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UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C.

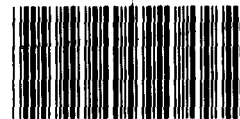
FOR RELEASE ON DELIVERY
EXPECTED AT 2:00 P.M. EST
MONDAY, NOVEMBER 9, 1981

STATEMENT OF
WILLIAM J. ANDERSON, DIRECTOR
GENERAL GOVERNMENT DIVISION
BEFORE THE
SUBCOMMITTEE ON OVERSIGHT OF THE
INTERNAL REVENUE SERVICE
SENATE COMMITTEE ON FINANCE
ON THE EFFECTS OF THE
1976 TAX REFORM ACT'S DISCLOSURE PROVISIONS
ON LAW ENFORCEMENT ACTIVITIES

Mr. Chairman and Members of the Subcommittee:

We are pleased to be here today to discuss an issue which continues to generate concern and controversy--whether tax disclosure restrictions prevent cooperation and coordination between the Internal Revenue Service (IRS) and other law enforcement agencies. Our testimony is based on extensive work that we have done at various times over the last few years on the effects of the disclosure provisions on Federal law enforcement activities.

In March 1979, we issued a report to the Joint Committee on Taxation entitled "Disclosure and Summons Provisions of 1976



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Tax Reform Act--Privacy Gains With Unknown Law Enforcement Effects" (GGD-78-110). In that report, we pointed out that the disclosure provisions had afforded taxpayers increased privacy over information they provide IRS but had adversely affected IRS' ability to coordinate with other members of the law enforcement community.

In December 1979, we testified before the Permanent Subcommittee on Investigations, Senate Committee on Governmental Affairs, on IRS' efforts to combat narcotics traffickers. We identified the disclosure provisions as a factor limiting IRS' involvement. We stated that changes were needed to the disclosure provisions, particularly with respect to allowing IRS to initiate disclosure of information about non-tax crimes.

In April 1980, we testified before the Senate Appropriations Subcommittee on Treasury, Postal Service, and General Government on changes needed to strengthen Federal efforts to combat narcotics traffickers. We proposed various administrative actions that IRS could take to expedite authorized disclosures of tax information to other agencies. However, we reemphasized the need for legislative changes to the disclosure provisions to enhance cooperation and coordination between IRS and law enforcement agencies.

Shortly thereafter, hearings were scheduled on a series of legislative proposals to amend the disclosure provisions. The proposals--S.2402, S.2404, and S.2405--were developed and introduced by the Chairman of the Permanent Subcommittee on Investigations as a result of the December 1979 hearings. In June 1980,

we issued a report 1/ and testified on the results of our analysis of the proposed Senate bills. We expressed support for the overall thrust of the bills. However, we called for substantial modifications to S.2402 to accommodate privacy concerns and to authorize a more effective disclosure mechanism. Following the June 1980 hearings, extensive revisions were made to S.2402. Then, in March 1981, S.2402, S.2404, and S.2405 were consolidated and reintroduced in this Congress as S.732.

For several years, we have supported the need for changes to the disclosure law to improve the effectiveness of law enforcement. In doing so, we have consistently maintained that it is essential to strike a proper balance between legitimate privacy concerns and equally legitimate law enforcement information needs. In this regard, our work in the disclosure area has been guided by two basic principles. First, 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. Second, 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.

With those principles in mind, I would now like to describe some of the specific problems caused by the disclosure provisions

1/"Disclosure and Summons Provisions of 1976 Tax Reform Act--
An Analysis of Proposed Legislative Changes" (GGD-80-76,
June 17, 1980).

and highlight our suggestions for dealing with these problems through legislation.

DISCLOSURE PROVISIONS HAVE REDUCED
COORDINATION BETWEEN IRS AND OTHER
LAW ENFORCEMENT AGENCIES

In enacting the disclosure provisions, the Congress clearly signaled its intention that IRS concern itself primarily with its basic mission--encouraging and achieving the highest possible degree of voluntary compliance with the tax laws. On the other hand, the Congress did not intend to put a halt to appropriate IRS participation in joint Federal efforts to combat crime. Rather, it sought to place tight controls on such IRS activities in an effort to prevent infringements on taxpayers' privacy rights. Since their enactment over 5 years ago, however, the disclosure provisions have affected cooperation and coordination between IRS and other law enforcement agencies in four major ways.

First, IRS' ability to coordinate effectively with Justice Department attorneys and other law enforcement agencies has been reduced. Coordination between IRS and the Department of Justice is essential to efficient Federal law enforcement. U.S. attorneys, for example, are responsible for prosecuting criminal tax cases and other criminal cases referred to them by other agencies. Because they often are aware of the investigative efforts of numerous agencies, U.S. attorneys can coordinate Federal law enforcement efforts, help prevent duplicative investigations, provide investigative guidance, and otherwise assist Federal law enforcement officials in developing successful cases. Likewise, Strike

Force attorneys are responsible for coordinating the efforts of various Federal law enforcement agencies against organized crime.

Under the disclosure provisions, however, U.S. attorneys and Strike Force attorneys often cannot coordinate IRS' criminal tax investigations with the non-tax investigations conducted by other Federal agencies. This is because the provisions, as interpreted by IRS, generally prohibit the Service from discussing the specifics of contemplated or ongoing investigations with Justice attorneys until cases have been formally referred to Justice for prosecution.

Thus, because Justice attorneys often do not know the identity of taxpayers under investigation by IRS, they cannot fully carry out their prescribed duties. For example, Justice attorneys have prosecuted individuals on non-tax criminal charges without knowing about ongoing tax investigations on the same individuals. In such instances, the attorneys lose the added advantage that the tax violations might have brought to their cases. In addition, such prosecutions render IRS investigations meaningless because Justice's "dual prosecution" policy requires that all offenses arising from a single transaction, such as narcotics trafficking and evading taxes on the ensuing profits, should be tried together. That policy recognizes the difficulties a Justice attorney would face in seeking to secure a second conviction on the basis of essentially the same set of facts. The following examples illustrate the dual prosecution problem.

--An individual who had failed to report at least \$150,000 during a 2-year period was sentenced to

1 year in prison on a narcotics misdemeanor. IRS attorneys did not refer the criminal tax case on this individual to Justice because he already had been incarcerated.

--In another case, the Department of Justice declined to prosecute a Drug Enforcement Administration class I violator on criminal tax charges because he pled guilty to a non-tax felony violation carrying a maximum sentence of 5 years in prison. Subsequently, the individual was sentenced to 5 years probation. IRS' investigation thus proved useless from a criminal tax standpoint. The disclosure provisions also hinder Justice attorneys in providing investigative guidance to IRS special agents before cases are formally recommended for prosecution. Finally, the attorneys cannot effectively coordinate ongoing IRS investigations with investigations being carried out by other Federal agencies.

Second, since the disclosure provisions were enacted, Justice attorneys have made little attempt under these provisions to obtain tax information for use in non-tax criminal cases, even when they have a bonafide need for and are authorized to obtain such information. In the 1976 Tax Reform Act, the Congress provided two means through which Federal agencies, such as the Justice Department, could gain access to tax information.

--To obtain information supplied to IRS by a taxpayer, an agency head must obtain a court order.

--To obtain information supplied to IRS by third parties, an agency head must file a written request for the information with IRS.

Since January 1, 1977, the effective date for the disclosure provisions, we have closely monitored the utility of these two access mechanisms. The Congress intended U.S. attorneys and Strike Force attorneys to be the prime users of tax information for non-tax criminal purposes. From the outset, however, definitional problems, misunderstandings, and differences over legal interpretations caused serious problems. Moreover, many Justice attorneys were of the view that it would be difficult to meet the criteria to obtain a court order and that the administrative disclosure process would be burdensome and time-consuming. These Justice attorneys thus decided that they would carry out their duties as well as they could without tax information. As a result, requests for tax information declined precipitously. Justice reported, for example, that its attorneys had made 1,816 requests for tax information in 1975. In contrast, IRS statistics indicate that fewer than 250 requests were received, on the average, in 1977, 1978, and 1979--the first 3 years the disclosure provisions were in effect.

In response to continuing congressional inquiries, however, Justice and IRS took a number of administrative actions in 1980 to facilitate the disclosure process under existing law. For example, IRS decentralized the authority to disclose tax information in response to court orders and written requests. Concurrently, Justice developed a comprehensive set of guidelines for

U.S. attorneys. The guidelines sought to clarify disclosure criteria, simplify disclosure paperwork, and otherwise encourage use of the access mechanisms authorized by existing law. These actions were successful in removing some of the burden associated with the process and improving timeliness. However, on the basis of a recent sampling of Justice attorneys' views, we determined that the administrative actions taken had not succeeded in changing the attorneys' views concerning the access mechanisms. As a result, the attorneys say they still make little use of tax information for non-tax criminal investigative and prosecutive purposes, despite congressional recognition of the propriety of, and the need for, such uses of tax information.

Third, IRS cannot self-initiate the disclosure of information about certain non-tax crimes. For example, in one case we reviewed, a taxpayer blatantly listed "narcotics" as his occupation on his tax return and, over a 2-year period, reported well over \$200,000 in revenues from the "sale of controlled substances." Because the information was reported on a tax return, IRS could not refer the matter to the Justice Department.

Fourth, current law authorizes Justice attorneys, through court order or written request, to obtain tax information for use in non-tax criminal cases. However, information the attorneys obtain from IRS through these processes cannot be used in civil proceedings directly related to the criminal investigation. For example, under Title 21, Section 881 of the U.S. Code, Justice attorneys may seek civil forfeiture of vehicles, equipment,

cash, and other items used in connection with narcotics transactions. In some instances, a Justice attorney investigating a drug trafficker for criminal violations will seek tax information from IRS. If, however, the attorney subsequently decides to pursue the trafficker under Section 881, he cannot use the tax information obtained from IRS as part of the civil case.

SENATE BILL 732, WITH
MODIFICATIONS, WOULD HELP
RESOLVE COORDINATION PROBLEMS

After almost 5 years of experience with the disclosure provisions, it is apparent that coordination and cooperation between IRS and law enforcement agencies have been adversely affected. Thus, while some administrative actions have been taken to enhance law enforcement efforts, legislative changes also are needed. However, there is no need to completely re-vamp existing law; instead, refinements can be made to resolve coordination problems while still protecting important privacy rights.

Although refinements to the disclosure provisions could be accomplished in various ways, an existing proposal--Senate bill 732--already contains many of the needed refinements. That bill can be modified in light of the basic principles mentioned earlier in my testimony to provide a more effective disclosure process and more balance between privacy and law enforcement. I would now like to summarize our proposed modifications, which are discussed in detail in the appendix to my prepared statement.

Our first modification centers on changes S.732 would make to categories of tax information. Present law defines three categories of tax information--a "return," "return information," and "taxpayer return information." These categories have proven somewhat confusing and need to be simplified. S.732 seeks to accomplish that objective by dividing tax information into two mutually exclusive categories--"return information" and "nonreturn information."

Although we support the concept of simplified tax information categories, S.732's definition of "return information" is too narrow. Under S.732, information supplied to IRS by any business entity composed of more than two persons would receive less protection than that afforded to information supplied IRS by individual taxpayers. In our view, any tax return information supplied to IRS by any taxpayer ought to be included within S.732's "return information" category and should be afforded the higher level of protection that category warrants.

Second, S.732 would vest the authority to seek access to tax information via court order in a limited number of Justice Department attorneys. It would also relax the criteria an attorney must meet to gain the court's approval for such access. These changes would facilitate appropriate use of tax information, thus enhancing Federal efforts to combat crime. Decentralization should facilitate and improve timeliness of the disclosure process. Relaxing the court order criteria would encourage, rather than discourage, use of this access mechanism where there is a bonafide need for tax information. From a

privacy perspective, however, the criteria set forth in S.732 could be modified to recognize that Justice attorneys should not seek access to tax information via court order if, in fact, the information can be more readily obtained elsewhere.

Third, S.732 would extend the authority to seek access to tax information via written request to additional Justice attorneys, the heads of Federal agencies, and Inspectors General. It also would slightly relax the criteria requestors must meet in order to be granted access to tax information. While we agree with the intent of this provision, we see no need for agency heads and Inspectors General to have the authority to seek access via written request. If that authority were limited to Justice attorneys, agency heads and Inspectors General could still gain access to needed tax information by coordinating effectively with Justice. We suggest that S.732 be modified accordingly.

Fourth, present law authorizes IRS to disclose information concerning non-tax crimes it obtains from third parties not acting on the taxpayer's behalf. S.732 would legally obligate, rather than authorize, IRS to disclose third-party information to other Federal law enforcement agencies. If interpreted as requiring IRS to regularly search its files for evidence of non-tax crimes, this provision could cause IRS to become involved in intelligence gathering to the detriment of its primary responsibilities. While we do not believe this to be the intent, the scope of IRS' responsibilities under this provision needs clarification.

On a related matter, under present law, when information provided by a taxpayer indicates commission of a non-tax crime by that person, IRS cannot report the violation to Justice. S.732 would not resolve this problem. Therefore, we suggest that it be modified so IRS can apply for an ex parte court order to disclose such information. The court could then determine whether the information is material and relevant to a violation of criminal law, and whether it ought to be disclosed.

Fifth, present law provides no specific authorization for disclosure under "emergency circumstances." S.732 seeks to resolve this problem by authorizing IRS to disclose to other Federal agencies, without a court order, necessary information concerning (1) imminent danger to persons or property or (2) flight from prosecution. We agree with the intent of this provision. However, the provision could be more narrowly drawn by keying it to IRS' inability to obtain a court order, as we suggested earlier, in sufficient time to prevent the emergency from occurring.

Sixth, S.732 explicitly states that no portion of the disclosure provisions is designed to prevent IRS from assisting other agencies in joint tax and non-tax investigations. The intent of this provision is unclear and, in the extreme, some might view it as completely overriding most other disclosure restrictions. Therefore, it needs to be clarified.

Finally, consideration also should be given to dealing with another problem which S.732 does not address. Specifically, under

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

WITH

SENATE BILL 732

TAX DISCLOSURE PROVISIONS: COMPARISON OF 26 U.S.C. §6103 AND S.732 1/

CATEGORIES OF TAX INFORMATION

26 U.S.C. §6103

S.732

Existing law divides information into three categories: return, return information, and taxpayer return information.

Proposal, by definition, divides information into return information and nonreturn 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 information--(a) all documents within existing category of "return" and (b) any information provided to IRS by or on behalf of an individual taxpayer.

(2) Return information--(a) all information on the return; (b) all information IRS has concerning the return, (a.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) Nonreturn 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.

Proposal adds a new definition:

~~(3) Taxpayer return information--return information (as in (2)) which is filed with or furnished to IRS by or on behalf of the taxpayer.~~

(3) Individual taxpayer--includes any individual taxpayer and small corporation, partnership, association, union or other entity with no more than two members.

1/This analysis is limited to the impact of the major provisions of S.732.

GAO Comments

Under present law, information supplied to IRS by a taxpayer, or anyone acting on his behalf, generally is disclosed only pursuant to court order. This court order requirement applies to information supplied by corporate as well as individual taxpayers. Under S.732, the category of protected tax information would include: (1) all tax returns, and (2) any information supplied IRS by, or on behalf of, individual taxpayers and one- or two-person corporations, partnerships, or similar business entities. Information supplied IRS by any business entity composed of more than two persons could be disclosed upon the written request of certain Government officials. We believe that information supplied to IRS by business entities, regardless of size, should remain on the same footing as information supplied by individual taxpayers. We would recommend, therefore, that the bill not draw a distinction between individual taxpayers and corporations, partnerships, associations, unions, or similar business entities.

Several factors underlie the rationale for this recommendation. First, the basis for distinguishing between two- and three-person business entities has not been established. Second, recent court opinions, including those of the Supreme Court, do not support the proposition that corporations, unlike individuals, do not enjoy constitutional protections. And third, information supplied to IRS by persons in support of a corporate return may disclose information about individual taxpayers. In other words, in disclosing business records, it may be easy to identify the individual taxpayer involved. This is true regardless of the size of the business entity involved. Finally, the matter of access to tax information in general should be placed in perspective. S.732's amendments to section 6103 would facilitate access to all tax information. This would be accomplished under S.732 primarily by lessening the standards for obtaining court orders and decentralizing the authority to request tax information. Corporate records could be disclosed under these mechanisms as readily as individual records.

The importance of S.732's definitional section cannot be overstated since the definitional categories ultimately determine the degree of privacy afforded the taxpayer. Under present law, the statutory definitions are somewhat ambiguous and need clarification--a point recognized by S.732. One alternative way to clarify the categories of tax information, and at the same time provide comparable protection to corporate and individual taxpayers, would be to amend section 6103 to provide for only two categories of tax information: (1) return--to include all tax returns and information supplied to IRS by all taxpayers or anyone acting on their behalf, and (2) return information--to include all other information IRS has with respect to the taxpayer. From a technical standpoint, we note that use of the terms "return" and "return information", in lieu of S.732's terms "return information" and "nonreturn information," would minimize the need to make conforming amendments to those provisions in section 6103 which are unrelated to disclosures for law enforcement purposes, such as disclosures to the Census Bureau.

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 section 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) Return information The term "return information" means any information which the Secretary collects, obtains, or receives (including whether a return was filed and whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing), 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).

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

COURT-ORDERED DISCLOSURES26 U.S.C. §6103S.732

- (i) Disclosure for Administration of Federal Laws Not Relating to Tax Administration
- (1) Non-tax criminal investigation:
- (A) Requires ex parte court order for disclosure of return or taxpayer return information to law enforcement agencies.
- (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.

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;
- (ii) there is reason to believe that the return is probative; and
- (iii) information cannot reasonably be obtained from another source.

- (i) Disclosure for Administration of Federal Laws Not Relating to Tax Administration
- (1) Non-tax criminal investigation:
- (A) Requires ex parte order for disclosure of "return information."
- (B) Application for order by Attorney General, Deputy Attorney General, Assistant Attorney General, U.S. Attorney, or Attorney in charge of organized crime strike force.

Ex parte order may be issued if

- (i) on the basis of reliable information, there is reasonable cause to believe a crime has been, or is being, committed;
- (ii) information is sought exclusively for use in Federal criminal investigation; and there is
- (iii) reasonable cause to believe information sought is relevant.

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GAO Comments

Under existing law, "return" and "taxpayer return information" can be disclosed only by court order, applied for by the heads of Federal law enforcement agencies. 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 to IRS during an audit can be disclosed for non-tax purposes only by court order.

Under S.732, ex parte orders would be required for disclosure of "return information." As a general proposition, all other information, including the records of three or more person business entities, would be disclosed on the request of certain Government officials. In our view, information supplied to IRS by any taxpayer or his agents should be disclosed only pursuant to a court order. (See p. I-2).

S.732 would amend the criteria for obtaining a court order. According to Justice officials, under the existing criteria, law enforcement agencies are caught in a Catch 22 position. To obtain the order, they must show that there is reason to believe that the information sought from IRS is probative. The Department of Justice has testified to considerable difficulty in meeting this standard in that often it cannot show that the information is probative until it actually has the requested tax information. S.732 responds to this by amending section 6103(i)(1) to require the Justice Department to show that the information sought from IRS is relevant, rather than probative. While we recognize that the standard of "relevancy" is intended to be less demanding than the "probative" test of present law, we would recommend the Committee provide interpretive guidance about how the criteria proposed in S.732 would differ in application from the requirement of current law.

S.732 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.

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.732 would vest the authority to request a court order in a limited number of Government attorneys within the Department of Justice. The heads of Federal investigative agencies could no longer independently request tax information. We agree with this proposal. Restricting this authority to Justice officials would promote the coordination between IRS and Justice which is essential to efficient Federal law enforcement. In this manner, Justice could help prevent duplicative investigations, provide investigative guidance, and otherwise assist Federal law enforcement officials in developing successful cases. And, by placing this authority in Justice, a mechanism is provided to insure that requests made under both sections 6103(i)(1) and (i)(2) meet the applicable statutory requirements.

Also, when information obtained under §6103(i)(1) is disclosed, we see no need for the requirement that Justice submit a written request for disclosure of less protected "return information" under §6103(i)(2). This is because in obtaining §6103(i)(1) information, Justice has already met a more stringent criteria than that contained in §6103(i)(2). (See p. I-7).

DISCLOSING NONRETURN INFORMATION26 U.S.C. §6103

(i)(2) Disclosure of return information other than taxpayer return information by written request of agency heads directly engaged in criminal law enforcement.

Such request shall include

- (i) name and address of the taxpayer,
- (ii) relevant taxable periods,
- (iii) statutory authority for the investigation or proceeding, and
- (iv) specific reason or reasons why such disclosure is or may be material to the proceeding or investigation.

Name and address of taxpayer disclosed pursuant to written request.

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(i)(2) Disclosure of nonreturn information on written request of agency heads and Inspectors General, and in the case of the Department of Justice, the Attorney General or his designee.

Such request shall include

- (i) name and address of the taxpayer,
- (ii) relevant taxable periods,
- (iii) statutory authority for the investigation or proceeding, and
- (iv) allegations of criminal conduct giving rise to the proceeding or investigation.

Name, address, social security number of taxpayer, whether a taxpayer filed a return, and whether there is or has been a criminal investigation of taxpayer disclosed pursuant to written request.

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.732 would allow all "nonreturn information" to be disclosed upon written request of certain Government officials. As discussed on page I-2, the category of protected information under S.732 seems too narrow. It would allow Government officials to gain access by written request to some categories of information that, in our opinion, should be protected and disclosed only via court order.

Under present law, the written request must state the specific reason why disclosure is or may be material to the criminal investigation. S.732 amends this to simply require an allegation of criminal conduct giving rise to the proceeding or investigation. This amendment should alleviate the so-called Catch 22 situation, discussed on page I-5, in the case of written requests.

We do not agree with the proposal in S.732 to allow all agency heads and Inspectors General to gain access to tax information by written request. This authority should be restricted to Justice officials to insure effective coordination between IRS, Justice, and other Federal agencies. (See p. I-5.) We agree, however, with the provision in S.732 which would allow the Attorney General to delegate this authority to those officials who need access to tax information by written request. Under this proposal, the Attorney General could authorize U.S. attorneys and heads of organized crime strike forces to gain access via written request. Conversely, the Attorney General could subsequently withdraw that authorization as necessary.

Under S.732, Government officials could also find out, by written request, whether a taxpayer filed a return and whether there is or has been a criminal investigation of a taxpayer. This is a needed amendment to section 6103. In the interest of efficiency and economy, law enforcement officials should first know if IRS has potentially useful information on the taxpayer before seeking a court order.

REDISCLASURE OF TAX INFORMATION26 U.S.C. §6103

Tax information obtained under (i)(1) and (i)(2) may be redisclosed to any Federal employee directly engaged in the criminal proceeding.

S.732

Explicitly authorizes a Government official to redisclose return and nonreturn information obtained either under (i)(1) or (i)(2) to such other Federal government personnel, or witness, he deems necessary to assist him during the criminal proceeding.

GAO Comments

S.732 would make clear that Government officials are authorized to redisclose return and nonreturn information to those necessarily involved in the criminal investigation, including prosecutive witnesses. We agree with this proposal. For example, it is sometimes necessary for prosecutors to disclose evidence to a witness during an investigation or in preparation for a criminal proceeding. We would recommend, however, that when Justice makes requests on behalf of other Federal agencies, the authorization be clear that Justice can then redisclose any information obtained under either section 6103(i)(1) or (i)(2) to those agency heads. Also, an accounting should be required for all such redisclosures.

IRS-INITIATED DISCLOSURE OF
NON-TAX CRIMINAL INFORMATION

26 U.S.C. §6103

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(i)(3) IRS may disclose information other than taxpayer return information to agency heads where there is evidence that a Federal crime has been committed. Name and address of taxpayer can be disclosed under this provision if return information is available.

No comparable provision.

(i)(3)(A) Places legal duty on IRS to disclose nonreturn information where there is evidence of a Federal crime. Name of address of taxpayer can also be disclosed under this provision.

(B) When IRS makes a prosecutive recommendation to Justice involving a Federal tax crime, any return or nonreturn information evidencing a non-tax Federal crime must also be disclosed.

IRS may decline to disclose any information under the above paragraphs if disclosure would identify a confidential informant or seriously impair a civil or criminal tax investigation.

GAO Comments

S.732 places an affirmative legal duty on IRS to provide enforcement agencies information that "may constitute evidence of a violation of Federal criminal laws." The scope of this duty needs clarification. As presently drafted, the bill could contemplate a responsibility, even in the absence of a request, for IRS to regularly review its files for non-tax criminal evidence. Recognizing that IRS' primary responsibility is tax administration, we believe IRS' disclosure obligation should extend to non-tax criminal information it becomes aware of during the normal course of administering the tax laws.

S.732 also authorizes IRS to disclose criminal evidence on non-tax matters to Justice when making prosecutive recommendations in a tax case. This would allow necessary coordination within the Department, providing Justice officials with the needed flexibility to decide how to proceed against a certain individual, and helping to avoid problems stemming from the Department's dual prosecution policy.

We recognize the need expressed in S.732 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. S. 732 does not resolve this problem. Under S.732, IRS would not be authorized to unilaterally inform law enforcement officials when it had criminal evidence based on return information. We suggest, therefore, that the Congress authorize IRS to apply for a court order to disclose protected information. Such a provision would insure that a neutral third party--the judiciary--decides on the disclosure of such information.

APPENDIX I

APPENDIX I

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 his designee shall disclose, to the head of the appropriate Federal investigative agency, information ordered disclosed pursuant to this subsection.

(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 or witness 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) Return Information: The Secretary may disclose in writing 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 return information which may constitute evidence of a violation of Federal criminal laws.

USE OF TAX INFORMATION IN JUDICIAL OR ADMINISTRATIVE PROCEEDINGS26 U.S.C. §6103

(i)(4) Any information obtained under (i)(2) or (i)(3) may be entered into evidence in any administrative or judicial proceeding involving a non-tax Federal crime. Information obtained under (i)(1) may be entered into evidence upon the court's finding that the information is probative.

S. 732

(i)(4) Any information obtained under (i)(1), (i)(2) or (i)(3) may be entered into evidence in any administrative, judicial, or grand jury proceeding involving a non-tax Federal crime or any ancillary civil proceeding by order of the court.

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. It should be recognized, however, that the authorization would not apply to organized crime and antitrust cases where the Government elected to proceed solely on a civil basis, as in a civil forfeiture action under 21 U.S.C. §881. This is because the provision provides no mechanism to transfer tax related information where the judicial action is exclusively civil, and there is no ancillary criminal proceeding or criminal investigation. The Congress may want to consider the desirability of such an authorization.

DISCLOSURE UNDER EMERGENCY CIRCUMSTANCES

26 U.S.C. §6103

No comparable provision.

S.732

Adds a new paragraph (5) to subsection (i)

Emergency circumstances:

Under emergency circumstances involving an imminent danger of physical injury to any person, serious physical damage to property, or flight from prosecution, IRS may disclose any necessary information to the appropriate Federal agency. IRS must then notify Justice, and Justice must notify the District Court after such disclosure has been made.

GAO Comments

We support the intent of this provision, which provides the Secretary discretionary authority to disclose information in emergency circumstances. We would, however, include the threat to national security in the emergency circumstances identified in the proposal. On the other hand, this provision could be more narrowly drawn and still achieve its intent. As discussed on page I-9, the Secretary should, in our view, be given the authority to seek court-ordered disclosure when IRS uncovers criminal evidence based on a return. In light of this, we suggest that the emergency circumstance disclosure authority of S.732 be explicitly keyed to the Secretary's inability to obtain a court order in sufficient time to prevent physical harm to persons, physical damage to property, harm to national security, or flight from prosecution. We also would suggest expanding this authority to allow disclosure of criminal evidence to appropriate State authorities, since some emergency circumstances, such as murder, would involve State crimes.

GAO Suggested Statutory Language

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

Emergency Circumstances

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

(i) "Emergency circumstances" means circumstances involving an imminent threat of harm to persons, property, or national security, or flight from prosecution, 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.

ASSISTANCE OF IRS IN JOINT TAX/NON-TAX INVESTIGATIONS

26 U.S.C. §6103

S.732

No comparable provision.

Adds a new paragraph (6) to subsection (1)

No portion of §6103 precludes or prevents IRS from assisting Federal agencies in joint tax/non-tax criminal investigations.

GAO Comments

We anticipate that IRS and Justice will encounter considerable difficulty administering this provision, and recommend the intended operation of this section be clarified. The precise purpose of the authorization, and the uses to which it may be put, should be defined with greater descriptive clarity. Although the proposal states that nothing in section 6103 shall be construed to preclude or prevent IRS' assistance in joint tax/non-tax criminal investigations, it is not clear what type of IRS "assistance" is envisioned, what might qualify as a "joint tax/non-tax" investigation, or whether the authorization is intended to override the disclosure restrictions set forth elsewhere in section 6103. Assuming the existence of a joint investigation, for example, would IRS still be obliged to await a court order or written request to disclose evidence of non-tax offenses in its files? On the other hand, this authorization may be intended simply to encourage IRS' participation in joint investigations, but only within the framework of the disclosure restrictions prescribed by section 6103. This could be viewed as consistent with other provisions of the bill which, among other matters, modify present law to explicitly authorize IRS to disclose non-tax criminal information to Justice when making a tax case.

In addition, the Congress may want to consider two problems under existing law which are not specifically addressed in S.732. ~~Under §6103(h)(2), which authorizes disclosures to Justice for tax administration purposes, IRS can disclose tax information to Justice when referring a tax case for prosecution. IRS has interpreted this provision as precluding the disclosure of tax information, either in a tax or a joint tax/non-tax criminal case, prior to case referral. Pre-referral disclosure in tax cases is essential, however, to insure effective coordination between IRS and Justice in prosecuting criminal tax matters, and to obtain such advice as may be necessary to develop the tax case. In addition, §6103 should be clear in authorizing such disclosure to both U.S. attorneys and Strike Force attorneys. Strike force attorneys, for example, sometimes need tax information to successfully prosecute organized crime figures.~~

DISCLOSURE TO STATE OFFICIALS26 U.S.C. §6103

No comparable provision.

S.732

Adds a new paragraph (7) to subsection (i)

Provides authorized officials 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 redisclosure to a State attorney general or a district attorney upon finding that

- (i) on the basis of reliable information, there is reasonable cause to believe a State felony has or is occurring; and
- (ii) there is reasonable cause to believe that the information is relevant.

GAO Comments

Present law does not authorize the redisclosure of tax information concerning non-tax State crimes. S.732 would authorize certain Federal officials to obtain an ex parte court order authorizing redisclosure when the information relates to State felony violations. Although there is a need for this redisclosure authorization, we would suggest a modification to this section to accommodate 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, as well as any redisclosures made by these State law enforcement officials.

DISCLOSURE TO COMPETENT AUTHORITY
UNDER INTERNATIONAL CONVENTIONS AND TREATIES

26 U.S.C. §6103

(K)(4) Disclosure of tax information to foreign governments to extent authorized under tax conventions.

S. 732

(K)(4) Adds an authorization for the disclosure of tax information to extent authorized under mutual assistance treaties. Requires ex parte court order for disclosure of information involving non-tax criminal matters under mutual assistance treaties, based on finding that

- (i) on the basis of reliable information, there is reasonable cause to believe a crime has been or is being committed;
- (ii) information is sought exclusively for use in a Federal criminal proceeding; and
- (iii) reasonable cause to believe information is relevant.

GAO Comments

This provision provides a needed mechanism to allow the Government to perform according to mutual assistance treaties it has entered into with foreign governments to exchange criminal evidence. Under S. 732, a court order is required for all disclosures, which we believe adequately accommodates privacy concerns. Also, it should be noted that under mutual assistance treaties generally, evidence exchanged with foreign governments must relate to criminal acts which are considered crimes in both countries involved, and there is considerable discretion provided in the treaties not to disclose any information which would be contrary to the public interest of the governments involved. These safeguards should protect against abusive disclosures.

CRIMINAL PENALTY PROVISION: COMPARISON OF
26 U.S.C. §7213 and S.732

26 U.S.C. §7213

Provides criminal penalties for unauthorized disclosure of tax information.

S.732

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

CIVIL PENALTY PROVISION: COMPARISON OF
26 U.S.C. §7217 and S.732

26 U.S.C. §7217

Authorizes the payment of civil damages to a taxpayer by the individual responsible for unauthorized disclosures of tax information.

S.732

When unauthorized disclosure is made by Federal employee, the Government, rather than the individual employee, is responsible for payment of civil damages.

GAO Comments

The Government would be civilly liable under S.732 for all unauthorized disclosures made by Federal employees, including those made intentionally and with knowledge of the disclosure restrictions. However, this would not affect the Government's ability to proceed criminally against employees who intentionally violate section 6103.

current law, IRS considers itself precluded from discussing investigative targets with Justice attorneys until such time as completed tax cases are referred for prosecution. As discussed earlier, this has caused considerable coordination problems between IRS and Justice. S.732 should address this problem.

In summary, the disclosure provisions have afforded taxpayers increased privacy over information they provide IRS. The provisions have also affected coordination between IRS and other agencies and thus have had an adverse effect on law enforcement efforts. The extent of that effect is difficult to measure and, indeed, may not be measurable. However, one fact is clear-- despite administrative actions aimed at facilitating coordination and cooperation under existing law, problems persist. Thus, to improve the effectiveness of Federal law enforcement efforts, legislative changes are needed to facilitate cooperation between IRS and other agencies. The Congress could accommodate this need and still maintain essential privacy controls by enacting a modified version of S.732.

This concludes my prepared statement. We would be pleased to respond to any questions.