannot identify themselves as special agents.

The Joint Committee staff believes a third party witness should know that the IRS agent interviewing them is an employee of the CID. By not identifying them self as such, the IRS agent could potentially mislead the witness about the nature of the investigation. In addition, the witness needs to know that he or she is speaking with a criminal investigator, if only to evaluate how to protect his or her own interests.

The Joint Committee staff recommends that IRS special agents should be required to

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[875] Sec. 7431(b)(1).

[876] *Gandy*, 1999 U.S. Dist. LEXIS 1029, at *12.

identify themselves as such and state the nature of their investigation to third parties. Special agents should be especially mindful that disclosure of the taxpayer's identity must be necessary to obtain the information sought as required by section 6103(k)(6). Special agents should pursue reasonable alternative avenues of questioning to avoid identifying the taxpayer whenever possible.

D. Disclosure in Judicial and Administrative Tax Proceedings

The staff of the Joint Committee recommends that when nonparty taxpayer returns and return information are to be disclosed pursuant to section 6103(h)(4)(A) - (C), the taxpayer should be given notice prior to the disclosure. The staff of the Joint Committee further recommends that only the portions of a nonparty return or return information that directly relate to the resolution of an issue in the proceeding should be disclosed in such proceeding. Finally, the staff of the Joint Committee recommends that the nonparty taxpayer should be given an opportunity to participate in the redaction process.

Under section 6103(h)(4), a return or return information may be disclosed in a Federal or State judicial or administrative proceeding pertaining to tax administration under certain circumstances. Under section 6103(h)(4)(A), such information may be disclosed if the taxpayer is a party to the proceeding or if the proceeding arose out of, or in connection with, determining the taxpayer's liability with respect to any tax. Under section 6103(h)(4)(B), such information may be disclosed if the treatment of an item reflected on a return is directly related to the resolution of an issue in the proceeding. Under section 6103(h)(4)(C), such information may be disclosed if the return or return information directly relates to a transactional relationship between a person who is a party to the proceeding and the taxpayer which directly affects the resolution of an issue in the proceeding.

Recently, the District Court for the District of Puerto Rico ordered the IRS to produce tax returns of unrelated third parties in a tax case under section 6103(h)(4).[877] The plaintiffs had sought to change their taxable year to maximize the benefits accorded by section 936 following the amendment of that provision in 1993. The plaintiffs argued that several similarly situated corporations were successful in their efforts to change taxable years and the IRS had improperly denied them the favorable treatment accorded the other taxpayers.[878] The IRS argued that the

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[877] *Bristol-Myers Barceloneta, Inc., et al. v. United States of America*, Civil No.97-2567CCC (D. P.R. May 14, 1999).

[878] The plaintiffs relied on *IBM Corp. v. United States*, 343 F.2d 914 (Ct. Cl. 1965). After the IRS granted Remington Rand, a direct IBM competitor, an excise tax exemption for its Univac computers, IBM applied for a similar ruling for its competing computer. Several years

(continued...)

third party returns could not be disclosed under section 6103.

Following the court's order requiring production, the IRS notified the affected third party taxpayers. The court denied the third party taxpayers' motion to participate *amici curiae*, as well as the government's motion for the court to reconsider its order. According to the Justice Department's Tax Division, only the pertinent portions of the third party taxpayer returns were disclosed as a result of the court's order. It is the Joint Committee staff's further understanding that several of the third party taxpayers reviewed the material to be released and were satisfied with the redactions.

The Joint Committee staff recommends that when nonparty returns and return information are to be disclosed under section 6103(h)(4)(A) through (C), the taxpayer should be given notice prior to the disclosure. The Joint Committee staff further recommends that only the portions of a nonparty return or return information that directly relate to the resolution of an issue in the proceeding should be disclosed in such proceeding. Finally, the Joint Committee staff recommends that the nonparty taxpayer should be given an opportunity to participate in the redaction process. Such modifications to section 6103(h)(4) would strike a proper balance between taxpayer privacy and the need of other taxpayers for information to resolve disputes with the IRS.

E. Investigative Disclosure Authority

The staff of the Joint Committee recommends that section 6103(k)(6), regarding investigative disclosure authority, should be clarified to include personnel of the Office of the Treasury Inspector General for Tax Administration.[879]

Section 6103(k)(6) authorizes an "internal revenue officer or employee," to make a disclosure of return information when such disclosure is necessary to obtain information for

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[878](...continued)
later, the IRS denied IBM's request, at the same time revoking Remington's exemption. Invoking section 7805(b), the court held that the IRS had abused its discretion by taxing IBM but not Remington in the years prior to the revocation of Remington's exemption. 343 F.2d at 923. "Implicit, too, in the Congressional award of discretion to the [IRS], through Section 7805(b), is the power as well as the obligation to consider the totality of the circumstances surrounding the handing down of a ruling -- including the comparative or differential effect on the other taxpayers in the same class. The Commissioner cannot tax one and not tax another without some rational basis for the difference." 343 F.2d at 920.

[879] A similar provision was included in the technical corrections title of the House-passed version of H.R. 2488, sec. 1602, 106th Cong. 1st Sess. (1999).

purposes of, among other things, the enforcement of provisions of the Code.[880] When the IRS Office of the Chief Inspector was replaced by the TIGTA in the IRS Reform Act, most of the Chief Inspector's investigative and tax administration responsibilities were assigned to the TIGTA. The provision authorizing investigative disclosures, section 6103(k)(6), refers only to "internal revenue" personnel. This should be clarified so the reference includes TIGTA personnel, who are employed by the Department of the Treasury, rather than the IRS.

F. Information Related to Offers in Compromise

The staff of the Joint Committee recommends that the IRS should not disclose the taxpayer identification number and street address of taxpayers who are parties to accepted offers in compromise.

Section 6103 permits the IRS to disclose return information to members of the general public to permit inspection of accepted offers in compromise. According to the IRS, it makes summaries of the accepted offers in compromise, Form 7249 - Offer Acceptance Report, available for public inspection in the IRS district offices. Currently, this form contains the taxpayer identification number of the taxpayer, e.g., the social security number in the case of an individual taxpayer, along with the taxpayer's name and full address. The Joint Committee staff believes that the disclosure of a taxpayer's taxpayer identification number and street address is unnecessary and an unwarranted invasion of privacy, and provides an opportunity for identity fraud and abuse.

G. Refund Offset Disclosures

The staff of the Joint Committee recommends the repeal of section 6103(m)(2), relating to the Federal debt collection refund offset program, as the usefulness of this provision has been superceded by the Treasury Offset Program.

Effective January 1, 1999, the Financial Management Service began administering the refund offset program as part of the Treasury Offset Program. This program matches government-wide payment data with government-wide debt data. If an individual has an outstanding debt and is receiving Federal money, the individual is notified that his or her Federal payment can be withheld to pay off the debt. Prior to the merger of the refund offset program into the Treasury Offset Program, an agency was required to use IRS mailing address information to provide pre-offset notice. The Treasury Offset Program continues to require pre-offset notice to a debtor but does not require an agency to use IRS information. According to the IRS, since the merger of the program in January 1999, only two requests have been made under this

[880] Sec. 6103(k)(6).

provision.[881] Thus, the Joint Committee staff recommends repeal of this provision.

H. Disclosure to Contractors

1. Present law and background

General rules

Employees of the Treasury Department, a State tax agency, the Social Security Administration, and the Department of Justice can disclose returns and return information to contractors for tax administration purposes.[882] These disclosures can be made only to the extent necessary to procure contractually equipment, other property, or the providing of services, related to tax administration.[883]

The contractors can make redisclosures of returns and return information to their employees as necessary to accomplish the tax administration purposes of the contract, but only to contractor personnel whose duties require disclosure.[884] Treasury regulations prohibit redisclosure to anyone other than contractor personnel without the written approval of the IRS.[885]

Notification requirements

Treasury regulations require that contractors give written notification to the personnel who may handle returns and return information that:

(1) such information is to be used only for the tax administration purpose of

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[881] The Railroad Retirement Board made a request in January 1999 and the U.S. Customs Service made a request in March 1999. Telephone interview, IRS Government Liaison and Disclosure, Office of Tax Checks and Safeguards (September 28, 1999).

[882] Sec. 6103(n) and Treas. reg. sec. 301.6103(n)-1(a).

[883] Treas. reg. sec. 301.6103(n)-1(a). Such services include the processing, storage, transmission or reproduction of such returns or return information, the programming, maintenance, repair, or testing of equipment or other property, or the providing of other services for purposes of tax administration.

[884] Treas. reg. sec. 301.6103(n)-1(a) and (b). A disclosure is necessary if such procurement or the performance of such services cannot otherwise be reasonably, properly, or economically accomplished without such disclosure. Treas. reg. sec. 301.6103(n)-1(b). The regulations limit the quantity of information to that needed to perform the contract.

[885] Treas. reg. sec. 301.6103(n)-1(a).

the contract; and

(2) disclosure for a purpose, or to an extent, unauthorized by the contract (a) is a felony punishable by up to 5 years in prison, a fine as much as $5,000, or both, plus the costs of prosecution, and (b) may subject the employee to liability for civil damages at a minimum of $1,000 per disclosure.[886]

Safeguards

All contracts must provide that the contractor will comply with all applicable restrictions and conditions prescribed by regulation, published rules or procedures, or written communication to the contractor.[887] Failure to comply with such restrictions or conditions may cause the IRS to terminate or suspend the duties under the contract or the disclosures of returns and return information to the contractor.[888] In addition, the IRS can suspend disclosures to the State tax agency or the Department of Justice until the IRS determines that the conditions are or will be satisfied.[889] The IRS may take such other actions as deemed necessary to ensure that such conditions or requirements are or will be satisfied.[890]

In 1998, to address the concerns of contractor access to returns and return information, the IRS modified its basic agreements with the States. The agreements now require the States to notify the IRS 45 days in advance of a contractor's scheduled receipt of returns and return information.[891] During this 45-day period, the IRS evaluates whether the contract properly addresses and implements all safeguard requirements prior to a contractor's receipt of returns and return information.[892]

The IRS has stated that "the use of contractors by both Federal and State agencies . . .

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[886] Treas. reg. sec. 301.6103(n)-1(c).

[887] Treas. reg. sec. 301.6103(n)-1(d).

[888] Treas. reg. sec. 301.6103(n)-1(d)(1).

[889] Treas. reg. sec. 301.6103(n)-1(d)(2).

[890] Treas. reg. sec. 301.6103(n)-1(d).

[891] *IRS Report on Procedures and Safeguards Established and Utilized by Agencies for the Period January 1 through December 31, 1998*, enclosure for Letter from Charles O. Rossotti, Commissioner of Internal Revenue, to Lindy L. Paull, Chief of Staff, Joint Committee on Taxation (June 4, 1999).

[892] *Id.*

continues to be an area requiring additional attention."[893] During its safeguard reviews, the IRS found that agencies permitted contractors to view returns and return information while setting up agency computer systems.[894] Agencies also utilized contractors to dispose of returns and return information without having agency personnel observe the process to ensure that the contractors did not access the information.[895]

Nontax administration contractors

Section 6103(n) only covers contracts to accomplish a tax administration purpose. Thus, in order for a Federal or State entity to utilize a contractor for nontax purposes, the Code must explicitly authorize the disclosure. For example, a child support enforcement agency can disclose a limited amount of returns and return information to a contractor of the agency.[896] The contractor's duties must be to establish and collect child support obligations from and locate individuals owing such obligations.[897] While child support enforcement agencies have limited contractor authority, agencies administering certain need-based programs (such as Temporary Assistance to Needy Families) have no authority to disclose return information to a contractor. This lack of authority has created issues under present law.

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 gave States the option of administering TANF through contracts with "charitable, religious, or private organizations."[898] Section 6103, however, limits disclosure to Federal, State, or local agencies administering such programs.[899] The IRS has interpreted the term "agencies" to mean

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[893] *IRS Report on Procedures and Safeguards Established and Utilized by Agencies for the Period January 1 through December 31, 1998*, enclosure for Letter from Charles O. Rossotti, Commissioner of Internal Revenue, to Lindy L. Paull, Chief of Staff, Joint Committee on Taxation (June 4, 1999).

[894] General Accounting Office, *Taxpayer Confidentiality: Federal, State, and Local Agencies Receiving Taxpayer Information* (GAO-GGD-99-164, August 1999) at 14.

[895] *Id.*

[896] The child support agency may disclose, with respect to the individual whom child support obligations are sought to be established or enforced, the address and social security number of that individual and the amount of any refund offset against past-due support. Sec. 6103(l)(6)(B).

[897] Sec. 6103(l)(6)(B) and (C).

[898] 42 U.S.C. sec. 604a.

[899] Sec. 6103(l)(7)(A) and (B).

governmental agencies.[900]

The Wisconsin Works TANF program illustrates the relationship between the Personal Responsibility Act and section 6103. In Wisconsin, a variety of organizations administer the program locally: county governments, private not-for-profit entities, and private for-profit entities.[901] Each local entity is responsible for operating the programs and designing the services. Wisconsin contends that, to administer Wisconsin's TANF program, these entities need access to the database and network that assists in determining and verifying eligibility.[902] Under the Social Security Act, agencies administering TANF programs must request and use return information from the IRS for income and eligibility verification. However, section 6103 does not allow disclosure of returns and return information to nongovernmental agencies.

Similarly, child support agencies contend that to use their contractors effectively, they need to be able to share fully the information they receive from the IRS. The amount of a refund offset and the name and social security number is insufficient, they contend.[903] Forms 1099 and W-2 information cannot be disclosed to contractors.

2. Recommendations

a. State tax administration contractors

The staff of the Joint Committee recommends that States receiving returns and return information should be required to:

(1) conduct annual on-site safeguard reviews of all their contractors (if the duration of the contract is less than one year, a review would be required mid-way through the duration of the contract), and

(2) submit the findings of such reviews to the IRS as part of their annual safeguard activity report, along with a certification that their contractors are in compliance with all safeguard

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[900] *See, e.g.*, sec. 6103(l)(6)(B) giving contractors of child support agencies the limited right to receive return information.

[901] Letter from Howard I. Bernstein, Legal Counsel, Wisconsin Department of Workforce Development, to Lindy L. Paull, Chief of Staff, Joint Committee on Taxation (October 1, 1999).

[902] *Id.* It is the understanding of the Joint Committee staff that there is also a dispute over whether an Indian tribe constitutes a "local agency."

[903] *See* sec. 6103(l)(6)(B).

restrictions. The certification should include the name of each contractor, a description of their contract responsibility, and the duration of the contract.

Twenty-nine IRS district offices have responsibilities for overseeing safeguard reviews at State and local agencies.[904] As of June 1999, there were 230 professional and 24 support staff assigned to IRS national and district disclosure offices.[905] In addition to overseeing the safeguard program, disclosure offices conduct a variety of other disclosure activities.[906] The IRS generally does not conduct on-site reviews of State agency contractors unless the contractor handles a large volume of returns and return information and the State specifically identifies them. IRS resources do not permit it to monitor every contractor in every State.

The Joint Committee staff believes that the review of State contracts important in protecting taxpayer confidentiality. IRS guidelines provide that a State is to perform periodic inspections of a contractor and keep a written record of such inspections.[907] The Joint Committee staff believes that this requirement should be strengthened and recommends that the States should be required to take the actions described above.

b. Nontax administration contractors

The staff of the Joint Committee recommends that the present-law disclosure rules for using contractors for nontax administration purposes should not be expanded.

In its general recommendations regarding section 6103, the Joint Committee staff recommends that new access to returns and return information should not be provided unless the requesting agency can establish a compelling need for the disclosure that clearly outweighs the

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[904] General Accounting Office, *Taxpayer Confidentiality: Federal, State, and Local Agencies Receiving Taxpayer Information* (GAO-GGD-99-164, August 1999) at 13.

[905] *Id.*

[906] These activities include conducting disclosure awareness seminars for State and local agency personnel, processing Freedom of Information and Privacy Act requests, processing *ex parte* orders for grand jury or Federal criminal investigations, testifying in Federal court to certify that certain documents are true copies of tax return information, and reviewing subpoenas served on IRS personnel to advise them of what they can and cannot testify to in court. GAO Fed/State Report at 54.

[907] Internal Revenue Service Publication 1075, *Tax Information Security Guidelines for Federal, State and Local Agencies*, at 27 (1998).

privacy interests of taxpayers.[908] The Joint Committee staff does not believe that there is a compelling need for agency contractors performing nontax administration functions to have access to returns and return information that outweighs taxpayers' privacy interests. Thus, the Joint Committee staff does not recommend expanding the present-law disclosure rules for contractors used for nontax administration purposes.

Agencies are increasingly using contractors to carry out a variety of their functions. Those who argue for increased access to returns and return information for contractors for nontax administration purposes argue that such access would facilitate the use of contractors, which may be the most effective way for agencies to perform their functions. It is also argued that the contractor may be viewed as an extension of the contracting agency and thus should have the same access to returns and return information as the agency.

On the other hand, expanding the number of persons who have access to returns and return information increases the likelihood that confidential information will be unlawfully disclosed. As discussed above, the IRS does not have the resources to fully monitor contractors' safeguards under present law; expanding contractors' access to returns and return information would make it more difficult for the IRS to ensure that adequate safeguards are in place.

If accessible, returns and return information contain a ready source of information that could be useful for a variety of purposes. Section 6103's general principal of confidentiality recognizes that many persons would be interested in obtaining returns and return information, and that restrictions on access to such information are necessary to protect taxpayer privacy. While allowing contractors greater access to returns and return information may make it easier for agencies to perform their functions, a similar argument could be made in almost any case in which access to returns or return information is requested.

Expanding contractors' access to returns and return information for nontax administration purposes is counter to section 6103's principal of confidentiality and would comprise taxpayers' privacy interests. The Joint Committee staff does not recommend expanding the present-law disclosure rules regarding access to such information by contractors for nontax administration purposes.

I. Consent to Authorize Disclosure to Third Parties

1. Present law and background

Overview

Under section 6103(c), a taxpayer may designate a third party to receive his or her return or return information from the IRS. The IRS estimates that it receives more than 800,000

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[908] *See* Part I.A. of this Part Five, above.

requests from taxpayers directing that their returns or return information be sent to a third party.[909] Examples of third party entities to which the IRS provides information include financial institutions (including the mortgage banking industry), colleges and universities, and Federal, State, and local governmental entities.

Usually these entities do not have access to returns and return information under another provision of section 6103. However, in other circumstances, a third party entity receiving information pursuant to section 6103(c) also has access to returns and return information under another subsection of section 6103. For example, the Department of Education has authority under section 6103(l)(13) to obtain return information with respect to student loan recipients. The IRS has interpreted section 6103(l)(13) to exclude access to return information by contractors of the Department of Education. Because the Department of Education uses contractors to conduct its program, it utilizes section 6103(c) to obtain return information, rather than section 6103(l)(13).

The President of the United States and executive agencies are authorized under section 6103(g)(2) to receive certain information for the purpose of performing tax checks of prospective Federal appointees. The information disclosable under section 6103(g)(2) is limited to whether:

(1) an individual has filed income tax returns for the last 3 years;

(2) has failed to pay any tax within 10 days after notice and demand in the current or preceding 3 years;

(3) has been assessed a negligence penalty within this time period;

(4) has been or is under criminal tax investigation (and the results of that investigation); or

(5) has been assessed any civil penalty for fraud.[910]

Rather than utilizing section 6103(g)(2) for tax checks, the President and executive agencies solicit consent waivers from prospective employees.[911] The IRS reported to the Joint Committee that for calendar year 1998, 7,700 disclosures were made under section 6103(c) (instead of

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[909] This number is an estimate of requests received by the various IRS service centers' Return Income Verification Services ("RAIV") units. The bulk of third party requests are handled by the RAIV units. Telephone interview, Adjustments Section, Customer Service Compliance & Accounts Division, Internal Revenue Service (October 14, 1999).

[910] Sec. 6103(g)(2).

[911] Sec. 6103(g)(2).

section 6103(g)) for the purpose of tax checks.[912]

Unlike other provisions of section 6103 that permit access by a third party, section 6103(c) places no restrictions on the use of information obtained by consent.[913] For example, child support agencies can disclose the return information they receive from the IRS, as opposed to by taxpayer consent, "only for purposes of, and to the extent necessary in, establishing and collecting child support obligations from, and locating, individuals owing such obligations."[914] As another example, section 6103(g) restricts dissemination of returns and return information to persons of specified pay level and provides that information can only be disclosed with the personal written direction of the President or the head of the agency.[915] It also requires the President or the head of a requesting agency to file quarterly reports with the Joint Committee setting forth the names of the taxpayers, the returns or return information involved, and the reason for the request.[916]

When returns and return information are obtained under section 6103(c), no reports are filed, and the information can be used in any manner. Further, the IRS is not required to keep an accounting for disclosures made under section 6103(c).[917]

Section 6103(c) is often used in connection with mortgage loan applications. Mortgage

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[912] Joint Committee on Taxation, *Disclosure Report for Public Inspection Pursuant to Internal Revenue Code Section 6103(p)(3)(C) for Calendar Year 1998* (JCX-19-99) April 29, 1999.

[913] Similarly, no restrictions are placed on third parties contacted by the IRS for investigative purposes. The Code does require, however, that the IRS notify the taxpayer in advance that it intends to contact third parties and that the IRS provide a taxpayer with a record of persons contacted. Sec. 7602(c)(1) and (2). Notice is not required for contacts the taxpayer authorized, if notice would jeopardize collection or involve reprisal against any person, or with respect to a criminal investigation. Sec. 7602(c)(3).

Even with a valid consent, the IRS can refuse to disclose the returns or return information if it determines that the disclosure will seriously impair Federal tax administration. Sec. 6103(c); Treas. reg. sec. 301.6103(c)-1(c).

[914] Sec. 6103(l)(6)(C).

[915] Sec. 6103(g)(3) and (4).

[916] Sec. 6103(g)(5). Requests on current employees are exempt.

[917] Sec. 6103(p)(3)(A). Nonetheless, the IRS does provide the Joint Committee with the number of "tax check" disclosures made every year under section 6103(c).

originators qualify loan applicants as meeting or not meeting the requirements for loan approval. This process involves the verification and investigation of information and conditions. If the loan is granted, the mortgage originator may use its own money to fund the loan. Alternatively, another entity, an "investor," may buy the loan and provide the money. Investors typically perform a re-investigation of loans received for funding. Such re-investigations may include verification through the IRS of the tax return provided by the taxpayer to the mortgage originator.

Usually the mortgage originator does not know which investor will ultimately fund the loan. Thus, at the time of application, the originator asks the borrower/taxpayer to sign a consent (Form 4506) designating the originator as the third party to receive the taxpayer's returns. Subsequently, at closing, the investor may request that the originator obtain another Form 4506 naming the investor as the third party to receive the taxpayer's return.

Ostensibly to avoid confusion over why the taxpayer would be authorizing a party other than the originator to receive his tax return, the taxpayer may be asked to sign a blank Form 4506 at closing. In some cases, mortgage originators ask taxpayers not to date the Form 4506. This allows the form to be submitted to the IRS at a later date, often months or years later, for purposes of mortgage resale.[918] This facilitates the re-investigation of the basis for the loan by the investor.

Comparison of restrictions on tax return preparers

Generally, the Code prohibits a tax return preparer from using information furnished to the preparer in the preparation of a tax return (including the client's name and address) for other purposes without advance client consent.[919] Treasury regulations provide limited exceptions to this rule.[920] Typically, no consent is required for disclosures made within the preparer's legal or accounting firm for tax related services or to solicit additional tax business, to defend the preparer in an IRS investigation or related court proceeding, to report a crime, to respond to a court order, or for other limited reasons.

Advance consent is required to solicit *current* business in matters unrelated to the IRS by the tax preparer.[921] A preparer must obtain the consent at the time the taxpayer receives the

[918] The IRS will not accept a consent signed by the taxpayer more than 60 days prior to its submission. Treas. reg. sec. 301.6103(c)-1(a).

[919] Secs. 6713(a) (civil penalty) and 7216 (criminal penalty).

[920] Treas. reg. sec. 301.7216-2.

[921] Treas. reg. sec. 301.7216-3(a).

completed return.[922] The consent can not be used to solicit business to be furnished at some time in the indefinite future.[923] For example, the consent could not cover a future sale of mutual fund shares, or life insurance or products in development.[924] The consent can only cover affiliates if the preparer and the person to render the services are members of an affiliated group within the meaning of section 1504.[925] The taxpayer must execute separate written consents for each service.[926]

Comparison to restrictions on other financial records

The Gramm-Leach-Bliley Act, relating to financial services modernization, addresses issues relating to consumers' rights to privacy.[927] Under prior law, banks could share a person's name, address, account balance, and payment history with affiliates or sell it to outside firms without prior notification. However, if a bank wanted to share information from a credit report or loan application, it was required to offer the person a chance to say no or to "opt out." The Gramm-Leach-Bliley Act permits a consumer to "opt-out" as to third parties. In other words, banks must let their consumers know if they are selling their personal information to third parties. However, information sharing among affiliates, such as mortgage companies, insurance companies, brokerage houses and credit card companies under one roof, is unrestricted.[928]

Coerced consents: *Tierney v. Swieker*

At least one court has held that a coerced consent by a taxpayer to the sharing of return information is invalid.[929] Prompted by allegations of widespread abuse in the Supplemental Security Income ("SSI") program implemented a new policy to verify the income and assets of SSI recipients. Specifically, through a mass mailing distributed in May 1982, the SSA asked each of four million former and current SSI recipients to sign a consent form that would allow the SSA to obtain copies of otherwise confidential tax return information maintained by the IRS.

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[922] *Id.*

[923] *Id.*

[924] *Id.*

[925] *Id.*

[926] Treas. reg. sec. 7216-3(c) Example 2.

[927] Pub. L. No. 106-102, secs. 501-508 (Nov. 12, 1999).

[928] Jeri Clausing, *Revised Banking Legislation Raises Concerns About Privacy*, New York Times (October 25, 1999).

[929] *Tierney v. Schweiker*, 718 F.2d 449, 450 (D.C. Cir. 1983).

This tax return information would then be checked against the strict financial limitations that are imposed on SSI recipients, thereby allowing the SSA to eliminate from the program any individuals who are ineligible because their income or assets exceed the maximum allowable levels.[930]

> The consent provided:
>
> You have a choice about signing the form. But we must have accurate information about your income and what you own to pay your Supplemental Security Income checks. If you do not sign the form, your Supplemental Security Income checks may be affected.[931]

Refusal to sign the consent form apparently was grounds for suspending benefits. SSA staff were instructed to inform SSI recipients:

> Since you have not signed the authorization form we can not determine if you continue to be eligible for Supplemental Security Income payments. Therefore we can not pay you any more benefits beginning month/year.[932]

The court based its decision that the consents were invalid on two independent grounds. First, the consents did not provide the "taxable year" covered by the consent. It purported to give the SSA wholesale access to the recipient's return information. As such it did not comport with the Treasury regulations requiring that the consent address the taxable year covered.[933]

The court also found that the consents were coerced.[934] The consents were mailed to four million elderly, blind, and disabled individuals. They contained "poorly-veiled threats that the recipients' benefits would be terminated if they failed to sign the forms."[935] According to the court, that language in the SSA letter was likely to coerce individuals who depend on SSI for their subsistence to give up their right to confidentiality. The court also noted that the SSA failed to explain the substantive and procedural rights of the SSI recipients. Thus, the combination of threats and lack of an explanation of rights prevented the SSI recipients from knowingly and

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[930] *Id.*

[931] *Id.* at 452.

[932] *Id.* at 453.

[933] *Id.* at 455.

[934] *Id.* at 455-56.

[935] *Id.* at 456.

voluntarily consenting to the release of their return information.[936]

Electronic delivery of return information

On September 13, 1999, the IRS requested comments on a proposed pilot project that would deliver return information to third parties designated by the taxpayer. The project would be an electronic version of the current paper system. The system may reduce the current delivery time from ten days to 24 hours.[937]

Under the pilot project, a taxpayer would fill out the Form 4506, Request for Copy of Transcript of Tax Form, electronically and submit it to the IRS.[938] The proposed system would date lock the electronic request so that it could not be submitted again at a later date. The third party's access to a taxpayer's transcript would expire 30 days from the date of the electronic stamp.[939] The system would also prevent alteration of the form after the taxpayer submits it.

Currently, the IRS delivers a full return transcript (200 lines of information transcribed from the taxpayer's return) in response to a Form 4506.[940] Under the proposed system, the amount of information disclosed would be reduced to that information that would aid the specific industry in the processing of an application.[941]

The pilot project would be limited to California tax practitioners, financial institutions, mortgage companies, and credit bureaus.[942] In contrast to the current consent procedures, the IRS would place restrictions on what third party recipients could do with information received under the pilot program. These restrictions would require that:

(1) return information be kept confidential;

(2) return information be used solely for the purpose directed by the taxpayer;

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[936] *Id.* at 455-56.

[937] 64 Fed. Reg. 49,540-41.

[938] 64 Fed. Reg. 49,540.

[939] Amy Hamilton, *Barr Discusses Proposal for Electronic Disclosure of Tax Data*, Tax Notes Today, 1999 TNT 206-3 (October 26, 1999).

[940] 64 Fed. Reg. 49,541.

[941] *Id.*; Approximately 26 lines would be sent under the pilot program. Bruce Horovitz, *IRS E-sharing Raises Privacy Fears*, USA Today (October 1, 1999).

[942] 64 Fed. Reg. 49,541.

(3) return information be stored in locked containers when not in use;

(4) return information not be discussed unless specifically referring to the taxpayer's application; and

(5) return information not be further disclosed, traded, bartered, or sold without the express authorization of the taxpayer.[943]

As a further precaution, only those participants preapproved and enrolled with the IRS would be able to receive the return information. Participants would be selected competitively and awarded contracts for a period up to one year.[944] According to the IRS Assistant Commissioner for Electronic Tax Administration, the participants would have undergone background checks, and the IRS would have their fingerprints on file.[945]

The pilot program would require the participating businesses to prepare reports for the IRS on the discrepancies between income reported by the taxpayer and the income stated on the application form.[946] It would require the participants to track the number of requests processed, the number of discrepancies from the information provided by the taxpayers and the number of loans, grants or subsidies that were declined based on the data provided by the electronic delivery pilot.[947] The report would be in statistical form, rather than by individual taxpayer.[948]

Privacy advocates raised concerns when the pilot project was announced that the ease of obtaining the information will cause a flood of requests to see a taxpayer's return information.[949] The IRS estimates that the request for return information to be sent to third parties could increase

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[943] 64 Fed. Reg. 49,542.

[944] 64 Fed. Reg. 49,541.

[945] Amy Hamilton, *Barr Discusses Proposal for Electronic Disclosure of Tax Data*, Tax Notes Today, 1999 TNT 206-3 (October 26, 1999).

[946] 64 Fed. Reg. 49,541.

[947] *Id.*

[948] *Id.*

[949] John Schwartz, *IRS Looks to E-Mail as A Tool: Plan to Send Tax Data to Lenders Raises Privacy Concerns*, The Washington Post, (October 23, 1999) at E1; Bruce Horovitz, *IRS E-sharing Raises Privacy Fears*, USA Today (October 1, 1999).

to more than 50 million.[950] Privacy advocates argue that providing return information to third parties is not the role of the IRS.[951] The IRS argues that it would be performing a customer service to the taxpayer in that it is the taxpayer who consents to the disclosure. Privacy advocates argue that, in situations such as that involving a mortgage application, there is no voluntary consent.[952] The taxpayer wants to get the mortgage to buy the home, and so will sign the form. Despite the restrictions on the use of the information, privacy advocates are concerned that the IRS lacks the resources to monitor adequately the use of the information should the pilot go nationwide.[953] The IRS disputes this contention.[954]

2. Recommendations

a. Prohibit blank or undated consent forms

The staff of the Joint Committee recommends that the Code should prohibit a third party from requesting the execution of a consent that does not designate a recipient. The staff of the Joint Committee also recommends that the Code should prohibit a third party from requesting a taxpayer to execute a consent that will not be dated by the taxpayer at the time of execution.

The Joint Committee staff does not believe that the practice of asking taxpayers to sign blank or undated consent forms is appropriate. While recognizing that investors may want to minimize their risks in buying a loan, the Joint Committee staff finds that these practices can abuse the taxpayer consent process. It is doubtful that a taxpayer is aware that by not dating the form, it could be used months or years after the date it is executed. Taxpayers are probably unaware that a blank consent form which does not designate a recipient can be used for purposes other than those related to the transaction under which the request for consent arose. Even stating a specific purpose would not provide taxpayers with enough information for an informed consent because the taxpayers still would have no idea who is accessing their return information. In addition, the IRS does not have the resources to verify that the return information was used

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[950] Bruce Horovitz, *IRS E-sharing Raises Privacy Fears*, USA Today (October 1, 1999) quoting Sherrill Fields, Director for Electronic Program Enhancement.

[951] John Schwartz, *IRS Looks to E-Mail as A Tool: Plan to Send Tax Data to Lenders Raises Privacy Concerns*, The Washington Post, (October 23, 1999), at E8.

[952] Telephone Interview of Mary J. Culnan, Professor, Georgetown University School of Business (October 26, 1999).

[953] John Schwartz, *IRS Looks to E-Mail as A Tool: Plan to Send Tax Data to Lenders Raises Privacy Concerns*, The Washington Post, (October 23, 1999) at E8.

[954] *Id.*

solely for the stated purpose. This would be especially difficult with the integration of financial service products and companies. The coerced consents obtained in financial transactions from taxpayers (lenders won't make loans without verification of income) differ little from the consents invalidated in the *Tierney* case. To require taxpayers to go beyond this point and sign blank consents is improper. Thus, the Joint Committee staff believes that such blank consent forms should not be permitted. Under the Joint Committee staff recommendation, such consents will not be treated as consents described in section 6103(c). Finally, the Joint Committee staff recommends that penalties be imposed for violating these provisions.

The Joint Committee understands that completed consent forms may be difficult or not always possible based upon current financial practices. However, if the test for third parties obtaining tax return information was whether alternative means were more expensive or burdensome, section 6103 would provide very little privacy for taxpayers.

b. Limitations on the use of information obtained by consent

The staff of the Joint Committee recommends that all third parties, governmental or otherwise, receiving returns and return information under section 6103(c) should be required to: (1) ensure that the information received will be kept confidential; (2) use the information only for the purpose for which it was requested; and (3) not further disclose the information except to accomplish that purpose, unless a separate consent from the taxpayer is obtained.

In enacting section 6103, the Congress sought to balance an agency's need for return information, the taxpayer's right to privacy, and the related impact on compliance with the tax laws. That balance is upset when an agency that has been granted access to returns and information subject to certain restrictions chooses to obtain a consent from the taxpayer that effectively waives those restrictions. Similarly, agencies and others who have not been granted access to returns and return information under section 6103 circumvent section 6103's restrictions when they utilize the consent provision to obtain access to returns and return information.

A taxpayer should be able to decide who receives his or her return or return information. However, a taxpayer's consent may not be voluntary if a substantial benefit to the taxpayer hinges on the disclosure of information to a third party. The taxpayer may not be aware that, by consenting, he or she relinquishes the ability to control the dissemination of this information. Thus, the Joint Committee staff recommends restrictions on the use of returns and return information obtained by taxpayer consent.

J. Statistical Disclosure Authority for the Federal Trade Commission

The staff of the Joint Committee recommends the repeal of the provision authorizing disclosures to the Federal Trade Commission for statistical purposes, as this information is no longer needed.[955]

Section 6103(j)(2) authorizes disclosure of return information to the Federal Trade Commission for purposes of the authorized economic surveys of corporations. According to the IRS, the Federal Trade Commission no longer conducts such surveys.[956] No disclosures are being made to the Federal Trade Commission for statistical purposes. Because the disclosures permitted under section 6103(j)(2) are no longer needed, the staff of the Joint Committee recommends its repeal.

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[955] Sec. 6103(j)(2).

[956] GAO Fed/State Report at 25.

III. UNAUTHORIZED DISCLOSURE

The staff of the Joint Committee recommends that the IRS notify the taxpayer at the time the Treasury Inspector General for Tax Administration administratively determines that the taxpayer's return or return information has been unlawfully accessed or disclosed (rather than at the time of criminal indictment). In addition, the staff of the Joint Committee recommends that the IRS should provide, as part of its present-law public annual report to the Joint Committee, information regarding unauthorized disclosure and inspection of returns and return information. This information should include the number, status, and results of: (1) administrative investigations; (2) civil lawsuits brought under section 7431 (including settlement amounts or damages awarded); and (3) criminal prosecutions.

Currently, the IRS is not required to notify a taxpayer that an unlawful disclosure or inspection of the taxpayer's return or return information has occurred until the offender has been charged by criminal indictment or information.[957] The TIGTA investigates and substantiates more unlawful access (browsing) and disclosure cases than are prosecuted.[958] Notwithstanding the lack of a criminal prosecution, the IRS should make taxpayers aware that their returns or return information has been unlawfully accessed or disclosed. Thus, the IRS should notify the taxpayer at the time TIGTA administratively determines that returns and return information has been unlawfully accessed or disclosed.

The IRS is required under present law to provide, for disclosure to the public, an annual report to the Joint Committee regarding accountings of authorized disclosures of returns and return information[959] The IRS is not required to report on unauthorized disclosures or inspections of returns and return information. The staff of the Joint Committee recommends that the IRS should provide as part of its public annual report to the Joint Committee information on unauthorized disclosures or inspections of return and return information. Such information will allow review of the enforcement efforts in this area and the extent to which taxpayer privacy is being protected.

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[957] Sec. 7431(e).

[958] As discussed above, U.S. Attorneys may not prosecute every substantiated case of unlawful browsing or disclosure, and not every substantiated case will be referred for prosecution.

[959] *See* sec. 6103(p)(3)(C).

IV. PUBLIC DISCLOSURE OF NONFILERS[960]

A. Overview

Like the Federal government, States have the authority to collect taxes from delinquent taxpayers, including those who have not filed returns. The collection process generally begins with an assessment of taxes owed. The States have a variety of methods by which to collect taxes. Traditional methods include in person visits, telephone calls, placing a lien on the taxpayer's property, levying bank accounts, and the seizure and sale of a taxpayer's property. States are also experimenting with other methods to increase compliance. Such methods include using the Internet to display lists of delinquent taxpayers.

The Congress requested the Joint Committee staff to study whether allowing the public to know who is legally obligated to file returns but does not do so (referred to as "nonfilers") would increase voluntary compliance. To assist the Joint Committee staff, the GAO investigated whether any State or local government currently has such a program in place.

According to the GAO, no State or local government publishes the names of persons based on the failure to file returns. Instead, as of June 1999, the District of Columbia and four States – Connecticut, Illinois, Montana, and New Jersey – publicly list the names of delinquent taxpayers on the Internet. For purposes of this discussion "delinquent taxpayer" means a person who has failed to pay an assessed tax that is due and owing. These jurisdictions treat nonfilers the same as delinquent taxpayers once they determine that the nonfiler owes taxes and those taxes are assessed.

Connecticut began its Internet disclosure program in January 1997, followed by the District of Columbia in October 1997, Montana in April 1998, New Jersey in May 1999, and Illinois in September 1999.[961] All have statutes protecting the confidentiality of taxpayer information similar to their Federal counterpart, section 6103. Connecticut, Illinois, and the District of Columbia have enacted statutes specifically authorizing the disclosure of public lists of delinquent taxpayers. Montana and New Jersey rely on the fact that delinquency is a matter of

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[960] Data for this section of the study was taken from a report prepared by the General Accounting Office, *Tax Administration: Few State and Local Governments Publicly Disclose Delinquent Taxpayers* (GAO/GGD-99-165, August 1999) (hereinafter GAO Report 99-165).

[961] As of July 1999, Wisconsin and Minnesota were actively considering a public disclosure program. On August 19, 1999, the California Senate Revenue and Taxation Committee approved a bill to place on the Internet the names of the twelve largest violators of the sales tax law. CA A.B. 790.

public record.[962]

All five governments contend that their disclosure programs have successfully increased compliance. Nevertheless, none could identify the amount of revenue generated solely from public disclosure. Below is a description of the various programs.

B. Connecticut[963]

Connecticut's program has been the model for the others. In January 1997, Connecticut began publicly revealing the names of its top 100 delinquent taxpayers (both business and individual). The State discloses the names on the Internet,[964] in newspapers, and by press release. Connecticut law requires the tax commissioner to prepare a list of delinquent taxpayers and make it available for public inspection.[965]

Each month, Connecticut sends certified, return receipt letters to the top 200 delinquent taxpayers. These 200 persons have the largest accounts that have been delinquent for more than 90 days. The letter warns them of impending disclosures on the Internet if they do not resolve their delinquencies within ten business days.

The top 100 list that is publicly disclosed includes the taxpayer's name, address, amount owed (including penalties and interest) and the type of tax owed. Connecticut includes nonfilers on the list after assessments have been made and the account becomes delinquent. These accounts are processed in the same manner as other delinquent accounts. The list does not identify them as nonfilers.

The list is to be updated monthly. A review of the list website on August 11, 1999, however, showed the list was last revised on March 22, 1999. The site indicated that it would be updated in April.

Connecticut will remove a taxpayer's name from the list if :

(1) a taxpayer pays, negotiates a payment agreement, or otherwise resolves the account;

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[962] See Part Two, IV., of this study, above, for a discussion of the public record exception to the rule of confidentiality.

[963] The following information is taken from GAO Report 99-165 at 12-13.

[964] <http://www.state.ct.us/drs/delinq/mart100.html>

[965] Conn. Gen. Stat. sec. 12-7a (1999).

(2) the taxpayer's account appears on the website for three or more consecutive months, and

(A) for three consecutive months the post office has been unable to deliver the certified letters for reasons other than refusal by the addressee, or

(B) the account is not collectible for statutory or regulation-based reasons; or

(3) the taxpayer's account has appeared on the website for four to six months and revenue officials have verified that bankruptcy proceedings have occurred.

Connecticut initiated the program to apply pressure to encourage people to pay the taxes they owe. Since the inception of the program, Connecticut reports that it has collected $52 million in overdue taxes. Taxpayers have set up payment agreements for another $12 million.

Revenue officials could not say, however, to what extent to public disclosure spurred these collections. They acknowledged that other factors, such as a strong economy and the use of other collection tools, could have affected compliance. Such collection tools include letters, liens, levies, and seizures. In addition, Connecticut has used three other methods to increase compliance. The tax amnesty program allows nonfilers to come forward and pay their taxes without penalties. The voluntary disclosure project offers noncompliant taxpayers favorable terms to pay their back taxes. Another program, the nexus project, targets taxes owed by nonresident taxpayers.

C. District of Columbia[966]

In October 1997, the District of Columbia Office of Tax and Revenue ("OTR") began listing the names of delinquent taxpayers owing more than $10,000.[967] District of Columbia law specifically authorizes the publication of "delinquent lists" showing the names of taxpayers who have failed to pay their taxes.[968]

Before publication, the OTR sends certified letters to delinquent taxpayers informing them that failure to resolve the delinquency within 30 days could result in public disclosure. Upon the expiration of 30 days, OTR mails a copy of the Internet screen to the delinquent

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[966] The following information is taken from GAO Report 99-165 at 13-15.

[967] <http://www.dccfo.com/TopDelinquentTaxpayers1.htm>

[968] D.C. Code secs. 47-1805.4(c) and 47-2018(b) (1999).

taxpayer. The delinquent list contains the taxpayer's name (including the name of the responsible officer(s) for a business) and the amount owed. OTR updates the list periodically.

OTR can include a nonfiler on the list once an assessment has been made and the account becomes delinquent. These accounts are processed in the same manner as other delinquent accounts. The list does not identify nonfilers as such.

OTR will remove a taxpayer's name from the list if the taxpayer: (1) makes payment arrangements; (2) enters bankruptcy proceedings; or (3) provides evidence that he or she is not the responsible officer of a business. Additionally, if OTR makes a mistake in calculating the tax, OTR will remove the taxpayer's name from the list.

During fiscal year 1999, the OTR collected $669,912 after sending warning letters and $70,587 after disclosure on the Internet.[969] Additional factors, OTR acknowledged, could have influenced a taxpayer's decision to pay. Besides the Internet, OTR uses other collection tools such as telephone calls, letters, liens, and seizures.

OTR reported one instance in which the delinquency list contained inaccurate information. OTR improperly identified an individual as a responsible person for a business. Upon receiving proof of the mistake, OTR removed the name.

D. Illinois[970]

Illinois began disclosing the names of delinquent taxpayers on the Internet and through press releases in September 1999.[971] Illinois law specifically provides for public lists of delinquent State taxes.[972] The list includes taxpayers, both business and individual, who have final liabilities greater than $10,000 for more than six months.

Illinois sends certified letters to these taxpayers, warning them that if they do not make payment arrangements or resolve their accounts, the State will publish their names on the Internet. The taxpayers have sixty days to respond. If they do not respond, the list will include the taxpayer's name, amount owed, mailing address, type of tax owed, and tax periods. For corporations, the list includes the president's name. New names will be placed on the list only once a year. Names will be removed from the list if the taxpayer pays in full, makes

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[969] As of June 1999.

[970] The following information is taken from GAO Report 99-165 at 15-16.

[971] <http://www.revenue.state.il.us/>. As of November 23, 1999, there were 608 delinquent taxpayers on the Internet list. *Id.*

[972] 20 Ill. Comp. Stat. 2505/39b54 (1999).

arrangements to pay, or brings old payment agreements into compliance. The State will also remove a name if legal proceedings (such as bankruptcy) are underway.

Nonfilers appear on the list after an assessment is made and the account becomes delinquent. The list does not identify nonfilers as such. The State processes nonfiler accounts in the same manner as other accounts.

Illinois began sending warning letters to taxpayers in March 1999. After sending 5,200 warning letters, $2.9 million was collected before the State published any names. Taxpayers arranged an additional $918,000 in payment agreements. Taxpayers satisfactorily proved that they did not owe $453,000.

Besides the Internet, Illinois uses the traditional tools of liens, levies, seizures, and letters to increase compliance. Illinois also uses private collection agencies and will deny the issuance or renewal of licenses when taxes are in arrears.

E. Montana[973]

In April 1998, the Montana Department of Revenue began disclosing the names of Montana's top 50 delinquent taxpayer accounts (including both business and individual accounts).[974] The State uses both the Internet and press releases to publicize the lists.

Montana does not have a statute that specifically addresses the publication of delinquent lists. In Montana, a tax delinquency becomes a matter of public record when the clerk of the district court files a warrant of distraint (a judgment lien).[975] Montana relies on the fact that the delinquency is a public record to publicize its delinquency lists.

The Department of Revenue sends a warning letter to taxpayers who are 30 days delinquent. The letter provides that if the taxpayer fails to pay within 30 days, the department may issue and file a warrant of distraint in the district court. Once the clerk of the court files the warrant, making the delinquency a fact of public record, Montana can add a taxpayer to its delinquency list. No warning letter of impending disclosure is sent.[976] The delinquency list includes the taxpayer's name, city and state of residence, tax type, and amount owed. The list is to be updated monthly.

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[973] Unless otherwise indicated, the following information is taken from GAO Report 99-165 at 16-18.

[974] <http//www.state.mt.us/revenue/del._tax_accts.html>

[975] Mont. Code Ann. sec. 15-1-704 (1998).

[976] GAO Report 99-165 at 6, table 1.

Nonfilers can be included on the list after an assessment is made and the account becomes delinquent. Once assessment and delinquency occur, the State processes nonfiler accounts in the same manner as other delinquent accounts. The list does not identify non-filers as such.

Montana will remove a taxpayer's name from the list if the taxpayer establishes a payment plan, files for bankruptcy, or files a return affecting the amount owed. The State will also remove a name from the list if the revenue office accepts an offer in compromise or the taxpayer has appeared on the list for six months.

Montana reported that in one instance, its Internet list overstated the tax due. The overstatement resulted from the incorrect application of a tax rate.

Since the program's inception through June 1999, Montana had collected $367,839. Twenty-eight taxpayers paid in full, eighteen negotiated payment plans, twenty-three filed outstanding returns, and two filed amended returns. Revenue officials noted that other factors may have contributed to the taxpayers' decisions to pay. At the time the Internet delinquency list began, Montana also set up an automatic phone system. This new phone system enabled collectors to contact many more taxpayers. Montana also uses other tools to gain compliance, such as liens, levies, and offers in compromise.

F. New Jersey[977]

In May 1999, New Jersey began using the Internet to disclose the top 100 businesses and top 100 individuals owing taxes.[978] New Jersey does not have a provision that expressly authorizes public disclosure. Like Montana, New Jersey relies on the fact that a delinquency is a matter of public record. New Jersey files a certificate of debt with the clerk of the Superior Court.[979] The clerk then enters the certificate on the judgment docket.

After the clerk files the certificate, taxpayers may be subject to levies, seizures or referral to the Attorney General. Prior to appearing on the lists, New Jersey affords each taxpayer the opportunity to resolve the outstanding liability to avoid appearing on the lists. New Jersey notifies delinquent taxpayers by certified mail that they have fourteen days to resolve their delinquency or their certificate of debt information may appear on the Internet.

The lists contain the taxpayer's name, trade name (if a business), city, date, amount of the

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[977] GAO Report 99-165 at 18-19.

[978] <http//www.state.nj.us/treasury/taxation/jdgdiscl.htm>

[979] N.J. Stat. sec. 54:49-12 (1999).

certificate of debt, and the court docket number.[980] The information is updated monthly.

New Jersey will remove a taxpayer's name from the lists for several reasons. The State will remove a taxpayer's name from the lists if the taxpayer: (1) shows proof of bankruptcy proceedings; (2) enters into a deferred payment arrangement or closing agreement; or (3) pays all outstanding liabilities. To make room for the posting on new names, the State may remove names from the list. Such taxpayers may be posted again at any time until the taxpayer resolves the delinquency.

Nonfilers can be included on the lists after the State makes an estimated assessment and a certificate of debt is filed. The lists do not identify these accounts as nonfilers.

From May 1999 (the month names began appearing on the Internet) through July 1999, New Jersey had collected $695,991. Nonetheless, New Jersey officials state that it is too early to quantify the full effect of the program.

Besides the Internet, New Jersey uses a variety of other tools to improve compliance and collect unpaid taxes. Such tools include project letters, field investigations, levies, seizures, and office and field audit programs. New Jersey has also used private collection agencies. In addition, a special project group focuses upon noncompliance in the cash economy.

G. Historical Perspective - Federal Level

At the Federal level, public lists have been used in the past, although not recently. Shortly after the passage of the Sixteenth Amendment, Federal law required the Commissioner of Internal Revenue to prepare lists for each district showing the name and address and at one point the amount of tax paid.[981] The public could inspect the lists at the internal revenue district office of the collector. In 1925, the Treasury Department urged the repeal of the publication provision.[982] It asserted that no additional tax had been collected as a result of the provision.

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[980] In August 1999, New Jersey's web site stated that the current amount of tax penalty and interest due may differ from the judgment amount as a result of partial payments made against the judgment amount and/or accrual of additional penalty and interest. The site also noted that some taxpayers who have resolved their debt since their appearance on the list may still appear on the list. The site noted that these names are in the process of being removed.

[981] *E.g.*, sec. 257 of the Revenue Acts of 1917 and 1924. *See also*, the legislative history discussion in Appendix A: Statutory Evolution of Section 6103.

[982] *Report on Administrative Procedures of the Internal Revenue Service to the Administrative Conference of the United States*, 94th Cong., 2d Sess., S. Rep. No. 94-266 at 1039 n. 51 (1975) *quoting Hearings on Revenue Revision 1925 Before the House Ways and Means*

(continued...)

Treasury further contended that the provision only served to gratify idle curiosity and to fill newspaper space.[983]

The lists were abolished in 1966.[984] Instead, the Congress authorized the IRS to say, in response to an inquiry, whether a taxpayer had or had not filed a return for a particular period. Inquiries under that section were made by the news media and commercial concerns. The Congress repealed the fact of filing disclosure in 1976 when it overhauled section 6103.

H. Recommendations

The staff of the Joint Committee does not recommend the publication of the identities of nonfilers by the Federal government at this time. In addition, the staff of the Joint Committee recommends that States provide updated information to the Congress on their programs to publicize delinquent taxpayers.

In its general recommendations regarding exceptions to the general rule of confidentiality contained in section 6103, the Joint Committee staff recommends that, in order to protect adequately the privacy interests of taxpayers, new access to returns and return information should not be provided unless the requesting agency can establish a compelling need for the information that outweighs taxpayers' privacy interests.[985] Applying this general recommendation to the issue of whether the identities of nonfilers should be disclosed, the Joint Committee staff believes that such disclosure should be made only if there is a compelling public interest in such information that outweighs the privacy interests of the taxpayers involved.

The generally stated rationale for publicly disclosing the identities of persons who do not file tax returns is to increase compliance with the tax laws. Those who support publication of such information believe that nonfilers will pay outstanding tax liabilities rather than face public embarrassment or other possible consequences of disclosure. It is also agrued that payment of taxes is part of the obligations of U.S. citizens and residents, and that the public has a right to know if persons are not complying with such obligations. Disclosure that an individual has not filed his or her tax returns could affect the individual's standing in the community and business relationships. For example, some people may not wish to do business with someone who is not current with regard to Federal taxes. Similar results could apply with respect to publication of

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[982](...continued)
Comm., 69th Cong., 1st Sess., at 8-9 (1925).

[983] *Id.*

[984] Pub. L. No. 89-713, sec. 4(a)(2) (1966).

[985] *See* Part Five, I.A., above.

the identities of business entities that have not filed returns. It is exactly the fear of these consequences that some believe will increase compliance by providing an incentive for persons to file returns (or pay outstanding liabilities).

However, publicizing a list of nonfilers would not clearly be an effective compliance tool, because such a list would not convey accurate information regarding outstanding tax liabilities. That is, such a list would not target those who willfully fail to pay taxes.

Depending on the particular circumstances, a person who has failed to file a return may not owe taxes.[986] A person's allowable deductions, credits, or withholding may reduce the tax liability to zero or generate a refund.[987] Thus, a nonfiler may be due money from the Federal government rather than owe money. While not all nonfilers are tax delinquent, a list of nonfilers is likely to carry that presumption in the mind of the general public, possibly causing unjustified and considerable damage to the personal and business reputations of the taxpayers involved. The fact that no States publish a list of nonfilers per se is a reflection of the fact that such information does not accurately reflect tax delinquencies.

Even if a published list were limited to persons who are delinquent in their taxes, it is not clear that compliance would be increased. Because only five U.S. jurisdictions currently publish

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[986] The Congressional Research Service explains this as follows:

> The requirement to file a return does not necessarily mean that income tax is owed for the year. For example, individuals may file a return (even though their gross income is less than the filing requirement) in order to have income tax previously withheld from pay refunded[,] or in the case of the working poor to receive benefits under the earned income tax credit program. Individuals receiving tip income and self-employed persons earning low dollar amounts may be required to file a return to pay Social Security taxes or Medicare taxes but may not be liable for personal income taxes.

Congressional Research Service, RS20322, *Number of Federal Individual Income Taxpayers: Fact Sheet* (September 1, 1999).

[987] For example, in *Commissioner v. Lundy*, 516 U.S. 235 (1996), the Federal income taxes withheld from the wages of a husband and wife exceeded the amount of taxes that the couple owed for the year. In September 1990, at which time the couple had not yet filed with the IRS their joint 1987 tax return that was due on April 15, 1988, the IRS mailed the couple a notice of deficiency for 1987. The couple subsequently filed their 1987 return in December 1990, showing a refund due for overpaid taxes. The interplay of the statutes governing the limits on refunds and the Tax Court's ability to determine an overpayment, however, operated to deny the taxpayers their refund.

such information and the publication programs have only recently been adopted,[988] there is little data on which to determine whether such programs are effective at increasing compliance. As discussed above, these jurisdictions have been unable to determine the extent to which collections and compliance have increased as a result of their delinquent taxpayer publication programs. In addition, some errors have occurred (e.g., taxpayers were reported as owing more taxes than was correct).

There are a variety of errors that may occur in the publication of a list of nonfilers or delinquent taxpayers. For example, the wrong name could be published, taxpayers with names similar to those on the list could be mistakenly believed to be on the list, and the amount of the delinquency shown could be incorrect or may not be the final determination of liability.[989] The possibility for error is greater the larger the list.[990]

The extent to which publication of a list of nonfilers would increase compliance or serve another public interest is unclear. Any such list is likely to contain inaccuracies that may result in adverse consequences to persons who do not in fact owe Federal taxes. Thus, the Joint Committee staff does not recommend publication of such a list at this time. However, when there is additional experience with such lists at the State level, it may be appropriate to review the issue again. The Joint Committee staff recommends that States with such programs should provide updated information on their programs after they have been in effect for a few years so that the Congress can determine whether such lists prove helpful in increasing compliance and do not harm innocent taxpayers.

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[988] As noted above, two programs were started in 1997, one in 1998, and two in 1999.

[989] States that publish lists of delinquent taxpayers generally do so after a tax is assessed. Under the Federal tax laws, after a tax is assessed, taxpayers still have rights to contest the IRS determination of liability. Thus, the amount shown as assessed may not in fact be the amount for which the taxpayer is ultimately determined to be liable.

[990] The IRS currently experiences difficulties in tracking unpaid assessments. The GAO reported in August 1999 that the IRS does not have a detailed list, or subsidiary ledger, that tracks and accumulates unpaid assessments and their status on an ongoing basis. Deficiencies in the IRS systems have resulted in pursuit and collection of amounts that had already been paid. General Accounting Office, *Internal Revenue Service: Custodial Financial Management Weaknesses,* (GAO/AIMD-99-193, August 1999) at 2-3.

V. UNDELIVERED REFUNDS

The staff of the Joint Committee recommends that it be clarified that the IRS is able to notify taxpayers of undelivered refunds via any means of mass communication, including the Internet.

A. National Taxpayer Advocate Proposal

The National Taxpayer Advocate ("NTA") for the IRS noted in his December 1998 annual report to Congress that the postal service annually returns thousands of refund checks as undeliverable.[991] Usually, the taxpayer has moved and has not given the IRS his or her new address. In November 1997, the IRS was trying to contact 99,919 taxpayers about undelivered refunds.[992] The refunds totaled more than $62 million, averaging $625 per check.[993] Two years later the numbers have increased. In November 1999, the IRS announced that the U.S. Postal Service returned 102,840 more refund checks as undeliverable.[994] These checks totaled $72 million, averaging almost $700 per check.[995]

When the IRS is unable to find a taxpayer due a refund, present law provides that the IRS may use the press or other media to notify the taxpayer of the refund.[996] Section 6103(m) allows the IRS to give the press "taxpayer identity information" (name, mailing address and taxpayer identification number, such as social security number).[997]

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[991] Internal Revenue Service, Publication 2104, *National Taxpayer Advocate's Annual Report to Congress* (December 1998) (hereinafter "NTA Report 12/98").

[992] NTA Report 12/98 at 121.

[993] *Id.* at 122.

[994] Internal Revenue Service, Information Release IR-999-91 (November 9, 1999).

[995] *Id.*

[996] Sec. 6103(m)(1). This section provides:

> The Secretary may disclose taxpayer identify information to the press or other media for purposes of notifying persons entitled to tax refunds when the Secretary, after reasonable effort and lapse of time, has been unable to locate such persons.

[997] Sec. 6103(m)(1), and (b)(6) (definition of "taxpayer identity").

Three times a year the IRS generates undeliverable refund lists.[998] The IRS breaks the lists down by districts and then forwards them to the respective IRS district Media Relations representative.[999] The Media Relations representative forwards the lists to local newspapers for publication.[1000] Most of the larger circulation newspapers do not print the lists, according to the NTA.[1001] Further, if taxpayers have moved outside the region or country, they will probably not see the list for their former community.[1002]

The NTA has proposed using the Internet to inform these taxpayers of their undelivered refunds. By utilizing an interactive application, taxpayers could search a database using name, city, State or zip code.[1003] An Internet site would allow the IRS to reach taxpayers worldwide and would provide a central location for the information.[1004] According to the NTA, such a site would reduce taxpayer burden, enable more taxpayers to receive their refunds and increase confidence in tax administration.[1005]

The IRS believes, however, that the current statutory framework of "press and other media" does not permit disclosures via the Internet. The legislative history of the present-law provision does not address the meaning of "press and other media." At the time of the statute's enactment, the press (newspapers and periodicals) and other traditional media were the only means available for the IRS to distribute undelivered refund information to the public.[1006] Thus, the IRS interprets the term "other media" to exclude the Internet.[1007]

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[998] NTA Report 12/98 at 122.

[999] *Id.*

[1000] *Id.*

[1001] NTA Report 12/98 at 122.

[1002] *Id.*

[1003] *Id.*

[1004] NTA Report 12/98 at 122. The NTA also proposes having a change of address form available for taxpayers to download at the same location. *Id.*

[1005] NTA Report 12/98 at 122.

[1006] *Id.*

[1007] To eliminate this obstacle to an Internet site, the NTA proposes eliminating the "press and other media" limitation. NTA Report 12/98 at 123. As modified under the NTA proposal, section 6103(m)(1) would read:

(continued...)

At least one court has examined the meaning of "press and other media" for purposes of tax refund notification.[1008] Robert Aronson was a lawyer, who specialized in finding persons whom the government owes money. For a contingent fee, he helped persons obtain the money owed them by the government.[1009] Mr. Aronson made a FOIA request for the entire file of undistributed income tax refunds for the years 1981 through 1987.[1010] He wanted the name of each taxpayer due a refund, the taxpayer's last known address, taxpayer identification number, and the amount of the refund due.[1011] The IRS had previously released names and partial addresses (cities, states, and zip codes) to the press as part of its own efforts to find those taxpayers.[1012] It provided the same information to Aronson.[1013] Aronson sued the IRS to obtain the rest of the information he sought.

The district court ordered the IRS to provide the full street address, along with the names, cities, and zip codes that it had already supplied.[1014] In doing so, the court noted that the IRS's passive efforts at notice had been unsuccessful.[1015] Given the absence of legislative history interpreting the term "press or other media," the district court interpreted the term broadly. The district court found that the IRS had abused its discretion in finding that Mr. Aronson was not

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[1007](...continued)

> The Secretary may make public taxpayer identify information for purposes of notifying persons entitled to tax refunds when the Secretary, after reasonable effort and lapse of time, has been unable to locate such persons.

NTA Report 12/98 at 123.

[1008] 973 F.2d 962 (1st Cir. 1992).

[1009] 973 F.2d at 963.

[1010] *Id.* The FOIA is a Federal statute that provides that agencies are to make available agency records upon request unless those records fall within any of the nine listed exemptions. 5 U.S.C. sec. 552 (a)(3) and (b).

[1011] 973 F.2d at 963.

[1012] *Id.*

[1013] 973 F.2d at 963.

[1014] *Id.*

[1015] *Aronson v. Internal Revenue Service*, 767 F. Supp. 378, 393 (D. Mass. 1991). IRS methods for notification included press releases, newspapers, and waiting for the taxpayer to file a subsequent return with the proper address.

"other media," given the statute's goal of notifying persons of their refunds.[1016] The district court, however, did not allow Aronson to obtain the taxpayers' identification numbers finding that to do so would be an unnecessary invasion of privacy.[1017] It also denied Aronson knowledge of the amounts of the refund due. Such information is confidential return information. It is not within the scope of the "taxpayer identity information" the statute permits the IRS to disclose to the press regarding undelivered refunds.

On appeal, the circuit court found that the statute authorizes disclosure only "to the press and other media."[1018] The court interpreted the words "other media" to refer to "radio, television, and the like and not to a private citizen who wants to write letters to taxpayers."[1019] Thus, the court found that Aronson was not within the category of "other media."

Even if the court could stretch the language to cover Aronson, the court noted that the statute only permits, but does not require, the IRS to disclose "taxpayer identity information."[1020] Examining whether it was an abuse of discretion not to disclose the street addresses to Aronson, the court found that the decision whether to disclose involved competing interests. Such interests include:

(1) the usefulness of an old address in locating the taxpayer who has moved,

(2) the potential disturbance to the current resident of the old address, and

(3) a taxpayer's concern that other private citizens may obtain personal information about the taxpayer from the IRS.[1021]

The same or greater protection, the court noted, attaches to taxpayer identification numbers.[1022] Citizens have a strong privacy interest in social security numbers, more so than in home

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[1016] *Id*. at 385.

[1017] 973 F.2d at 963.

[1018] 973 F.2d at 967.

[1019] *Id*.

[1020] 973 F.2d at 967. The statute provides that "the Secretary *may* disclose taxpayer identity information to the press or other media . . ." Sec. 6103(m)(1) (emphasis added).

[1021] *Id.*

[1022] 973 F.2d at 968.

addresses.[1023] Given the forgoing, the court found that the IRS did not abuse its discretion by refusing to provide the requested information to Aronson. As a result, the circuit court denied Aronson access to the street addresses and tax identification numbers of taxpayers with undelivered refunds.

B. Discussion of Recommendation

The staff of the Joint Committee recommends it be clarified that the IRS should be able to notify taxpayers of undelivered refunds via the Internet. "Media" means "a medium of cultivation, conveyance, or expression . . . members of the mass media."[1024] "Mass media" is "a medium of communication (as newspapers, radio, or television) that is designed to reach the mass of the people."[1025] The IRS site on the World Wide Web was designed to reach the "Mass of the people." During the 1997 filing season, the IRS site on the World Wide Web recorded 300,000,000 hits.[1026]

The use of "press or other media" contemplates traditional news media, such as reporters, publishers and broadcasters, but does not necessarily preclude the Internet. The Internet is not unlike television or newspapers, in that it is a means for publishing or broadcasting news. The IRS is expected to use methods calculated to reach a broad range of people. To interpret the current statute to encompass the Internet would be consistent with its goal of public notification.

By limiting the statute's language to traditional news media, the IRS has taken the conservative approach to statutory interpretation. Given that a taxpayer can sue the United States for unauthorized disclosure of return information, the risk of suit arguably warrants such a conservative approach.[1027] Eliminating the words "press or other media," as proposed by the NTA, would remove any ambiguity about whether the IRS could disclose undelivered refund information on the Internet. It would also accommodate any new methods of mass communication that may subsequently arise. The staff of the Joint Committee recommends that 6103(m)(1) should be modified consistent with the NTA's proposal.

[1023] 973 F.2d at 968 *citing Int's Bhd of Elec. Workers Local Union No. 5 v. Dept. of Hous. And Urban Dev.*, 852 F.2d 87, 89 (3d Cir. 1988).

[1024] *Merriam-Webster's Collegiate Dictionary*, 721 (10th ed. 1995).

[1025] *Id.* at 715.

[1026] NTA Report 12/98 at 122.

[1027] *See* sec. 7431.

APPENDICIES

APPENDIX A: STATUTORY EVOLUTION OF SECTION 6103

A. Summary

For much of the 100 years preceding the Tax Reform Act of 1976 (the "1976 Act"), tax returns were designated "public records" and were subject to disclosure pursuant to executive order and regulations. The law, in its various forms, required that lists of tax information be made available to the general public. Proponents of publication of this information argued that it kept taxpayers honest, while opponents argued that publication of this information did nothing more than satisfy idle curiosity. Immediately prior to the 1976 Act, the IRS was authorized by statute to tell anyone who asked whether a taxpayer had or had not filed a return.

The Watergate hearings brought out allegations regarding impropriety on the part of the White House regarding return information. This publicity regarding possible misuse of return information on the part of the Administration helped provide impetus for the 1976 Act changes to the disclosure rules. The 1976 Act eliminated executive branch control over access to returns and return information and replaced it with an extensive statutory regime governing disclosure. In general, the 1976 Act provided that returns and return information are confidential. The 1976 Act also included a variety of exceptions to this general rule.

Since the enactment of the 1976 Act, the general rule that returns and return information are confidential has remained. However, additional exceptions to this rule have been added by subsequent changes in the law where the need for returns and return information has been determined to outweigh the taxpayers' interest in privacy and other purposes served by nondisclosure.[1028]

B. 1862-1975: Tax Returns as Public Records

Pre Sixteenth Amendment - 1862-1910

To finance the Civil War, Congress imposed the nation's first income tax in 1861.[1029] Provisions requiring publication of tax information were included in the Act of July 1, 1862.[1030] Although returns were designated public records, access to tax returns was, for the most part, limited to those persons authorized by executive order and regulations. That Act required assessors for each district to make a list of the persons liable to pay tax and the amount due. The

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[1028] *See* Part Three for a discussion of these issues.

[1029] 12 Stat. 309.

[1030] 12 Stat. 436-437, 439.

public could inspect the list for fifteen days.[1031] The law required that the collectors' lists of tax due also be publicized.[1032] It appears that the purpose of the lists was to notify the taxpayer of his

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[1031] The Act of July 1, 1862, 12 Stat. 432 directed assessors for each collection district to make lists concerning tax information open for examination for 15 days :

> Sec. 14. . . .make two general lists, the first of which shall exhibit, in alphabetical order, the names of all persons liable to pay any duty, tax, or license under this act residing within the assessment district, together with the value of the assessment, or enumeration, . . . of the objects liable to duty or taxation, . . . with the amount of duty or tax payable thereon; and the second list shall exhibit in alphabetical order, the names of all persons resident out of the collection district, owners of property within the district together with the value and assessment or enumeration thereof, as the case may be, with the amount of duty or tax payable thereon as aforesaid. . . .
>
> Sec. 15. . . . advertise all persons concerned of the time and place within said county when and where the lists, valuations, enumerations made and taken within said county may be examined; and said lists shall remain open for examination for the space of fifteen days after notice shall have been given aforesaid.

12 Stat. 432, 436-437.

[1032] Section 19 of the Act of 1862, regarding collector lists stated:

> Sec. 19. And be it further enacted. That each of said collectors shall, within ten days of receiving his annual collection list from the assessors, respectively as aforesaid, give notice, by advertisement published in each county in his collection district, in one newspaper printed in such county if any such there be, and by notifications to be posted up in at least four public places in each county in his collection district, that the said duties have become due and payable, and state the time and place within said county at which he will attend to receive the same, which time shall not be less than ten days after such notification.

12 Stat. 439.

liability and when it would be collected.[1033] In 1864, the law required revenue personnel to make the district's annual lists available to anyone who made a request to see the list.[1034] As a result, newspapers began to publish incomes of leading citizens.[1035]

Opponents of public disclosure argued that disclosure was offensive and objectionable. Among the opponents, Representative (later President) Garfield argued that there was no reason that "the private affairs of individuals should be brought out and paraded in the public papers."[1036] He did acknowledge that some sort of publicity was necessary "to act as pressure upon men to bring out their full incomes." Nonetheless, he asserted that public inspection of the lists at the county seat was sufficient.[1037] Proponents contended that publicity prevented collusion between taxpayers and unfaithful collectors.[1038] For example, the *New York Tribune* contended that the best way to keep all taxpayers honest was to publicize the amounts reported to the government.[1039]

In 1870, the policy of publication was halted:

> . . . no collector, deputy collector, assessor or assistant assessor, shall permit to be published in any manner such income return, or any part thereof, except such

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[1033] U.S. Congressional Research Service, Library of Congress, *Legislative History of Tax Return Confidentiality: Section 6103 of the Internal Revenue Code and Its Predecessors*, 74-211A (1974) at 4 (hereinafter "CRS").

[1034] In 1864, legislation provided that the annual lists be made available for inspection by all person who may apply for that purpose:

> It shall be the duty of the assessor for each collection district, at the time fixed for hearing such appeal, as aforesaid, to submit the proceedings of the assessors and assistant assessors, and the annual lists taken and returned as aforesaid, to the inspection of any and all persons who may apply for that purpose.

Act of June 30, 1864, 13 Stat. 218, 228.

[1035] CRS at 6.

[1036] CRS at 7.

[1037] *Id.*

[1038] "The apparent view was the such publicity would make every citizen a deputy tax collector, spying on neighbors and looking out for the government's interests." *CRS* at 6.

[1039] CRS at 6 *citing* the *New York Tribune*, page 5 cols. 304 (January 20, 1865).

> general statistics not specifying the names of individuals or firms, as he may make public, under such rules and regulations as the Commissioner of Internal Revenue shall prescribe. [1040]

The income tax was repealed in 1872, and the issue of publicity of returns (temporarily) died with it.

Fourteen years later, in 1894, Congress reinstated the income tax. Congress affirmatively prohibited printing and publishing, in any manner, an income tax return unless otherwise provided by law. The following year, however, the Supreme Court declared the income tax unconstitutional, [1041] eliminating, for the time being, concerns about publicity of tax returns.

In 1909, Congress enacted the Payne-Aldrich Tariff Act of 1909, which introduced a special excise tax on corporations. Section 38 of this Act made corporate excise tax returns public records. This provision was amended in 1910 to provide that only those authorized by order of the President (and under rules and regulations prescribed by the Secretary of the Treasury and approved by the President), had access to corporate excise tax returns.[1042]

Post Sixteenth Amendment: 1913 to 1975

With the ratification of the Sixteenth Amendment on February 3, 1913, Congress had the authority to lay and collect an income tax.[1043] The first revenue act after the Sixteenth Amendment, the Revenue Act of 1913, increased the availability of tax information. In addition to inspection upon order of the President, the Revenue Act of 1913 gave State officers the right to inspect returns without the permission of the President.[1044]

[1040] Act of July 14, 1870, 16 Stat. 256, 259.

[1041] *Pollack v. Farmers Loan and Trust Co.*, 157 U.S. 429 (1895).

[1042] Act of June 17, 1910, 36 Stat. 468, 494.

[1043] The Sixteenth Amendment provides:

> The Congress shall have the power to lay and collect taxes on incomes from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

[1044] The Revenue Act of 1913 provided:

> G.(d)1. When the assessment shall be made, as provided in this section, the returns, together with any corrections thereof which may have been made by the

(continued...)

The requirement of public lists returned with the Revenue Act of October 3, 1917. The lists contained the name and post office addresses of all individuals making a return in an internal revenue district. They were to be prepared annually and made available for public inspection in the office of the district collector.[1045] Besides resurrecting the public lists, the Act also permitted

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[1044](...continued)

> Commissioner, shall be filed in the office of the Commissioner of Internal Revenue and shall constitute public records and be open to inspection as such: *Provided*, that any and all such returns shall be open to inspection only upon the order of the President, under rules and regulations to be prescribed by the Secretary of the Treasury and approved by the President: *Provided*, That the proper officers of any State imposing a general income tax may, upon the request of the governor thereof, have access to such returns or to an abstract thereof, showing the name and income of such corporation, joint stock company, association and insurance company, at such times and in such manner as the Secretary of Treasury may prescribe.

38 Stat. 177.

[1045] Section 257 of the Revenue Act of October 3, 1917, provided:

> Section 257. That returns upon which the tax has been determined by the Commissioner shall constitute public records; but they shall be open to inspection only upon order of the President and under rules and regulations prescribed by the Secretary and approved by the President: *Provided*, That the proper officers of any state imposing an income tax may, upon request of the governor thereof, have access to the returns of any corporation, or to an abstract thereof showing the name and income of the corporation, at such times and in such manner as the Secretary may prescribe: *Provided further*, That all bona fide stockholders of record owning 1 per centum or more of the outstanding stock of any corporation shall, upon making request of the Commissioner, be allowed to examine the annual income returns of such corporation and of its subsidiaries. Any stockholder who pursuant to the provisions of this section is allowed to examine the return of any corporation, and who makes known in any manner whatever not provided by law the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any such return, shall be guilty of a misdemeanor and be punished by a fine not exceeding $1,000, or by imprisonment not exceeding one year or both.

(continued...)

one-percent shareholders to inspect the return of a corporation and its subsidiaries. States continued to have access to corporate returns upon request of the State governor.

Committees of Congress were given access to return information in 1924. Under the Revenue Act of 1924, the House Committee on Ways and Means, the Senate Committee on Finance, or a special committee of the Senate or House, could request returns or data contained therein from the Secretary of Treasury.[1046] Such committees could inspect this information

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[1045](...continued)

> The Commissioner shall as soon as practicable in each year cause to be prepared and made available to public inspection in such manner as he may determine, in the office of the collector in each internal revenue district and in such other places as he may determine, lists containing the names and the post-office addresses of all individuals making income tax returns in such district.

[1046] The Revenue Act of 1924 provided:

> Sec. 257. (A) Returns upon which the tax has been determined by the Commissioner shall constitute public records but they shall be open to inspection only upon order of the president and under rules and regulations prescribed by the secretary and approved by the President: *Provided*, that the committee on Ways and Means of the House of Representatives, the Committee on Finance of the Senate, or a special committee of the Senate or House shall have the right to call on the Secretary of the Treasury for and it shall be his duty to furnish, any data of any character contained in or shown by the returns or any of them, that may be requested by the committee; and any such committee shall have the right, acting directly as a committee, or by and through such examiners or agents as it may designate or appoint, to inspect all or any of the returns at such times and in such manner as it may determine; and any relevant or useful information thus obtained may be submitted by the committee obtaining it to the Senate and House, or to both the Senate and House, as the case may be: *Provided further*, that the proper officers of any state may, upon request of the governor thereof, have access to the returns of any corporation, or to an abstract thereof showing the name and income of the corporation, at such times and in such manner as the Secretary may prescribe: *Provided further*, That all bona fide shareholders of record owning 1 per centum or more the outstanding stock of any corporation shall, upon making request of the Commissioner, be allowed to examine the annual income returns of such corporation and its subsidiaries. Any shareholder who pursuant to the provisions of this section is allowed to examine the returns of any corporation, and who makes known in any manner whatever not provided by law the amount or source of income, profits, losses, expenditures, or any particular thereof, set

(continued...)

through designated examiners or agents. Further, such committees could submit relevant and useful information obtained by the committee to the House or Senate.

The Revenue Act of 1924 also continued the requirement of public lists. Besides the taxpayer's name and post office address, the Act required that the amount of tax paid be added to such lists. The Supreme Court upheld the right to publish these lists in newspapers in 1925.[1047]

The Treasury Department opposed publicity:

> The publicity is utterly useless from a Treasury standpoint. . . . All of the supervising revenue agents report that no additional tax has been collected due to the publicity provision and all of them recommend its repeal. . . . There is no excuse for the present publicity provisions except the gratification of idle curiosity and the filling of newspaper space. . . .[1048]

Nonetheless, the Revenue Act of 1926 continued to authorize public lists. The Act, however, did repeal the requirement that the amount of tax be made public.[1049] The Ways and Means Committee Report stated, "The Treasury Department informs your committee that no useful purpose has been served by publication of the amount of income tax paid by various

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[1046](...continued)
forth or disclosed in any such return, shall be guilty of a misdemeanor and be punished by a fine not exceeding $1,000 or by imprisonment not exceeding one year or both.
(B) The Commissioner shall as soon as practicable in each year cause to be prepared and made available to public inspection in such manner as he may determine, in the office of the collector in each internal revenue district and in such other places as he may determine, lists containing the name and the post-office addresses of each person making an income tax return in such district, together with the amount of the income tax paid by such person.

43 Stat. at 293.

[1047] *United States v. Dickey*, 268 U.S. 378 (1925).

[1048] *Report on Administrative Procedures of the Internal Revenue Service to the Administrative Conference of the United States*, S. Rep. No. 94-266 at 1039 n. 51 (1975) quoting *Hearings on Revenue Revision 1925 Before the House Ways and Means Comm.*, 69th Cong., 1st Sess., at 8-9 (1925).

[1049] Revenue Act of 1926, 44 Stat. 9, 52.

taxpayers. The committee therefore recommends its repeal."[1050]

The Revenue Act of 1926 also established the Joint Committee on Taxation. The Joint Committee had the same right to obtain data and inspect returns as the Committee on Ways and Means and the Committee on Finance.[1051]

The Revenue Act of 1934 included a controversial "pink-slip" provision.[1052] Under that provision, a taxpayer's gross income, total deductions, net income and tax payable were to be set forth in this slip. The Act required that a taxpayer file the slip with his return. Failure to file the "pink slip" subjected the taxpayer to a five-dollar fine and required that the collector prepare a pink slip for the taxpayer from the return. For three years from the filing date, the pink slip would be available for public inspection. After enactment, the pink slip provisions met with

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[1050] 1939-1 C.B. (Part 2) 321.

[1051] Section 1203 of the Revenue Act of 1926 provided:

> Sec. 1203. (d) The Joint Committee shall have the same right to obtain data and to inspect returns as the Committee on Ways and Means or the Committee on Finance, and to submit any relevant or useful information thus obtained to the Senate, the House of Representatives, the Committee on Ways and Means, or the Committee on Finance. The Committee on Ways and Means or the Committee on Finance may submit such information to the House or to the Senate, or to both the House and the Senate, as the case may be.

[1052] Section 55(b) of the Revenue Act of 1934, 48 Stat. 680, provided:

> (b) Every person required to file an income return shall file with his return, upon a form prescribed by the commissioner; a correct statement of the following items shown upon the return: (1) name and address, (2) total gross income, (3) total deductions, (4) net income, (5) total credits against net income for purposes of normal tax, and tax payable. In case of failure to file with the return the statement required by this subsection, the collector shall prepare it from the return and $5 shall be added to the tax. The amount so added to the tax shall be collected in the same manner as amounts added under section 291 [penalties and interest for failure to file a return]. Such statements or copies thereof shall as soon as practicable be made available to public examination and inspection in such manner as the Commissioner, with the approval of the Secretary, may determine, in the office of the collector with which they are filed, for a period of not less than three years from the date they are required to be filed.

48 Stat. at 698.

substantial public opposition. The provision was the subject of many debates.[1053] It was asserted that the slips would only be of use to a person's competitors, the "malicious and idle curious," kidnappers, and blackmailers.[1054] Congress repealed the provision before it took effect.[1055]

Between 1934 and 1966, Congress made no substantial revisions to the disclosure provisions.[1056] Accordingly, returns as public records, subject to disclosure by order of the President, remained the general rule.

In 1966, Congress repealed the requirement of public lists.[1057] At that time, the IRS was beginning to maintain returns on microfilm. By making the microfilm available to the public, the taxpayer's social security number would also be available.[1058] This was not a desirable result because a third party could use the social security number to obtain a taxpayer's wage information from the Social Security Administration.[1059] Instead, in response to an inquiry about a taxpayer, Congress authorized the IRS to state whether a taxpayer had or had not filed a return for a particular period.[1060]

In 1974, Congress authorized the Pension Benefit Guaranty Corporation to inspect any return filed with respect to a plan of deferred compensation or with respect to wages paid by an employer.[1061] Congress also authorized disclosure to the Department of Health, Education, and

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[1053] *See* CRS at 65 through 228.

[1054] *See* CRS at 64-65 *quoting* Representative Robert Bacon of New York in the Congressional Record at 2305-2307 (February 30, 1935).

[1055] Act of April 19, 1935, 49 Stat. 158.

[1056] In 1939, the disclosure provisions were codified at section 55 of the Internal Revenue Code. In 1954, the disclosure provisions moved to their present location in section 6103. No material change was made from existing law.

[1057] Pub. L. No. 89-713, sec. 4(a)(2) (1966).

[1058] In 1962, Public Law 87-397 added section 6109 to the Internal Revenue Code of 1954. For periods beginning after December 31, 1961, this provision required taxpayers to use an identifying number on income tax returns, statements and other documents required to be filed with the IRS. For individuals, this identifying number is their social security number.

[1059] S. Rep. No. 1625, 89th Cong. 2d Sess., 7-8 (1966).

[1060] Section 6103(f) (1966).

[1061] Employee Retirement Income Act of 1974 (Pub. L. No. 93-406).

Welfare to notify a social security claimant of deferred vested benefits.[1062]

Throughout this period Congress classified returns as public records. Nonetheless, other than access specifically permitted by statute, the President, through executive order and by Treasury regulations he approved, controlled access to returns and return information. Generally, the regulations provided access to returns and return information for persons with material interest,[1063] the heads of departments for official business upon written request detailing why inspection is necessary, and use in legal proceedings where United States was a party to the proceedings.

A number of events led to and influenced Congress' reexamination of the issue of confidentiality. Executive Orders 11697 and 11709, issued by President Nixon in 1973, authorized the Department of Agriculture to inspect the tax returns of all farmers "for statistical purposes."[1064] The orders were the subject of two Congressional committee hearings.[1065] The proposed release of return information on gross receipts and gross income was considered an unacceptable invasion of privacy.[1066] In addition, Agriculture's request caused concern that this

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[1062] Section 1131 of the Social Security Act (42 U.S.C. sec. 1320b-1).

[1063] Persons with material interest included: return of an individual open to that individual or his attorney in fact; either spouse of a joint return upon satisfactory evidence of such relationship; if deceased, the administrator, executor or trustee of his/her estate or attorney fact of the administrator, executor or trustee; heir at law or next of kin (or their attorney in fact) upon showing of a material interest affected by info contained in the return at the Commissioner's discretion; partners, estate/next of kin of a deceased partner having an affected material interest/partnership returns; return of a trust: trustee, beneficiary, estate of beneficiary, next of kin of beneficiary; corporate returns: president, vice president, secretary, treasurer or any of the principal officers. Treas. reg. sec. 301.6103(a)-1(c) (1975).

[1064] Exec. Order No. 11697, 38 Fed. Reg. 1723 (1973); Exec. Order No. 11709, 38 Fed. Reg. 8131 (1973).

[1065] *See generally, Hearings on Executive Orders 11697 and 11709 Permitting Inspection by the Department of Agriculture of Farmers' Income Tax Returns Before House Subcommittee on Foreign Operations and Government Information of Committee on Government Operations*, 93rd Cong., 1st Sess. (1973); and *Hearings on Inspection of Farmers' Federal Income Tax Returns by the U.S. Department of Agriculture Before the House Subcommittee on Department Operations of the Committee on Agriculture*, 93rd Cong., 1st Sess. (1973).

[1066] *Report on Administrative Procedures of the Internal Revenue Service to the Administrative Conference of the United States*, S. Rep. No. 94-266 at 878 (1975).

was the beginning of a "raid" on the IRS.[1067] The President subsequently revoked the orders in 1974; nonetheless, tax return confidentiality remained in the spotlight. The Watergate Committee hearings revealed that former White House Counsel John Dean had sought to use the IRS to harass political "enemies."[1068] White House Staff requested information and income tax audits from the IRS and IRS personnel complied with such requests.[1069] In addition, the Privacy Protection Study Commission recommended major changes in the dissemination of tax information.[1070]

Against this backdrop, in 1976, Congress re-examined the issue of taxpayer confidentiality and prescribed by statute rules regarding access to returns and return information. With the revision of section 6103 in 1976, Congress removed control over the dissemination of returns and return information from the Executive Branch.

C. Tax Reform Act of 1976 - Returns and Return Information Designated Confidential

General rule

In the Tax Reform Act 1976 (the 1976 Act), Congress entirely rewrote the statutory provisions relating to disclosure of returns and return information. Returns were no longer public records, and returns and return information became confidential.[1071] This confidentiality

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[1067] *Id.* at 879.

[1068] Senate Select Committee on Presidential Campaign Activities, The Final Report, S. Rep. No. 93-981, at 7-9 (1974) (hereinafter S. Rep. No. 93-981).

[1069] Joint Committee on Taxation, *General Explanation of the Tax Reform Act of 1976* (JCS-33-76), December 29, 1976, at 314.("Apparently, tax information had been obtained by the White House pertaining to a number of well known individuals for use for non-tax purposes."); *See also* S. Rep. No. 93-981 at 9 ("Dean recalled that, after an article was published in Newsday on Charles ("Bebe") Rebozo, one of the President's closest friends, Dean was told that the 'authors of that article should have some problems.'[footnote omitted] Dean discussed this with John Caufield, who had friends at the IRS. . . . Dean recalls that the IRS did audit the newsman involved.").

[1070] The Privacy Protection Study Commission was created as part of the Privacy Act of 1974. The commission was ordered by Congress to report on the proper restrictions that should be placed on the disclosure of Federal income tax information.

[1071] Pub. L. No. 94-455 sec. 1202(a)(1), 90 Stat. 1667 (1976) [Sec. 6103(a)]. The definition of "return" and "return information" is broad, covering almost all data received by or

(continued...)

was not absolute, however, as the statute provided exceptions to the general rule of confidentiality. These exceptions allowed disclosure for tax administration purposes, as well as for purposes unrelated to the administration of the tax laws. Congress adopted many of the exceptions from regulations already in existence prior to enactment. Below is a brief discussion of these exceptions both before and after amendment.

Disclosure to State and local governments

Before 1976, section 6103 provided that, upon request of the State governor, return and return information was available to State tax officials for purposes of administering State tax laws.[1072] In stating its reasons for change, the Senate Finance Committee noted that some States had failed to properly safeguard return information.[1073] However, when brought to the attention of the State, the problems were remedied. As a result, the Committee recommended that the States retain access to return information with certain restrictions:

> It has been suggested that tax information that is supplied to tax officials at the State and local levels may not be invariably subject to appropriate safeguards on confidentiality. Also it has been suggested that political considerations may produce unwarranted interest by State and local governments in tax information for nontax purposes.
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> IRS studies have indicated that in several situations, State authorities have allowed other States (or local governments) to inspect return information, have not maintained adequate records of inspection of return information, and have inadequate procedures to instruct employees with respect to Federal tax return confidentiality. However, it is understood that when these problems have been brought to the attention of the State authorities involved, remedial action has been taken.
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> However, the committee feels that it is important that the States continue to have access to return information. With return information, the States are able to determine if there are discrepancies between the State and Federal returns in

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[1071](...continued)
furnished to the IRS. Sec. 6103(b). Data in a form that cannot be associated with or otherwise identify a particular taxpayer is not return information. Sec. 6103(b)(2).

[1072] Sec. 6103(b) (1975).

[1073] The House version of H.R. 10612 did not contain any provisions regarding the disclosure of returns and return information. Section 6103 was a Senate amendment. H.R. Conf. Rep. No. 94-1515 at 475 (1976). The conference agreement generally followed the Senate amendment with minor modifications. *Id.* at 482-83.

e.g. reported income. Also many states have only a few, if any, of their own tax auditors and rely largely (or entirely) on information concerning Federal enforcement in enforcing their own laws.[1074]

Thus, the 1976 Act continued to allow States to have access to returns and return information, but the principal State tax official, rather than the governor, was to required to make the request.[1075] Disclosure was only permitted to the extent necessary for the administration of State tax laws and only available to those persons whose official duties require inspection. The 1976 Act also authorized disclosure to the State's legal representative for purposes of administering State tax laws. The information disclosed was not available to the governor or other nontax personnel. Local taxing authorities did not have access to returns or return information. However, the IRS could disclose taxpayer identity information of any State return preparer to any State or local agency charged with administering the licensing, registration, or regulation of tax return preparers.[1076]

Disclosure to taxpayers with a material interest and consent disclosures

Under pre-1976 regulations, returns were open to the filing taxpayer, trust beneficiaries, partners, heirs of the decedent, and similar persons.[1077] Return information was available at the discretion of the IRS. In addition, the statute gave one-percent shareholders access to returns.[1078]

Under the 1976 Act, persons with a material interest continued to have access to returns and return information to the same extent as in the prior regulations.[1079] Thus, upon written request, the filing taxpayer, either spouse filing a joint return, the partners of a partnership, the shareholders of an S corporation, the administrator, executor or trustee of an estate, heirs of an estate that have a material interest that may be affected by the information, the trustee of a trust and beneficiaries with a material interest, persons authorized to act for a dissolved corporation, a receiver or trustee in bankruptcy, and the trustee or guardian of an incompetent taxpayer, were given statutory access to return information. The Congress also retained the one-percent shareholder provision. The statute allowed a taxpayer to designate in writing a person to receive

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[1074] S. Rep. No. 94-938, at 337 (1976).

[1075] Pub. L. No. 94-455 sec. 1202(a)(1), 90 Stat. 1669 (1976) [Sec. 6103(d)].

[1076] Pub. L. No. 94-455 sec. 1202(a)(1), 90 Stat. 1679 (1976) [Sec. 6103(k)(5)].

[1077] Treas. Reg. sec. 301.6103(a)-1(c) (1975).

[1078] Sec. 6103(c) (1975).

[1079] Pub. L. No. 94-455 sec. 1202(a)(1), 90 Stat. 1669-1671 (1976)[Sec. 6103(e)].

the return or return information of that taxpayer.[1080] The requirements of the designation or consent to disclosure were subject to regulation.

Disclosure to the Congress

Before 1976, the statute authorized the House Committee on Ways and Means, the Senate Committee on Finance, and the Joint Committee on Taxation to access tax information in an executive session.[1081] Select committees could access tax information by resolution of the appropriate congressional body. Under regulations, standing, select, and subcommittees could obtain access by Presidential order upon adoption of resolution by the full committee.[1082]

In adopting the 1976 Act, the Congress noted that, while it required access to returns and return information to carry out its legislative responsibilities, it could do so under more restrictive disclosure rules.[1083] The 1976 Act allowed the Ways and Means Committee, the Finance Committee, and the Joint Committee on Taxation, to continue to have access to returns and return information.[1084] Other committees and subcommittees had access to returns and return information upon written request of the Chairman of the committee after (1) a committee action approving a decision to request returns and (2) an authorizing resolution of the House or Senate.[1085] The resolution must specify the purpose of the inspection and that no reasonable alternative source for the information exists.[1086]

Disclosure to the President

Before 1976, an executive order permitted tax checks with respect to prospective appointees, and inspection of returns by the President and certain White House employees.[1087] Requests were required to be made in writing, signed personally by the President.

In amending section 6103, the Congress acknowledged that the President and other

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[1080] Pub. L. No. 94-455 sec. 1202(a)(1), 90 Stat. 1669 (1976) [Sec. 6103(c)].

[1081] Sec. 6103(d) (1975).

[1082] Treas. Reg. sec. 301.6103(a)-101 (1975).

[1083] S. Rep. No. 94-938 at 319-320.

[1084] Pub. L. No. 94-455 sec. 1202(a)(1), 90 Stat. 1671 (1976) [Sec. 6103(f)(1)].

[1085] Pub. L. No. 94-455 sec. 1202(a)(1), 90 Stat. 1671-72 (1976) [Sec. 6103(f)(3)].

[1086] *Id.*

[1087] Executive Order 11805, September 20, 1974.

Federal agencies needed access to return information for tax checks for prospective appointees.[1088] Thus, the 1976 Act essentially codified the then-current practice under executive order. However, the Congress felt that the White House should report to the Congress regarding the disclosures of returns and return information made to it, and so a reporting requirement was added.[1089]

Under the 1976 Act, disclosure of returns and return information to the President and certain White House employees continued upon written request of the President, signed by the President personally.[1090] Among other things, the request was to specify the reason for the request.[1091] The President and the head of a Federal agency could also request "tax checks" with respect to prospective appointees.[1092] The IRS was to notify the prospective appointee of the tax check request.[1093] The 1976 Act required the President and agency heads to file quarterly reports with the Joint Committee regarding information requested under this provision.[1094] No report was required for information requested about current executive branch employees.[1095]

[1088] The Senate report provided:

> The committee recognizes the President's need for certain tax information, particularly, if not entirely in the "tax check" area. The committee amendment, to a large extent, codifies President Ford's Executive Order 11805, September 20, 1974, which, among other things, restricts access to tax information to a relatively limited number of people in the White House. Moreover, the committee felt that the White House should report to Congress regarding the disclosures of tax information made to it. Consequently, annual reporting requirements were imposed upon the White House. Similar requirements were also provided with respect to tax checks made by other Federal agencies.

S. Rep. No. 94-938 at 322.

[1089] *Id.*

[1090] Pub. L. No. 94-455 sec. 1202(a)(1), 90 Stat. 1672-73 (1976) [Sec. 6103(g)].

[1091] Pub. L. No. 94-455 sec. 1202(a)(1), 90 Stat. 1673 (1976) [Sec. 6103(g)(1)(D)].

[1092] Pub. L. No. 94-455 sec. 1202(a)(1), 90 Stat. 1673 (1976) [Sec. 6103(g)(2)].

[1093] *Id.*

[1094] Pub. L. No. 94-455 sec. 1202(a)(1), 90 Stat. 1673-74 (1976) [Sec. 6103(g)(5)].

[1095] Pub. L. No. 94-455 sec. 1202(a)(1), 90 Stat. 1674 (1976) [Sec. 6103(g)(5)].

Disclosure in civil and criminal tax cases

Before 1976, pursuant to regulation, the IRS could furnish return information to the Department of Justice and U.S. Attorneys in cases that the IRS had referred for prosecution or defense.[1096] For cases not referred by the IRS, DOJ had to make a written application for information "necessary in the performance of [] official duties."[1097] DOJ used the returns of potential witnesses and third parties to evaluate credibility and for investigative purposes. Upon request, the IRS would also reveal whether the IRS had investigated a prospective juror. Returns and return information could be disclosed in any proceeding conducted by or before any department of the Federal government or in which the United States is a party.[1098]

In adopting the 1976 Act, the Congress recognized the need for DOJ to continue to have access to carry out its responsibilities in the civil and criminal tax area. However, the Congress imposed restrictions on the use of third party returns and return information to balance the potential abuse of privacy:

> The committee recognizes the need of the Justice Department to continued access to tax returns and return information in carrying out its statutory responsibility in the civil and criminal tax areas. While the committee decided to maintain the present rules pertaining to the disclosure of returns and return information of the taxpayer whose civil and criminal tax liability is at issue, restrictions were imposed in certain instances at the pre-trial and trial levels with respect to the use of third-party returns where, after comparing the minimal benefits derived from the standpoint of tax administration to the potential abuse of privacy, the committee concluded that the particular disclosure involved was unwarranted.[1099]

The 1976 Act continued to authorize DOJ to access return or return information of a taxpayer whose civil or criminal tax liability is at issue.[1100] The 1976 Act limited disclosure of third party returns and return information to those situations in which an item reflected on the taxpayer's return "is or may be related" to the resolution of an issue involving the taxpayer's

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[1096] Treas. reg. sec. 301.6103(a)-1(h) (1975).

[1097] Treas. reg. sec. 301.6103(a)-1(g) (1975).

[1098] Treas. reg. sec. 301.6103(a)-1(h) (1975).

[1099] S. Rep. No. 94-938 at 324.

[1100] Pub. L. No. 94-455 sec. 1202(a)(1), 90 Stat. 1674 (1976) [Sec. 6103(h)(2)].

liability under the Code.[1101] A third party's return or return information could also be disclosed under circumstances when it may relate to a transaction, between the third party and the taxpayer whose liability is at issue, and the return information pertaining to that transaction may affect the resolution of an issue of the taxpayer's liability.[1102] Disclosure of third party return information in a tax proceeding was subject to the same item and transaction tests, except that such items and transactions must have a direct relationship to the resolution of an issue pertaining to the taxpayer's liability.[1103] The IRS could provide no information to DOJ for the sole purpose of discrediting a witness. Congress gave the IRS the discretion to refuse to have return information disclosed in a tax proceeding if it determines disclosure would identify a confidential informant, or seriously impair a civil or criminal tax investigation.[1104]

In response to an inquiry about a prospective juror, the IRS could reveal whether such jurors had been audited by the IRS.[1105] The IRS, however, could only respond in the affirmative or negative.

Disclosure to Federal agencies in nontax criminal cases

Before 1976, DOJ and other Federal agencies could obtain information upon written request for nontax official business purposes.[1106] As a practical matter, an agency could obtain the information at its own discretion.

In adopting the 1976 Act, the Congress noted that the information provided by taxpayers is compelled by law. The legislative history states that such information should be accorded the same degree of privacy as those private papers contained in their homes.[1107] Thus, Congress

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[1101] *Id.* [Sec. 6103(h)(2)(B)].

[1102] *Id.* [Sec. 6103(h)(2)(C)].

[1103] Pub. L. No. 94-455 sec. 1202(a)(1), 90 Stat. 1674-75 (1976) [Sec. 6103(h)(4)(B) and (C)].

[1104] Pub. L. No. 94-455 sec. 1202(a)(1), 90 Stat. 1675 (1976) [Sec. 6103(h)(4)].

[1105] Pub. L. No. 94-455 sec. 1202(a)(1), 90 Stat. 1675 (1976) [Sec. 6103(h)(5)]. This provision would be repealed by the Taxpayer Relief Act of 1997 (Pub. L. No. 105-34).

[1106] Treas. reg. sec. 301.6103(a)-1(f) and (g) (1975).

[1107] The committee report provides:

> The committee decided that the information that the American citizen is compelled by our tax laws to disclose to the Internal Revenue Service was entitled

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imposed a court order requirement for disclosure relating to nontax criminal matters.

The 1976 Act required an agency to obtain an *ex parte* court order before the IRS could give a taxpayer's return or return information provided by the taxpayer to DOJ or another Federal agency for use in nontax criminal cases.[1108] No court order was necessary for information that suggests the taxpayer committed a nontax crime that the IRS derives from a source other than the taxpayer.[1109] A court order was to be based on a finding that there was reasonable cause to believe that a specific crime has been committed; that such return or return information was probative of the commission of such criminal act; and the information sought to be disclosed could not reasonably be obtained from any other source.[1110] Disclosure of the return or return information in a proceeding could only be permitted if there was a showing that such return or return information was probative of the commission of a crime.[1111] Thus, information was not available for collateral purposes, such as discrediting a witness on matters unrelated to the crime at issue.

Nontax civil matters

Prior to 1976, DOJ had access to returns and return information for nontax civil matters

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[1107](...continued)
to essentially the same degree of privacy as those private papers maintained in his home. Present law and practice does not afford him that protection – the Justice Department and other Federal agencies, as practical matter, being able to obtain that information for nontax purposes almost at their sole discretion.

The committee decided, therefore, that the Justice Department and any other Federal agency responsible for the enforcement of a non-tax criminal law should be required to obtain court approval for the inspection of taxpayer's return or return information. The court approval procedure would not be required, however, with respect to information indicative of a commission of a nontax crime which is derived from a source other than the taxpayer.

S. Rep. No. 94-938 at 328.

[1108] Pub. L. No. 94-455 sec. 1202(a)(1), 90 Stat. 1675-77 (1976) [Sec. 6103(i)].

[1109] Pub. L. No. 94-455 sec. 1202(a)(1), 90 Stat. 1676 (1976) [Sec. 6103(i)(2)].

[1110] Pub. L. No. 94-455 sec. 1202(a)(1), 90 Stat. 1675 (1976) [Sec. 6103(i)(1)(B)].

[1111] Pub. L. No. 94-455 sec. 1202(a)(1), 90 Stat. 1675 (1976) [Sec. 6103(i)(1)(B)(ii)].

on the same basis as nontax criminal matters.[1112] Other Federal agencies were given returns and return information in connection with matters officially before them.[1113] After the 1976 Act, generally, no disclosure for nontax civil matters was permitted.[1114] The Congress noted that alternative sources of information were available to DOJ and the other agencies in these circumstances.[1115]

Disclosure to the GAO

Before 1976, the GAO did not have independent authority to inspect tax returns. It could inspect returns when acting as an agent of the Joint Committee in an audit of IRS operations.

The 1976 Act gave the GAO the authority to access returns and return information in auditing the IRS or the Bureau of Tobacco, Alcohol and Firearms.[1116] The Joint Committee was given a 30-day period to disapprove any proposed GAO audit. The Congress also gave the GAO authority to review and evaluate the Federal and State agency compliance with the requirements

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[1112] Treas. reg. sec. 301.6103(a)-1(g) (1975).

[1113] Treas. reg. sec. 301.6103(a)-1(f) (1975).

[1114] An exception existed for those instances where DOJ is defending the United States in a suit involving the renegotiation of contracts previously determined by the Renegotiation Board. Pub. L. No. 94-455 sec. 1202(a)(1), 90 Stat. 1677 (1976) [Sec. 6103(i)(5)].

[1115] S. Rep. No. 94-938 at 331. The committee report provides:

> The committee decided that the current use by the Department of Justice and other Federal agencies in nontax civil cases described above were not warranted in light of the invasions of privacy involved and the fact of the alternative sources of information available to the Department of Justice and other agencies in these situations. However, in one limited instance, the committee decided that the disclosure of returns and return information, particularly since it pertained to corporations in most instances (where the invasion of privacy is not involved) that returns and return information would be disclosed to the Department of Justice in those cases involving the renegotiation of contracts where the Department of Justice, in defending the United States in such cases, would use such returns and return information to verify the income earned on the contracts in question.

Id.

[1116] Pub. L. No. 94-455 sec. 1202(a)(1), 90 Stat. 1677 (1976) [Sec. 6103(i)(6)].

for use and safeguarding returns and return information.[1117]

Disclosure for statistical use

The Bureau of the Census,[1118] Bureau of Economic Analysis, [1119] the Federal Trade Commission,[1120] and the Securities and Exchange Commission,[1121] had access to return information for statistical purposes prior to the 1976 Act.

Congress found that the potential for abuse of privacy in agency statistical use was minimal:

> The committee recognizes the importance to other Federal agencies to be allowed the use of returns and return information in connection with certain of their statistical and research functions. Since there does not appear to be any real likelihood that the use of returns and return information by these agencies would, under the procedures and safeguards provided for in this amendment, result in an abuse of privacy or other rights of the taxpayers whose returns and return information is used, the committee decided that the use of returns and return information should be available for statistical use by certain agencies other than the IRS.[1122]

The SEC no longer needed access to return information because the functions for which it required the information were moved to the FTC. Thus, its disclosure authority was not carried over into the 1976 Act. The Census, the BEA and the FTC retained their authority to access return information under the 1976 Act.[1123] Non-IRS Treasury personnel also could now obtain

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[1117] This provision had been previously included in another bill reported favorably out of the Senate Finance Committee. H.R. 8948, 94th Congress (1976)(a bill to amend the Accounting and Auditing Act of 1960 to provide for the audit of the IRS, and the Bureau of Alcohol Tobacco and Firearms, by the Comptroller General, reported to the Senate from the Committee on Finance by S. Rep. No. 94-909 (1976)).

[1118] Treas. reg. sec. 301.6103(a)-104 (1975).

[1119] Treas. reg. sec. 301.6103(a)-104 (1975).

[1120] Treas. reg. sec. 301.6103(a)-106 (1975).

[1121] Treas. reg. sec. 301.6103(a)-102 (1975).

[1122] S. Rep. No. 94-938 at 333.

[1123] Pub. L. No. 94-455 sec. 1202(a)(1), 90 Stat. 1678 (1976) [Sec. 6103(j)(1) &(2)].

tax returns and limited return information for statistical and research purposes.[1124] The law prohibited publication of studies identifying any particular taxpayer.[1125]

Inspection by Federal agencies

By regulation, prior to the 1976 Act, several agencies could inspect returns and return information for general purposes without submitting a written request by the agency head.[1126] The Department of Health, Education and Welfare, the Renegotiation Board[1127], and the FTC, most frequently used this provision.[1128]

Congress determined that inspection on a general basis was not warranted. Instead, Congress decided to limit strictly the types of return information made available, and the circumstances of disclosure, to agencies for nontax purposes:

> The committee decided that in many situations, the current use of returns and return information on a general basis is not warranted. The committee decided to limit strictly the types of returns and return information which would be made available to other agencies on a general basis for purposes other than tax administration or statistical use, and the situations in which they would be made available. Generally, these are situations where the return information is directly related to programs administered by the agency in question.[1129]

After the 1976 Act, the Social Security Administration (for Social Security Act purposes), the Railroad Retirement Board (for Railroad Retirement Act purposes), the Department of Labor and the Pension Benefit Guaranty Corporation (for Employee Retirement Income Security Act of 1974 purposes) and the Renegotiation Board (for Renegotiation Act purposes) were allowed

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[1124] Pub. L. No. 94-455 sec. 1202(a)(1), 90 Stat. 1678 (1976) [Sec. 6103(j)(3)].

[1125] Pub. L. No. 94-455 sec. 1202(a)(1), 90 Stat. 1678 (1976) [Sec. 6103(j)(4)].

[1126] *See, e.g.,* Treas. reg. sec. 301.6103(a)-100 (1975) (Health, Education, and Welfare); Treas. Reg. sec. 301.6103(a)-105 (1975)(Renegotiation Board); Treas. reg. sec. 301.6103(a)-106 (1975) (FTC).

[1127] The Renegotiation Board was charged with administering the laws to renegotiate contracts with government contractors to eliminate excess profits. S. Rep. No. 94-938 at 334.

[1128] S. Rep. No. 94-938 at 334.

[1129] *Id.* at 335.

disclosures of limited return information.[1130]

Miscellaneous disclosures

Before 1976, the statute authorized the IRS to disclose, upon inquiry, whether a taxpayer had or had not filed a return. The regulations authorized other miscellaneous disclosures.

The 1976 Act repealed the provision authorizing disclosure of the fact of filing a return. The Act retained other miscellaneous disclosures. In each situation, Congress decided that either the returns or return information should be disclosed as a matter of policy or that the reasons for limited disclosures outweighed any possible invasion of taxpayer privacy.[1131] These situations included disclosure:

(1) to Federal, State, and local child support enforcement offices to the extent not available from another source (but not to third parties or in litigation)[1132];

(2) of mailing addresses to agencies collecting under the Federal Claims Collection Act,[1133]

(3) to the Privacy Protection Study Commission,[1134]

(4) to tax administration contractors,[1135]

(5) to the press and media for purposes of notifying a person due a refund,[1136]

[1130] Pub. L. No. 94-455 sec. 1202(a)(1), 90 Stat. 1677, 1679-81 (1976) [Sec. 6103(i)(5) and sec. 6103(l)].

[1131] S. Rep. No. 94-938 at 378.

[1132] Pub. L. No. 94-455 sec. 1202(a)(1), 90 Stat. 1680 (1976) [Sec. 6103(l)(6)].

[1133] Pub. L. No. 94-455 sec. 1202(a)(1), 90 Stat. 1681 (1976) [Sec. 6103(m)(2)].

[1134] Pub. L. No. 94-455 sec. 1202(a)(1), 90 Stat. 1680 (1976) [Sec. 6103(l)(3)].

[1135] Pub. L. No. 94-455 sec. 1202(a)(1), 90 Stat. 1681 (1976) [Sec. 6103(n)].

[1136] Pub. L. No. 94-455 sec. 1202(a)(1), 90 Stat. 1681 (1976) [Sec. 6103(m)(1)].

(6) in personnel matters against an employee,[1137]

(7) to persons who practice before the IRS when their right to practice may be affected by administrative action or proceeding,[1138]

(8) upon approval of the Joint Committee on Taxation, to correct a misstatement of fact,[1139]

(9) for investigative purposes,[1140]

(10) of completed offers in compromises,[1141]

(11) to foreign government by treaty,[1142]

(12) of the amount of an outstanding lien to a person with an interest, or who intends to obtain an interest, in the property subject to the lien.[1143]

Procedures and safeguards

Prior to 1976, the IRS did not have a standardized method for tracking the disclosure of returns and return information. The Congress noted that information had been improperly transferred outside the IRS and inadequate records were kept of transfers to both Federal and State agencies.[1144]

After the 1976 Act, the IRS was required to maintain a standardized system of permanent

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[1137] Pub. L. No. 94-455 sec. 1202(a)(1), 90 Stat. 1680 (1976) [Sec. 6103(l)(4)].

[1138] Pub. L. No. 94-455 sec. 1202(a)(1), 90 Stat. 1680 (1976) [Sec. 6103(l)(4)(A)(ii)].

[1139] Pub. L. No. 94-455 sec. 1202(a)(1), 90 Stat. 1678 (1976) [Sec. 6103(k)(3)].

[1140] Pub. L. No. 94-455 sec. 1202(a)(1), 90 Stat. 1679 (1976) [Sec. 6103(k)(6)].

[1141] Pub. L. No. 94-455 sec. 1202(a)(1), 90 Stat. 1678 (1976) [Sec. 6103(k)(1)].

[1142] Pub. L. No. 94-455 sec. 1202(a)(1), 90 Stat. 1679 (1976) [Sec. 6103(k)(4)].

[1143] Pub. L. No. 94-455 sec. 1202(a)(1), 90 Stat. 1678 (1976) [Sec. 6103(k)(2)].

[1144] S. Rep. No. 94-938 at 343.

records on the use and disclosure of returns and return information.[1145] The record keeping requirements do not apply to certain circumstances. For example, the record keeping requirements do not apply to: (1) return or return information open to the public generally (accepted offers-in-compromise, amounts of outstanding liens, etc.); (2) disclosures to the Treasury or Justice Department for tax administration and litigation purposes; (3) disclosures to persons with a material interest; (4) taxpayer consent disclosures; (5) disclosures to the media of taxpayer identity information and (6) disclosure to contractors.[1146] For purposes of the Privacy Act, the IRS is not required to account for disclosures with respect to which the record keeping requirements do not apply.[1147]

Federal and State agencies that receive returns and return information must maintain a standardized system of permanent records on the use and disclosure of that information.[1148] Maintaining such records is a prerequisite to obtaining and continuing to obtain returns and return information.[1149]

Such agencies must also establish procedures satisfactory to the IRS for safeguarding the returns and return information it receives.[1150] The IRS must review the safeguards established by such agencies on a regular basis.

Reports to the Congress

The Congress felt it was necessary for it to review very closely the use of returns and return information and the extent to which taxpayer privacy is being protected.[1151] The 1976 Act requires that the IRS make a confidential report to the Joint Committee each year.[1152] All requests for disclosure of returns and return information and the reasons for such requests are covered by the report. A separate section, to be publicly released, includes a listing of all agencies receiving returns and return information, the number of cases in which disclosure was made to that agency and the general purposes of the disclosures. The IRS must also file reports

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[1145] Pub. L. No. 94-455 sec. 1202(a)(1), 90 Stat. 1682 (1976) [Sec. 6103(p)(3)].

[1146] Pub. L. No. 94-455 sec. 1202(a)(1), 90 Stat. 1682 (1976) [Sec. 6103(p)(3)(A)].

[1147] *Id.*

[1148] Pub. L. No. 94-455 sec. 1202(a)(1), 90 Stat. 1683 (1976) [Sec. 6103(p)(4)].

[1149] *Id.*

[1150] *Id.*

[1151] S. Rep. No. 94-938 at 346.

[1152] Pub. L. No. 94-455 sec. 1202(a)(1), 90 Stat. 1682-83 (1976) [Sec. 6103(p)(3)].

on the procedures established for maintaining the confidentiality of returns and return information disclosed outside the IRS, on the implementation of these procedures, and on any problems that may develop concerning these procedures.

D. Post-1976 Amendments

In the years that have followed the 1976 Act, the Congress has primarily expanded, access to returns and return information. The following is a highlight of the changes made since the 1976 amendment of section 6103.

Revenue Act of 1978: National Institute for Occupational Safety and Health, Department of Education, State, and nontax criminal case changes

The Revenue Act of 1978 (the 1978 Act) amended section 6103 to allow the National Institute for Occupational Safety and Health is allowed to receive disclosure of address information to locate workers exposed to hazardous substances. This disclosure is for the purpose of ascertaining whether the worker is dead or alive and to refer these persons for medical treatment.[1153] The 1978 Act also allows the Commissioner of Education and educational institutions to obtain address information to find individuals who have defaulted on student loans.[1154]

As noted above, for nontax criminal cases, a court order is needed to obtain information filed by or on behalf of the taxpayer. The court order requirement does not apply to information not filed by or on behalf of the taxpayer. Because the taxpayer gives his or her name and address on the return, arguably this is information filed by the taxpayer. For purposes of 6103(i), the 1978 Act gave the IRS authority to disclose the name and address of a taxpayer without a court order.[1155]

The 1978 Act also added additional information that could be disclosed to the States. It provided that fuel excise returns could be disclosed to the States.[1156]

Bankruptcy Tax Act of 1980: modifications to material interest provision

In connection with the addition of section 1398 of the Code (relating to Title 11 cases), the Bankruptcy Tax Act of 1980 modified the rules for material interest disclosures relating to

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[1153] Pub. L. No. 95-600, sec. 701(bb) (1978).

[1154] *Id.*

[1155] *Id.*

[1156] *Id.*

Title 11 cases.[1157] It allowed disclosure of a debtor's tax return for the year in which the bankruptcy case was commenced and prior year returns upon written request by the trustee.[1158] It also permitted the debtor to inspect any return of the estate upon written request. A special rule applied to involuntary cases.[1159]

Excise tax refunds: State audit agencies added

In 1980, Congress allowed State agencies that audit governmental functions to access return information. Such disclosures were subject to the same safeguards, record keeping and reporting requirements that apply to other State agencies.[1160]

Omnibus Reconciliation Act of 1980: student loan programs

The Omnibus Reconciliation Act of 1980 permitted the IRS to provide mailing addresses of students who are in default on their loans to the holders of the loans.[1161]

Economic Recovery Act of 1981: definition of return information amended

The definition of return information was amended by the Economic Recovery Act of 1981. The 1981Act amended the statute to state that nothing in the law will be construed to require the disclosure of standards used, or to be used, for the selection of returns for examination (or data used or to be used for determining such standards), if the Secretary determines such disclosure will seriously impair assessment, collection or enforcement under the internal revenue laws.[1162] This measure was enacted to clarify that data derived by the IRS from its Tax Measurement Compliance Program is protected. The data is used by the IRS to develop

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[1157] Section 1398 creates a separate taxable bankruptcy estate, which succeeds to various tax attributes of the debtor. Sec. 1398(g).

[1158] Pub. L. No. 96-589, sec. 3(c) (1980). Such disclosures permit the trustee to determine attribute carryovers to the estate and carry back deductions to the preceding years of the debtor. S. Rep. No. 96-1035, at 31-32 (1980).

[1159] In involuntary cases, the IRS may not make a disclosure to the trustee until the order for relief has been entered, unless the court having jurisdiction over the case determines that such disclosure is appropriate for purposes of determining whether an order for relief should be entered. Pub. L. No. 96-589, sec. 3(c) (1980).

[1160] Pub. L. No. 96-598, sec 3 (1980).

[1161] Pub. L. No. 96-499, sec. 302 (1980).

[1162] Pub. L. No. 97-34, sec. 701 (1981).

variables used to derive scores that are used for the purpose of selecting returns for an audit. Prior to enactment, the Ninth Circuit, in *Long v. United States Internal Revenue Service*,[1163] or denied the disclosure of TMCP data from which the taxpayers' identifying characteristics had been deleted. The decision was based on the fact that the definition of return information excluded "data in a form which cannot otherwise be associated with, or otherwise identify, directly or indirectly, a particular taxpayer."

Tax Equity and Fiscal Responsibility Act of 1982: nontax criminal disclosures revised; GAO access expanded

The Tax Equity and Fiscal Responsibility Act of 1982 (the 1982 Act) revised the statute with respect to disclosures for nontax criminal purposes. First, it relaxed the standard for obtaining an *ex parte* order for a taxpayer's return or return information provided by the taxpayer from "probative" to "relevant."[1164] The Congress viewed the probative standard as a catch-22 because it could not be proven that the information was probative before it was obtained and it could not be obtained until it was shown that the information was probative. The 1982 Act also eliminated the authority of agency heads to authorize the application for an *ex parte* order. However, it expanded the number of individuals within the DOJ who could authorize such an application.[1165]

The 1982 Act also added new disclosure provisions in the nontax criminal area. The IRS could make disclosures for emergency purposes (death or imminent danger).[1166] Additionally, it could make disclosures for use in locating Federal fugitives from justice.[1167] Disclosures in administrative or judicial proceedings not involving tax administration were expanded. [1168] The Act authorized information to be disclosed in such proceedings pertaining to the enforcement of a civil forfeiture related to a nontax Federal criminal statute, or as required by court order under 18 U.S.C. 3500 or rule 16 of the Federal Rules of Criminal Procedure. [1169]

The 1982 Act also expanded the amount of returns and return information available to the GAO. The GAO could now access return information in the possession of any Federal agency

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[1163] 596 F.2d 362 (9th Cir. 1979).

[1164] Pub. L. No. 97-248, sec. 356(a) (1982).

[1165] *Id.*

[1166] *Id.*

[1167] *Id.*

[1168] *Id.*

[1169] *Id.*

when the GAO is auditing an agency program or activity that involves the use of returns or return information. Further the GAO may access returns and return information of the type that may have been disclosed to the agency for use in the program or activity that is the subject of the GAO audit.[1170]

Social Security Amendments of 1983: Social Security and Railroad Retirement Board

To assist the Social Security Administration and the Railroad Retirement Board in carrying out their responsibilities for withholding taxes from the social security benefits of nonresident aliens, in 1983, Congress authorized the IRS to disclose the address and status of an individual as a nonresident alien, resident, or citizen of the United States.[1171]

Deficit Reduction Act of 1984: Income and eligibility verification procedures, Windfall Profit Tax and alcohol fuel producers disclosed to States

The Deficit Reduction Act of 1984 (the 1984 Act) increased the type of information available to the States. It added the windfall profit tax to the list of information permitted to be disclosed to the State tax agencies for purposes of administering State tax laws.[1172] It also permitted the disclosure of the names, addresses, and business locations of persons producing alcohol for fuel use to State agencies charged with responsibility for administration of State alcohol laws.[1173] The 1984 Act also required, rather than allowed, the IRS to disclose unearned income information upon request of specified agencies for purposes of income and eligibility verification procedures.[1174]

Tax Reform Act of 1986: large cities allowed access to returns and return information

The Tax Reform Act of 1986 permitted large cities (population in excess of two million) that impose an income tax or wage tax to receive returns and return information in the same manner and with the same safeguards as States are eligible to do.[1175] The population threshold of two million was lowered to 250,000 by the Technical and Miscellaneous Revenue Act of

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[1170] *Id.* at sec. 358.

[1171] Pub. L. No. 98-21, sec. 121 (1983).

[1172] Pub. L. No. 98-369, sec. 449 (1984).

[1173] *Id.* at sec. 453.

[1174] *Id.* at sec. 2651(k)(1).

[1175] Pub. L. No. 99-514, sec. 1568 (1986).

1988.[1176]

Technical and Miscellaneous Revenue Act of 1988: foreign governments and the Blood Donor Locator Service

The Technical and Miscellaneous Revenue Act of 1988 also made other changes to section 6103. It clarified that returns and return information can be disclosed to a competent authority of a foreign government pursuant to a bilateral agreement relating to the exchange of information with the United States.[1177] The Act also authorized disclosures to the Blood Donor Locator Service for purposes of notifying donors that they may have the AIDS virus.[1178]

Omnibus Reconciliation Act of 1989: Medicare Secondary Payer Program

The Omnibus Budget Reconciliation Act of 1989 added the disclosure of certain taxpayer identity information to the Social Security Administration and the Health Care Financing Administration.[1179] This information is used for verification of the employment status of a medicare beneficiary and of a medicare beneficiary's spouse. This data match program is intended to identify situations and recover payments for which Medicare is the secondary rather than the primary payer with respect to health claims.[1180]

Omnibus Budget Reconciliation Act of 1990: Veteran's Administration

The Veterans Administration was added to the list of agencies receiving return information by the Omnibus Budget Reconciliation Act ("OBRA") of 1990. This Act permitted the disclosure of certain third party and self employment tax return information to the Veterans Administration to verify a recipient's eligibility for need-based veterans' benefits.[1181] The Congress felt it was appropriate to permit disclosure of otherwise confidential return information

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[1176] Pub. L. No. 100-647, sec. 6251 (1988).

[1177] Pub. L. No. 100-647, sec. 1012(bb)(3)(A)(i)-(ii) (1988).

[1178] *Id.* at sec. 8008.

[1179] Pub. L. No. 101-239, sec. 6202 (1989).

[1180] *See* H.R. Conf. Rep. No. 101-386, at 823 (1990).

[1181] Pub. L. No. 101-508, sec. 8051 (1990). The Taxpayer Relief Act of 1997 extended disclosure authority to the Veterans Administration to September 30, 2003. Pub. L. No. 105-34, sec. 1023(a) (1997).

to ensure the correctness of government benefits payments.[1182]

This Act also clarified that contractors, such as expert witnesses, were subject to the penalty for unauthorized disclosure. No inference was intended that these persons were not subject to these penalties prior to the amendment.

North American Free Trade Agreement Implementation Act

The Congress noted that the Customs Service conducted approximately 200 major import audits annually. In some cases, importers had voluntarily provided return information to the Customs Service. The Customs Service, however, received no voluntary return information in about three-fourths of its 200 annual audits.[1183] Thus, in 1993, section 6103 was amended to permit disclosure to the Commissioner of the Customs Service for (1) the purpose of ascertaining the correctness of any entry in audits as provided for in 19 U.S.C. 1509 (the Tariff Act of 1930), and (2) other actions to recover any loss of revenue, or to collect duties, taxes, and fees, determined to be due and owing pursuant to such audits.[1184]

Omnibus Reconciliation Act of 1993: Department of Education, HUD, and the States

The Omnibus Reconciliation Act of 1993 ("OBRA 1993") authorized access of certain return information by the Department of Education to establish the appropriate income contingent repayment amount for an applicable student loan.[1185] The Department of Education could also receive the mailing address of taxpayers delinquent on Pell grants.[1186] The Congress felt that this disclosure was appropriate to carry out modifications to the Federal student loan program. The Ways and Means Committee noted, however, its increasing concern over the number of requests for disclosure of return information for nontax purposes and the effect on voluntary compliance.[1187]

The Congress believed that the Department of Housing and Urban Development ("HUD") should be provided with access to certain items of return information to assist HUD in determining eligibility for, and establishing correct benefit-levels under, certain HUD programs.

[1182] H.R. Rep. No. 101-881, at 223 (1990).

[1183] S. Rep. No. 103-189, at 104 (1993).

[1184] Pub. L. No. 103-182, sec. 522 (1993).

[1185] Pub. L. No. 103-66, sec. 4021 (1993).

[1186] *Id.* at sec. 13402.

[1187] H.R. Rep. No. 103-111, at 1034 (1993).

Thus, it granted HUD access to return information for purposes of verifying a taxpayer's eligibility for (or the correct amount of benefits under) those HUD programs.[1188] The committee report noted:

> The committee, however, is also concerned about the increasing number of requests for disclosure of confidential tax information for nontax purposes and the effect of such disclosure on voluntary taxpayer compliance. Accordingly HUD's access to tax information has been granted only temporarily to provide the Treasury Department sufficient time to conduct a study on the effectiveness of such disclosure and HUD's compliance with safeguards contained in the Code.[1189]

OBRA 1993 added a restriction on the information available to the States. It established that return and return information is not available to a State taxing agency for any period for which there is not a contract between the State and the Secretary of Health and Human Service ("HHS") regarding the availability and use of death information. Such contracts require the State to furnish HHS with death certificates and related information. The contract cannot contain any restriction on use by HHS, except that the contract may provide that such information only be used to ensure that Federal benefits or payments are not erroneously paid to deceased individuals.[1190]

Social Security Independence and Program Improvements Act of 1994: epidemiological research

In 1994, the Social Security Independence and Programs Improvement Act gave the Social Security Administration authority to disclose a limited amount of personally identifiable information for epidemiological research purposes. The Treasury Department was authorized to disclose such information to the SSA for this purpose.[1191]

Taxpayer Bill of Rights 2 (1996): disclosure of collection efforts for joint deficiencies and trust fund recovery penalty; consents; and cash transactions over $10,000

Expanding the available information to individuals, the Taxpayer Bill of Rights 2 permits the IRS to disclose return information to divorced individuals or married individuals no longer living in the same household with respect to collection efforts against the other of a joint

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[1188] Pub. L. No. 103-66, sec. 3003 (1993).

[1189] H.R. Rep. No. 103-111, at 1035 (1993).

[1190] Pub. L. No. 103-66, sec. 13444 (1993).

[1191] Pub. L. No. 103-296, sec. 311 (1994).

deficiency.[1192] The IRS can also disclose to a responsible person the collection efforts against other responsible persons of a trust fund recovery penalty.[1193] The Congress felt that "it was appropriate to permit the IRS to disclose to a responsible person whether the IRS is imposing the penalty on any other responsible person and whether the IRS has been successful in collecting the penalty against such a person."[1194]

The Congress noted that "the IRS' move to a paperless system depends on the ease and functionality of electronic communication systems, e.g. telephones, facsimile machines, computers, communications networks, etc."[1195] Thus, the Act eliminated the requirement that consent be in writing in order for there to be a disclosure to the designee of a taxpayer.[1196] Congress believed that allowing such a change would expedite and facilitate the development and implementation of Tax System Modernization projects.[1197]

TBOR2 also makes the Form 8300 information (relating to cash transactions over $10,000) available to State, local and foreign agencies for civil, criminal and regulatory purposes. These forms are to be treated in the same manner as currency transaction reports under the Bank Secrecy Act.[1198]

Balanced Budget Act of 1997

The Balanced Budget Act of 1997 added a provision for disclosures to administer the District of Columbia Retirement Protection Act of 1997.[1199] It also made the medicare secondary payer data match program (SSA-HCFA disclosures) permanent.[1200]

[1192] Pub. L. No. 104-168, sec. 403 (1996).

[1193] *Id.* at sec. 902.

[1194] H.R. Rep. No. 104-506, at 40 (1996).

[1195] *Id.* at 49.

[1196] Pub. L. No. 104-168, sec. 1207 (1996).

[1197] H.R. Rep. No. 104-506, at 49 (1996).

[1198] Pub. L. No. 104-168, sec. 1206 (1966).

[1199] Pub. L. No. 105-33, sec. 11024 (1997).

[1200] *Id.* at sec. 4313.

Taxpayer Relief Act of 1997: Financial Management Service, section 6311, and demonstration project disclosure authority added; prospective juror disclosures deleted

Section 6103 was amended again in 1997 by the Taxpayer Relief Act of 1997 ("TRA of 1997"). The IRS could now disclose return information to the Financial Management Service.[1201]

TRA of 1997 authorized the IRS to make disclosures in administering section 6311 of the Internal Revenue Code (relating to payment by commercially acceptable means).[1202]

TRA of 1997 allowed the IRS to disclose taxpayer identities and signatures for purposes of the combined employment tax reporting demonstration project between Montana and the IRS. The demonstration project will assess the feasibility of expanding combined reporting in the future.

After being part of section 6103 since 1976, the TRA of 1997 repealed the provision allowing the IRS to disclose whether a prospective juror had been audited.[1203] The Congress found that this provision created significant difficulties in the civil and criminal tax litigation process.[1204]

IRS Restructuring and Reform Act of 1998: Attorney in fact, whistle-blower and NARA disclosure authority added

As noted above, TBOR2 permitted disclosures of collection efforts to separated or divorced individuals regarding joint deficiencies and to responsible persons involving trust fund recovery penalties. The IRS Restructuring and Reform Act of 1998 ("the IRS Reform Act"),

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[1201] Pub. L. No. 105-34, sec. 1026 (1997).

[1202] *Id.* at sec. 1205.

[1203] *Id.* at sec. 1283.

[1204] H.R. Rep. No. 105-148, at 609 (1997). Four reasons were cited for the change. First, it slowed the litigation process because it could take a substantial period of time to compile the requested information. Second, the early release of the list of potential jurors to the defendant provided an opportunity for harassment and intimidation of potential jurors. Third, significant judicial resources were spent interpreting this procedural requirement. Fourth, differing judicial interpretations have caused confusion. In some instances, defendants convicted of criminal tax offenses have obtained reversals based on a failure to fully comply with this provision.

extended this authority to allow disclosures to the attorney in fact for such individuals.[1205]

The IRS Reform Act also added a whistle-blower provision.[1206] This provision allows an individual to disclose return information to the House Committee on Ways and Means, Senate Committee on Finance and the Joint Committee on Taxation for purposes of disclosing taxpayer or employee abuse or mismanagement. The Congress thought it appropriate to have the opportunity to receive return information directly from whistle-blowers.

The IRS Reform Act added a provision allowing disclosures to the National Archives and Records Administration for purposes of appraisal of records for destruction or retention.[1207]

Tax and Trade Relief Extension Act of 1998: Agriculture census

Department of Agriculture personnel are responsible for structuring, preparing, and conducting the census of agriculture in accordance with the Census of Agriculture Act of 1997. Department of Agriculture personnel are entitled to returns and return information for this purpose. This disclosure provision was added by the Tax and Trade Relief Extension Act of 1998.[1208] Previously, the Bureau of Census had handled this responsibility.

Ticket to Work and Work Incentives Improvement Act of 1999: APAs

The Ticket to Work and Work Incentives Improvement Act of 1999 amended section 6103 to clarify that advance pricing agreements and related background information are confidential return information.[1209]

[1205] Pub. L. No. 105-206, sec. 6019(c) (1998).

[1206] Pub. L. No. 105-206, sec. 3708 (1998).

[1207] *Id.* at sec. 3702.

[1208] Pub. L. No. 105-277, sec. 4006 (1998).

[1209] Pub. L. No. 106-170, sec. 521 (1999).

APPENDIX B: INFORMATION PROVIDED BY THE TAXPAYER IN AN APA REQUEST

Revenue Procedure 96-53 sets forth an extensive list of information the IRS requires the taxpayer to provide as part of an APA request.[1210] That information is listed below.[1211]

General factual and legal items for all proposed transfer pricing methodologies ("TPMs")

(1) The organizations, trades, businesses, and transactions that will be subject to the APA.

(2) The names, addresses, telephone numbers, and taxpayer identification numbers of the controlled taxpayers that are parties to the requested APA ("the parties").

(3) A properly completed Form 2848 for any persons authorized to represent the parties in connection with the request. If the taxpayer or the taxpayer's authorized representative has retained any other person or persons (including, but not limited to, a law firm, accounting firm, or economic consulting firm) to assist the taxpayer in pursuing the APA request, the taxpayer must also provide a separate written authorization for disclosures to such person or persons and their employees during the IRS's consideration of the request, pursuant to the instructions in sec. 301.6103(c)--1 of the Income Tax Regulations.

(4) A brief description of the general history of business operations, worldwide organizational structure, ownership, capitalization, financial arrangements, principal businesses, and the place or places where such businesses are conducted, and major transaction flows of the parties.

(5) Representative financial and tax data of the parties for the last three taxable years, together with other relevant data and documents in support of the proposed TPM. This item includes, but need not be limited to, data contained in Form 5471 (Information Report with Respect to a Foreign Corporation); Form 5472 (Information Report of a Foreign Owned Corporation); income tax returns; financial

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[1210] Rev. Proc. 96-53, *Section 482 – Allocations Between Related Parties*, secs. 5.03-5.95, 1996-2 C.B. 375(1996).

[1211] The list is not exhaustive. Other information may be required by the IRS.

statements; annual reports; other pertinent U.S. and foreign government filings (for example, customs reports or SEC filings); existing pricing, distribution, or licensing agreements; marketing and financial studies; and company-wide accounting procedures, business segment reports, budgets, projections, business plans, and worldwide product line or business segment profitability reports.

(6) The functional currency of each party and the currency in which payment between parties is made for the transactions that will be covered by the APA.

(7) The taxable year of each party.

(8) A description of significant financial accounting methods employed by the parties that have a direct bearing on the proposed TPM.

(9) An explanation of significant financial and tax accounting differences, if any, between the U.S. and the foreign countries involved that have a bearing on the proposed TPM.

(10) A discussion of any relevant statutory provisions, tax treaties, court decisions, regulations, revenue rulings, or revenue procedures that relate to the proposed TPM.

(11) A statement describing all previous and current issues at the examination, appeals, judicial, or competent authority levels that relate to the proposed TPM, including an explanation of the taxpayer's and the government's positions and any resolution of any such issues. The same information also may be required for similar issues involving foreign tax authorities.

Specific factual items for a proposed TPM other than a cost sharing arrangement

The following information may be appropriate to establish the arm's length basis of the proposed TPM under section 482:

(1) Pertinent measurements of profitability and return on investment (for example, gross profit margin or markup, gross income/total operating expenses, net operating profit margin, or return on assets).

(2) A functional analysis of each party setting forth the economic

activities performed, the assets employed, the economic costs incurred, and the risks assumed.

(3) An economic analysis or study of the general industry pricing practices and economic functions performed within the markets and geographical areas to be covered by the APA.

(4) A list of the taxpayer's competitors and a discussion of any uncontrolled transactions, lines of business or types of businesses that may be comparable or similar to those addressed in the request.

(5) A detailed presentation of the research efforts and criteria used to identify and select possible independent comparables and of the application of the criteria to the potential comparables. This presentation should include a list of potential comparables and an explanation of why each was either accepted or rejected.

(6) A detailed explanation of the selection and application of the factors used to adjust the activities of selected independent comparables for purposes of devising the proposed TPM. Examples of possible adjustments include adjustments to accord with product line segregations; for functional differences relating to activities performed, assets employed, risks and costs incurred; for volume or scale differences; and for differing economic and market conditions.

Specific factual items for a cost sharing arrangement

The taxpayer must apply the cost sharing regulations under section 482 in developing the cost sharing arrangement proposed in the request. The following illustrates information that may be appropriate to establish that the proposed arrangement is a qualified cost sharing arrangement:

(1) The history of the business operations, the geographic locations, and principal business activities (for example, manufacturing or marketing) of each of the participants.

(2) Documentation of the arrangement and any changes made to it, along with an explanation and the dates thereof.

(3) The participants, their dates of entry, each participant's contribution to the arrangement, each participant's interest in any covered

intangibles, and how each participant reasonably anticipates that it will derive benefits from the use of covered intangibles; a statement whether there has been or will be any transfer by any participant of covered intangibles to another taxpayer under common control and, if so, how benefits will be reflected under those circumstances; and evidence of participants' compliance with the reporting requirements under the cost sharing regulations.

(4) The method for calculating each participant's share of intangible development costs and the reason why such method can reasonably be expected to reflect that participant's share of anticipated benefits; and a statement whether and how the participants' shares of intangible development costs will be adjusted to account for changes in economic conditions, the business operations and practices of the participants, and the ongoing development of intangibles under the arrangement.

(5) The scope of the research and development to be undertaken, including the intangible or class of intangibles intended to be developed.

(6) The duration of the arrangement; the conditions under which the arrangement may be modified or terminated; and the consequences of such modification or termination, such as the interest that each participant will receive in any covered intangibles.

(7) The scope of intangible development costs, and which costs are included and which are excluded (for example, costs of technology acquired from third parties; non-product specific development costs; costs associated with abandoned projects; costs associated with specific stages of product development; and relevant labor, material, and overhead costs); a description of any services performed for participants to be included in intangible development costs (for example, contract research) and how those services would be taken into account; and, for a representative period, a breakdown of total costs incurred, and the costs borne by each participant, pursuant to the arrangement.

(8) The basis used for measuring benefits, the projections used to estimate benefits, and why such basis and projections yield the most reliable estimate of reasonably anticipated benefits; a description of any amounts to be received from nonparticipants for the use of covered intangibles (for example, as a royalty pursuant

to a license agreement) and how such amounts would be taken into account; and, for a representative period, a comparison of projected and actual benefit shares.

(9) The accounting method used to determine the cost and benefits of the intangible development (including the method used to translate foreign currencies), and to the extent that the accounting method differs materially from U.S. generally accepted accounting principles, an explanation of any material differences.

(10) Prior research, if any, undertaken in the intangible development area; any tangible or intangible property made available for use in the arrangement and any compensation paid for that property (specifying the amount, payor and payee, and how such compensation is determined); and any other information used to establish the value of preexisting and covered intangibles.

(11) Whether and how participants may join or leave the arrangement (or otherwise change their interests in covered intangibles); any adjustments that will be made to the participants' interests in covered intangibles in such cases; any payments that must be made in such cases, and how such payments will be calculated and made; and whether any changes in the participants' interests in covered intangibles have already occurred, any compensation paid for those interests, and any information used to establish the value of such interests.

(12) How cost sharing payments and buy-in or buy-out payments (i.e., payments made when a participant contributes intangibles, or acquires or relinquishes an interest in covered intangibles) made or received have been treated for U.S. income tax purposes.

(13) Representative internal manuals, directives, guidelines, and similar documents prepared for purposes of implementing or operating the cost sharing arrangement (for example, research and development committee meeting minutes, market studies, economic impact analyses, capital expenditure budgets, engineering studies, reports and studies of trends and profitability in the industry, and financial analyses for financing and cash flow purposes).

(14) Each participant's gross and net profitability (historical for five taxable years and projected for two taxable years) with regard to the product area covered by the arrangement.

APPENDIX C: CONGRESSIONAL RESOLUTIONS AUTHORIZING DISCLOSURES TO NONTAX COMMITTEES

(1) H. Res. 463, 105th Cong., 144 Cong. Rec. 4748 (1998) (authorizing disclosure to the Select Committee on U.S. National Security and Military/Commercial Concerns with the People's Republic of China).

(2) S. Res. 120, 104th Cong., 141 Cong. Rec. 6823 (1995) (authorizing disclosure to a special committee on Whitewater to be administered by the Committee on Banking, Housing, and Urban Affairs).

(3) S. Res. 217, 103rd Cong., 140 Cong. Rec. 6412 (1994) (authorizing disclosure to a special subcommittee on the Whitewater Development Corporation).

(4) H. Res. 414, 101st Cong., 136 Cong. Rec. 2003 (1990) (authorizing disclosure to the Select Committee to Investigate Financial Institution Fraud, Mismanagement, Oversight and Supervision).

(5) S. Res. 162, 100th Cong., 133 Cong. Rec. 2867 (1987) (authorizing disclosure to the Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition).

(6) H. Res. 12, 100th Cong., 133 Cong. Rec. 113 (1987) (authorizing disclosure to the House Select Committee to Investigate Covert Arms Transactions with Iran).

(7) S. Res. 284, 99th Cong., 131 Cong. Rec. 18,165 (1985) (authorizing disclosure to the Permanent Subcommittee of Investigations of the Committee on Governmental Affairs for a labor fraud investigation involving specified departments).

(8) S. Res. 485, 97th Cong., 128 Cong. Rec. 25,871 (1982) (authorizing disclosure to the Select Committee to Study Law Enforcement Undercover Activities of Components of the Department of Justice (ABSCAM)).

(9) S. Res. 496, 96th Cong. 126 Cong. Rec. 21,003 (1980) (authorizing disclosure of specified tax records of William E. Carter, III to a subcommittee of the Senate Judiciary Committee, established to investigate activities of individuals representing the interests of foreign governments).

(10) S. Res. 139, 95th Cong. 123 Cong. Rec. 11,887 (1977) (authorizing disclosure to the Human Resources Committee for its investigation of the Teamsters' Central States Southeast and Southwest Area Pension Fund).

APPENDIX D: SUMMARY OF WRITTEN COMMENTS RECEIVED BY THE JOINT COMMITTEE STAFF RELATING TO GENERAL DISCLOSURE PROVISIONS

In general

The staff of the Joint Committee received a number of responses to a request for comments on the issues of: (1) confidentiality of returns and return information; and (2) increased disclosure of information with respect to tax-exempt organizations described in Code section 501. Joint Committee on Taxation Press Release 99-03, released on August 17, 1999, solicited comments from interested parties on these issues and, in particular, requested comments on the following: (1) the adequacy of present-law protections governing taxpayer privacy; (2) the need, if any, for third parties, including those presently authorized under the Internal Revenue Code (the "Code"), to use taxpayer information; (3) whether greater levels of voluntary compliance can be achieved by allowing the public to know who is legally required to file tax returns but does not do so; (4) the interrelationship of the taxpayer confidentiality provisions in the Code with the Freedom of Information Act, the Privacy Act, and section 6110 of the Code; (5) the impact on taxpayer privacy of sharing tax information for purposes of enforcing State and local laws (other than income tax laws), including the impact on taxpayer privacy intended to be protected at the Federal, State, and local levels under the Taxpayer Browsing Protection Act of 1997, and (6) the extent to which the current disclosure provisions provide taxpayer, exempt organizations, and tax practitioners with sufficient guidance. Regarding the disclosure of information with respect to tax-exempt organizations, the press release specifically solicited comments on: (1) whether the public interest would be served by greater disclosure of information with respect to such organizations; and (2) the extent to which the present-law disclosure provisions assure accountability of tax-exempt organizations to the public, the Internal Revenue Service (the "IRS"), and other agencies that provide oversight.

The comments relating to confidentiality of returns and return information can be divided into five categories.[1212] The first category is comments from State governments either individually or through the Federation of Tax Administrators (the "FTA"). This category represents the majority of comments. Comments in this category relate primarily to return information sharing under present law. The second category of comments is comments from tax professional organizations. The third category is comments relating to disclosure of advance pricing agreements. The fourth category includes a comment from Counsel to the President relating to Administration officials' access to taxpayer information for conducting tax checks on potential appointees. The final category of comments includes comments from private individuals and others.

[1212] *See also,* the summary of comments relating to increased disclosure of information with respect to tax-exempt organizations in Volume II of this study.

State governments

The FTA, which represents the tax administration agencies for the 50 States and the District of Columbia submitted comments. Several individual States also provided comments that were generally consistent with the comments of the FTA. The FTA comments focused on the present-law uses of returns and return information and efforts to ensure taxpayer confidentiality.

Regarding the need of State and local governments for returns and return information, the FTA pointed out that 37 of the 42 States which levy a broad-based income tax rely on the taxpayer's Federal income tax calculation as a starting point (i.e., "piggyback income tax systems"). Four types of information were identified as being of primary importance to the States. The four were: (1) Federal data from individual returns, primarily shared through the IRS's Individual Return Master File (data reported on returns); (2) the Individual Return Transaction File (data reported by certain third parties e.g., Form 1099 filers); (3) Federal adjustments made by matching return amounts with those reported by third party filers (known as the "CP2000" data extract); and (4) Revenue Agent Reports that transmit the results of IRS field exams. All such information is provided to State and local governments subject to the requirements of section 6103 of the Code, which requires that certain compliance safeguards are met.[1213]

Most of the States that do not have a broad-based individual income tax also carry on active information exchange programs with the IRS. These information exchanges are used for tax administration purposes and governed by the same compliance safeguards of section 6103. Typically, the information exchanges involve one or more of the following: (1) motor fuels tax information; (2) income tax information used to enforce a related State tax (e.g., interest and dividends taxes); (3) a comparison of income and expense amounts for two different taxes (e.g., gross receipts for income and sales tax purposes); or (4) an exchange of general information for enforcement and administration purposes (e.g., taxpayer address verification). The State of Tennessee as well as the two largest States without a broad-based individual income tax, Florida and Texas, separately commented on the importance to them of the present-law information sharing system.

The FTA took the position that the present-law safeguards substantially and adequately protect taxpayer privacy. It specifically referred to the safeguards enumerated in the IRS Publication 1075, Tax Information Security Guidelines for State, Local and Federal Agencies. The applicable safeguards referred to include the physical security of such information as well as the application and enforcement of guidelines on the access and use of such information by individuals. Another safeguard mentioned by the FTA was the existence of Federal civil and criminal penalties for improper disclosure. The FTA listed applicable State privacy and confidentiality laws as an effective additional deterrent to improper use of taxpayer information.

[1213] *See* Part Four, IV.E., above.

The FTA referred to the importance of the recently enacted Taxpayer Browsing Protection Act of 1997 in limiting access to confidential taxpayer data not only to appropriate agencies, but also to individual employees with an official business reason to view such data. It noted that both the FTA and individual States worked with the IRS in the development and implementation of this important piece of legislation to further safeguard individual privacy rights.

The FTA pointed out that States also share information with the IRS. The individual States provide both continuous exchanges of information (such as State audit adjustments for fuels and sales tax purposes), and *ad hoc* exchanges involving sales tax information about particular taxpayers or types of businesses to the IRS. The FTA argued that such information sharing improves the efficiency of tax administration (e.g., by avoiding duplication of audit work at the Federal, State and local levels). Similarly, it suggested that the States' reliance on piggyback income taxes reduces the compliance burden on taxpayers, who might otherwise be required to provide the same or similar information to Federal, State and local governments. If sharing of returns and return were eliminated, the FTA contended, the States would be forced to contact taxpayers and third-party payers directly, possibly by requiring the filing of return information a second time directly with the State tax agency.

The FTA expressed the belief that the present-law compliance system results in the collection of significant revenue (although the actual dollar amount may be difficult to quantify). Several of the individual States, however, did try to quantify revenues, and spoke in terms of hundreds of millions of dollars in additional revenue collections. The FTA also argued that the present-law system is invaluable in maintaining current levels of voluntary compliance. It attributed this compliance effect to a recognition by taxpayers of a high risk of being caught under the combined enforcement efforts of the Federal, State and local governments.

The comments of the FTA and the individual States referred to the importance of returns and return information on the development of State-level analytical models, and its use for State legislative analysis. One comment expressly requested an expansion of section 6103 to non-governmental administrators of the TANF program. Under present law, a State or local government agency but not a third-party administrator may use return information to verify eligibility for TANF benefits under the recently enacted welfare reforms.[1214]

Tax professional organizations

Three tax professional organizations provided comments. Those organizations were: (1) the Section of Taxation of the American Bar Association (the "ABA Tax Section"); (2) the National Association of Enrolled Agents (the "NAEA"); and (3) the Tax Executives Institute,

[1214] *See*, Part Five, II. H., above.

Inc. ("TEI").[1215]

In addressing the adequacy of present-law protections governing taxpayer privacy, the Tax Section took the position that the IRS should not allow agents to use return information of one taxpayer in preparing for litigation involving another taxpayer. On the issue of public disclosure of those persons failing to file legally required tax returns, the ABA Tax Section argued that accuracy in reporting as well as the protection of taxpayer's privacy interests direct the public disclosure of only those taxpayers who have been convicted of failure to file. Finally, in response to the question whether current disclosure provisions provide sufficient guidance to taxpayer, tax-exempt organizations, and tax practitioners, the ABA Tax Section called for the disclosure of all internal memoranda of the IRS as long as it is consistent with the mandates of section 6103.

The NAEA responded to all six questions relating to confidentiality of returns and return information in the press release. Regarding the adequacy of present-law privacy protection, the NAEA took the position that present-law use of social security numbers as the sole identification mechanism for tax purposes results in an unacceptably high potential for unauthorized disclosure of such information. It strongly recommended an alternative "identifying number" system to be used in conjunction with social security numbers. Regarding third-party use, the NAEA had two comments. First, it suggested that an original signature of a judge assigned to a specific court proceeding be required on any subpoena for the disclosure of return information. Second, it took the position that no government agency, including the IRS, be allowed to supply return information for income verification purposes. Because of concerns about the accuracy of such information as well as a lack of confidence in improved voluntary compliance as a result of such publication, the NAEA responded negatively to the idea of public disclosure of non-filers. Regarding the issue of the interaction of taxpayer confidentiality and other laws, the NAEA generally supported the operation of these laws, with one exception. It recommended that section 6110 should be amended to require the agreement by affected taxpayers that the IRS has properly deleted all taxpayer identifying information, trade secrets, and similar confidential information prior to the public disclosure. With respect to the impact on privacy by the sharing of return information for purposes other than for tax law enforcement, the NAEA called for harsher penalties for unauthorized disclosures, while generally supporting the need for authorized disclosures. Finally, the NAEA maintained that additional guidance relating to disclosure is not necessary at this time.

The TEI expressed a strong belief that the exceptions provided under section 6103 from the general ban on disclosure of confidential information need to be more narrowly construed. The TEI submission discussed recent court decisions involving what it believes to be inappropriately broad interpretations of the section 6103 exceptions. Like the other tax

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[1215] Comments from both the ABA Tax Section and the Tax Executive's Institute, Inc, with respect to disclosure of Advance Pricing Agreements are discussed in another section of this summary, below.

professional organizations, the TEI argued against public disclosure of non-filers. Its position was that, even if such information were accurate, individuals' privacy rights would be eroded and no improvement in voluntary compliance would be achieved.

Disclosure of APAs

There were three sets of comments received relating to disclosure of APAs. One set of comments was received from the TEI. A second set was received from the ABA Tax Section. The third set was received from the Bureau of National Affairs (the "BNA") and its legal representative, Winston and Strawn.

All of three of these comments responded to an IRS decision in 1999 to treat APAs as "written determinations" under section 6110, and therefore to subject them to disclosure in redacted form.[1216] Disclosure under section 6110 is one of several enumerated exceptions from the prohibition on disclosure of tax return information generally applicable under section 6103.[1217] The comments received from these organizations predated the enactment on December 17, 1999, of the Ticket to Work Act, which included provisions relating to expiring tax provisions and other revenue provisions). That legislation provided that APAs and related background information are confidential return information and are not "written determinations" for purposes of the public disclosure requirements of section 6110.[1218] The Ticket to Work Act requires the Secretary of the Treasury to prepare annually a detailed report regarding APAs and the APA program. These provisions of the Ticket to Work Act became effective upon enactment, and therefore, APAs and their related background files now may not be released to the public, irrespective of the date the APA was executed.

The TEI's comments reviewed the development of the laws regarding disclosure of return information. The comments discussed the natural tension between the general rule of confidentiality under section 6103 and section 6110's policy of public access. The TEI concluded that disclosure of APAs and related background information violated the affected companies' right to privacy, and could affect those companies' ability to compete in the international marketplace. Such concerns could, in turn, lead companies to forego the APA option in favor of

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[1216] BNA had sought the disclosure of APAs in three consolidated lawsuits before the U.S. District Court for the District of Columbia. *BNA v. IRS*, Nos. 96-376, 96-2820, and 96-1473 (D.D.C.) Prior to this litigation and since the inception of the APA program, the IRS held the position that APAs were confidential return information protected from disclosure by section 6103. *See, e.g.,* Rev. Proc. 91-22, sec. 11, 1991-1 C.B. 526, 534, and Rev. Proc. 96-53, sec. 12, 1996-2 C.B. 375, 386. On January 11, 1999, the IRS conceded that APAs were "rulings" and therefore were "written determinations" for purposes of section 6110.

[1217] *See*, Part Two, VI. D., above.

[1218] Pub. L. No. 106-170, sec. 521 (1999).

expensive and time-consuming litigation. It could be inferred that the level of redaction necessary to preserve the legitimate privacy interests of companies participating in an APA would reduce the usefulness of the disclosed information to similarly situated taxpayers.

The comments of the ABA Tax Section also expressed concern over the IRS decision to disclose redacted versions of APAs and related background material. The ABA Tax Section reiterated the concerns expressed by the TEI that such disclosure threatened the legitimate privacy interests of companies securing an APA and could result in reduced reliance on the APA program in favor of costly and time-consuming litigation. Another concern of the ABA Tax Section was that the redaction process could become a potential source of dispute between the companies and the IRS. The ABA Tax Section took the position that the public's right to know about the administration of the tax laws would be better satisfied by regular summary reports of APAs than by the release of the individual redacted APAs themselves.

The BNA and its legal representative, Winston and Strawn, also provided comments with respect to APAs. These comments strongly supported the disclosure of APAs and related background information in a redacted form. They argued that disclosure of APAs and related background information is the only avenue for taxpayers to determine the application of these tax laws by the IRS. They also argued that such disclosure did not violate taxpayer privacy and that such disclosure was initially intended as part of the APA process. In response to TEI's comments, the BNA argued that taxpayer participation in the APA process has not and would not be adversely effected by disclosure. The BNA also expressed concern that in the absence of such disclosure, only practitioners with libraries of APAs obtained for their clients could have a sense of the tax regulations and procedures that the IRS is following.

Access to taxpayer information for conducting tax checks on potential appointees

The Counsel to the President submitted a comment relating to section 6103(g) (which permits certain Administration officials access to return information of individuals under consideration for appointment to a position in the executive or judicial branch of the Federal government without taxpayer consent). The comment, while acknowledging that the provision has not previously been used, argued for the retention of the provision in the event that it may be necessary (e.g., "in a situation raising national security concerns").

Private individuals and others

Several individuals responded to the request for comments. Some argued that more public disclosure of non-filers would enhance voluntary compliance. Others responded that no return information should be disclosed, including information disclosed under present law to State and local governments, without the prior written permission of each individual taxpayer. Others asserted that under no circumstances should return information be shared with third parties (e.g., State and local governments). Another individual taxpayer expressed concern about the present-law practice of notice of Federal tax liens. The taxpayer was concerned that such

notice allows certain tax practitioners to deluge affected taxpayers with offers of assistance in dealing with the IRS in conjunction with the lien process. Another individual commentator represented that an IRS employee had shared the content of communications between the individual and the IRS with another individual who was in litigation with the first individual. To avoid repetition of such behavior, the individual advocated additional protections for confidential communications between the IRS and individuals. Another individual, through his attorney, related his experience with a disability insurer's contractual requirement to disclose the insured's tax return. The individual suggested legislation to forbid access to a taxpayer's Federal tax return by any entity other than an entity permitted under present law, or alternatively, to extend criminal and civil penalties similar to those under present law. Finally, a certified public accountant suggested that a rule should be added making present-law prohibitions on disclosure inapplicable if the taxpayer has voluntarily released his return to the public.

An attorney representing several clients (including an individual and an accounting firm) offered comments arising from perceived misuse of confidential return information by State tax authorities. The attorney recommended that the IRS be directed to cease sharing return information with any State or local tax agency that recklessly disregards safeguards designed to protect taxpayer information (or does not have safeguards), until the abuses are rectified. The attorney recommended that all State and local agencies receiving Federal tax returns and return information be required to adopt the same reforms and taxpayer protections imposed on the IRS under the Internal Revenue Service Restructuring and Reform Act of 1998, in order to obtain the returns and return information. In addition, the attorney recommended that the IRS Taxpayer Advocate address taxpayer complaints regarding breaches of confidentiality by State and local tax agencies relating to Federal tax returns and return information.

The staff of the Joint Committee also received comments from other sources. An IRS taxpayer advocate had two comments. One was to suggest a streamlining of the procedure for disclosure of return information by the IRS to correct certain misstatements of fact concerning taxpayer's returns. The other was to suggest ways to implement public disclosure of non-filers. The Social Security Administration also commented about the critical importance to the administration of the Social Security system of present-law return information sharing. Finally, the University of Michigan Retirement Research Center argued for continued return information sharing to improve research involving proposed public policy initiatives.

APPENDIX E

DISCLOSURE REPORT FOR PUBLIC INSPECTION PURSUANT TO INTERNAL REVENUE CODE SECTION 6103(p)(3)(C) FOR CALENDAR YEAR 1998

Prepared by the

INTERNAL REVENUE SERVICE

Published by the

JOINT COMMITTEE ON TAXATION

April 29, 1999
JCX-19-99

INTRODUCTION

Pursuant to Internal Revenue Code section 6103(p)(3)(C), the Secretary of the Treasury shall, within 90 days after the close of each calendar year, furnish to the Joint Committee on Taxation for disclosure to the public a report which provides with respect to each Federal agency and certain other entities the number of: (1) requests for disclosure of returns and return information (as such terms are defined in section 6103(b)); (2) instances in which returns and return information were disclosed pursuant to such requests or otherwise; and (3) taxpayers whose returns, or return information with respect to whom, were disclosed pursuant to such requests. In addition, the report must describe the general purposes for which such requests were made.

The information in this document[1] was prepared by the Internal Revenue Service for calendar year 1998 and was furnished to the Joint Committee on Taxation on April 15, 1999, pursuant to section 6103(p)(3)(C).

Copies of reports covering prior calendar years are available and may be obtained by submitting a written request to the Chairman of the Joint Committee on Taxation.

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[1] This document may be cited as follows: Joint Committee on Taxation, *Disclosure Report for Public Inspection Pursuant to Internal Revenue Code Section 6103(p)(3)(C) for Calendar Year 1998* (JCX-19-99), April 29, 1999.

Section II

Disclosure Report for Public Inspection
Pursuant to 26 U.S.C. 6103(p)(3)(C)

Internal Revenue Service

CY 1998

CY 1998 Volume of Disclosures of Tax Returns and/or Return Information Required to be Accounted for Pursuant to 26 U.S.C. 6103(p)(3)(A)

Disclosure To/For	IR Code Section 6103 Subsections		Number of Disclosures by Type	Total Number of Disclosures
States	(d)	*(1) **(2)	1,794,233,617 652,297	1,794,885,914
Congressional Committees and/or their agents including GAO Representatives	(f)	(1) (2)	169,432,717 10,931	169,443,648
Tax Checks	(c)	(2)	7,700	7,700
Prospective Jurors	(h)(5)	(2)	2,496	2,496
Federal Agencies	(i)(1)			
US Attorneys		(2)	13,212	
DEA		(2)	3,084	
FBI		(2)	4,526	
Other		(2)	2,036	22,858
Federal Agencies	(i)(2)			
US Attorneys		(2)	184	
DEA		(2)	30	
Customs		(2)	6	
FTC		(2)	2	222
Federal Agencies	(i)(3)			
Department of Justice		(2)	36	
FBI		(2)	2	
Other		(2)	63	101
Federal Agencies	(i)(5)			
Secret Service		(2)	1	1
General Accounting Office	(i)(7)	(1) (2)	167,537,207 2,297	167,539,504
Statistical Use	(j)			
Department of Commerce				
Bureau of Census	(j)(1)(A)	(1)	412,763,563	
Bureau of Economic Analysis	(j)(1)(B)	(1)	1,861,303	414,624,866
Foreign Countries	(k)(4)	(1)	1,165,568	
Tax Treaty Authority		(2)	220,820	1,386,388

CY 1998 Volume of Disclosures of Tax Returns and/or Return Information Required to be Accounted for Pursuant to 26 U.S.C. 6103(p)(3)(A), continued

Disclosure To/For	IR Code Section 6103 Subsections		Number of Disclosures by Type	Total Number of Disclosures
Federal Agencies	(l)(2)			
Department of Labor		(2)	3,138	
Pension Benefit Guaranty Corp.		(2)	225,201	228,339
Department of Treasury Employees	(l)(4)(A)	(2)	5,730	5,730
Child Support Enforcement Agencies	(l)(6)			
Group I Information		(1)	1,559,265	
Group II Information		(1)	6,089,318	
Group III Information		(2)	726	7,649,309
Total: Tape Extracts		**(1)**	**2,554,642,558**	
Other Disclosures		**(2)**	**1,154,518**	
				2,555,797,076

* (1) Tape Extracts – disclosures made from extracts of Master File tapes.

**(2) Other Disclosures – disclosures made by furnishing transcripts of records, permitting inspection of records, furnishing photocopies of records, oral disclosures, and disclosures by means of correspondence without furnishing a copy of the record. Also, includes disclosures from locally automated files.

Explanation of Internal Revenue Code section 6103
(General Purpose for Disclosure)

IR Code Section 6103	Purpose of Disclosure
(c)	Disclosure of returns and return information to the designee of the taxpayer.
(d)	Disclosure to State tax officials having responsibility for administering State tax laws.
(f)	Disclosure to Committees of Congress or their agents.
(h)(3)(B)	Disclosure of returns and return information for tax administration purposes upon written request from Department of Justice.
(h)(5)	Disclosure as to whether prospective jurors in judicial tax proceedings have or have not been the subject of any tax investigation.
(i)(1)	Disclosure of returns or return information to Federal officers or employees upon the grant of an ex parte order by a Federal district court judge or magistrate for use in non-tax criminal investigations.
(i)(2)	Disclosure of return information other than taxpayer return information to Federal officers or employees for use in non-tax criminal investigations, upon request by the head of the agency or Inspector General thereof (or designated officials of the Department of Justice.)
(i)(3)	Disclosure of return information to apprise Federal agencies of possible criminal activities or emergency situations.
(i)(5)	Disclosure to Federal agency to locate fugitive from justice.
(i)(7)	Disclosure to the General Accounting Office for making audits of the IRS.
(j)(1)(A)	Disclosure to the Department of Commerce for statistical use by the Bureau of the Census in activities authorized by law.

Explanation of Internal Revenue Code section 6103, continued

IR Code Section 6103	Purpose of Disclosure
(j)(1)(B)	Disclosure to the Department of Commerce of corporation information for statistical use by the Bureau of Economic Analysis in activities authorized by law.
(k)(4)	Disclosure to competent authority of a foreign government which has an income tax convention with the United States.
(l)(2)	Disclosure of returns and returns information to the Department of Labor and Pension Benefit Guaranty Corporation for administration of Titles I and IV of the Employee Retirement Income Security Act of 1974.
(l)(3)	Disclosure of tax delinquent account indicator to Federal agencies to determine creditworthiness of a Federal loan applicant.
(l)(4)(A)	Disclosure of returns and return information for use in personnel or claimant representative matters by employees of the Department of the Treasury, practitioners, or their representatives involved in such actions.
(l)(6)	Disclosure of return information to Federal, State, and local child support enforcement agencies for use in establishing and collecting child support obligations from, and locating, individuals owing such obligations.