

**Internal Revenue Service
Memorandum**

CC:EL:D:4470-94
Br4:DSquires

date: Feb 15, 1995

to: Assistant Commissioner (Employee Plans and Exempt Organizations) CP:E

from: Assistant Chief Counsel (Disclosure Litigation) CC:EL:D

subject: Disclosures by PBGC to Contractors

This memorandum addresses the question of whether and under what circumstances officers and employees of the Pension Benefit Guaranty Corporation (PBGC) may disclose returns and return information to contractors. The PBGC has claimed a general authority to disclose tax information obtained from the IRS to contractors for any duties related to the administration of Title I and Title IV of ERISA. It bases its asserted authority on a Treasury regulation promulgated under the Internal Revenue Code provision authorizing IRS disclosures of tax information to the PBGC.¹

¹ PBGC relies on Treas. Reg. § 301.6103(1)(2)-3(c)(2)(ii), which permits disclosures by DOL, PBGC, and Department of Justice employees, where necessary in connection with the administration of titles I or IV of ERISA. Such disclosures may include, but are not limited to, disclosures where necessary:

(A) to properly obtain the services of persons having special knowledge or technical skills;

(B) to properly interview, consult, depose, or interrogate or otherwise obtain relevant information from the taxpayer to whom such return or return information relates (or the legal representative of such taxpayer) or any witness who may be called to give evidence in proceeding; or

(C) to properly conduct negotiations concerning, or obtain authorization for, settlement or disposition of the proceeding, in whole or in part, or stipulation of fact in connection with proceeding.

Disclosure of a return or return information to a person other than the taxpayer to whom such return or return information relates . . . to properly accomplish any purpose or activity described in this subparagraph should be made, however, only if such purpose or activity cannot otherwise properly be accomplished without making such disclosure.

Conclusion

The PBGC does not have a generalized authority to disclose tax information to contractors. Nor was such authority ever intended by Congress when it enacted I.R.C. § 6103. Moreover, the regulation relied upon in its claim for this authority applies only to litigation related activities. As explained below, this is evidenced by the regulation's own history and context within the statutory and regulatory scheme, by the regulation (and accompanying history) upon which it was patterned and by its contemporaneous and current interpretation by the IRS, which must be given significant if not controlling weight.

Discussion

Section 6103

Section 6103(a) of the Internal Revenue Code establishes a general framework in which tax information is confidential and may not be disclosed unless otherwise specifically authorized by the Code.² Church of Scientology of California v. Internal Revenue Service, 484 U.S. 1 (1987); United States v. Bachelier, 611 F.2d 443, 447 (3rd Cir. 1979) ("we must be ever mindful that when Congress enacts a statute [section 6103] designed to limit government intrusion into the private affairs of its citizens, the statutory provisions must be followed scrupulously").

² a) General rule.

Returns and return information shall be confidential, and except as authorized by this title--

- (1) no officer or employee of the United States,
- (2) no officer or employee of any State, any local child support enforcement agency, or any local agency administering a program listed in subsection (1)(7)(D) who has or had access to returns or return information under this section, and
- (3) no other person (or officer or employee thereof) who has or had access to returns or return information under subsection (e)(1)(D) (iii), (1)(12), paragraph (2) or (4)(B) or subsection (m), or subsection (n),

shall disclose a 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. For purposes of this subsection, the term "officer or employee" includes a former officer or employee.

Congress enumerated the circumstances in which tax information could be disclosed³ and strictly limited the situations in which tax information would be made available for purposes other than tax administration. See S. Rep. No. 938, 94th Cong. 2d Sess. 326-337 (1976), 1976-3 C.B. (Vol. 3) 324-373. Section 6103(1) delineates a handful of narrowly defined circumstances in which tax information may be disclosed for non-tax purposes directly related to the programs administered by the agency in question. Among these is section 6103(1)(2), which authorizes disclosures of tax information to the Department of Labor and the PBGC for purposes of administering the civil and criminal provisions of titles I and IV of ERISA. This section provides:

The Secretary may, upon written request, furnish returns and return information to the proper officers and employees of the Department of Labor and the Pension Benefit Guaranty Corporation for purposes of, but only to the extent necessary in, the administration of titles I and IV of the Employee Retirement Income Security Act of 1974.

I.R.C. § 6103 (1)(2). See S. Rep. No. 938, *supra*, at 334, 1976-3 C.B. (Vol. 3) 372.⁴ Section 6103(1)(2) does not authorize the disclosure of tax information to agents or contractors of the PBGC but only to the "proper officers and employees" thereof. This contrasts with other provisions of section 6103 which do provide such authority as discussed below.

Disclosures to Contractors

Section 6103 explicitly addresses the issue of disclosures to contractors in subsection (n), where it provides:

Pursuant to regulations prescribed by the Secretary, returns and return information may be disclosed to any person including any person described in section 7513(a), to the extent necessary in connection with the processing, storage, transmission, and reproduction of such returns and return information, the programming, maintenance, repair, testing and procurement of equipment, and the providing

³ See e.g., I.R.C. §§ 6103(d) (state tax officials), 6103(f) (Congressional committees), 6103(h) (Justice Department for tax administration), 6103(k) (miscellaneous other disclosures for tax administration).

⁴ . Section 6103(1)(2) previously existed as section 6103(g) which was added (with nearly identical language) by section 1022(h) of ERISA, P.L. 93-406, 1974-3 C.B. 110-111, without explanation.

of other services, for purposes of tax administration.

I.R.C. § 6103(n).⁵ Persons to whom disclosures are made under this section are specifically subject to civil and criminal penalties by virtue of their inclusion in section 6103(a)(3) and section 7213(a)(1), respectively. Moreover, disclosures made pursuant to this subsection are subject to the restrictions, limitations, and safeguard requirements set forth in Treas. Reg. § 301.6103(n)-1.

There are other isolated subsections of section 6103 which explicitly authorize the disclosure of discrete items of taxpayer data, consisting primarily of taxpayer address data, to agents of federal agencies to help locate taxpayers for a variety of federal non-tax programs.⁶ With rare exceptions, these agents are also included within the set of persons

⁵ For purposes of I.R.C. § 6103, the term "tax administration" is defined at I.R.C. § 103(b)(4) as follows:

(A) means---

(i) the administration, management, conduct, direction, and supervision of the execution and application of the internal revenue laws or related statutes (or equivalent laws and statutes of a State) and tax conventions to which the United States is a party, and

(ii) the development and formulation of Federal tax policy relating to existing or proposed internal revenue laws, related statutes, and tax conventions, and

(B) includes assessment, collection, enforcement, litigation, publication, and statistical gathering functions under such laws, statutes, or conventions

Pursuant to the authority under section 6103(n), the Treasury (including the IRS), the Tax Division of the Department of Justice, state tax agencies, and the Social Security Administration (to process W-2s for the IRS), may utilize the services of contractors where necessary for tax administration purposes.

⁶ See I.R.C. §§ 6103(m)(2) (disclosures of mailing address to agents of federal agencies to collect or compromise a Federal claim); 6103(m)(4) (disclosures of mailing address to agents of Department of Education to collect on a Pell Grant overpayment or a defaulted student loan administered by that agency); 6103(m)(5) (disclosures of mailing address to agents of the Department of Health and Human Services and certain schools and eligible lenders to collect on defaulted student loans administered by that agency); 6103(m)(7) (disclosures of mailing address to the agents of the Social Security Administration to send eligible taxpayers a social security account statement); and section 6103(1)(12) (filing

subject to civil and criminal penalties by virtue of section 6103(a)(3) and section 7213(a), and the safeguard requirements of section 6103(p)(4).

Other than section 6103(n) and the other isolated provisions designed to locate taxpayers, no other provision of the Code explicitly authorizes disclosure of tax information by federal agencies to contractors.⁷ The PBGC's asserted authority to disclose tax information to outside contractors is not authorized within the statutory framework created by section 6103.

Such authority, if allowed, would constitute a significant shift in taxpayer confidentiality. It would result in the anomalous situation whereby the IRS (and its tax administration contractors), and the PBGC, would be subject to civil and criminal penalties for unauthorized disclosures, as well as comprehensive administrative, technical, and physical safeguard requirements, but PBGC's contractors would not.⁸ Furthermore, the PBGC would be subject to less restrictive standards with respect to disclosing tax information to contractors than the IRS itself, which must abide by the procedures of Treas. Reg. § 301.6103(n). This was not the intent of Congress in section 6103(1) (2) nor does it reflect the strict control Congress placed on disclosures to contractors elsewhere in section 6103.

Such authority, if allowed, would also constitute a major policy change in the statute. Indeed, proposals were rejected by the Committee on Ways and Means during drafting of the Omnibus Budget and Reconciliation Act of 1993 which would have permitted

status and taxpayer identifying information for verification of employment status of medicare beneficiary and spouse of medicare beneficiary).

⁷ It should be noted that under section 6103(k)(6), which authorizes disclosures by the IRS to third parties for investigative purposes, the IRS issued regulations to explicitly permit disclosures to persons contracted for special technical skills such as handwriting analysis, valuation of property, etc. Treas. Reg. § 301.6103(k)(6)-1 (b) (5). In fact, this particular provision has been largely subsumed by I.R.C. § 6103(n), which was amended by P.L. 101-508, the Omnibus Budget Reconciliation Act of 1990 by adding in the phrase "the providing of other services." 1991-2 C.B. 509. This addition was made to clarify those persons who provided services to the IRS, and to whom the IRS disclosed tax information, for tax administration purposes, were covered by penalties for unauthorized disclosures. The amendment also makes clear that disclosures under section 6103(n) are not limited to contracts for mechanical and technological services. H.R. Conf. Rep. No. 964, 101st Cong., 2d Sess. 1076-1077 (1990), 1991-2 C.B. 581.

⁸ "[T]he express prohibitory language of § 6103(a)(3) is needed to extend its proscription" to private sector employees who provide necessary tax administration services pursuant to section 6103(n). Johnson v. Sawyer, 4 F.3d 369, 379 (5th Cir. 1993); see Wiemerslage v. United States, 838 F.2d 899, 903 (7th Cir. 1988).

other federal agencies to disclose tax information to their contractors for non-tax administration purposes pursuant to other subsections of section 6103(1).

The PBGC's Assertion of Regulatory Authority for Use of Contractors is not Supported by Those Regulations' Intent

Notwithstanding the clear intent of section 6103 to strictly control disclosures to contractors, the PBGC nevertheless argues that regulations issued pursuant to section 6103(1)(2) authorize it to disclose tax information to contractors. Unfortunately, their argument is not consistent with the reasons for and the history of those regulations.

There are three provisions of section 6103 under which essentially identical regulations have been issued permitting redisclosure of tax information in connection with agencies' participation in, and preparations for federal grand jury, civil and criminal proceedings. These consist of section 6103(h) (disclosures to the Department of Justice for tax administration), section 6103(i) (1)-(3) (disclosures to federal agencies for non-tax criminal investigations), and section 6103(1)(2) (disclosures to the PBGC and the Department of Labor for their administration of ERISA). As discussed below, however, none of these regulations was intended by the IRS to authorize the use of contractors.

Regulations Issued Under I.R.C. §§ 6103(h)(2) and 6103(1)(1)-(3)

As originally enacted as part of the Tax Reform Act of 1976, I.R.C. 6103(h)(2) authorized the IRS to disclose tax information to Department of Justice attorneys⁹ personally involved in, and for purposes of, their preparation for and use in federal grand jury or court proceedings. Section 6103(i) (1)-(3) authorized disclosures under special circumstances to other federal agencies for federal non-tax criminal investigations and prosecutions.

As the new statutory scheme attached criminal and civil penalties for unauthorized disclosures of tax data and because neither of these provisions explicitly permitted the agency recipients to redisclose the information provided to them, it was decided to issue regulations to clarify that some limited, yet necessary, redisclosures were nevertheless consistent with the language and intent of those statutes.

Specifically, in order to clarify that section 6103 did not intend to impede federal investigations and prosecutions, Treas. Reg. § 404.6103(h)(2)-1 (later renumbered as § 301.6103(h) (2)-1) (Attachment B) was issued providing that Justice Department attorneys may disclose tax information "to other persons" in connection with a limited scope of necessary ancillary activities associated with their prosecutorial duties: investigative activities, activities related to obtaining information from the taxpayer or other

⁹ The statute was later amended to authorize disclosures to all officers and employees of the Department of Justice. P.L. 95-600, § 503(a)(2), 1978-3 C.B. (Vol. 1) 113.

witnesses such as depositions or interviews, and activities related to negotiations with the taxpayer.¹⁰ The regulation listed certain categories of persons as among those to whom tax information could be disclosed: Justice Department supervisory and clerical employees, employees of other federal agencies working under the direction and control of DOJ employees and court reporters.

Clearly, the entire focus of this regulation is the ability for the Justice Department to carry out its normal prosecutorial duties, as was explained in a memorandum from Commissioner Alexander to Assistant Secretary for Tax Policy Charles M. Walker accompanying the regulations for final approval:

A principal purpose of proposed § 404.6103(h)(2)-1 is to describe the permissible [sic] uses which Justice Department attorneys may make of return and return information disclosed to them under section 6103(h)(2) for trial preparation and related tax investigative purposes. A second principal purpose of this proposed regulation is to clarify that, where necessary in the course of trial preparation or a related tax investigation, Justice Department attorneys may disclose returns and return information to, by way of illustration, supervisory and clerical personnel of the Justice Department, officers and employees of another Federal agency working under the direction and control of the Justice Department (for example, FBI or SEC investigators), and court reporters.

Although section 6103(h)(2), read literally, appears to restrict disclosure of Federal tax data to Justice Department attorneys for use only by them in preparing for trial or conducting a related tax investigation, it is obvious that the provision was not intended to ^b be so read. In the course of trial preparation or conducting a tax investigation, it is, of course, essential that the trial attorney be able to work, where necessary, with appropriate Federal investigators both within and without the Justice Department. Although it also logically follows that the trial attorney be permitted to disclose returns and return information to supervisory and clerical personnel of the Justice Department and to court reporters in taking depositions, for example, the Justice Department's Tax Division requested that some of these more common examples of permissible [sic] disclosures be illustrated in proposed § 404.6103(h) (2)-1 (b)(2).

Memorandum from Commissioner Donald C. Alexander to Assistant Secretary for Tax Policy Charles M. Walker (January 18, 1977), at 2.

While not meant to be an exhaustive list, the categories of persons enumerated in the regulations as potential recipients hardly reflect ^{the} intent to confer a general authority for the Department of Justice to disclose tax information to third parties for routine

¹⁰ Virtually identical regulations were simultaneously issued under I.R.C. § 6103(1)(1)-(3), (Attachment C) which authorizes disclosures to federal agencies for non-tax criminal investigations. The underlying concerns and rationale for these regulations are identical with those issued under (h) (2).

administrative tasks. Significantly, the only non-governmental persons specifically included are court reporters, who are essential for providing a written record of depositions, hearings, etc. but who are not ordinarily employed on a full-time basis by federal agencies.

That this regulation was not intended to function as a general authority to use contractors is further confirmed by an amendment to Treas. Reg. § 301.6103(n)-i in 1989 adding the Tax Division of the Justice Department to the list of entities authorized to disclose tax information to contractors for purposes of securing equipment or services relating to tax administration. T.D. 8271, 1989-2 C.B. 251-253; see 1989-1 C.B. 924-925. Obviously, this amendment would have been unnecessary if Treas. Reg. § 301.6103(h)(2) already authorized such disclosures.

Treas. Reg. 310.6103(1)(2)-3(c)(2) Authorizes Redisclosures by the PBGC for Litigation related Purposes and is not a General Authority for Disclosures to Contractors

As noted above, I.R.C. § 6103(1)(2) provides for the disclosure of tax information only to officers and employees of the Department of Labor and the PBGC for the administration of Titles I and IV of ERISA. As was the case with the use of tax information by the Justice Department, there was concern, upon the enactment of the Tax Reform Act of 1976, that the Department of Labor and the PBGC might be hindered in their ability to initiate civil and criminal prosecutions under ERISA if they could not disclose information to the Justice Department or to others as necessary to assist and prepare for such prosecutions.¹¹ Given the similar nature of the concerns, it is not surprising that the particular regulatory provisions adopted under section 6103(1)(2) to deal with this situation were virtually identical to those adopted under section 6103(h)(2) and (i) (1)-(3)-

As can be seen by its text, Treas. Reg. § 301.6103(1)(2)-3(c) (2) (Attachment A) precisely tracks the language of Treas. Reg. §§ 301.6103(h)(2) (Attachment B) and 301.6103(1) (1)-(3) (Attachment C). Subsection (i) of this regulation provides for disclosures by the PBGC and the DOL to officers and employees of the Justice Department for their use in (or preparation for) federal grand jury, civil or criminal proceedings. Subsection (ii) provides for disclosures to:

other persons, including, but not limited to, persons described in subparagraph (2) (iii) of this paragraph, but only to the extent necessary in connection with administration of the provisions of title I or IV of the Act, including a Federal grand jury proceeding, and

¹¹ The concern was brought to a head by the much publicized Central States case concerning the Government's review of the use of pension funds for members of the Teamsters' union. See e.g., Teamsters' Central States Pension Fund and General Erisa Enforcement: Hearings before the Subcommittee on Oversight of the Committee on Ways and Means, 95th Cong. 1st Sess. (1977).

proper preparation for a proceeding (or investigation), described in subparagraph (1) or (2)(i).

Tracking precisely the language of the (h)(2) and the (i) (1)-(3) regulations, subsection (ii) of the DOL/PBGC regulations specifies that disclosures "may include, but are not limited to, disclosures where necessary" to obtain specialized services, or to conduct interviews, depositions of the taxpayer or witnesses, "in connection with the proceeding" or to conduct negotiations "in connection with the proceeding." Subsection (iii) specifies that "[a]mong those persons to whom returns and return information may be disclosed" are other employees of the PBGC, Department of Labor and the Justice Department, officers and employees of other federal agencies (working under the direction of the PBGC, DOL and DOJ) and court reporters.

The PBGC argues that the language of the regulation which allows for disclosures to "other persons . . . to the extent necessary with the administration of . . . Title IV of the Act" constitutes broad authority for disclosures to contractors. Unfortunately, this literal interpretation is at odds with the intent of the regulations, as evidenced by Commissioner Kurtz's memorandum to Acting Assistant Secretary of the Treasury for Tax Policy Donald Lubick accompanying the regulations for final approval.

As Commissioner Kurtz's memorandum demonstrates, the IRS's concern was to ensure that section 6103(1)(2) not impede the DOL's and the PBGC's prosecutorial activities authorized by ERISA by prohibiting redisclosures necessary for those activities. Noting that ERISA both amended section 6103 to permit IRS disclosures to DOL and PBGC for the administration of ERISA and also authorized civil and criminal investigations by those agencies, the memorandum concludes:

The combination of the foregoing ERISA provisions and Section 6103(g)(1) of the Code prior to its amendment by the Tax Reform Act of 1976 clearly indicates that Congress intended that "administration" of Titles I and IV of ERISA for purposes of section 6103(g)(1) encompass investigations and civil and criminal litigation authorized by those titles, including authorized referrals of criminal matters to the Department of Justice. If such were not the case, there would have been no statutory authority under section 6103 for these contemplated disclosures by the Department of Labor, the Pension Benefit Guaranty corporation, and the Department of Justice. . . Thus, if the term "administration" in section 6103 (g)(1) were not broadly construed, the foregoing provisions of ERISA applicable to investigative activity and litigation would have been rendered

essentially inoperative insofar as the use of Federal tax data was concerned. It cannot be assumed that Congress intended such a result when it enacted ERISA.

Memorandum from Commissioner Jerome Kurtz to Assistant Secretary of the Treasury for Tax Policy (March 29, 1978) at 2-3. The memorandum later described the source of the language of the redisclosure provision:

These provisions are modeled after §§ 404.6103(h)(2)-1 and 404.6103(i)-1, applicable to disclosures of returns and return information to and by the Department of Justice in preparing for tax litigation or nontax Federal criminal litigation or related investigations.

Id. at 5-6.

The IRS Considered and Rejected Authorization for DOL and the PBGC to Disclose Identifiable Tax Information to Contractors

Significantly, the final flush language of Treas. Reg § 301.6103(1)(2)-(3) (c)(2) expressly forbids the disclosure of identifiable tax information by DOL and the PBGC to contractors for research and statistical projects. The Commissioner's memorandum noted that section 6103(n) is the sole statutory authority for disclosures to contractors and that section 6103(j) (the section authorizing disclosures to specified agencies for statistical purposes) does not authorize the use of contractors by even those agencies specifically authorized by that section to do such studies. The memorandum explains that Congress's intent to restrict the disclosure of tax information to contractors overrode any implied authority to the contrary in ERISA:

Section 513(a) of ERISA authorizes the Department of Labor to undertake research, survey, and other studies relating to employee benefit plans. These activities could, of course, invoke the use of return information. Section 513(a) (4) of ERISA permits such activities to be conducted by the Department of Labor directly or indirectly "through grant or contract arrangements." We understand that the Department of Labor now wishes to contract with an educational institution to perform certain activities described in Section 513(a) which would involve the disclosure of identifiable return information.

We believe that, Section 513(a)(4) of ERISA notwithstanding, Congress in its revision of section 6103 did not intend that Federal agencies be permitted to contract out permissible [sic] research and

statistical projects using identifiable return information.

Id. at 6. Clearly, the same reasoning and concern would have applied to any function for which the DOL or PBGC would have wanted to use outside contractors. In fact, a separate internal IRS memorandum prepared at the time reveals that the IRS did reject a broader proposal by DOL and PBGC to use contractors for routine processing of tax data.¹²

Conclusion

As demonstrated above, the regulations relied upon by the PBGC were intended to ensure that the DOL and PBGC could conduct civil and criminal investigations under ERISA and in coordination with the Department of Justice. PBGC's broad interpretation of these regulations is unsupported by their history and would represent a major policy shift away from the general prohibition against disclosures to contractors except as expressly provided by the Internal Revenue Code.

Please contact Donald Squires, at 622-4570, if you have any additional questions on this matter.

PETER V. FILPI

cc: Director, Employee Plans Division CP:E:EP
Director, Office of Disclosure CP:EX:D
Associate Chief Counsel (Employee Benefits and Exempt Organizations) CC:EBEO

¹² See Memorandum from David E. Dickinson, Assistant Director, Legislation and Regulations Division to Lester Stein, Associate Chief Counsel (Technical), March 10, 1978, at 2-3:

These regulations were coordinated with Labor and PBGC, which made a number of suggested changes. Many changes were adopted, others were rejected because they did not conform to section 6103 as a whole (e.g., it was suggested by Labor and PBGC that they could use outside contractors to process tax data without regard to section 6103(n)), and still others were rejected because of what we regarded to be the mistaken view that implied disclosure authority in ERISA overrode section 6103(1) (2).