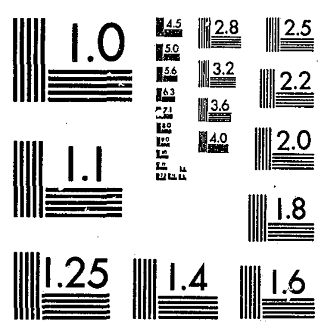

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Department of Justice

STATEMENT

OF

IRVIN B. NATHAN

DEPUTY ASSISTANT ATTORNEY GENERAL

CRIMINAL DIVISION

BEFORE THE

SUBCOMMITTEE ON OVERSIGHT OF THE

INTERNAL REVENUE SERVICE

SENATE FINANCE COMMITTEE

ON

NEEDED AMENDMENTS TO

DISCLOSURE PROVISIONS

OF THE INTERNAL REVENUE CODE

JUNE 20, 1980

Mr. Chairman and Members of the Subcommittee:

I appreciate this opportunity to provide you with the views of the Department of Justice regarding proposed modifications in the nondiscloure provisions of the Internal Revenue Code. These proposals, although in the nature of technical and perfecting amendments, are critically important to remove serious impediments to effective federal law enforcement, particularly in such priority areas as the prosecution of narcotics trafficking, organized crime and white-collar offenses.

At the outset, I emphasize that we share the commitment of this Committee and the Congress to proper safeguards for the privacy interests of taxpayers. I am pleased to report that the disclosure amendments supported by this Administration have been developed after close consultation between the Internal Revenue Service and the Department of Justice and are endorsed by both of those agencies. We are confident that the proposals will enhance our law enforcement capacity without adversely affecting privacy interests or the administration of our voluntary federal income tax system.

THE PROBLEM

Prior to 1976, the Internal Revenue Service was an integral part of federal law enforcement, coordinating its efforts with other agencies, such as the Federal Bureau of Investigation, the Drug Enforcement Administration and the Organized Crime Strike Forces. Trained criminal investigators from the Service provided

leads and assistance to investigators from other agencies who were not as well trained in sophisticated accounting matters. When information developed during the course of IRS investigations showed serious violations of non-tax federal criminal statutes, the IRS agents routinely provided this information to the appropriate law enforcement agency. Such information often formed the cornerstone of successful prosecutions of serious white-collar or other sophisticated crimes.

This coordination and assistance were badly disrupted when Congress enacted the non-disclosure provisions of the Tax Reform Act of 1976. A thorough review of the legislative history of those provisions reveals that they were passed to prevent the kind of political misuse of tax returns that had been perpetrated by White House aides working for President Nixon. You will recall that it was widely reported in the press that in the early 1970's some White House aides had obtained the tax returns of political enemies of the Nixon Administration whom they desired to embarrass. There is no question that such abuses were improper and this Administration shares the sentiment of the Congress that legislation should prohibit access to tax returns for political purposes.

Unfortunately, the statute passed went far beyond that salutary purpose. The Act's complex web of substantive and procedural restrictions on the disclosure of any information in the possession of the Internal Revenue Service has severely limited access to essential information for perfectly legitimate law enforcement purposes. At a time when our society uniformly seeks to combat and bring to justice high-rolling narcotics traffickers, entrenched organized crime kingpins and sophisticated corporate swindlers, the front line federal agencies must fight without the benefit of crucial data in the hands of another federal agency. It must be emphasized that nowhere in the legislative history of the 1976 statute were there any reported instances of abuse by federal prosecutors of information theretofore provided by the Service. The information provided to federal prosecutors prior to 1976 was used exclusively in a lawful manner to investigate and prosecute serious federal crimes.

However, as enacted in 1976, subsection 6103(i) of the Internal Revenue Code established needlessly severe, ambiguous, and cumbersome restrictions upon law enforcement access to tax information necessary in non-tax criminal investigations. Generally, the statute provides that all tax information is confidential and cannot be disclosed to law enforcement agencies

unless one of the express -- and highly complicated -- exceptions applies, and then only pursuant to complex procedures. Moreover, the 1976 law establishes civil and criminal sanctions for violations of its provisions. An IRS employee who in discloses information to the Department of Justice in violation of the statute risks up to five years in prison, a criminal fine of up to $5,000, and civil damages by the aggrieved taxpayer of at least $1,000, or more if any actual damages can be established. Of course, these sanctions are all in addition to any administrative sanctions, including dismissal, which may be imposed by IRS.

The effect of these new provisions was immediate and dramatic. Recognizing the consequences of mistaken disclosure of information, IRS took prompt steps to implement the statute and adopted internal procedures, definitions and regulations to protect taxpayers and IRS employees. A 1979 General Accounting Office Report concluded that as a result of the 1976 law, "coordination between IRS and the Department of Justice has suffered."

We have now had the experience of three and a half years of operating under the non-disclosure provisions, and I can state unequivocally that federal prosecutors and criminal investigators are convinced that no legislation is a greater handicap on our ability to contain serious financial crimes than the non-disclosure provisions of the Tax Reform Act.

MANIFESTATIONS OF THE PROBLEM

With sharply limited access to tax information and the expertise of highly trained IRS personnel upon whom we had long relied for assistance in unraveling complex financial transactions, we have found it extremely difficult to investigate and prosecute complex financial crimes. This loss has been felt in many areas of criminal law enforcement, but is particularly severe in the investigation of narcotics trafficking, organized crime syndicates, fraud against the government, foreign corrupt payments, corporate bribery, illegal currency transactions, and public corruption.
In many of these cases, our investigations require us to follow a complex and purposely circuitous paper trail of financial transactions. Tracking down all of the key transactions to establish a complete picture of what occurred is like piecing together a puzzle. Not only are IRS personnel among the world's best at assembling such puzzles, IRS often has the missing pieces among its records.

Generally, the 1976 law creates four major problems: (1) IRS is unable to advise us of the cases on which it is working with the result that there is sometimes duplication of effort; (2) it is unduly difficult to obtain IRS information which would materially assist in development of important criminal cases; (3) the statute makes it difficult for IRS to provide other law enforcement agencies even with evidence developed based on sources independent of tax returns; and (4) in those few circumstances where prosecutors are permitted to work with the Service, the delays caused by the intricate and cumbersome mechanisms of the Act often stall investigations interminably.

The statute has caused a number of concrete problems which are frustrating to prosecutors and criminal investigators. In its 1979 Report, the GAO found that the IRS Disclosure Office literally has a file drawer full of evidence of serious federal non-tax crimes which the Service has uncovered in the last three years but which the statute prevents from being

transmitted across the street to the Department of Justice for investigation and prosecution. Included in this material revealed by the GAO Report were evidence that a corporation had paid bribes to a federal official; evidence that an individual had defrauded the Customs Service of hundreds of thousands of dollars; and evidence that corporations had made substantial payments to union officials and politicians which violated the Taft-Hartley and Corrupt Practices Acts. In the last two months alone, we have been informed that such serious non-tax crimes as wire and mail fraud, perjury, embezzlement, concealment of a large government overpayment and illegal political contributions, as well as the location of a homicide suspect, have been reported by IRS agents to headquarters, which has been barred by the Tax Reform Act from doing anything but adding them to these file drawers.

In my testimony before the Senate Permanent Investigation Subcommittee last December, I described several specific cases in which prosecutors had been denied access, as a result of the statute, to important incriminating information in the possession of the Service. I will not rehearse those examples here.

Those examples were anecdotal in nature and were offered merely to serve as illustrations of the problems caused by the Act. In an effort to provide the Congress with comprehensive documentation of the impact of the Act on law enforcement, we developed and distributed a detailed questionnaire to all federal prosecutors late last year seeking to assess their experience under the Tax Reform Act. The questionnaire consisted of 60 specific questions and sought information on virtually every case in which Department attorneys have attempted to obtain information or assistance from the IRS in connection with non-tax cases and joint tax/non-tax grand jury investigations, as well as on the use of tax information in criminal tax cases.

A total of 355 responses to the survey were received, representing the experience of 105 different offices. These responses were carefully reviewed and analyzed, and the results compiled into a report of over 50 pages. For your ready reference, the summary section of the report is appended to my statement. We will, of course, provide the entire report to the Subcommittee upon request and can arrange for your staff's review of the individual responses to the questionnaire if you desire. Additional examples of the unfortunate consequences of the statute were contained in the report.

This report represents the first comprehensive effort to document the problems arising from the Tax Reform Act. Its 50 pages are filled with examples of serious difficulties with obtaining access to information, confusion over complex and ambiguous statutory standards, and -- the factor most readily quantified -the enormous delays in obtaining either tax information, technical assistance, or the participation of the Service in joint tax/non-tax grand jury investigations.

Perhaps the most revealing finding is that more than 50% of those surveyed sought information from the Service on only one of two occasions in the last three and a half years because they claimed their experiences and those of other prosecutors indicated that the statutory procedures were too cumbersome, too time-consuming and too restrictive. Even those offices which have continued to struggle with the disclosure procedures have sought tax records relatively infrequently. Total requests for tax information by federal prosecutors have plummeted from 1,816 in the year before the Act took effect to 255 in the most recent 12-month period for which statistics are available. It is, of course, impossible to quantify precisely the effects of this reduced access to tax information, but we believe that many investigations and prosecutions of complex financial criminal cases have been jeopardized or frustrated for want of information known only to IRS.

The report's statistics on delay point up why so many prosecutors have given up on seeking to obtain information from the Service under the Tax Reform Act. In one case it took over two years to obtain a defendant's tax returns. In 1979-80 an average of 65.8 days elapsed before tax information sought pursuant to court order -- and which we were entitled to obtain under the statute -- was received by prosecutors. A significant part of this delay resulted from the requirement that the prosecutors in the field seek permission from the Assistant Attorney General in Washington before they can even file their papers with the court. Unlike delays within the Service, which have recently been addressed by administrative charges, this aspect of the delay must be corrected by legislation. The cumulative effect of these delays in major investigations can be disastrous. Faced with Speedy Trial Act deadlines, statutes of limitations, and the demands of fast-moving investigations, delays produced by the 1976 law often foreclose the opportunity to obtain neded information under the disclosure provisions of the Internal Revenue Code.

Internally, the Administration has addressed these problems and the serious effect of these difficulties on federal law enforcement activities. For the past six months, IRS has worked closely with the Department in an effort to narrow the gap between us created by the statute. After a series of high

level meetings, we have created a permanent IRS-DOJ Coordinating Committee which convenes every other week. These meetings have been productive and have resulted in administrative measures which should lessen some of the problems caused by the Act. These administrative changes are detailed in Commissioner Kurtz's testimony.

In addition to these administrative changes, the Administration is convinced that there must be legislative amendments in order to achieve an acceptable level of coordination and effectiveness on the part of federal law enforcement.

THE EMERGING CONSENSUS FOR REFORMS

With the documentation of Tax Reform Act problems developed by the Department of Justice, and through hearings by Senator Nunn's Permanent Investigation Subcommittee, Senator DeConcini's Subcommittee on Judicial Machinery, and Senator Chiles' Appropriations Subcommittee, support for corrective legislation has emerged. Chairman Long has joined Senator Nunn and six other Senators in co-sponsoring proposed amendments, which are now before this Subcommitee. Similar legislation has been introduced in the House of Representatives.

The General Accounting Office, which in 1979 concluded that adverse effects of the Act on law enforcement had not been sufficiently documented, now endorses corrective legislation. The Administration supports amendments to the Tax Reform Act developed by the Department of Justice, the IRS and the Domestic Policy Staff of the White House. Major national and local news organizations have reported on the problems created by the Act and advocated fine-tuning of the 1976 law. In short, support has developed in the Congress, the Administration and among the public generally for legislation to establish a proper balance between taxpayer privacy interests and the need for the proper administration of justice.

THE REMEDY TO THE PROBLEM: SUMMARY AND ANALYSIS

Our proposed revisions of the disclosure provisions would (1) redefine with precision those materials in the hands of the Service which are to be accorded confidential protection; (2) simplify and expedite the processes for obtaining the available information; (3) mandate the disclosure of evidence of serious non-tax crimes coming to the Service from non-protected sources; and (4) facilitate closer cooperation between the Service and other agencies for legitimate law enforcement purposes. As I have noted and will explain further as we proceed, we believe that all of these revisions can be accomplished without invading the legitimate privacy interests of taxpayers or impairing our voluntary tax collection system.

We believe that the information which should be protected are the tax returns themselves and the financial books and records which an individual keeps and submits to the Service to support the accuracy of his or her return. We do not believe that the Service should be required by law to withhold from any appropriate federal law enforcement agency (1) incriminating information provided about the taxpayer by third parties; or (2) evidence obtained by the Service from corporate records which are maintained for non-tax purposes.

Tax returns which are required by law to be prepared and filed should clearly be given confidential protection. The Administration believes taxpayers will report their income more fully and honestly if they are confident that the information they report will not be used to incriminate them. Further, the Administration believes that in order to encourage an individual to maintain and retain accurate underlying financial records, these too should be accorded confidential treatment when they come into the possession of the Service. Accordingly, under the revisions we propose, no tax return and no individual's financial books and records in IRS possession could be disclosed to a federal law enforcement agency except upon a properly obtained court order.

Consistent with this policy, our proposed revisions provide that if a taxpayer engages in fraud upon the Service by wilfully filing false returns, then the confidential protection for his return and underlying books and records is lost. Thus, we propose that once it becomes clear that a taxpayer has engaged in tax evasion, all of the information developed by the Service in that case involving non-tax offenses committed by that individual would be turned over at the same time to the appropriate federal law enforcement agency. We believe it makes no sense to continue to provide to a tax evader the benefits of a policy of confidentiality which was designed to encourage honest compliance in the first place. We would also provide that information in the possession of the Service, regardless of its derivation, which reveals the imminent commission of a crime involving bodily harm, could be disclosed. We believe that society's interest in preventing the harm is greater than any theoretical damage to the voluntary tax assessment system which could result from such a narrow exception.

Under present law, the Service may provide to appropriate law enforcement agencies evidence about non-tax crimes which comes to the Service's attention from third parties. Thus, if an informant tells an IRS agent that a taxpayer is engaging in tax fraud by deducting bribes paid to a federal official, the Service may inform the Department of Justice about the allegation of bribery.

There are other kinds of information about individuals which do not derive from third parties but which we believe should also be turned over by the IRS to criminal investigators. This would include, for example, contraband obtained in a lawful manner by the Service. We are confident that the present statute does not mean to give protection to this category of information but some doubts appear to have arisen because of field-level interpretations of the statute. We believe that either in the revised definitional section of the statute or by administrative regulations, we should make clear that materials, such as contraband, are not protected by the disclosure provisions of the statute.

In a similar vein, we believe that evidence of non-tax crimes in the possession of the Service which comes from the books and records of corporations should be reported to the appropriate federal authorities. To reach this conclusion, we start from the premise that evidence of crime in the possession of a federal agency should be made available to the agency responsible for investigating and prosecuting that offense, unless there is a clear overriding policy reason for maintaining the confidentiality of that material. As we have seen, there is such an overriding policy reason for tax returns and for protection of an individual's underlying financial records.

However, the reasons which support providing confidentility to tax returns and individuals' financial records do not obtain with respect to a corporation's books and records. In the first place, corporations and other commercial entities are required by many non-tax federal and local laws to maintain accurate books and records. Second, these records are available for production and inspection by federal and local agencies other than tax authorities. Third, corporations and commercial entities, unlike individuals, have no Fifth Amendment privilege against self-incrimination. Thus, there is no overriding reason which justifies giving confidential protection to evidence of non-tax crimes which the Service finds in the books and records of corporations Under our proposed revision of the disclosure provisions, if the Service finds evidence of non-tax federal crimes in the books and records of a corporation, it will be required to report such information to the appropriate law enforcement agency, much as we would expect any citizen to report evidence of crime coming to his or her attention.

By requiring the Service to turn over incriminating information from all sources -- other than tax returns and an individual's underlying financial records -- we will eliminate an important source of problems under existing law. Presently,

if third-party information alone does not constitute evidence of a crime, but must be added to corporate financial data in the hands of the Service to make out the offense, the Service cannot turn over any information, including the "tip" of the third party. Under our proposed revision, experienced Service personnel can combine the third-party information and the corporate financial data, and if they add up to a non-tax offense, the Service will be free to transmit it to the proper authorities.

Having now explained our views concerning which categories of information should be protected and which should not, I would like to proceed sequentially through the statute and explain the nature of each of our proposed revisions and the reasons for them.

SPECIFIC AMENDMENTS NEEDED

Section 6103(i)(1) establishes the mechanism and standards by which we can seek a court order to obtain from the Service tax returns and other protected information which may be necessary in a criminal investigation. We support the principle that an ex parte court order should be necessary for seeking access to this type of protected information, but believe that the standards and procedures can be substantially refined.

Under the present statute, the application for such an order must show (1) reasonable cause to believe that a specific crime has been committed; (2) reason to believe the information sought -- which the applicant hasn't yet seen -- constitutes probative evidence of a matter in issue related to the commission of the crime, and (3) reason to believe the information sought cannot be obtained from any other source or that it is the most probative evidence available. This standard is a Catch-22 test; normally an applicant cannot attest that the tax information is the most probative evidence of a matter in issue without access to the information itself. Yet he cannot see the information until he obtains the order. Further, it is often difficult to predict at the early stages of an investigation what matters will be "in issue" by the time of trial. Such a standard does not protect privacy. It merely confuses applicants and courts, creates grave uncertainty over permissible disclosures, and in the end deters most prosecutors from seeking tax information.

Because federal judges are familiar with the realities of criminal investigation and prosecution, most federal courts interpret the statutory standard of §6103(i)(1) in the light of reason and experience and accept a factual showing limited to the information that common sense

indicates a prosecutor can reasonably be expected to develop through investigation: that a specific crime has been committed and that independent reasons exist to support a belief that the tax returns or financial data sought are relevant to the criminal investigation or prosecution. We believe this logical standard should be codified to eliminate the confusion and deterrent effect of the current statute and to insure uniform determination of disclosure applications by the courts. As this standard is in fact the one now followed by most courts, we believe codification would have no practical adverse effect on taxpayer privacy interests or tax administration.

A second problem with §6103(i)(1) is that federal prosecutors cannot now file applications for disclosure orders without approval from Washington. The statute requires all applications for (i)(1) orders to be signed by an Assistant Attorney General. Thus, federal prosecutors must mark time while their applications are sent to Washington for the required signature and then returned for filing with the court. This is a time-consuming and pro forma process; rarely, if ever, does an Assistant Attorney General refuse to permit an application for return information to be filed with the courts. The requirement of approval in Washington significantly delays the process and makes the procedure more cumbersome for federal prosecutors. Its contribu-

tion to privacy or tax policy is unclear because a neutral and detached magistrate must review the application. We believe §6103(i)(1) should be modified to authorize United States Attorneys, who are appointed by the President with the advice and consent of the Senate, to approve applications in the field.

We also believe that the order should be obtainable from United States Magistrates as well as district court judges. Magistrates are authorized to enter analogous orders, such as search and arrest warrants, and it would expedite the process if the application could be filed with and ruled on by them as well as by busy district court judges.

Section 6103(i)(2) applies to information relating to a taxpayer obtained by IRS from third parties rather than from the taxpayer or tax returns. The law permits this information to be disclosed pursuant to a formal written request to IRS specifying identifying information and "the specific reason or reasons why such disclosure is or may be material to the proceeding or investigation". As with (i)(1), we believe it is unreasonable to require a showing of materiality when the applicant has not yet seen the information which IRS has in its possession. Moreover, any expectation of privacy in such information gleaned from third parties is far less than exists as to information which the taxpayer himself has furnished to IRS. We believe, therefore, that (i)(2) should be revised to permit disclosure of such third-party information upon

a certification that the material is sought exclusively for use in the investigation of a specified crime. This procedure effectively protects against abuse by creating a paper trial in connection with such disclosures; all (i)(2) disclosures would be documented and individual accountability established. As with (i)(1) applications for court orders, the (i)(2) request letters must now be signed by an Assistant Attorney General necessitating that every disclosure be routed through Washington. We recommend, therefore, that (i)(2) requests be permitted by field prosecutors and investigators designated by the Attorney General. Finally, (i)(2) should authorize disclosure of whether a tax payer filed a return for a particular year and whether there is or has been a criminal investigation of a taxpayer.

Section 6103(i)(3) governs situations in which IRS agents come across evidence of non-tax crimes in the course of their tax investigations. We are often unaware of the existence of this information and have no reason to request it under (i)(1) or (i)(2). The Service cannot pursue the matter itself because its investigative jurisdiction is limited to tax offenses. Section 6103(i)(3) permits, but does not require, the Service to disclose the information to us if it was obtained from third parties. The limited disclosure mechanism established by (i)(3) has not worked well. The flow of (i)(3) information has been a mere trickle -- about two referrals per month.

We believe that there should be two fundamental changes made to 6103(i)(3). First, the Service should be required to transmit to appropriate federal law enforcement agencies the unprotected information which reveals evidence of serious non-tax crimes. Second, as I have explained earlier, the unprotected information should include all information in the possession of the Service, except tax returns themselves and an individual's financial records which were retained and submitted to the Service to support the return. These changes are necessary to eliminate the anomalous and unhealthy present situation in which one federal agency is prohibited from initiating disclosure of evidence of serious crimes to other agencies responsible for investigating and prosecuting those offenses. Finally, in addition to making (i)(3) disclosures mandatory and establishing a broader category of information which may be disclosed, we believe the law should be amended to require (i)(3) disclosures to be made to the appropriate official in the district involved rather than to the agency head in Washington as is now the case.

Along with the changes to (i)(1), (2), and (3) I have suggested, the other major revision to the statute should be the modification of the penalty provisions. The sanctions of present law chill disclosures under the statute. The minor revisions to the penalty provisions made in November of 1978 have proven inadequate to reverse the prevailing attitude, and extreme caution persists.

We recommend that where a disclosure is made inappropriately by an IRS employee, any civil action for damages must be brought against the Service rather than the individual employee. This approach is consistent with the Right to Financial Privacy Act of 1978, 12 U.S.C. 3417, and the Administration's proposed amendments to the Federal Tort Claims Act. If the court hearing the civil damage action finds that the violation was wilful, the Office of Personnel Management would be required to initiate administrative disciplinary proceedings against the responsible employee.

With respect to criminal sanctions, the Nunn bill would establish, as an affirmative defense to criminal prosecution, that the unauthorized disclosure resulted from a good faith, but erroneous, interpretation of the law. We are not certain that this would make any significant change in existing law as interpreted by the courts. We would note that §1525 of S. 1722, the proposed Federal Criminal Code Revision, makes it an affirmative defense to criminal prosecution for disclosure of private information submitted for a governmental purpose that the disclosure was made to report a potential violation of law and was make to a law enforcement officer charged with investigating or prosecuting such a violation. The Administration supports that provision of the proposed Criminal Code bill. Of course, we are prepared to discuss with the Committee or other interested parties whether there are reasons why this proposed general principle is not appropriate in the area of tax disclosure.

The Administration also proposes minor amendments to §6103(i)(4) governing admissibility of tax information into evidence in trials. We propose that admissibility of tax information be governed expressly by the Federal Rules of Evidence and that admission should be authorized in connection with civil forfeiture and other proceedings related to criminal cases. Furthermore, (i)(4) should make clear that tax information used in criminal cases is available to defendants under the Jencks Act and discovery provisions of the Federal Rules of Criminal Procedure. This is necessary to protect the due process rights of criminal defendants.

Finally, we favor an amendment to §6103(k)(4) to clarify that federal tax information can be obtained for use by law enforcement authorities of foreign governments who provide United States authorities with similar information pursuant to mutual assistance treaties. Such international exchanges are presently authorized in connection with tax investigations and proceedings and should, we believe, be authorized pursuant to court order in connection with non-tax criminal matters as well. Of course, reciprocity is essential in dealing with foreign governments and any inability to furnish tax information to foreign governments in connection with their legitimate non-tax investigations will make it impossible for us to obtain foreign tax information in connection with our investigations. Because many complex criminal cases do require access to foreign tax information, this issue should be addressed in any disclosure amendments.

We believe the revisions I have outlined to §6103(i), §6103(k) and the penalty provisions will not undermine taxpayer privacy or our tax system and, they would substantially reduce the impediments to effective law enforcement created by the 1976 law.

COMPARISON OF ADMINISTRATION AND SENATE PROPOSALS

The proposals we endorse, after months of careful analysis and consultation between IRS and Justice, are remarkably similar to the proposals co-sponsored by Senators Nunn, Long and six others. Their proposals, based on the extensive hearings held in the last six months by Senators Nunn and Chiles and others, help resolve the major problems we have experienced with current law. The major differences between our proposals and those of the Senate bills relate to the protection of an individual's financial records which underlie the tax return. The Nunn bill would permit access to this information without a court order and would require the Service to report evidence of non-tax crimes revealed in those records. We recognize that the Nunn proposal would greatly assist law enforcement, but we believe that this involves an area where the taxpayer has a legitimate expectation of privacy and could adversely impact on the tax collection system. Accordingly, we do not endorse that aspect of the Nunn bill.

I should also add that the Senate proposals for reforming the penalty provisions are somewhat at odds with my suggestions. We believe our proposals more effectively address the problem. Finally, the Senate bills do not contain provisions with respect to admissibility of tax information or mutual assistance treaties. The Senate bills do, however, provide for limited access to federal tax information by State law enforcement authorities. It is our view that the Senate proposal for State access should be deleted as one which unjustifiably compromises taxpayer privacy interests.

CONCLUSION

In conclusion, let me emphasize that legislation to amend the Tax Reform Act will have an impact much more important than mere resolution of the specific disclosure problems I have discussed. We believe that such legislation will enable the Internal Revenue Service, the Department of Justice and other federal law enforcement agencies to work more closely as cooperating partners in the enforcement of federal law. After three and one-half years of experience, we believe that our fully documented legislative proposals will significantly reduce the impediments to such cooperation without jeopardizing privacy protection or our self-assessment tax system. On behalf of federal prosecutors, I deeply appreciate your prompt consideration of these proposals and assure you that they are imperative to effective federal law enforcement efforts.

Thank You.

VII. SUMMARY OF RESPONSES TO PART V OF THE QUESTIONNAIRE

This section summarizes the responses of the replying offices to the open-ended request in Part V of the questionnaire for comments and additional information regarding the impact of Section 6103 on the Department's law enforcement activities. Fifty-six of the 105 responding offices provided additional information or general comments in response to Part V of the survey.

A. Tax Cases - Section 6103(h)

The following additional information was provided by the responding offices regarding the impact of Section 6103(h) on tax cases. This information was furnished in the form of specific examples of problems encountered in the utilization of Section 6103. The following summaries are based solely upon the information provided by the responding offices, and should be considered together with the data set forth in Section III of this report. Nine offices provided additional information in Part V of the survey regarding the impact of Section 6103 on tax cases.

--Two offices noted that IRS's fear of violating Section 6103 frequently causes that agency to fail to provide to the Government attorney all the tax information needed to prepare adequately for the trial of a civil tax case.

--One office noted that in 26 U.S.C. 6672 cases, where all the parties are not before the court (the ordinary situation in the Court of Claims), a problem exists in learning what, if anything, has been collected by IRS from the other assessed persons. Although payments by these other persons have no effect on the liabilities of the parties in the suit, the Government's policy is to collect 100% only once in such cases. Thus tax information regarding collection activity with respect to assessed nonparties is very useful to the Government attorney, but difficult to obtain under Section 6103.

--One office raised the question of whether Section 6103 permits the disclosure of tax information to outside experts specially hired by the Government in civil tax litigation to handle special issues such as valuation.

--One office pointed out that, after the passage of the 1976 amendments to Section 6103, tax protesters have attempted to "trap" Government attorneys into making allegedly unlawful disclosures of tax information relating to them by submitting fictitious powers of attorney or revoking existing powers of attorney, and then challenging the attorney's disclosure to the lawyers that the attorney believed were actually representing the protesters.

--One office noted that in summons enforcement cases, IRS agents, fearful of violating Section 6103, have neglected to tell the Government attorney handling the proceeding that Section 6103(i)(1) orders had been obtained by offices seeking tax information regarding the taxpayer for nontax purposes. In other cases agents have neglected to report that, by the time of trial, they had already recommended to their superiors at IRS that a grand jury investigation of the taxpayer be conducted. In some cases the Government attorney has learned this information from opposing counsel. Information regarding both is extremely important on the issue of improper criminal purpose (see United States v. LaSalle National Bank, 437 U.S. 298 (1978)).

--One office noted the need for better coordination with FOIA units within the Department, which make determinations whether requested information may be disclosed consistent with the restrictions of Section 6103. This office reported that, in a civil tax case, the Government attorney disclosed information which she believed was disclosable under Section 6103(h)(4). However, the attorney subsequently learned that plaintiff's counsel had made an FOIA request before instituting the tax suit, and that some of the information which the plaintiff was requesting--information which the Government attorney disclosed under §6103(h)(4)--had not been disclosed by the individual handling the FOIA request, on the ground that disclosure would violate Section 6103.

--Two offices stated that Chief Counsel of IRS directs disclosure of wagering tax information to the Department of Justice under 26 U.S.C. 4424(b), but is very reluctant to disclose information under Section 6103(h)(2), although the language of the two statutory provisions is essentially the same.

B. Nontax Cases - Section 6103(i)

Twenty-five offices provided additional information in Part V of the survey regarding the impact of Section 6103 on nontax cases. The following summaries are based solely upon the information provided by the responding offices, and should be considered together with the data set forth in Section IV of this report.

Thirteen offices commented that the procedures for obtaining tax information under Section 6103(i) for nontax criminal purposes are simply too cumbersome and too time-consuming, especially, as some offices noted, in view of the requirements of the Speedy Trial Act. These offices offered the following proposals for improving the procedures for obtaining disclosure:

--"Return information" should be redefined so as to include only the information which is contained on a tax return, and should not be interpreted to encompass information obtained through an investigation. (One office)

--The distinction between "return information" and "taxpayer return information" should be abolished. (One office)

--Authorization to seek disclosure from IRS under §6103(i)(1) and §6103(i)(2) should lie with the United States Attorney. (One office)

--Department procedures should be amended so as to eliminate the need for the second "request letter" to IRS which accompanies the signed ex parte order obtained pursuant to §6103(i)(1). This office noted that there is no need to again set forth "probable cause" for obtaining the information, when the grounds justifying disclosure are already set forth in the application and the court order. (One office)

--Procedures under §6103(i)(1) should be amended so that returns, taxpayer return information, and return information can all be obtained using the ex parte order procedure--then IRS would not be required to separate out return information when responding to a disclosure request under Section 6103(i)(1). (One office)

--The Government attorney should not be required to utilize §6103(i)(1) simply to learn that the taxpayer in question has not filed tax returns. (Two offices)

One of these offices also noted that, in nontax cases, the restrictions of Section 6103 conflict with the requirements of the Jencks Act, where the Government attorney is aware that IRS has interviewed an individual who is a Government witness in a nontax case.

Two offices reported having disagreements with IRS over which documents or information is covered by an order under §6103(i)(1), or a request under §6103(i)(2). In one case an additional order had to be obtained in order to get the remainder of the needed information from IRS. One office reported that IRS frequently requires separate orders when information is sought regarding more than one taxpayer. Another office stated that if a typing error or misspelling of a name appears in either the court order or the authorization letter from the Assistant Attorney General, Criminal Division, IRS refuses to produce the returns, even though the addresses, social security numbers, and other identifying information on the documents clearly indicate that the error is clerical and not substantive. One office reported that after the court had issued a §6103(i)(1) order, IRS stated that it did not believe that the order was adequately supported by the reasonable cause showing required in §6103(i)(1)(B), "and even went so far as to 'request' that additional 'probable cause' be added to the order and the application." One other office also had problems when it learned that IRS was not satisfied with the language of the order issued by the court.

Two offices complained of internal delays at IRS in the processing of court orders authorizing disclosure; one of these offices cited IRS's requirement that the orders be sent to its National Office in Washington, D.C. before being served on the appropriate Service Center as one cause for the delays.

One office reported that it was required to get a §6103(i)(1) order before IRS would permit an agent to testify in a civil habeas corpus proceeding (28 U.S.C. 2255), where the agent had investigated the defendant for potential criminal tax violations, and was asked to testify as to defendant-petitioner's use of pseudonyms in conducting his real estate transactions. Delays encountered in obtaining the order in turn delayed the habeas corpus proceeding.

One office reported that, after a court requested an in camera inspection of a return that was the subject of an application for a §6103(i)(1) order, the IRS disclosure officer refused to let the tax returns out of her presence when being reviewed by the judge, and forbid any discussion of the returns with the judge's law clerk--a procedure which disturbed the court.

Finally, three offices reported that they have not encountered any difficulties thus far in the utilization of Section 6103(i), and another office stated that while the procedures under §6103(i) are time-consuming, "[m]ost Assistants probably exaggerate the difficulty and amount of work that is required to secure disclosure."

C. General Comments Regarding Section 6103

Twenty-two offices provided additional information in Part V of the survey regarding the impact of Section 6103 generally on their law enforcement activities. The following summaries are based solely upon the information provided by the responding offices.

Fourteen offices expressed the view that Section 6103 has had a "chilling effect" on law enforcement, in that it makes IRS investigating agents apprehensive of making disclosures, and restricts information sharing between federal investigatory agencies. Four offices noted that the procedures under Section 6103 for obtaining needed tax information are so complex and/or time-consuming that frequently Government attorneys do not view the information as worth the effort of attempting to obtain it.

One office reported that it has had no difficulty utilizing Section 6103, and has found both IRS and the Department of Justice quite cooperative in processing its requests for tax information.

One office suggested that uniform instructions should be given to IRS agents, and made available to courts and Government attorneys, regarding the scope of permissible disclosures under Section 6103, so as to minimize possible contempt problems that might arise if a court, in either a federal or state case, should insist on the agent appearing and testifying regarding certain tax information. In this regard, this office noted that in 1979, a subpoena duces tecum was served on an IRS special agent to appear in state chancery court and bring the joint tax return of a husband and wife for use in a divorce proceeding. After much debate between IRS Regional Counsel and the attorney representing the wife involved in the divorce proceeding, the attorney was persuaded to withdraw or cancel his subpoena.

Another office complained that IRS does not take uniform positions regarding disclosure requests: in one case, this office sought tax information regarding 3 defendants from IRS, the requests being submitted at various times. One request was granted, but an identical form request as to another defendant was rejected.

One office has noted what appears to be a problem regarding

what types of information come within the scope of Section 6103. Specifically, this office reported that during the course of executing search warrants for evidence of wagering tax violations, IRS agents discovered certain weapons in the possession of a convicted felon then on probation. An attempt was made to revoke the felon's probation, but an attorney in the office of IRS Regional Counsel prohibited the agents from discussing the discovery of the weapons with the United States Attorney's office on the ground that this would violate Section 6103. This attorney was also reluctant to permit the agents to discuss anything that was included in the affidavit for the search warrant. The probationer eventually pled guilty to the probation violation charge.

One office reported that IRS takes an unduly restrictive view of the information that it may disclose to the Department of Justice under Section 6103(i)(3).

One office reported the following situation: In a prosecution of X for bribery of an FBI employee, the employee testified for the Government that X had asked if she could obtain information relating to the criminal tax investigation that was being conducted regarding X by the Criminal Investigation Division of IRS. (It was generally known that IRS had issued a large number of summonses throughout the city seeking evidence of X's tax liability.) To corroborate the testimony of the employee, the prosecuting Government attorney wanted an IRS special agent to testify that X had been the subject of a criminal tax investigation during the period in question. IRS prohibited the agent from testifying on the ground that this would violate Section 6103, even though the IRS agents, when conducting witness interviews, had already disclosed to third parties that X was under investigation.

Finally, one office stated that most Assistant United States Attorneys are unfamiliar with Section 6103 and its procedures, and therefore usually do not make use of the statute to obtain tax information. This office stated that the Department of Justice can and should take steps to educate Government attorneys regarding Section 6103, either through the Attorney General's Advocacy Institute or through a separate seminar.

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