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DEPARTMENT OF THE TREASURY

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Internal Revenue Service

26 CFR Part 301

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Disclosure of Return Information by Certain Officers and Employees for Investigative Purposes

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Temporary regulations.

SUMMARY: This document contains temporary regulations relating to the disclosure of return information pursuant to section 6103(k)(6) of the Internal Revenue Code. The temporary regulations describe the circumstances under which officers or employees of the IRS, the IRS Office of Chief Counsel, and the Office of Treasury Inspector General for Tax Administration (TIGTA), in connection with official duties relating to any examination, administrative appeal, collection activity, administrative, civil, or criminal investigation, enforcement activity, ruling, negotiated agreement, prefiling activity, or other proceeding or offense under the internal revenue laws or related statutes, or in preparation for any proceeding described in section 6103(h)(2) (or investigation which may result in such a proceeding), may disclose return information to the extent necessary to obtain information relating to such official duties or to accomplish properly any activity connected with such official duties. The temporary regulations amend the existing regulations to clarify and

elaborate on the facts and circumstances in which disclosure pursuant to section 6103(k)(6) is authorized. The temporary regulations clarify that IRS and TIGTA officers and employees make the determination, based on the facts and circumstances, at the time of the disclosure, whether a disclosure is necessary to obtain the information sought, and that section 6103(k)(6) does not affect the authority or decision of IRS and TIGTA officers and employees to initiate, or to conduct, an investigation, or to determine the nature of the investigation. The temporary regulations clarify that the return information of any taxpayer, not only the taxpayer under investigation, may be disclosed when necessary to obtain the information sought in an investigation. The temporary regulations clarify that section 6103(k)(6) permits IRS and TIGTA officers and employees to identify themselves, their organizational affiliation with the IRS (e.g., Criminal Investigation (CI)) or TIGTA (e.g., Office of Investigations (OI)), and the nature of their investigation when making oral, written, or electronic contacts with third party witnesses. The text of the temporary regulations also serves as the text of the proposed regulations set forth in the notice of proposed rulemaking on this subject in the Proposed Rules section in this issue of the **Federal Register**.

DATES: Effective Date: These temporary regulations are effective July 10, 2003.

FOR FURTHER INFORMATION CONTACT: Helene R. Newsome, 202-622-4570 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

Under section 6103(a), returns and return information are confidential unless the

Code authorizes disclosure. Section 6103(k)(6) authorizes an internal revenue officer or employee and an officer or employee of TIGTA, in connection with official duties relating to any audit, collection activity, civil or criminal tax investigation, or offense under the internal revenue laws or related statutes, to disclose return information to a person other than the taxpayer to whom such return information relates (or his or her representative) to the extent that such disclosure is necessary to obtain information not otherwise reasonably available with respect to the correct determination of tax, liability for tax, or the amount to be collected, or with respect to the enforcement of any other provision of the Code or related statutes. Disclosure is subject to situations and conditions prescribed by regulation.

The temporary regulations amend the existing regulations to reflect a recent legislative amendment to section 6103(k)(6). The Consolidated Appropriations Act, 2001, Public Law 106-554 (114 Stat. 2763), was signed into law on December 21, 2000. Section 1 of that Act enacted into law H.R. 5662, the Community Renewal Tax Relief Act of 2000. Section 313(c) of the Community Renewal Tax Relief Act of 2000 amended section 6103(k)(6) to clarify that officers or employees of TIGTA are among those persons authorized to make disclosures under section 6103(k)(6).

The temporary regulations also clarify the standard used in determining whether disclosures are authorized under section 6103(k)(6). Recent litigation indicates that there is some confusion as to the authority of IRS (and now TIGTA) officers and employees to make disclosures in certain situations under section 6103(k)(6). The temporary regulations seek to address these issues. In particular, the temporary regulations address the issues surrounding the disclosures that occur when IRS or TIGTA officers and

employees introduce themselves to third party witnesses or communicate in writing using, e.g., official letterhead that reveals affiliation with IRS or TIGTA. The temporary regulations also clarify that section 6103(k)(6) does not limit IRS or TIGTA officers and employees with respect to the initiation or conduct of an investigation. Finally, the temporary regulations clarify that section 6103 does not require IRS and TIGTA officers or employees to contact a taxpayer for information before contacting third party witnesses.

Explanation of Provisions

The temporary regulations amend the existing regulations to clarify that there is a single, objective standard for all disclosures under section 6103(k)(6). This standard is embodied in the definitions of the terms disclosure of return information to the extent necessary and information not otherwise reasonably available.

The definition of disclosure of return information to the extent necessary is a disclosure of return information that an IRS or TIGTA officer or employee, based on the facts and circumstances known to the officer or employee at the time of the disclosure, reasonably believes is necessary to obtain information to perform properly the official duties described by the temporary regulations, or to accomplish properly the activities connected with carrying out those official duties. The term necessary in this context does not mean essential or indispensable, but rather appropriate and helpful in obtaining the information sought.

The definition of information not otherwise reasonably available is information that an IRS or TIGTA officer or employee reasonably believes, under the facts and circumstances known to the officer or employee at the time of a disclosure, cannot be

obtained in a sufficiently accurate or probative form, or in a timely manner, and without impairing the proper performance of the official duties described by the temporary regulations, without making the disclosure. Corroboration of information provided by, or concerning, a taxpayer is, by definition, information not otherwise reasonably available from the taxpayer. In criminal cases, corroboration of information provided by the taxpayer is essential. See Smith v. United States, 348 U.S. 147 (1954).

The temporary regulations clarify that section 6103(k)(6) does not alter or affect the authority of IRS and TIGTA officers or employees to decide whether or how to conduct an investigation. For example, in an action for wrongful disclosure under section 7431, the inquiry is whether the particular disclosure at issue was consistent with section 6103(k)(6), not the necessity of conducting an investigation or the appropriateness of the means or methods chosen to conduct the investigation. Thus, the temporary regulations remove the term necessary from several places in the existing regulations where the term may have implied a requirement, under section 6103(k)(6), that the information sought be necessary to or for an investigation (e.g., §301.6103(k)(6)-1(a) (“disclose . . . to obtain necessary information”). Removal of the term necessary in these instances clarifies that the standard is whether disclosure is necessary to obtain the information sought, not whether the information sought is necessary for the investigation. See Barrett v. United States, 795 F.2d 446 (5th Cir. 1986).

The temporary regulations also address certain issues that have arisen in criminal investigations, although similar issues may arise in civil investigations. Criminal investigations typically involve obtaining evidence and verifying taxpayer-supplied

information through contacts with third party witnesses. A disclosure that a taxpayer is under criminal investigation may occur by various means including, but not limited to, direct oral, written, or electronic disclosure, or indirect disclosure by the introduction of the special agent through the presentation of a CI or OI badge, credential, or business card, or through the use of information document requests, summonses, or correspondence, about an identified taxpayer, on CI or OI letterhead or that bears a CI or OI return address or signature block. In litigation, taxpayers have asserted that CI special agents, by various means, wrongfully disclosed the criminal nature of the investigation of the taxpayers in the course of conducting third party witness interviews or inquiries. See, e.g., Comyns v. United States, 155 F. Supp. 2d 1344 (S.D. Fla. 2001), aff'd, 287 F.3d 1034 (11th Cir. 2002); Payne v. United States, 91 F. Supp. 2d 1014 (S.D. Tex. 1999), rev'd, 289 F.3d 377 (5th Cir. 2002); Gandy v. United States, 99-1 U.S. Tax Cas. (CCH) ¶ 50,237 (E.D. Tex. 1999), aff'd, 234 F.3d 281 (5th Cir. 2000); Rhodes v. United States, 903 F. Supp. 819 (M.D. Pa. 1995); Diamond v. United States, 944 F.2d 431 (8th Cir. 1991).

When CI special agents disclose to third party witnesses that a taxpayer is under criminal investigation, there is a risk that the disclosure may adversely affect the taxpayer's reputation, particularly if the third party witnesses have no prior independent knowledge of the investigation. The government and third party witnesses have equally important interests at stake: the CI special agents' authority to accurately identify themselves so as not to mislead third party witnesses, and the third party witnesses' interest in knowing that the inquiry involves a criminal investigation to fairly assess the situation and protect their own interests. See Roebuck v. United States, 83 A.F.T.R.2d (RIA) ¶ 99-2947 (E.D.N.C.

1999), aff'd, 84 A.F.T.R.2d (RIA) ¶ 99-7051 (4th Cir. 1999). This issue has concerned the Department of the Treasury and the Staff of the Joint Committee on Taxation, both of which have recommended legislation to clarify that CI special agents may identify themselves as CI special agents when contacting third party witnesses in the course of a criminal investigation. See Study of Present-Law Taxpayer Confidentiality and Disclosure Provisions as Required by Section 3802 of the Internal Revenue Service Restructuring and Reform Act of 1998, Vol. I: Study of General Disclosure Provisions (JCS-1-00), at 208-11, Joint Committee on Taxation, January 28, 2000; Report to the Congress on Scope and Use of Taxpayer Confidentiality and Disclosure Provisions, Vol. I: Study of General Provisions, at 51-52, Office of Tax Policy, Department of the Treasury, October 2000. The temporary regulations clarify that section 6103(k)(6) permits, but does not require, IRS or TIGTA officers or employees, including CI or OI special agents, to identify themselves, their organizational affiliation with the IRS or TIGTA, and the nature of the investigation, when making oral, written, or electronic contacts with third party witnesses.

Moreover, the temporary regulations do not require IRS or TIGTA officers or employees to contact a taxpayer for information before contacting a third party witness. The temporary regulations clarify that, if an IRS or TIGTA officer or employee reasonably believes, under the facts and circumstances, at the time of a disclosure, that information cannot be obtained from a taxpayer in a sufficiently accurate or probative form, or in a timely manner, without impairing the proper performance of official duties, then the officer or employee may disclose taxpayer identity or other return information in seeking information from a third party. For example, a taxpayer may be a reasonable source of

routine business records, but not of records detailing alleged illegal transactions or sources of income. The facts and circumstances will help determine the necessity of the disclosures, but IRS and TIGTA officers or employees have wide latitude to determine whether the taxpayer is a reasonable source of information. The temporary regulations clarify that disclosures are authorized to verify independently, or to corroborate, from third party sources, information obtained from or concerning the taxpayer.

The temporary regulations expand upon the list of official duties relating to tax administration for which disclosure, pursuant to section 6103(k)(6), is authorized, and clarify that this list is not exhaustive. Finally, the temporary regulations retain the authority for IRS and TIGTA officers or employees to make section 6103(k)(6) disclosures in certain personnel or claimant representative matters.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that 5 U.S.C. 553(b), the Administrative Procedure Act, does not apply to these regulations, and because the regulation does not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f), these temporary regulations will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal author of these regulations is Helene R. Newsome, Office of the

Associate Chief Counsel (Procedure and Administration), Disclosure and Privacy Law Division.

List of Subjects in 26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income Taxes, Penalties, Reporting and recordkeeping requirements.

Amendments to the Regulations

Accordingly, 26 CFR part 301 is amended as follows:

PART 301-- PROCEDURE AND ADMINISTRATION

Paragraph 1. The authority citation for part 301 is amended by adding an entry in numerical order to read as follows:

Authority: 26 U.S.C. 7805 * * *

Section 301.6103(k)(6)-1T also issued under 26 U.S.C. 6103(k)(6); * * *

§301.6103(k)(6)-1 [Removed]

Par. 2. Section 301.6103(k)(6)-1 is removed.

Par. 3. Section 301.6103(k)(6)-1T is added to read as follows:

§301.6103(k)(6)-1T Disclosure of return information by certain officers and employees for investigative purposes (temporary).

(a) General rule. (1) Pursuant to the provisions of section 6103(k)(6) and subject to the conditions of this section, an internal revenue employee or an Office of Treasury Inspector General for Tax Administration (TIGTA) employee, in connection with official duties relating to any examination, administrative appeal, collection activity, administrative, civil or criminal investigation, enforcement activity, ruling, negotiated agreement, prefiling

activity, or other proceeding or offense under the internal revenue laws or related statutes, or in preparation for any proceeding described in section 6103(h)(2) (or investigation which may result in such a proceeding), may disclose return information, of any taxpayer, to the extent necessary to obtain information relating to such official duties or to accomplish properly any activity connected with such official duties, including, but not limited to--

(i) Establishing or verifying the correctness or completeness of any return or return information;

(ii) Determining the responsibility for filing a return, for making a return if none has been made, or for performing such acts as may be required by law concerning such matters;

(iii) Establishing or verifying the liability (or possible liability) of any person, or the liability (or possible liability) at law or in equity of any transferee or fiduciary of any person, for any tax, penalty, interest, fine, forfeiture, or other imposition or offense under the internal revenue laws or related statutes or the amount thereof for collection;

(iv) Establishing or verifying misconduct (or possible misconduct) or other activity proscribed by the internal revenue laws or related statutes;

(v) Obtaining the services of persons having special knowledge or technical skills (such as, but not limited to, knowledge of particular facts and circumstances relevant to a correct determination of a liability described in paragraph (a)(1)(iii) of this section or skills relating to handwriting analysis, photographic development, sound recording enhancement, or voice identification) or having recognized expertise in matters involving the valuation of property if relevant to proper performance of official duties described in

this paragraph;

(vi) Establishing or verifying the financial status or condition and location of the taxpayer against whom collection activity is or may be directed, to locate assets in which the taxpayer has an interest, to ascertain the amount of any liability described in paragraph (a)(1)(iii) of this section for collection, or otherwise to apply the provisions of the Internal Revenue Code relating to establishment of liens against such assets, or levy, seizure, or sale on or of the assets to satisfy any such liability;

(vii) Preparing for any proceeding described in section 6103(h)(2) or conducting an investigation which may result in such a proceeding; or

(viii) Obtaining, verifying, or establishing information concerned with making determinations regarding a taxpayer's liability under the Internal Revenue Code, including, but not limited to, the administrative appeals process and any ruling, negotiated agreement, or prefiling process.

(2) Disclosure of return information for the purpose of obtaining information to carry out properly the official duties described by this paragraph, or any activity connected with the official duties, is authorized only if the internal revenue or TIGTA employee reasonably believes, under the facts and circumstances, at the time of a disclosure, the information is not otherwise reasonably available, or if the activity connected with the official duties cannot occur properly without the disclosure.

(3) Internal revenue and TIGTA employees may identify themselves, their organizational affiliation with the Internal Revenue Service (IRS) (e.g., Criminal Investigation (CI)) or TIGTA (e.g., Office of Investigations (OI)), and the nature of their

investigation, when making an oral, written, or electronic contact with a third party witness through the use and presentation of any identification media (including, but not limited to, an IRS or TIGTA badge, credential, or business card) or through the use of an information document request, summons, or correspondence on IRS or TIGTA letterhead or which bears a return address or signature block that reveals affiliation with the IRS or TIGTA.

(4) This section does not address or affect the requirements under section 7602(c)(relating to contact of third parties).

(b) Disclosure of return information in connection with certain personnel or claimant representative matters. In connection with official duties relating to any investigation concerned with enforcement of any provision of the Internal Revenue Code, including enforcement of any rule, or directive prescribed by the Secretary or the Commissioner of Internal Revenue under any provision of the Internal Revenue Code, or the enforcement of any provision related to tax administration under the jurisdiction of the IRS or TIGTA, that affects or may affect the personnel or employment rights or status, or civil or criminal liability, of any former, current, or prospective employee of the Treasury Department or the rights of any person who is, or may be, a party to an administrative action or proceeding pursuant to 31 U.S.C. 330 (relating to practice before the Treasury Department), an internal revenue or TIGTA employee is authorized to disclose return information for the purpose of obtaining, verifying, or establishing other information which is or may be relevant and material to the investigation.

(c) Definitions. The following definitions apply to this section--

(1) Disclosure of return information to the extent necessary means a disclosure of

return information which an internal revenue or TIGTA employee, based on the facts and circumstances, at the time of the disclosure, reasonably believes is necessary to obtain information to perform properly the official duties described by this section, or to accomplish properly the activities connected with carrying out those official duties. The term necessary in this context does not mean essential or indispensable, but rather appropriate and helpful in obtaining the information sought. Nor does necessary in this context refer to the necessity of conducting an investigation or the appropriateness of the means or methods chosen to conduct the investigation. Section 6103(k)(6) does not limit or proscribe IRS or TIGTA officers and employees with respect to the decision to initiate or how to conduct an investigation. Disclosures under this subparagraph, however, may not be made indiscriminately or solely for the benefit of the recipient or as part of a negotiated quid pro quo arrangement. This paragraph (c)(1) is illustrated by the following examples:

Example 1. A revenue agent contacts a taxpayer's customer regarding the customer's purchases made from the taxpayer during the year under investigation. The revenue agent is able to obtain the purchase information only by disclosing the taxpayer's identity and the fact of the investigation. Depending on the facts and circumstances known to the revenue agent at the time of the disclosure, such as the way the customer maintains his records, it also may be necessary for the revenue agent to inform the customer of the date of the purchases and the types of merchandise involved for the customer to find the purchase information.

Example 2. A revenue agent contacts a third party witness to obtain copies of invoices of sales made to a taxpayer under examination. The third party witness provides copies of the sales invoices in question and then asks the revenue agent for the current address of the taxpayer because the taxpayer still owes money to the third party witness. The revenue agent may not disclose that current address because this disclosure would be only for the benefit of the third party witness and not necessary to obtain information for the examination.

Example 3. A revenue agent contacts a third party witness to obtain copies of invoices of sales made to a taxpayer under examination. The third party witness agrees to

provide copies of the sales invoices in question only if the revenue agent provides him with the current address of the taxpayer because the taxpayer still owes money to the third party witness. The revenue agent may not disclose that current address because this disclosure would be a negotiated quid pro quo arrangement.

(2) Disclosure of return information to accomplish properly an activity connected with official duties means a disclosure of return information to carry out a function associated with official duties generally consistent with established practices and procedures. This paragraph (c)(2) is illustrated by the following example:

Example. A taxpayer failed to file an income tax return and pay the taxes owed. After the taxes were assessed and the taxpayer was notified of the deficiencies, a revenue officer filed a notice of federal tax lien and then served a notice of levy on the taxpayer's bank. The notices of lien and levy contained the taxpayer's name, social security number, amount of outstanding liability, and the tax period and type of tax involved. The taxpayer's assets were levied to satisfy the tax debt, but it was determined that, prior to the levy, the revenue officer failed to issue the taxpayer a notice of right to hearing before the levy, as required by section 6330. The disclosure of the taxpayer's return information in the notice of levy is authorized by section 6103(k)(6) despite the revenue officer's failure to issue the notice of right to hearing. The ultimate validity of the underlying levy is irrelevant to the issue of whether the disclosure was authorized by section 6103(k)(6).

(3) Information not otherwise reasonably available means information that an internal revenue or TIGTA employee reasonably believes, under the facts and circumstances, at the time of a disclosure, cannot be obtained in a sufficiently accurate or probative form, or in a timely manner, and without impairing the proper performance of the official duties described by this section, without making the disclosure. This definition does not require or create the presumption or expectation that an internal revenue or TIGTA employee must seek information from a taxpayer or authorized representative prior to contacting a third party witness in an investigation. Moreover, an internal revenue or TIGTA employee may make a disclosure to a third party witness to corroborate information

provided by a taxpayer. This paragraph (c)(3) is illustrated by the following examples:

Example 1. A revenue agent is conducting an examination of a taxpayer. The taxpayer refuses to cooperate or provide any information to the revenue agent. Information relating to the taxpayer's examination would be information not otherwise reasonably available because of the taxpayer's refusal to cooperate and supply any information to the revenue agent. Therefore, the revenue agent may seek information from a third party witness. Neither the Internal Revenue Code, IRS procedures, nor these regulations require repeated contacting of an uncooperative taxpayer.

Example 2. A special agent is conducting a criminal investigation of a taxpayer. The special agent has acquired certain information from the taxpayer. Although the special agent has no specific reason to disbelieve the taxpayer's information, the special agent contacts several third party witnesses to confirm the information. The special agent may contact third party witnesses to verify the correctness of the information provided by the taxpayer because the IRS is not required to rely solely on information provided by a taxpayer, and a special agent may take appropriate steps, including disclosures to third party witnesses under section 6103(k)(6), to verify independently or corroborate information obtained from a taxpayer.

(4) Internal revenue employee means, for purposes of this section, an officer or employee of the IRS or Office of Chief Counsel for the IRS.

(5) TIGTA employee means an officer or employee of the Office of Treasury Inspector General for Tax Administration.

(d) Examples. The following examples illustrate the application of this section:

Example 1. A revenue agent is conducting an examination of a taxpayer. The taxpayer has been very cooperative and has supplied copies of invoices as requested. Some of the taxpayer's invoices show purchases that seem excessive in comparison to the size of the taxpayer's business. The revenue agent contacts the taxpayer's suppliers for the purpose of corroborating the invoices the taxpayer provided. In contacting the suppliers, the revenue agent discloses the taxpayer's name, the dates of purchase, and the type of merchandise at issue. These disclosures are permissible under section 6103(k)(6) because, under the facts and circumstances known to the revenue agent at the time of the disclosures, the disclosures were necessary to obtain information (corroboration of invoices) not otherwise reasonably available because suppliers would be the only source available for corroboration of this information.

Example 2. A revenue agent is conducting an examination of a taxpayer. The

revenue agent asks the taxpayer for business records to document the deduction of the cost of goods sold shown on Schedule C of the taxpayer's return. The taxpayer will not provide the business records to the revenue agent, who contacts a third party witness for verification of the amount on the Schedule C. In the course of the contact, the revenue agent shows the Schedule C to the third party witness. This disclosure is not authorized under section 6103(k)(6). Section 6103(k)(6) permits disclosure only of return information, not the return (including schedules and attachments) itself. If necessary, a revenue agent may disclose return information extracted from a return when questioning a third party witness. Thus, the revenue agent could have extracted the amount of cost of goods sold from the Schedule C and disclosed that amount to the third party witness.

Example 3. A special agent is conducting a criminal investigation of a taxpayer, a doctor, for tax evasion. Notwithstanding the records provided by the taxpayer and the taxpayer's bank, the special agent decided to obtain information from the taxpayer's patients to verify amounts paid to the taxpayer for his services. Accordingly, the special agent sent letters to the taxpayer's patients to verify these amounts. In the letters, the agent disclosed that he was a special agent with IRS-CI and that he was conducting a criminal investigation of the taxpayer. Section 6103(k)(6) permits these disclosures to confirm the taxpayer's income. The decision of whether to verify information already obtained is a matter of investigative judgment and is not limited by section 6103(k)(6).

Example 4. Corporation A requests a private letter ruling (PLR) as to the taxability of a merger with Corporation B. Corporation A has submitted insufficient information about Corporation B to consider properly the tax consequences of the proposed merger. Accordingly, information is needed from Corporation B. Under section 6103(k)(6), the IRS may disclose Corporation A's return information to Corporation B to the extent necessary to obtain information from Corporation B for the purpose of properly considering the tax consequences of the proposed merger that is the subject of the PLR.

(e) Effective date. This section is applicable on July 10, 2003.

Robert E. Wenzel,
Assistant Deputy Commissioner of Internal Revenue.

Approved: June 27, 2003.

Pamela F. Olson,
Assistant Secretary of the Treasury.