

**DESCRIPTION OF CHAIRMAN'S AMENDMENT IN THE
NATURE OF A SUBSTITUTE TO H.R. 2923**

The House Committee on Ways and Means has scheduled a markup of the provisions in H.R. 2923 on September 24, 1999. A description of these provisions is contained in JCX-64-99. The amendment in the nature of a substitute would adopt the provisions of H.R. 2923 with one modification and four additional provisions:

I. MODIFICATION TO H.R. 2923

A. Extension of Research Tax Credit

The provision relating to research credits attributable to periods after June 30, 1999, and before October 1, 2000, is clarified to provide that such research credits shall not be taken into account in determining any amount required to be paid for any purpose under the Internal Revenue Code before October 1, 2000. Such credits would be available on or after October 1, 2000, by filing an amended return, applying for an expedited refund, applying for an adjustment of estimated tax payments, or by other means allowed under the Internal Revenue Code.

II. ADDITIONAL PROVISIONS

A. Time-Sensitive Provisions

1. Prohibit Disclosure of APAs and APA Background Files

Present Law

Section 6103

Under section 6103, returns and return information are confidential and cannot be disclosed unless authorized by the Internal Revenue Code.

The Code defines return information broadly. Return information includes:

- C a taxpayer's identity, the nature, source or amount of income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments;

- C whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing; or
- C any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense.¹

Section 6110 and the Freedom of Information Act

With certain exceptions, section 6110 makes the text of any written determination the IRS issues available for public inspection. A written determination is any ruling, determination letter, technical advice memorandum, or Chief Counsel advice. Once the IRS makes the written determination publicly available, the background file documents associated with such written determination are available for public inspection upon written request. The Code defines “background file documents” as any written material submitted in support of the request. Background file documents also include any communications between the IRS and persons outside the IRS concerning such written determination that occur before the IRS issues the determination.

Before making them available for public inspection, section 6110 requires the IRS to delete specific categories of sensitive information from the written determination and background file documents.² It also provides judicial and administrative procedures to resolve disputes over the scope of the information the IRS will disclose. In addition, Congress has also wholly exempted certain matters from section 6110's public disclosure requirements.³ Any part of a written determination or background file that is not disclosed under section 6110 constitutes “return information.”⁴

¹ Sec. 6103(b)(2)(A).

² Sec. 6110(c) provides for the deletion of identifying information, trade secrets, confidential commercial and financial information and other material.

³ Sec. 6110(l).

⁴ Sec. 6103(b)(2)(B) (“The term ‘return information’ means . . . any part of any written determination or any background file document relating to such written determination (as such terms are defined in section 6110(b)) which is not open to public inspection under section 6110”).

The Freedom of Information Act (“FOIA”) lists categories of information that a federal agency must make available for public inspection.⁵ It establishes a presumption that agency records are accessible to the public. The FOIA, however, also provides nine exemptions from public disclosure. One of those exemptions is for matters specifically exempted from disclosure by a statute other than the FOIA if the exempting statute meets certain requirements.⁶ Section 6103 qualifies as an exempting statute under this FOIA provision. Thus, returns and return information that section 6103 deems confidential are exempt from disclosure under the FOIA.

Section 6110 is the exclusive means for the public to view IRS written determinations.⁷ If section 6110 covers the written determination, then the public cannot use the FOIA to obtain that determination.

Advance Pricing Agreements

The Advanced Pricing Agreement (“APA”) program is an alternative dispute resolution program conducted by the IRS, which resolves international transfer pricing issues prior to the

⁵ Unless published promptly and offered for sale, an agency must provide for public inspection and copying: (1) final opinions as well as orders made in the adjudication of cases; (2) statements of policy and interpretations not published in the Federal Register; (3) administrative staff manuals and instructions to staff that affect a member of the public; and (4) agency records which have been or the agency expects to be, the subject of repetitive FOIA requests. 5 U.S.C. sec. 552(a)(2). An agency must also publish in the Federal Register: the organizational structure of the agency and procedures for obtaining information under the FOIA; statements describing the functions of the agency and all formal and informal procedures; rules of procedure, descriptions of forms and statements describing all papers, reports and examinations; rules of general applicability and statements of general policy; and amendments, revisions and repeals of the foregoing. 5 U.S.C. sec. 552(a)(1). All other agency records can be sought by FOIA request; however, some records may be exempt from disclosure.

⁶ Exemption 3 of the FOIA provides that an agency is not required to disclose matters that are:

(3) specifically exempted from disclosure by statute (other than section 552b of this title) provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld; . . .

5 U.S.C. § 552(b)(3).

⁷ Sec. 6110(m).

filing of the corporate tax return. Specifically, an APA is an advance agreement establishing an approved transfer pricing methodology entered into among the taxpayer, the IRS, and a foreign tax authority. The IRS and the foreign tax authority generally agree to accept the results of such approved methodology. Alternatively, an APA also may be negotiated between just the taxpayer and the IRS; such an APA establishes an approved transfer pricing methodology for U.S. tax purposes. The APA program focuses on identifying the appropriate transfer pricing methodology; it does not determine a taxpayer's tax liability. Taxpayers voluntarily participate in the program.

To resolve the transfer pricing issues, the taxpayer submits detailed and confidential financial information, business plans and projections to the IRS for consideration. Resolution involves an extensive analysis of the taxpayer's functions and risks. Since its inception in 1991, the APA program has resolved more than 180 APAs, and approximately 195 APA requests are pending.

Currently pending in the U.S. District Court for the District of Columbia are three consolidated lawsuits asserting that APAs are subject to public disclosure under either section 6110 or the FOIA.⁸ Prior to this litigation and since the inception of the APA program, the IRS held the position that APAs were confidential return information protected from disclosure by section 6103.⁹ On January 11, 1999, the IRS conceded that APAs are "rulings" and therefore are "written determinations" for purposes of section 6110.¹⁰ Although the court has not yet issued a ruling in the case, the IRS announced its plan to publicly release both existing and future APAs. The IRS then transmitted existing APAs to the respective taxpayers with proposed deletions. It has received comments from some of the affected taxpayers. Where appropriate, foreign tax authorities have also received copies of the relevant APAs for comment on the proposed deletions. No APAs have yet been released to the public.

⁸ BNA v. IRS, Nos. 96-376, 96-2820, and 96-1473 (D.D.C.). The Bureau of National Affairs, Inc. (BNA) publishes matters of interest for use by its subscribers. BNA contends that APAs are not return information as they are prospective in application. Thus at the time they are entered into they do not relate to "the determination of the existence, or possible existence, of liability or amount thereof . . ."

⁹ The IRS contended that information received or generated as part of the APA process pertains to a taxpayer's liability and therefore was return information as defined in sec. 6103(b)(2)(A). Thus, the information was subject to section 6103's restrictions on the dissemination of returns and return information. Rev. Proc. 91-22, sec. 11, 1991-1 C.B. 526, 534 and Rev. Proc. 96-53, sec. 12, 1996-2 C.B. 375, 386.

¹⁰ IR 1999-05.

Some taxpayers assert that the IRS erred in adopting the position that APAs are subject to section 6110 public disclosure. Several have sought to participate as *amici* in the lawsuit to block the release of APAs. They are concerned that release under section 6110 could expose them to expensive litigation to defend the deletion of the confidential information from their APAs. They are also concerned that the section 6110 procedures are insufficient to protect the confidentiality of their trade secrets and other financial and commercial information.

Description of Proposal

The proposal would amend section 6103 to state that APAs and related background information are confidential return information under section 6103. Related background information would include: the request for an APA, any material submitted in support of the request, and any communication (written or otherwise) prepared or received by the Secretary in connection with an APA, regardless of when such communication is prepared or received. Protection would not be limited to agreements actually executed; it would include material received and generated in the APA process that does not result in an executed agreement.

Further, the proposal would also provide that APAs and related background information are not “written determinations” as that term is defined in section 6110. Therefore, the public inspection requirements of section 6110 would not apply to APAs and related background information. A document’s incorporation in a background file, however, would not be grounds for not disclosing an otherwise disclosable document from a source other than a background file.

The proposal would statutorily require that the Treasury Department prepare and publish an annual report on the status of APAs. The annual report would contain the following information:

- C Information about the structure, composition, and operation of the APA program office;
- C A copy of each current model APA;
- C Statistics regarding the amount of time to complete new and renewal APAs;
- C The number of APA applications filed during such year;
- C The number of APAs executed to date and for the year;
- C The number of APA renewals issued to date and for the year;
- C The number of pending APA requests;
- C The number of pending APA renewals;
- C The number of APAs executed and pending (including renewals and renewal requests) that are unilateral, bilateral and multilateral, respectively;
- C The number of APAs revoked or canceled, and the number of withdrawals from the APA program, to date and for the year;

C The number of finalized new APAs and renewals by industry;¹¹ and

General descriptions of:

- C the nature of the relationships between the related organizations, trades, or businesses covered by APAs;
- C the related organizations, trades, or businesses whose prices or results are tested to determine compliance with the transfer pricing methodology prescribed in the APA;
- C the covered transactions and the functions performed and risks assumed by the related organizations, trades or businesses involved;
- C methodologies used to evaluate tested parties and transactions and the circumstances leading to the use of those methodologies;
- C critical assumptions;
- C sources of comparables;
- C comparable selection criteria and the rationale used in determining such criteria;
- C the nature of adjustments to comparables and/or tested parties;
- C the nature of any range agreed to, including information such as whether no range was used and why, whether an inter-quartile range was used, or whether there was a statistical narrowing of the comparables;
- C adjustment mechanisms provided to rectify results that fall outside of the agreed upon APA range;
- C the various term lengths for APAs, including rollback years, and the number of APAs with each such term length;
- C the nature of documentation required; and
- C approaches for sharing of currency or other risks.

In addition, the proposal would require the IRS to describe, in each annual report, its efforts to ensure compliance with existing APA agreements. The first report would cover the period January 1, 1991, through the calendar year including the date of enactment. The Treasury Department could not include any information in the report which would have been deleted under section 6110(c) if the report were a written determination as defined in section 6110. Additionally, the report could not include any information which could be associated with or otherwise identify, directly or indirectly, a particular taxpayer. The Secretary would be expected to obtain input from taxpayers to ensure proper protection of taxpayer information and, if necessary, utilize its regulatory authority to implement appropriate processes for obtaining this input. For purposes of section 6103, the report requirement would be treated as part of Title 26.

¹¹ This information was previously released in IRS Publication 3218, "IRS Report on Application and Administration of I.R.C. Section 482."

While the proposal would statutorily require an annual report, it is not intended to discourage the Treasury Department from issuing other forms of guidance, such as regulations or revenue rulings, consistent with the confidentiality provisions of the Code.

Effective Date

The proposal would be effective on the date of enactment; accordingly, no APAs, regardless of whether executed before or after enactment, or related background file documents could be released to the public after the date of enactment. The proposal would require the Treasury Department to publish the first annual report no later than March 30, 2000.

2. Add Certain Vaccines Against Streptococcus Pneumoniae to the List of Taxable Vaccines

Present Law

A manufacturer's excise tax is imposed at the rate of 75 cents per dose (sec. 4131) on the following vaccines routinely recommended for administration to children: diphtheria, pertussis, tetanus, measles, mumps, rubella, polio, HIB (haemophilus influenza type B), hepatitis B, varicella (chicken pox), and rotavirus gastroenteritis. The tax applies to any vaccine that is a combination of vaccine components equals 75 cents times the number of components in the combined vaccine.

Amounts equal to net revenues from this excise tax are deposited in the Vaccine Injury Compensation Trust Fund to finance compensation awards under the Federal Vaccine Injury Compensation Program for individuals who suffer certain injuries following administration of the taxable vaccines. This program provides a substitute Federal, "no fault" insurance system for the State-law tort and private liability insurance systems otherwise applicable to vaccine manufacturers. All persons immunized after September 30, 1988, with covered vaccines must pursue compensation under this Federal program before bringing civil tort actions under State law.

Description of Proposal

The proposal would add conjugate streptococcus pneumoniae vaccines to the list of taxable vaccines. The proposal would also correct an effective date enacted in Public Law 105-277 and makes certain other conforming amendments to expenditure purposes to enable certain payments to be made from the Trust Fund.

In addition, the General Accounting Office ("GAO") would be directed to report to the House Committee on Ways and Means and the Senate Committee on Finance on the operation and management of expenditures from the Vaccine Injury Compensation Trust Fund and to

advise the Committees on the adequacy of the Vaccine Injury Compensation Trust Fund to meet future claims under the Federal Vaccine Injury Compensation Program. The GAO would report its findings to the House Committee on Ways and Means and the Senate Committee on Finance not later than December 31, 1999.

Effective Date

The proposal would be effective for vaccine purchases beginning on the day after the date on which the Centers for Disease Control make final recommendation for routine administration of conjugate streptococcus pneumoniae vaccines to children. No floor stocks tax would be collected for amounts held for sale on that date.

3. Authority to Postpone Certain Tax-Related Deadlines by Reason of Year 2000 Failures

Present Law

There are no specific provisions in present law that would permit the Secretary to postpone tax-related deadlines by reason of Year 2000 (also known as "Y2K") failures. The Secretary is, however, permitted to postpone tax-related deadlines for other reasons. For example, the Secretary may specify that certain deadlines are postponed for a period of up to 90 days in the case of a taxpayer determined to be affected by a Presidentially declared disaster. The deadlines that may be postponed are the same as are postponed for reason of service in a combat zone. The provision does not apply for purposes of determining interest on any overpayment or underpayment.

The suspension of time applies to the following acts: (1) filing any return of income, estate, or gift tax (except employment and withholding taxes); (2) payment of any income, estate, or gift tax (except employment and withholding taxes); (3) filing a petition with the Tax Court for redetermination of a deficiency, or for review of a decision rendered by the Tax Court; (4) allowance of a credit or refund of any tax; (5) filing a claim for credit or refund of any tax; (6) bringing suit upon any such claim for credit or refund; (7) assessment of any tax; (8) giving or making any notice or demand for payment of any tax, or with respect to any liability to the United States in respect of any tax; (9) collection of the amount of any liability in respect of any tax; (10) bringing suit by the United States in respect of any liability in respect of any tax; and (11) any other act required or permitted under the internal revenue laws specified in regulations prescribed under section 7508 by the Secretary.

Description of Proposal

Under circumstances which the Secretary deems appropriate, the Secretary would be permitted to postpone, on a taxpayer-by-taxpayer basis, certain tax-related deadlines for a period of up to 90 days in the case of a taxpayer determined to be affected by an actual Y2K related

failure. In order to be eligible for relief, taxpayers must have made good faith, reasonable efforts to avoid any Y2K related failures. The relief would be similar to that granted under the Presidentially declared disaster and combat zone provisions, except that employment and withholding taxes also would be eligible for relief under the proposal. The relief would permit the abatement of both penalties and interest.

The relief may apply to the following acts: (1) filing of any return of income, estate, or gift tax, including employment and withholding taxes; (2) payment of any income, estate, or gift tax, including employment and withholding taxes; (3) filing a petition with the Tax Court; (4) Allowance of a credit or refund of any tax; (5) filing a claim for credit or refund of any tax; (6) bringing suit upon any such claim for credit or refund; (7) assessment of any tax; (8) giving or making any notice or demand for payment of any tax, or with respect to any liability to the United States in respect of any tax; (9) collection of the amount of any liability in respect of any tax; (10) bringing suit by the United States in respect of any liability in respect of any tax; and (11) any other act required or permitted under the internal revenue laws specified or prescribed by the Secretary.

Effective Date

The proposal would be effective with respect to Y2K failures occurring on or after January 1, 2000.

B. Revenue Offset for Fiscal Year 2000

1. Modification of Individual Estimated Tax Safe Harbor

Present Law

Under present law, an individual taxpayer generally is subject to an addition to tax for any underpayment of estimated tax. An individual generally does not have an underpayment of estimated tax if he or she makes timely estimated tax payments at least equal to: (1) 100 percent of the tax shown on the return of the individual for the preceding year (the "100 percent of last year's liability safe harbor") or (2) 90 percent of the tax shown on the return for the current year. The 100 percent of last year's liability safe harbor generally is modified to be a 110 percent of last year's liability safe harbor for any individual with an AGI of more than \$150,000 as shown on the return for the preceding taxable year, except that it is 105 percent of last year's liability for taxable years beginning in 1999, 106 percent of last year's safe harbor for taxable years beginning in 2000 and 2001, and 112 percent of last year's liability for taxable years beginning in 2002. If a married individual files a separate return for the year for which an estimated tax installment payment was due, the \$150,000 amount becomes \$75,000.

Description of Proposal

For taxable years beginning in 2000, the safe harbor for an individual with an AGI of more than \$150,000 as shown on the return for the preceding taxable year would be modified to be a 108.5 (instead of 106) percent of last year's liability safe harbor.

Effective Date

The proposal would be effective for estimated tax payments made with respect to taxable years beginning in 2000.