



Consenting to Disclosure or Use of Return Information
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IRS Releases New Regulations on Tax Return Information

The IRS released final regulations under §7216 to revise requirements for the use or disclosure of tax return information by tax return preparers. As well, more detailed rules, including specific language required to be in any consent related to a 1040 series form, was added by the IRS in Revenue Procedure 2008-12.

These new rules will go into force as of January 1, 2009.

Use and Disclosure of Tax Return Information

IRC Section 7216 imposes criminal sanctions on the unauthorized disclosure of taxpayer information. The provision reads:

Sec. 7216 Disclosure or use of information by preparers of returns

(a) General rule

Any person who is engaged in the business of preparing, or providing services in connection with the preparation of, returns of the tax imposed by chapter 1, or any person who for compensation prepares any such return for any other person, and who knowingly or recklessly--

- (1) discloses any information furnished to him for, or in connection with, the preparation of any such return, or*
- (2) uses any such information for any purpose other than to prepare, or assist in preparing, any such return,*

shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not more than \$1,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

(b) Exceptions

(1) Disclosure

Subsection (a) shall not apply to a disclosure of information if such disclosure is made--

- (A) pursuant to any other provision of this title, or*
- (B) pursuant to an order of a court.*

(2) Use

Subsection (a) shall not apply to the use of information in the preparation of, or in connection with the preparation of, State and local tax returns and declarations of estimated tax of the person to whom the information relates.

(3) Regulations

Subsection (a) shall not apply to a disclosure or use of information which is permitted by regulations prescribed by the Secretary under this section. Such regulations shall permit (subject to such conditions as such regulations shall provide) the disclosure or use of information for quality or peer reviews.

As well, civil sanctions are also imposed on tax return preparers for unauthorized disclosure under §6713 of \$250 for each unauthorized disclosure, up to a maximum of \$10,000. The civil penalty does not apply to disclosures allowed under §7216 [IRC §6713(b)].

In January of 2008 the IRS issued the revisions to the final regulations implementing this provision, effective for use and disclosures of return information after January 1, 2009. Until that time, the old proposed regulations and prior guidance applies. The regulations note that Revenue Ruling 79-114 (which dealt with rules for using tax return information for marketing other services offered by the preparer) will be rendered obsolete upon the effective date of these new rules.

A. Tax Return Preparation and Auxiliary Services

A “tax return preparer” is anyone who is engaged in the business of preparing tax returns or providing auxiliary services in connection with the preparation of income tax returns. That is true even if the preparation of tax returns or provision of auxiliary services is not the principal business of the organization, as well as if no fee is charged specifically for the preparation of income tax returns, as well as those that do such returns “on the side” outside the course of business, if done for compensation. [Reg. §301.7216-1(b)(2)]

B. Tax Return Information

Tax return information includes any and all information provided to a tax return preparer in connection with the preparation of a taxpayer’s tax return. That includes, but is not limited to, the taxpayer’s name, address and identifying number. As well, it includes both information provided directly by the taxpayer to the preparer as well as information received from third parties in connection with the preparation of the taxpayers’ return, including items received from the IRS such as efile acceptances and rejections.

Tax return information does not include any information that was otherwise made available to the tax return preparer outside the tax return preparation context. In essence, information that is provided to the preparer if the information would not have been provided to the preparer if the taxpayer had not been seeking to engage or had not engaged the tax return preparer to perform the tax preparation service. [Reg. §301.7216-1(b)(3)]

The new regulations make clear that statistical compilations of tax return information also constitute tax return information, even if the information is maintained in a form that cannot be associated with the taxpayer. A limited use exception to the use of statistical compilations without taxpayer consent is provided in Reg. §301.7216-2(o) which allows such compilations to be made solely for the internal management and support of the taxpayer’s business. The information may not be used for support of businesses other than tax return preparation.

Such compilations may not be disclosed to third parties except as explicitly provided for the Reg. §301.7216-2(o), which allows disclosure for:

- Financial accounting or regulatory reporting requirements or
- In conjunction with the sale or other disposition of a a tax preparation business

In the latter case, the person obtaining the information is subject to the same restrictions as the original compiler of the information.

C. Use and Disclosure

Use of tax return information is defined as any circumstance where the preparer refers to or relies upon tax return information as to the basis to take or permit an action [Reg. §1.7216-1(b)(4)(i)]. The IRS gives an example where the tax preparer inquires of taxpayers about whether they wish to make an IRA contribution after determining if the taxpayer is eligible to make an IRA contribution. Only those taxpayers that are eligible to make an IRA contribution receive the inquiry. As such, this is a use of tax return information potentially subject to the consent rules [Reg. §1.7216-1(b)(4)(ii)].

Disclosure of tax return information includes the act of making tax return information known to any person in any manner whatever—an extremely broad definition [Reg. §1.7216-1(b)(5)].

D. Permitted Disclosures or Uses Without Taxpayer Consent

Regulation §301.7201-2 provides a list of cases where tax return information may be used for disclosed without taxpayer consent. Note that CPAs need to remember that even if the Internal Revenue Code permits disclosure, Arizona Accountancy Law and Regulations dealing with confidential client information must also be complied with—and these exceptions would not override any prohibition imposed on a CPA under Arizona law.

1. Disclosures pursuant to other provisions of the Internal Revenue Code or Regulations
2. Disclosures to Officers or Employees of the IRS
3. Disclosures or Uses for the Preparation of a Taxpayer's Tax Return

The regulation specifically allows the use of tax return information for the purposes of updating a preparer's software for changes in IRS requirements or to test and ensure the software's technical capabilities if the preparer provides the taxpayer with software used in preparing the return. As well, if the taxpayer furnishes information to a tax preparer located in the United States, disclosure to other members of the same firm and use of that information by those members in performing tax return preparation or auxiliary services is permitted without specific authorization so long as all individuals are located within the United States.

If such a member is located outside the United States, disclosure can only be made if specific consent is obtained for such a disclosure prior to any disclosure taking place. [Reg. §301.7216-2(c)(3)] However, if the taxpayer makes the initial disclosure to a tax return preparer located outside the United States, the

information may be disclosed to other members of the firm (whether or not located in the United States) without additional consent [Reg. §301.7216-2(c)(4)].

4. Disclosure to Other Preparers

Information may be disclosed to other tax return preparers without the taxpayer's consent if it is made for the purpose of preparing or assisting in the preparation of a tax return (or auxiliary services) so long as the services provided are not "substantive determinations or advice" affecting the tax liability reported by the taxpayers. Substantive determinations involves analysis, interpretation or application of the law. [Reg. §301.7216-2(d)(1)]

This exception is meant to cover the situation where a preparer sends off the return information to a third party processor that will actually handle the e-filing of the return directly with the IRS.

Disclosures may be made to persons under contract with the return preparer for the programming, maintenance, repair, testing or procurement of equipment or software used for purposes of tax return preparation without consent only if the disclosure is limited to the minimum information necessary to perform the service and the contractor is provided with a written notice informing them of their responsibilities under IRC §§6713 and 7216. [Reg. §301.7216-2(d)(2)]

5. Related Taxpayers

Information may be used and disclosed without the consent of taxpayer for use in the preparation of the return of a related taxpayer. The disclosure can only be made in the form on which it appears on the return. As well, this exception is subject to two additional conditions:

1. The first taxpayers interest in the information is not adverse to the second taxpayer and
2. The first taxpayer has not explicitly prohibited such disclosure or use. [Reg. §301.7216-2(e)(1)]

For these purposes, the following relationships create "related taxpayers":

- Husband and wife
- Parent and child
- Grandchild and grandparent
- Partner and partnership
- Trust or estate and beneficiary
- Corporation and shareholder
- Members of a controlled group of corporations as defined in §1563

[Reg. §301.7216-2(e)(2)]

For any other “relationship” a specific authorization as provided for in Reg. §301.7216-3 is required.

6. Courts and regulatory bodies [Reg. §301.7216-2(f)]

Disclosure without taxpayer consent is allowed if the preparer receives any of the following:

- Order of any Federal, State or local court of record
- Subpoena issued by a Federal or State grand jury
- Subpoena issued by the United States Congress
- Administrative order, demand, summons or subpoena issued by
 - o Any Federal agency
 - o State agency, body or commission charged with the licensing, registration or regulation of tax return preparers
- Written request from a professional association ethics committee or board investigating the ethical conduct of the tax return preparer
- Written request from the PCAOB in connection with an inspection under Section 104 of the Sarbanes-Oxley Act of 2002 or an investigation under Section 105 of that act

7. Attorney for Purposes of securing legal advice [Reg. §301.7216-2(g)(1)]

8. Employee of the Treasury Department for use in the investigation of the tax return preparer conducted by the IRS or Treasury Department [Reg. §301.7216-2(g)(2)]

9. Officer of the Court [Reg. §301.7216-2(f)(3)]

A disclosure without taxpayer consent can be made to an officer of the court for use in proceeding involving the tax preparer or the tax preparer’s client before any court or grand jury convened by the court.

10. Certain disclosures by Attorneys and Accountants

Attorneys and accountants and members of their firms may use tax return information for purposes of performing other legal and accounting services for the client. The IRS specifically cites as an example a use by an accounting firm of the information obtained during tax return preparation in preparation of the books and records, working papers or accounting statements or reports of the taxpayers. The information may be disclosed to third parties as well, consistent with the applicable legal and ethical responsibilities of the attorney or accountant, unless the taxpayer directs otherwise. However, if disclosure is

made outside the United States, then the rules of Reg. §301.7216-2(c) and (d) apply. [Reg. §301.7216-2(g)(1)(i)]

This exception is limited to the specific law or accounting firm, and does not include any related or affiliated firms [Reg. §301.7216-2(g)(1)(ii)]

Similarly, the accountant and attorney may make use of the tax return information (subject to applicable professional ethical responsibilities) when performing legal or accounting services for a client other than the taxpayer without taxpayer consent. This is permitted if the information is, or may be, relevant to the subject matter of the services for the other client and consideration of the information by those performing the services is necessary for the proper performance of the services. However, in no case may the information be disclosed to a person who is not an officer, employee or member of the law or accounting firm unless another exception applies. [Reg. §301.7216-2(g)(2)]

11. Corporate fiduciaries [Reg. §301.7216-2(i)]

Unless the taxpayer directs otherwise, a corporate fiduciary that prepares a tax return for a client may disclose or use information in the ordinary course of rendering fiduciary, investment or other custodial or management services for the taxpayer or make the information available to the taxpayer's attorney, accountant or investment adviser.

12. Taxpayer's fiduciary [Reg. §301.7216-2(j)]

If a taxpayer dies, becomes incompetent, insolvent or bankrupt after furnishing information to a tax preparer, the preparer may disclose information to the duly appointed fiduciary of the taxpayer or his estate, or to the duly appointed agent of the fiduciary.

13. Other Tax Returns/Tax Obligations [Reg. §301.7216-2(k)]

The provisions for disclosing information to preparers outside the United States [Reg. §301.7216-2(c) and (d)] will apply to any tax return information furnished in connection with the preparation of any state or local tax return (including for the District of Columbia), any territory or possession of the United States or any foreign country. This provision prevents an "end run" around the disclosure requirements for information transferred outside the United States by using a state return to "bootstrap" all federal information when the federal return is used as the starting point for the state or local return (as is true for Arizona income taxes).

However, §7216(a) and Reg. §310.7216-1 will not apply to the use by any tax return preparer of tax return information in connection with the preparation of any state for local return or of a country other than the United States, or with an audit related to those returns.

14. Payment for Tax Preparation Services [Reg. §301.7216-2(l)]

Tax return information can be used for the limited purpose of processing or collecting the fee for the tax preparation services. However, this is limited to information the taxpayer gave the tax return preparer for the purpose of making the payment (such as the taxpayer's credit card number and other information necessary to process a credit card payment).

15. Retention of Records of Taxpayer [Reg. §301.7216-2(m)]

16. Lists for Solicitation of Tax Return Business [Reg. §301.7216-2(n)]

Such a list may be used solely to contact the taxpayer for the purpose of offering tax information or additional tax return preparation services. The list may not be transferred to another person except as part of the sale of the tax return preparation business.

17. Production of Statistical Information for Return Preparation Business [Reg. §301.7216-2(o)]

As described earlier, a tax return preparer may make use of tax return information without consent for limited purposes related solely to internal management and support of the tax return preparation business. The information may not be disclosed or used for any business of the preparer other than tax return preparation.

18. Quality or Peer Reviews [Reg. §301.7216-2(p)]

A limited exception is granted for the use of information for quality and peer reviews conducted by attorneys, certified public accountants, enrolled agents and enrolled actuaries or individuals supporting one of the above. No tax return information can be disclosed in any evaluative report or recommendations that may be accessible by any person other than the reviewer and the preparer being reviewed. The reviewer also is not allowed to retain any tax return information after completion of the review, and the reviewer and administrative personnel who receive tax return information are treated as preparers for purposes of §§7216(a) and 6713(a).

19. Disclosure to Report the Commission of a Crime [Reg. §301.7216-2(q)]

Disclosure can be made to Federal, State or local authorities to the extent necessary to inform them of criminal activities and assist in the investigation into such activities. Protection is also extended to disclosures made in a bona fide but mistaken belief that activities constituted a violation of criminal law.

However, note that a CPA must also determine that any such disclosure would not result in a violation of ARS §32-749, especially if such a disclosure is made voluntarily by the CPA.

20. Disclosure Due to Tax Return Preparer's Incapacity or Death [Reg. §301.7216-2(r)]

Disclosure can be made for purposes of assisting the tax return preparer or his legal representative in operating the business.

All other uses and disclosures not covered by one of these exceptions can only be made with the consent of the taxpayer as provided for in Reg. §301.7216-3.

E. Taxpayer Consent for Other Uses and Disclosures [Reg. §301.7216-3]

Preparers can use and disclose tax return information in other manners, but only so long as the taxpayer provides an informed and voluntary consent to the use or disclosure of the information. A tax return preparer cannot condition tax preparation services on the taxpayer signing the consent except for consent to furnish information to another tax return preparer, including one located outside the United States [Reg. §301.7216-3(a)(2)].

1. Required Form and Content [Reg. §301.7216-3(a)(3)]

Any taxpayer consent must contain:

- Tax return preparer's name
- Taxpayer's name
- Specific recipients of tax return information (if consenting to disclosure)
- Particular use authorized (if consenting to use of information) along with particular solicitation uses being authorized. That includes specific identification of products or services that may be solicited. Specifically listed as subject to disclosure are
 - o Balance due loans
 - o Mortgage loans
 - o Mutual funds
 - o Individual retirement accounts
 - o Life insurance
 - o And any other product or service...
- Specific tax return information to be disclosed or used
- If consenting to disclosure to a tax return preparer outside the United States, must also have specific consent to that as well

- Signature of taxpayer and date taxpayer signed the consent

2. Form 1040 Consents

The regulations authorize the IRS to issue specific additional guidance for the form and content of consents related to tax return information received in the preparation of a Form 1040 series return. The IRS issued Revenue Procedure 2008-12 with those requirements.

a) Basic 1040 Consent Requirements

A separate written consent is generally required to be obtained from the taxpayer for each use and/or disclosure [Revenue Procedure 2008-12, Section 4.01]. Multiple disclosures and uses can be authorized within a single form, but only if the document provides the taxpayer with the opportunity to affirmatively select each disclosure or use, and must be provided any information required for each specific disclosure or use [Revenue Procedure 2008-12, Section 4.05].

A paper consent must be provided on one or more sheets of 8½ by 11 inch or larger piece of paper, the text on the paper must pertain only to the disclosure or use the consent authorizes and the text must be printed in at least 12 point type. [Revenue Procedure 2008-12, Section 4.02].

An electronic consent must be provided on one or more computer screens, and the information on the screen must relate solely to the disclosure or use authorized by the consent except for navigation tools. The text must be at least the same size or larger than the normal or standard body text used by the website and must be formatted in a readable and printer friendly manner [Revenue Procedure 2008-12, Section 4.03]. Specific electronic signature requirements are provided that must be complied with in order to use online consents [Revenue Procedure 2008-12, Section 5].

All consents must be affirmative—no “opt-out” system or negative consents are allowed. That includes having consent boxes “prechecked” on a computer screen presented to the taxpayer that must be unchecked to prevent use or disclosure [Revenue Procedure 2008-12, Section 4.04(2)].

Preparers may not present taxpayer with consent forms for signature that has blank spaces on it related to the purpose of the consent [Revenue Procedure 2008-12, Section 4.05].

Any consent authorizing the disclosure of the taxpayer’s entire return or all information contained in the return must provide the taxpayer with the ability to select a more limited set of information to disclose.

The IRS has prescribed mandatory language that must be used in each consent. The language cannot be modified except to substitute the preparer’s name each time “we” or “our” is used in the required language.

b) **Consent to Disclose Information Other than For Tax Return Preparation or Auxiliary Services [Revenue Procedure 2008-12, Section 4.04(a)].**

A consent to disclose return information in this case must contain the following language:

Federal law requires this consent form be provided to you. Unless authorized by law, we cannot disclose, without your consent, your tax return information to third parties for purposes other than the preparation and filing of your tax return. If you consent to the disclosure of your tax return information, Federal law may not protect your tax return information from further use or distribution.

You are not required to complete this form. If we obtain your signature on this form by conditioning our services on your consent, your consent will not be valid. If you agree to the disclosure of your tax return information, your consent is valid for the amount of time that you specify. If you do not specify the duration of your consent, your consent is valid for one year.

c) **Consent to Disclose Information For Tax Return Preparation or Auxiliary Services [Revenue Procedure 2008-12, Section 4.04(a)]**

This type of consent is required to contain the following language:

Federal law requires this consent form be provided to you. Unless authorized by law, we cannot disclose, without your consent, your tax return information to third parties for purposes other than the preparation and filing of your tax return. If you consent to the disclosure of your tax return information, Federal law may not protect your tax return information from further use or distribution.

You are not required to complete this form. Because our ability to disclose your tax return information to another tax return preparer affects the service that we provide to you and its cost, we may decline to provide you with service or change the terms of service that we provide to you if you do not sign this form. If you agree to the disclosure of your tax return information, your consent is valid for the amount of time that you specify. If you do not specify the duration of your consent, your consent is valid for one year.

If the consent will involve disclosure of tax return information to a preparer outside of the United States, the following language is required [Revenue Procedure 2008-12, Section 4.04(e)]:

This consent to disclose may result in your tax return information being disclosed to a tax return preparer located outside the United States.

d) **Consent to Use Tax Return Information**

A consent to use must contain the following language:

Federal law requires this consent form be provided to you. Unless authorized by law, we cannot use, without your consent, your tax return information for purposes other than the preparation and filing of your tax return.

You are not required to complete this form. If we obtain your signature on this form by conditioning our services on your consent, your consent will not be valid. Your consent is valid for the amount of time that you specify. If you do not specify the duration of your consent, your consent is valid for one year.

e) Language Required in All Consents

All consents noted above must contain the following language:

If you believe your tax return information has been disclosed or used improperly in a manner unauthorized by law or without your permission, you may contact the Treasury Inspector General for Tax Administration (TIGTA) by telephone at 1-800-366-4484, or by email at complaints@tigta.treas.gov.