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REPORT BY THE

Comptroller General

OF THE UNITED STATES

Disclosure And Summons Provisions Of 1976 Tax Reform Act--An Analysis Of Proposed Legislative Changes

Legislative changes are needed in the 1976 Tax Reform Act, which currently hampers the Government's ability to detect and prosecute criminals. The act's disclosure and summons provisions afford taxpayers increased privacy with respect to information they provide IRS and additional rights in summons matters. However, the disclosure provisions inhibit coordination between IRS and other Federal law enforcement agencies. Similarly, the summons provisions adversely affect IRS' ability to carry out criminal tax investigations.

Senate bills 2402, 2403, 2404, and 2405 would significantly revise these sections of the Tax Reform Act, and GAO supports their overall thrust. However, Senate bill 2402 can be further refined to authorize a more effective disclosure mechanism and improve the balance between privacy concerns and law enforcement information needs.

GAO prepared this report at the request of the Chairman, Subcommittee on Treasury, Postal Service, and General Government, Senate Committee on Appropriations.

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GGD-80-76
JUNE 17, 1980

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-199000

The Honorable Lawton Chiles
Chairman, Subcommittee on
Treasury, Postal Service,
and General Government
Committee on Appropriations
United States Senate

SEN00314

Dear Mr. Chairman:

As you requested during hearings on April 22, 1980, we are providing our views and suggestions on four bills--S. 2402, S. 2403, S. 2404, and S. 2405. The Senate bills, if enacted, would substantially revise the disclosure and summons provisions of the 1976 Tax Reform Act. Similar bills--H.R. 6764, H.R. 6765, H.R. 6766, and H.R. 6767--have been introduced in the House of Representatives. Since the Senate bills are currently being considered by the Senate Committee on Finance, we are sending a copy of this report to that Committee's Chairman and to the Chairman of its Subcommittee on Oversight of the Internal Revenue Service.

Basically, the Senate bills seek to strike a better balance than now exists between legitimate privacy concerns and equally legitimate law enforcement information needs. We support the overall thrust of the bills because the record (see app. I) indicates a need for legislative revisions aimed at strengthening the Government's ability to detect and prosecute criminals. On the other hand, S. 2402 can be further refined to authorize a more effective disclosure mechanism and improve the balance between privacy and law enforcement concerns.

In analyzing the proposed bills, we were guided by two basic principles:

--The Internal Revenue Service (IRS) is not primarily a criminal law enforcement agency. Rather, its primary mission is to collect taxes and to encourage and achieve the highest possible degree of voluntary compliance with the tax laws.

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HSR04102
SEN06603
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--Taxpayers who supply information to IRS have a basic right to privacy with respect to that information. Such information should be subject to disclosure for non-tax purposes only when society has a compelling interest which outweighs individual privacy concerns.

Although the Senate bills and our analysis address the disclosure and summons provisions' effects on criminal law enforcement efforts, neither addresses a second important issue--restrictions on the use of tax data for exclusively civil and administrative purposes. For example, Federal debt collectors could carry out their responsibilities more effectively given access to tax information. Federal agencies could make more accurate program eligibility decisions in certain instances given access to tax data. Also, Federal statistical analyses could be improved if certain tax data were made available to various agencies. The Congress may want to address this issue in considering amendments to the Tax Reform Act.

Following is a summary of our views and suggestions on the major provisions of the bills. A detailed comparative analysis of the Senate bills to present law is included as appendix II. References to specific pages in appendix II are provided.

SENATE BILL 2402

We are suggesting modifications to Senate bill 2402, which would substantially revise the disclosure provisions of the Internal Revenue Code. The bill, among other things, would

--simplify existing categories of tax information;

--broaden the definition of taxpayer identity information;

--extend the authority to seek access to tax information to additional Justice Department attorneys;

--limit the time IRS has to respond to access requests;

--require that IRS justify, to a court, decisions to deny Justice Department attorneys access to requested tax information;

--require IRS to disclose information regarding non-tax criminal violations;

--provide a mechanism for IRS to disclose tax information under exigent circumstances;

--authorize redisclosure, to State officials, of tax information concerning non-tax crimes; and

--authorize redisclosure, to Federal authorities, of certain tax information affecting Federal civil litigation.

Our suggested changes are discussed below.

Clear tax information categories are needed

The manner in which tax information is categorized and defined is extremely important because the law affords various levels of protection to different kinds of information. Present law defines and affords certain levels of protection to a "return," "return information," and "taxpayer return information." However, as experience with the Tax Reform Act demonstrates, these definitions have proven confusing to IRS employees, Justice Department officials, and other Federal agencies. Thus, existing categories and definitions of tax information need to be simplified while insuring that taxpayers' privacy rights are retained.

S. 2402 would divide tax information into two basic categories--return and non-return information. A "return" would be defined generally as "any document the taxpayer is required by law to furnish to the Secretary [of the Treasury]." All other information would be considered "non-return information." Substantial protection would be afforded to a return; less protection would be afforded to non-return information.

Although S. 2402 would simplify the categories and definitions of tax information, the bill seems to define the term "return" narrowly in that certain kinds of tax

information could receive less protection than under present law. Also, the definition of return contains two ambiguities. First, it offers little guidance about what would qualify as a document. Second, it does not explain the circumstances in which taxpayers are required by law to furnish documents to IRS. Thus, while a tax return and attached schedules certainly would be considered a return under S. 2402, other information a taxpayer supplies IRS might not. For example, books and records voluntarily made available to IRS by a taxpayer during an audit, including oral explanations of those materials, might not be considered part of the return. On the other hand, the same books and records arguably could constitute a return if supplied to IRS as a result of a summons.

In our view, any information taxpayers supply IRS about their returns ought to be included in the return category and should be afforded the protection that this category warrants. In this regard, virtually all information defined under present law as a "return" and "taxpayer return information" should be protected information. To that end, we have developed proposed statutory language to clarify the definition of a return. Henceforth, all references to the term "return" pertain to our proposed statutory definition. (See pp. II-1 to II-3, II-7, II-8, and II-13.)

The definition of "taxpayer identity information" needs to be expanded

To obtain a court-ordered disclosure and/or to request access to third-party tax information, Justice Department attorneys need to know the taxpayer's name, address, and identifying number. However, Justice does not always have all the information it needs to make such requests. Existing law authorizes IRS to disclose "taxpayer identity information" to Justice on request.

The existing definition of taxpayer identity information does not include information on whether an individual has filed a tax return for particular tax years. As a result, Justice obtained on several occasions a court order authorizing disclosure of information, such as a tax return, which did not exist. In such instances, Justice attorneys and the courts wasted resources simply because present law prevents IRS from telling Justice whether a return was filed.

S. 2402 would expand the definition of taxpayer identity information to alleviate this disclosure problem. The definition would enable a Justice attorney to determine that a return exists before seeking court-ordered access to the return. We support the intent of this provision.

As presently drafted, however, S. 2402 authorizes IRS to disclose any information which identifies the name, address, or social security number of any taxpayer or which reveals whether the taxpayer filed a tax return for any given year. Precisely what may qualify as any information is not defined and thus is open to various interpretations. S. 2402 could achieve its intent by dropping the reference to any information. Then, taxpayer identity information should be defined to include the taxpayer's name, address, and identifying number, and a statement as to whether protected information relating to the taxpayer exists for any particular tax year. (See p. II-4.)

The authority to seek access to tax information needs to be extended to other officials

Under existing law, the authority to request tax information, for criminal law enforcement purposes, either by court order or written request, lies with the head of any Federal agency that enforces Federal criminal laws not involving tax administration. In the case of the Justice Department, that authority extends to the Attorney General, the Deputy Attorneys General, and any Assistant Attorney General. S. 2402 would vest this authority in a defined category of "Attorney[s] for the Government," all within the Department of Justice. The heads of other Federal investigative agencies could no longer independently request tax information.

We agree with the thrust of this proposal. Restricting this authority to Justice Department attorneys would enhance coordination between IRS and Justice essential to efficient Federal law enforcement. Justice, as a result, could prevent duplicative investigations, provide investigative guidance, and otherwise assist Federal law enforcement officials in developing successful cases. Also, giving Justice attorneys sole authority to request information could better insure that such requests meet applicable statutory requirements.

In our April 1980 testimony, we discussed the need for IRS to decentralize its disclosure processes in accordance with existing law. IRS did so on June 1, 1980, and now should respond more quickly to access requests. Under present law, however, Justice attorneys must send requests through headquarters officials for signature. IRS' action thus has created a need to decentralize within Justice the authority to seek access to tax information.

We do have one suggested modification to S. 2402's definition of the "Attorney for the Government." We would limit the authority to request tax information to fewer additional parties than contemplated under S. 2402. In our view, a better balance between privacy and law enforcement concerns could be achieved by limiting the number of persons authorized to seek access to tax information, consistent with the needs of law enforcement agencies.

We suggest that S. 2402 vest such authority in the Attorney General, the Deputy Attorney General, the Assistant Attorneys General, and, when designated on an individual basis by the Attorney General, U.S. attorneys and attorneys in charge of Organized Crime Strike Forces. (See pp. II-5 and II-6.)

Placing limits on IRS response time to access requests is impractical

We believe the 10-day limit proposed by S. 2402 on IRS' response time to court-ordered disclosures and written requests should be reconsidered. Although we concur with the intent of the provision to expedite the disclosure process, we consider the time limit impractical for two reasons.

First, IRS could not always meet the proposed 10-day limit because its efforts to locate, obtain, and review the requested information often take much longer than 10 days. For example, several weeks are often needed to locate information requested by a U.S. Attorney that has been stored in a Federal records center. Second, through extensive audit work at several IRS offices throughout the country, we determined that IRS invariably seeks to respond to disclosure requests as quickly as possible. Also, effective June 1, 1980, IRS decentralized its disclosure processes in an effort to further speed the process.

We do not object to the imposition of a limit on IRS' response time. However, no systematic study has been undertaken of reasonable time restrictions. Without data on which to base such a decision, any time limit would be arbitrary. We therefore suggest deleting this provision of S. 2402. (See p. II-9.)

Little apparent need for additional controls over IRS' authority to deny access requests

Under present law, IRS may decline to provide requested tax information if it determines and certifies that such a disclosure would identify an informant or impair a tax investigation. In such instances, S. 2402 would require that IRS apply to a Federal district court for permission to deny an access request. The Attorney for the Government then would have the right to contest IRS' application in court by seeking to show that the disclosure is of "such substantial importance to a Federal criminal investigation that said disclosure should take precedence over the considerations for any civil or criminal tax investigation." Although we do not object to court review of IRS determinations, in this instance it seems unnecessary and could have some undesirable effects.

Both IRS and Justice officials believe that court review is not needed because the agencies have clearly demonstrated the ability to negotiate mutually agreeable solutions to access request problems. As a result, since January 1, 1977, IRS has only once had to use the current court certification process to deny Justice access to requested tax information.

Also, in providing a forum for conflict resolution, S. 2402 could cause some potential problems. First, it could inadvertently affect IRS' ability to develop and use confidential informants. Some informants simply will not cooperate with IRS if anonymity cannot be guaranteed. Second, by having the judiciary make final disclosure decisions, S. 2402 could have a negative impact on the ability of IRS and Justice officials to successfully resolve their differences without court intervention. Finally, the application of this standard would place the Judicial branch of government in the awkward position of making prosecutorial value judgments that have historically been the responsibility of the Executive Branch.

If, however, the Congress decides that court review is appropriate, we would suggest that it be invoked only in those instances in which the agencies cannot reach an agreement through informal negotiations. This would preclude the need for court review when Justice does not contemplate challenging IRS' determination that it should deny an access request. (See pp. II-10 and II-11.)

Proposed requirement that IRS disclose information concerning non-tax crimes needs clarification

S. 2402 would obligate IRS to provide law enforcement agencies information that "may constitute evidence of a violation of any Federal criminal law or which may be pertinent to any investigation of a violation of Federal statutes." If interpreted as legally requiring IRS to regularly search its files for evidence of possible non-tax crimes, this provision could create an undesirable situation. Such an interpretation could effectively cause IRS to become an intelligence gathering arm for every other Federal law enforcement agency. We therefore suggest that the scope of IRS' responsibilities under this provision be clarified. Subject to the protection provided by other sections of the bill, IRS should be required to disclose only non-tax criminal information it becomes aware of in the course of administering the tax laws.

On this point, one serious problem with present law should be addressed. When IRS uncovers criminal evidence based on taxpayer return information, it lacks authority to unilaterally report the evidence to the appropriate law enforcement agency. This also would be the case with respect to a return under S. 2402. Therefore, we suggest that Congress authorize IRS to apply for a court order to disclose protected information. This would ensure that a neutral third party--the judiciary--decides on the disclosure of such information. Accordingly, we have developed a proposed revision to the statutory language contained in S. 2402. (See pp. II-13 to II-15.)

IRS needs specific authority to disclose tax information under exigent circumstances

Present law provides no specific authorization for disclosures under "exigent circumstances." S. 2402 seeks to resolve this problem. Under exigent circumstances, including a possible threat to persons, property, or national security, IRS would be required to disclose without a court order any necessary information to the appropriate Federal investigative agencies.

We support the intent of this provision. However, as presently drafted, it could cover a wide variety of situations because it does not define the term "exigent circumstances." This provision should be more narrowly drawn, and the exigencies intended to be covered defined with greater

clarity. For reasons discussed previously, we suggested that IRS be given the authority to seek court-ordered disclosures when it uncovers criminal evidence based on a return. In light of this, we suggest that the exigent circumstances provision of S. 2402 be explicitly keyed to IRS' inability to obtain a court order in sufficient time to prevent harm to persons, property, or national security.

In addition, we would authorize rather than require the Secretary to make such disclosures. This would give the Secretary discretion in situations where the potential harm to a confidential informant or a particularly sensitive tax investigation outweighs the potential harm to persons, property, or national security. We would also expand this authorization to allow disclosure of such information to appropriate State authorities, since many exigent circumstances, such as murder, would involve State crimes.

We have developed statutory language to incorporate our proposals. (See pp. II-16 to II-18.)

Redisclosure of non-tax State felony information should be authorized

Present law forbids disclosure of tax information concerning non-tax State crimes. S. 2402 would authorize Attorneys for the Government to obtain a court order authorizing redisclosure to State authorities of information they possess concerning non-tax State felonies. Thus, the Attorneys could self-initiate such redisclosures and could, but would not be required to, respond to State requests for such information. We concur with the need for such redisclosure authority and the court controls over them. However, with privacy concerns in mind, we suggest that such redisclosures be limited to State attorneys general. The attorneys general would, of course, be authorized to further redisclose the information as necessary to carry out their specific criminal law enforcement responsibilities. (See p. II-19.)

Redisclosure of certain tax information for Federal civil litigation purposes should be authorized

Present law generally does not authorize disclosure of tax information for civil litigation purposes. S. 2402 would authorize the Attorney for the Government to apply for a court order authorizing redisclosure, for Federal civil litigation purposes, of tax information obtained initially for use in actual or contemplated criminal prosecutions.

We concur with the need for this redisclosure authority. However, again, with privacy concerns in mind, we suggest that such redisclosures be limited to the heads of the affected Federal agencies. They would then have the authority to further redisclose the information as necessary to carry out their official duties. (See p. II-20.)

SENATE BILL 2403

Under existing law, a taxpayer can prevent third-party recordkeepers from complying with an IRS summons simply by serving notice on them not to comply. The Government then must bring a court action to enforce the summons. The taxpayer can, but is not required to, participate in the court action. S. 2403 would require that a taxpayer file a motion to quash the summons in the local district court. Thus, a taxpayer no longer would be able to delay an IRS investigation simply by serving a notice on the third-party recordkeeper.

The procedure contemplated under S. 2403, which already is contained in the Right to Financial Privacy Act, is reasonable. It also coincides with the recommendation we made in our March 1979 report on the effects of the disclosure/summons provisions (GGD-78-110) and in recent testimony. (See p. II-22.)

SENATE BILLS 2404 AND 2405

Senate bills 2404 and 2405 would amend existing provisions of the Internal Revenue Code which provide criminal and civil penalties for unauthorized disclosures. S. 2404 authorizes Federal employees an affirmative defense against criminal prosecution for improper disclosure, i.e., that the disclosure resulted from a good faith, but erroneous, interpretation of the law. S. 2405 would hold the Government, rather than the affected employee, liable for civil damages under circumstances similar to those described above. (See pp. II-23 and II-24.)

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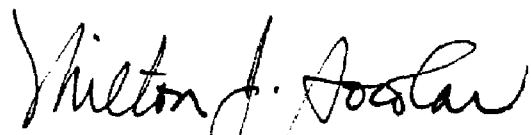
In summary, we support the overall thrust of the four Senate bills. Enactment of S. 2402, with the modifications discussed above, would provide law enforcement officials with needed access to tax information as well as provide adequate control to protect individuals' privacy rights.

Enactment of S. 2403 would enable IRS to better carry out its mission. Taxpayers, however, would retain the right to contest administrative summonses in court. Enactment of S. 2404 and 2405 would enable Federal employees to make authorized disclosures without undue fear of criminal prosecution or responsibility for civil damages. In our view, the Congress should adopt these bills.

As arranged with your office, in addition to the earlier mentioned persons to whom we are sending copies of this report, we are also sending copies to the Chairman of the House Ways and Means Committee, the sponsors of the Senate and House bills, and other interested parties who request them.

Sincerely yours,



Acting Comptroller General
of the United States

APPENDIX I

SELECTED RECORD OF THE EFFECTS OF THE DISCLOSURE AND SUMMONS PROVISIONS OF THE 1976 TAX REFORM ACT

Hearings on the Erosion of Law Enforcement Intelligence Capabilities and its Impact on the Public Security before the Subcommittee on Criminal Laws and Procedures, Senate Judiciary Committee, April 1978.

General Accounting Office report entitled "Disclosure And Summons Provisions of 1976 Tax Reform Act--Privacy Gains With Unknown Law Enforcement Effects" (GGD-78-110, March 12, 1979).

General Accounting Office report entitled "Gains Made In Controlling Illegal Drugs, Yet the Drug Trade Flourishes" (GGD-80-4, October 25, 1979).

Hearings on Illegal Narcotics Profits before the Permanent Subcommittee on Investigations, Senate Committee on Governmental Affairs, December 1979.

General Accounting Office report entitled "The Drug Enforcement Administration's CENTAC PROGRAM-- An Effective Approach To Investigating Major Traffickers That Needs To Be Expanded" (GGD-80-52, March 27, 1980).

Hearings on Federal Efforts to Combat Narcotics Trafficking before the Subcommittee on Treasury, Postal Service, and General Government, Senate Committee on Appropriations, April 1980.

APPENDIX II

COMPARATIVE ANALYSIS OF 26 U.S.C. §§6103, 7609, 7213, AND 7217

WITH

SENATE BILLS 2402, 2403, 2404, AND 2405

TAX DISCLOSURE PROVISIONS: COMPARISON OF 26 U.S.C. §6103 AND S.2402 1/

CATEGORIES OF TAX INFORMATION

26 U.S.C. §6103	S. 2402
Existing law divides information into three categories: return, return information, and taxpayer return information.	Proposal, by definition, divides information into return and non-return information, eliminating the category of taxpayer return information.
(b) Definitions	(b) Definitions
(1) Return--any document the taxpayer is required by law to file, including information returns, declarations of estimated tax, claims for refund, and any schedules and attachments.	(1) Return--defined similar to existing law, but also includes any document the taxpayer is required by law to provide IRS.
(2) Return information--(a) all information on the return; (b) information IRS has concerning the return, e.g., whether the return is being audited; (c) all data received or collected by IRS relating to the return and determination of tax liability; and (d) any background or written document on the determination not open for public inspection.	(2) Non-return information--all other information IRS has relating to the return and tax liability.
By definition, return information does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer.	
(3) Taxpayer return information--return information (as in (2)) which is filed with or furnished to IRS by or on behalf of the taxpayer.	

1/ This analysis is limited to the impact of the major provisions of S. 2402.

APPENDIX II

GAO Comments

The present statutory definitions of return, return information, and taxpayer return information are somewhat unclear. For example, it is difficult to determine what information falls within the meaning of "taxpayer return information." One reason for this difficulty is the problem of identifying when information is actually supplied on behalf of the taxpayer. Information supplied by the taxpayer's attorney, accountant, or witness brought to an audit seems to be information supplied on behalf of the taxpayer. It is not clear, however, whether information qualifies as taxpayer return information when, for example, the taxpayer's witness decides to testify against the taxpayer and supplies information harmful to the taxpayer's case.

These definitions should be easily understood because the definitional categories ultimately determine the degree of privacy afforded the taxpayer. For this reason, we agree with S. 2402's premise that the present statutory definitions need clarification.

Although the definitions need to be clarified, S. 2402 limits the category of protected information, and the bill's definitions are somewhat ambiguous. Any definitional ambiguities could seriously erode the careful balance the bill's sponsors intended to strike between privacy concerns and law enforcement information needs. Under the proposal, only a "return" would be protected from disclosure by IRS absent a court order. The term "return" clearly covers the actual tax return and such documents as a taxpayer's refund claim. It is not clear, however, whether a taxpayer's books and records provided during an audit would be included. Only documents required by law to be provided IRS are covered by the definition. The bill neither defines the term "documents" nor describes the circumstances in which a taxpayer is "required by law" to provide "documents" to IRS. A taxpayer's books and records provided during an audit should be included within the category of protected information, as well as any return-related information supplied to IRS by the taxpayer or anyone actually acting on the taxpayer's behalf.

APPENDIX II

GAO Suggested Statutory Language

Paragraph (1) of subsection (b), section 6103 of title 26, United States Code, should be amended to read as follows:

(1) Return
The term "return" means:
(A) Any tax or information return, declaration of estimated tax, or claim for refund required by, or provided for or permitted under, the provisions of this title which is filed with the Secretary by, on behalf of, or with respect to any person, and any amendment or supplement thereto, including supporting schedules, attachments, or lists which are supplemental to, or part of, the return so filed, and
(B) Any information provided by or on behalf of the taxpayer to whom such information relates including
(i) the nature, source, or amount of the taxpayer's income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, over-assessments, or tax payments, and
(ii) any part of any written determination, or any background file document relating to such written determination (as such terms are defined in 6110 (b)) which is not open to public inspection under section 6110,
But such term does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer.

Paragraph (2) of subsection (b), section 6103 of title 26, United States Code, should be amended to read as follows:

(2) Non-return information: The term "non-return information" means any information which the Secretary collects, obtains, or receives, or any part of any written determination or any background file document relating to such written determination which is not a return as defined in paragraph (1).

Paragraph (3) of subsection (b), section 6103 of title 26, United States Code, the category "taxpayer return information," should be repealed.

APPENDIX II

DEFINING TAXPAYER IDENTITY

26 U.S.C. §6103	S. 2402
(b)(6) Taxpayer Identity-- Name, address, and identifying number of taxpayer	(b)(3) Expands definition to cover more than just the name, address, and identifying number by including any information which identifies name, address, or identifying number of taxpayer, or which reveals whether taxpayer filed a tax return.

GAO Comments

It is not clear what is meant by the phrase "any information" in this definition. Arguably, any information that even indirectly identifies a taxpayer is included. This conceivably could include a document, such as a letter from an informant, which refers to an organized crime figure. Such a reference could reveal the taxpayer's identity. Since taxpayer identity information would be disclosed merely on the request of a Government attorney, the category of "taxpayer identity" information should be clarified by deleting the reference to any information. In addition, Justice attorneys need to know whether IRS has information other than just a filed tax return. For example, IRS could have a criminal tax case file on a nonfiler which could be useful to Justice. IRS should be able to inform Justice that it has such "return" information. Actual disclosure of the information could be accomplished through the court order process.

GAO Suggested Statutory Language

Paragraph (6) of subsection (b), section 6103 of title 26, United States Code, should be amended to read as follows:

> (6) Taxpayer identity: The term "taxpayer identity" means the name of a person with respect to whom a return is filed, the person's mailing address, and identifying number (as described in section 6109) and an affirmative or negative statement as to whether 'return' information exists for any particular tax year, or a combination thereof.

APPENDIX II

AUTHORITY TO SEEK ACCESS TO TAX INFORMATION

26 U.S.C. §6103	S. 2402
(i)(1)(B), (i)(2) Authority to request access to tax information vested with certain agency heads and, in the case of the Justice Department, the Attorney General, Deputy Attorney General, and any Assistant Attorney General.	Adds a new paragraph (9) to subsection (b): (9) Attorney for the Government--Defined as the Attorney General, the Deputy Attorney General, any Assistant Attorney General, Deputy Assistant Attorney General, and any U.S. Attorney, any head of a local or regional office of the Department of Justice, an attorney in charge of an Organized Crime Strike Force, or any supervisory attorney designated by Attorney General. These are the individuals authorized either to file court orders to obtain returns or to request non-return information from IRS.

GAO Comments

Under existing law, the authority to request tax information for law enforcement purposes, either by court order or written request, generally lies with the head of any Federal agency that enforces Federal criminal laws not involving tax administration. S. 2402 would vest this authority in a defined category of Attorneys for the Government, all within the Department of Justice. The heads of Federal investigative agencies could no longer independently request tax information.

We agree with the thrust of this proposal. Restricting this authority to Justice attorneys would insure coordination between IRS and Justice essential to efficient Federal law enforcement. In this manner, Justice could prevent duplicate investigations, provide investigative guidance, and otherwise assist Federal law enforcement officials in developing successful cases. And, by placing this authority in Justice attorneys, a mechanism is provided to insure that all tax information requests meet applicable requirements.

APPENDIX II

We would, however, suggest a modification to the list of officials authorized to apply for tax information. We suggest vesting this authority in the (1) Attorney General, (2) Deputy Attorney General, (3) Assistant Attorneys General, and (4) U.S. attorneys and heads of Organized Crime Strike Forces, when specifically designated by the Attorney General. This would provide the Attorney General with flexibility to authorize a wide range of individuals to request tax information when necessity demands, and to withdraw such authorization when necessary. This revision would recognize the balance that must be struck between the need to decentralize this authority within Justice and the danger of having too many people requesting tax information.

GAO Suggested Statutory Language

Subsection (b) of section 6103 of Title 26, United States Code, should be amended to add a new paragraph numbered (9) as follows:

(9) Attorney for the Government: The term "Attorney for the Government" means the Attorney General, the Deputy Attorney General, the Assistant Attorneys General, and, when specifically designated on an individual basis by the Attorney General, any U.S. Attorney or Attorney in Charge of a Criminal Division Organized Crime Strike Force.

APPENDIX II

COURT ORDERED DISCLOSURES

26 U.S.C. §6103	S. 2402
(i) Disclosure For Administration of Federal Laws Not Relating to Tax Administration	(i) Disclosure For Administration of Federal Laws Not Relating to Tax Administration
(1) Non-tax criminal investigation:	(1) Non-tax criminal investigation:
(A) Requires ex parte court order for disclosure of return or taxpayer return information to law enforcement agencies.	(A) Requires ex parte order for disclosure of "return" only.
(B) Application for order by head of Federal agency involved in law enforcement or in case of Department of Justice, the Attorney General, Deputy Attorney General or Assistant Attorney General.	(B) Application for order by an "Attorney for the Government."
Ex parte order may be issued if	Ex parte order may be issued if
(i) on the basis of reliable information, there is reasonable cause to believe a crime has been committed;	(i) it relates to a lawful administrative, judicial, or grand jury proceeding pertaining to a possible violation of a Federal criminal statute; and there is
(ii) there is reason to believe that the return is probative; and	(ii) reasonable cause to believe that the information sought is both material and relevant.
(iii) information cannot reasonably be obtained from another source.	

APPENDIX II

GAO Comments

Under existing law, "taxpayer return information" can be disclosed only by court order, applied for by certain agency heads. Taxpayer return information includes any information concerning the return supplied to IRS by either the taxpayer or anyone acting on the taxpayer's behalf. Under this provision, for example, an accountant's work papers provided on behalf of the taxpayer during an audit can be disclosed only by court order.

Under S. 2402, ex parte orders would be required for disclosure of a "return." As a general proposition, all other information would be disclosed on the request of the Attorney for the Government. In our view, information supplied to IRS by the taxpayer or anyone actually acting on his behalf should be disclosed pursuant to a court order. (See page II-2.)

S. 2402 does, however, provide a needed amendment to the criteria for obtaining a court order. Under existing law, law enforcement agencies are caught in a Catch 22 position. To obtain the order, they must show, based on reliable information, that there is reasonable cause to believe a crime has been committed and that the information sought from IRS is probative. The Department of Justice has testified to considerable difficulty in meeting this standard in that it often cannot make these determinations until it has the requested information. We believe the less burdensome "material and relevant" standard of S. 2402 is reasonable and could alleviate the Catch 22 scenario.

S. 2402 does away with the requirement that, to obtain a court order, the agency seeking disclosure from IRS first ascertain that the information is not available from another source. In recognition of IRS' primary responsibility to administer the tax laws and collect the revenue, the Committee could consider refining the bill to recognize that if the law enforcement agency can obtain the information from another source in a timely manner and without prejudicing enforcement, there is no persuasive reason why judicial process should be invoked to compel disclosure by IRS.

APPENDIX II

DISCLOSURE TIME LIMITS

26 U.S.C. §6103	S. 2402
No comparable provision	Adds a new paragraph (D) to section (i): IRS must disclose a "return" to the Attorney for the Government within 10 days of receipt of an ex parte court order.

GAO Comments

We understand the intent of this provision--to speed the disclosure process--but consider the time limit impractical. IRS could not meet the proposed 10-day limit because locating, obtaining, and reviewing the requested information often takes a great deal of time. For example:

--Information requested by a U.S. Attorney that has been stored in a Federal records center could take weeks or even months to locate and obtain.

--A criminal tax case file containing references to (but not the name of) a confidential informant must be studied in detail--a time consuming process--by IRS before that file can be disclosed. IRS has to ensure that the disclosed information will in no way indicate the informant's identity.

--Certain disclosure requests sometimes include hundreds of targets. IRS must locate, obtain, and review hundreds of files in response to such a request. This, again, is a time consuming process.

Moreover, through extensive audit work at various IRS offices throughout the country, we determined that the Service invariably seeks to respond to disclosure requests as quickly as possible. Furthermore, effective June 1, 1980, IRS decentralized its disclosure processes in an effort to further speed the process.

We do not object to the imposition of a limit on IRS' response time. However, no systematic study has been undertaken to develop reasonable time restrictions. Without data on which to base such a decision, any time limit would be arbitrary. We therefore do not believe this provision of S. 2402 is necessary.

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IRS' AUTHORITY TO DECLINE ACCESS REQUESTS

26 U.S.C. §6103	S. 2402
(i)(1), (i)(2) To prevent an otherwise required disclosure, IRS certifies to the court that disclosure would identify an informant or impair a tax investigation. IRS certifications are not subject to challenge.	Revises sections (i)(1) and (i)(2) by adding a new paragraph: Reasons for nondisclosure are the same; however, IRS must apply for approval (not merely certify) to District Court. The Attorney for the Government may contest IRS' determination in court.

GAO Comments

The procedure contemplated by S. 2402, not contained in existing law, requires the judiciary to make the final determination as to whether disclosure would be harmful to an IRS investigation or compromise a confidential informant's identity. Present law vests the authority to make such determinations with IRS. Although we do not object to court review of IRS' determinations, in this instance it seems unnecessary and could have some undesirable effects.

Both IRS and Justice officials believe that court review is not needed because the two agencies have clearly demonstrated the ability to negotiate mutually agreeable solutions to access request problems. As a result, since January 1, 1977, IRS has only once had to use the current court certification process to deny Justice access to requested tax information.

Also, in providing a forum for conflict resolution, S. 2402 could cause some potential problems, First, it could inadvertently affect IRS' ability to develop and use confidential informants. Some informants simply will not cooperate with IRS if anonymity cannot be guaranteed. Second, by having the judiciary make final disclosure decisions, S. 2402 could have a negative impact on the ability of IRS and Justice officials to successfully resolve their differences without court intervention. Finally, this provision would place the Judicial Branch of government in the awkward position of making prosecutorial value judgments that have historically been the responsibility of the Executive Branch.

If, however, the Congress decides that court review is appropriate, we would suggest that it be invoked only in those instances in which the agencies cannot reach agreement

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through informal negotiations. This would preclude the need for court review when Justice does not contemplate challenging IRS' determination that it should deny an access request. Also, the bill, as presently drafted, makes no provision for either in camera court review or the issuance of protective orders to insure the confidentiality of these proceedings. If this provision is enacted, this authority should be specifically given to the judiciary as there is a valid concern of protecting an informant's identity and not impairing a viable tax investigation.

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DISCLOSING NON-RETURN INFORMATION

26 U.S.C §6103	S. 2402
(i)(2) Disclosure of return information other than taxpayer return information by written request of certain agency heads.	(i)(2) Disclosure of all information other than returns on written request of Government attorney. IRS must disclose within 10 days. Also, the Attorney for the Government can further disclose non-return information to agents and agencies assisting him in the investigation. Provision similar to grand jury secrecy rules, except Senate proposal, unlike Rule 6(e), requires no accounting to the court for redisclosures.

GAO Comments

Under existing law, information which can be disclosed on written request of an agency head is limited to information which is not considered taxpayer return information. S. 2402 would allow all information other than that defined as a "return" to be disclosed upon written request of the Attorney for the Government. As discussed on page II-2, the definition of a return under S. 2402 seems too narrow. It would allow Government attorneys to gain access by written request to some categories of information that, in our opinion, should be protected and disclosed only via court order.

One additional feature of the provision, not previously discussed, authorizes the Attorney for the Government to redisclose non-return information to anyone involved in the criminal investigation. To avoid abusive disclosures, safeguards should be provided to assure that redisclosures are made on a "need to know" basis, and that an accounting is made for those disclosures.

Also, IRS would be required to disclose requested tax information 10 days after receipt of the ex parte court order. For the reasons discussed on page II-9, we consider the time limit unnecessary.

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IRS-INITIATED DISCLOSURE OF NON-TAX CRIMINAL INFORMATION

26 U.S.C. §6103	S. 2402
(i)(3) IRS may disclose information other than taxpayer return information to agency heads when there is evidence that a Federal crime has been committed.	(i)(3) Places legal duty on IRS to disclose criminal information except for limited category of returns.

GAO Comments

S. 2402 places an affirmative legal duty on IRS to provide enforcement agencies information that "may constitute evidence of a violation of any Federal criminal law or which may be pertinent to any investigation of a violation of Federal statutes." This obligation is not explicitly limited to a duty to review IRS files upon request or to disclose evidence uncovered in the normal course of tax administration. The scope of this duty needs clarification. As presently drafted, the bill could contemplate a responsibility, even in the absence of a request, to regularly review IRS files for nontax criminal evidence. Recognizing that IRS' primary responsibility is in the area of tax administration, we believe IRS' disclosure obligation should extend to non-tax criminal information it becomes aware of when (1) administering the tax laws and (2) reviewing case files pursuant to a Department of Justice request.

At the same time, we recognize the need expressed in S. 2402 to enable IRS to provide assistance to law enforcement agencies. Under present law, when IRS uncovers criminal evidence based on taxpayer return information, it lacks authority to report it to the appropriate law enforcement agency. This is because the law authorizes only heads of Federal criminal investigative agencies other than IRS to apply for a court order to disclose taxpayer return information. This also would be the case with respect to a "return" under S. 2402. Therefore, we suggest that Congress authorize IRS to apply for a court order to disclose protected information. Such a provision would ensure that a neutral third party--the judiciary--decides on the disclosure of such information.

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GAO Suggested Statutory Language

Paragraph (3) of subsection (i), section 6103 of title 26, United States code, should be amended to read as follows:

(3) Disclosure of information concerning possible criminal activities.

(A) Information from taxpayer: Upon application by the Secretary, a U.S. District Court may, by ex parte order, direct that a return (as defined in section 6103(b)(2)) be disclosed to the head of the appropriate Federal investigative agency if, in the opinion of the court, such information is material and relevant to a violation of Federal criminal law.

(B) Application for order: The application for an ex parte court order shall set forth the name of the taxpayer involved; the time period to which the request relates; and the reasons why, in the opinion of the Secretary, the information is material and relevant to a violation of Federal criminal law.

(C) Procedures: A U.S. District Court shall act upon any application for an ex parte order within 5 days of the receipt thereof. In the event that the district court denies the application

(i) a motion for reconsideration shall be acted upon not later than 5 days after the receipt of such motion and

(ii) an appeal shall be disposed of as soon as practicable but not later than 30 days after receipt of appeal.

(D) Duty of the Secretary: The Secretary or a designee shall disclose, to the head of the appropriate Federal investigative agency, information ordered disclosed pursuant to this subsection.

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(E) Further Disclosure: The head of the Federal investigative agency may further disclose any information, which has been disclosed to him pursuant to an ex parte order, to such other Government personnel as he deems necessary to assist him during or in preparation for any administrative, judicial, or grand jury proceeding or in a criminal investigation which may result in such a proceeding.

(F) Non-Return Information: The Secretary may disclose in writing non-return information which may constitute evidence of a violation of Federal criminal laws to the extent necessary to apprise the head of the appropriate Federal agency charged with the responsibility for enforcing such laws. For purposes of this subsection, the name and address of the taxpayer shall not be treated as a return if there is non-return information which may constitute evidence of a violation of Federal criminal laws.

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DISCLOSURES UNDER EXIGENT CIRCUMSTANCES

26 U.S.C. §6103	S. 2402
No comparable provision.	Adds a new paragraph (4)(b) to subsection (i) Exigent circumstances: Under exigent circumstances, including a possible threat to persons, property, or national security, IRS must disclose without a court order any necessary information to the appropriate Federal agency. District Court must be notified of disclosure, but not until after IRS releases the information.

GAO Comments

We support the intent of this provision, which provides the Secretary the authority to disclose information in exigent circumstances. As presently drafted, however, this provision could cover a variety of situations. The bill sets forth no clear standards about what constitutes an "exigent circumstance" or "possible threat to persons, property, or national security." Thus, the provision could be interpreted in many different ways and could become the subject of abuse.

This provision could be more narrowly drawn, and still achieve its intent. As discussed on page II-13, the Secretary should, in our view, be given the authority to seek court-ordered disclosures when IRS uncovers criminal evidence based on a "return." In light of this, we suggest that the exigent circumstance disclosure authority of S. 2402 be explicitly keyed to the Secretary's inability to obtain a court order in sufficient time to prevent harm to persons, property, or national

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security. We would also suggest expanding this authority to allow disclosure of criminal evidence based on a "return" to appropriate State authorities, since many exigent circumstances, such as murder, would involve State crimes.

With regard to the act of disclosing information related to exigent circumstances, we would authorize rather than require the Secretary to make such disclosures. This would enable the Secretary to use discretion in situations where the potential harm to a confidential informant or a particularly sensitive tax investigation outweighs the potential harm to persons, property, or national security.

GAO Suggested Statutory Language

Subsection (i), section 6103 of title 26, United States Code should be amended to add a new paragraph:

Exigent Circumstances

(A) Under exigent circumstances, the Secretary or a designee may disclose such information, including returns, as is necessary to apprise the appropriate Federal or State authorities having jurisdiction over the offense to which such information relates.

> (i) "Exigent circumstances" means circumstances involving an imminent threat of harm to persons, property, or national security, and in which, in the judgment of the Secretary, time is insufficient to obtain an ex parte order authorizing disclosure of the information involved.

(B) The Secretary shall maintain standardized records or accountings of all disclosures made under this paragraph.

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DISCLOSURE TO STATE OFFICIALS

26 U.S.C. §6103	S. 2402
No comparable provision.	Adds a new paragraph (7) to subsection (i) Provides Attorneys for the Government with authority to obtain an ex parte court order authorizing the redisclosure of tax information which evidences a violation of a State felony statute. Under this provision, a court can authorize that redisclosure of such information be made to an appropriate State official whose duty it is to investigate or prosecute the crime involved.

GAO Comments

Present law does not authorize the redisclosure of tax information concerning non-tax State crimes. S. 2402 would authorize the Attorney for the Government to obtain an ex parte court order authorizing such redisclosure when the information relates to State felony violations. We believe there is a need for this redisclosure authorization.

However, we suggest a modification to this section to accomodate privacy concerns. Redisclosure should be made only to State Attorneys General. The Attorneys General would, of course, be authorized to further redisclose the information as necessary to carry out their specific criminal enforcement responsibilities. Also, IRS should be notified of redisclosures to State Attorneys General by the Attorney for the Government.

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DISCLOSURE CONCERNING FEDERAL CIVIL LITIGATION

26 U.S.C. §6103	S. 2402
No comparable provision.	Adds a new paragraph (8) to subsection (i) Provides a mechanism through which the Attorney for the Government may redisclose, for Federal civil litigation purposes, information obtained initially for use in a non-tax criminal investigation. The redisclosure would be authorized only upon issuance of an ex parte court order.

GAO Comments

This provision provides a needed authorization for redisclosure of tax information in connection with civil actions initiated under the civil rights, antitrust, fraud, and organized crime statutes. It also could be invoked for other civil statutes that have a criminal counterpart. However, we would suggest a modification to this section to accommodate privacy concerns. Redisclosure should be made only to the heads of Federal agencies. The agency heads would, of course, be authorized to redisclose the information as necessary to carry out their specific responsibilities.

Also, one feature of the authorization could complicate and detract from its workability. Namely, the authorization would not apply, for example, to organized crime and antitrust cases where the Government elected to proceed civilly but not criminally. This is because the provision provides no mechanism to transfer tax information where the judicial action is exclusively civil and there is no related criminal proceeding or criminal investigation.

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DISCLOSURE FOR USE IN MUTUAL ASSISTANCE TREATIES

26. U.S.C.§6103	S. 2402
No comparable provision.	This section provides a mechanism to allow the Government to perform according to mutual assistance treaties it has entered into with foreign countries to exchange criminal evidence.

GAO Comments

As an adjunct to Mutual Assistance treaties, this provision should be useful to identify laundering operations involving the use of foreign depositories and foreign investments.

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SUMMONS PROVISIONS: COMPARISON OF 26 U.S.C. §7609 and S. 2403

26 U.S.C §7609	S. 2403
Taxpayer receives notice of the issuance of an IRS summons. Taxpayer can prevent third-party recordkeeper from complying with the summons simply by serving notice on the recordkeeper, within 14 days, not to comply. IRS then must initiate court action to enforce compliance with the summons.	Taxpayer receives notice of the issuance of an IRS summons. To halt compliance by the third-party, taxpayer must file a motion with the district court to quash the summons. The Government then must respond to that motion within 10 days. Court ruling denying taxpayer's motion to quash is not appealable until the court issues final order in case for which records were sought.

GAO Comments

Under existing law, a taxpayer is able to stay compliance with a third-party summons merely by serving notice on the recordkeeper not to comply. IRS believes organized crime figures, drug traffickers, and some tax protesters tend to use the present law as a means for delaying and obstructing tax investigations. S. 2403 would still require that IRS notify a taxpayer when it has issued a third-party recordkeeper summons. Unlike present law, however, the taxpayer could intervene in the process only by filing a motion to quash with the court.

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CRIMINAL PENALTY PROVISIONS: COMPARISON OF
26 U.S.C. §7213 and S. 2404

26 U.S.C. §7213	S. 2404
Provides criminal penalties for unauthorized disclosure of tax information.	Adds an affirmative defense to a prosecution under this section, i.e., that the disclosure resulted from a good faith but erroneous interpretation of the law.

GAO Comments

Enactment of S.2404 would make clear that criminal sanctions attach only in the case of intentional violations of the disclosure provisions.

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CIVIL PENALTY PROVISIONS: COMPARISON OF 26 U.S.C. §7217 and S. 2405

26 U.S.C. §7217	S. 2405
Authorizes the payment of civil damages to a taxpayer by the Federal employee responsible for unauthorized disclosures of tax information.	Makes the Government, rather than the individual employee, responsible for payment of civil damages with respect to good faith disclosures.

GAO Comments

In the absence of a knowing or intentional violation of the disclosure restrictions, civil damages awarded to a taxpayer as a result of an unauthorized disclosure would be payable by the Government, rather than by the employee making the discloure.

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