



IRS Associate Chief Counsel, Deborah Butler, invited NATP to issue a paper regarding IRS Code Section 7216, *Disclosure or Use of Tax Information by Preparers of Returns*, detailing its impact on the tax professional. Larry Gray, NATP Government Affairs Liaison, compiled the following real world examples and assessments from the perspective of this Association and its members.

Issue: Newsletters

The “use” of a taxpayer’s information as defined under Reg. §301.7216-1(b)(4) is unnecessarily restrictive in terms of ensuring taxpayer compliance. Many tax return preparers maintain a stratified client base consisting of different classes of filers (e. g. 1040, 1065, 1120, 1120S, etc.). The literal interpretation of the regulations prohibit a tax return preparer from using taxpayer information to send customized newsletters to varying segments of their client base.

The regulations imply that return preparers can send client newsletters without violating the use provision provided the same newsletter is sent to all clients and is generically tax related. This restriction does not allow the return preparer to specifically address the unique tax issues relative to a particular filer. For example:

- Tax laws change affecting S corporations during the year. A specific newsletter describing the change to the preparer’s S corporation clients should be allowed to be sent to those clients only. Doing so maintains and ensures tax compliance. The preparer is exercising due diligence by informing their client of a change in the law and how it directly affects the client’s tax return.
- A Supreme Court case hands down a ruling on family limited partnerships. A specific newsletter addressing the issues and the potential tax effect for the preparer’s clients who currently have family limited partnerships should be allowed to be sent to those clients only. Doing so maintains and ensures tax compliance. The preparer is exercising due diligence by informing the client that the IRS and the courts would or would not accept a position.
- Similar situations can arise with a Schedule C, E, or F filer. The point being that a preparer’s client base is stratified. One “size” does not fit all.

Tax return preparers should be allowed to assist their clients with compliance by educating them when there is a law change or new guidance is issued that will directly affect their situation. The aforementioned examples may actually make the taxpayer noncompliant in the current year. In a best practice model the tax preparer should always keep the taxpayer apprised of the latest tax law changes.

Tax compliance is an ongoing process in which the taxpayer expects their tax professional to remain current and compliant with tax matters and to inform them of any changes that may have a possible effect on their specific tax situation. Such a restriction puts an additional strain on the tax administration system because taxpayers are not as educated regarding their specific issues before making decisions that directly affect their tax return.

Issue: Client organizers

Client organizers are often used by tax return preparers as a tool to encourage their clients to be more diligent in their tax responsibilities. Organizers prompt taxpayers into compliance by reminding them of the information they are required to provide to their tax preparer. Typically the organizers are mailed to clients before the filing season often in conjunction with a client newsletter. Organizers are used as a means to secure the taxpayer's business, as a method for ensuring taxpayer compliance in tax matters, and as a tool for the tax return preparer to have the necessary information to accurately prepare the tax return.

As the regulations imply, tax return preparers will not be in violation of the use provision if they mail a client organizer to all clients (1040, 1041, 1065, 1120, 1120S, etc), regardless of their particular filing needs. Such a rule is counterproductive. It is impracticable to send organizers to all clients, maybe impossible because there is no organizer for that particular return (e.g., 1120, 941 payroll clients, etc.). In addition, the client should have the right to refuse having an organizer sent to them.

A tax return preparer's ability to segment his client base should be permitted under Reg. §301.7216-2. For example:

- There are no organizers for corporate clients, they simply do not exist.
- A taxpayer dies. If the taxpayer dies in a prior year, the tax professional should not have to send the taxpayer a client organizer. If the taxpayer dies in the current year, a portion of the year may be a 1041 return. How does the tax return preparer send a 1041 organizer? Surviving relatives should have the option to not receive a client organizer for a deceased relative. Also, preparers may be informed of the death and should be allowed to make a conscious decision not to send an organizer to a grieving family.
- Because the organizer is strictly related to tax matters and tax compliance, the preparer should have the flexibility to decide when and who to send an organizer. Doing so results in a desired outcome that can be delivered with fewer problems and unforeseen complications.

Issue: Sale of a tax practice

A tax return preparer is retiring (or dies) and a new preparer takes over his business either by purchase or inheritance. What type of consent to disclosure or use is required in this situation?

The regulations themselves are unclear. Reg. §301.7216-2(m) addresses retention of records where Reg. §301.7216-2(n) deals specifically with solicitation. Under section (m), it does not appear that the sale of a taxpayer's business, client list, or book of business is clearly addressed in the sense that the transfer of the taxpayer's records (i.e., their completed return and accompanying work papers) is permitted without consent under that section. Under section (n), the transfer of records is addressed, however, it only appears that a listing of the taxpayer's name, address, phone number, e-mail address, and related records and papers is permitted with regard to solicitation.

A selling tax preparer should be permitted to transfer client records and prior year's returns in connection with the sale of his business to another preparer without the consent of the taxpayer. If in fact consent of the taxpayer is required prior to the transfer of the records what needs to be documented?

Issue: Contact after the return is presented for signature

Under Reg. §301.7216-3(b), a signed consent to disclose or use taxpayer information may not be sought after the tax return preparer provides the completed return to the taxpayer for signature. Reg. §301.7216-3(b)(2) states: *Time limitations on requesting consent in solicitation context.* A tax return preparer may not request a taxpayer's consent to disclose or use tax return information for purposes of solicitation of business unrelated to tax return preparation after the tax return preparer provides a completed tax return to the taxpayer for signature. This requirement does not fit in with the real world.

There are many subsequent events and unforeseen circumstances that occur after the tax return is completed to require a signed consent before the return is presented to the taxpayer. For example, the taxpayer receives a completed return on March 1, after signing the consent to use the information for purposes of preparing the tax return for that year. Later that same year, the taxpayer wants to refinance his mortgage because interest rates dropped. The preparer is not permitted to disclose or use that return information for this purpose because the tax preparer was required to get the consent to use or disclose this information prior to presenting the tax return to the client for signature.

This is just one example. There are numerous real world situations like this which arise and cannot be anticipated for purposes of securing a signed consent before the return is presented to the taxpayer. A partial list may include:

- A notice from the IRS for any number of reasons which will require access and use of the taxpayer's return information for the year;
- The death of the taxpayer or his spouse;
- The taxpayer's child gets accepted at a college and a FAFSA form must be filled out;
- The taxpayer is subject to a disaster and is able to obtain tax relief based upon his tax circumstances;
- The taxpayer inherits property and other assets later in the year;

- The taxpayer becomes ill and has a need to do estate planning;
- The government offers tax incentives for purchasing an auto or other assets during periods that are retroactive and cover portions of the tax year for which a return has been filed.

When a possible disclosure is initiated by the taxpayer, whether the request is tax related or not, what documentation, if any, is required? The taxpayer would be better served in situations such as these, as would the tax administration system as a whole, to be allowed to sign a consent based on the timing of the need rather than in advance of the return preparation. When the taxpayer initiates the contact and requests that the preparer assist with a tax matter, the preparer should be allowed as a practical matter, to “go do” what needs to be done with a signed release at the time of the occurrence.

If the tax preparer discovers a matter that needs resolving, whether is a law change or some other unforeseen circumstance, the consent to disclose or use tax information is required. What needs to be documented? What needs to be included in the consent?

Issue: Business relationship

A business relationship exists for the convenience of the client. The tax return is the end result of that ongoing relationship, yet the relationship does not end there. Here are some specific examples of the ongoing relationship where the taxpayer has contact with the preparer outside the actual filing process:

- Pre-scheduling the tax appointment and the use of appointment reminder postcards.
- Sending birthday, anniversary, and holiday cards.
- Mid-year reviews for future tax planning or determining estimated tax payments.
- Contact by the IRS.

In all of these examples, whether the contact is before, during, or after the tax return is presented for signature, the taxpayer must give signed consent for the use of their return information. Under current regulations, the preparer would not be allowed to maintain these vital business relationships absent a signed consent for each occurrence. Each contact is separate and stands on its own. What is the best practice in these situations? Each instance of contact with the taxpayer by the preparer cements the business relationship, builds trust, and promotes tax compliance. Using these techniques and practices has proven to reliably lead to the desired result, maintaining compliance by filing more complete and accurate returns.