

Tax Practitioners May Use Return Information to Market to their Return Preparation Clients, But Some Use and Disclosures Require Written Consent Beforehand



Anton Janik, Jr.
ajanik@mwlaw.com
(501) 688.8888

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Accounting firms have specific rights and duties that come into play when they market to their clients using data gleaned from the return preparation process. The general rule is that returns and return information cannot be disclosed without consent. For example, on the government side Section 6103 of the Internal Revenue Code prevents federal and state personnel from disclosing returns or return information without taxpayer consent, except in specified circumstances. Similarly, on the practitioner side Section 7216, a criminal statute, imposes penalties upon practitioners who make unauthorized disclosures of tax returns or tax return information, up to and including a fine of \$1,000 and a year of imprisonment.

The Treasury Regulations have carved out some important exceptions from Section 7216, which permit practitioners to use return information for certain marketing or other purposes. Some of these exceptions require taxpayer consent; others do not. Let's start with usage that requires no taxpayer consent.

Pursuant to Treas. Reg. § 301.7216-2(n)(1) a return preparer is permitted to compile and maintain a paper or electronic list consisting of the names, mailing addresses, email addresses, phone numbers, taxpayer entity classification (including "individual" and the specific type of business entity), and the income tax form number of taxpayers for whom the return preparer has prepared or processed tax returns. The information on that list may be used by the return preparer solely to contact those listed taxpayers for purposes of providing further or additional tax information, general business or economic information or analysis for educational purposes, or even to solicit additional tax return preparation services. However, the return preparer may not use that list to solicit sales of services or products that are not tax return preparation services, for example bookkeeping assistance, preparation of payroll returns, or the processing of regulatory returns.

That compiled list may not be transferred or sold, unless that transfer or sale is made in conjunction with the sale or disposition of the return preparer's business. A due diligence review by a prospective buyer prior to a proposed sale does not violate the Regulations so long as that review is subject to a written confidentiality agreement that meets certain requirements imposed by Treas. Regs. § 301.7216-2(n)(1).

Where the return preparer plans to disclose a return or return information or plans to solicit sales of services or products that are not tax return preparation services, the return preparer must first obtain

written taxpayer consent. Treas. Regs. § 301.7216-3 provides that such consent must be knowing and voluntary. The consent may be requested and obtained in the client services agreement, but the preparer may not condition the provision of return preparation services upon the receipt of such consent. (In that case, the consent will be deemed involuntary and ineffective.) Keep in mind that a single document may not authorize both the return preparer's use of information and the return preparer's disclosure of information. A copy of the consent must be provided to the taxpayer, and are valid for one year unless otherwise specified in the consent.

An effective consent must identify the return preparer and the name of the taxpayer, the intended purpose of the disclosure, the specific recipient(s) of the disclosure (unless excepted by Treas. Regs. § 301.7216-3(a)(3)(iii)), the return information to be disclosed or used, and be signed and dated by the taxpayer. Specific consent must be obtained if the return or return information will be transferred outside the United States. An effective consent can only be entered into prior to a disclosure; retrospective consents are not allowed. Furthermore, a consent may not be granted after the return preparer has provided a completed tax return to the taxpayer for signature. Finally, keep in mind that where a taxpayer has previously declined a request for consent to disclose, the return preparer may not thereafter solicit the taxpayer for another consent for a purpose substantially similar to the rejected request.