

NEW TAX PREPARER RULES FOR DISCLOSURE AND USE OF RETURN INFORMATION¹

Background

The IRS released final regulations in 2008 under Internal Revenue Code section 7216², modifying previous regulations that had been substantially unchanged for 30 years. These regulations (hereafter referred to as Treas. Reg. section 301.7216 or the 2008 final regulations) provide guidance for tax return preparers about the disclosure or use of tax return information.

Treas. Reg. section 301.7216, and recently released Revenue Procedure 2008-35 provide the complete authoritative guidance on the disclosure or use of tax return information. This newly adopted guidance became effective beginning on January 1, 2009.

Section 7216 prohibits tax return preparers from “knowingly or recklessly” disclosing or using tax return information. As a criminal provision, this section could result in the preparer being charged with a misdemeanor, involving a maximum penalty of \$1,000 or one year in prison, or both, plus costs of prosecution. In addition to section 7216, section 6713 is a companion provision that provides for a civil penalty for improper disclosures or use of tax return information. Under the civil penalty provisions of section 6713, the unauthorized disclosure or use of tax return information could result in an assessment of \$250 for each unauthorized action by the preparer, subject to a limit of \$10,000 per calendar year.³

Treas. Reg. section 301.7216 generally requires tax return preparers to obtain permission (in written or electronic form) from the taxpayer prior to the disclosure or use of tax return information. Some of the more significant parts of the new regulations involve the form of the consents that tax return preparers must generally obtain from taxpayers prior to disclosure or use of tax return information under the 1040 series of federal income tax returns. This series includes Forms 1040, 1040NR, 1040A, and 1040EZ. Moreover, the regulations also have an impact on the disclosures or use of tax return information found on federal business entity forms, such as 1120, 1065, and others.

Section 7216(b) and the regulations there under provide for certain exceptions to assessment of the penalty. Section 7216(b)(1)(B) provides that the penalty shall not apply to the disclosure of tax return information made pursuant to a court order. Further, section 7216(b)(2) states that the penalty should not be assessed with respect to the use of information in the preparation of, or in

¹ The AICPA recognizes the significant contributions the following persons made to the drafting of this article on Treas. Reg. section 301.7216: (1) Nayan Bhikha, PricewaterhouseCoopers LLP; (2) Paul Eldridge, PricewaterhouseCoopers LLP; (3) Michael P. Dolan, KPMG LLP; (4) Danny Snow, Thompson Dunavant PLC; (5) Ruth Ann Michnay, Ruth Ann Michnay, P.A.; and (6) John Miller, Metropolitan Community College. The Institute especially acknowledges the assistance Mr. Bhikha and Mr. Eldridge provided in editing a draft of the article.

² Unless otherwise indicated, all section references are to the Internal Revenue Code of 1986, as amended (the “Code” or “IRC”), and the regulations promulgated there under (“Regulations” or “Treas. Reg.”)

³ Unlike section 7216, section 6713 does not contain a “knowingly or recklessly” standard. In all other respects, the application of section 6713 mirrors the provisions of section 7216.

connection with the preparation of, state and local tax returns and declarations of estimated tax of the person to whom the information relates. Similarly, if a tax return preparer provides tax return information to the Internal Revenue Service (the “Service” or “IRS”) in the course of providing tax return preparation services or in response to a request for information, the providing of such information to the Service would not constitute a penalty. Treas. Reg. section 301.7216-2 provides a list of additional permissible disclosures or uses without the need for obtaining the consent of the taxpayer, some of which are discussed in this article.

This article also contains a discussion about the requirement under Treas. Reg. section 301.7216-3 to obtain prior written consent from the taxpayer if an exception does not apply, including an overview of the form and content of taxpayer consents.

General Overview of the Regulations Under Section 7216

As a prelude to issuance of the 2008 final regulations, Treasury and IRS released proposed regulations under section 7216 on December 8, 2005. The proposed regulations provided for expanded or new definitions, including the terms “tax return preparer,” “tax return information,” and “request for consent.” Additionally, Notice 2005-93 set out proposed procedures involving the content and nature of a request for consent. The most significant of the proposed changes was a new requirement that return preparers obtain written consent from the taxpayer before sending any tax return information outside the U.S., in response to security and privacy concerns related to the offshore outsourcing of actual return preparation.

Treasury received a significant number of comments on these proposed regulations. Some commentators suggested that the regulations did not go far enough in protecting taxpayers from identity theft. Organizations representing tax practitioners, while sensitive to the need to protect the privacy of taxpayer information, sought less burdensome consent requirements. However, with one significant exception, the final regulations issued in January 2008, for the most part, follow the proposed regulations.

Treas. Reg. Section 301.7216-1, Penalty for Disclosure or Use of Tax Return Information

Treas. Reg. section 301.7216-1 provides the pertinent definitions that provide meaning for section 7216 terminology. Some of these terms are as follows:

- The “tax return” is any return or amended return of income tax imposed by chapter 1 of the Internal Revenue Code.⁴
- The “tax return preparer” is any person engaged in the business of preparing or assisting to prepare a tax return; any person who is compensated to prepare; any person providing auxiliary services in connection with the tax return preparation; or any person who as part of his or her duties of employment with any of the aforementioned persons prepares or assists with the preparation of tax returns.⁵

⁴ Section 301.7216-1(b)(1). The types of tax returns subject to the provisions of section 7216 are federal income tax returns and are much narrower than the types of returns subject to the regulations under section 6694.

⁵ The definition of tax return preparer is much broader than the definition of a tax return preparer for purposes of section 6694.

- The “business of preparing returns” involves a person who “holds himself out” to taxpayers or tax preparers as one who prepares tax returns or assists in preparing tax returns. The activity does not have to be the sole business of the person. Fees or no fees for the services may not be a factor.
- “Providing auxiliary” services are based on the business of preparing returns. Their performance is a support function in tax preparation. This definition is intended to be broad so long as the services provided are not substantive determinations or advice affecting the tax liability reported by taxpayers.⁶ The activity does not have to be the sole business. Fees or no fees for the services may not be a factor.
- “Otherwise compensated” is any person compensated for preparing, but not in the course of a business; or is compensated for helping, on a casual basis, a relative, friend, or other acquaintance to prepare their tax return.⁷

As a practice note, a person is not a “tax return preparer” if he or she:

- Leases office space to a tax return preparer;
- Furnishes credit to a taxpayer whose tax return is prepared by a tax return preparer;
- Furnishes information to a tax return preparer at the taxpayer’s request;
- Furnishes access (free or otherwise) to a separate person’s tax return preparation website through a hyperlink on his own website; or,
- Performs some service that only incidentally relates to the preparation of tax returns.⁸

Example. Bank B is a tax return preparer and an Authorized IRS e-file Provider. B employs one individual, Q, to solicit the necessary tax return information for the preparation of a tax return; another individual, R, to prepare the return on the basis of the information that is furnished; a secretary, S, who types the information on the returns into a computer; and an administrative assistant, T, who uses a computer to file electronic versions of the tax returns. All four employees (Q, R, S, and T) are tax return preparers for purposes of section 7216. However, only R is an income tax return preparer for purposes of section 7701(a)(36).⁹

The definition of “tax return information” is very comprehensive under Treas. Reg. section 301.7216. It is defined as “... any information, including, but not limited to, a taxpayer’s name, address, or identifying number, which is furnished in any form or manner for, or in connection with, the preparation of a tax return of the taxpayer. This information includes information that the taxpayer furnishes to a tax return preparer and information furnished to the tax return preparer by a third party. Tax return information also includes information the tax return preparer derives or generates from tax return information in connection with the preparation of a taxpayer’s return.”¹⁰

⁶ An example under Section 301.7216-2(d) includes one tax return preparer disclosing tax return information to another tax return preparer for the purpose of having the second tax return preparer transfer that information to, and compute the tax liability on, a tax return of the taxpayer by means of electronic, mechanical, or other form of tax return processing service.

⁷ Section 301.7216-1(b)(2)(iv)

⁸ Section 301.7216-1(b)(2)(v)

⁹ Section 301.7216-1(b)(2)(vi), Example 1

¹⁰ Section 301.7216-1(b)(3)(i)

The breadth of the regulations' definition for tax return information is evidenced by the following. Tax return information includes statistical compilations of tax return information, even in a form that cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer.¹¹ Tax return information does not include information identical to any tax return information that has been furnished to a tax return preparer if the identical information was obtained for another matter not connected with the preparation of the return. Information maintained in a form that is associated with the tax return preparation, however, becomes tax return information regardless of how the information was initially obtained.¹²

Example. Taxpayer A purchases computer software designed to assist with the preparation and filing of her income tax return. When A loads the software onto her computer, it prompts her to register her purchase of the software. As part of the registration process, the software provider states that it will provide registrants with any updates to the software. In this situation, the software provider is a tax return preparer under Treas. Reg. section 301.7216-1(b)(2)(i)(B) and the information that A provides to register her purchase is tax return information because she is providing it in connection with the preparation of a tax return.¹³

Example. Corporation A is a brokerage firm that maintains a website through which its clients may access their accounts, trade stocks, and generally conduct a variety of financial activities. Through its website, A offers its clients free access to its own tax preparation software. Taxpayer B is a client of A and has furnished A his name, address, and other information when registering for use of A's website to use A's brokerage services. In addition, A has a record of B's brokerage account activity, including sales of stock, dividends paid, and IRA contributions made. B uses A's tax preparation software to prepare his tax return. The software populates some fields on B's return on the basis of information A already maintains in its databases. A is a tax return preparer within the meaning of section 301.7216-1(b)(2)(i)(B) because it has prepared and provided software for use in preparing tax returns. The information in A's databases that the software accesses to populate B's return, i.e., the registration information and brokerage account activity, is not tax return information because A did not receive that information in connection with the preparation of a tax return. Once A uses the information to populate the return, however, the information associated with the return becomes tax return information. If A retains the information in a form in which A can identify that the information was used in connection with the preparation of a return, the information in that form is tax return information. If, however, A retains the information in a database in which A cannot identify whether the information was used in connection with the preparation of a return, then that information is not tax return information.¹⁴

“Use” of tax return information includes any circumstance in which a tax return preparer refers to, or relies upon, tax return information as the basis of an action. Tax preparer G determines, upon preparing a return that a refund is due to the taxpayer. G will ask whether the taxpayer desires a refund anticipation loan. G does not ask the question if the taxpayer is not due a refund. G is using tax return information when it asks whether a taxpayer is interested in obtaining a re-

¹¹ Section 301.7216-1(b)(3)(i)(B)

¹² Section 301.7216-1(b)(3)(i)(C)

¹³ Section 301.7216-1(b)(3)(ii), Example 1

¹⁴ Section 301.7216-1(b)(3)(ii), Example 2

fund anticipation loan because G is basing the inquiry on the taxpayer's being entitled to a refund.¹⁵

The act of making tax return information known to any person in any manner whatever is a disclosure. Hyperlink transfers are disclosures. A hyperlink is the device used to transfer an individual's tax return information, using tax preparation software from a tax return preparer's webpage to a webpage operated by another person without the individual having to separately enter the web address on the destination page.¹⁶ An example of a "hyperlink" disclosure is when the taxpayer uses the tax preparer's web address to transmit to and from tax return information. The transmission of tax return information is a disclosure by the tax return preparer subject to penalty under section 7216 if not authorized by regulation.¹⁷

Tax return preparers should be aware of the importance of documentation. This is critical for consent to use or disclose taxpayer's tax return information. "Request for consent" includes any effort by a tax return preparer to obtain the taxpayer's consent. When the tax return preparer requests a taxpayer's consent, any associated efforts of the tax return preparer, including, but not limited to, verbal or written explanations of the form, are part of the request for consent. The definition of request for consent includes the act of supplying a taxpayer with a paper or electronic form that meets the requirements of a revenue procedure published pursuant to Section 301.7216-3(a).¹⁸ The tax return preparer should document his or her actions/procedures to request consent.¹⁹

Section 301.7216-2, Permissible Disclosures or Uses Without Consent of the Taxpayer

Permissible Disclosures

In defining permissible disclosures and uses, Treas. Reg. section 301.7216-2 contains several significant changes from the prior regulations. In particular, the regulations add new rules to the process by which tax return preparers disclose taxpayer information to any other firm and, in particular, any firm or contractor located outside the United States.

Tax return preparers within the same firm in the United States may use or disclose information within the firm for purposes of assisting in the preparation of, or assist in providing auxiliary services in connection with, return preparation. However, any disclosure or use of tax return information outside the country requires the specific consents as defined under Treas. Reg. section 301.7216-3.

Disclosure may be made to another preparer located within the U.S., so long as the services provided are not substantive determinations or advice affecting the tax liability reported by the taxpayer. Responding to a commentator's request for clarity, the regulations define substantive de-

¹⁵ Section 301.7216-1(b)(4)(i) and (ii)

¹⁶ Section 301.7216-1(b)(6)

¹⁷ Section 301.7216-1(b)(5)

¹⁸ Section 301.7216-1(b)(7)

¹⁹ Section 301.7216-1(c) states that section 7216 and the regulations thereunder are not superseded by, nor do they supersede, the requirements under The *Gramm-Leach-Bliley Act*, Public Law 106-102 (113 Stat. 1338)

termination as one which “...involves an analysis, interpretation, or application of the law.”²⁰ Non-substantive determinations will generally be those associated with ministerial type actions required to completed and process the tax return.

In general, under the attorney-accountant rule of the regulations, a tax return preparer who is lawfully engaged in the practice of law or accountancy and prepares a tax return may use the taxpayer’s information or disclose it to another member of the firm for purposes of providing other legal or accounting services to the taxpayer.²¹ However, two significant differences from the prior regulations should be noted. The revised attorney-accountant provision only permits disclosures and uses within the U.S. Moreover, a related or affiliated firm is not considered to be part of the definition of a “law or accounting firm,” thereby requiring taxpayer consent for any disclosures a tax return preparer makes to a related or affiliated firm.²²

Any disclosure from a tax return preparer inside the U.S. to a party outside the U.S. (including a related or member firm) may not be accomplished without the consent of the taxpayer as set out in Treas. Reg. section 301.7216-3. However, if a taxpayer initially furnishes tax return information to a return preparer located outside the U.S., that information may be disclosed to or used (without a specific consent) by other members of that firm to assist in connection with the preparation of the taxpayers return.²³

A return preparer may disclose tax return information to a person under contract with the tax return preparer in connection with the programming, maintenance, repair, testing or procurement of equipment or software used in return preparation only to the extent necessary for the person to provide the contracted service and only if the return preparer ensures that anyone who receives disclosures of tax return information also receives a written notice informing them of the applicability of sections 6713 and 7216 and the rules and penalties that apply under those sections.²⁴

A list of names, addresses, e-mail addresses, and phone numbers of the tax return preparer’s clients may be compiled and maintained by the preparer for the sole purpose of offering tax information or additional tax return preparation services to such taxpayers.²⁵ Similarly, certain statistical compilations may be produced by tax return preparers as long as such information relates directly to the preparer’s return preparation business.²⁶

The section 301.7216-2 portion of the regulations also identifies a variety of other permissible disclosures and uses which may be made without specific taxpayer consent. These authorizations are narrowly drawn and, among other things, permit disclosures and uses of taxpayer information. Specific taxpayer consent is not necessary if the taxpayers are: (1) related and not “adverse” parties; and (2) one taxpayer has not specifically prohibited the disclosure to the other.²⁷ Taxpayer consent is not needed if the disclosure or use of the return information is pur-

²⁰ Section 301.7216-2(d)(1)

²¹ Section 301.7216-2(h)

²² Section 301.7216-2(h)(1)(ii)

²³ Section 301.7216-2(c)(3)

²⁴ Section 301.7216-2(d)(2)

²⁵ Section 301.7216-2(n)

²⁶ Section 301.7216-2(o)

²⁷ Section 301.7216-2(e)

suant to a court order, or an administrative order, demand, request, summons or subpoena issued in the performance of its duties by a Federal or State agency, the United States Congress, a professional association ethics committee or board, or the Public Company Accounting Oversight Board (PCAOB).²⁸ Further, the tax return preparer does not have to obtain the taxpayer's written consent when updating the taxpayer's software for the purpose of addressing changes in IRS forms and e-file specifications.²⁹

Treas. Reg. Section 301.7216-3, Disclosure or Use Permitted Only with the Taxpayer's Consent

General Overview of Treas. Reg. section 301.7216-3

The 2008 final regulations retain the 30 year old rule recognizing that taxpayers should have control over their own tax return information and with appropriate safeguards, taxpayers should be able to direct tax return preparers to disclose and use tax return information as they see fit.

Treas. Reg. section 301.7216-3(a)(1) provides that, unless section 7216 or Treas. Reg. section 301.7216-2 specifically authorize the disclosure or use of tax return information, a tax return preparer may not disclose or use a taxpayer's tax return information prior to obtaining a written consent from the taxpayer. Thus, a tax return preparer may disclose or use tax return information as the taxpayer directs as long as the preparer obtains prior written consent from the taxpayer.

Disclosure of Taxpayer's Social Security Number to Return Preparers outside the United States

Treas. Reg. section 301.7216-3(b)(4) of the January 2008 regulations originally provided that a tax return preparer located within the United States (including any territory or possession of the United States) (the "U.S. preparer") could not obtain consent to disclose the taxpayer's social security number ("SSN") to a tax return preparer located outside of the United States (the "foreign preparer"). This would have resulted in a U.S. preparer having to redact or otherwise mask the taxpayer's SSN before other tax return information could be disclosed outside the United States. This restriction was incorporated in the January 2008 regulations because of heightened concern by the Treasury and IRS about identity theft when an individual's confidential information is disclosed outside the United States.³⁰

The provision resulted in the unintended consequence of restricting taxpayers' ability to direct their tax return preparers to disclose tax return information as they saw fit and made it extremely difficult for CPA firms to provide services to international clients in an efficient manner. For example, many expatriates have tax filing obligations in multiple countries. CPA firms are often engaged to prepare the expatriates' tax returns for filing in many countries. This can't be done without the sharing of information with affiliated foreign firms to complete the applicable tax returns.

²⁸ Section 301.7216-2(f)

²⁹ Section 301.7216-2(c)(1)

³⁰ See preamble to TD 9375

In response to concerns raised by the AICPA's Section 7216 Task Force and many other tax return preparers, on July 1, 2008 the Treasury Department and IRS issued final and temporary regulations³¹ and Revenue Procedure 2008-35. The focus of the new pronouncements was updated guidance regarding the disclosure of a taxpayer's SSN to foreign preparers. As a general rule, a U.S. preparer may not obtain taxpayer consent to disclose a taxpayer's SSN with respect to taxpayers filing a return in the Form 1040 series to a foreign preparer. As was the case in the January 2008 regulations, if a U.S. preparer received taxpayer consent to disclose tax return information to a foreign preparer, the U.S. preparer must redact or otherwise mask the taxpayer's SSN before the tax return information is disclosed outside of the United States.³²

If a U.S. preparer initially receives or obtains a taxpayer's SSN from a foreign preparer, the U.S. preparer may, without consent, retransmit the taxpayer's SSN to the foreign preparer that initially provided the SSN to the U.S. preparer.³³

As an exception to the general rule, U.S. preparers may disclose a SSN to foreign preparers if:

- The taxpayer has consented to the disclosure; and
- Both tax return preparers have "adequate data protection safeguards" as defined by the Secretary; and
- The U.S. preparer verifies the maintenance of adequate data protection safeguards in the request for the taxpayer's consent.³⁴

If a U.S. preparer is seeking to disclose a taxpayer's SSN outside the United States, and either the U.S. or foreign preparers, or both preparers, do not have adequate data protection safeguards, the general rule above will apply and the U.S. preparer will be required to redact or mask any SSN prior to the disclosure of tax return information to a foreign preparer, even if the taxpayer has consented to the disclosure of his or her SSN.³⁵

The regulations also clarify that a foreign preparer does not include a tax return preparer who is continuously and regularly employed in the United States and who travels temporarily outside the United States on business.³⁶

Adequate Data Protection Safeguard

Revenue Procedure 2008-35 provides guidance regarding the requirements for an adequate data protection safeguard. U.S. preparers seeking to disclose a taxpayer's SSN to foreign preparers should familiarize themselves with these safeguards. An important requirement is that both the U.S. and foreign preparer maintain an adequate data protection safeguard at the time the tax-

³¹ See TD 9409 and TD 9437. This modification, which was made final as part of TD 9437 on December 16, 2008, allows disclosure of a taxpayer's SSN by a U.S. preparer to a non-U.S. preparer with taxpayer consent if certain security procedures are in effect. The December (final) regulation modification can be found at: <http://edocket.access.gpo.gov/2008/pdf/E8-29770.pdf>.

³² Section 301.7216-3(b)(4)(i)

³³ Section 301.7216-3(b)(4)(i)

³⁴ Section 301.7216-3(b)(4)(ii)

³⁵ See preamble to TD 9437, as released on December 16, 2008.

³⁶ Section 301.7216-3(b)(4)(i)

payer's consent is obtained and when making the disclosure.³⁷ U.S. preparers seeking to disclose a taxpayer's SSN to foreign preparers will therefore have to gain an understanding of the operation of the information retention and processing systems of both the U.S. and foreign preparers, including ongoing monitoring of compliance with the mandated safeguards to ensure that both preparers comply with the requirements of the final regulations.

An "adequate data protection safeguard" is a security program, policy and practice that has been approved by firm management and implemented that includes administrative, technical and physical safeguards to protect tax return information from misuse or unauthorized access or disclosure and that meets or conforms to one of the following privacy or data security frameworks:

- a. The United States Department of Commerce "safe harbor" framework for data protection (or successor program);
- b. A foreign law data protection safeguard that includes a security component, e.g., the European Commission's Directive on Data Protection;
- c. A framework that complies with the requirements of a financial or similar industry-specific standard that is generally accepted as best practices for technology and security related to that industry, e.g., the BITS (Financial Services Roundtable) Financial Institution Shared Assessment Program;
- d. The requirements of the AICPA/CICA Privacy Framework;
- e. The requirements of the most recent version of IRS Publication 1075, Tax Information Security Guidelines for Federal, State and Local Agencies and Entities; or
- f. Any other data security framework that provides the same level of privacy protection as contemplated by one or more of the frameworks described in (a) through (e).³⁸

Conditioning Services on Consent

Treas. Reg. section 301.7216-3(a)(1) requires that a taxpayer's consent be knowing and voluntary. As a general rule, conditioning the provision of any services on the taxpayer's furnishing consent will make the consent involuntary, and thus not satisfy the requirements of the regulations.³⁹

As an exception to this general rule, a tax return preparer may condition its provision of preparation services upon a taxpayer's consenting to disclosure of the taxpayer's tax return information for the purpose of performing services that assist in the preparation of, or provide auxiliary services in connection with the preparation of the tax return of the taxpayer.⁴⁰

As an example, making the use of a tax return preparation software contingent on the taxpayer consenting to the tax return preparer's use of the taxpayer's tax return information for use in displaying targeted banner advertisements does not satisfy the requirements of the final regulations and is therefore invalid. In this example, the use of the taxpayer information for targeted banner advertisements is not considered part of the tax return preparation.⁴¹

³⁷ Revenue Procedure 2008-35, Section 4.07

³⁸ Revenue Procedure 2008-35, Section 4.07

³⁹ Section 301.7216-3(a)(1)

⁴⁰ Section 301.7216-3(a)(2)

⁴¹ Revenue Procedure 2008-35, Section 6.01, Example 1

The 2008 final regulations do not provide much clarifying guidance regarding “auxiliary services in connection with the preparation of the tax return of the taxpayer”.⁴² For example, a CPA firm may be engaged by an expatriate’s employer to prepare the expatriates United States and foreign tax returns and to calculate tax equalization payments under the employer’s expatriate program. It is not clear under the 2008 final regulations whether the calculation of the equalization payments is considered “auxiliary services in connection with the preparation of the tax return of the taxpayer”. Thus it is not clear whether a tax return preparer may condition the provision of any services related to the calculation of the equalization payments on the taxpayer’s furnishing consent.

Prohibition on Multiple Requests for Consent

Treasury and the IRS were concerned that repetitious requests may cause undue pressure on taxpayers to consent. Consequently, where a taxpayer has declined a request for consent to the disclosure or use of tax return information for purposes of solicitation of business unrelated to tax return preparation, the tax return preparer may not solicit from the taxpayer another consent for a purpose substantially similar to that of the rejected request.⁴³

According to the preamble to the 2008 final regulations, under this rule, there is no prohibition regarding the taxpayer independently asking the tax return preparer about a disclosure or use of the taxpayer’s same tax return information after a declined consent request.

Timing for Obtaining Consent

Written consents must be obtained from a taxpayer before a tax return preparer discloses or uses the taxpayer’s tax return information. Retroactive consents will therefore not be valid.⁴⁴

In the case of consents for the disclosure and use of tax return information for the solicitation of business unrelated to tax return preparation, the tax return preparer may not request a taxpayer’s consent after the tax return preparer provided a completed tax return to the taxpayer for signature.⁴⁵ From a practical perspective, the ideal time to request consent from the taxpayer is when the tax practitioner executes an engagement letter with the taxpayer.

⁴² Section 301.7216-1(b)(2)(iii) defines providing auxiliary services as “A person is engaged in the business of providing auxiliary services in connection with the preparation of tax returns as described in paragraph (b)(2)(i)(B) of this section if, in the course of the person’s business, the person holds himself out to tax return preparers or to taxpayers as a person who performs auxiliary services, whether or not providing the auxiliary services is the person’s sole business activity and whether or not the person charges a fee for the auxiliary services. Likewise, a person is engaged in the business of providing auxiliary services if, in the course of the person’s business, the person receives a taxpayer’s tax return information from another tax return preparer pursuant to the provisions of §301.7216-2(d)(2).” The definition itself uses the words “auxiliary services”, and therefore does not provide the clarity required. The preamble to the January 2008 regulations states that the definition of auxiliary services includes analysis of data for purposes of monitoring the tax return preparer’s business for fraud prevention and provision of data storage services (Preamble to T.D. 9375, section 2.E).

⁴³ Section 301.7216-3(b)(3)

⁴⁴ Section 301.7216-3(b)(1)

⁴⁵ Section 301.7216-3(b)(2)

Duration of Consent

Unless a consent document specifies the duration of the taxpayer's consent to the disclosure and use of tax return information, the consent will be effective for a period of one year from the date the taxpayer signed the consent.⁴⁶

Practitioners should assess the facts and circumstances to determine the appropriate duration for which taxpayer consent is being sought.

Distinguishing Between “Disclosure” and “Use”

Given the Treasury and IRS' concern regarding the potential for confusion surrounding the distinction between “disclosure” and “use”, particularly amongst individuals, the 2008 final regulations prescribe rules regarding multiple disclosures or multiple uses.⁴⁷ Taxpayers are given the flexibility to consent to one, but not the other. The applicable rules depend on the type of taxpayer as set out below.

Both uses and disclosures cannot be authorized by a single written consent. A separate written document is required for uses and a separate written document is required for disclosures. The separate written document for uses may contain consent to multiple uses. The separate written document for disclosures may contain consent to multiple disclosures. Where a written document authorizes multiple uses or disclosures, it must specifically identify each use or disclosure respectively.⁴⁸

There is an exception for taxpayers that are not filing returns in the Form 1040 series. Such taxpayers may authorize both uses and disclosures in a single written consent.⁴⁹

Form and Content of Taxpayer Consents

Treas. Reg. section 301.7216-3(a)(3) has been modified to provide a set of requirements regarding the format and content of consents to disclose and use tax return information with respect to taxpayers filing income tax returns in the Form 1040 series and a separate set of requirements regarding the format and content of consents to disclose and use tax return information with respect to taxpayers filing all other tax returns.

Rev. Proc. 2008-35 provides guidance to tax return preparers regarding the format and content of consents to disclose and consents to use tax return information with respect to taxpayers filing a return in the Form 1040 series.

⁴⁶ Section 301.7216-3(b)(5)

⁴⁷ See Preamble to January 2008 regulations (T.D. 9375)

⁴⁸ Section 301.7216-3(c)(1)

⁴⁹ Section 301.7216-3(a)(3)(iii)

Under Treas. Reg. section 301.7216-3(a)(3)(iii), for tax return preparers providing tax return preparation services to taxpayers who do not file an income tax return in the Form 1040 series, a consent to use or a consent to disclose may be in any format, including an engagement letter to a client, as long as the consent complies with the requirements of Treas. Reg. section 301.7216-3(a)(3)(i).