Getting Taxpayers' Consent to Disclose or Use Tax Return Information under IRC Section 7216

By Caroline Rule

Under Internal Revenue Code (IRC) section 7216 and its concomitant regulations, a tax preparer must obtain the consent of a taxpayer before disclosing or using the taxpayer's tax return information when that consent is required. Section 7216 makes it a crime for any preparer to knowingly or recklessly disclose any information that is furnished to the preparer in connection with preparing a client's tax return, or use tax return information other than to prepare or assist in preparing that return, thus establishing a prohibition on disclosure or use of a taxpayer's tax return information without the taxpayer's prior consent. Treasury Regulations section 301.7216-2 then sets forth a great many instances where disclosure or use is in fact permitted without consent, as discussed in last month's column.

Treasury Regulations section 301.7216-3, discussed in this column, sets forth requirements that apply when a tax return preparer must seek a taxpayer's consent for a disclosure or use not authorized by section 301.7216-2. Section 301.7216-3, as well as Revenue Procedure 2013-14, sets forth additional requirements in connection with consent from taxpayers who file returns in the 1040 series.

For the purposes of IRC section 7216 and its regulations, a "tax return preparer" is any person in the business of preparing or assisting in preparing tax returns, any employee of such a person, or any person who provides auxiliary services in connection with the preparation of tax returns (such as an e-file provider). "Tax return information" is "any information, including, but not limited to, a taxpayer's name, address, or identifying number, that is furnished in any form or manner for, or in con-

nection with, the preparation of a tax return" [Treasury Regulations sections 301.7216-1(b)(2) and (3)].

A disclosure of tax return information is "the act of making tax return information known to any person in any manner whatever," and use of tax return information is "any circumstance in which a tax return preparer refers to, or relies upon, tax return information as the basis to take or permit an action" [Treasury Regulations sections 301.7216-1(b)(4),(5)].

To date, the government does not appear to have prosecuted any tax return preparers under IRC section 7216, but no CPA will want to be the first. In addition, IRC section 6713 provides for civil fines and does not require violations to be knowing or reckless. Willful unauthorized disclosure of tax return information also subjects a tax preparer to discipline under Circular 230, Subpart C, sections 10.50, 10.51(a)(15).

Taxpayers Who File Returns Not in the 1040 Series

A taxpayer's consent to disclosure or use of tax return information must be knowing and voluntary. Tax return preparers may not condition the provision of any services on the taxpayer's consent, except for disclosure of the taxpayer's tax return information to another preparer for the purpose of assisting in the preparation of the return [Treasury Regulations section 301.7216-3(a)].

A taxpayer's consent is always required prior to disclosure of tax return information to a preparer located outside the United States [Treasury Regulations section 301.7216-3(a)(3)(i)(D)].

Consent to disclosure or use of the taxpayer's tax return information must—

- include the name of the preparer and the taxpayer,
- identify the intended purpose of the disclosure, and
- identify the specific recipient (or recipients) of the tax return information, or
- describe the particular use authorized. For example, if the preparer intends to use tax return information to generate solicitations for products or services other than tax return preparation, the consent must identify each specific type of product or service. Examples include, but are not limited to, balance due loans, mortgage loans, mutual funds, individual retirement accounts, and life insurance [Treasury Regulations section 301.7216-3(a)].

In addition, consent to disclose or use tax return information may be in any format, including an engagement letter, and may allow disclosure to a descriptive class of entities to whom information will be disclosed or in connection with which information will be used, including audited financial statements, other financial statements, or financial information, as required by a government authority, municipality, or regulatory body [Treasury Regulations section 301.7216-3(a)(3)(iii)].

A taxpayer must provide written consent *before* the preparer discloses or uses the taxpayer's tax return information; there can be no retroactive consent. In addition, the preparer may not request consent to disclose or use tax return information for purposes of soliciting business unrelated to tax return preparation *after* the preparer has provided a completed tax return to the taxpayer for signature. Finally, if the taxpayer declines a request for consent, the preparer may not solicit another consent for a purpose substantially similar to that of the rejected request [Treasury Regulations section 301.7216-3(b)].

A taxpayer must provide written consent before the preparer discloses or uses the taxpayer's tax return information; there can be no retroactive consent.

A taxpayer may consent to multiple uses within the same written document, or multiple disclosures within the same written document, but cannot authorize both uses and disclosures in a single document. A document that authorizes multiple disclosures or multiple uses must specifically and separately identify each disclosure or use [Treasury Regulations section 301.7216-3(c)].

Taxpayers Who File Returns in the 1040 Series

Stricter rules apply to consents from taxpayers who file returns in the Form 1040 series. In addition, Treasury Regulations section 301.7216-3(ii) provides that the Treasury Secretary may issue guidance describing additional requirements for such consents. The Secretary has done so in Revenue Procedure 2013-14, which provides detailed requirements for consent from Form 1040 taxpayers.

Revenue Procedure 2013-14 permits taxpayer consent documents to be either on paper or electronic, but provides different detailed requirements for each medium. Physical consent forms must—

- be on 8.5" × 11" paper,
- include only text pertaining solely to the disclosure or use the consent authorizes, and
- use at least 12-point type [Revenue Procedure 2013-14, section 5.02].

Electronic consent forms must—

- only include text pertaining solely to the disclosure or use the consent authorizes;

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- use a text size that is the same size as, or larger than, the normal or standard text used by the return preparer's website or software package;
- have sufficient contrast between the text and background color;
- be able to be formatted in a readable and printer-friendly manner;
- be able to be signed and dated by the taxpayer; and
- comply with precise methods of obtaining the taxpayer's electronic signature which ensure that the taxpayer must specifically give consent, rather than, for example, having a computer program fill in personal information automatically so that the taxpayer only has to click one button to give consent [Revenue Procedure 2013-14, section 5.03].

Revenue Procedure 2013-14 requires that a taxpayer's consent to each separate disclosure or use must be contained in a separate consent document [sections 5.01 and 6.02]. It also sets out several mandatory statements that are required to be included verbatim in a consent form. For example, if a preparer is required to seek consent to disclose a taxpayer's tax return information in connection with preparing the taxpayer's return, the consent must state that, "Unless authorized by law, we cannot disclose your tax return information to third parties for purposes other than those related to the preparation and filing of your tax return without your consent." The required language continues as follows:

> You are not required to complete this form. Because our ability to disclose your tax return information to another tax return preparer affects the tax return preparation service(s) that we provide to you and its (their) cost, we may decline to provide you with tax return preparation services or change the terms (including the cost) of the tax return preparation services 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 from the date of signature. [Revenue Procedure 2013-14, section 5.04(1)(b).]

If the preparer seeks consent to disclose tax return information in a context other than tax return preparation, the consent must include the same introductory language, and also provide that:

> You are not required to complete this form to engage our tax return preparation services. If we obtain your signature on this form by conditioning our tax return preparation 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 from the date of signature. [Revenue Procedure 2013-14, section 5.04(1)(a).]

All consents to use of tax return information must state that "we cannot use your tax return information for purposes other than the preparation and filing of your tax return without your consent," and then use language similar to that regarding disclosures [Revenue Procedure 2013-14, section 5.04(1)(c)].

The Revenue Procedure also provides specific language that must be used if consent is sought to disclose a taxpayer's Social Security number outside the United States, as well as language to be used if a taxpayer's information is to be so disclosed without their Social Security number [Revenue Procedure 2013-14, section 5.04(e)].

Cover All the Bases

Tax return preparers must become familiar with the provisions of Treasury Regulations section 301.7216-3 and Revenue Procedure 2013-14. The alternative is fines or disciplinary measures under Circular 230, as well as possible federal prosecution. ❑

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