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Chairman Klobuchar, Ranking Member Grassley and members of the Committee, my name is Jim Keightley. For 27 years I was in the Chief Counsel's Office of the Internal Revenue Service (IRS), and I was for many years involved with issues surrounding the disclosure of tax information under the Internal Revenue Code, particularly Code section 6103. Based on my experience at the IRS, I hope to clarify for the Committee the disclosure limitations facing the IRS in providing data to investigative organizations attempting to locate missing and abducted children. The views I express are my own, and my testimony has not been reviewed by any governmental organization.

I left the IRS in 1995 to become the General Counsel for the Pension Benefit Guaranty Corporation (PBGC). For those of you not familiar with the PBGC, it is a multi-billion dollar government corporation that guarantees the defined benefit pensions of millions of Americans, and currently pays 5.6 billion dollars annually in pension benefits to retirees whose pension plans have been taken over. As PBGC General Counsel, I continued to address taxpayer confidentiality issues. In 2005 I opened a law firm, Keightley & Ashner LLP, that specializes in defined benefit issues.

Brief History of the Taxpayer Confidentiality Provisions Prior to 1976

Prior to 1976, federal tax returns were treated as a "public record" but only made available outside the IRS when authorized by Presidentially approved regulations, or, on occasion, by a specific "Executive

Order." As I recall, for example, the Warren Commission investigating the assassination of President Kennedy was authorized by a specific Presidential Executive Order to obtain tax information in connection with its investigation. While that was noncontroversial, there were a number of instances in the mid-1970s of inappropriate disclosures authorized by the Executive Branch, including disclosures involving White House access. Congress changed the law in 1976 to limit severely access to federal tax returns and closed the so-called IRS "lending library." After 1976, only Congress could authorize access to tax returns and tax information.

The Dramatic Changes in 1976

Congress in 1976 adopted the predecessor of the current Code Section 6103, and much of the structure remains the same today. In making the changes, Congress drafted a comprehensive exclusive disclosure provision controlling virtually all disclosures to be made by the IRS. The opening language of Code Section 6103 says: "Returns and the return information shall be confidential, and except as authorized by this title . . . no officer or employee of the United States . . . shall disclose any return or return information . . . . " Code Section 6103(a). This language requires that a disclosure be authorized somewhere in the Internal Revenue Code. (Although most authorized disclosures are found in Section 6103, there are some minor disclosure provisions in other sections of the Code.)

The definition of protected material is expansive. While the provision protects tax returns themselves as we would expect, it also covers "return information." That is defined to include "any other data received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return . . . . " Code Section 6103(b)(2)(A).

In addition to the broad definitional scope of the statute, it also covers "functional disclosures." For example, the statute covers routine Investigative disclosures made by an agent who needs to disclose information in order to obtain information. (Just asking a question would disclose that an individual was under investigation, and a specific question regarding transaction could disclose the amount and nature of an item on a tax return). It even covers the disclosure of tax return information to the White House. It was felt to be unconstitutional to deny the President access to Executive Branch material, so a compromise was developed. Under the compromise, any disclosure to the White House would require a report by the disclosing official to Joint Committee on Taxation. Congressional access was also restricted: only tax-writing committees could request and receive tax information, and access by other committees had to be authorized by the full House or Senate.

Safeguarding Tax Information

While allowing access to some agencies, stringent requirements were included to ensure that the information was only used for the purposes for which it was given and protected from illegal or accidental disclosure. The IRS was given the authority to audit these safeguards and to cut off access if the safeguards were inadequate. These provisions included burdensome record keeping and documentation requirements.

Newly-added Enforcement Provisions

To ensure the efficacy of these new limitations, Congress made clear that violations would be prosecutable under a new criminal provision, Code Section 7213, and that civil damages could be sought under another provision, Code Section 7217 (now Section 7431).

Exclusively For Purposes of Tax Administration

The overall intent of the 1976 changes when viewed as a whole was to limit the use of tax information to tax administration. The 1976 changes did not authorize use for any nontax federal civil law enforcement purposes. While that was the original goal, you will find that has been changed by Congress over the years. Under Code Section 6103(I), there are now 20 subparagraphs dealing with "Disclosure of returns and return information for purposes other than tax administration." Each permitted use was specifically authorized by Congress.

Tax Confidentiality Policy

It is a reasonable question to ask why we afford taxpayers such a high degree of confidentiality. The answer lies in our self-assessment system. The implicit contract between the government and the taxpayers is that in exchange for you voluntarily providing extensive personal data, we will provide very limited access from the IRS. That arguably is why we have the best tax administration system in the world. That secret is voluntary compliance.

Access to Tax Information to Locate Missing Children

While it is clear to me that the IRS lacks the authority to disclose tax returns or return information to state and local investigative bodies under the current IRC provisions, in my view it is not clear how helpful the data would be in any event. It takes considerable amount of time for the IRS to compile comprehensive data for a given tax year allowing it to search to the SSN of the dependent who is missing or abducted. As a result the data may be out of date. In addition, once the disclosure is authorized by Congress, the abducting parent may simply stop taking the deduction or stop filing altogether. I also think some cost benefit analysis needs to be done regarding the cost burden in

complying with the disclosure requests. The more difficult question regarding a disclosure's impact on the voluntary assessment system is virtually impossible to measure, but should be kept in mind as proposals are considered.

Why does the abducting parent file a tax return?

There are a number of reasons. First, it is a crime to fail to file a return if you have taxable income. Second, it is easy for the IRS to determine if you have a taxable income because your wages and investment income are reported to the IRS by third parties. Third, in order to get credit for social security, you need to have a record of your contributions either through your employer or through self-employment taxes. Remember social security provides lifetime benefits in case of disability of the parent, or financial benefits for the dependent in the event of parental death. Finally and probably most important, the presence of the dependent on the return would allow the filer to qualify for the "earned income tax credit" which can be paid as a refund even you have not paid in any federal taxes.

In other words, it is very difficult not to file a federal income tax return and not get caught, and there is a strong financial incentive to file a return to get the benefit of the dependency deduction, as well as the earned income tax credit. The question becomes should Congress enact a disclosure law that discourages a taxpayer from filing an income tax return and penalizes the dependent and the parent financially?

Permitted Disclosures by Social Security Administration to State and Local Child Support Agencies

Congress has already provided significant federal disclosure authority in Code Section 6103(l)(8), a copy of which is set forth below.

(8) Disclosure of certain return information by Social Security Administration to Federal, State and local child support enforcement agencies

(A) In general

Upon written request, the Commissioner of Social Security shall disclose directly to officers and employees of a Federal or State or local child support enforcement agency return information from returns with respect to social security account numbers, net earnings from self-employment (as defined in section 1402), wages (as defined in section 3121(a) or 3401(a)), and payments of retirement income which have been disclosed to the Social Security Administration as provided by paragraph (1) or (5) of this subsection.

(B) Restriction on disclosure

The Commissioner of Social Security shall disclose return information under subparagraph (A) only for purposes of, and to the extent necessary in, establishing and collecting child support obligations from, and locating, individuals owing such obligations. For purposes of the preceding sentence, the term "child support obligations" only includes obligations which are being enforced pursuant to a plan described in section 454 of the Social Security Act which has been approved by the Secretary of Health and Human Services under part D of title IV of such Act.

(C) State or local child support enforcement agency

For purposes of this paragraph, the term "State or local child support enforcement agency" means any agency of a State or political subdivision thereof operating pursuant to a plan described in subparagraph (B).

It is unclear to me why this authority does not allow state and local child enforcement agencies to obtain information on the locations of individuals evading child support obligations. Whether or not the child is deducted as a dependent is not particularly relevant in searching for the elusive parent. There would seem to be no need to see the entire tax return of the elusive parent. Since Congress has already set a disclosure policy in this area, possibly a broader interpretation of the provision or minor change to this provision would be a solution to the problem confronting us today.

Change to Enforce Local Criminal Laws

It has been the policy adopted by Congress to preclude the use of federal tax information for purposes of enforcing local and state non tax criminal laws. To the extent that Congress were to authorize such access in this situation based on the existence of a criminal warrant, it would represent a major change in the philosophy reflected in the current disclosure provisions. In 1976, Congress closed the tax return "lending library" when it was administered by the Executive Branch. The question for Congress is whether they are prepared to reopen the library without regard to its impact on tax administration.