

**TECHNICAL EXPLANATION OF
H.R. 9640,
THE “PRESIDENTIAL TAX FILINGS AND
AUDIT TRANSPARENCY ACT OF 2022”**

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of the
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INTRODUCTION

On December 21, 2022, House Committee on Ways and Means Chairman Richard Neal introduced H.R. 9640, the “Presidential Tax Filings and Audit Transparency Act of 2022.” This document,¹ prepared by the staff of the Joint Committee on Taxation, provides a description of present law and a description of the bill.

¹ This document may be cited as follows: Joint Committee on Taxation, *Technical Explanation of H.R. 9640, the “Presidential Tax Filings and Audit Transparency Act of 2022”* (JCX-20-22), December 21, 2022. This document can also be found on the Joint Committee on Taxation website at www.jct.gov. All section references in the document are to the Internal Revenue Code of 1986, as amended (the “Code”), unless otherwise stated.

EXAMINATION AND DISCLOSURE WITH RESPECT TO PRESIDENTIAL INCOME TAX RETURNS

Present Law

IRS authority and duties with respect to examination of tax returns

The U.S. tax system relies upon self-reporting and assessment. All taxpayers are expected to prepare a return reporting their income and individual Federal income tax liability and submit it to the Internal Revenue Service (“IRS”) with any payment due.² The Code directs the Secretary of the Treasury (“Secretary”) to assess all taxes reported on a return, as well as taxes determined to be due but not previously assessed, and interest and additions to tax.³ It further provides authority to examine books and records of taxpayers as necessary to execute those duties and determine compliance with the Code.⁴

Responsibility for these compliance-related duties generally resides with the Commissioner of the IRS, as delegated by the Secretary.⁵ Unless otherwise specified by the Secretary, compliance-related duties and powers include the power to administer, manage, conduct, direct, and supervise the execution and application of the internal revenue laws or related statutes and tax conventions to which the United States is a party. These duties are further delegated to employees of the Commissioner who examine returns as filed and determine whether tax was underreported or underpaid.⁶

In addition to the general authority of the Secretary to interpret the Code⁷ and that of the Commissioner to administer the Code and to employ the persons necessary to do so, the IRS operates the Independent Office of Appeals (“Appeals”).⁸ Appeals functions as the settlement arm of the IRS. In doing so, it provides an independent and final administrative step in a range of administrative proceedings. These proceedings include examinations as well as certain collection actions, in attempts to resolve them without litigation. Appeals may issue notices of

² Similar rules apply to taxpayers that are not individuals.

³ Sec. 6201 *et seq.*

⁴ Secs. 7601 through 7613.

⁵ Sec. 7803(a) (The duties also include the duty to recommend to the President a candidate for Chief Counsel (and recommend the removal of the Chief Counsel)).

⁶ Sec. 7804 (authorization of the Commissioner to employ such persons as the Commissioner deems proper for the administration and enforcement of the internal revenue laws and is required to issue all necessary directions, instructions, orders, and rules applicable to such persons, including determination and designation of posts of duty).

⁷ Sec. 7805.

⁸ Sec. 7803(e).

deficiency where appropriate. As a result, review of administrative actions is generally available prior to payment of any tax underlying the controversy.⁹

The Code does not dictate how the IRS determines which returns are subject to examination, though it does include restrictions with respect to certain examinations.¹⁰ There are no mandatory examinations of returns under the Code. The authority of the Secretary to examine returns, as delegated to the Commissioner, is generally not subject to oversight by other departments of the executive branch. The Code prohibits any applicable person (including the President, Vice President, or any employee of the executive office of the President or the Vice President) from requesting that any officer or employee of the IRS conduct or terminate an audit or otherwise investigate or terminate the investigation of any particular taxpayer with respect to the tax liability of that taxpayer.¹¹

The IRS has developed extensive guidelines for its employees to follow in selecting which returns to examine and when. Those guidelines are incorporated in the Internal Revenue Manual (“IRM”), which is the primary, official compilation of instructions to employees that relate to the administration and operation of the IRS and is used by the IRS to carry out its responsibilities in administering the tax laws in a manner that is consistent and fair to all taxpayers.¹² However, courts have held that the procedures set forth in the IRM are neither mandatory nor binding on the IRS.¹³ The IRS reviews the IRM annually to ensure its accuracy

⁹ Exceptions to the general availability may depend upon whether cases are already docketed before the United States Tax Court, involve novel issues designated for litigation or raise frivolous positions. Sec. 7803(e)(5).

¹⁰ See, e.g., sec. 7605(b) (limited second examination); sec. 7611 (special rules for examinations of churches); and sec. 7612 (examination of computer code).

¹¹ Sec. 7217. Any IRS officer or employee receiving a request to conduct or terminate an audit of any taxpayer is required to report the request to the Treasury Inspector General for Tax Administration.

¹² Sec. 7803(a)(3) (Commissioner must ensure employees are familiar with and act in accordance with taxpayers’ rights); IRM 1.11.2.2, *IRM Standards* (August 12, 2021). The IRM fulfills the IRS’s Freedom of Information Act (*i.e.*, FOIA) obligation imposed on each agency to maintain and make available for public inspection records of policies, authorities, procedures, and organizational operations. 5 U.S.C. sec. 552(a)(2)(c); IRM 1.11.2.1.2, *Authority* (April 22, 2020); and IRM 1.11.6.1.2, *Authority* (April 8, 2020). The IRM in its current form is available on the IRS’s website at <https://www.irs.gov/irm>. Information designated as “Official Use Only” is not published in order to protect against loss or harm to the IRS or guard the privacy to which individuals are entitled under the Privacy Act (5 U.S.C. sec. 552). IRM 1.11.2.5.3, *Designate IRM Content as Official Use Only (OUO)* (August 12, 2021).

¹³ See, e.g., *Shwarz v. United States*, 234 F.3d 428, 433-34 (9th Cir. 2000); *United States v. McKee*, 192 F.3d 535, 540-41 (6th Cir. 1999). Taxpayers have generally been unsuccessful in raising challenges based on an IRS employee’s failure to follow or otherwise act in compliance with provisions in the IRM based on violations of constitutional rights. See *United States v. Caceres*, 440 U.S. 741, 743, 754-55 (1979) (the Supreme Court refused to exclude taped conversations obtained in violation of an IRM provision that required Justice Department approval for such actions. The Court concluded that none of the defendant’s constitutional rights had been violated, either by the actual recording or by the IRS’s violation of its own regulations and held that the evidence was not required to be excluded).

and to implement any necessary changes.¹⁴ The IRM provides detailed instructions relating to processing, safeguarding, and auditing all taxpayer returns.

President's and Vice President's individual income tax returns

Under IRS policies adopted in 1977, the individual income tax returns of the President and Vice President are subject to both special processing and mandatory examination.¹⁵ The IRM outlines detailed procedures to ensure the privacy and safekeeping of the President's and Vice President's individual income tax returns while in IRS control.¹⁶

The stated rationale for institution of the policy, attributed to IRS spokesperson Leon Levine, is that the addition to the IRM was on the initiative of the IRS "in the interest of sound tax administration."¹⁷ The IRS further stated that "automatically auditing the returns of the President and Vice President . . . removes from any particular employee of the IRS the necessity of having to make a decision as to whether to audit the particular returns involved."¹⁸

The IRS policy requiring examination of the President's and Vice President's individual income tax returns applies without regard to otherwise applicable standards for assessing risk of noncompliance in selecting returns for examination.¹⁹ In all other respects, the examination of the President's and Vice President's individual income tax returns is conducted in a process similar to the audit of any taxpayer.²⁰ Consistent with the prohibition of executive branch interference in section 7217, the IRM provides that IRS employees must never initiate, terminate,

¹⁴ IRM 1.11.2.2, *IRM Standards* (August 12, 2021).

¹⁵ IRM 3.28.3.5, *Processing Returns and Accounts of the President and Vice President* (January 1, 2020). For example, the returns are required to be mailed to the Field Director at the Austin Submission Processing Campus, as opposed to the service center location based on their residence.

¹⁶ IRM 4.2.1.15, *Processing Returns and Accounts of the President and Vice President* (April 23, 2014). The locations of the President's and Vice President's income tax returns are monitored at all times, can only be viewed by authorized IRS employees, and are to be secured in a drawer or cabinet when not being worked on. IRM 4.2.1.15(7).

¹⁷ "IRS auditing Carter, Mondale tax returns," *Chicago Tribune*, June 21, 1977; Bill Curry, "Yearly Audits Set for Carter, Mondale," *Washington Post*, June 21, 1977; "President, Vice President to Have Annual Tax Audits," *Los Angeles Times*, June 21, 1977.

¹⁸ *Ibid.* (quoting IRS spokesperson Leon Levine).

¹⁹ Regardless of the Discriminant Index Function score, the returns are examined. See generally IRM 3.28.3, *Individual Income Tax Returns* (January 1, 2022); IRM 3.28.3.4.3, *Processing Returns and Accounts of the President and Vice President* (January 1, 2020). The IRM uses the words audit and examination interchangeably throughout the IRM, including in the various provisions relating to the President's and Vice President's income tax returns.

²⁰ *Ibid.* The IRS also audits its employees' returns per its comprehensive employee tax compliance program which subjects all employees to annual delinquency check procedures. IRM 4.2.6, *Examination of Employee Returns* (August 9, 2019). The audit of an IRS employee is performed in a manner similar to the audit of any taxpayer but it is done on an expedited basis and in accordance with special safeguarding procedures. *Ibid.*

or in any way modify their work on the President's and Vice President's individual income tax returns based on requests from executive branch employees.²¹

Following the audit, the President's and Vice President's individual income tax returns undergo a final mandatory review by the Employee Audit Reviewer at Baltimore Technical Services.²² The final mandatory review verifies that the examination was conducted in accordance with established procedures and the appropriate conclusions were reached. Following this review, the processing and examination of the President's and Vice President's individual income tax returns is complete. The President's and Vice President's audit and the associated investigation, return adjustments, and conclusions are protected "return information" and remain confidential under the terms of section 6103, as discussed below.

Overview of confidentiality of returns and return information

Section 6103 begins with the general rule that returns and return information are confidential. The definition of "return information" is very broad and includes any information collected, received, recorded or prepared by the IRS with respect to the determination of the existence, or possible existence, of a person's liability (or of the amount thereof) or of a potential liability under the Code for any tax, penalty, interest, fine, forfeiture, or other imposition or offense.²³ Returns and return information cannot be disclosed unless a specific exception for such disclosure is provided for in the Code.²⁴

To protect the confidentiality of returns and return information, section 6103 imposes recordkeeping and safeguard requirements. Further, civil and criminal penalties apply for violations of section 6103. For example, the willful unauthorized disclosure of a return or return information is a felony, punishable by up to five years imprisonment, a fine not exceeding \$5,000, or both, together with the costs of prosecution.²⁵ Willful unauthorized inspection of a return or return information is punishable by up to one year in prison and a fine not exceeding \$1,000 or both, together with the costs of prosecution.²⁶ If either offense is committed by an officer or employee of the United States, upon conviction, that person is required to be dismissed

²¹ IRM 4.10.2.2.3, *Conflict of Interest* (February 11, 2016) (the IRM specifically mentions requests from the President, Vice President, employees of the executive offices of the President or Vice President, or any other cabinet level official with the exception of the Attorney General. Any such requests must be reported to the Treasury Inspector General for Tax Administration).

²² IRM 4.2.1.15, *Processing Returns and Accounts of the President and Vice President* (April 23, 2014); IRM 4.8.4.2.4, *Audit of President and Vice President* (March 12, 2015).

²³ Sec. 6103(b)(2).

²⁴ Sec. 6103(a).

²⁵ Sec. 7213. The term "disclosure" means the making known to any person in any manner whatever a return or return information. Sec. 6103(b)(8).

²⁶ Sec. 7213A. The terms "inspected" and "inspection" mean any examination of a return or return information. Sec. 6103(b)(7).

from office or discharged from employment.²⁷ Taxpayers may pursue a civil cause of action for disclosures and inspections not authorized by section 6103.²⁸

Section 6103 contains a number of specific exceptions to its general rule of confidentiality. For example, section 6103 permits the disclosure of a taxpayer's return or return information by consent of the taxpayer.²⁹ Specifically, subject to requirements and conditions prescribed by the Secretary, the Code permits the IRS to disclose a taxpayer's return or return information to (1) such persons as the taxpayer may designate in a request for, or consent to, such disclosure or (2) to any other person at the taxpayer's request to the extent necessary to comply with the taxpayer's request to such other person for information or assistance.³⁰ Return information will not be disclosed to such person if the Secretary determines that such disclosure would seriously impair Federal tax administration.³¹

Additionally, there are many exceptions to confidentiality that do not require consent of the taxpayer. For instance, the general public has access to return information to permit the inspection of accepted offers in compromise.³² 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.³³ Further, the IRS is permitted to 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.³⁴ However, the IRS no longer creates or publishes annual lists of undelivered refunds.³⁵

²⁷ Secs. 7213(a)(1) and 7213A(b)(2).

²⁸ Sec. 7431.

²⁹ Sec. 6103(c).

³⁰ See sec. 6103(c) and Treas. Reg. 301.6103(c)-1.

³¹ Sec. 6103(c).

³² Sec. 6103(k)(1). Treas. Reg. section 601.702(d)(8) requires that Form 7249, Offer Acceptance Report, for each accepted offer in compromise with respect to any liability for tax imposed by Title 26 will be available for inspection and copying. Any applicable Form 7249, Offer Acceptance Report will be available for one year from the date of execution. Case histories prepared by the appropriate functions relating to the consideration of the offer are not open to inspection and may be disclosed only as permitted by other provisions of section 6103. IRM 11.3.11.8, *Public Inspection of Accepted Offer-In-Compromise* (June 21, 2022).

³³ Sec. 6103(k)(3). For IRS guidelines on the use of this authority, see IRM 11.3.11.3, *Disclosure to Correct Misstatement of Fact* (June 21, 2022).

³⁴ Sec. 6103(m)(1).

³⁵ IRM 11.3.11.4, *Disclosure of Undeliverable Tax Refunds Information* (June 21, 2022).

Explanation of Provision

The provision addresses the Secretary's handling of records with respect to income tax returns filed by the President of the United States, the spouse of the President and any entities controlled by them, in two ways. First, it provides new section 7613 to mandate timely examination and reporting to the public with respect to such returns. Second, it provides a new exception to the general rule of confidentiality for returns and return information under section 6103, proposed new subsection 6103(q).³⁶

Examination with respect to Presidential income tax returns

Under new section 7613, the Secretary examines the taxpayer's books and records relevant to each Presidential income tax return, as defined below, as rapidly as practicable and discloses and makes publicly available initial, periodic and final reports with respect to the examination.

The initial report on the examination of a Presidential income tax return is required no later than 90 days after the filing of such Presidential income tax return. The initial report identifies the type of return filed and by whom, the taxable period to which it relates, and the date the examination began. Accordingly, the examination of a Presidential income tax return is expected to begin within 90 days of filing of that return. If an examination has not begun by the date an initial report is required, the report must explain the reasons for such delay. Periodic reports every 180 days after the initial report are required so as to provide updates of the procedural posture of the examination and any administrative appeal prior to issuance of a notice of deficiency, including an expected completion date. These initial and periodic reports may address significant benchmarks such as meetings held, document production, existence of obstacles to progress and expected timely completion, specific to the facts and circumstances of the examination.

Special rules apply in instances of either a request to extend the due date for filing a return or a failure to file with respect to a Presidential income tax return. If a taxpayer requests an extension of the due date for filing a return, the Secretary is required to report with respect to such extension, including the new filing due date for the return, within 90 days of acting upon the request for an extension. If a return is not filed within 60 days of its due date, the Secretary is required to initiate an examination of the taxable period for which no return was filed, and to include the fact of such failure to file in the initial report. When such return is subsequently filed, that return is subject to the mandatory examination and is subject to the reporting and disclosure requirements of new section 7613 and subsection 6013(q).

These initial and periodic reports are to be disclosed and made publicly available on the internet throughout administrative proceedings, until a final report, described below, is issued. After the final report is disclosed and made publicly available, no further periodic reports are required during any subsequent judicial proceeding involving the same taxable period.

³⁶ The provision would renumber current subsection 6103(q) as subsection 6103(r).

A “Presidential income tax return” is any relevant income tax return filed by the President or the President’s spouse. These returns include their individual income tax returns and the income tax returns of certain controlled corporations or partnerships. The term also includes income tax returns of an estate of the President or the President’s spouse, or an estate with respect to which the President, President’s spouse or an entity controlled by either of them is an executor or beneficiary at any time during the year to which the return relates. Finally, the term includes income tax returns of certain trusts related to the President, the President’s spouse, or an entity related to them.

“Relevant income tax return” includes returns that are due during the term of office, returns related to a taxable year that include any portion of a year during the term of office, and returns (including amended returns) filed during the term of office. Returns include all related forms and schedules submitted with the return. An amendment or supplement to a Presidential income tax return is a separate return for purposes of proposed new section 7613 and new subsection 6103(q).

Determination of whether a President or spouse “controls” a corporation or partnership is determined under the rules of section 6038(e)(2) and (3). Control of a corporation exists if the President or spouse holds more than 50 percent of the total value of shares of all classes of stock or more than 50 percent of combined voting power of such stock, after applying the attribution rules of section 318. Control of a partnership generally exists if the President or spouse owns, directly or indirectly, more than a 50 percent capital or profits interest in a partnership, as determined under the constructive ownership rules under section 267(c). In both cases, the family attribution and constructive ownership is generally limited to the President and spouse, unless recent transfers to family members in the immediately preceding four years divested the President and spouse of control. If so, the limitation on such attribution is inapplicable, and control of such entities is determined by the general rules of sections 318(a) and 267(c).

Within 90 days of completion of the administrative proceedings, the Secretary is required to disclose and make publicly available a final report, together with audit materials specified in section 6103(q). For purposes of this final report, the administrative proceedings are considered complete upon issuance of a notice of deficiency or other issuance of a closing document described in section 6103(q)(2)(A)(v). The report is to identify the taxpayer, type of return and taxable period, the date the proceeding was completed, and a description of all adjustments, including whether and how all proposed adjustments are resolved.

Disclosure with respect to Presidential income tax returns

Information to be disclosed

The provision amends section 6103 by adding a new exception to section 6103’s general rule of confidentiality, a proposed new subsection (q). The new exception requires the Secretary to disclose and make publicly available the following information: (1) each Presidential income tax return (as defined above), (2) each report required by the new section 7613(b) (described above) and (3) any audit material with respect to a return described in (1).

“Audit material” means, with respect to any return, certain material provided by the Secretary to the taxpayer (or any designee of the taxpayer), any request for referral to Appeals of any controversy with respect to such return, and any petition filed with the United States Tax Court for a redetermination of any deficiency if there was a notice of deficiency with respect to such return. “Material provided by the Secretary to the taxpayer (or any designee of the taxpayer)” means:

- Any written communication which identifies the return as being subject to examination.
- Any written communication which proposes the adjustment of any item on such return, any report by an examiner related to such proposed adjustment, and any supervisory approval of any penalty proposed as part of such adjustment.
- Any memorandum or report of Appeals with respect to such return, and any denial of any request for referral to Appeals.
- Any notice of deficiency with respect to the return.
- Any closing documents with respect to the examination of the return, including any closing agreement or no change letter.

Publicly available and exception for certain identity information

Information is considered made publicly available when it is made publicly available on the internet. The Secretary is required to redact any identification number of any person (including any social security number), any financial account number, the name of any individual who has not attained age 18 (as of the close of the taxable year to which the return relates), the name of any employee of the Department of the Treasury, or any address (other than the city and State in which such address is located).

Timing of disclosures

Any Presidential income tax return is required to be disclosed and made publicly available not later than 90 days after the date that such return is filed. In the case of the reports required by proposed new section 7613, such reports are required to be disclosed and made publicly available no later than the deadline specified for disclosing such report. In the case of audit materials, such materials are required to be disclosed and made publicly available no later than 90 days after the completion of the examination (within the meaning of proposed section 7613(b)(3)) with respect to the return to which such audit materials relate.

Effective Date

The provision applies to returns, amendments, and supplements filed (and failures to file returns which occur) after the date of enactment (and to reports and audit materials with respect to such returns, amendments, supplements, and failures).