

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

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

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

**SUPPLEMENTARY INFORMATION:**

**Background**

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

provision of the Code or related statutes. Disclosure is subject to situations and conditions prescribed by regulation.

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

The temporary regulations also clarify the standard used in determining whether disclosures are authorized under section 6103(k)(6). Recent litigation indicates that there is some confusion as to the authority of IRS (and now TIGTA) officers and employees to make disclosures in certain situations under section 6103(k)(6). The temporary regulations seek to address these issues. In particular, the temporary regulations address the issues surrounding the disclosures that occur when IRS or TIGTA officers and employees introduce themselves to third party witnesses or communicate in writing using, e.g., official letterhead that reveals affiliation with IRS or TIGTA. The temporary regulations also clarify that section 6103(k)(6) does not limit IRS or TIGTA officers and employees with respect to the initiation or conduct of an investigation. Finally, the temporary regulations clarify that section 6103 does not require IRS and TIGTA officers or employees to contact a taxpayer for information before contacting third party witnesses.

**Explanation of Provisions**

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

The definition of *disclosure of return information to the extent necessary* is a disclosure of return information that an IRS or TIGTA officer or employee, based on the facts and circumstances known to the officer or employee at the time of the disclosure, reasonably believes is necessary to obtain information to perform properly the official duties described by the temporary regulations, or to accomplish properly the activities

connected with carrying out those official duties. The term *necessary* in this context does not mean essential or indispensable, but rather appropriate and helpful in obtaining the information sought.

The definition of *information not otherwise reasonably available* is information that an IRS or TIGTA officer or employee reasonably believes, under the facts and circumstances known to the officer or employee at the time of a disclosure, cannot be obtained in a sufficiently accurate or probative form, or in a timely manner, and without impairing the proper performance of the official duties described by the temporary regulations, without making the disclosure. Corroboration of information provided by, or concerning, a taxpayer is, by definition, *information not otherwise reasonably available* from the taxpayer. In criminal cases, corroboration of information provided by the taxpayer is essential. See *Smith v. United States*, 348 U.S. 147 (1954).

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

The temporary regulations also address certain issues that have arisen in criminal investigations, although similar issues may arise in civil investigations. Criminal investigations typically involve obtaining evidence and verifying taxpayer-supplied information through contacts with third party witnesses. A disclosure that a taxpayer is under criminal investigation may occur by various means including, but not limited to, direct oral, written, or electronic disclosure, or indirect