Testimony of Kenneth J. Kies

Managing Director, Federal Policy Group

Before the

Committee on Ways and Means

Subcommittee on Oversight

United States House of Representatives

Hearing on

Legislative Proposals and Tax Law Related to Presidential and Vice-Presidential Tax Returns

February 7, 2019

Chairman Lewis, Ranking Member Kelly, and distinguished members of the Subcommittee, my name is Ken Kies. I am the Managing Director of the Federal Policy Group. Thank you for inviting me to speak on tax law related to presidential and vice-presidential tax returns. During my time in governmental service as Chief of Staff of the Joint Committee on Taxation, as well as when I was Chief Republican Tax Counsel for the Ways and Means Committee, I have had occasion to review the law surrounding the handling and disclosure of tax return information, as well as to advise Members of Congress with respect thereto, and my comments today are informed by this experience.

Section 6103(a) of the Internal Revenue Code specifically provides that "[r]eturns and return information shall be confidential, and except as authorized by this title—(1) no officer or employee of the United States…shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or employee or otherwise under the provisions of this section." This Code provision has sometimes been described as a general prohibition on the disclosure of tax returns and tax return information. While I agree that the provision does prohibit disclosure, I note that the characterization of this rule as a "general" restriction is somewhat misleading.

Instead, I would describe the provision as a "blanket" rule against disclosure by any authorized recipient of returns (with disclosure allowed in some "limited situations" I will describe later).

For purposes of this hearing, an even more relevant aspect of the blanket restriction as it pertains to Members of Congress and their staff is that the prohibition rule explicitly refers to returns obtained "in any manner in connection with" being a Member of Congress or employed by one, including returns that were obtained "under the provisions of this section." This is a crucial point to remember when considering how the blanket rule against the disclosure of returns relates with the limited exceptions provided in the section.

Just because a Member of Congress or employee of such Member is entitled to have returns disclosed to him or her, that Member, or employee, is still prohibited from then disclosing the return to another unless such further disclosure is explicitly allowed by reason of the section. To willfully do otherwise is to commit a felony punishable by up to five years in prison.

As for the exception that is relevant to Members of Congress and their staff, I read the plain language of section 6103(f) and find no comfort whatsoever that any public disclosure of tax returns is clearly permitted. A sentence in section 6103(f) does refer to one of the three listed Committees submitting returns it has received "to the Senate" or "House" (or both). This sentence explicitly says nothing about permitting disclosure to "the public." It likewise says nothing about public disclosure being permitted when Members have a valid legislative purpose, and does not say that the permissive disclosure to the Senate or House overrides the blanket restrictions. Thus, since every disclosure of returns is prohibited unless it is explicitly allowed, the only conclusion I could feel safe adopting is that disclosure can be made by a listed Committee to the House Members or Senate Members generally, but that such disclosure can go no further unless permitted by some other section (of which, in relevant part, there is none).

Further, while I acknowledge the existence of a colorable argument that the so-termed "Speech and Debate" clause of the U.S. Constitution could prevent prosecution of a Member of Congress or staff member for a violation of the tax return confidentiality rules so long as the act was undertaken in furtherance of the performance of their legislative tasks, I would observe that this clause has never been tested or applied by the Supreme Court in the context of a felony violation of section 6103. Thus, if I were advising a Member of Congress or any of their staff, I would tell them I could provide them no firm comfort on what this clause actually allows them to do with respect to tax returns that they have legally received under section 6103. In my mind, the risk to such Members and staff is grave when one considers the potential penalties.

Given everything I have briefly described above, I would never feel comfortable advising a client that he or she could safely disclose—let alone "make public"—any tax return in a manner that was not unequivocally enumerated in section 6103. In my capacity as Chief of Staff of the Joint Committee on Taxation, I never did so, nor would I have counseled any of my staff, any Member of Congress, or any congressional staff to ever do so.

This concludes my formal remarks. I thank the Subcommittee for its attention, and welcome any questions.