

# FLORIDA TAX REVIEW

Volume 10

2011

Number 10

## TRANSPARENCY IN PRIVATE COLLECTION OF FEDERAL TAXES

*T. Keith Fogg\**

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\* Associate Professor, Villanova University School of Law. Thanks to Rachel Zuraw and Fleming Ware for their exceptional research assistance. Thanks to Professor Les Book of Villanova University and the Villanova Junior Faculty Workshop for their review and guidance.

### ABSTRACT

Most federal taxes are collected from taxpayers by business entities, held in a public trust for the United States, and then paid over to the Internal Revenue Service (the IRS). While the vast majority of business entities pay over the taxes held in trust in a timely and appropriate manner, a sizeable amount, in dollar terms, does not get paid. The amount of unpaid “collected” taxes in 2008 created a \$58 billion tax gap item.

Disclosure law governing federal taxes defaults to non-disclosure for most tax returns. This general rule of non-disclosure governs the returns reporting the taxes collected by business entities even though the information on these returns is information concerning a public trust. This article analyzes the federal tax disclosure laws and concludes that the amount of taxes collected on behalf of the United States and the amount of these collected taxes paid over to the IRS should be disclosed. Rather than coming under the general rule of non-disclosure which applies to income tax returns and other returns reporting the liability of an individual or entity for the payment of taxes, these returns should be treated like the returns of pension plans, which are open for the public to see.

In addition to approaching the issue from the perspective of disclosure policy, the article also looks at the collection policy issues presented by the disclosure of this information. For the same policy reasons that Congress has decided compliance is enhanced by the disclosure of pension plans and the returns of exempt organizations, the article concludes that compliance would be enhanced by this proposal and the tax gap reduced.

### I. INTRODUCTION

Most federal taxes in the United States are collected by business entities as a routine part of their operations.<sup>1</sup> In order to promote efficiency, employers collect income taxes and social security taxes, while telephone companies, airlines, and certain other businesses collect federal excise taxes. The practice of using business entities to collect federal taxes has a long history in the United States.<sup>2</sup>

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1. IRC § 3102(a) (“The tax imposed by § 3101 shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid.”); IRC § 3402(a) (“Except as otherwise provided in this section, every employer making payment of wages shall deduct and withhold upon such wages a tax. . . .”). Collecting taxes from employees represents one form of collected taxes and the most common form. Taxes are collected for the government by business entities in other situations as well. The definition of collected taxes for purposes of this article is set out in note 13, *infra*.

2. The use of business entities to collect employment taxes, for example, dates back to 1943, when President Roosevelt signed into law the Current Tax

Although private entities are continuously entrusted with enormous sums of money, there has been little debate concerning this collection process. However, when Congress passed Internal Revenue Code (IRC) section 6306 in 2004,<sup>3</sup> which permitted private debt collectors to pursue unpaid taxes, privacy debates surprisingly abounded.<sup>4</sup> No part of these debates addressed the fact that business entities<sup>5</sup> regularly perform pre-assessment collection.<sup>6</sup> Similarly, in the debates concerning disclosure law, the special nature of the pre-assessment collection, and the reporting of that

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Payment Act, which authorized withholding taxes. Current Tax Payment Act, Ch. 120, 57 Stat. 126 (1943). Some excise taxes were collected even prior to this, leading to the passage of the criminal tax provision which was the antecedent of the current trust fund recovery penalty found in IRC § 6672. See Gerald P. Moran, *Willfulness: The Inner Sanctum or Unnecessary Element of Section 6672*, 11 U. Tol. L. Rev. 709, 723 (1980).

3. All references and citations to sections hereinafter are to sections of the Internal Revenue Code of 1986, as amended, unless otherwise indicated.

4. The Bush administration persuaded Congress that private tax collectors could bring into federal coffers money going unattended by the IRS. The IRS struggled through a period of setting rules for these private collectors before entering into contracts permitting them to begin collection. Critics of the program, including the National Treasury Employees Union and the National Taxpayer Advocate, complained loud and long before passage of IRC § 6306, during the writing of the regulations and the contracts, and after the private collectors began. The complaints ultimately led to the cancellation of the contracts. Currently, there is no post-assessment collection by business entities.

5. This discussion focuses on collection by business entities, but it must be acknowledged that pre-assessment collection of federal taxes occurs by any employer in the United States which, of course, includes local, state, and federal governments, as well as tax-exempt entities.

6. The term pre-assessment collection is used here to describe collection of federal taxes before the IRS has made an assessment of those taxes. This circumstance can easily be seen in the employment tax context. When ABC, Inc. pays John Smith wages, it withholds \$100 each week from John's wages to pay that amount over to the IRS. This amount is credited toward John's income and social security tax liability for the tax year in which the wages are paid. At the time the taxes are collected by ABC, Inc. from John's wages, John has not filed a tax return for the tax year relating to the withholding, and the IRS has not made an assessment against John for those taxes. The amount withheld is simply placed into John's account for that tax year as a credit which will be applied when John does file his tax return at a later time. Contrast this with the post-assessment collection of taxes by a private collector. The post-assessment collection occurs after John has filed his tax return or otherwise had a federal tax assessment occur with respect to his liability. His account balance for the year at issue shows that John has not paid into the account sufficient funds to satisfy the tax liability. So, the IRS or a private tax collector seeks additional funds from John at that point to satisfy the outstanding debt.

collection, was not discussed. This recent situation highlights the fact that if the public is so concerned with individuals being pursued by private debt collectors for tax liabilities, the same level of concern should exist when other private entities collect taxes on the IRS's behalf.<sup>7</sup>

This article does not suggest changing the system by which business entities collect federal taxes in the pre-assessment context. The current system generally works very well. Rather, this article seeks to show how the current system of pre-assessment collection of federal taxes by private parties would benefit from disclosure and align this activity with other situations in which disclosure policy has determined that transparency, rather than confidentiality, is important.

The collection of federal taxes by business entities creates public trusts, where the business entities act as trustees and the United States becomes the beneficiary.<sup>8</sup> Despite the public nature of these trusts, tax returns filed by business entities reporting these trust receipts and dispositions are kept confidential under current disclosure laws. The current law shields information about these public trusts, treating returns filed by business entities similarly to returns from taxpayers that report income taxes or other private tax information. This article proposes that current disclosure law and policy treats these collected tax returns incorrectly, and instead should acknowledge the benefit of publishing returns reporting money held in trust for the United States.<sup>9</sup>

Section 6103 provides for the non-disclosure of most tax information reported to the IRS. Certain narrow exceptions exist within this section when the benefits of disclosure outweigh the costs. This article does not recommend creating another exception to section 6103 with respect to collected tax returns. Instead, this article proposes that the provision requiring the disclosure of taxes held in trust should rest in section 6104, which governs the return information of tax-exempt organizations, pension plans, and political organizations.

For almost 150 years since the enactment of the first income tax in 1861, Congress has grappled with the disclosure policy it should employ

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7. This characterization of the debates surrounding the enactment of IRC § 6306 is not meant to ignore the complexity of issues associated with the statute. It is merely meant to shed light on the fact that the debates concerning private debt collection have not addressed pre-assessment collection by business entities.

8. IRC § 7501.

9. The returns that business entities file concerning collected tax information should contain only information about the taxes collected and paid over to the government and not other tax information. As discussed in more detail below, the proposal here also includes a recommendation that returns reporting money held in trust should only report information about the money held in trust and not blend that information with matters on which the business entities are directly liable for taxes and on which they are entitled to the full protection of the disclosure laws.

with respect to tax information.<sup>10</sup> Disclosure policy seeks to strike a balance between privacy interests and the benefits derived from publicity. The policy debate has primarily centered on individual and corporate income taxes,<sup>11</sup> with some attention, starting in 1950,<sup>12</sup> on tax-exempt organizations. Almost no attention during this debate has focused on collected taxes,<sup>13</sup> which businesses must hold in a statutory or public trust for the United States.<sup>14</sup>

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10. In 1998 Congress mandated in § 3802 of the Revenue Reform Act that the Joint Committee on Taxation and the Treasury Department prepare reports on disclosure law. The Joint Committee on Taxation (JCT) report was issued in three volumes: Volume I covers more general issues, Volume II discusses issues involving exempt organizations, and Volume III contains letters from states and tax authorities on the costs and benefits of disclosure. The JCT Report, Staff of the Joint Committee on Taxation, *Study of Present-Law Taxpayer Confidentiality and Disclosure Provisions as Required by § 3802 of the Internal Revenue Service Restructuring and Reform Act of 1998*, (2000) [hereinafter JCT Report (Vol. I)], contains a thorough history of disclosure laws in the United States in Volume I at pages 246-79. While some disclosure history will be briefly summarized below, a more detailed summary of the history exists in Volume I of the JCT Report, *Study of General Disclosure Provisions*. Although Volume I of the Treasury Department report (Treasury Report) notes that a Volume II will be published focusing on IRC § 6104, no Volume II was published by the Treasury Department. Documented in email dated July 7, 2010 from Channprett Singh, IRS Office of the Chief Counsel (on file with the author). Dep't of the Treasury, Office of Tax Policy, *Report to The Congress on Scope and Use of Taxpayer Confidentiality and Disclosure Provisions* (2000) [hereinafter Treasury Report]. Therefore, all references to the Treasury Report herein are to Volume I.

11. See JCT Report (Vol. I), *supra* note 10, at 5-6, 127-33; Treasury Report, *supra* note 10, at 33-37; see also Paul Schwartz, *The Future of Tax Privacy*, LXI, *Nat'l Tax J.* 883, No. 4, 2, (2008); and Marc Linder, *Tax Glasnost' for Millionaires: Peeking Behind the Veil of Ignorance along the Publicity-Privacy Continuum*, 18 *N.Y.U. Rev. L. & Soc. Change* 951 (1990-91).

12. Pub. L. No. 81-814, § 341, 64 Stat. 906, 960 (1950); see Staff of the Joint Committee on Taxation, JCS-1-00, *Study on Present-Law Confidentiality and Disclosure Provisions as Required by Section 3802 of the Internal Revenue Service* (Vol. II) (2000) 124 (“This provision, § 153(c) of the 1939 Code, was the earliest version of § 6104. Section 153(c) was codified as § 6104(a) of the 1954 Code without amendment. Pub. L. No. 83-591 (1954).”) [hereinafter JCT Report (Vol. II)].

13. The term “collected taxes” will be used in this article to describe taxes that an individual or entity must collect on behalf of the United States and hold for payment over to the United States at some future point. The most common collected taxes are employment taxes that consist of two parts: withheld income taxes and withheld social security taxes. Although employment taxes receive the most attention, in some ways they do not fit as neatly into the definition of collected taxes since the employer does not actually receive any money from its employees, but simply sets aside money it would otherwise have paid to them in order to pay that money over to the IRS. The fiction in this analysis is that often the employer never has the money allegedly set aside. Contrast this type of collected tax with excise

Given the amount of collected money withheld and not remitted to the United States, and the compelling governmental interest in ensuring that the United States receives these funds, this neglect is a serious policy mistake, and has contributed to the billions of dollars of withheld taxes that businesses have not paid over to the United States. This article discusses the relationship between collected taxes and relevant disclosure law and determines that collected tax information more closely resembles the information of tax-exempt organizations and pension plans than that of individuals or corporations reporting income taxes and other types for which those entities are directly liable.

As discussed below, this insight is crucial, as it reveals that the disclosure policy considerations for tax-exempt organizations and pension plans start with a bias for disclosure, while the policy for income tax liabilities starts with a bias for confidentiality.<sup>15</sup> This article concludes that tax returns concerning collected taxes fall onto the tax-exempt and pension plan side of the line for purposes of determining disclosure policy, and consequently recommends a wholesale revision of the disclosure statutes, particularly section 6104, to provide for disclosure of collected tax returns. This recommendation is based principally on disclosure policy. Because disclosing collected tax returns benefits the collection process, the article will

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taxes, in which entities actually collect money from their customers on behalf of the United States and hold the money so collected for the benefit of the United States until the filing of the excise tax return. Common examples of excise taxes are the communications excise tax, which the phone company collects from its customers each month, and the airline excise tax, which the airline collects as it sells the ticket. These excise taxes essentially equate with the sales taxes imposed in most states. As will be discussed below, many states draw a distinction between sales taxes and employment taxes. The basis for this distinction must lie in the fact that a third party has physically given to the seller the actual tax dollars due to the government, in contrast to employment taxes, where the employer should set aside those dollars from its general operating account. This is the same description of the term collected taxes used in a previous article, T. Keith Fogg, *In Whom We Trust*, 43 *Creighton L. Rev.* 357 (2010) [hereinafter Fogg, *Trust*].

14. “Whenever any person is required to collect or withhold any internal revenue tax from any other person and to pay over such tax to the United States, the amount of tax so collected or withheld *shall be held to be a special fund in trust* for the United States.” IRC § 7501(a) (emphasis added). This statutory provision creates a trust in which the collected or withheld taxes are kept.

15. This bias in favor of disclosing tax information of tax-exempt organizations is described in the JCT Report: “Thus, the Joint Committee staff believes that the general principle governing disclosure of information regarding tax-exempt organizations is that such information should be disclosed unless there are compelling reasons for nondisclosure that clearly outweigh the public interest in disclosure.” JCT Report (Vol. I), *supra* note 10, at 6. See also *infra* Part IV.B.

also discuss the positive influence that revising disclosure policy will have on collection policy with respect to these returns.

In addition to revealing the policy flaws in current disclosure law, this article recommends a straightforward solution to the problem. To effectuate the disclosure of collected tax information, this article recommends changing the design of collected tax returns by creating return forms that specifically require business entities to report collected taxes. These forms would contain some information similar to the information reporting found on the forms for tax-exempt organizations. The information would then be publicly posted in a manner similar to posting returns of tax-exempt organizations in section 6104. The specifics of this aspect of the proposal will be discussed in detail below.

As I have discussed in prior articles,<sup>16</sup> the failure to pay collected taxes represents a significant, if not highly publicized, segment of the tax gap.<sup>17</sup> The prior articles focused on attacking this corner of the tax gap by improving the functionality of the responsible person penalty<sup>18</sup> and by creating a better structure for promoting payment of collected taxes.<sup>19</sup> This article focuses on the impact that greater transparency can have on the collected tax issue. With greater transparency of the collection and payment of collected taxes, the potential exists for improved compliance in this area.

This article will first briefly examine the history of disclosure laws over the past 150 years. Second, it will discuss the current system of using business entities to collect taxes for the United States and how the collected monies are held and paid over to the United States. Third, the article will look at the policy behind sections 6103 and 6104 and propose placing returns reporting collected taxes within the policy considerations behind those two code sections. Fourth, it will recommend changes in current tax returns forms to cause the forms to separate collected tax information from other entity tax obligations. Fifth, it will discuss the mechanics involved and how the disclosure of information should take place. Lastly, the article will examine how this proposed change to disclosure policy might positively impact collection issues, including an examination of current law regarding publicity of outstanding liabilities and numerous state provisions regarding shaming.

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16. See Fogg, Trust, *supra* note 13; T. Keith Fogg, Leaving Money on the Table and Providing an Incentive Not to Pay—The Story of a Flawed Collection Device, 5 *Hastings Bus. L.J.* 1 (2009) [hereinafter Fogg, Leaving Money on the Table].

17. U.S. Gov't Accountability Office, GAO-08-617, Tax Compliance: Businesses Owe Billions in Federal Payroll Taxes (2008).

18. See generally Fogg, Leaving Money on the Table, *supra* note 16.

19. See generally Fogg, Trust, *supra* note 13.

## II. HISTORY OF DISCLOSURE LAWS

Almost since the adoption of an income tax system, Congress has debated the appropriateness of publishing the returns of individuals and entities reporting that income.<sup>20</sup> In addition to income taxes, Congress has imposed several other types of taxes in its quest to gather enough money to satisfy its spending appetite.<sup>21</sup> Most of the taxes reported to the IRS fall under the disclosure provisions of section 6103, which prohibits the IRS from disclosing the information on those returns except in specifically prescribed situations.<sup>22</sup>

While the United States initially experimented with public disclosure of tax returns and return information, it evolved fairly early in the income tax era into a restrictive posture with respect to the general availability of information from tax returns.<sup>23</sup> This more restrictive posture treated returns as public documents but subject to disclosure rules established by the President.<sup>24</sup> Under this system, public disclosure of returns generally did not occur. Broad disclosure of returns and return information, however, took place within the federal government. In the disclosure provisions prior to 1977, Congress deferred to the executive branch to create rules governing this area. Within this context, a significant shift occurred in 1977 in reaction to President Richard Nixon's use of tax information.<sup>25</sup>

The Nixon White House used tax return information to attack the President's "enemies," and consequently Congress began more carefully to

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20. See JCT Report (Vol. I), *supra* note 10, at 246-79 for a comprehensive discussion of the history of the disclosure laws. This section does not seek to provide comprehensive information concerning this history but only to assist the reader in understanding the policy debates that have occurred concerning disclosure of tax information.

21. See, e.g., IRC § 1 (imposing income tax on individuals); § 11 (imposing income tax on corporations); § 1201 (outlining capital gains tax on corporations); § 2001(a) (imposing tax on transfers of estates); § 2501 (imposing tax on gifts); § 4001 (imposing tax on luxury vehicles); § 4051 (imposing tax on heavy trucks and trailers); § 4064 (imposing tax on gas guzzlers); § 4191 (imposing tax on medical devices); § 4261(a) (imposing tax on taxable transportation); § 4261(b) (imposing tax on air transportation); § 4375 (imposing fee on health insurance); § 4401 (imposing tax on wagers); § 4471 (imposing tax on covered voyages); § 4611 (imposing tax on petroleum); § 5701 (imposing tax on cigarettes).

22. The general rule of non-disclosure of tax information is set out in § 6103(a), which provides in part that "[r]eturns and return information shall be confidential," and except as provided in 6103 the information cannot be disclosed.

23. See Robert P. Strauss, *State Disclosure of Tax Return Information: Taxpayer Privacy Versus The Public's Right to Know*, 5 *State Tax Notes* 24, 25 (1993).

24. *Id.* at 25-26.

25. *Id.* at 26.



monitor the use of tax information.<sup>26</sup> Its review of the situation resulted in a significant revamping of section 6103 in 1976 to the statutory structure that exists today.<sup>27</sup> Through the Tax Reform Act of 1976, Congress set out to eliminate the ability of the executive branch to obtain and use tax information, and it successfully terminated that practice by removing the President's control of disclosure exceptions.<sup>28</sup> Instead of granting broad discretion to the executive branch, Congress took the disclosure power upon itself and created a series of narrow exceptions to govern disclosure of tax information. These limited exceptions produced a scheme in which non-disclosure of tax information now serves as the guiding premise.<sup>29</sup>

The debate over privacy of returns has not uniformly marched toward keeping private all tax information, but rather has meandered as different types of tax information came under scrutiny. Disclosure of individual income tax information came up for debate with the Revenue Act of 1864, which provided that tax lists would be public.<sup>30</sup> This debate continued in 1870 when the Commissioner ended publication in newspapers, but the information remained open to inspection.<sup>31</sup> Congress stepped into the debate in 1894 with the reenactment of the income tax by prohibiting publishing of tax information and imposing criminal sanctions for violations.<sup>32</sup>

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26. *Id.*; David Lenter, Joel Slemrod, & Douglas Shackelford, Public Disclosure of Corporate Tax Return Information: Accounting, Economics, and Legal Perspectives, *LVI National Tax Journal* 813 (2003).

27. The Privacy Protection Study Commission, created as part of the Privacy Act of 1974, recommended that Congress make major changes to the disclosure of federal tax information. The Watergate scandal and ensuing disclosure policy recommendations caused Congress to evaluate access to taxpayer records. *JCT Report (Vol. I)*, *supra* note 10, at 256.

28. Tax Reform Act of 1976, Pub. L. No. 94-455, § 1202(a)(1), 90 Stat. 1667; IRC § 6103(a).

29. *Compare* IRC § 6103 (1976) *with* § 6103 (effective 1977).

30. Lenter, Slemrod, & Shackelford, *supra* note 26, at 807.

31. Act of July 14, 1870, 16 Stat. 256, 259 (“[N]o collector, deputy collector, assessor, or assistant assessor shall permit to be published in any manner such income returns, or any part thereof, except such general statistics, not specifying the names of individuals or firms, as he may make public, under such rules and regulations as the commissioner of internal revenue shall prescribe.”).

32. 28 Stat. 509, 557 ch. 349 (“Sec. 34. That . . . the Revised Statutes of the United States as amended are hereby amended so as to read as follows: Sec. 3167. That it shall be unlawful for any collector, deputy collector, agent, clerk or other officer or employee of the United States to divulge . . . the amount or source of income. . .”).

The issues surrounding the disclosure of returns by business entities did not surface until much later.<sup>33</sup> In 1909 the Payne–Aldrich Tariff passed, which imposed an excise tax on corporations.<sup>34</sup> This law contained conflicting provisions on the public nature of corporate returns, with one paragraph explicitly making them public records and the next punishing the divulgence of information.<sup>35</sup> The confusion caused by the conflicting provisions of the 1909 legislation resulted in an amendment to the provision in 1910 which stated that “any and all such returns shall be open to inspection only upon the order of the President under rules and regulations to be prescribed by the Secretary of the Treasury and approved by the President.”<sup>36</sup> This language essentially created a compromise between those who thought that corporate returns should be fully open to the public and those who did not.<sup>37</sup> The amendment also left the corporate returns as “public records,” but only open to public inspection with the President’s authorization.<sup>38</sup>

After the passage of the Sixteenth Amendment permitting income taxes, Congress passed tax legislation in 1913 to exercise its newly created

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33. See JCT Report (Vol. I), *supra* note 10, at 248-49. The Joint Committee on Taxation Report does not discuss any debate concerning disclosure of these types of returns, suggesting that returns filed by business entities did not become an issue until later.

34. Act of Aug. 5, 1909, ch. 6, § 38, 36 Stat. 11, 112.

35. The sixth and seventh paragraphs of § 38 of the legislation read as follows:

Sixth. When the assessment shall be made, as provided in this section, the returns, together with any corrections thereof which may have been made by the commissioner, shall be filed in the office of the Commissioner of Internal Revenue and shall constitute public records and be open to inspection as such.

Seventh. It shall be unlawful for any collector, deputy collector, agent, clerk, or other officer or employee of the United States to divulge or make known in any manner whatever not provided by law to any person any information obtained by him in the discharge of his official duty, or to divulge or make known in any manner not provided by law any document received, evidence taken, or report made under this section except upon the special direction of the President; and any offense against the foregoing provision shall be a misdemeanor and be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding one year, or both, at the discretion of the court.

36 Stat. 11, 116-17.

36. Appropriations Act of 1910, ch. 297, 36 Stat. 468, 494.

37. IRS Disclosure and Privacy Law Reference Guide 1-3 to 1-4, available at <http://www.irs.gov/pub/irs-pdf/p4639.pdf>.

38. *Id.* at 1-4.

taxing authority.<sup>39</sup> In this legislation Congress essentially adopted the compromise on disclosure adopted in the 1910 provision.<sup>40</sup> The debate surrounding the confidentiality of tax return information continued for two more decades with each side citing the policy reasons for and against publicity.<sup>41</sup> In 1924 Congress ordered the Commissioner to prepare and make publicly available the names, addresses, and amounts of tax of individuals and corporations filing returns.<sup>42</sup> In 1934 Congress enacted further disclosure and then repealed it less than a year later.<sup>43</sup> Concerns over

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39. The 16th Amendment states that “[t]he Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.” U.S. Const. amend. XVI.

40. Section G(d) of the Tariff Act of 1913 provided:

When the assessment shall be made, as provided in this section, the returns, together with any corrections thereof which may have been made by the Commissioner, shall be filed in the office of the commissioner of Internal Revenue and shall constitute public records and be open to inspection as such: Provided, That any and all such returns shall be open to inspection only upon the order of the President, under rules and regulations to be prescribed by the Secretary of the Treasury and approved by the President. . . . 38 Stat. 144, 177.

41. *Compare* Harrison on Tax Dodging, N.Y. Times, Feb. 23, 1898 (reporting statement of President Benjamin Harrison before the Union League Club of Chicago in 1898: “Each citizen has a personal interest, a pecuniary interest in the tax return of his neighbor. We are members of a great partnership, and it is the right of each to know what every other member is contributing to the partnership and what he is taking from it,” with Paul Schwartz, The Future of Tax Privacy, 41 Nat’l Tax J. 883, 891 (2008) (With the statement of Secretary of the Treasury, Mellon: “[w]hile the government does not know every source of income of a taxpayer and must rely upon the good faith of those reporting income, still in the great majority of cases this reliance is entirely justifiable, principally because the taxpayer knows that in making a truthful disclosure of the sources of his income, information stops with the government. It is like confiding in one’s attorney”).

42. Lenter, Slemrod, & Shackelford, *supra* note 26 (citing Revenue Act of June 2, 1924, ch. 234, § 257(b), 43 Stat. 293).

43. Section 55(b) of the Revenue Act of 1934, 48 Stat. 680, 698 provided: “Every person required to file an income return shall file with his return, upon a form prescribed by the commissioner a correct statement of the following items shown upon the return: (1) name and address, (2) total gross income, (3) total deductions, (4) net income, (5) total credits against net income for purposes of normal tax, and (6) tax payable. . . . Such statements or copies thereof shall as soon as practicable be made available to public examination and inspection in such manner as the Commissioner, with the approval of the Secretary, may determine, in the office of the collector with which they are filed, for a period of not less than three years from the date they are required to be filed.”

kidnapping, resulting from the publicity of individual income, overrode concern for the public's need for this information, causing repeal of the 1934 disclosure provisions in 1935.<sup>44</sup> From 1935 until 1976, little changed in tax disclosure provisions, with Presidential order controlling disclosure of return information.<sup>45</sup> During this period, Presidential decree inhibited the publicity of tax return information, but availability of this information increased among government agencies.<sup>46</sup>

In 1976 Congress enacted sweeping changes to section 6103, severely restricting the use of tax return information.<sup>47</sup> Essentially, through legislation Congress assumed the role of determining which information to disclose, removing this authority from the executive branch.<sup>48</sup> Since the 1976 revisions to section 6103, merely cosmetic changes have occurred. In section 3802 of the Revenue Reform Act of 1998, Congress provided for a major study of the disclosure laws.<sup>49</sup> That section ordered the Joint Committee on Taxation and the Treasury Department to submit reports to Congress on the state of the disclosure laws and any needed changes. These reports provide a significant overview of the disclosure laws from both historical and policy perspectives and also outline legislative proposals.<sup>50</sup> Nothing in these reports or in any legislative history specifically addresses the recommendation of this article that returns of collected taxes present different issues than income tax returns and other returns reporting taxes of taxable entities.

In addition to section 6103, which provides the primary directives on disclosure issues, two other statutes exist in the Internal Revenue Code which provide significant guidance concerning disclosure issues—sections 6104 and 6110. Section 6104 got its legislative start in 1950 when Congress first gave legislative attention to the different disclosure considerations

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44. Act of April 19, 1935, ch. 74; 49 Stat. 158 (repealing the pink slips).

45. JCT Report (Vol. I), *supra* note 10, at 254 & n.1056 (“In 1939, the disclosure provisions were codified at § 55 of the Internal Revenue Code. In 1954, the disclosure provisions moved to their present location in § 6103. No material change was made from existing law.”)

46. See *id.* at 255-56.

47. Tax Reform Act of 1976, Pub. L. No. 94-455 § 1202(a)(1), 90 Stat. 1667.

48. See generally Staff of Joint Committee on Taxation, 94th Cong., 2d Sess., General Explanation of the Tax Reform Act of 1976 313-316 (Comm. Print 1976), available at 1976-3 C.B. (Vol. 2) 325-328.

49. “The Joint Committee on Taxation and the Secretary of the Treasury shall each conduct a separate study of the scope and use of provisions regarding taxpayer confidentiality, and shall report the findings of such study . . . to Congress.” Revenue Reform Act of 1998, Pub. L. No. 105-206, § 685.

50. The JCT Report and the Treasury Report are so thorough that they must be read by anyone with an interest in this area. As discussed below, this article takes off from the point of many of the disclosure policies stated in the Joint Committee Report.

regarding returns of tax-exempt organizations.<sup>51</sup> Essentially, section 6104 takes the opposite approach to section 6103 and provides for disclosure of the tax information of tax-exempt organizations.<sup>52</sup> This disclosure occurs because of the tax benefits received by the tax-exempt organizations and a perceived need for public awareness of the affairs of organizations that receive a public subsidy.<sup>53</sup>

Section 6110 resulted from litigation under the Freedom of Information Act (FOIA)<sup>54</sup> seeking disclosure of private letter rulings.<sup>55</sup> In 1976, as Congress revised section 6103, it added section 6110 to create a more open system for parties trying to understand the IRS positions on specific transactions. Prior to section 6110 certain law firms that regularly made private letter ruling requests had significant information on IRS ruling positions that was unavailable to the general public.<sup>56</sup> Section 6110 opened up the IRS decision making process. The IRS removes taxpayer identifying information and certain other data in the published rulings before the data is made public.<sup>57</sup> The inclusion of Chief Counsel Advice in 1998 significantly expanded the scope of section 6110.<sup>58</sup> Litigation by Tax Analysts has

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51. Revenue Act of 1950, 64 Stat. 906, 960, Pub. L. No. 81-814, § 341. Section 153(c) of the 1939 Code was the earliest version of § 6104. Section 153(c) was later codified as § 6104(a) of the 1954 Code, without amendment. JCT Report (Vol. II), supra note 12, at 124 (citing Pub. L. No. 83-591 (1954)).

52. Unlike IRC § 6103, which starts with a blanket statement prohibiting disclosure without an exception, § 6104 outlines what will be open to the public, addressing first tax-exempt organizations in § 6104(a)(1) and then pension plans in (a)(2).

53. See JCT Report (Vol. II), supra note 12, at 5-6, 121.

54. Pub. L. No. 89-487, 80 Stat. 250.

55. See JCT Report (Vol. I), supra note 10, at 82 & n. 293 (citing *Tax Analysts & Advocates v. IRS*, 505 F.2d 350 (D.C. Cir. 1974) and *Fruehauf Corp. v. IRS*, 75-2 U.S.T.C. ¶ 16,189 (6th Cir. 1975)).

56. See *id.*

57. Treasury Report, supra note 10, at 27.

58. Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3509, 112 Stat. 685, 772-74 (*codified* at IRC § 6110(i)); H.R. Rep. No. 105-599, at 298-99 (1998) (Conf. Rep.), *reprinted* in 1998 U.S.C.C.A.N. See Mitchell Rogovin & Donald L. Korb, *The Four R's Revisited: Regulations, Rulings, Reliance, and Retroactivity in the 21st Century A View From Within*, 46 Duq. L. Rev. 323, 357 at n. 60 (2007-08) (“The Act also added Chief Counsel Advice to the definition of a “written determination” in IRC § 6110(b). By including Chief Counsel Advice within the disclosure framework of IRC § 6110, . . . Congress intended to remove the advice from disclosure under the Freedom of Information Act, 5 U.S.C. § 552 (2000 & Supp. V 2005). See IRC § 6110(m) (2000) (providing that “written determinations” are not subject to mandatory disclosure); H.R. Rep. No. 105-599, at 302 (1998) (Conf. Rep.), *reprinted* in 1998 U.S.C.C.A.N.”).

increasingly expanded the interpretation of 6110's disclosure provisions, as it constantly pushes for disclosure of more information.<sup>59</sup>

The history of the disclosure provisions demonstrates a fairly broad consensus that privacy interests trump publicity of most tax returns and return information except in narrowly drawn circumstances. Broad exceptions to that consensus exist with respect to the returns of tax-exempt organizations, political organizations, and pension plans. This article argues that the private collection of federal taxes should trigger application of the broad exception to the general rule of privacy. To understand why, it is necessary to understand how the private collection of federal taxes operates.

### III. COLLECTING TAXES FOR THE UNITED STATES

Using business entities to collect taxes for the government results in efficient and often seamless tax collection as demonstrated by the significant percentage of federal taxes collected in this manner.<sup>60</sup> Incorporating the collection of taxes into the purchase price of goods and services, a process which occurs with sales and excise taxes, requires little additional time or effort to collect the tax beyond making payment for the underlying item. Similarly, using employers to collect income and social security taxes directly out of employees' wages produces efficiencies and reduces compliance concerns because the taxpayer never sees the money but merely receives a net paycheck. By collecting taxes through such transactions, the government uses efficient structural tax principles which increase compliance while simultaneously lowering both the collection costs and the bitterness associated with making tax payments.<sup>61</sup>

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59. See, e.g., *Tax Analysts v. IRS*, 350 F.3d 100 (D.C. Cir. 2003).

60. See Written Testimony Before the Senate Comm. on Homeland Security and Governmental Affairs Permanent Subcomm. On Investigations on the Collection of Federal Employment Taxes, 110th Cong. 2 (2008) (statement of Linda Stiff, Deputy Commissioner, Services and Enforcement, IRS) ("Today, employment taxes represent the largest portion of total tax dollars collected by the IRS. In FY 2007 for example, of the \$2.7 trillion in taxes collected by the IRS, \$1.7 trillion was payroll taxes. This means that approximately two out of every three dollars collected by the IRS are from required withholding on employment tax returns. Of this \$1.7 trillion collected in withholding and FICA taxes approximately \$778 billion was collected for Social Security and Medicare and approximately \$992 billion was collected for individual withholding taxes.")

61. See generally, e.g., Edward K. Cheng, *Structural Laws and the Puzzle of Regulating Behavior*, 100 NW. U. L. Rev. 655 (2006); Leandra Lederman, *Statutory Speed Bumps: The Roles Third Parties Play in Tax Compliance*, 60 Stan. L. Rev. 695 (2007); Richard H. Thaler & Cass R. Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (2008); Erich Kirchler, *The Economic Psychology of Tax Behavior* (2007).

One of the most common ways in which businesses collect excise taxes on the government's behalf involves telephone companies. For example, telephone companies collect most of the communications excise tax<sup>62</sup> as they collect telephone bill payments from their customers, simply adding the excise tax to the amount of the bill.<sup>63</sup> The bill clearly details the amount of the excise tax, separating the amount from the bill's total. Upon receipt of payment, the telephone company sets aside the portion of the payment that represents the tax. The telephone company then reports the excise tax to the IRS on a Form 720, which is filed by the telephone company on a quarterly basis. Payments of the communications excise tax occur along with the filing of the Form 720.<sup>64</sup> At present the Form 720 reports both excise taxes collected by the entity from others as well as excise taxes for which an entity has its own liability. Proposed revisions to Form 720 to create a new form specifically for reporting collected taxes are discussed in more detail below.

The most important taxes commonly collected by business entities are employment taxes—social security taxes and Medicare taxes—and income taxes on wages of employees withheld by their employer for the benefit of the United States. With respect to these taxes, the employer calculates the amount of taxes it should withhold from each employee's paycheck. Each time the employer pays its employees, it pays them the net amount of wages after withholding income and social security taxes and any other deductions.<sup>65</sup> The employer should set aside the money it holds back from the employees for payment of their income and social security taxes.<sup>66</sup> Unlike excise taxes, where the entity actually collects the taxes from a third party, the employer "collects" these taxes from itself. The theory is that an employer with a gross payroll of \$10,000 will have \$10,000 with which to pay the wages. It will pay \$7,000 to its employees and place the other \$3,000

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62. IRC § 4251 imposes a tax on communications services, including local telephone service, toll telephone service, and teletypewriter exchange service.

63. IRC § 4291 ("[E]very person receiving any payment for facilities or services on which a tax is imposed upon the payor thereof under this chapter shall collect the amount of the tax from the person making such payment."). Airlines use a similar system as they collect the airline excise tax from their customers. The amount of the excise tax is added to the cost of the ticket and collected at the time of purchase.

64. IRS, Instructions for Form 720 (Rev. July 2010) ("Use Form 720 and attachments to report liability by IRS No. and pay the excise taxes listed on the form.").

65. IRS, Publication 15: (Circular E), Employer's Tax Guide, available at <http://www.irs.gov/pub/irs-pdf/p15.pdf>.

66. *Id.* There may be instances in which the entity need not set this money aside in a separate account, but can continue to hold it in the entity's general account.

into a trust account and in such a manner collect the taxes.<sup>67</sup> Since some employers may have only have \$7,000 at the time of the payment of payroll, the concept of collected taxes sometimes breaks down when cash poor employers lack the resources necessary to satisfy the tax obligations of its employees. The law, however, does not distinguish between taxes collected from third parties as part of an excise tax and taxes collected from employees to satisfy the employees' income and social security taxes.<sup>68</sup>

The public nature of the trust comes not only from the description of the monies held in section 7501 but also in the manner in which the money is treated once collected. When a taxpayer pays a telephone bill that includes the communications excise tax, the taxpayer's liability ends there because that taxpayer receives credit for the payment of the excise tax regardless of whether the telephone company actually pays over the tax.<sup>69</sup> Similarly, the employee whose wages are withheld does not need to worry about whether the employer pays the withheld income and social security taxes over to the IRS because that employee receives credit for the payment regardless of whether the employer pays over the withheld taxes.<sup>70</sup> In essence the entity

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67. See *infra* note 183 (providing discussion of *Begier v. IRS*, 496 U.S. 53 (1990)).

68. IRC §§ 6672, 7501 (both addressing collected taxes, but neither provision specifying which type of collected taxes). States do make distinctions between sales taxes and withholding taxes which can ultimately only be attributed to this difference. See, e.g., Fogg, Trust, *supra* note 13, at 418 app. (listing states which have adopted bonding laws for unpaid sales taxes with no complimentary bonding laws for unpaid withholding taxes); see also Fogg, Leaving Money on the Table, *supra* note 16, at 44-45 (discussing how certain states charge interest to responsible officers from due date of sales tax return but not due date of withholding tax return).

69. IRC § 31(a)(1) provides that “[t]he amount withheld as tax under chapter 24 shall be allowed to the recipient of the income as a credit against the tax imposed by this subtitle.” No parallel credit provision exists for excise taxes such as the communication or airline excise taxes; however, the same rules of principal and agent govern the transaction. When a taxpayer pays their phone bill, including the communications excise tax, that taxpayer expects credit for such payment and would not welcome an appearance by the IRS seeking to collect the tax from the taxpayer for a second time. This circumstance is acknowledged by Robert Schriebman in his text *IRS Tax Collection Procedures*, where he stated that “[i]f a collecting agency (other than a partnership or sole proprietorship) has failed to pay over excise taxes it has collected from patrons or members, the IRS will explore the possibility of asserting the trust fund recovery penalty against the collecting agency’s responsible persons.” Robert S. Schriebman, *IRS Tax Collection Procedures: A Manual for Practitioners* ¶ 1309-1 (3rd ed. 2005). His statement acknowledges the liability of the collecting entity for the excise tax.

70. IRC § 31(a)(1) (“The amount withheld as tax under chapter 24 shall be allowed to the recipient of the income as a credit against the tax imposed by this subtitle.”).



collecting the taxes becomes an agent of the United States. It does not hold the collected money for the benefit of the individuals whose taxes are collected but rather for the benefit of the United States Treasury. Because the funds are held for the public benefit, the public nature of the trust exists not only by virtue of the statutory language which labels it a trust<sup>71</sup> but also because of the operation of the trust and the monies it holds.<sup>72</sup>

The legislative history of the disclosure provisions does not contain a discussion concerning why public trusts such as those held by business entities with collected tax dollars are subject to the same disclosure laws, or rather, non-disclosure laws, as income tax returns. Congress did, however, provide for disclosure of certain types of returns and identified the reason for its, treatment of those returns. The benefits that tax-exempt organizations receive often serve as a basis for the policy argument behind disclosing their tax return information.<sup>73</sup>

While business entities holding these trusts of collected taxes do not receive the same subsidies received by tax-exempt organizations,<sup>74</sup> some similarities exist between the benefits these entities receive and the benefits received by tax-exempt organizations and pension plans. First, the businesses do control funds for days or weeks, depending on their size, as the money passes from the taxpayer to the IRS.<sup>75</sup> For businesses with a high number of employees or large amounts of excise tax, the cash flow benefit could be substantial, even if short lived. Temporary control of this money helps to offset the cost of administering the tax, even though many businesses may not view it as much of a subsidy. Second, businesses are granted the right to operate subject to certain obligations that exist regardless of whether the business is tax-exempt. The grant of authority to operate a business is the grant of a potentially valuable benefit which should not entirely be overlooked. Collecting taxes is a price the business must pay for the privilege of operating. Third, the money held in trust for the public in the collected tax situation is not unlike the money held in trust by a pension for its beneficiaries. It also bears similarities to other public trusts which keep their records open to the public.<sup>76</sup>

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71. See IRC § 7501.

72. See *infra* note 183 (providing discussion of *Begier v. IRS*, 496 U.S. 53 (1990)).

73. JCT Report (Vol. II), *supra* note 12, at 6.

74. Tax-exempt organizations also must comply with the employment tax provisions. Many tax-exempt organizations have large employee bases and collect vast amounts of taxes from their employees.

75. The payment of excise taxes generally occurs semimonthly, with several narrow exceptions. IRS, Publication 510: Excise Taxes 41, available at <http://www.irs.gov/pub/irs-pdf/p510.pdf>.

76. The Code currently provides for eleven public trust funds: IRC § 9501, Black Lung Disability Trust Fund, § 9502, Airport and Airway Trust Fund, § 9503,

Other reasons exist for disclosing returns of collected taxes, particularly employment tax returns reporting withheld income and social security taxes. The first of these ancillary reasons stems from the peculiar circumstances of employment tax returns. Many of these returns are prepared by “payroll tax providers.” These providers prepare the returns, sign the returns, pull the money from taxpayers’ checking accounts, and file the returns and the required remittances. Taxpayers essentially turn everything about payroll taxes over to firms that provide this service.<sup>77</sup>

If collected tax returns were publicly posted, the accessibility of information on a public website would allow taxpayers who rely on payroll providers to pay their taxes to ensure that their taxes were paid. Of course, these taxpayers could go to the IRS now and make a request for their transcripts, but the availability of a website with an easy search feature might help to reduce the problem caused by payroll providers with a bent to steal—a small collateral benefit to this proposal.

A second ancillary reason for disclosing collected tax returns involves the federal government and its relationships with federal contractors. The federal government has a goal of not contracting with those who do not pay their federal taxes.<sup>78</sup> On January 20, 2010, President Obama signed a memorandum directing government officials to recommend how to ensure that no new federal contracts were awarded contractors delinquent in paying their federal taxes.<sup>79</sup> One obvious way to accomplish this goal would be to publish the delinquent collected tax data in a form easily retrieved by

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Highway Trust Fund, § 9504, Sport Fish Restoration and Boating Trust Fund, § 9505, Harbor Maintenance Trust Fund, § 9506, Inland Waterways Trust Fund, § 9507, Hazardous Substance Superfund, § 9508, Leaking Underground Storage Tank Trust Fund, § 9509, Oil Spill Liability Trust Fund, § 9510, Vaccine Injury Compensation Trust Fund, and § 9511, Patient-Centered Outcomes Research Trust Fund. The Treasury website contains monthly financial reports for trust funds administered by the Treasury Department. Treasury Direct, Trust Fund Financial Reporting, <http://www.treasurydirect.gov/govt/reports/tfmp/tfmp.htm>.

77. Because of the “trusting” nature of taxpayers who rely on payroll providers, a number of these providers have perpetrated Ponzi style schemes in which they take the money from the taxpayers’ accounts and use some of it for personal gain rather than using the money to pay the taxes. By the time the schemes collapse, potentially thousands of taxpayers who actually had money drawn out of their accounts to pay over the collected taxes find themselves with a tax bill. See, e.g., *In re FirstPay, Inc.*, Nos. 09-1076, 09-1107, 2010 WL 3199858 (4th Cir. Aug. 13, 2010). See also Fogg, *Trust*, supra note 13, at 384.

78. See U.S. Gov’t Accountability Office, GAO-05-637, *Financial Management: Thousands of Civilian Agency Contractors Abuse the Federal Tax System with Little Consequence*, at intro (2005), [hereinafter GAO 2005 Report].

79. See Michael Joe, *Obama Seeks to Block Tax Debtors from Receiving Federal Contracts*, 2010 Tax Notes Today 13-3 (Jan. 21, 2010).

federal contracting officers since collected taxes comprise over 90% of the unpaid federal tax debts of contractors seeking federal contracts.<sup>80</sup>

This article does not seek to change the practice of having third parties collect taxes for the IRS or the method by which third parties collect these taxes. Rather, it seeks to shed light on that process by changing the disclosure law regarding these taxes. Amending current disclosure law will not only significantly enhance the chances of closing the multi-billion dollar tax gap that exists because of the failure to pay over these collected taxes, but this change will also correctly align the disclosure laws with their policy considerations.

#### IV. DISCLOSURE POLICY CONSIDERATIONS

Disclosing tax return information brings together competing policies of openness and transparency against privacy rights, fiercely held individualism, and concerns for unnecessary government intrusion. Disclosure also brings up competing claims concerning the benefits of openness. Proponents of opening up more information to the public cite the positive effects they perceive such openness will have on compliance.<sup>81</sup> Opponents, on the other hand, cite it as a concern, suggesting that it will detract from compliance as taxpayers become fearful that accurately reporting their taxes will negatively affect other aspects of life.<sup>82</sup>

In order to determine when transparency should trump privacy and vice versa, it is necessary to examine the benefits and concerns raised on each side of the policy coin. Privacy concerns heighten when disclosure of tax information: (1) concerns individuals rather than entities; (2) may disclose trade secrets or other information that might damage the taxpayer's business; (3) discourages rather than promotes accurate reporting of information; (4) results in associated costs which outweigh the benefits of

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80. GAO 2005 Report, *supra* note 78, at intro.

81. See Christopher S. Rizek, *Taxpayer Privacy and Disclosure Issues Will Continue to Touch Us All*, in *The Future of American Taxation: Essays Commemorating the 30th Anniversary of Tax Notes 81, 89*, available at [http://www.aei.org/docLib/20021222\\_conf021210d.pdf](http://www.aei.org/docLib/20021222_conf021210d.pdf) ("The short answer is, unfortunately, that no one really knows as a factual matter what the link is between the confidentiality of taxpayer information and voluntary compliance. The claim that confidentiality fosters compliance is rather, something like an article of faith, for or against which only anecdotal and not particularly conclusive evidence can be offered.").

82. See generally Treasury Report, *supra* note 10 (making the concern for collateral non-reporting a basis for its recommendations concerning correct policy in this area, and placing much more emphasis on this factor than the JCT report).

the information so disclosed; (5) fosters misunderstanding; and (6) politicizes the process.<sup>83</sup>

Concerns for the need to disclose information heighten when disclosure of tax information involves (1) an entity that receives significant tax subsidies, such as a tax-exempt organization, (2) an entity that is reporting information about funds held in trust for others such as pension plans, (3) an entity that, while receiving tax subsidies, exerts influence without adequate accountability of those exerting the influence, such as the concerns driving section 527(j),<sup>84</sup> or (4) the tax returns containing information valuable to other government entities under circumstances where further release of the information can be controlled.<sup>85</sup>

The Joint Committee on Taxation Report (JCT Report), which Congress directed the Joint Committee on Taxation to prepare on disclosure law, describes presumptions either for or against disclosure.<sup>86</sup> The general recommendation of the staff of the Joint Committee with respect to returns and return information was that information “should not be provided unless the requesting *agency* can establish a compelling need for the disclosure that clearly outweighs the privacy interests of the taxpayer.”<sup>87</sup> In contrast to this

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83. See JCT Report (Vol. I), *supra* note 10, at 127-33 and Treasury Report, *supra* note 10, at 33-37 for a policy discussion on the last two points. See also Mark Boyle, TEI Opposes Public Disclosure of Corporate Tax Returns, 2006 Tax Notes Today 115-18 (June 12, 2006) (discussing the last two factors). Mr. Boyle strongly opposed disclosure of corporate tax returns, citing many reasons for his opposition. Interestingly, one reason was that “public disclosure of corporate tax returns would effectively represent the outsourcing of a core governmental function—the examination of tax returns—to the public or the media.” That comment provides an interesting bookend to the discussion of disclosure surrounding private tax collectors, below.

84. See JCT Report (Vol. II), *supra* note 12, at 5-9 (providing policy discussion related to the three points listed above).

85. For example, the Department of Justice may access returns and return information for use in tax administration proceedings. IRC § 6103(h)(3). The Department of the Treasury may access returns and return information when a need to know is demonstrated. Section 6103(h)(1). The Department of Commerce, the Federal Trade Commission, and the Department of Agriculture all may access returns and return information upon written request to the IRS. See JCT Report (Vol. I) *supra* note 10, at 43-44; see also Rizek, *supra* note 81, at 86-87 (discussing heavy use by outside sources of incredible database maintained by IRS, which each claimant for exception sees as important resource).

86. *Compare* JCT Report (Vol. I), *supra* note 10, at 5 (discussing IRC § 6103), *with* JCT Report (Vol. II), *supra* note 12 at 4 (discussing § 6104).

87. JCT Report (Vol. I), *supra* note 10, at 6 (emphasis added). Emphasis is added to the word “agency” because the JCT’s use of that word makes an important statement as a part of this policy. That term basically speaks of disclosures to government entities and not to individuals. Yet, two of the exceptions contained in §

general rule with respect to tax returns stands the policy recommendation concerning tax-exempt organizations, stating that “disclosure of information regarding tax-exempt organizations . . . should be disclosed unless there are compelling reasons for nondisclosure that clearly outweigh the public interest in disclosure.”<sup>88</sup> Tax-exempt organizations, pension plans, and political organizations thus receive a presumption for, instead of against, disclosure.

As a starting point, this article adopts the two general principles<sup>89</sup> set out by the Joint Committee staff that a presumption of non-disclosure of return information governs most return information and that a presumption of disclosure governs the information of tax-exempt organizations. These principles fit the consensus on disclosure matters that has essentially controlled disclosure rules during the modern era of tax administration and certainly reflects the consensus in effect since 1934 and the repeal of the “pink slips.”<sup>90</sup> Exploring the reasons behind these general principles provides an opportunity to determine where the returns of collected taxes should fall, and allows a testing of these principles against a specific type of tax information that has received very little, if any, attention in the policy debates surrounding disclosure.

The Joint Committee Report identifies the principal reason for the general rule of non-disclosure: privacy. The right to privacy is a bedrock principle in the United States.<sup>91</sup> It has driven the policy debate concerning disclosure from its inception. A second reason for the rule of non-disclosure is the view that confidentiality promotes accuracy on the returns submitted because taxpayers do not need to worry about collateral effects of reporting

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6103 concern disclosures to individuals and not to government entities. Section 6103(c), (e). The essential exclusion of these two exceptions in the JCT Report’s conclusion concerning disclosure policy reflects, as discussed below, that disclosures to individuals almost always occur only in the absence of privacy interests.

88. JCT Report (Vol. II), *supra* note 12, at 6.

89. Perhaps the better view of the second principle is that it is simply a broad exception to the first and not really a second principle unto its own. Many exceptions to the general rule of non-disclosure exist in § 6103, and the disclosure of tax-exempt returns in § 6104 simply represents one of those exceptions, albeit a broad one.

90. Act of Apr. 19, 1935, ch. 74, 49 Stat. 158.

91. Although privacy has a strong foundation in this country, individuals arguably have severely diminished privacy expectations due to the advances of the Internet Age. A simple search in a search engine of an individual’s name may produce results detailing that individual’s political party affiliation, locations where the individual owns property and how much each is worth, phone numbers and even relatives of the individual, and a link to the individual’s Facebook profile. With all of this information “floating” around and easily accessible by the public, privacy considerations for tax return information, which may reveal less than what an internet search may uncover, are potentially worth less than they used to be.

accurate information if they know that the returns stay within the IRS.<sup>92</sup> The principal countervailing interest to privacy in this debate is the benefit that disclosure provides by shedding light on corrupt practices. This was a principle that weighed heavily for Progressives in the early part of the 20th century and drove the disclosure provisions enacted in 1909, 1924, and 1933, discussed above. While privacy eventually defeated the Progressive position and the presumption of non-disclosure won with respect to most tax returns, the victory has not meant complete confidentiality. As the JCT Report states, the showing of a compelling interest can overcome the general principle.<sup>93</sup>

The table below clearly outlines the disadvantages and benefits of disclosing tax return information.

Disadvantages of Disclosure

1. Tax returns contain private information which the government compels taxpayers to report, and when disclosed, the individual may lose significant privacy protections.<sup>94</sup>
2. Tax return information that concerns individuals implicates greater privacy concerns.<sup>96</sup>

Benefits of Disclosure

1. The disclosure of information may be necessary in order to protect taxpayer rights.<sup>95</sup>
2. The informational value of the data from the return may outweigh the privacy concerns and safeguards exist to protect privacy to the greatest extent possible.<sup>97</sup>

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92. JCT Report, (Vol. I), supra note 10, at 5; Treasury Report, supra note 10, at 34; see also Rizek, supra note 81, at 89.

93. JCT Report (Vol. I), supra note 10, at 238.

94. Id. at 5.

95. Without disclosure of the existence of the federal tax lien, the government cannot perfect its lien interest with respect to certain competing creditors. IRC § 6323. Alternatively, if the lien of the government can defeat competing creditors without their ability to know of the lien, lending would dry up as creditors feared for the security of their loans.

96. See *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (holding that “corporations can claim no equality with individuals in the enjoyment of a right to privacy”); S. Rep. No. 94-938, at 328 (1976). (“The committee decided that the information that the American citizen is compelled by our tax laws to disclose to the Internal Revenue Service was entitled to essentially the same degree of privacy as those private papers maintained in his home.” This discussion focused on the ability to obtain tax information in non-tax criminal matters and highlights the kind of sensitivity surrounding tax information of individuals.)

97. Id. at 5.

Disadvantages of Disclosure

3. Tax return information that contains trade secrets of a business implicates greater privacy concerns.<sup>98</sup>
4. When the disclosure of return information would discourage accurate reporting of information, the benefits of disclosure must overcome the concerns of inaccuracy.<sup>100</sup>

Benefits of Disclosure

3. The disclosure of information assists in closing the tax gap.<sup>99</sup>
4. When an entity is publicly traded, certain information on the return could influence investor behavior.<sup>101</sup>

97. Statistical disclosures and state matching programs fall into this benefit category.

98. In a letter from Michael P. Boyle, International President of Tax Executives Institute, to Senators Grassley and Baucus dated June 12, 2006, Mr. Boyle expressed concerns about expanded disclosure of corporate tax returns, listing several reasons. One of his concerns specifically addressed the issue of proprietary information:

“Public disclosure of tax returns of publicly traded corporations would also reveal confidential and proprietary data not currently contained in consolidated financial statements, including revenue and expense information by legal entity, jurisdiction, and functional category (e.g., sales, dividends, cost of sales). Although much if not all of the information in a tax return would be confusing to the majority of investors, disclosure would clearly aid a company’s competitors enormously in understanding the taxpayer’s business practices. Where a company’s competitors are not subject to U.S. taxing jurisdiction (and, hence, not subject to the same disclosure rules), the comparative disadvantage would be even more pronounced.”

Boyle, *supra* note 83, at 4.

See also Strauss, *supra* note 23, at 29 (stating that disclosure “in this instance could disadvantage the individual company as competitors learn the private details of the company’s activities. For small public companies, and for companies with foreign competitors this problem is most pronounced, because for small companies there will be a close relationship between their state and federal return and what they provide to the Massachusetts secretary of state for public review. They would now have their private financial affairs subject to competitive scrutiny. Foreign competitors of a domestic firm would not have to disclose the financial circumstances of their offshore parent companies, while now gaining access to information about the financial circumstance of the domestic firm.”).

99. States have used this in adopting their shaming provisions.

100. JCT Report (Vol. I), *supra* note 10, at 5.

101. See Joe Thorndike, *Tax History: Promoting Honesty by Releasing Corporate Tax Returns*, 96 *Tax Notes* 324, 324 (July 15, 2002); Marjorie E. Kornhauser, Letter to the Editor: More Historical Perspective on Publication of

Disadvantages of DisclosureBenefits of Disclosure

5. When the costs of disclosure outweigh the benefits, the decision to disclose becomes impractical.<sup>102</sup>

6. Disclosure has the potential to foster misunderstanding of the information in a manner that disadvantages the tax system or the taxpayer whose information was disclosed.<sup>103</sup>

The two statements from the JCT Report setting out the policies governing disclosure create several factors against which to test a request for a disclosure exception. The application of these tests permits a reasonable determination of whether a new proposed change to disclosure laws follows established policies. These policies are embedded in the subparagraphs of

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Corporate Returns, 96 Tax Notes 745 (July 29, 2002). These articles describe the perceived benefits of disclosing corporate tax returns as a means of informing investors.

In arguing that publication of corporate tax shelter participation may have the opposite effect desired by proponents of such publication, Joshua Blank points out that investors have been positively motivated to invest in corporations seen as aggressively seeking to lower their taxes. Joshua D. Blank, *What's Wrong With Shaming Corporate Tax Abuse*, 62 Tax L. Rev. 539, 560, 561 & n. 116 (2009) (citing Michelle Hanlon & Joel Slemrod, *What Does Tax Aggressiveness Signal? Evidence from Stock Price Reactions to News About Tax Shelter Involvement*, 93 J. Pub. Econ. 126, 128 (2009)).

102. See Lederman, *supra* note 61, at 725 n. 174 (citing Theodore P. Seto, *The Assumption of Selfishness in the Internal Revenue Code: Reframing the Unintended Tax Advantages of Gay Marriage* 6 (Loyola Law Sch. L.A., Legal Studies Paper No. 2005-33, 2005), available at <http://ssrn.com/abstract=850645>). Of course, a cost-benefit analysis is essential in every policy decision. The benefits listed below are simply a part of this analysis.

103. In comments on taxpayer confidentiality submitted to the Joint Committee on Taxation and the Treasury Department, the Tax Executives Institute (TEI) stresses the necessity of the confidentiality of taxpayer information to "the integrity of the tax system." See Charles W. Shewbridge, "Taxpayer Confidentiality Must Remain Paramount," TEI Says, 1999 Tax Notes Today 206-60 (Oct. 21, 1999). This is a big concern of TEI. TEI has also expressed concern that public disclosure of corporate tax returns would implicate the need to protect taxpayers from their return information being misused for political purposes. Boyle, *supra* note 83. Of course, this is a big concern in general about the disclosure of return information and is essentially reflected in the first reason.



section 6103 that contain the exceptions to the general rule of non-disclosure.<sup>104</sup>

A. *IRC Section 6103*

Section 6103 outlines the disclosure principles regarding tax information, beginning with the general rule of confidentiality. The code section then creates exceptions to this rule through a series of four basic steps, detailed below.

*First.* Does the disclosure contain a “return” or “return information?”<sup>105</sup> If the information sought is not a return or return information, then more general federal laws concerning disclosure of information take over.<sup>106</sup> If the information sought is return or return information, however, then the general rule of non-disclosure takes effect, with no disclosure absent an exception.

*Second.* Does disclosure of the information raise privacy concerns? If the disclosure is to the taxpayer or to the taxpayer’s proxy, privacy concerns are not implicated. In this situation, the reason for disclosure need not be compelling and may be simply that a taxpayer wants to view his own tax return.

When disclosure is to someone other than the taxpayer or the taxpayer’s proxy, the next inquiry is whether the tax information concerns individuals. An individual’s tax information has the greatest presumption of

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104. The rules listed here do not include the disclosure exceptions carved out in § 6104, which will be discussed separately below:

- 1) The entity receives substantial subsidies from the government such as tax-exempt organizations.
- 2) The entity exists to hold funds in trust for the public, such as pension plans.
- 3) The entity exerts political influence without adequate accountability, such as the political organizations described in § 527.

105. These terms are defined in § 6103(b)(1) & (2) and are discussed below at note 110.

106. Around the same time Congress amended the disclosure provisions in the Internal Revenue Code in 1976 to usher in the modern era, it was also looking at similar issues from a broader perspective. In 1966, Congress passed the Freedom of Information Act (FOIA), Pub. L. No. 89-487, 80 Stat. 250 (1966), and in 1974 it passed the Privacy Act, Pub. L. No. 93-579, 88 Stat. 1896 (1974). FOIA established a right to access certain information held by the federal government. The purpose was to allow citizens of the United States to be better informed so they could fight corruption and hold those governing accountable. *NLRB v. Robbins Tire and Rubber Co.*, 437 U.S. 214, 242 (1978). The Privacy Act created rules to govern the use of personnel information concerning individuals working for the federal government. All of these changes occurred as the government recognized the massive databases that it maintained and the good or evil that could result from the dissemination of information in those databases.

non-disclosure and requires the greatest showing of a compelling interest. A business entity's tax information also requires the demonstration of a compelling interest, but not quite as high as is needed for individuals.<sup>107</sup>

Other factors enter into this step of the privacy analysis as well: (1) The nature of the tax information sought affects privacy concerns. Disclosure of a taxpayer's entire return will implicate greater privacy concerns than a discreet portion of the return. (2) The type of disclosure also impacts privacy concerns. If the tax information clearly identifies the taxpayer and is published in a public place, then privacy concerns are elevated. Passing tax information to a limited group with restrictions on further publication creates less of a privacy concern. (3) The potential for publication of the tax information to reveal trade secrets will implicate a greater level of privacy concerns. (4) The potential for disclosure of the information to discourage accurate reporting on the return will create a stronger presumption of non-disclosure. (5) The potential for disclosure of the information to foster misunderstanding will also implicate greater privacy concerns.

Each of these factors affecting privacy can be seen as moving the needle on a dial, with one side of the dial representing complete non-disclosure and the other representing full disclosure. The needle sits on the non-disclosure side of the dial for disclosure of most tax information. When more of these factors are present and greater privacy interests are involved, the dial moves even further onto the non-disclosure side of the dial and the more compelling the reasons must be to move the needle over to the disclosure side of the dial.

*Third.* Do the benefits of the disclosure outweigh the privacy concerns? This step requires an analysis of the disclosure's purpose and the gains derived from disclosing information. Many benefits can result from disclosing tax information, which serve as the basis for the numerous exceptions that currently exist to the rule of non-disclosure. Disclosing tax information can help close the tax gap, catch criminals, protect the rights of others, and serve many other useful purposes. Each exception represents an example of successful arguments for the benefits that disclosing tax information can bring.<sup>108</sup>

*Fourth.* If the disclosure is to an "agency," are adequate safeguards in place to limit disclosure of the information beyond that agency? Clear limitations on the use of the information must accompany any disclosure

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107. *United States v. Dickey*, 268 U.S. 378, 387 (1925).

108. Reading the letters from the state taxing authorities to the Joint Committee provides an easy source of the benefits which stem from disclosing tax information to state taxing authorities. Staff of the Joint Committee on Taxation (JCS-1-00) Study of Present-Law Taxpayer Confidentiality and Disclosure Provisions as Required by § 3802 of the Internal Revenue Service Restructuring and Reform Act of 1998, Volume III: Public Comments and General Accounting Office Reports, (2000). [hereinafter JCT Report (Vol. III)]

outside the IRS that is not to the taxpayer or the taxpayer's proxy. In addition to the general admonition against further disclosure contained in section 6103(a), almost every subsection of section 6103 involving disclosure to an agency contains explicit safeguards regarding further disclosure as well as citations to agreements regarding disclosure, which will also contain restrictions on further disclosure.<sup>109</sup>

These four steps encompass the inquiry necessary to implement the disclosure policy on section 6103 stated in the JCT Report.

Section 6103 currently contains 13 exceptions to the non-disclosure principle, representing instances in which Congress found a compelling reason to override the principle. Congress has also created exceptions for tax-exempt returns through section 6104, opinions through section 6110, and information concerning political organizations through section 527. Examining the situations in which Congress has applied the four-step test and determined to create exceptions provides the basis for a system to test further exceptions to the rule of non-disclosure.

Testing the Policy:

(1) Section 6103(a) provides that “[r]eturns and return information shall be confidential, and except as authorized by the title,” no official or anyone else with access to this information “shall disclose any return or return information . . .” This very broad statement prohibiting disclosure follows the rule that absent a compelling showing of a need for disclosure, the information remains inside the IRS. Due to its breadth, this rule does not distinguish between individuals and entities.

(2) The second test first concerns disclosure to the taxpayer or the taxpayer's proxy. This portion of the test drives two of the exceptions set out in section 6103.

(a) *Section 6103(c) disclosure to taxpayer or taxpayer's designee.* Although almost unnecessary, Congress created this exception with a limitation that the Secretary can restrict the disclosure of return information if such disclosure would “seriously impair Federal tax administration.”<sup>110</sup> Permitting disclosure upon the request of a taxpayer

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109. “The IRS maintains standing agreements with the States and the District of Columbia for disclosure of returns and return information. The basic agreement, Agreement on Coordination of Tax Administration, provides for the mutual exchange of returns and “return information between a specific State tax agency and the IRS.” JCT Report (Vol. I), *supra* note 10, at 28.

110. The limiting language requires an explanation of terms. The terms “return” and “return information” are defined terms in the statute. IRC § 6103(b)(1)-(2). A “return” is “any tax or information return, declaration of estimated tax, or claim for refund required by, or provided for or permitted under” title 26 of the United States Code. The term “return information” is much longer, comprising four subparts. Essentially, return information encompasses all of the data associated with a taxpayer's file for a particular return.

avoids policy concerns because the taxpayer waives his right to privacy. No policy reasons for non-disclosure stand as a barrier to this exception and, therefore, there is no need to analyze the benefits side of the equation.<sup>111</sup> The limitation within section 6103(c) stems principally from the government's interest in protecting the identity of informants.<sup>112</sup> If a taxpayer or a taxpayer's designee could access all information in a taxpayer's file, then the taxpayer could learn the identity of any IRS informants who may have instigated investigation of the taxpayer's return.

(b) *Section 6103(e) disclosure to persons having a material interest.* This exception covers a variety of persons who have a material interest in a return filed by a taxpayer,<sup>113</sup> viz., the taxpayer himself, the taxpayer's spouse<sup>114</sup> and children,<sup>115</sup> administrators of estates,<sup>116</sup> trustees

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111. While the policy issue here presents little challenge, the administration of this provision does provide some challenges for the IRS. It must determine the form of adequate consent and the execution of such consent. See *Huckaby v. IRS*, 794 F.2d 1041 (5th Cir. 1986) (unlawful disclosure based on oral consent); *Olsen v. Egger*, 594 F. Supp. 644 (S.D.N.Y. 1984) (consent in divorce decree not binding on IRS); *Tierney v. Schweiker*, 718 F.2d 449, 455 (D.C. Cir. 1983) (open-ended consent not valid; consents were coerced based on fear of losing social security benefits); *Hefti v. Loeb*, 1992 U.S. Dist. LEXIS 12644 (C.D. Ill. 1992) (disclosure to one spouse of other spouse's separate return for year between years in which spouses filed joint returns did not violate § 6103(a), because revenue agent reasonably believed that spouse whose return was disclosed had authorized the other spouse to receive information); *Ward v. United States*, 973 F. Supp. 996 (D. Colo. 1997) (disclosure in public form during radio broadcast unauthorized because consent did not designate persons to whom disclosure could be made).

112. IRC § 6103(d)(1) ("[S]uch return information shall not be disclosed to the extent that the Secretary determines that such disclosure would identify a confidential informant or seriously impair any civil or criminal tax investigation."). Another concern is disruption if taxpayer invites persons to participate in a meeting whose goal in the meeting might be to impair tax administration. See also *United States v. Finch*, 434 F. Supp. 1085 (D. Colo. 1977); Reg. § 301.6103(c)-1(c); Delegation Order No. 156; 1976-2 C.B. 624.

113. It includes return information "if the Secretary determines that such disclosure would not seriously impair Federal tax administration." IRC § 6103(e)(7).

114. IRC § 6103(e)(1)(B) (regarding Joint income tax returns filed by the spouses, but not other returns).

115. IRC § 6103(e)(1)(A)(iii) (regarding those portions of returns filed by the child's parents which contain information necessary for the child to comply with § 1(g)).

116. IRC § 6103(e)(1)(E)(i). Heirs can also obtain tax information from an estate tax return to the extent that the heirs demonstrate a material interest in the estate to the IRS. Section 6103(e)(1)(E)(ii).

of trusts,<sup>117</sup> trustees or guardians of incompetent individuals,<sup>118</sup> executors and administrators,<sup>119</sup> receivers and bankruptcy trustees,<sup>120</sup> attorneys in fact,<sup>121</sup> former spouses,<sup>122</sup> and responsible officers.<sup>123</sup> Due to the lack of a need to protect privacy, the policy basis for the exception follows a similar path as that in section 6103(c), which involves the taxpayer's own information. Most of the persons with a material interest in the tax return essentially step into the taxpayer's shoes, have a direct connection with the return, or have an interest in knowing the information in order to make reasoned decisions.<sup>124</sup> Since few, if any, privacy concerns exist, little effort is needed to move the needle from the non-disclosure side to the disclosure side of the dial.

(3) The remaining exceptions to the rule of non-disclosure set out in section 6103(a) and the policy explained by the JCT Report all raise privacy concerns. Therefore, they require applying a combination of factors: the party seeking disclosure must demonstrate a compelling interest; benefits

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117. IRC § 6103(e)(1)(F). Beneficiaries of trusts can also obtain tax information from a trust tax return to the extent that the beneficiaries demonstrate a material interest in the trust to the IRS. *Id.*

118. IRC § 6103(e)(2).

119. IRC § 6103(e)(3). Heirs can also obtain tax information concerning deceased individuals to the extent that the heirs demonstrate a material interest in the information contained in those income tax returns. *Id.*

120. IRC § 6103(e)(4)-(5). These individuals can receive the returns filed by the estate being administered or prior returns of the individual or entity whose estate they administer if they can demonstrate a material interest in the information contained in the prior returns.

121. IRC § 6103(e)(6).

122. IRC § 6103(e)(8). This exception allows a former spouse to receive information concerning collection action with regard to a tax liability for which the former spouse is jointly liable with the taxpayer.

123. IRC § 6103(e)(9). This exception allows a person responsible for taxes pursuant to § 6672 to learn if others have also been held liable for the same penalty and, if so, the collection actions taken with respect to the other responsible officers.

124. This last basis applies to responsible officers. The § 6672 liability does not strictly relate to a tax return. No return is filed that reports such a liability. Rather, the liability is derivative, resulting from a failure of certain persons to meet their statutory obligations to collect and pay over certain taxes. This provision, like § 6103(e)(8), which addresses collection information on former spouses, was added to § 6103 in 1996. By adding this provision, Congress acknowledged that joint liability creates a need to know that overrides individual privacy concerns. The policy reasons behind this provision are distinct from most other material disclosures in that the need for information actually outweighs the individual's privacy concerns, rather than the requesting party eliminating privacy concerns by stepping into the taxpayer's shoes. While the information disclosure is based on a material interest, the nature of the material interest here differs from that of most of the persons on this list. (Disclosure to a child for compliance with § 1(g) and disclosure to a spouse concerning collection on a joint return also fall within this basis for an exception.)

must exceed the costs; and rules must exist to limit further disclosure. These tests are met in each of the exceptions to the general rule of non-disclosure set out in the subsections of section 6103. Because these disclosures implicate privacy interests, the reason for disclosure must be sufficiently compelling to move the dial over to the disclosure side. As will be seen with each exception discussed below, applying the four-step test outlined above provides a clear demonstration of the underlying policy reasons for disclosure:

(a) *Section 6103(d) disclosure to state tax officials and law enforcement agencies.*<sup>125</sup> This exception fully discloses both returns and return information, the broadest possible array of information, to a limited party—state and local taxing agencies. Disclosure to this limited party fully implicates all privacy concerns and has drawn many lawsuits over concerns of lost privacy.<sup>126</sup> The privacy issues here affect both individuals and entities, implicating heightened scrutiny of this exception. The cost of this disclosure does not outweigh the benefits because the taxpayer incurs no direct dollar cost. The information transfer takes place directly, usually electronically, between the IRS and the receiving state or local entity.<sup>127</sup> The states perceive a significant benefit in receiving this information.<sup>128</sup> This disclosure will not cause misunderstanding because the recipients of the information are tax collectors with specific knowledge and interest in the information.

Disclosure of tax return information to the state taxing authorities raises the traditional privacy concerns; however, none of the other factors

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125. See IRS, Disclosure Litigation Reference Book 8-2 to -5 (providing cases and details on form of disclosure); see also JCT Report (Vol. I), *supra* note 10, at 163.

126. See, e.g., *Long v. United States*, 972 F.2d 1174 (10th Cir. 1992); *Smith v. United States*, 964 F.2d 630 (7th Cir. 1992); *Bator v. IRS*, 89-1 U.S. Tax Cas. ¶ 9138 (D. Nev. 1988), *aff'd* without published opinion *sub nom.* *Bator v. United States*, 899 F.2d 1224, 1990 WL 40300 (9th Cir. 1990); *Rueckert v. IRS*, 775 F.2d 208 (7th Cir. 1985); *Taylor v. United States*, 106 F.3d 833 (8th Cir. 1997); *White v. Commissioner*, 537 F. Supp. 679 (D. Colo. 1982); *Loomis v. IRS*, 81-1 U.S. Tax Cas. ¶ 9341 (D. Colo. 1981); *Davis v. United States*, 80-2 U.S. Tax Cas. ¶ 9794 (D. Mass. 1980).

127. See IRS, Electronic Data Exchange Pilot Project (EDS), <http://www.irs.gov/privacy/article/0,,id=132017,00.html> (last visited Oct. 16, 2010).

128. California uses federal tax information to “[l]ocate tax debtors, especially those who are out of state and cannot be located through the post office or other skip tracing methods,” to “[i]dentify the amount and sources of tax debtors’ assets,” and to “[v]erify the accuracy of taxpayer-supplied information. . . .” JCT Report (Vol. III), *supra* note 108, at 120. Colorado stated that the federal tax information is the “cornerstone of our income tax compliance program” and that it is used for statistical analysis for informed economic decision-making. *Id.* at 124. Hawaii also states that it uses federal tax information on individuals and businesses for “statistical and compliance purposes.” *Id.* at 131.

suggest that this information should remain within the IRS and not be shared with states. The states perceive a significant benefit from the receipt of this information as demonstrated by their many letters to the Joint Committee on Taxation.<sup>129</sup> For ease of tax administration, most states have chosen to base their income taxes on the federal model.<sup>130</sup> One consequence of this conformity is that states rely heavily on federal tax information to confirm the limited data they require from taxpayers.<sup>131</sup> Currently, the state returns ask for less information from taxpayers because the states know that they can obtain additional information from the federal government.<sup>132</sup> This system creates efficiencies because it keeps taxpayers from duplicating information in two parallel systems. Because the states could ask for the same information that appears on the federal return, their willingness to obtain this information through the disclosure exchange does not really subject taxpayers to a greater intrusion.

In addition to the overall benefits this disclosure provides to the tax system, other reasons exist in support of disclosure. The states must carefully safeguard the tax information they receive from the IRS as a part of this bargain.<sup>133</sup> This safeguarding represents an integral part of this policy decision to allow disclosure, because this exception is so broad that state failure to safeguard the information could compromise the integrity of the entire taxpayer information database. The exception limits the use of the information, stating that the disclosure is “for the purpose of, and only to the extent necessary in, the administration of such laws, including any procedures with respect to locating any person who may be entitled to a refund.”<sup>134</sup> Additionally, the use is limited by the agreement entered into between the IRS and the state or local agency.<sup>135</sup>

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129. See *supra* note 128. In addition to the letters from the individual states, the Federation of Tax Administrators submitted a detailed letter addressing the need for states to “use tax return information and the adequacy of present-law protections governing taxpayer privacy.” See JCT Report (Vol. III), *supra* note 108, at 41.

130. JCT Report (Vol. III), *supra* note 108, at 41.

131. *Id.* at 42.

132. See *id.*

133. IRC § 6103(d)(6). Those safeguards are detailed in IRS Publication 1075, *Tax Information Security Guidelines For Federal, State and Local Agencies* (2010). States safeguard confidential taxpayer data in accordance with IRS guidelines. Many states implement training and education programs to instruct employees on proper procedures to protect this data. See, e.g., JCT Report (Vol. III), at *supra* note 108, at 33, 117, 119, 124, 132, 142, 162, 166, 170.

134. IRC § 6103(d)(1).

135. JCT Report (Vol. I), *supra* note 10, at 28 (“A prerequisite to disclosure is a written request by the head of the agency, body or commission. The IRS maintains standing agreements with the States and the District of Columbia for disclosure of returns and return information. The basic agreement, Agreement on

Looking at how this provision would affect the needle on the disclosure dial, the needle would start on the non-disclosure side, but no specific privacy concerns would push it further to that side of the dial. The importance of the material to the states coupled with the elimination of duplication by sharing this information pulls the needle over to the disclosure side of the dial.

(b) *Section 6103(j) disclosure of information for statistical purposes.*<sup>136</sup> This exception fully discloses both return and return information to some federal agencies, and discloses only return information to other agencies.<sup>137</sup> The exception permits disclosure to allow certain agencies to use the tax information to create statistics,<sup>138</sup> specifically limiting the disclosure to this purpose.<sup>139</sup> Even though the disclosure implicates privacy concerns by releasing information about individuals and entities to the agencies, the overall effect of the disclosure here moves the needle to the disclosure side of the dial. The implication of the privacy concerns initially moves the needle further toward non-disclosure; however, the limited use of the information by the agencies, the protection from further disclosure, and the importance of the data pull the needle to the disclosure side. Similar to the reasoning for release of data to the states, the release of this data may also have the effect of reducing burden on taxpayers by keeping them from receiving duplicate data requests from different government agencies.

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Coordination of Tax Administration, provides for the mutual exchange of returns and return information between a specific State tax agency and the IRS.”)

136. For a general discussion of these provisions, see General Accounting Office, GAO-GDD-99-164, *Taxpayer Confidentiality: Federal, State, and Local Agencies Receiving Taxpayer Information*, (1999); see also JCT Report (Vol. I), *supra* note 10, at 43-45.

137. Compare the disclosure to the Department of Commerce for the Bureau of the Census, which allows both return and return information, with the disclosure to Commerce’s Bureau of Economic Analysis, which only releases return information. Section 6103(j)(1)(A) (Census Bureau); § 6103(j)(1)(B) (Bureau of Economic Analysis).

138. These agencies are the Commerce Department, the Congressional Budget Office, the Federal Trade Commission, the Treasury Department, and the Agriculture Department. The exceptions granted here do not reach all federal agencies, but only agencies that demonstrated a specific need related to the statutorily mandated tasks governed by that agency’s directives.

139. Regarding the Commerce Department the statute says, “for the purpose of, but only to the extent necessary in, the structuring of censuses and national economic accounts and conducting related statistical activities authorized by law.” IRC § 6103(j)(1). Regarding the Treasury Department the statute says, “only to the extent necessary in, preparing economic or financial forecasts, projections, analyses, and statistical studies and conducting related activities.” IRC § 6103(j)(3). Each grant to an agency has similar limiting language.



The cost of this disclosure does not outweigh the benefits because there is no direct dollar cost to the taxpayer. The information transfer takes place directly, usually electronically, between the IRS and the receiving agency. Disclosure of this rich database of information benefits all taxpayers by aiding the economy in running more smoothly and reducing intrusions on privacy by the census data collectors. In addition, the statistical information that these agencies produce must protect the privacy of individual taxpayers.<sup>140</sup> The importance of the data to the specific programs satisfies the compelling need test, even where, as here, many of the agencies receive data about individuals as well as entities.

(c) *Section 6103(k) disclosure for tax administration purposes.*

This subsection contains a number of discrete circumstances in which disclosure occurs, only one of which will be discussed here.<sup>141</sup> This provision permits disclosure to the public of specific taxpayer information, including information about individual taxpayers.<sup>142</sup> The information disclosed by filing a notice of federal tax lien (NFTL) is very specific, and therefore economically harmful to the named taxpayer.<sup>143</sup> Because of the sensitive and private nature of the tax data and the public nature of the disclosure, the filing of the NFTL would move the needle far to the non-disclosure side of the dial. Only the compelling need to protect the lien interest of the government allows the needle to swing to the disclosure side.

The compelling need to disclose taxpayer information by filing an NFTL comes under the umbrella of tax administration. An NFTL is filed only when a federal tax lien exists, and the lien exists only when taxes remain unpaid. To collect the unpaid taxes, Congress created the federal tax lien to protect the United States' interest in the taxpayer's assets. The administrative problem with the lien is that without publication, only the IRS and the taxpayer know of its existence. Creditors remain unaware of the

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140. IRC § 6103(j)(4) provides that “[n]o person who receives a return or return information under this subsection shall disclose such return or return information to any person other than the taxpayer to whom it relates except in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer.”

141. IRC § 6103(k)(2).

142. I.R.M. exhibit, available at [http://www.irs.gov/irm/part1/irm\\_01002-149.html](http://www.irs.gov/irm/part1/irm_01002-149.html).

143. National Taxpayer Advocate, Report to Congress: Fiscal Year 2011 Objectives 14, available at <http://www.irs.gov/pub/irs-utl/nta2011objectivesfinal.pdf>; (“[T]he filing of the NFTL in the public record might actually prevent the taxpayer from borrowing money to fully pay the outstanding tax liability.”) National Taxpayer Advocate, Report to Congress: Fiscal Year 2010 Objectives 54, available at [http://www.irs.gov/pub/irs-utl/fy2010\\_objectivesreport.pdf](http://www.irs.gov/pub/irs-utl/fy2010_objectivesreport.pdf) (“Filing an NFTL on outstanding liabilities may create serious consequences for a taxpayer, including making it more difficult to obtain credit.”).

existence of the lien until its publication. In the 1966 Federal Tax Lien Act, Congress acknowledged that most creditors would defeat the federal tax lien unless a notice of the lien was properly filed.<sup>144</sup> It devised a system of filing as a mechanism for fairly treating creditors competing with the federal tax lien.<sup>145</sup> Filing the lien, however, discloses the taxpayer's identity and address, the existence of an outstanding tax liability, the amount and type of that liability, and the year(s) related to the liability.<sup>146</sup>

The costs associated with filing the NFTL do not outweigh the benefits because the IRS secures its interest in the taxpayer's assets by filing the lien.<sup>147</sup> Even though this disclosure enables the availability of damaging information in an unlimited fashion, it meets the compelling need to disclose test. The only alternative to disclosure that would protect the IRS's secured status is a law that would make competing creditors vulnerable to losing their secured claims, without the opportunity to know of the competing tax lien.<sup>148</sup> Here, the benefit to the IRS and to competing creditors outweighs the privacy interests of the taxpayer. This exception to the rule of non-disclosure only occurs because of the compelling need to disclose the lien to protect the interests of the government and competing creditors.

(d) *Proposed shaming laws.* Even though Congress has not passed laws similar to the shaming provisions enacted by some states, applying this test to shaming laws provides insight into Congress' failure to follow the lead of the states. Shaming laws would greatly implicate privacy concerns. The shaming laws of most states do so in the broadest way by listing the names of individuals as well as entities. The proposals of the past decade seeking to shame corporations engaged in tax shelters still invoke privacy concerns, although not at the same level. Broad shaming laws, such as those many states have adopted, create a level of privacy concern similar

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144. See William T. Plumb, Jr., *Federal Tax Liens* 53-75 (3rd ed. 1981).

145. See *id.*

146. IRC § 6323(f); Reg. § 301.6323(f)-1(d)(2) ("A Form 668 must identify the taxpayer, the tax liability giving rise to the lien, and the date the assessment arose regardless of the method used to file the notice of Federal tax lien.").

147. IRS, *File a Notice of Federal Tax Lien*, <http://www.irs.gov/businesses/small/article/0,,id=108339,00.html> (last visited Oct. 17, 2010).

148. A vulnerability of this type currently exists with respect to liens for unpaid real estate taxes. In most, if not all, jurisdictions, these liens can jump ahead of mortgages and other liens created prior in time. To protect themselves, mortgage lenders require borrowers to escrow their real estate taxes. In this manner, mortgage lenders protect themselves from nasty surprises. If federal tax liens could, without notice, similarly defeat lenders, lenders would either be required to fashion some type of protective mechanism as with mortgage liens, be exposed to defeat or forego lending. The problem with fashioning a protective mechanism is that unlike real estate taxes, which are relatively easily ascertained and predicted, federal taxes could be assessed for very unpredictable amounts.

to the level created by filing the NFTL – essentially the highest level of concern short of publishing an individual's return. Given the privacy interests presented by the proposal, proponents need to show a very compelling need for such a proposal to pass. As noted by the JCT Report, a more in-depth study on the benefits of shaming is needed to make a compelling case for such a law.<sup>149</sup> In 2000 when the JCT Report was written, insufficient empirical data existed to support a compelling case for the benefit of disclosing information in this manner. The same concerns still exist today based on some of the articles discussing corporate shaming.<sup>150</sup> Nothing like the compelling case presented by the filing of the NFTL exists with respect to shaming. Until it does, shaming should continue to stand on the sidelines of federal disclosure law.<sup>151</sup>

Assuming that returns containing collected tax information contain only information about collected taxes and the entity, the disclosure of these returns can be tested similarly to the exceptions under section 6103. Making these returns public would not implicate privacy concerns of individuals

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149. JCT Report (Vol. I), *supra* note 10, at 238-242. The specific proposal before the JCT staff concerned publication of the names of persons who did not file tax returns. The JCT staff's concerns extended beyond whether such a proposal would reap collection benefits and into the area of the reliability of the data concerning who had not filed a return. The combination of both concerns effected the view of the staff on the failure of such a shaming provision to demonstrate a compelling interest for disclosure. The concerns about the reliability of the data listing persons with unfiled returns raises issues on the benefits side of the test since disclosure of incorrect data could destroy any benefits received even if collection from some persons increased as a result of the disclosure.

150. See Blank, *supra* note 101.

151. The way shaming laws can meet the tests necessary to qualify as an exception to the rule of non-disclosure is to ride on the back of the exception allowing the publication of the notice of lien. Several of the states that permit shaming have explicitly stated this as their basis for publishing the shaming lists. See, e.g., Maryland, South Carolina, and Virginia, listed below in Appendix A. Essentially, these states have determined that the taxpayer has little or no privacy interest in the information because the information already exists in the public domain. Since it exists in the public domain and no privacy interests are implicated, the benefits derived by publishing the information need not be as great in order to move the needle over to the disclosure side. These states view the shaming provision as merely a formatting issue more than a disclosure issue.

The reasoning used some by states, an absence of privacy interests in the disclosed information, in adopting shaming laws would not work for corporate shaming provisions. With corporate shaming, the taxpayer's privacy interests have not been removed by the public filing of an NFTL. While the corporate interests in privacy may not equal those of individuals, these interests remain substantial. The benefits side of the equation would need to pull full weight in order to move the needle on the dial over to the disclosure side.

because all of the information concerns a business entity. So, this disclosure is not deserving of the strongest possible protections. Still, the proposal in this article is to fully disclose the return, making all of the entity information about the collected taxes available to anyone seeking information about the entity.

Because the collected tax information is information about others paying their taxes through the entity, the information does not directly provide private tax information about the entity. If viewed strictly in that light, it is possible to argue that privacy concerns are not implicated. Nor does the disclosure involve privacy information about the individuals whose taxes have been collected because the reporting of collected tax data would occur only in an aggregate form. The inquiry does not stop here, however.

The tax information on a collected tax return does reveal entity information about the number and, potentially, the compensation levels of employees. More specifically, the excise tax information reveals information about sales by the entity. This indirect revelation of information deserves some protection or at least a basis for disclosure. The revelation of this information may cause the entity to make an incorrect tax filing for the purpose of hiding trade secrets. It is also possible that an entity, knowing that the information would become public, would fail to file a return in order not to reveal the extent to which it was not paying taxes.

Even though the privacy interests of the entity may be weak, the entity has privacy interests in the conclusions that could be drawn from the tax data and the seriousness of those privacy interests push the needle onto the non-disclosure side a reasonable distance. It may not be possible to overcome these concerns from a section 6103 perspective. The reasons for disclosing the collected tax returns derive from both the disclosure perspective and a collection perspective. From a disclosure perspective, the nature of the information serves as the basis for disclosing the collected tax returns. The information concerns money held in trust, and the public has a right to know what is happening to its money. This argument is unlike the reasons for other exceptions to section 6103 and is the reason that this article proposes that the change instead be made to permit this information to become public pursuant to section 6104. This argument, if persuasive, could move the needle on the dial from the non-disclosure position to disclosure.

This article will next examine the broadest exception to the rule of non-disclosure, section 6104. This provision provides further background for this proposal concerning collected taxes and their placement within the Internal Revenue Code. Unlike the exceptions to section 6103 discussion in this section, section 6104 takes the view that certain returns have a different starting point from a disclosure perspective.

*B. Section 6104*

Section 6104 begins, with the governing principle that tax information should be disclosed unless a reason exists for non-disclosure, which is the opposite of the presumption in section 6103.<sup>152</sup> The tax-exempt organizations, pension plans, and political organizations governed by section 6104 relinquish their privacy rights, in large part, because of the tax benefits they receive.<sup>153</sup> The public has a legitimate interest in the information on the tax returns and applications of these organizations. This interest outweighs the privacy concerns and other policy concerns driving the non-disclosure policy behind section 6103.

The history of section 6104 starts later than that of section 6103, in part because the history of tax-exempt organizations, pension plans, and political organizations trails the income taxes that these organizations receive exemptions from paying.<sup>154</sup> Tax-exempt status was first formally recognized in 1939.<sup>155</sup> Reporting requirements for these organizations followed in 1943.<sup>156</sup> Concerns about abuses in the charitable sector resulted in passage of additional reporting requirements for these organizations in 1950<sup>157</sup> and additional disclosure provisions.<sup>158</sup> In 1958, applications for tax-exempt status became available after an amendment to section 6104.<sup>159</sup> Pension plans

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152. See JCT Report (Vol. II), *supra* note 12, at 6.

153. See *id.* at 63. (“The present-law rules requiring disclosure of returns and return information relating to tax-exempt organizations reflect a determination that, because such organizations are supported by the public, both through the tax benefits associated with tax-exempt status and, in some cases, direct contributions, such organizations have a different expectation of privacy than taxable persons and the public has a strong interest in information regarding such organizations.”).

154. For a general discussion of the history of § 6104, see JCT Report (Vol. II, Appendix A), *supra* note 12 at 120-129.

155. See IRC § 101 (1939).

156. Revenue Act of 1943, Pub. L. No. 78-235, § 117, 58 Stat. 21, 36-37 (1943).

157. Revenue Act of 1950, Pub. L. No. 81-814, 64 Stat. 906 (1950). S. Rep. No. 81-2375, at 125 (1950).

158. Form 990, already in existence at that time, was opened to public inspection. Obtaining the form required a written request to the IRS. Public Law 81-814 became § 153(c) of the 1939 Code which then became § 6104 of the 1954 Code. Internal Revenue Code of 1954, Pub. L. No. 83-591, 68 Stat. 730 (1954).

159. Technical Amendments Act of 1958, Pub. L. No. 85-866, § 75, 72 Stat. 1606. “The committee believes that making these applications available to the public will provide substantial additional aid to the Internal Revenue Service in determining whether organizations are actually operating in the manner in which they have stated in their applications for exemption.” H.R. Rep. No. 85-262, at 41-42 (1957).

were added to section 6104 in 1974 as part of the passage of ERISA.<sup>160</sup> As discussed further below, political organizations were added in 2000.<sup>161</sup>

The JCT Report cited four reasons for increased disclosure of information concerning tax-exempt organizations:<sup>162</sup> “(1) increasing public oversight of tax-exempt organizations; (2) increasing compliance with Federal tax and other applicable laws; (3) promoting the fair application and administration of the Federal tax laws; and (4) advancing the policies underlying the federal tax rules regarding such organizations.”<sup>163</sup>

To the extent that the basis for presumption of disclosure of tax information of the entities described in section 6104 rests on the benefits they receive, as the Joint Committee staff cited with respect to tax-exempt organizations, it is difficult to draw a parallel to the returns reporting collected taxes. While entities that collect taxes on the government’s behalf receive some small benefits for holding the taxes, the argument that those benefits outweigh the burdens has little merit.<sup>164</sup> Therefore, the reason for categorizing returns reporting collected taxes under section 6104 comes from policies creating section 6104 that extend beyond simply the grant of benefits to tax-exempt organizations. For that reason, other types of taxpayers and returns that section 6104 involves are discussed here as well.

One type of tax-exempt organization with a special return that receives partial disclosure pursuant to section 6104 is the trust for black lung patients.<sup>165</sup> Black Lung Benefits Trusts (BLBTs) collect money for beneficiaries held in a public trust for them administered by the Treasury Department.<sup>166</sup> The money paid into BLBTs comes from coal mine operators

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160. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, § 1022(g)(1), 88 Stat. 820 (effective for applications filed after Sep. 2, 1974).

161. Act to Amend Internal Revenue Code of 1986, Pub. L. No. 106-230, § 1(b)(a)(A)(i)-(vi), 114 Stat. 477 amended IRC § 6104 to include political organizations, effective July 1, 2000.

162. Volume II of the JCT Report, which specifically deals with IRC § 6104, did not address issues concerning pension plans or political organizations but only tax-exempt organizations. The reasons for pension plans may not mirror those of exempt organizations because of the trust nature of the pension plans. The JCT Report also did not discuss the Black Lung Trust information made public under IRC § 6104, which is discussed elsewhere in this report.

163. JCT Report (Vol. II), supra note 12, at 6.

164. The benefits are discussed briefly at notes 74-75 and accompanying text.

165. See generally Bruce Hopkins, *The Law of Tax-Exempt Organizations* 406, 408 (8th Ed. 2003) (discussing the tax-exempt organizations created under IRC § 501(c)(21) called “Black Lung Benefits Trusts”); see also John Lopatto III, *The Federal Black Lung Program: A 1983 Primer*, 85 W. Va. L. Rev. 677 (1983) (discussing the general law of black lung benefits with a discussion in § XI of the creation of the public trust under IRC § 9501).

166. Hopkins, supra note 165, at 406.

seeking to “self-insure for liabilities under federal and state black lung benefits laws.”<sup>167</sup> These trusts file a return on Form 990-BL, portions of which are public pursuant to section 6104. The money paid by coal mine operators into BLBTs is not a collected tax.<sup>168</sup> BLBTs serve a different purpose than most exempt organizations. They do, however, have a certain quasi-government aspect demonstrated by their ability to pour money into a trust administered by the Treasury Department, the Black Lung Disability Trust Fund.<sup>169</sup> Congress created BLBTs for the benefit of coal mine operators who had a requirement to pay black lung benefits.<sup>170</sup>

Unlike most tax-exempt organizations which receive public benefits, BLBTs instead serve a benefit to coal mine operators. The JCT Report did not address BLBTs and the policy issues behind their creation as tax-exempt organizations. In this case the policy argument for disclosing a BLBT’s return information cannot easily derive from the grant of government benefits as with most tax-exempt organizations and particularly the tax-exempt organizations that existed in 1950. The trust created here more resembles a public trust than a tax-exempt organization. In this regard it represents an instance of disclosure not unlike the disclosure proposed in this article for collected taxes.

BLBTs are singled out for discussion here because they have a different policy foundation than most tax-exempt organizations. The policy basis for BLBTs as organizations whose returns face a presumption for disclosure more closely mirrors the basis for making public collected tax returns, since both circumstances involve trusts in which the public has an interest. Moving from tax-exempt organizations, even those such as BLBTs,

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167. *Id.* Section 4121 imposes the excise tax on extraction of coal. See also 30 U.S.C. § 934 for creation of the trust into which the excise is paid.

168. Money paid into BLBTs is not considered a collected tax because Black Lung Benefits Trusts are not funded by taxes. Rather, the mine operators pay this money as an alternative to commercial insurance coverage or state workers’ compensation for pneumoconiosis. The payments by the mine operator to this trust are deductible under § 192. See Hopkins, *supra* note 165, at 406-08.

169. IRC § 9501. The Black Lung Disability Trust Fund was established on the books of the Treasury in fiscal year 1978 according to the Black Lung Benefits Revenue Act of 1977 (Public Law 95-227). The Black Lung Benefits Revenue Act of 1981 (Public Law 97-119) reestablished the fund in § 9501. The Black Lung Disability Trust Fund is one of ten public trusts created in the Internal Revenue Code. See IRC §§ 9501 - 9510. It is the only one of these ten to accept a portion of its contributions from a tax-exempt organization. IRC § 9501(a)(2)(C) provides that a portion of the receipts of this trust fund can come from Black Lung Disability Trust Funds described in IRC § 501(c)(21).

170. “Congress established this form of self-insurance program, with similar tax consequences (from the point of view of the operator) as would result if the operator had purchased non-cancellable accident and health insurance.” Hopkins, *supra* note 165, at 406-07 (citing S. Rep. No. 95-336, at 11-12 (1978)).

to pension plans makes this parallel more apparent. The reasons for disclosing pension plan information do not mirror those for tax-exempt organizations, although some overlap exists.<sup>171</sup> Pension plans hold money paid by employers into a trust for their employees. The public trust created by pension plans more closely resembles the public trust created by collected taxes than the circumstances of most tax-exempt organizations.<sup>172</sup> The disclosure of the tax return information of pension plans increases public oversight just as with tax-exempt organizations. Publication allows plan beneficiaries to observe the finances of their pension plan. Even though pension plans serve a defined population of employees and former employees of a business, the health of the plan implicates significant public interest.

A failed pension plan invokes the intervention of the Pension Benefit Guarantee Corporation (PBGC), a quasi-government agency that pays pension benefits when a pension plan fails.<sup>173</sup> Because the government is standing behind the pension plan, the interest of the general public in the information about pension plans is heightened. Publication of pension plan information also, arguably, increases compliance with Federal tax laws because plan administrators know that they are being watched.

In addition to tax-exempt organizations and pension plans, political organizations<sup>174</sup> described in section 527 also have their returns disclosed under section 6104.<sup>175</sup> Political organizations only came under the disclosure provisions of section 6104 in 2000<sup>176</sup> as a result of Congressional desire to make public both contributors to political organizations and the expenditures of political organizations.<sup>177</sup> When the Supreme Court struck down and

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171. Pension plans are subject to public inspection so that participants may comment on employer plan submissions and to ensure compliance with certain antidiscrimination rules. See David S. Preminger, E. Judson Jennings, and John Alexander, *What Do You Get with the Gold Watch? An Analysis of the Employee Retirement Income Security Act of 1974*, 17 *Ariz. L. Rev.* 426 (1975).

172. Some overlap exists between disclosing pension plan information under IRC § 6104 and the disclosure exception under IRC § 6103(c)(1)(F) to beneficiaries of trusts. See *Duncan v. N. Alaska Carpenters Ret. Fund*, 1991 WL 165052 (W.D. Wash. 1991).

173. How PBGC Operates, <http://www.pbgc.gov/about/operation.html> (last visited Oct. 10, 2010); Pension Benefit Guaranty Corporation, <http://www.pbgc.gov/docs/egovrept2008.pdf>.

174. For a general description of political organizations, see Hopkins, *supra* note 165, at 411-17.

175. IRC § 6104(a)(1)(A).

176. Act to Amend Internal Revenue Code of 1986, Pub. L. No. 106-230, § 1(b)(a)(A)(i)-(vi), 114 Stat. 477 amended IRC § 6104 to include political organizations (effective July 1, 2000).

177. The information required to be made public is set out in IRC § 527(j). For a general discussion of the history of IRC § 527 and the history leading to its



limited as unconstitutional some of the reporting requirements of the Federal Election Campaign Act of 1971 (FECA),<sup>178</sup> Congress relied on section 6104 as a mechanism for shining light on those who stood behind the curtain of political organizations. This use of section 6104 served more to benefit campaign finance law than to promote tax disclosure.<sup>179</sup> Using section 6104 and section 527(j) to publicly name donors to political organizations stands in contrast to the shielding of donors to section 501 organizations by section 6104.<sup>180</sup> While the information disclosure with respect to political organizations that occurs under section 6104 differs significantly from the disclosure of information about collected taxes proposed in this article, the use of section 6104 for the purpose of disclosing donations and expenditure information of political organizations demonstrates that section 6104 does not exist solely to shine a light on charities. Here, Congress used it for primarily a non-tax purpose.

Another possible reason cited by the JCT Report as a basis for publication of the tax information of tax-exempt organizations is the fact that these organizations often fill a void that a government organization would otherwise fill. The governmental nature of the operation of these tax-exempt

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inclusion in the list of organizations subject to the disclosure rules of IRC § 6104, see Donald B. Tobin, *Anonymous Speech and Section 527 of the Internal Revenue Code*, 37 Ga. L. Rev. 611 (2003). The political organization provision of section 527 came into existence in 1974 as recognition that organizations engaged strictly in political activity did not fit under IRC § 501, but were also not traditional taxable entities. By 2000 these organizations had morphed into something very different than Congress initially envisioned.

178. See *Buckley v. Valeo*, 424 U.S. 1 (1976).

179. Senator Lieberman, a sponsor of the changes to §§ 527 and 6104 to permit disclosure of information about the political organizations stated: “None of us should doubt that the proliferation of these groups—with their potential to serve as secret slush funds for candidates and parties, their ability to run difficult-to-trace attack ads, and their promise of anonymity to those seeking to spend huge amounts of money to influence our elections—poses a real and significant threat to the integrity and fairness of our elections.” 146 Cong. Rec. S5995 (daily ed. June 28, 2000) (statement of Sen. Lieberman).

180. Some have criticized this distinction, arguing that some 501(c) organizations can engage in limited political activity and the inability to see the donors of those organizations leaves the public in the same place it was before IRC § 6104 required publication of the donors of political organizations. See *Recent Legislation: Campaign Finance Reform – Issue Advocacy Organizations – Congress Mandates Contributions and Expenditure Requirements for Section 527 Organizations*, 114 Harv. L. Rev. 2209 (2001), and *Note, The Political Activity of Think Tanks: The Case for Mandatory Contributor Disclosure*, 115 Harv. L. Rev. 1502 (2002).

organizations provides a reason for opening up their records, just as the records of the government are accessible to all.<sup>181</sup>

The JCT Report contained a quote from Senator Carl Curtis made in 1969 during the legislative debates that led to significant overhaul and restructuring of the tax-exempt sections of the Internal Revenue Code. The language used by Senator Curtis provides a powerful argument for placing the returns of collected taxes into the same category as tax-exempt returns:

[T]ax exemption is a high privilege. I believe the operation of a tax-exempt foundation is *public trust*; and starting from the premise, I believe that all the business, all the transactions, all the receipts, all the investments, all the grants and all contributions made by the foundation to individuals or to institutions, are of public concern. (Emphasis added)<sup>182</sup>

This quote helps to tie the returns of tax-exempt organizations and the policy driving their disclosure with the returns reporting collected taxes. Senator Curtis' use of the term "public trust" very accurately describes the effect of section 7501.<sup>183</sup> That statute provides, in part, that "[w]henver any

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181. JCT Report (Vol. II), *supra* note 12, at 63.

182. Statement of Senator Carl T. Curtis, Cong. Rec. S15646 (daily ed. Dec. 4, 1969)

183. The language of § 7501 describes what can fairly be described as a public trust in function but it does not lay out the terms of that trust. See *supra*, note 8 and accompanying text. The Supreme Court tried to do that in *Begier v. IRS*, 496 U.S. 53 (1990). The Court sought to describe the res of the trust created under IRC § 7501 where the monies paid to the IRS for the collected taxes came from the general account of the entity that collected the tax rather than from a specifically designated trust account. This inquiry was important because the payment to the IRS came less than 90 days before bankruptcy. If the payment represented trust funds held for the United States then the payment would not get pulled back into the bankruptcy estate under the preference rules. On the other hand, if the payment came from the taxpayer's money rather than a trust, then a preference payment would exist. The Court held the receipt of the collected taxes created the trust res at the moment of payment. The fact that the funds were held in the corporation's general account did not destroy the trust res and payment of the money to the IRS for purposes of satisfying the collected tax obligation identified the trust res. Therefore, it held that the payment to the IRS was not a preferential payment.

As mentioned above, the Internal Revenue Code specifically establishes eleven trust funds in §§ 9501 through 9511 that definitely fit the description of public trusts. One of these trusts is the Black Lung disability Trust, described above. Three of these trusts are funded in whole or in part with collected taxes – the Airport and Airway Trust Fund in § 9502; the Highway Trust Fund in § 9503; and the Sports Fish Restoration and Boating Trust Fund of IRC § 9504. These public trusts are

person is required to collect or withhold any internal revenue tax from any other person and to pay over such tax to the United States, the amount of tax so collected or withheld shall be held to be a special fund in trust for the United States.”<sup>184</sup> The statutory language describes a public trust held by the business entity. The monies so held are certainly of public concern. As described above, the persons paying the taxes receive credit whether or not the entity holding the funds in trust pays over the taxes to the IRS.<sup>185</sup> Therefore, the public has a direct concern with the public trust created when business entities hold collected taxes, since the persons whose taxes are collected received credit for those payments whether or not the IRS ever receives the money.<sup>186</sup> The nature of the public trust created when business entities hold these taxes and the quasi-governmental nature of this activity can perhaps more easily be seen if viewed through the lens of the policy debate in recent years surrounding private debt collectors.

During the past decade Congress has enacted section 6306 which established “Qualified Tax Collection Contracts,” the statutory language for private debt collectors.<sup>187</sup> Even though the authority to enter into private collection contracts still exists in the Code, the IRS has recently decided not to renew any contracts and does not plan to renew. One of the biggest concerns with private debt collectors was that detractors of the program viewed collection of taxes as an inherently government function.<sup>188</sup> Even though the program did not allow private debt collectors to handle any

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managed by Treasury’s Office of Public Debt Accounting – Trust Funds Management Branch which maintains a website where it discloses the management of these funds. The fact that some collected taxes end up in public trust managed by the Treasury Department, some taxes with Social Security and some taxes go into the general fund of the Treasury Department does not change the fact that entities collecting this tax hold it in trust as described in § 7501 and in *Begier*.

184. IRC § 7501(a).

185. See IRC § 31(a)(1), *supra* note 69.

186. *Id.*

187. For a general overview of private debt collection see Gary Guenther, CRS Updates Report on Private Debt Collection Program, 2007 Tax Notes Today 236-21 (Nov. 15, 2007).

188. See Hearing on the Internal Revenue Service’s Use of Private Debt Collection Companies to Collect Federal Income Taxes: Hearing Before the H. Comm. on Ways & Means, 110th Cong. 43 (2007) (statement of Nina E. Olson, the National Taxpayer Advocate). See also Internal Revenue Service Budget for FY 2008: Hearing Before the H. Appropriations Subcomm. on Fin. Serv. & Gen. Gov’t, 110th Cong., 1st Sess., 2 (2007) (statement submitted by Colleen Kelley, President of the National Treasury Employees’ Union); Use of Private Collection Agencies to Improve IRS Debt Collection: Hearing Before the H. Subcomm. on Oversight of the Comm. on Ways & Means, 108th Cong., 1st Sess., 21 (2003) (statement of Earl Pomeroy, Member, H. Comm. on Ways and Means).

money,<sup>189</sup> the actions of these companies in assisting the IRS to collect taxes was viewed as too closely tied to government action to permit their actions to continue.<sup>190</sup> It is interesting how the post-assessment use of private collectors could be such a hot topic because of the inherently governmental nature of the activity while most pre-assessment taxes are collected by “private collectors” without even a whisper of complaint and without public disclosure of what they collected and whether they paid over the taxes.

While the carefully vetted private debt collectors were not permitted to handle *any* dollars, business entities handle over a trillion collected tax dollars every year with no vetting prior to assumption of that responsibility.<sup>191</sup> The point here is not that the collected tax system requires dismantling in the same manner that the private debt collection program has been dismantled, but rather that the collected tax system is one of an inherently governmental function – the collection of taxes. Further, the collected tax system allows private parties to hold tax dollars which even the private tax collectors could not do. The governmental nature of the action coupled with the holding of large amounts of federal tax dollars makes the returns reporting collected taxes like the returns currently listed in section 6104.

### C. *Placement of Collected Taxes within Disclosure Regime*

While most of the businesses submitting returns to report collected taxes do not receive subsidies in the same manner as tax-exempt organizations, they operate as businesses with the understanding that they have an obligation to collect federal taxes as a part of the grant of the right to do business. In this sense their role as tax collectors, while not subsidized, is a role in which they carry out a government function. In addition to carrying

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189. Guenther, *supra* note 187 (stating that “all revenue collected through the efforts of PCAs has to go into a revolving fund. PCAs are not allowed to receive or process any of this money; only the IRS can do so. The IRS may use up to 25% of the money in the fund to compensate PCAs for their services – though IRC § 6306 offers no guidance on the factors the IRS should consider in compensating a PCA for its services. In addition, the IRS may transfer up to 25% of the revenue in the revolving fund to its budget for tax law enforcement.”).

190. David Lawder, U.S. IRS to End Contracts with Private Tax Debt Collectors, Reuters (Mar. 2009), available at <http://www.reuters.com/article/idUSN0536345520090306>, quoting Sen. Richard Durbin, “Until private debt collectors can prove they can do the job . . . more efficiently and do it at a lower cost than the IRS, there is no reason we should continue this program.” Senator Durbin agreed with the IRS decision not to renew contracts with the private tax debt collectors, arguing that tax collection is a “core government function.” *Id.*

191. See Statement of Deputy Commissioner Linda Stiff, *supra* note 60.

out a government function, these businesses also receive the benefits of holding this money as well as the burden of reporting on it.

The JCT Report cited two reasons for public disclosure that would apply equally to reporting collected taxes as to the entities listed in section 6104: (1) disclosure enables the public to provide oversight, and (2) disclosure allows the public to determine which organizations to support.<sup>192</sup> If tax returns reporting collected taxes became public through section 6104, the public would have the opportunity to view those returns and report anomalies. The public would also have the opportunity to decide whether to support businesses that did not properly treat the collected taxes they held. Businesses and government agencies, seeking to contract with the taxpayer would have an easy means of checking on this important measure of tax compliance.<sup>193</sup> Compliance or lack of compliance could form an important part of the decision to contract with the taxpayer.

A few states have opted to disclose certain collected tax information such as sales tax, excise tax, use tax, and gasoline tax data.<sup>194</sup> The policies of these states essentially reach the same result as the result proposed here that disclosure of collected tax data is beneficial. A close look at these state laws and the policies behind those laws is warranted.

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192. JCT Report (Vol. II), *supra* note 12, at 64.

193. See Statement of Commissioner Linda Stiff, *supra* note 60; U.S. Gov't Accountability Office, GAO-07-742T, *Tax Compliance Thousands of Federal Contractors Abuse the Federal Tax System*, 3-4, April 2007; U.S. Gov't Accountability Office, GAO-05-637, *Financial Management: Thousands of Civilian Agency Contractors Abuse the Federal Tax System with Little Consequence*, 2, June 2005.

194. Ark. Code Ann. § 26-18-303(b)(18) (West 2010) (“For the purpose of the timely and accurate collection of local sales and use tax and state income tax withholding for employees, disclosure of the name and address of a taxpayer that has failed three (3) times within any consecutive twenty-four-month period to either report or remit state or local gross receipts or compensating use tax or state income tax withholding for employees and has been served with a business closure order under § 26-18-1001 et seq.”); Fla. Stat. § 213.053(8)(d) (2010) (“the department may provide . . . [n]ames, addresses, and sales tax registration information, and information relating to a hotel or restaurant having an outstanding tax warrant, notice of lien, or judgment lien certificate, to the Division of Hotels and Restaurants of the Department of Business and Professional Regulation in the conduct of its official duties.”); Ind. Code § 6-8.1-7-1(n) (2010); Mass. Gen. Laws ch. 62C § 21(b)(3) (LexisNexis 2010); Nev. Rev. Stat. § 366.160(1) (LexisNexis 2010) (“All records of mileage operated, origin and destination points within Nevada, equipment operated in this state, gallons or cubic feet consumed, and tax paid must at all reasonable times be open to the public.”); Utah Code Ann. § 59-1-403(3)(e) (LexisNexis 2010) (“[A]t the request of any person, the commission shall provide that person sales and purchase volume data reported to the commission on a report, return, or other information filed with the commission under . . . Motor Fuel or . . . Aviation Fuel”).

Wisconsin, home of the Progressives who lead the early 20th Century charge to disclose tax returns, has permitted disclosure of some aspects of its income tax returns since 1923.<sup>195</sup> In 1953 access to the entire return was paired back to access to the net taxes paid.<sup>196</sup> Public access to the amount of income tax paid extends to individuals as well as corporations; however, the information is available only upon a specific request to the Wisconsin Department of Revenue satisfying certain conditions.<sup>197</sup> While the Wisconsin disclosure provisions do not cover returns of collected taxes, other states do.

Vermont allows disclosure of a number of taxes.<sup>198</sup> Specifically, the plain language of the statute allows for anyone to obtain information about an entity holding money in trust concerning the compliance of that entity. The publicity of this tax data closely correlates with the collected tax data for which disclosure is proposed here. Vermont permits oral or written requests. The Tax Department responds by advising the requester whether the taxpayer is in “good standing,” which is the code phrase for fully paid upon the collected taxes, or is “not in good standing,” which is the phrase for a delinquent taxpayer. Vermont does not allow the public to view the returns.

Massachusetts passed a law in 1992 making public a host of tax information regarding publicly traded corporations, banks, and insurance companies.<sup>199</sup> Businesses are currently required to disclose the following:

- (1) name;
- (2) address of principal office;
- (3) Massachusetts taxable income;
- (4) total Massachusetts excise tax due;
- (5) non-income excise tax due;
- (6) gross receipts or sales;
- (7) either gross profit or credit carries over to future years;

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195. 1923 Wis.Laws 39.

196. 1953 Wis.Laws 303.

197. Wis. Stat. Ann. § 71.78(2) (West 2010).

198. Vt. Stat. Ann. tit. 32, § 3102 (West 2010) (providing that “the commissioner shall disclose a return or return information . . . to any person who inquires, provided that the information is limited to whether a person is registered to collect Vermont income withholding, sales and use, or meals and rooms tax; whether a person is in good standing with respect to the payment of these taxes; whether a person is authorized to buy or sell property free of tax; or whether a person holds a valid license . . .”). The practical explanation of Vermont’s application of this provision is based on a conversation between the author and Molly Bachman, Vermont’s General Counsel for the Tax Department. Telephone conversation with Molly Bachman, Vermont’s General Counsel for the Tax Department (Aug. 18, 2010).

199. Mass. Gen. Laws. ch. 62C, § 83(c) (1992); currently Mass. Gen. Laws Ann. ch. 62C, § 83(c) (West 2010).

(8) income subject to apportionment.<sup>200</sup>

The Massachusetts provisions require reporting of both income taxes and the sales and excise taxes more like the collected tax which are the focus of this article. One problem with the Massachusetts statute is its focus on publicly traded companies. As will be discussed more fully below, companies of this size are very unlikely to have problems with reporting and paying collected taxes. The purpose for disclosing the liabilities in Massachusetts appears driven by a somewhat populist desire to insure that large companies pay their “fair share.” To the extent a goal exists for reporting collected taxes aside from the goal of aligning collected taxes with the proper disclosure provisions, limiting the reporting of collected taxes to public corporations would serve no collection purpose. The reporting of this information has now been in place for almost two decades with little data gathered showing any negative impact from this reporting.<sup>201</sup>

The returns reporting collected taxes differ from almost all other tax returns because they do not contain information about a tax liability incurred by the taxpayer.<sup>202</sup> Rather, they contain information about taxes collected and held in trust for the United States. These returns do not calculate a tax rate nor do they contain “secret” information about a business that would enable competitors to obtain an advantage. These returns simply report the amount of money held in trust by the tax collecting entity. This type of return information should not raise privacy concerns that drive the underlying secrecy of federal tax information.<sup>203</sup> Rather, this type of information should

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200. *Id.*

201. Not only is there little data that evidences any negative impact, but there is little data concerning the beneficial effects of the disclosure. See Richard Pomp, *The Disclosure of State Corporate Income Tax Data: Turning the Clock Back to the Future*, 22 *Cap. U. L. Rev.* 373 (discussing benefits of disclosure at state level).

202. Current employment tax returns do reflect the liability of the employer portion of the social security tax. As discussed below, this article recommends removing that section from returns reporting collected taxes.

203. In some ways the debate on disclosure of tax information has become less important since 1976 when the last great debate occurred. Tax information no longer exists as the single greatest source of information about an individual or an entity. Tax information has been replaced by a host of other information sources including, but not limited to, the Bank Secrecy Act, the SEC rules, and other broad rules seeking transparency in corporate affairs. Interestingly, the IRS even uses third party data gathering sources such as ChoicePoint, which is built upon publicly available data as it tries to gather information about taxpayers. The IRS’s use of this information provider serves as a poignant statement of where much information lies today – it lies in a wide array of public venues available to those who know how to mine such data. Additionally, other rich sources of information about individuals and entities exist in the public domain, provided by the federal government through such

exist in the public domain in order that everyone has a transparent view of the money collected on our behalf by the entities serving as agents of the federal government. The disclosure policy reasons behind the decision to make public the returns reporting tax-exempt and pension return information should apply to the returns reporting collected tax information.

Because the money is held in trust, there is no basis for distinguishing between the various entities reporting this information.<sup>204</sup> The information should be readily available in an unfiltered manner and posted on the internet so that it is easily accessible. Reporting all of the information in an unfiltered manner would make the task administratively easier for the IRS and allow those using the data to access it all without limitations on size of business or other limiting criteria. The reasons for disclosing the returns apply to all returns containing collected taxes.

Disclosing all returns fits with the collection aspect of the policy consideration as well as the disclosure piece. By disclosing all returns, businesses filing these returns know from the outset that the information on these returns differs from the information on other tax returns of the business. Knowing that it is different helps them understand why this debt obligation differs from other debt obligations of the business which should make it more likely that businesses would pay this debt, or go out of business, rather than paying the debts of trade creditors in an attempt to stay afloat.

## V. CHANGES TO CURRENT RETURN FORMS

Currently, returns reporting money held in trust contain information about both money held in trust and tax liabilities that do not stem from a trust relationship.<sup>205</sup> Those returns should be split into two parts: one part

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sources as PACER, which provides public information on individuals filing bankruptcy or other court proceedings. Again, far more data about an individual can readily be accessed electronically through PACER than is found on the individual's income tax return.

204. While disclosure policy provides no basis for distinguishing among different taxpayers whose information will be disclosed, collection policy with respect to collected taxes suggests that the most likely taxpayers to fail to pay over collected taxes are small and newly formed businesses. With this in mind, an alternate proposal, discussed below, addresses the disclosure of collected tax returns for certain smaller entities or entities that have experienced difficulties fulfilling their collected tax obligations.

205. Take, for example, Form 941 which reports three different types of information: withheld income taxes (trust information); withheld social security taxes (trust information); and the employer's portion of the social security taxes (not trust information). Similarly, Form 720 sets out a reporting mechanism for a variety of excise taxes, some of which result from a trust relationship where the entity filing



reporting the collected taxes (the collected taxes return) and the other reporting the taxes directly due from the entity (the entity liability return). The collected taxes return should become publicly available while the entity liability return would remain subject to the current disclosure provisions.<sup>206</sup> The collected taxes return should report not only the obligation for the taxes

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the Form 720 has collected the excise taxes from third parties and some of which result from excise taxes directly imposed on the entity.

206. This article focuses on policy reasons for changing the disclosure laws to provide for disclosure of the returns reporting collected taxes. Those policy reasons come both from the policy reasons driving the disclosure laws as well as policy reasons related to effective collection strategies. Other reasons exist for disclosing returns of collected taxes, particularly employment tax returns reporting withheld income and social security taxes. The first of these ancillary reasons stems from the peculiar circumstances of employment tax returns. Many of these returns are prepared by “payroll tax providers.” These providers prepare the returns, sign the returns, pull the money from taxpayer’s checking accounts, and file the returns and the required remittances. Taxpayers essentially turn over everything about payroll taxes to these firms that provide this service. Because of the “trusting” nature of taxpayers who rely on payroll providers, a number of these providers have perpetrated Ponzi style schemes in which they take the money from the taxpayers’ accounts and use some of it for personal gain rather than using the money to pay the taxes. By the time the schemes collapse, potentially thousands of taxpayers who actually had money drawn out of their accounts to pay over the collected taxes find themselves with a tax bill for these taxes. See, e.g., *In re FirstPay, Inc.*, 09-1076, 2010 WL 3199858 (4th Cir. Aug. 13, 2010). See Fogg, Trust, *supra* note 13, at 384. If collected tax returns were publicly posted, the accessibility of information on a public website would allow taxpayers who rely on payroll providers to pay their taxes to ensure that their taxes were paid. Of course, these taxpayers could go to the IRS now and make a request for their transcripts, but the availability of a website with an easy search feature might help to reduce the problem that payroll providers with a bent to steal cause – a small collateral benefit to this proposal. A second ancillary reason for disclosing collected tax returns involves the Federal government and its relationships with federal contractors. As discussed in GAO 2005 report (U.S. Gov’t Accountability Office, GAO-05-637, *Financial Management: Thousands of Civilian Agency Contractors Abuse the Federal Tax System with Little Consequence*, 2, June 2005), and in statements by Senator Grassley, the Federal government has a goal of not contracting with those who do not pay their federal taxes. On Jan. 20, 2010, President Obama signed a memorandum directing government officials to recommend how to ensure that no new federal contracts were awarded contractors delinquent in paying their federal taxes. See President Barack Obama Directs Agencies To Deny Business to Tax-Delinquent Contractors, 2010 Tax Notes Today 13-36 (Jan. 20, 2010); see also Michael Joe, Obama Seeks to Block Tax Debtors from Receiving Federal Contracts, 2010 Tax Notes Today 13-3 (Jan. 21, 2010). One obvious way to accomplish this goal would be to publish the delinquent collected tax data in a form easily retrieved by federal contracting officers since collected taxes comprise over 90% of the unpaid federal tax debts of contractors seeking federal contracts, according to the GAO report.

but also the amount of payments made toward that obligation during the return period and with the return itself. This would allow anyone viewing the return to ascertain if the trust obligation had been fulfilled or remained partially or fully unmet.<sup>207</sup>

Two return forms require revision in order to accomplish this result. First, the employment tax return, Form 941, must be modified. Form 941, due on a quarterly basis, currently reports three primary tax liabilities of the entity having employment tax obligation. These tax liabilities consist of the amount of income taxes withheld from employees, the amount of social security tax withheld from employees, and the entity's own liability for social security taxes.<sup>208</sup> Instead of one form that reports both collected taxes and the entity's own obligation, two forms should exist. One form would report the collected taxes, described here as Form 941T (the T stands for "trust") and the other would report the entity's obligation, described here as Form 941E (the E stands for "entity").

Form 941T should contain relatively little information in order to limit the disclosure of information and avoid confusion for anyone reading it. It should report the total amount of income taxes collected from its employees, the total amount of social security taxes collected from its employees, and the total amount of taxes paid to the IRS during the quarter. Some additional information could be placed on the return similar to the information currently reported on Form 990 with respect to tax-exempt organizations.<sup>209</sup> This information is general information about the entity such as the type of organization, year of formation, and state of domicile. Certain information required on the Form 990-BL might also provide some benefit such as "The books are in the care of: [fill in the blank]," "Phone number: [fill in the blank]," and "Located at: [fill in the blank]."<sup>210</sup>

Form 941E should track the information on the current Form 941, but will exclude the information on the collected taxes reported on the companion Form 941T.

The second return requiring revision is the Form 720, which is used to report excise taxes. Like the Form 941, this form currently reports excise taxes directly owed by the employer as well as excise taxes collected from others. Two forms, the Form 720T and Form 720E, should replace the current Form 720. The Form 720T should report only the excise taxes

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207. See following discussion below for a detailed discussion of what should be on the collected tax return.

208. IRS Form 941 and instructions.

209. Form 5500, used for returns of pensions, requires extensive information; however, the information sought on Form 5500 seems irrelevant to the information that would make Form 941T and Form 720T useful.

210. As discussed above, Form 990-BL concerns the type of tax most closely related to collected taxes of all of the returns made public pursuant to IRC § 6104 at present.

collected from others, identify the type of tax collected, and report the total amount paid to the IRS during the reporting period for the form. Some additional information could be placed on the return similar to the information reported on Form 941T discussed above.

The Form 720E should retain the information on the current Form 720, but will exclude the information on the collected taxes reported on the companion Form 720T.

## **VI. HOW MECHANICS OF DISCLOSURE SHOULD TAKE PLACE**

The disclosure of the collected tax information should take place through posting every filed Form 941T and Form 720T on the internet. The posting should adopt a format that is easily searchable. Section 6104(a)(3) currently contemplates posting on the internet certain returns disclosed under section 6104 and 527. That same mechanism for dissemination of information should apply with respect to the returns reporting collected taxes. The posting of returns should occur as soon as possible after receipt. Neither the business entity nor the IRS should be required to produce copies of the returns posted on the internet.

The IRS should post any failure to receive a return on the internet. Individuals interested in collected tax returns of an entity should not be forced to guess whether or not a return was filed and not posted. To incorporate suggestions made in this article, provisions substantially similar to those that follow should be added to section 6104:

Proposed change to section 6104(a)(1)(E) – “Returns Reporting Collected Taxes – If a business is required to collect taxes for the United States and holds the collected taxes in trust pursuant to section 7501(a), the returns of the business reporting the collection and payment of the collected taxes shall be open to public inspection and posted on the internet.”

Proposed change to section 6104(a)(3)(C) – Information Available on the Internet– “The Secretary shall make publicly available on the internet the tax returns described in 6103(a)(1)(E).”

## **VII. DISCLOSURE POLICY ASPECTS OF PROPOSAL**

While disclosure policy drives the recommendation in this article that collected tax returns should be disclosed under section 6104 rather than kept private under section 6103, the decision to disclose these returns could impact collection policy as well. This article proceeds with the belief that the disclosure of collected tax returns would benefit compliance. In this unsubstantiated belief, the article adopts the unsubstantiated position of the

JCT Report that disclosing tax-exempt organization information increases compliance whereas disclosing returns and return information with respect to taxable persons generally compromises voluntary compliance.<sup>211</sup>

Assuming that disclosing collected tax returns will have the beneficial compliance effect that such disclosures controlled by section 6104 currently have, the next issue concerns the costs associated with publishing this information. Under this proposal the taxpayer would bear little direct costs. The cost of preparing the returns would increase, if at all, only marginally. The IRS would bear the cost of publication. The real costs of this proposal would potentially consist of a decrease in compliance, as a result of publishing the returns. This disclosure proposal must then consider whether a taxpayer's likelihood of filing returns and reporting accurate information will decrease because of fears that information on these returns would disclose proprietary information or otherwise harm the business. Publication is unlikely to impact the accuracy of the withholding tax returns because of the direct link between these returns and the social security/withholding benefits of the employees including the employees responsible for filing the returns. This accuracy is checked each year for employment tax returns under the CAWRS program.<sup>212</sup> While it is possible that some taxpayers would react to publication by failing to file returns, this failure also has a detrimental effect on those responsible for filing the returns since it indefinitely extends the statute of limitations on assessment of their liability as responsible officers

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211. See JCT Report (Vol. II), *supra* note 12, at 65 and accompanying footnotes. See also Rizek, *supra* note 81, at 88-90 for a pragmatic view that may represent the only realistic point of view on this subject in the absence of credible supporting data for either point.

212. I.R.M. 1.15.19, 1.15.35, available at [http://www.irs.gov/irm/part1/irm\\_01-015-019.html](http://www.irs.gov/irm/part1/irm_01-015-019.html); [http://www.irs.gov/irm/part1/irm\\_01-015-035.html](http://www.irs.gov/irm/part1/irm_01-015-035.html) (last visited Oct. 18, 2010). The Combined Annual Wage Reporting (CAWR) falls under the division of Small Business/Self-Employed (SB/SE). CAWR ensures that employers accurately report annual wage data on IRS Forms in the 940 series to the IRS and Form W-3 to the Social Security Administration (SSA). When there is a discrepancy between the two forms, a case is created and worked within the SB/SE campuses. The CAWR system consists of five Tier 1 sub-projects maintained by National Office Modernization and Information Technology Services (MITS) and one Tier 2 system maintained by Ogden Development Center MITS. CAWR runs on both the Tier 1 IBM platform and on the Teir 2 Sun platform. The Tier 1 processing is known as Combined Annual Wage Reporting Mainframe (CAWR MAINFRAME). The Tier 2 processing is known as the Combined Annual Wage Reporting Automation Program (CAP).

The CAP system houses the CAWR for cases for a three year period, it allows notice/letter generation and user updates, monitors cases for responses/no responses etc., and creates reports.

for the trust fund recovery penalty.<sup>213</sup> Although no definitive answer exists on possible detriments to publication of collected tax returns, no specific negative consequences immediately appears.

Creating collected taxes returns that report only the money held in trust and then making those returns public would enable everyone to determine if a business entity meets its basic obligation to properly handle the public's money with which it was entrusted. Publishing this information would also allow the public to make decisions concerning businesses entrusted with public funds just as everyone makes decisions concerning public officials entrusted with public funds. The monies reported on these returns do not belong to the taxpayers filing the returns and implicate few of the reasons for protection that ordinary tax information carries. Publishing this information facilitates informed decision-making regarding which businesses to support, which businesses have a strong likelihood of failure, and which competing businesses have gained an improper competitive advantage. Once this information becomes public, those entities failing to pay over the collected taxes should find a non-receptive public just as public officials would find a non-receptive public if they improperly handled public monies. The pressure caused by this situation should encourage entities to properly report and pay collected taxes, thereby improving compliance in this segment of the tax gap.

The proposal in this article to disclose all returns reporting collected taxes under the regime of section 6104 turns on an interpretation of disclosure policy that places collected taxes into public view because of the trust nature of these returns.<sup>214</sup> It is possible to approach this problem based on the collection policy perspective rather than disclosure policy, by considering possibilities of increasing transparency without moving collected tax returns under section 6104. One such possibility would be to use tools essentially available already under section 6103, which would require minor changes in that statute to the manner of publication of information about taxpayers who owe collected taxes. This article does not recommend the collection policy approach but addresses it below as a potential path to

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213. See *Lipsig v. United States*, 187 F. Supp. 826. (E.D.N.Y. 1960); Michael I. Saltzman, *IRS Practice and Procedure*, ¶ 17.09[4] (Warren, Gorham & Lamont, 2nd ed. 2002).

214. Publishing all returns of collected taxes, as recommended in this article, does go further in disseminating information than allowed under § 6103(k)(2). In some ways such disclosure mirrors the disclosure exception in § 6103(e)(1)(F) which permits disclosure of information to trust beneficiaries. Here the disclosure of information benefits the beneficiaries of the trust on collected taxes created under § 7501. The beneficiaries are the people of the United States. The exception to disclosure concerning the NFTL is discussed in notes 141-48 and accompanying text.

increased compliance with a smaller change in the approach to disclosure policy with respect to collected taxes.

A. *Shaming*

As discussed below, the ability to disclose information concerning unpaid collected taxes already exists in almost all instances.<sup>215</sup> Once the IRS files an NFTL, the taxpayer's liability for collected taxes (or at least for liabilities on returns on which collected taxes are reported) becomes a matter of public record. This public record will be quickly found by credit reporting agencies and others tracking the filing of the federal tax lien.<sup>216</sup> Disclosure of this information is currently permitted under section 6103(k)(2). This information goes to the county clerk's office where the taxpayer resides or where the taxpayer has property.<sup>217</sup> If the taxpayer is a corporation or partnership, the NFTL is filed as designated by the state where the entity's principal executive office is located.<sup>218</sup>

Given that the information of an unpaid collected tax can become public through the filing of an NFTL as soon as ten days after the assessment

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215. Collected taxes fall outside the deficiency tax procedure of § 6213. When collected taxes go unpaid, the IRS can, if it has not already done so based on a return with insufficient remittance, assess the taxes due on the collected tax return and almost immediately begin collection. Because these taxes can go immediately or almost immediately into the collection stream, the federal tax lien exists once the liability goes unpaid. The existence of the federal tax lien occurs when a federal tax assessment has taken place, followed by notice and demand pursuant to § 6303, followed by ten days (the usual period the IRS gives taxpayers to pay as a policy matter) in which the taxes remain unpaid. If this sequence occurs, a federal tax lien exists as described in §§ 6321 and 6322. If a federal tax lien exists, then the IRS can make the liability public when it wants by filing an NFTL pursuant to § 6323(f). The publication of the liability to the world through the NFTL represents one of the many exceptions promulgated in § 6103. See IRC § 6103(k)(2). Since the collected tax liabilities in almost all instances fit this disclosure exception, publishing these liabilities presents few hurdles from a disclosure perspective if a liability exists.

216. Based on correspondence to clients of the Villanova Federal Tax Clinic for whom federal tax liens are filed, a number of business organizations track federal tax lien filings in order to offer taxpayers assistance in working out their debts with the IRS.

217. IRC § 6323(f)(1)(A).

218. IRC § 6323(f)(1)(A); I.R.M. 5.12.2.8, available at [http://www.irs.gov/irm/part5/irm\\_05-012-002.html](http://www.irs.gov/irm/part5/irm_05-012-002.html) (last visited Oct. 12, 2010) ("The principal executive office is deemed to be the residence of the corporation or partnership. It is the place where the major management decisions are made. Do not confuse the principal executive office with the principal place of business.")

of the tax,<sup>219</sup> the next collection policy question is whether a more public pronouncement of the liability should occur in order to more effectively convince taxpayers with unpaid collected taxes (or potentially any unpaid taxes) to quickly satisfy the obligation. Starting in the late 1990s and continuing as an increasing trend, states have turned to further publicity.<sup>220</sup>

In a tight market, one business may be able to hold a business advantage over its competitors if it avoids paying to the IRS the taxes collected from or on behalf of others. Publicizing the names of entities that fail to pay these taxes could potentially serve to level the playing field in such business areas. A business advantage obtained in this manner should instead become a business liability if competitors have knowledge of the situation and can use it in the marketplace. Much of the literature in this area characterizes this type of disclosure as “shaming.”<sup>221</sup> Shaming seeks to alter taxpayer behavior through the use of social pressure.<sup>222</sup> In recent years over half of the states have adopted a limited disclosure exception allowing publication of the names of certain delinquent taxpayers.<sup>223</sup> States enact such statutes with the hope that the individual or entity, seeking to avoid the negative publicity associated with this publication, will ultimately comply.<sup>224</sup> This article does not recommend that the United States government should adopt a shaming policy as a basis for the publication of taxpayers delinquent in paying their collected taxes. However, the relatively recent policy debate surrounding the state shaming provisions provides a basis for examining one relevant policy reason for creating an exception to disclosure that would cover those taxpayers who were delinquent in paying over collected taxes.

If the United States were to adopt shaming as a basis for addressing unpaid collected taxes, it has several models to choose from as it reviews the

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219. As discussed in note 215, above, assessment triggers issuance of the notice and demand letter under IRC § 6303 giving the taxpayer 10 days to pay. If the taxpayer does not pay within the 10 days, the assessment lien arises automatically. Once the assessment lien exists, it is up to the IRS to decide when to make that lien public with the filing of an NFTL.

220. Section 3802 of the Revenue Reform Act of 1998 directed the Joint Committee on Taxation and the Treasury Department to comment on the feasibility of shaming among many other disclosure issues. The JCT Report addresses shaming, recommending against a federal shaming program for non-filers and expressing concern that publishing non-filer information might incorrectly identify individuals with no filing requirement. See JCT Report (Vol. I), *supra* note 10, at 238-40. As of 2000 only five jurisdictions had adopted shaming provisions. Contrast that number with the twenty-six states and the District of Columbia that now use shaming, listed in Appendix A.

221. See Blank, *supra* note 101, at 539, 547-48.

222. *Id.*

223. See Appendix A, *infra*.

224. JCT Report (Vol. I), *supra* note 10, at 238.

statutes adopted by the states. The most common shaming provisions choose a numerical limit, such as the 100 taxpayers with delinquent collected taxes who owe the most outstanding liabilities, and publish the names of those taxpayers on a website or other prominent location. Another common method involves publishing the names of all delinquent taxpayers whose outstanding liabilities exceed a selected dollar amount. The dollar level for publication of an entity with debt should reflect an amount high enough to avoid information overload from all of the published names but low enough to provide meaningful information to competitors and consumers.

Using ABC, Inc. to illustrate the proposal, the IRS would consider posting the name of ABC, Inc. on its website at a special location designed to publicize delinquent taxpayers. The IRS would only publish ABC's name if ABC owed a sufficient amount, for example \$25,000, of unpaid collected taxes. Once ABC crossed the dollar threshold, the IRS would enter ABC's name onto the list of tax delinquents. The list would be available to anyone with internet access.

Currently, the IRS may not disclose tax information about any taxpayer without specific authorization under section 6103. No exception exists for listing the names of entities that do not pay taxes, whether the taxes are income, excise, employment, or some other type. In many instances entities with unpaid collected taxes find themselves saddled with a filed federal tax lien; however, even when the lien is filed, their competitors and companies with whom they do business might not know about the existence of the federal tax lien.<sup>225</sup>

At present, one exception to this general rule of non-disclosure in the Internal Revenue Code fairly could be characterized as a shaming provision,<sup>226</sup> rather than simply a disclosure exception based on one of the traditional reasons. In 1996 Congress enacted section 6039G.<sup>227</sup> This section

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225. The failure to pay collected taxes creates a competitive advantage for the company that fails to pay over related companies that do pay these taxes. This competitive advantage creates a strong reason for publishing this information. If competitors learn of the failure to pay, they may be able to publicize that fact and potentially remove the advantage. Some discussion of the competitive advantage has surfaced although little has been written on the scope of this advantage.

226. The disclosure under § 6039G is the disclosure of the taxpayer's name. Although the filing of the § 6039G information return acts as the triggering mechanism for the disclosure, the disclosure itself simply consists of the listing of the taxpayer's name with no identifying tax information. In this respect, the § 6039G disclosure differs from other disclosure exceptions described in IRC §§ 6103, 6104, or 6110.

227. Section 6039G provides that any individual to whom § 877(b) or § 877A applies for any taxable year shall provide a statement for such taxable year which includes the following information: (1) the taxpayer's TIN, (2) the mailing address of such individual's principal foreign residence, (3) the foreign country in



addresses a problem perceived by Congress when an individual renounces U.S. citizenship for the purpose of avoiding the payment of U.S. taxes.<sup>228</sup> The shaming remedy created by Congress to address this situation appears to be both too broad and too obscure.<sup>229</sup> The remedy reaches too broadly because shaming, or publication of the names of individuals renouncing U.S. citizenship, occurs for all who renounce, rather than just those who renounce for tax motivated reasons. The breadth of this reach diminishes the effectiveness of the publication of the names, because inclusion on this list does not tie directly to improper tax behavior. The remedy is also too obscure because the names of the shamed individuals are published in the Federal Register on a quarterly basis. The Federal Register seems a rather remote and inaccessible place to publish names if its purpose is to have the individuals ostracized by their community of peers.<sup>230</sup>

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which such individual is residing, (4) the foreign country of which such individual is a citizen, (5) information detailing the income, assets, and liabilities of such individual, (6) the number of days during any portion of which that the individual was physically present in the United States during the taxable year, and (7) such other information as the Secretary may prescribe. The statute also provides that an individual who is required to file a statement under subsection (a) for any taxable year, and fails to file such a statement, fails to include all required information, or includes incorrect information, must pay a penalty of \$10,000 unless it is shown that such failure is due to reasonable cause and not to willful neglect. Finally, the statute provides that any Federal agency or court which collects the statement under subsection (a) shall provide to the Secretary a copy of any such statement, and the name (and any other identifying information) of any individual refusing to comply with the provisions of subsection (a). The Secretary of State shall provide to the Secretary a copy of each certificate as to the loss of American nationality under § 358 of the Immigration and Nationality Act which is approved by the Secretary of State, and the Federal agency primarily responsible for administering the immigration laws shall provide to the Secretary the name of each lawful permanent resident of the United States whose status has been revoked or abandoned. No later than 30 days after the close of each calendar quarter, the Secretary shall publish in the Federal Register the name of each individual losing United States citizenship with respect to whom the Secretary receives information under the preceding sentence during such quarter.

228. See Michael S. Kirsch, *Alternative Sanctions and the Federal Tax Law: Symbols, Shaming, and Social Norm Management As a Substitute For Effective Tax Policy*, 89 Iowa L. Rev. 863 (2004) for a detailed discussion of this law and of the policies behind the law as well as the shortcomings of the law.

229. The remedy also appears ineffective, as more and more American citizens renounce their citizenships in order to avoid this taxation. See Ellen Kelleher, *Americans Forfeit Citizenship to Avoid Tax*, Financial Times, July 17, 2010, available at <http://www.ft.com/cms/s/0/bab42a32-9126-11df-b297-00144feab49a.html>.

230. Kirsch, *supra* note 228, at 888 (discussing the effectiveness of shaming sanctions).

Regardless of its effectiveness, section 6039G demonstrates a Congressional willingness to resort to shaming as an enforcement technique.<sup>231</sup> More recently Congress has flirted with the idea of using shaming to identify corporate taxpayers who seek to reduce or eliminate their tax liability by employing “abusive” tax shelters.<sup>232</sup> While numerous states

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231. The IRS and the Department of Justice use a form of shaming in some of their information releases and website postings. The IRS publishes a “dirty dozen” list of transactions it finds abhorrent and contrary to the law. The list serves both to “shame” the promoters and investors in the promotion as well as to inform prospective investors of the toxic tax nature of the transaction. Internal Revenue Service, Beware of IRS’ 2010 “Dirty Dozen” Tax Scams, <http://www.irs.gov/newsroom/article/0,,id=220238,00.html>. Similarly, but in less of a shaming mode, the IRS publishes “listed transactions” in an effort to let people know that certain transactions have gained the attention of the IRS in such a way that settlement of the cases is no longer an option. The listing of a transaction serves to shame those engaged in that transaction although not by name as well as to inform. Internal Revenue Service, Recognized Abusive and Listed Transactions, <http://www.irs.gov/businesses/corporations/article/0,,id=120633,00.html>. The Service sometimes back-ends the shaming provisions on these transactions by requiring a disclosure waiver in settlements it reaches with taxpayers engaged in such transactions so it can publicize the concession by the offending taxpayer. See Blank, *supra* note 101, at 82-85. The Department of Justice regularly publicizes the convictions that it obtains and the civil injunctions that it obtains in promoter and return preparer cases. See, e.g. Press Release, U.S. Department of Justice, Cincinnati Area Return Preparer Pleads Guilty to Tax Crimes (June 8, 2010), available at <http://www.justice.gov/tax/txdv10671.htm>; Press Release, U.S. Department of Justice, Federal Jury Convicts Local Tax Preparer – Faces up to 33 Years in Federal Prison (Mar. 12, 2010), available at [http://www.justice.gov/usao/txn/PressRel10/watson\\_tax\\_convict\\_pr.html](http://www.justice.gov/usao/txn/PressRel10/watson_tax_convict_pr.html). The publication of the name of the person convicted or enjoined serves not only to shame the individual so named but to deter others who might engage in similar behavior. Here, the shaming comes after enforcement so the shaming does not motivate the convicted or enjoined individual to change their behavior. The enforcement activity, hopefully, accomplishes that purpose.

232. Jumpstart Our Business Strength (JOBS) Act, S. 1637, 108th Cong., 2d Sess., 402, 150 Cong. Rec. S. 5622, 5643 (May 18, 2004). For a detailed discussion of this provision, see Blank, *supra* note 101, at 553 & n.74. Blank argues that shaming corporations that use tax shelters would not promote tax compliance for a variety of reasons. In many ways the proposal to shame corporations in this context carries many of the symbolic but ineffective concerns expressed by Kirsch about expatriate shaming. Kirsch, *supra* note 228, at 921. Congress feels a need to express displeasure about certain behavior but chooses to make its expression in a manner that does not affect future behavior in the manner in which it seeks.

have adopted shaming as a means of increasing revenue, no state has yet adopted shaming based on corporate tax shelter activity.<sup>233</sup>

The concept of shaming has received much attention among writers seeking ways to promote tax compliance.<sup>234</sup> Earlier writing concerning shaming addressed its effectiveness in the criminal context.<sup>235</sup> Toni Massaro provided a critical analysis of shaming in this context and identified five conditions that a shaming statute should meet to be an effective remedy: (1) offenders should be members of an identifiable group; (2) sanctions must compromise social standing within the group; (3) group awareness of the sanctions and withdrawal from offenders; (4) offenders must fear withdrawal by the group; and (5) offenders must have means to regain social standing.<sup>236</sup> Massaro concludes that these tests are rarely met in modern America so she does not favor shaming as an effective remedy for criminals. Her article demonstrates that shaming fell from grace as an appropriate sanction because it lost its effectiveness as a punishment tool as American society evolved over the past 200 years.<sup>237</sup> Because the factors for effective shaming in a

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233. See Appendix A for a listing of states with shaming laws and, where used, their websites. All of the state shaming provisions focus on collection of unpaid taxes rather than corporate shaming.

234. See Dennis J. Ventry, Jr., *Cooperative Tax Regulations*, 41 *Conn. L. Rev.* 431 (2009); Maryann Richardson & Adrian Sawyer, *A Taxonomy of the Tax Compliance Literature: Further Findings, Problems and Perspectives*, 16 *Austl'n Tax Forum* 137, 168 (2001); Leandra Lederman, *The Interplay Between Norms and Enforcement in Tax Compliance*, 64 *Ohio St. L. J.* 1453, 1493 (2003); Susan Cleary Morse, *Using Salience and Influence to Narrow the Tax Gap*, 40 *Loy. Uni. Chi. L. J.* 483 (2009); Dan A. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*, 102 *Mich. L. Rev.* 71 (2003); Marjorie Kornhauser, *Tax Compliance and the Education of John (and Jane) Q. Taxpayer*, 121 *Tax Notes* 737 (Nov. 10, 2008); Joshua Rosenberg, *Narrowing the Tax Gap: Behavioral Options*, 117 *Tax Notes* 517 (Oct. 29, 2007); Jay Soled and Dennis Ventry, Jr., *A Little Shame Might Just Deter Tax Cheaters*, *USA Today*, Apr. 10, 2008.

235. Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 *Mich. L. Rev.* 1880 (1991); Dan M. Kahan & Eric A. Posner, *Shaming White Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 *J.L. & Econ.* 365 (1999); John B. Owens, *Have We No Shame?: Thoughts on Shaming, "White Collar" Criminals, and the Federal Sentencing Guidelines*, 49 *Am. U. L. Rev.* 1047 (2000); James Q. Whitman, *What is Wrong with Inflicting Shame Sanctions?*, 107 *Yale L.J.* 1055 (1998). For more recent discussion continuing this debate see Dan Kahan, *What's Really Wrong with Shaming Sanctions*, 84 *Tex. L. Rev.* 2015 (2006) and the articles cited therein.

236. Massaro, *supra* note 235, at 1883.

237. One concern with shaming provisions is that shaming not publicize a general failure of society to comply with the tax law. Shaming should not cause less compliance by alerting the compliant to the fact they may constitute a disadvantaged minority of individuals complying with present laws. This circumstance graphically displayed itself in bankruptcy courts around the country in the 1980s and 1990s as the

criminal case do not currently exist in America, she concludes that a reprise of shaming as a tool for effective criminal punishment and rehabilitation would be a mistake.

The concerns expressed by Massaro have validity for analyzing whether shaming would work in certain tax contexts, but they also fail to address certain issues presented by civil tax issues.<sup>238</sup> Kirsch identified some of the shortcomings of shaming in the tax context, at least as applied to the expatriate situation currently adopted in the Code.<sup>239</sup> Assuming that Massaro's often cited tests provide the most appropriate structure for determining the effectiveness of shaming, how do these tests apply to the context of the failure to pay over taxes held in trust by an entity? Is it worthwhile to consider the publication of the names of entities that fail to pay their trust fund taxes, or would such publication fail to motivate the named entities to pay the taxes while broadcasting to the world that the government has been unsuccessful in fixing the problem in this area of non-compliance?<sup>240</sup>

Many of the concerns raised about the effectiveness of shaming in the criminal context do not apply to the naming of liable entities in the trust fund context. Arguably, the publishing of names in the trust fund context serves not so much to shame the offending party as to inform competitors and potential customers. If the principal function of publishing names is to inform rather than to shame, then the tests for effectiveness would be quite

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IRS and Department of Justice sought to hold up plan confirmation of individuals who had not filed their tax returns. It did so by objecting to every chapter 13 plan in which the debtor had outstanding tax returns. The bankruptcy judge in Richmond, Virginia before whom the author practiced, initially took the time to publicly berate each chapter 13 debtor coming before him who failed to file their tax returns explaining to the individual how the failure to file the tax returns was a federal crime for which the individual could be sent to jail, etc. After seeing these motions in case after case, the judge eventually gave up on the failure to file return lecture almost undoubtedly after realizing the extent of the problem and the lack of effect his lectures were having. The problem eventually led to changes in the bankruptcy law in 2005 theoretically preventing debtors from moving forward in chapter 13 cases without the submission of the prior four years returns. 11 U.S.C. § 1308.

238. The IRS engages in some publication that could be classified as shaming as it publicizes the "dirty dozen" most offensive tax shelters which plays the dual role of shaming the transaction and warning people away from the transaction. The IRS listed transactions could be viewed as a similar type of shaming as is the IRS publication of certain settlements with corporations engaged in tax shelters. See Blank, *supra* note 101, at 554. The Department of Justice regularly publicizes the names of individuals whom it successfully prosecutes or whom it successfully enjoins from promoting tax shelters or improperly preparing tax returns. See *supra* note 231.

239. Kirsch, *supra* note 228, at 908-12.

240. Massaro, *supra* note 235, at 1930-32.

different than those set out in Massaro's article. The focus moves from the impact of publication on the offender's feelings to the impact of publication on the behavior of its customers and, in their reaction, on the offender. Other than the few anecdotal consequences cited herein, the effect of the knowledge of an entity's failure to pay over its trust fund taxes is not known.

In addition to the concerns about shaming in the criminal context, Kirsch raised concerns about shaming in the civil context because of the way in which it was handled in section 6039G.<sup>241</sup> His concerns raise slightly different issues than the ones identified by Massaro and likewise need to be addressed in deciding whether to pursue publication as an effective remedy for failing to pay over trust fund taxes. Perhaps the largest single distinction between the expatriation statute and the proposal to publish names of entities not paying trust fund taxes is the failure of the definite link between having a tax motivated purpose for expatriation and the publication of the individual's name in the Federal Register implying that such a link may exist.<sup>242</sup> The link between non-payment of trust fund taxes and publication would clearly exist. The employment or excise tax that gives rise to the trust fund liability is not a tax situation in which uncertainty exists. This is a situation with a straightforward tax and an unpaid liability that is almost always a certainty. The issue for trust fund taxes turns on non-payment and not the sometimes ambiguous language of the Internal Revenue Code in which the existence of a liability itself can be in play.<sup>243</sup>

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241. Kirsch, *supra* note 228, at 889-90.

242. The manner in which states publish the names of the individuals and entities provides a good insight into effective use of publication of non-payment. Some states, such as Wisconsin, create an easy to use link right on the front page of their website. This model makes it quite easy to locate entities that fail to pay. Other states bury the listing of names well into the website making it very difficult, if not impossible to locate the names. For the same reason that publication only in the Federal Register does not make much sense in this context, neither does publication on a website that is relatively inaccessible.

243. The uncertainty of the liability created one of the concerns expressed by Joshua Blank in his article. See Blank, note 101, at 544. With corporate tax shelters, the government may believe that the claims abuse the tax code but until case law settles the issue, the alleged abuse lacks certainty. Uncertainty is also one of the problems with the publication of the names of the expatriates since the list sweeps up all expatriates and even if it were targeting only those who left for tax motivated reasons, it would be difficult to determine those situations in which the tax motive was the sole or primary reason for renouncing citizenship. None of that uncertainty exists with unpaid collected taxes. The liability is almost always a certainty usually stemming from self-assessment but even when it results from adjustments by the IRS the dollar amount of the assessment is rarely at issue.

Knowledge that an entity has failed to pay its employment taxes could modify the behavior of competitors of that entity or its customers.<sup>244</sup> Competitors would seek to find ways to exploit that information and would feel disadvantaged that prior competition occurred on a non-level playing field. In addition, customers might make decisions about entering into long-term contacts with an entity that could not keep current on its employment

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244. The failure of federal contractors to pay their collected taxes was the subject of a GAO report, U.S. Gov't Accountability Office, *Thousands of Federal Contractors Abuse the Federal Tax System*, GAO-07-742T, Apr. 2007. This report not only found that entities contracting with the United States owed billions of dollars in unpaid employment taxes but determined that the United States had not previously requested information that would allow it to factor such behavior into its decision making process. As a result of this GAO report, the Federal government proposed to revise the information that contractors must disclose as they seek to contract with the Federal government. This caused proposed changes to the Federal Acquisition Regulation (FAR) – Representations and Certifications – Tax Delinquency, 72 Fed. Reg. 15,093 (Mar. 30, 2007). The GAO report represents a clear example of how knowledge of the failure to pay collected taxes impacts a potential customer. With that type of customer reaction, one would expect that in the area of federal contractors the incidence of failure to pay collected taxes should significantly decrease.

This GAO report was one of several on a similar theme. A follow up report was issued later in 2007. U.S. Gov't Accountability Office, *Thousands of Organizations Exempt from Federal Income Tax Owe Nearly \$1 Billion in Payroll and Other Taxes*, June 2007. This report shows how the failure to pay collected taxes could impact charitable organizations and the entities making donations to those organizations. This is yet another example of how knowledge of the failure to pay the collected taxes could impact behavior. See, e.g., Farah Stockman, *Shell companies in Cayman Islands allow KBR to avoid Medicare, Social Security Deductions*, *The Boston Globe*, March 6, 2008, available at [http://www.boston.com/news/world/articles/2008/03/06/top\\_iraq\\_contractor\\_skirts\\_us\\_taxes\\_offshore/](http://www.boston.com/news/world/articles/2008/03/06/top_iraq_contractor_skirts_us_taxes_offshore/) (“Payroll taxes can be a significant cost, he said, speaking on the condition of anonymity. If you are bidding against [rival construction firms] Fluor and Bechtel, it might give you a competitive advantage.”) The issue in this article is not so much Brown & Roots’ failure to pay employment taxes as its setting up a foreign entity to employ individuals in a manner in which it would have no employment tax obligation whatsoever; see also U.S. Gov't Accountability Office, *Thousands of Federal Contractors Abuse the Federal Tax System*, 3-4 (April 2007) (“[F]or wage-based businesses that provide goods and services, federal contractors with unpaid federal taxes have an unfair advantage in price competition when competing against other businesses for federal contracts. Companies that do not pay their payroll tax, which is typically over 15 percent of the employees’ wages, would have a significantly lower costs advantage and therefore have a substantive competitive advantage over similarly situation businesses that pay their taxes. For example, we identified instances in which companies that had unpaid payroll taxes were competitively awarded contracts over companies that had paid their federal taxes.”)

taxes since this failure would suggest a lack of financial stability.<sup>245</sup> The information could assist both competitors and customers in making decisions.<sup>246</sup>

Many states have embraced shaming as a basis for altering taxpayer behavior in a manner resulting in greater success in tax law enforcement.<sup>247</sup> The movement toward shaming in tax laws has increased significantly in the

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245. The author knows of one situation in which knowledge that the entity had outstanding collected tax obligations had a direct impact on a potential customer's decision and drove the customer away. The potential customer was the IRS. The IRS sought to contract with a hotel in which it would hold a continuing professional education conference for its employees in one state. The contracting officer chose a hotel that had a longstanding problem with the payment of its collected taxes. When the revenue officers knowledgeable about the outstanding taxes learned of the potential contract with the hotel, they became quite vocal about how improper contracting with that hotel would be. Their voices were heard and another location was selected. Perhaps this example is extreme because of the close nature between the potential customer and the unpaid collected taxes; however, it is not hard to imagine other circumstances in which a potential customer would make a decision not to contact with an entity that did not pay its collected taxes. Indeed, the hope in publicizing this information is to assist in creating a culture in which not paying these taxes makes the entity somewhat of a pariah and causes entities in general to want to pay these taxes in order to avoid the stigma that would come from failure to pay.

246. While slightly different in its factual underpinnings, the actions of Kellogg, Brown & Root (KBR) with respect to its workers in Iraq provides some insight into how information can impact customer and competitor decisions. Based on the information provided in an article in *The Boston Globe* on Mar. 6, 2008, by Farah Stockman, KBR apparently avoided paying employment taxes altogether with respect to approximately 20,000 employees it had in Iraq by treating the individuals as employees of a Cayman Island subsidiary. KBR's customer, the Defense Department, knew "since at least 2004 that KBR was avoiding taxes by declaring its American workers as employees of Cayman Islands shell companies, and officials said the move allowed KBR to perform the work more cheaply, saving Defense dollars." The reaction of KBR's customer is somewhat surprising because of the overall losses to the United States and its citizens from the employment tax maneuver executed by KBR but at least it shows a reaction from a customer aware of the situation. A former executive at Halliburton, the parent of KBR, said "Payroll taxes can be a significant cost, . . . speaking on the condition of anonymity. 'If you are bidding against [rival construction firms] Fluor and Bechtel, it might give you a competitive advantage.'" The article did not contain statements from the competitors but one can imagine what they might say. Farah Stockman, Shell companies in Cayman Islands allow KBR to avoid Medicare, Social Security Deductions, *The Boston Globe*, Mar. 6, 2008, available at [http://www.boston.com/news/world/articles/2008/03/06/top\\_iraq\\_contractor\\_skirts\\_us\\_taxes\\_offshore/](http://www.boston.com/news/world/articles/2008/03/06/top_iraq_contractor_skirts_us_taxes_offshore/).

247. See Appendix A for a list of states that have shaming provisions.

past decade.<sup>248</sup> State shaming laws generally follow a pattern of disclosing the 100 or 200 largest delinquent accounts or disclosing accounts exceeding a certain dollar amount.<sup>249</sup> They generally do not distinguish between types of taxes. No state, however, focuses its shaming laws on collected taxes.

Balanced against providing a list that discloses outstanding tax obligations is the general policy that tax information has privacy protections other types of information about an entity do not. The question becomes whether protecting an entity's privacy with respect to its tax information should extend to money it holds in trust for the United States. The money held in trust for the United States does not reveal any business secrets about an entity. Because this type of shaming would occur with respect to an unpaid liability, an exception for disclosure of the information already exists in section 6103(k)(2). In this way, Congress has already demonstrated a willingness to reveal this information in a format designed to alert competing creditors of the existence of the liability making the issue of shaming or other disclosure listing of this information one of formatting rather than disclosing.<sup>250</sup>

Shaming seeks to modify behavior by targeting specific taxpayers with the highest unpaid taxes or some other identifying negative tax trait. While some states have expressed what they characterize as success through

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248. Compare the current list of states engaged in shaming from Appendix A with the five states that had adopted this practice in 1999 at the time the Joint Committee on Taxation report to Congress was prepared in 2000. See p. 231 of that report; see also U.S. Gov't Accountability Office, GAO-GDD 99-164, Federal, State, and Local Agencies Receiving Taxpayer Information (Aug. 1999). Like the Joint Committee Report, this GAO report was ordered by Congress as a result of § 3802 of the Revenue Reform Act of 1998. While the states felt the disclosure of delinquent taxpayers was aiding in the collection of outstanding taxes, no studies quantified the impact of the disclosure.

249. Several states have provisions that disclose the greatest delinquent accounts: California, Delaware, and Rhode Island. See *infra*, Appendix A. Several other states have provisions that disclose accounts exceeding a certain dollar amount: Colorado, Illinois, Indiana, Massachusetts, and Wisconsin. See *infra* Appendix A.

250. The IRS can file an NFTL against any taxpayer with an assessed liability which is unpaid. Upon assessment of a tax, the IRS computer searches a taxpayer's account for credits with which to satisfy the assessed liability. If insufficient credits exist on the account, the IRS sends the taxpayer a notice and demand letter pursuant to § 6303 demanding payment of the outstanding liability within ten days. If payment is not forthcoming within the ten-day period, §§ 6321 and 6322 cause the creation of a lien against all of the taxpayer's property and rights to property. This lien, known only to the taxpayer and the IRS, is sometimes called the secret lien or assessment lien. In order for this secret lien to defeat certain creditors described in § 6323(a), the IRS must file a public notice of the lien pursuant to § 6323(f). That notice is available to the world. The filing of an NFTL has serious consequences for credit and financial well-being.



their shaming laws, shaming has limitations in a modern society as discussed by Massaro. The theory underpinning shaming applies equally to all types of unpaid taxes and, in fact, is applied by states adopting shaming laws to a broad spectrum of delinquent taxes.<sup>251</sup> Because no proof exists that shaming laws succeed, because they represent a departure from the disclosure laws for a somewhat penal reason, and because they represent a broad based exception to the disclosure laws rather than one targeted to collected taxes, this article does not propose shaming laws as the remedy for increasing collected tax compliance.<sup>252</sup>

In addition to broader policy implications for rejecting shaming as a remedy for collecting collected taxes, a more specific reason exists for the circumstances of these taxes. Shaming would not serve as an adequate deterrent to individuals and entities considering the improper use of collected taxes. Tax shaming occurs well after the use of this money in a circumstance in which the money is frequently faced with a more immediate and real form of shaming, business failure.

While some persons may fail to pay collected taxes motivated purely by the personal gain of “embezzling” collected taxes,<sup>253</sup> the majority of persons using collected taxes do so because of liquidity issues with the business. When collected taxes become the operating capital of businesses with liquidity issues, the people making the decision to do so already face very real shaming issues. These people face the shame of losing their business and perhaps losing their home and other personal assets.<sup>254</sup> The

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251. R.I. Gen. Laws § 44-1-34 (2010). Rhode Island’s Division of Taxation website lists the top 100 delinquent taxpayers which includes all types of state tax delinquencies, including personal, sales, withholding, corporate and inheritance taxes.

252. Although articulated almost solely on the unproven aspect of the success of shaming, the Joint Committee on Taxation reached the same conclusion in its 2000 report. See JCT Report (Vol. I), *supra* note 10, at 238-40. At the time of that report only five states had shaming laws. Obviously, the allure of shaming to states has grown since that time. Because of the difficulty of separating the positive effect that shaming has on compliance from other causes, the empirical case for shaming still lacks a strong underpinning. The concerns voiced by the Joint Committee and others as cited above, still raise a cautionary flag to this approach. It also has some disconnects with the policy reasons underlying disclosure unless you view the shaming provisions solely as an extension of the lien filing as discussed further below.

253. Shaming serves as an unlikely deterrent to those setting out to cheat. For those persons, strong enforcement measures must deter.

254. The stress of these types of situations also leads to the loss of relationships. Financial difficulties of the type encountered by those running failing businesses frequently lead to the dissolution of marriages which further serves to drag individuals in this circumstance down a financial and emotional hole. In this

shame of having their name published on a list by the IRS at some distance point in the future may come far down the list of matters causing them deep personal pain. The shaming remedy when applied to collected taxes seeks to shame the individual or entity responsible into paying the taxes at a point when the business has often failed and the individual is broke. No amount of shame can bring money into the government when the party shamed has no ability to pay the taxes. Publication of the information of non-payment must come at an earlier stage when business decisions concerning the use of the trust fund money still have meaning.<sup>255</sup>

While shaming might deter a large corporation from investing in a tax shelter that will marginally improve its profits,<sup>256</sup> the issues facing most entrepreneurs who tap collected taxes for working capital differ significantly and suggest that the shame from publication of non-payment of taxes may pale in comparison to the shame they seek to avoid by using the collected tax dollars. For this specific reason, as well as for the more general reasons discussed here, shaming is not recommended as a better policy alternative to broad disclosure of collected tax returns.

#### *B. Disclosing Some Returns Containing Collected Tax Information*

As discussed above the failure to pay over collected taxes occurs in small businesses, usually during their start up phase when working capital needs achieve acute status. Since large businesses almost never have issues with failure to pay over collected taxes, should these businesses suffer the requirement of disclosure of their collected tax return information when such information will rarely disclose anything other than the timely filing and payment of the required taxes. Given the realities of when the failure to pay collected taxes occurs, would a disclosure provision targeted at the businesses most likely to have difficulty be preferable to the broad disclosure of these tax returns?

Through a targeted use of disclosure the possibility exists that the benefits of making information available could exist without burdening all entities that collect taxes with disclosure. Disclosure could occur for those entities in the target group which failed to timely file or pay their collected taxes.<sup>257</sup> This approach would resemble shaming in the sense that it would

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situation shaming will not cause the person to pay over the money. It simply puts more fuel on the fire of a life situation going up in flames.

255. The publication of returns of collected taxes comes at this early stage and would seem a much more effective mechanism for effecting behavior of those making decisions about this money than the much later publications of shaming lists.

256. Not everyone would agree with this point. See Blank, *supra* note 101, at 540. Here, it serves merely as an illustration in contrast.

257. Ark. Code Ann. § 26-18-303(b)(18) (2010) (“For the purpose of the timely and accurate collection of local sales and use tax and state income tax

not publish all entities, only the names of the “bad” entities. It would also resemble general disclosure from the perspective that it would provide information about all entities because it would provide information about all entities within the target group.

The exceptions to the rule of disclosure for tax-exempt organizations, political organizations, and pension plans do not provide for disclosure of only a part of the group of impacted entities. In each of those exceptions, all of the returns of exempt organizations or pension plans are displayed openly. No effort exists in the provisions opening those returns to the public to distinguish between good and bad taxpayers or large and small taxpayers.<sup>258</sup> Such a distinction would not make sense in the disclosure of the returns of exempt organizations, political organizations, or pension plans since the goal of disclosure stems from a broad desire for knowledge about all of the organizations.

One distinction, however, between pension plans and collected taxes is that the information on the pension plan return provides a picture into a complex investment situation. The payment or non-payment of collected taxes, however, is a black and white situation—either they were paid or they were not paid; the same simplicity of compliance does not exist in the pension plan situation. The amount necessary to properly fund a pension plan, while calculated by actuaries, does not represent the same type of clear-cut picture presented by collected taxes. For this reason publication of all pension returns provides information beyond the payment or non-payment situation presented with collected taxes. Therefore, it makes sense to publicize all pension plan returns because of the information such publication provides where a similar publication of the returns of collected taxes does not serve the same function.

If not all collected tax returns were published, the next issue concerns how to make the division between publishing and not publishing. This decision could rest on whether the return has unpaid taxes. The policy

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withholding for employees, disclosure of the name and address of a taxpayer that has failed three (3) times within any consecutive twenty-four-month period to either report or remit state or local gross receipts or compensating use tax or state income tax withholding for employees and has been served with a business closure order under § 26-18-1001 et seq.”) See Arkansas Department of Finance & Administration Revenue Division, *Sales Tax Business Closures Update*, *State Revenue Tax Quarterly*, Volume XI, No. 1 (2005), at 3-4 (describing this provision with respect to sales taxes).

258. There are some distinctions concerning the publication of pension plan information which leaves out some of the information of the smaller plans in an apparent recognition that the smaller plans do not raise the same overall concerns as the large ones. I.R.M. 11.3.10.3. (“Documents relating to plans with 25 or fewer participants are available only to plan participants, the plan sponsor, or their authorized representatives.”)

decision made along such grounds would parallel, in many ways, the policies present with respect to shaming. As mentioned above, at least one of those policy decisions has already been made in the area of federal tax liens. A decision to publish all collected tax returns on which the taxpayer has an outstanding balance in actuality provides little more information to the public, if any, than would already exist with the NFTL.<sup>259</sup> Such a decision involves small policy issues of the formatting of information but not broader policy issues of whether to allow such information into the public realm.<sup>260</sup>

Another way to limit publication of collected tax returns would be to publish all collected tax returns of entities of a certain size or age. Size

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259. As discussed above in notes 128-31 and accompanying text, the IRS can decide to make public the outstanding liability on any collected tax by simply filing an NFTL. IRC §§ 6323(f), 6103(k)(2). Filing an NFTL notifies the “world” that a taxpayer has an unpaid federal tax liability. Because credit reporting agencies almost always search for filings of the NFTL, these filings generally have significant negative consequences to the taxpayers against whom the liens are filed. See 2010 NTA Annual Report, *supra* note 143, at 54 (discussing effect of filing an NFTL and urging for more measured approach to filing of NFTL). Despite the fact that the world knows about the lien when the NFTL occurs, many people do not know because of where the lien filing occurs. Section 6323(f) requires filing of the notice in the place where the taxpayer resides in order to perfect the lien as to personalty and in the location of any real property with respect to such property. Unless one frequents courthouses or their online databases, where available, knowledge of the filing of the NFTL would require some searching. Public knowledge would come easier if a national tax lien registry were adopted. T. Keith Fogg, National Tax Lien Registry, 120 Tax Notes 783 (Aug. 25, 2008). Still, even a national registry would lump all types of taxes together not highlighting collected taxes. Some states take the position that the existence of a published lien allows them to highlight liabilities in their shaming websites. E-mail from VA Tax Customer Service, to Fleming Ware, Research Assistant, Villanova University School of Law (July 9, 2009, 09:19 EST) (on file with author). The IRS could not take that approach because of the uncertain state of the law regarding the public records exception. The Circuits have split on the issue of whether allowable public disclosure of information in one setting allows publication of that same information by the IRS in other settings. See JCT Report (Vol. I), *supra* note 10, at 70-81 (citing *Lampert v. United States*, 854 F.2d 335, 338 (9th Cir. 1988), *cert. denied*, 490 U.S. 1034 (1989) (holding that “if a taxpayer’s return is lawfully disclosed in a judicial proceeding . . . [t]he information is no longer confidential and may be disclosed again without regard to § 6103”); *Rowley v. United States*, 76 F.3d 796 (6th Cir. 1996) (holding that once return information becomes public through filing and recording of judicial lien, it is no longer confidential); *Mallas v. United States*, 993 F.2d 1111 (4th Cir. 1993) (holding that the United States is liable when it discloses return information that was previously made part of public records).

260. The debate over the public disclosure exception seems like a “small” policy issue of the format and procedure for disclosure rather than the larger policy decision of whether to disclose.

measurement could occur in a number of ways; however, the ideal method for such a limitation would turn on finding the break point at which entities, based on size or some similar criteria, no longer fail to pay over the collected taxes. Disclosure of all returns reporting collected taxes would occur below that break point. This method, like the reporting of all entities, might create administrative simplicity while avoiding publishing information about collected taxes that in almost all instances would simply report that they were paid.

The Internal Revenue Code contains many numerical cut off points that base reporting, and other decisions, on size or similar criteria. Creating another such break point would not create precedent but would add a small layer of complexity in administration that simply reporting all returns would not create. While placing a limit on reporting holds some allure because it avoids dumping information into the public with very limited benefit, the simplicity of a policy decision that requires publication of all returns of collected taxes holds the greater allure. For that reason, the limited publication of returns reporting collected taxes is not recommended.

### **VIII. CONCLUSION**

Returns reporting collected taxes differ from other tax returns both in the type of information they report and the underlying nature of that information. Disclosing these returns is consistent with current disclosure policy when these returns are viewed as similar to the returns disclosed under section 6104. Disclosing these returns is consistent with good collection policy because their disclosure informs the taxpayer of the important and different nature of collected taxes as well as informing the public of compliance regarding collected taxes. For these reasons, the returns of collected taxes should move from the restrictive circumstances of section 6103 to the openness of section 6104.

**Appendix A - States with Shaming Laws and Their Websites (as of August, 2010)**

- Alabama** Ala. Code § 40-5-23 (LexisNexis 2010)  
The tax collector must publish twice during the month of July a list of delinquent taxpayers. The publication shall be made in a daily newspaper printed and published in the county in which the taxpayer lives. If no such paper is published, a weekly paper will suffice. If there is neither a daily nor a weekly newspaper of any sort published in said county, the tax collector shall publish the list in the courthouse and in other conspicuous places in said county. The tax collector must keep said posting available for the public during the entire month of July.
- Alaska** Alaska does not have a shaming statute.
- Arizona** Arizona does not have a shaming statute.
- Arkansas** Ark. Code Ann. § 26-36-203 (2010)  
No later than December 1 of each year, the county tax collector shall prepare a list of delinquent personal property taxes and deliver a copy of the list to a legal newspaper in the county. The newspaper shall publish the list within seven days. The list must be in at least seven-point font. The list shall show the name of the taxpayer, the taxpayer's school district, and the total amount of taxes delinquent.
- California** Cal. Rev. & Tax. Code § 19195 (Deering 2010)  
The Franchise Tax Board shall make available as a matter of public record each calendar year a list of the 250 largest delinquencies in excess of \$100,000 as of December 31 of the preceding year.
- Colorado** Colo. Rev. Stat. § 24-35-117 (2010)  
The executive director of the department of revenue shall annually disclose a list of all taxpayers delinquent in the payment of tax liabilities collected by the department. The list shall include only those taxpayers with total delinquent final liabilities for all taxes collected by the department in an amount

greater than \$20,000 for a period of six months from the time that a distraint warrant issues or may issue. The list shall contain the name, address, types of taxes, month and year in which each tax liability was assessed, the amount of each tax outstanding of each delinquent taxpayer, and, in the case of a corporate taxpayer, the name of the current president of the corporation.

**Connecticut**

Conn. Gen. Stat. § 12-7a (2010)

The Commissioner of Revenue Services shall prepare and maintain a list related to each type of tax levied by the state, containing the name and address of any person or corporation liable for payment of any such tax and the amount thereof which tax is unpaid and a period in excess of ninety days has elapsed following the date on which such tax was due. Such lists shall be available to the public for inspection by any person.

**Delaware**

Del. Code Ann. tit. 30, § 359(b) (2010)

The Secretary of Finance shall prepare, maintain, and publish on the Division of Revenue Internet Website, two lists of taxpayers owing unpaid tax and additions to tax finally determined to be due under Title 30 for personal income tax and business taxes administered by the Department of Finance. Each list shall consist of the 100 taxpayers owing to Delaware the greatest amount of unpaid tax and shall contain the name and address of each such taxpayer, the total type and amount of tax and additions to tax due and the date the amount was finally determined to be due. In the case of entities other than natural persons, the list may also name any persons who were at least 25% owners or beneficial owners or who were responsible officers of such entity at or after the time the liability was created.

**District of Columbia**

District of Columbia Office of Tax and Revenue, Taxpayer Delinquent  
[http://otr.cfo.dc.gov/otr/cwp/view,a,1330,q,593715,otrNav\\_gid,1679,otrNav,|33288|.asp](http://otr.cfo.dc.gov/otr/cwp/view,a,1330,q,593715,otrNav_gid,1679,otrNav,|33288|.asp) (last visited Aug. 9, 2010).

The District of Columbia publishes a list of its delinquent taxpayers as part of an overall program to encourage voluntary compliance with the District's tax laws. The list contains the taxpayer's name, address, and amount owed. In the case of a business, the responsible officer and his/her address is listed.

**Florida**

Florida does not have a shaming statute.

**Georgia**

Ga. Code Ann. § 48-3-29 (2010)

The commissioner may publish in the media or on the internet for public access any or all information with respect to executions issued for the collection of any tax, fee, license, penalty, interest, or collection costs due the state which are recorded on the public records of any county.

**Hawaii**

Haw. Rev. Stat. Ann. § 231-32 (LexisNexis 2010)

Hawaii Department of Taxation, List of Delinquent Taxpayers With Large Balances, [http://www6.hawaii.gov/tax/a2\\_b2\\_2delinq.htm](http://www6.hawaii.gov/tax/a2_b2_2delinq.htm) (last visited Aug. 9, 2010).

The department of taxation shall prepare and maintain, open to public inspection, a complete record of the amounts of taxes assessed in each district that have become delinquent with the name of the delinquent taxpayer in each case. This list may be published on the Internet after taxpayers have had a final opportunity to settle their debt.

**Idaho**

Idaho does not have a shaming statute.

**Illinois**

20 Ill. Comp. Stat. Ann. 2505/2505-425 (LexisNexis 2010)

State of Illinois Department of Revenue Public List of Delinquent Taxpayers, <http://www.revenue.state.il.us/AboutIdor/DelinquentList.html> (last visited Aug. 9, 2010).

The Director may annually disclose a list of all taxpayers that are delinquent in the payment of tax liabilities collected by the Department. The list shall include only those taxpayers with total final liabilities for all taxes collected by the Department



in an amount greater than \$1,000 for a period of six months from the time that the taxes were assessed. The list shall contain the name, address, types of taxes, month and year in which each tax liability was assessed, the amount of each tax outstanding of each delinquent taxpayer, and, in the case of a corporate taxpayer, the name of the current president. Illinois is in the process of creating a website for publication of this list.

**Indiana**

Ind. Code Ann. § 6-8.1-3-16 (LexisNexis 2010)

The Department shall compile each month a list of the taxpayers subject to tax warrants that were issued at least twenty-four months before the date of the list and are for amounts that exceed \$1,000. The list must identify each taxpayer liable for a warrant by name, address, and amount of tax. The department shall publish the list on access Indiana and make the list available for public inspection and copying. The department may not publish a list that identifies a particular taxpayer unless at least two weeks before the publication of the list the department sends notice to the taxpayer.

**Iowa**

Iowa does not have a shaming statute.

**Kansas**

Kansas does not have a shaming statute.

**Kentucky**

Ky. Rev. Stat. Ann. § 131.650 (LexisNexis 2010)

The department may publish a list or lists of taxpayers that owe delinquent taxes of fees administered by the Department of Revenue. A taxpayer may be included on the list if the taxes owed remain unpaid at least forty-five days after the dates they became due and payable and a tax lien or judgment has been filed of public record against the taxpayer. If the listed taxpayers are business entities, the Department of Revenue may also list the names of responsible persons assessed. Notice must be given to the affected taxpayers before any list is published.

**Louisiana**

La. Rev. Stat. Ann. § 47:1508 (2010)

The secretary may disclose the name and address of the taxpayer, the type of delinquent taxes due, and the total amount of tax, penalty, and interest due. If the taxpayer is a business entity, the secretary may additionally name any owner who owns at least a 50% ownership interest in the entity. The disclosure may be made in a newspaper, magazine, or in electronic media, such as television or the Internet. The secretary must provide written notice by registered mail to the taxpayer.

**Maine**

Maine does not have a shaming statute.

**Maryland**

Comptroller of Maryland Caught In the Web, [http://compnet.comp.state.md.us/Compliance\\_Division/Collections/General\\_Collections\\_Information/Caught\\_in\\_the\\_Web.shtml](http://compnet.comp.state.md.us/Compliance_Division/Collections/General_Collections_Information/Caught_in_the_Web.shtml) (last visited Aug. 9, 2010).

Maryland publishes the names of businesses, individuals, and corporate officers having large unresolved liabilities (including individuals who have large unresolved personal income tax liabilities). All of the information is public, because liens and judgments have been recorded in the judgment dockets of one or more circuit courts of Maryland.

**Massachusetts**  
2010)

Mass. Ann. Laws ch. 62C, § 21(b)(11) (LexisNexis

Massachusetts Department of Revenue, Public Disclosure, <https://wfb.dor.state.ma.us/dorcommon/PublicDisclosure/disclosure.aspx> (last visited Aug. 9, 2010).

Massachusetts allows disclosure by the commissioner of a list of all taxpayers that are delinquent in the payment of their tax liabilities in an amount greater than \$25,000 for a period of six months from the time the taxes were assessed. The list shall contain the names, address, types of taxes, month and year assessed, and amounts outstanding of said delinquent taxpayer. Massachusetts publishes this list online.

**Michigan**

Michigan does not have a shaming statute.

- Minnesota** Minnesota no longer has a shaming statute.
- Mississippi** Mississippi does not have a shaming statute.
- Missouri** Email from Kathy Mantle, Collections and Tax Assistance, State of Missouri, to Fleming Ware, Research Assistant, Villanova University School of Law (July 8, 2009, 14:11 EST) (on file with author).  
Missouri publishes a list of businesses that have had their sales licenses revoked for failure to remit sales tax, but does not publish a list of the state's largest delinquent taxpayers.
- Montana** Email from Russ Hyatt, Accounts Receivable and Collections Bureau, Business and Income Tax Division, State of Montana, to Fleming Ware, Research Assistant, Villanova University School of Law (July 8, 2009, 14:09 EST) (on file with author); Mont. Code Ann. §§ 3-5-508-09 (2010).  
The Montana Department of Revenue publishes a list of the state's delinquent taxpayers. The list includes only taxpayer's names for tax debts that Montana has filed a warrant for distraint against them for the tax debt they owe. Authority is derived from cited statute.
- Nebraska** Nebraska does not have a shaming statute.
- Nevada** Nev. Rev. Stat. Ann. § 361.300 (LexisNexis 2010)  
On or before January 1 of each year, the county assessor shall transmit to the county clerk, post at the front door of the courthouse and publish in a newspaper published in the county a notice that the tax roll is complete and open for public inspection. Additionally, the list may be posted in public areas of public libraries, in public areas of courthouses, and on a website.
- New Hampshire** New Hampshire does not have a shaming statute.
- New Jersey** Email from New Jersey Taxation, to Fleming Ware, Research Assistant, Villanova University School of Law (July 8, 2009, 13:00 EST) (on file with author); New Jersey Division of Taxation's Largest

Judgmented Taxpayer Listing, <http://www.state.nj.us/treasury/taxation/jdgdisc1.shtml> (last visited Aug. 9, 2010).

New Jersey publishes a list of delinquent taxpayers; however, the website is currently under construction.

- New Mexico** New Mexico no longer has a shaming website.
- New York** New York does not have a shaming statute.
- North Carolina** North Carolina Tax Debtors, [http://www.dor.state.nc.us/collect/debtor\\_info.html](http://www.dor.state.nc.us/collect/debtor_info.html) (last visited Aug. 9, 2010).  
North Carolina publishes a list of delinquent taxpayer's names, the type of tax owed, and the amount of the tax.
- North Dakota** North Dakota does not have a shaming statute.
- Ohio** Ohio Rev. Code Ann. § 5719.04 (LexisNexis 2010)  
Ohio prepares a tax list containing the name of the person charged and the amount of such taxes and the penalty. The auditor shall cause a copy of the delinquent personal and classified property tax list to be published twice within sixty days in a newspaper published in the English language in the county and of general circulation thereof.
- Oklahoma** Email from Tim Rudek, Oklahoma Tax Division - Account Maintenance Division, to Fleming Ware, Research Assistant, Villanova University School of Law (July 13, 2009, 08:25) (on file with author). Oklahoma Tax Commission, <http://www.tax.ok.gov/top100.html> (last visited Aug. 9, 2010).  
Oklahoma publishes a hard list of delinquent taxpayers owing taxes for which a warrant has been issued.
- Oregon** Oregon does not have a shaming statute.
- Pennsylvania** Pennsylvania no longer has a shaming website.

- Rhode Island** R.I. Gen. Laws § 44-1-34 (2010); Rhode Island Division of Taxation, Top 100 Tax Delinquents, <http://www.tax.ri.gov/misc/top100.php> (last visited Aug. 9, 2010).  
The tax administrator is authorized by statute to prepare a list of names of the 100 delinquent taxpayers who owe the largest amount of state tax and whose taxes have been unpaid for a period in excess of ninety days following the date their tax was due.
- South Carolina** South Carolina's Debtor's Corner, <http://www.sctax.org/delinquent/delinquent.shtml> (last visited Aug. 9, 2010).  
The South Carolina Department of Revenue publishes information pertaining to some of the largest uncollected liabilities owed to the citizens of South Carolina. All of the information provided on the list is public information as a result of the Department of Revenue's having filed a tax lien with the Clerk of Court/Register of Deeds in the county of residence. Debt information may also be obtained directly for the Department of Revenue. The list includes the name of the taxpayer, the taxpayer's address, and the amount owed.
- South Dakota** South Dakota does not have a shaming statute.
- Tennessee** Tennessee does not have a shaming statute.
- Texas** Texas does not have a shaming statute.
- Utah** Utah does not have a shaming statute.
- Vermont** Vermont does not have a shaming statute.
- Virginia** Email from VA Tax Customer Service, to Fleming Ware, Research Assistant, Villanova University School of Law (July 9, 2009, 09:19 EST) (on file with author); Virginia Delinquent Taxpayer List, <http://www.tax.virginia.gov/site.cfm?alias=delinquentdebtors> (last visited Aug. 9, 2010).  
Virginia publishes the names of businesses having unresolved tax liabilities. The list includes

the name of the business, address, and amount of tax owed. The information contained in the list is public information as a Memorandum of Lien has been filed on the debts listed in the Circuit Court.

**Washington**  
(LexisNexis 2010).

Wash. Rev. Code Ann. § 82.32.330(3)(c)

Washington may publish the names of taxpayers against whom a warrant has been either issued or filed and remains outstanding for a period of at least ten working days.

**West Virginia**

West Virginia does not have a shaming statute.

**Wisconsin**

Wis. Stat. § 73.03(62) (2010).

It shall be the duty of the department of revenue, and it shall have the power and authority to prepare and maintain a list of all persons who owe delinquent taxes to the department, in excess of \$5,000, which are unpaid for more than ninety days after all appeal rights have expired. The department shall post the names of persons from this list on the internet at a site that is created and maintained by the department for this purpose. The department shall distribute the posted information to Internet search engines so the information is searchable. The Internet site shall list the name, address, type of tax due, and amount of tax due, and the Internet site shall contain a special a special page for the 100 largest delinquent taxpayer accounts.

**Wyoming**

Wyoming does not have a shaming statute.