

**THE SOCIAL SECURITY ADMINISTRATION'S ROLE  
IN VERIFYING EMPLOYMENT ELIGIBILITY:  
BACKGROUND AND PRESENT LAW RELATING TO  
SECTION 6103 AND EMPLOYMENT VERIFICATION**

Scheduled for a Public Hearing  
Before the

HOUSE COMMITTEE ON WAYS AND MEANS  
SUBCOMMITTEE ON SOCIAL SECURITY

On April 14, 2011

Prepared by the Staff  
of the  
JOINT COMMITTEE ON TAXATION



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## INTRODUCTION

The House Committee on Ways and Means Subcommittee on Social Security has scheduled a public hearing on the Social Security Administration's role in verifying employment eligibility on April 14, 2011. The hearing will focus on the progress made, and challenges created, by E-Verify, an internet-based system designed to electronically verify work eligibility and operated by the Department of Homeland Security ("DHS") and the Social Security Administration ("SSA"). The Subcommittee will examine ways to improve the system and, in that context, review various proposals to expand employment eligibility verification, including increasing enforcement through the sharing of taxpayer wage information and taxpayer identity information.

The proposals that provide for increase enforcement through sharing of taxpayer wage information and taxpayer identity information require amendments to the Internal Revenue Code<sup>1</sup> which classifies this information as confidential return information protected by section 6103 and prohibits its disclosure except under specifically identified circumstances.

This document,<sup>2</sup> prepared by the staff of the Joint Committee on Taxation and submitted to the House Committee on Ways and Means Subcommittee on Social Security, provides a brief overview of section 6103 of the Code which prohibits disclosure of tax returns and tax return information except in specific circumstances, such as disclosure of certain tax return information to the SSA.

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<sup>1</sup> Unless otherwise stated, all section references and reference to the "Code" are to the Internal Revenue Code of 1986, as amended.

<sup>2</sup> This document may be cited as follows: Joint Committee on Taxation, *The Social Security Administration's Role in Verifying Employment Eligibility: Background and Present Law Relating to Section 6103 and Employment Verification* (JCX-25-11), April 12, 2011. This document is available on the internet at [www.jct.gov](http://www.jct.gov).

## OVERVIEW OF SECTION 6103 AND TAX RELATED PENALTIES

### **Background**

Congress reviewed the tax information disclosure rules in depth in 1976.<sup>3</sup> At that time, the rules had not been reviewed by Congress for 40 years and a growing number of rules allowing disclosure of tax information had been established by executive order. Prior to 1976, tax returns were considered public records, and were subject to disclosure pursuant to executive order. There was substantial controversy over the extent of actual and potential disclosure of returns and return information to other Federal and State agencies for nontax purposes and whether such disclosures breached a reasonable expectation of privacy on the part of the American citizen with respect to such information. This controversy led to the concern as to whether the public's reaction to such an abuse of privacy would impair compliance with the Federal voluntary tax assessment system. In addition, questions were raised about whether tax returns and tax information should be used for any purpose other than tax administration.<sup>4</sup>

Due to concerns regarding the possible misuse of returns and return information, section 6103 was amended in the Tax Reform Act of 1976. In reviewing each of the areas in which returns and return information were subject to disclosure, Congress sought to balance a particular office's or agency's need for the information with the citizen's right to privacy and the related impact of the disclosure upon the necessary continuation of voluntary compliance with the country's tax assessment system. Legislation at that time clarified the rules governing disclosure of taxpayer return information, providing that returns and return information are confidential and not subject to disclosure except in those limited circumstances set forth in section 6103 in which Congress determined that disclosure was warranted.

### **General rule and scope of information protected by section 6103**

Under present law, section 6103 provides that returns and return information are confidential and may not be disclosed by the IRS, other Federal employees, State employees, and certain others having access to such information except as provided by specified exceptions.

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<sup>3</sup> For further detail, see Joint Committee on Taxation, *General Explanation of the Tax Reform Act of 1976* (JCS-33-76) December 29, 1976 at 314; 1976-3 C.B. 314 (Vol. 2) at 326.

<sup>4</sup> As the Senate Finance Committee noted: "It has been stated that the IRS probably has more information about more people than any other agency in this country. Consequently, almost every other agency that has a need for information about U.S. citizens, therefore logically seeks it from the IRS. However, in many cases, the Congress has not specifically considered whether the agencies which have access to tax information should have that access. . . Questions have been raised and substantial controversy created as to whether the present extent of actual and potential disclosure of return and return information to other Federal and State agencies for nontax purposes breaches a reasonable expectation of privacy on the part of the American citizen with respect to such information. . . In a more general sense, questions have been raised with respect to whether tax returns and tax information should be used for any purposes other than tax administration...[R]eturns 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." S. Rep. No. 94-938 at 317, 1976-3 CB 355.

### Returns and information returns (including Forms W-2)

A “return” means any tax or information return, declaration of estimated tax, or claim for refund which, under the Code, is required (or permitted) to be filed on behalf of, or with respect to, any person. It also includes any amendment, supplemental schedule or attachment filed with the tax return, information return, declaration of estimated tax or claim for refund. For example, Form W-2, Wage and Tax Statement, is an information return, and is the return of both the employer who filed it with the IRS and the employee with respect to whom it was filed.

### Return information

The Code defines “return information” broadly. It includes a taxpayer’s identity (the name of the person with respect to whom a return is filed, his or her mailing address, his or her taxpayer identifying number (“TIN”), social security number (“SSN”) or a combination thereof). In addition to taxpayer identity, return information includes any information gathered by the IRS with regard to a taxpayer’s liability under the Code, including the following data:

- the nature, source or amount of income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments;
- whether the taxpayer’s return was, is being, or will be examined or subject to other investigation or processing;
- 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;
- 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;
- any advance pricing agreement entered into by a taxpayer and the Secretary and any background information related to the agreement or any application for an advance pricing agreement; and
- any agreement under section 7121 (relating to closing agreements), and any similar agreement, and any background information related to such agreement or request for such agreement (sec. 6103(b)(2)).

The term “return information” does not include data in a form that cannot be associated with or otherwise identify, directly or indirectly, a particular taxpayer. However, return information with the identifiers (name, address, SSN) simply removed is still protected by section 6103.

### Taxpayer return information

“Taxpayer return information” is another defined term for purposes of section 6103 and is a subset of return information. Taxpayer return information means return information that is

filed with, or furnished to, the IRS by or on behalf of the taxpayer to whom such return information relates. For example, information filed with the IRS by a taxpayer's attorney or accountant is taxpayer return information. Information transcribed directly from a taxpayer's return is taxpayer return information. Thus, identity information taken from a return or information return is taxpayer return information. The distinction between return information and taxpayer return information is significant for the disclosures of nontax criminal matters for which a court order generally is required to obtain taxpayer return information.

### **Exceptions to the general rule of confidentiality**

Section 6103 contains a number of exceptions to the general rule of confidentiality that permit disclosure in specifically identified circumstances when certain conditions are satisfied.<sup>5</sup> The primary use of tax information is for tax administration purposes, which is addressed in several broadly drawn exceptions.<sup>6</sup> For nontax civil matters, section 6103 provides narrowly tailored exceptions that generally provide the minimum amount of information necessary to achieve the requesting agency's purpose. As discussed above, the tailoring of the exceptions reflects the balance between a taxpayer's legitimate expectation of privacy in their communications with the IRS and an agency's nontax program need, and is based on the notion that maintenance of an expectation of privacy promotes tax compliance.

#### Nontax criminal matters (section 6103(i))

In the case of criminal matters unrelated to tax administration, Congress has indicated that a taxpayer's communications with the IRS, which are compelled by the Internal Revenue Code, should be afforded the same degree of privacy as those private papers maintained in a taxpayer's home:

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 to essentially the same degree of privacy as those private papers maintained in his or her home. Present law and practice does not afford him that protection – the Justice Department and other Federal agencies, as a practical matter, being able to obtain that information for nontax purposes almost at their sole discretion.<sup>7</sup>

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<sup>5</sup> See section 6103(c) (disclosure by taxpayer consent); 6103(d) (disclosure to State tax officials); 6103(e) (disclosure to persons having material interest); 6103(f) (disclosure to committees of Congress); 6103(g) (disclosure to the President and certain other persons); 6103(h) (disclosure to Federal officers and employees for tax administration purposes); 6103(i) disclosure to Federal officer and employees for administration of Federal laws not relating to tax administration); 6103(j) (statistical use); 6103(k) (disclosure of certain returns and return information for tax administration purposes); 6103(l) (disclosure for purposes other than tax administration); 6103(m) (disclosure of taxpayer identity information); 6103(n) (tax administration contractors); and 6103(o) (disclosure of return and return information with respect to certain taxes).

<sup>6</sup> For example, see secs. 6103(f)(1) and (2), 6103(h), and 6103(k).

<sup>7</sup> S. Rep. No. 94-938 at 328.

For criminal matters unrelated to tax administration, present law section 6103(i) draws a distinction between returns and information provided by the taxpayer or his or her representative to the IRS (“taxpayer return information”) and all other return information. Return information that is not also within the subset of data known as taxpayer return information includes witness statements or records gathered by the IRS from third party sources (e.g., witnesses and banks). Stricter requirements must be met to obtain returns and taxpayer return information.<sup>8</sup>

To obtain a return or return information that was provided to the IRS by the taxpayer or his or her representative (taxpayer return information), an ex parte court order must be obtained. Such order is made only if the court finds that the application for the court order meets certain specificity and relevancy requirements.<sup>9</sup>

In contrast, for return information (other than taxpayer return information) a court order is not required and may be disclosed upon receipt of a written request, meeting the statutory content requirements, from the head of a Federal agency and certain other statutorily identified persons. In addition, on its own accord and without a written request, the IRS may disclose return information (other than taxpayer return information) in writing which may constitute evidence of a violation of nontax Federal criminal law to the head of a Federal agency responsible for administering such law.<sup>10</sup> The IRS may also disclose return information to Federal and State law enforcement agencies in cases of imminent danger of death or physical injury.<sup>11</sup>

### **Exception for disclosures to the Social Security Administration**

For purposes of administering the Social Security Act, present law authorizes disclosure to the Social Security Administration (“SSA”), upon written request, of returns and return information relating to self-employment taxes (Chapter 2 of the Code); Federal Insurance Contributions Act (“FICA”) taxes (Chapter 21 of the Code); and taxes withheld at the source on wages (Chapter 24 of the Code).<sup>12</sup>

Documents which may be disclosed to the SSA under this provision include but are not limited to:

- Schedule C, Form 1040, Profit (or Loss) from Business or Profession,

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<sup>8</sup> Sec. 6103(i)(1)(A).

<sup>9</sup> See sec. 6103(i)(1). While less restrictive standards apply to disclosures related to terrorism investigations, an ex parte court order is still required to obtain returns and taxpayer return information. Sec. 6103(i)(7)(C).

<sup>10</sup> Sec. 6103(i)(3)(A).

<sup>11</sup> Sec. 6103(i)(3)(B).

<sup>12</sup> Sec. 6103(l)(1)(A).

- Schedule E, Form 1040, Supplemental Income Schedule-Part III, Income or Loss from Partnerships,
- Schedule F, Form 1040, Farm Income and Expenses,
- Schedule SE, Form 1040, Computation of Social Security Self-Employment Tax,
- Form 1065, U.S. Partnership Return of Income,
- Form 941, Employer’s Quarterly Federal Tax Return,
- Form 942, Employer’s Quarterly Tax Return for Household Employees or portions Schedule H, Form 1040,
- Form 943, Employer’s Annual Tax Return for Agricultural Employees,
- Form W-2, Wage and Tax Statement (limited to those portions of the W-2 relating to Chapters 21 and 24), and
- Return information related to the bullets above.<sup>13</sup>

For administering section 1131 of the Social Security Act, Code section 6103(l)(1)(B) authorizes disclosure to the SSA of return information described in section 6057(d) pertaining to pension, profit-sharing, stock bonus plans, etc. to which part I of subchapter D of Chapter 1 of the Code applies.<sup>14</sup>

Section 6103(l)(5) authorizes disclosure of information returns to the SSA for: (1) carrying out an effective returns processing program; (2) the Combined Annual Wage Reporting (“CAWR”) Program; and (3) certain disclosures for epidemiological and similar research. The information returns which may be disclosed under section 6103(l)(5) are those filed under Part III, Subchapter A, Chapter 61 of the Internal Revenue Code. These include primarily Form W-2; Form W-3 (Transmittal of Wage and Tax Statements); and Form 1099-R (Distributions from Pensions, Annuities, Retirement or Profit Sharing Plans, IRAs, Insurance Contracts, etc).<sup>15</sup>

## **Safeguards against and penalties for unauthorized disclosure or inspection of returns and information**

### **Safeguards**

Section 6103 requires as a condition for receiving tax information, that recipient agencies establish, to the satisfaction of the IRS, physical, administrative and technical safeguards to the

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<sup>13</sup> Internal Revenue Service, Internal Revenue Manual, *Disclosure of Official Information: Administration of the Social Security Act - Social Security Administration*, Ch. 11.3, sec. 11.3.29.3 (9-1-2009).

<sup>14</sup> Section 6057(d) covers statements, notifications, reports and other information received by the IRS pursuant to the annual plan registration requirements of section 6057. Section 1131 of the Social Security Act relates to notification of Social Security claimant with respect to deferred vested benefits.

<sup>15</sup> Internal Revenue Service, Internal Revenue Manual, *Disclosure of Official Information: Disclosure of Information Returns to Social Security Administration*, Ch. 11.3, sec. 11.3.29.3.2 (9-1-2009).

protect the confidentiality of the information received.<sup>16</sup> Such safeguards include a standardized system of records with respect to requests for disclosure of tax information and the reason for such disclosure, secure storage for the tax information, restrictions which limit access to the tax information to persons whose duties and responsibilities require access, and other safeguards as the IRS deems appropriate. The IRS is to review the safeguards established by such agencies and is permitted to terminate access if the safeguards are found unsatisfactory.

#### Civil and criminal penalties for unauthorized disclosure or inspection

The Code provides for criminal penalties and civil damages in the event of an unauthorized disclosure. The willful unauthorized disclosure of tax information is a felony punishable by a \$5,000 fine, up to five years imprisonment, or both.<sup>17</sup> Willful unauthorized inspection of tax information is a misdemeanor punishable by a \$1,000 fine, up to one-year imprisonment or both.<sup>18</sup> Federal employees and officers are required to be discharged from employment upon conviction of willful unauthorized disclosure or inspection.

An action for damages against the United States is permitted when any Federal officer or employee knowingly or by reason of negligence inspects or discloses tax information in violation of any provision of section 6103.<sup>19</sup> A plaintiff is entitled to: (1) actual damages sustained as a result of unauthorized disclosure (including punitive damages for willful or grossly negligent disclosures), or (2) liquidated damages of \$1,000 per disclosure, whichever is greater, as well as costs of the action and in certain cases, attorney fees. No liability arises from a good faith but erroneous interpretation of section 6103 or a disclosure made at the request of the taxpayer.

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<sup>16</sup> Sec. 6103(p)(4). See also Internal Revenue Service, Publication 1075, *Tax Information Security Guidelines for Federal, State and Local Agencies: Safeguards for Protecting Federal Tax Returns and Return Information* (Rev. 6/2000).

<sup>17</sup> Sec. 7213(a)(1).

<sup>18</sup> Sec. 7213A(a)(2)(b).

<sup>19</sup> Sec. 7431.