

## CONGRESSIONAL ACCESS TO RETURNS AND RETURN INFORMATION

### EXECUTIVE SUMMARY

- Section 6103(a) provides that returns and return information shall be confidential, and except as authorized by the Code, no officer or employee of the United States may disclose any return or return information obtained by him or her in any manner.
- The House Ways and Means and Senate Finance Committees' oversight authority regarding tax issues is rooted in the constitutional oversight authority of the Legislative Branch over the Executive Branch. The Constitution provides the House of Representatives with initial jurisdiction over revenue raising initiatives, giving it a special interest in tax matters. In 1926, Congress also established the Joint Committee on Taxation. The modern Joint Committee was established by the Internal Revenue Code of 1986 to share oversight over tax issues.
- The IRS discloses returns and returns information when authorized or required by section 6103. Congress in its oversight and investigative role could seek to compel by subpoena a refusal to disclose returns or return information requested. The only basis for the agency's refusal to comply with a committee's subpoena would be the invocation of the doctrine of executive privilege.
- Sections 6103(f)(1) and (f)(2) require the disclosure, upon proper request, of returns and return information to the three congressional tax committees. The provisions require such disclosure in response to a specific written request from the Chairs of the House Committee on Ways and Means, the Senate Finance Committee, or from the Chief of Staff of the Joint Committee on Taxation (JCT). Absent taxpayer consent, return information is to be provided to these committees only when sitting in closed executive session. Unlike other subsections of 6103, section 6103(f) is a provision that, by its terms, does not allow for discretion as to whether to comply with a proper request for returns or return information.
- Section 6103(f)(3) contains authority for other committees of Congress to obtain returns and return information pursuant to a congressional resolution that specifies the reason for accessing the information and represents that it cannot be obtained from another source.
- Section 6103(f)(4)(A) authorizes the Chairs of Ways and Means and Finance and the JCT Chief of Staff to designate agents (most commonly, committee staff or the GAO) to receive and inspect the returns and return information they have specifically requested. It also provides that any returns or return information obtained by or on behalf of such committee under this subsection can be submitted by the committee to the Senate or the House of Representatives, or to both, effectively making the return information public.
- Section 6103(f)(4)(B) authorizes nontax committees to designate four agents to inspect returns and return information received via congressional resolution required by section 6103(f)(3). It also states that information provided to these nontax committees can be submitted to the Senate or the House of Representatives only when sitting in closed executive session.

- Section 6103(c) authorizes the disclosure of returns and return information pursuant to taxpayer consent provided regulatory requirements are satisfied and disclosure will not seriously impair tax administration.

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## ANALYSIS

### Access to Return Information Generally

Section 6103(a) establishes the general rule regarding access to returns and return information. It provides that returns and return information shall be confidential, and shall not be disclosed except as authorized by this Title 26. It further states that "no officer or employee of the United States ... shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section." I.R.C. § 6103(a).

"Returns" and "return information" are broadly defined in sections 6103(b)(1) and (2) to include, respectively, tax or information returns and all attachments which are supplemental thereto, and any information obtained by, created by or otherwise in the Secretary's possession concerning the liability or potential liability of a taxpayer under the Code. IRS employees, as officers and employees of the United States, are subject to the confidentiality provisions of section 6103 and authorized to disclose returns and return information only as authorized by the Code. Likewise Members of Congress and their staff are subject to the confidentiality rules of section 6103 with regard to any returns or return information they receive under the Code.

### Production of Information to Congress

The House Ways and Means and Senate Finance Committees' oversight authority regarding tax issues is rooted in the constitutional oversight authority of the Legislative Branch over the Executive Branch. *See, e.g., Watkins v. United States*, 354 U.S. 178, 187 (1957) (the power of Congress to conduct investigations comprehends probes into departments of the Federal government to expose corruption, inefficiency or waste). Article 1, Section 1 of the U.S. Constitution vests all legislative power a Congress of the United States which shall consist of a Senate and a House of Representatives. By statute, each standing committee of Congress, including the Ways and Means and Finance Committees, reviews on a continuing basis the application, administration, and execution of those laws, or parts of laws, the subject matter of which is within the jurisdiction of that committee. 2 U.S.C. § 190d. Congress has subpoena power, 2 U.S.C. § 190m and the failure to produce testimony or documents in response to a congressional subpoena is subject to penalty. 2 U.S.C. § 192.

Each Congress adopts rules both for the new Congress and for the various congressional committees. Though subject to change with each new Congress, the rules adopted generally establish standing committees, including the House Ways and Means and Senate Finance Committees. The rules also generally authorize the committees to conduct investigations and studies necessary to consider matters within their jurisdiction, including the authority to subpoena witnesses and records in connection with such investigations. Article 1, Section 7 of the Constitution provides that all bills for raising revenue shall originate in the House of Representatives, affording the House revenue raising prerogative and, therefore, special authority over tax issues. As the standing House committee with jurisdiction over tax issues, the Committee on Ways and Means has a particularized interest in IRS programs and policy.



The IRS discloses returns and returns information when authorized or required by section 6103. As discussed below, sections 6103(f)(1) and (f)(2) provide clear statutory authority for the Chairs of the Ways and Means and Finance Committees and the JCT Chief of Staff to request and receive access to returns and return information. Congress in its oversight and investigative role could seek to compel by subpoena a refusal to disclose returns or return information requested. One potential basis for a refusal in these circumstances to comply with the committee's subpoena would be the invocation of the doctrine of executive privilege.

Executive privilege is based on the separation of powers doctrine. The theory of the privilege is that the Executive Branch of the government, even in light of various governmental checks and balances, may require confidentiality in discharging certain of its constitutional responsibilities. For example, in *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974), the privilege was invoked and upheld by the court with regard to tapes of presidential conversations with advisors. The court's construction of the privilege "was designed to ensure that the President and those upon whom he directly relies in the performance of his duties could continue to work under a general assurance that their deliberations would remain confidential." *Id.* at 730.

Executive privilege is invoked most often to protect the type of information for which disclosure was prohibited in *Nixon* – opinions, recommendations, and advice generated in the process of formulating policies and making decisions—the so-called "deliberative process" of the government. But it has also been invoked to prevent Congress from receiving information about an agency's open investigations. For example in a conflict between the Executive and Legislative Branches over the Superfund, then-Attorney General William French Smith articulated a series of justifications for the nondisclosure of open investigatory files. These included forestalling political influence over the conduct of an investigation, preventing the disclosure of investigative sources and methods, protecting the privacy of innocent parties named in the files, and maintaining the appearance of integrity, impartiality, and fairness of the law enforcement process as a whole. The specific mandatory disclosure authority afforded the congressional tax writers through section 6103(f)(1) and the entire structure of section 6103, which clearly lays out areas within which the Secretary can exercise discretion to refuse to make disclosures of return information, might be read to preclude a claim of executive privilege against the disclosure of returns and return information.

The IRS has on occasion considered declining section 6103(f)(1) requests for access to returns and return information. In the mid-1990s, the IRS and Ways and Means reached an informal agreement not to provide Congress files of open criminal investigations should a request from one of the Chairs or the JCT Chief of Staff implicate open criminal matters, confidential informant identities, or information subject to Federal Rule of Criminal Procedure 6(e) (grand jury secrecy). The agreement was made to avoid possible impairment of IRS criminal enforcement efforts that could result from sharing such information outside the agency, generally the same reasons described above by Attorney General William French Smith for asserting executive privilege over open investigative files. It is unknown whether returns and return information have ever been specifically requested and/or withheld under this informal agreement.



### Disclosure to Tax Writing Committees

Sections 6103(f)(1) and (f)(2) require the disclosure of returns and return information to the tax writing committees of Congress, which consist of the House of Representatives Committee on Ways and Means, the Senate Committee on Finance, and Joint Committee on Taxation. In general, the statutes provide that the Secretary *shall* furnish returns and return information upon a specific written request from the Chair of the respective committees or the JCT Chief of Staff. The only restriction is that the information must be furnished to the committee while sitting in closed executive session if it can identify directly or indirectly a particular taxpayer.

Unlike some other provisions of section 6103, the language in subsections 6103(f)(1) and (2) is mandatory, requiring the Secretary to disclose returns and return information requested by the tax writing Chairs. On its face, the statute does not allow the Secretary to exercise discretion to disclosing the information provided the statutory conditions are met. In contrast, the following 6103 subsections use the non-mandatory “the Secretary *may* disclose” language: section 6102(l)(3) for disclosures in emergency circumstances involving nontax criminal or terrorist activities, section 6103(k)(5) for disclosures to state agencies regulating tax return preparers, section 6103(l)(1) for disclosures to the Social Security Administration, and section 6103(l)(2) for disclosures to the Department of Labor and PBGC. The only conditions on committee access as specified in the statute are that the request be specific in nature, originate with the Chairs or the JCT Chief of Staff, and be received by the committee in closed executive session if the information would identify directly or indirectly a particular taxpayer. Disclosures under section 6103(f) to Ways and Means, Finance, and the JCT have been routine and numerous. Members of Congress and their staff have long recognized the sensitivity of the information they receive via these requests and the confidentiality obligation imposed by the requirement that the information be furnished only in closed executive session. The IRS assists Members and staff in meeting these confidentiality requirements by including a statement that the information provided includes returns and return information requested pursuant to section 6103(f).

As noted, the returns and return information requested by the Chairs or JCT Chief of Staff shall be received by the committees when sitting in “closed executive session.” This term is not defined in the Code, though congressional and committee rules frequently include references to closed executive sessions. Over time this term has generally been interpreted to allow committee members access to returns and return information requested by the Chairs in environments in which the conditions promote and support safeguarding and confidentiality, such as congressional office space where the information can be secured and accessed only by authorized persons. Congress has not interpreted the term to require the Chairs to order a closed executive meeting or hearing of the committee in order to receive tax information.

Unlike section 6103(f)(3), subsections (f)(1) and (2) do not require the Ways and Means and Finance Chair or JCT Chief of Staff to include a reason or purpose for the request. Therefore, the Secretary’s obligation to disclose return and return information would not be affected by the failure of a tax writing



committee or the JCT to state a reason for the request. In contrast, nontax writing committees must include a purpose for their request for returns and return information when seeking access under section 6103(f)(3).

In practice, when sharing returns or return information pursuant to a request under section 6103(f)(1) or (f)(2), the IRS will include in its transmittal letter notification that the information is being produced pursuant to a section 6103(f) request. The notification is intended as a reminder to the recipients that the information is protected by section 6103 and should be safeguarded and protected as such.

#### Disclosure to Nontax Writing Committees

Section 6103(f)(3) contains a much more rigorous process for nontax writing committees to gain access to returns and return information.

The statute requires a resolution of Congress for a nontax writing committee to have access to returns and return information. The resolution must specify the reason for accessing the information and that it cannot be obtained from another source. To our knowledge, such a resolution has been passed only eight times since enactment of the statute in 1976, typically in high profile matters such as the Iran-Contra investigation.

#### Use of Return and Return Information by Tax Writing Committees

Section 6103(f)(4)(A) provides guidelines for tax writing committee use of returns and return information requested under 6103(f), in particular, specifying to whom the tax writers can redisclose the returns and return information they receive. Generally the subsection allows the tax writing Chairs and the JCT Chief of Staff to designate agents to receive the returns and return information they have requested and also allows the tax writing committees to submit the returns and return information they have received to the House, the Senate, or both.

This provision is employed frequently by the tax writing committees in the regular course of their oversight responsibilities to appoint staff (or the GAO) to act as their agents to receive the information requested. Absent this provision, the Chairs and JCT Chief of Staff would not be able to share the information with their staff.

The subsection also allows, without any apparent restrictions, the tax writing committees to submit to the Senate or the House of Representatives, or both, any returns or return information obtained pursuant to a 6103(f)(1) request. To our knowledge, this provision has been employed only once since its enactment in 1976 in connection with congressional investigations begun in 2013 into the alleged politically-motivated mishandling of some organizations' applications for tax exemption under section 501(c)(4). In the course of its 6103(f)(1)-authorized investigation, the Ways and Means Committee had access to returns and return information it wished to include in a referral to the Department of Justice (DOJ) to recommend a criminal investigation. Section 6103 does not contain specific authority for the Ways and Means Committee to redisclose to the DOJ returns and return information received under 6103(f)(1). According to the publicly available transcript of a closed executive hearing on the subject



held on April 9, 2014, the House Parliamentarian, in consultation with House Counsel, advised then-Chairman Camp that the committee could employ the authority granted it in section 6103(f)(4)(A) to submit the referral letter containing return information to the House of Representatives, effectively making it public, so the public referral letter could then be provided to DOJ. The proposed disclosure procedure generated much debate among the Members. Ultimately, the Committee voted to employ the 6103(f)(4)(A) procedure, submit the referral letter containing return information to the House of Representatives and provide the publicly available referral letter to DOJ. The IRS was not consulted about the process, nor does the statute require such consultation.

Also significant to this subsection, the legislative history of this provision indicates that the disclosure laws prior to the 1976 revisions provided that

the tax committees and select committees authorized to inspect tax information may submit "any relevant or useful" information obtained to the House or Senate. (Sec. 6103(d)(1)(C).).

S. Rpt. 94-938, 1976-3 C.B. (Vol. 3) 49, 357. In revising section 6103 in 1976 Congress decided to remove the 'relevant and useful' qualifiers from the type of information that could be shared with the Houses of Congress and allow "any" information received under subsection 6103(f)(1) to be shared.

#### **Use of Return and Return Information by Nontax Writing Committees**

Section 6103(f)(4)(B) contains guidelines for nontax writing committees use and redisclosure of returns and return information received under the authority of 6103(f)(3). This subsection authorizes nontax committees to designate up to four agents, designated in equal numbers by a bipartisan process by the Chair and ranking minority member of the committee, to inspect the returns and return information they have received by resolution, and also allows the nontax writing committees to submit the returns and return information they have received to the House, the Senate, or both, but only when sitting in closed executive session.

The significant differences in the authority granted nontax writers is that they are limited to a bipartisan designation of only four agents to have access to the returns and return information received, and can submit the returns and return information to the Senate or the House only when sitting in closed executive session. In contrast, the tax writers are authorized to use an unlimited number of agents and to submit returns and return information to the House and Senate in open session. This absence of a restriction on how returns or return information may be submitted to the House or Senate means that the tax writers may submit returns or return information to the House or Senate in a committee session that would be open to members of the public, thereby effectively making the returns and return information public.

#### **Disclosure by Taxpayer Consent**

Section 6103(c) provides for disclosure of returns and return information to whomever a taxpayer designates in a consent that meets the requirements set forth in Treasury regulations implementing the provision. The only basis for the IRS to decline to disclose returns or return information via the

taxpayer's consent is if the Secretary determines that such disclosure would seriously impair Federal tax administration.

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## Appendix

### Section 6103

#### **(f) Disclosure to Committees of Congress**

##### **(1) Committee on Ways and Means, Committee on Finance and Joint Committee on Taxation**

Upon written request from the chairman of the Committee on Ways and Means of the House of Representatives, the chairman of the Committee on Finance of the Senate, or the chairman of the Joint Committee on Taxation, the Secretary shall furnish such committee with any return or return information specified in such request, except that any return or return information which can be associated with, or otherwise identify, directly or indirectly, a particular taxpayer shall be furnished to such committee only when sitting in closed executive session unless such taxpayer otherwise consents in writing to such disclosure.

##### **(2) Chief of Staff of Joint Committee on Taxation**

Upon written request by the Chief of Staff of the Joint Committee on Taxation, the Secretary shall furnish him with any return or return information specified in such request. Such Chief of Staff may submit such return or return information to any committee described in paragraph (1), except that any return or return information which can be associated with, or otherwise identify, directly or indirectly, a particular taxpayer shall be furnished to such committee only when sitting in closed executive session unless such taxpayer otherwise consents in writing to such disclosure.

##### **(3) Other committees**

Pursuant to an action by, and upon written request by the chairman of, a committee of the Senate or the House of Representatives (other than a committee specified in paragraph (1)) specially authorized to inspect any return or return information by a resolution of the Senate or the House of Representatives or, in the case of a joint committee (other than the joint committee specified in paragraph (1)) by concurrent resolution, the Secretary shall furnish such committee, or a duly authorized and designated subcommittee thereof, sitting in closed executive session, with any return or return information which such resolution authorizes the committee or subcommittee to inspect. Any resolution described in this paragraph shall specify the purpose for which the return or return information is to be furnished and that such information cannot reasonably be obtained from any other source.

##### **(4) Agents of committees and submission of information to Senate or House of Representatives**

###### **(A) Committees described in paragraph (1)**

Any committee described in paragraph (1) or the Chief of Staff of the Joint Committee on Taxation shall have the authority, acting directly, or by or through such examiners or agents as the chairman of such committee or such chief of staff may designate or appoint, to inspect returns and return information at such time and in such manner as may be determined by such chairman or chief of

staff. Any return or return information obtained by or on behalf of such committee pursuant to the provisions of this subsection may be submitted by the committee to the Senate or the House of Representatives, or to both. The Joint Committee on Taxation may also submit such return or return information to any other committee described in paragraph (1), except that any return or return information which can be associated with, or otherwise identify, directly or indirectly, a particular taxpayer shall be furnished to such committee only when sitting in closed executive session unless such taxpayer otherwise consents in writing to such disclosure

**(B) Other committees**

Any committee or subcommittee described in paragraph (3) shall have the right, acting directly, or by or through no more than four examiners or agents, designated or appointed in writing in equal numbers by the chairman and ranking minority member of such committee or subcommittee, to inspect returns and return information at such time and in such manner as may be determined by such chairman and ranking minority member. Any return or return information obtained by or on behalf of such committee or subcommittee pursuant to the provisions of this subsection may be submitted by the committee to the Senate or the House of Representatives, or to both, except that any return or return information which can be associated with, or otherwise identify, directly or indirectly, a particular taxpayer, shall be furnished to the Senate or the House of Representatives only when sitting in closed executive session unless such taxpayer otherwise consents in writing to such disclosure.

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**Section 6103**

**(c) Disclosure of returns and return information to designee of taxpayer**

The Secretary may, subject to such requirements and conditions as he may prescribe by regulations, disclose the return of any taxpayer, or return information with respect to such taxpayer, to such person or persons as the taxpayer may designate in a request for or consent to such disclosure, or to any other person at the taxpayer's request to the extent necessary to comply with a request for information or assistance made by the taxpayer to such other person. However, return information shall not be disclosed to such person or persons if the Secretary determines that such disclosure would seriously impair Federal tax administration.