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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 301

[TD 9375]

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Guidance Necessary to Facilitate Electronic Tax Administration—Updating of Section 7216 Regulations

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains regulations to update the rules regarding the disclosure and use of tax return information by tax return preparers. Among other things, the regulations finalize rules for taxpayers to consent to the disclosure or use of their tax return information by tax return preparers.

DATES: Effective Date: These regulations are effective January 7, 2008.

Applicability Date: The regulations apply to disclosures or uses of tax return information occurring on or after January 1, 2009.

SUPPLEMENTARY INFORMATION:

Background

This document contains amendments to the Regulations on Procedure and Administration (26 CFR Part 301) under section 7216 of the Internal Revenue Code. These regulations strengthen taxpayers' ability to control their tax return information by requiring that tax return preparers give taxpayers specific information, including who will receive the tax return information and the particular items of tax return information that

will be disclosed or used, to allow taxpayers to make knowing, informed, and voluntary decisions over the disclosure or use of their tax information by their tax return preparer.

Section 7216 imposes criminal penalties on tax return preparers who knowingly or recklessly make unauthorized disclosures or uses of information furnished to them in connection with the preparation of an income tax return. In addition, tax return preparers are subject to civil penalties under section 6713 for disclosure or use of this information unless an exception under the rules of section 7216(b) applies to the disclosure or use.

Section 7216 was enacted by section 316 of the Revenue Act of 1971, Public Law 92-178 (85 Stat. 529). In 1988, Congress modified the section by limiting the criminal sanction to knowing or reckless, unauthorized disclosures. Public Law 100-647 (102 Stat. 3749). At the same time, Congress enacted the civil penalty that is now found in section 6713. Public Law 100-647, § 6242(a) (102 Stat. 3759). In 1989, Congress further modified section 7216, directing the Treasury Department to issue regulations permitting disclosures of tax return information for quality or peer reviews. Public Law 101-239, § 7739(a) (103 Stat. 3759).

The Treasury Department and the IRS proposed regulations under section 7216 on December 20, 1972 (37 FR 28070). Final regulations were issued on March 29, 1974 (39 FR 11537). These regulations are divided into three parts: §301.7216-1 for general provisions and definitions; §301.7216-2 for disclosures and uses that do not require formal taxpayer consent; and §301.7216-3 for disclosures and uses that require formal taxpayer consent. Since the regulations were adopted in 1974, the Treasury Department and the IRS have amended §301.7216-2 on occasion, but §§301.7216-1

and 301.7216-3 have remained unchanged.

A notice of proposed rulemaking (REG-137243-02) was published in the **Federal Register** (70 FR 72954) on December 8, 2005. Concurrently with publication of the proposed regulations, the IRS published Notice 2005-93, 2005-52 I.R.B. 1204 (December 07, 2005), setting forth a proposed revenue procedure that would provide guidance to tax return preparers regarding the format and content of consents to disclose and consents to use tax return information under §301.7216-3.

Written comments were received in response to the notice of proposed rulemaking. A public hearing was held on April 4, 2006. Commentators appeared at the public hearing and commented on the notice of proposed rulemaking.

All comments were considered and are available for public inspection upon request. This preamble summarizes most of the comments received by the IRS and Treasury Department. After consideration of the written comments and the comments provided at the public hearing, the proposed regulations under section 7216 are adopted as revised by this Treasury decision.

Concurrently with publication of these regulations, the IRS is publishing a revenue procedure and an advanced notice of proposed rulemaking. The revenue procedure provides guidance on the format and content of consents to disclose or use tax return information under §301.7216-3 for taxpayers filing a return in the Form 1040 series, e.g., Form 1040, Form 1040NR, Form 1040A, or Form 1040EZ. The revenue procedure also provides specific guidance for electronic signatures when a taxpayer filing a return in the Form 1040 series executes an electronic consent to the disclosure or use of the taxpayer's tax return information.

The advanced notice of proposed rulemaking requests comments regarding a proposed rule under §301.7216-3 that a tax return preparer may not obtain a consent to disclose or use tax return information for the purpose of the tax return preparer soliciting, or the taxpayer obtaining, a refund anticipation loan (RAL) or certain other products.

Summary of Comments

1. Preamble.

Some commentators recommended that the final regulations specify the existing revenue rulings, notices, and other guidance under section 7216 that continue to have effect under the final regulations. While the final regulations do not identify all guidance that has continuing effect, the section of this Treasury decision entitled “Effect on Other Documents” specifies guidance that Treasury and the IRS have determined as contrary to the regulations.

One commentator requested that the preamble of the regulations clarify whether a tax return preparer may offer for sale an insurance policy that will reimburse the taxpayer additional tax the taxpayer is required to pay under certain circumstances involving errors by the tax return preparer. Section 7216 and the regulations thereunder govern only a tax return preparer’s disclosure or use of tax return information. To the extent that a tax return preparer offers a product, such as insurance, where the offer is based on the disclosure of tax return information to a third-party, or where use of such tax return information serves as the basis for making the offer, section 7216 and the regulations thereunder only govern whether use or disclosure of the tax return information requires taxpayer consent.

2. §301.7216-1 Penalty for Disclosure or Use of Tax Return Information.

A. Statutory provisions.

Some commentators recommended that Treasury and the IRS seek legislative changes to section 7216. More specifically, these commentators recommended that the amount of the section 7216 criminal penalty be increased, that the amount of the section 6713 civil penalty be increased, and that the Code be amended to provide a private right of action against tax return preparers. Another commentator recommended amending section 7216 to provide a means to abate the penalty in cases where reasonable cause and good faith is established. This commentator also recommended that Treasury and the IRS not attempt to regulate the disclosure or use of tax return information in the context of a criminal statute, section 7216, but that only civil penalties should apply.

Requests for statutory changes to sections 7216 and 6713 are outside of the scope of these regulations. Section 7216 expressly provides for Treasury to promulgate regulations to exempt certain disclosures or uses of information from the statute's criminal sanction. Although Treasury and the IRS do not have the regulatory authority to provide for a reasonable cause exception under section 7216, the criminal penalty provided for by that statute is premised on a finding of knowing or reckless conduct.

B. Tax return preparer.

One commentator requested expanding the definition of tax return preparer to include clerical staff involved in preparation of a tax return. Because the definition of tax return preparer in the regulations already encompasses clerical staff involved in the preparation of a return, no change is needed to address this comment.

While approving of the generally broad scope of the term “tax return preparer,” one commentator expressed concern that the term did not cover employees of tax return preparers who do not personally assist in the preparation of tax returns or the provision of auxiliary services. That commentator recommended that section 7216 should nonetheless apply to any employee. This comment was not adopted. The statute applies only to persons “engaged in the business of preparing, or providing services in connection with the preparation of, returns.” The regulations, however, do not permit disclosure by one employee of a tax return preparer to another employee of the tax return preparer on the basis of employment status alone. See Treas. Reg. §301.7216-2(c).

Based on recent amendments to section 7701(a)(36) of the Code (which post-amendment applies more generally to tax return preparers other than income tax returns), the final regulations were revised to omit the language in the proposed regulations pertaining to the lack of uniformity of the definition of tax return preparer provided in section 7701(a)(36) and the definition of tax return preparer for purposes of section 7216.

C. Tax return information.

Some commentators expressed concern that the definition of tax return information encompasses an overly broad amount of information. One commentator recommended that a taxpayer’s name, address, telephone number, e-mail address, and identification number should not be treated as tax return information. Another commentator recommended that a taxpayer’s name, address, and other contact information should be available for a tax return preparer to use to provide the taxpayer

with any information that the tax return preparer believes may be of interest to the taxpayer. These recommendations regarding tax return information were not adopted because information revealing the identity of, or how to contact, a person is information central to one's privacy and deserving of treatment as tax return information when submitted for, or in connection with, the preparation of a tax return. Section 301.7216-2(n), however, permits tax return preparers to make limited use of taxpayer's contact information to offer tax information or additional tax return preparation services to previous customers.

One commentator recommended eliminating language from the regulations providing that information maintained in a form that is associated with the tax return preparation becomes tax return information regardless of how the information was initially obtained. The commentator questioned whether non-tax return information could become tax return information as a result of the manner in which it is stored and maintained by the tax return preparer. Treasury and the IRS agree that section 7216 protects only information furnished to a tax return preparer for, or in connection with, the preparation of a return and that information does not become tax return information merely by the method in which the information is stored. The language in the proposed regulations that is the subject of the comment was included to recognize that the protections of section 7216 may extend to information furnished by persons other than the taxpayer, including information furnished by one person within a firm to a tax return preparer employed by the same firm. In that situation, the information in the hands of the tax return preparer would be tax return information even if the person furnishing the information had obtained it other than in connection with the preparation of a tax return.

Because this rule is evident from other provisions of the regulations, and the language commented upon may create confusion, the language has been removed from these regulations.

One commentator expressed concern that the proposed regulations improperly expand upon section 7216 by defining “tax return information” to include information derived or generated from tax return information. The commentator commented that section 7216 protects only information furnished to tax return preparers, and data that a tax return preparer derives from that information should not be considered data furnished to the tax return preparer. The commentator, therefore, recommended removing this language from the regulations.

The commentator’s recommendation was not adopted. Information that a tax return preparer would typically derive from other information furnished in connection with the preparation of a return could include information on the taxpayer’s entitlement to deductions, credits, losses or gains, the amounts thereof, and the amount of tax due. It would frustrate the purpose of the statute not to protect this information when a taxpayer has furnished the tax return preparer the means to derive it.

Similarly, the same commentator stated that the proposed regulations improperly expand upon the statute by defining “tax return information” to include “information received by the tax return preparer from the IRS in connection with the processing of such return.” The commentator recommended eliminating this language from the regulations. This recommendation was not adopted. The statute protects information furnished to a tax return preparer for, or in connection with, preparation of a return and does not require that the taxpayer have furnished the information.

Some commentators approved of the proposed regulations' definition of tax return information, but expressed concern that Example 1 in §301.7216-1(b)(3)(ii) suggests that information supplied to register tax preparation software is not tax return information unless the tax return preparer states during the registration process that it will provide updates to registrants. These commentators, therefore, recommended deleting that fact from the example. This recommendation was adopted to explicitly provide that all information furnished to register tax return preparation software is tax return information.

Some commentators expressed concern that if information furnished to register tax return preparation software was treated as tax return information, then tax return preparers would be required to obtain consent from taxpayers prior to updating the tax return preparation software. To address this concern, section 301.7216-2(c) of the regulations has been revised.

D. Disclosure and use.

One commentator stated that the definition of “use” is overly broad. The commentator proposed that the “use” of tax return information should not include tax return preparers informing taxpayers of the availability of products and services that tax return preparers offer that could benefit taxpayers. As an example, the commentator stated that informing a taxpayer about the availability of a refund anticipation loan based on the taxpayer's tax return information should not be a “use” of tax return information. This recommendation was not adopted. The regulations require consents for tax return preparers to use tax return information so that taxpayers themselves determine whether they want additional information regarding products and services that might benefit

them. The potential uses of tax return information should be clearly described by tax return preparers and the potential uses must be consented to by taxpayers before such uses occur.

Two commentators recommended that tax return preparers should be responsible for subsequent disclosures or uses of tax return information by third parties to whom tax return preparers made an authorized disclosure of tax return information. This recommendation was not adopted because section 7216 does not apply to third parties who are not tax return preparers.

E. Providing auxiliary services.

Section 301.7216-1(b)(2)(iii) of the proposed regulations provides that 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 that 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. One commentator recommended broadening the definition of auxiliary services to include analysis of data for purposes of monitoring the tax return preparer's business for fraud prevention and provision of data storage services. These services as well as similar services are typical of the types of auxiliary services that can be provided to tax return preparers as contemplated by §301.7216-1(b)(2)(iii) and are already covered by the broad definition of auxiliary services in the regulations. The same commentator also recommended broadening the definition of auxiliary services to include the analysis of customer activity to improve services and

assistance in connection with preparation for taxpayer audits. These services are already addressed in other parts of the regulations. See §§301.7216-2(o) and 301.7216-2(k).

F. Exclusions under §301.7216-1(b)(2)(v).

One commentator recommended that the express exclusion under §301.7216-1(b)(2)(v) of the proposed regulations of certain persons from the definition of tax return preparer should be extended to include persons who provide “a broad range of financial products and services . . . to customers of tax return preparers, including savings, transaction, and retirement accounts.” The commentator’s recommendation was not adopted as the regulations do not provide an exhaustive list of the persons identified as excluded from the definition of tax return preparer. To the extent the service providers suggested to be excluded by the commentator provide services only incidentally related to the preparation of the return, these persons would be excluded under the regulation.

G. Hyperlinks.

One commentator recommended that the regulations should not treat as a disclosure by a tax return preparer the situation where a taxpayer is transferred from the tax return preparer’s website to a different website and the taxpayer separately enters information on the different website. This recommendation was not adopted because the regulations already do not treat this fact pattern as a disclosure by the tax return preparer.

3. §301.7216-2 Permissible Disclosures or Uses Without Consent of the Taxpayer.

A. Disclosures to the IRS.

Section 301.7216-2(b) of the proposed regulations provides that tax return

preparers may disclose to the IRS any tax return information the IRS requests to assist in the administration of electronic filing programs. One commentator requested limiting this rule to “specific necessary purposes, such as compliance by electronic return originators.” This recommendation was not adopted. Return information in the hands of the IRS is already protected from unauthorized disclosure. See, e.g., section 6103.

Other commentators expressed concern regarding whether §301.7216-2(b) permitted disclosures of tax return information to the IRS in general. Because the purpose of these regulations is to protect taxpayers from the unauthorized uses and disclosures by tax return preparers, and because tax return information in the hands of the IRS is already protected from unauthorized disclosure, §301.7216-2(b) has been modified to clarify that return preparers may disclose any tax return information to the IRS for any purpose.

B. Use by tax return preparer for purposes of updating software.

Section 301.7216-2(c)(1) of the final regulations has been revised to provide that if a tax return preparer provides software to a taxpayer that is used in connection with the preparation or filing of a tax return, the tax return preparer may use the taxpayer’s tax return information to update the taxpayer’s software for the purpose of addressing changes in IRS forms, e-file specifications and administrative, regulatory and legislative guidance or to test and ensure the software’s technical capabilities without obtaining the taxpayer’s consent under §301.7216-3.

C. Disclosure to a tax return preparer within the same firm located outside of the United States.

Section 301.7216-2(c) of the proposed regulations generally provides that an officer, employee, or member of a tax return preparer in the United States may disclose

tax return information to another officer, employee, or member of the same tax return preparer located within the United States. Section 301.7216-2(c)(1) of the proposed regulations provides that the taxpayer must give consent under §301.7216-3 prior to any disclosure of tax return information by an officer, employee, or member of a tax return preparer in the United States to an officer, employee, or member of the same tax return preparer located outside of the United States or any territory or possession of the United States. One commentator expressed concern that this rule was too strict with respect to multinational companies and employees on assignment outside of the United States. This commentator stated that such taxpayers anticipate that their tax return information will be disclosed outside of the United States. This commentator recommended that consent under §301.7216-3 should not be required with respect to disclosures when the taxpayer is a multinational company or an individual taxpayer employed or on assignment outside of the United States and that an engagement letter explaining potential circumstances involving disclosures overseas ought to be permitted in these situations.

This recommendation was not adopted. As explained in the preamble to the proposed regulations, the Treasury Department and IRS believe that a separate explanation is required under these circumstances in order to advise taxpayers that their tax return information is being disclosed to tax return preparers located outside the United States. The final regulations, however, address the commentator's request for additional flexibility with respect to the form and manner of the consent for taxpayers other than individuals. For tax return preparers providing tax return preparation services to taxpayers who do not file an income tax return in the Form 1040 series, e.g., Form

1040, Form 1040NR, Form 1040A, or Form 1040EZ, a consent to disclose tax return information outside the United States may be in any format, including an engagement letter to a client, as long as the consent provides sufficient information to enable the taxpayer to provide informed consent. For tax return preparers providing tax return preparation services to taxpayers who file an income tax return in the Form 1040 series, the regulations provide that the Secretary may issue guidance, by publication in the Internal Revenue Bulletin, proscribing the form and manner of the consent to disclose tax return information, including disclosure of return information outside the United States. This rule is consistent with the general rule adopted by these final regulations with respect to a tax return preparer's request for consent to disclose tax return information. See section 301.7216-3(a)(3).

Additionally, one commentator recommended that, rather than provide limitations on the disclosure of tax return information by a tax return preparer within the United States to another tax return preparer of the same firm who is located outside of the United States, the regulations should instead permit such disclosures without consent if the tax return preparer of the same firm outside of the United States consents to adhere to the rules of section 7216. This recommendation was not adopted because it does not inform taxpayers that their tax return information will be disclosed outside of the United States or allow taxpayers to control the decision whether their information is disclosed overseas.

D. Disclosures to other tax return preparers.

Section 301.7216-2(d) of the proposed regulations provides that disclosures between tax return preparers are authorized when the disclosures (i) assist in the

preparation of a return; (ii) the services provided by the recipient of the disclosure are not substantive determinations or advice affecting a taxpayer's reported tax liability; and (iii) the disclosure is to a tax return preparer located in the United States. Two commentators expressed concern that the phrase "substantive determinations or advice" is a vague standard and recommended the use of examples in the regulations that adequately define the phrase. The final regulations clarify the meaning of substantive determinations and provide an example to illustrate the operation of this rule.

One commentator recommended adopting the professional ethics rules of the American Institute of Certified Public Accountants (AICPA) on outsourcing in lieu of §301.7216-2(d) of the proposed regulations. Rule 102 of the AICPA Code of Professional Conduct requires that, prior to sharing confidential client information (such as a tax return) with a third-party service provider, an AICPA member must inform the client, preferably in writing, that the member may use a third-party service provider when providing professional services to the client. Unlike the rules in the regulations, the AICPA Code of Professional Conduct does not require that the client consent to the disclosure of tax return information when substantive determinations or advice are sought from third parties. Under the AICPA rules, AICPA members who use third-party service providers remain responsible for the work done by the service providers and they must contract with the third-party service provider for the service provider to monitor the confidentiality of the client's information to the third-party Service provider. The commentator's recommendation that the regulations adopt only the protections of the AICPA ethics rules was not adopted. The Treasury Department and the IRS are

concerned that taxpayers and tax return information would not be adequately protected if a tax return preparer could disclose tax return information to any third-party service provider without taxpayer consent to that disclosure.

One commentator recommended modifying §301.7216-2(d) of the proposed regulations to allow disclosures between franchisors and franchisees in the tax return preparation business according to the terms of their franchise agreement. The commentator's recommendation was not adopted because the existence of a written franchise agreement should not affect the confidentiality of a taxpayer's tax return information.

One commentator critiqued §301.7216-2(d) because it will limit the benefits tax return preparation firms may enjoy from using foreign outsourcing. Foreign outsourcing is not prohibited by the final regulations, which permit the disclosure of tax return information outside of the United States if the taxpayer consents to such disclosure. One commentator recommended that tax return preparers should be allowed to disclose tax return information to third-party service providers subject to the requirements of the privacy provisions of Title V of the Gramm-Leach-Bliley Act, Public Law 106-102 (113 Stat. 1338) (GLBA). Specifically, the commentator proposed that the regulations should permit tax return preparers to: (1) execute a written contract with a service provider limiting the service provider's disclosure or use of tax return information; (2) select and retain service providers that are capable of safeguarding tax return information; and (3) implement contractual provisions requiring service providers to develop and maintain appropriate information safeguards. This recommendation was not adopted. While the requirements of section 7216 and these regulations do not override any requirements or

restrictions of the GLBA, the sensitivity of tax return information justifies affording tax return information stronger protections than other information subject to the GLBA.

E. Disclosure pursuant to an order of a court, or an administrative order, demand, request, summons or subpoena which is 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

One commentator recommended that the title of proposed §301.7216-2(f) be revised to add the word “request” following the word “demand,” to align the subsection’s title with the regulation’s language in §301.7216-2(f)(5). This recommendation was adopted in the final regulation.

One commentator recommended replacing the phrase “professional ethics board” in proposed §301.7216-2(f) with the phrase “certain professional association ethics committees or boards.” The commentator noted that this change would avoid confusion as to whether the reference to professional ethics boards means governmental entities that control licensing for CPAs or whether the phrase would include professional associations that have boards or committees that discipline their members, such as the AICPA or state and local bar associations. This recommendation was adopted, in part, by changing the phrase “professional ethics board” to “professional association ethics committee or board.” Section 301.7216-2(f)(4)(ii) separately addresses disclosures to government entities charged with licensing, registration, or regulation of tax return preparers.

One commentator recommended permitting disclosure of tax return information without taxpayer consent pursuant to disclosures required by Federal or State laws and administrative rules, but did not identify any specific rule or law that required a disclosure in circumstances contrary to either the preexisting regulations or the

proposed regulations. Preexisting regulations already permitted disclosures pursuant to an order of a court or a Federal or State agency. These final regulations permit disclosures pursuant to an order of a court or an administrative order, demand, summons or subpoena that is 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. The protections offered by limiting disclosures to responses to specific governmental or quasi-governmental requests provide appropriate protection for taxpayer privacy.

One commentator expressed concern about proposed §301.7216-2(f)(5) and the safeguarding of tax return information received by a professional association board or committee conducting an ethics investigation. The commentator recommended revising §301.7216-2(f)(5) to expressly prohibit professional associations from publishing as part of any resulting professional disciplinary determination the tax return information of a taxpayer furnished to them during an ethics investigation of a preparer unless the taxpayer provides consent. This recommendation was not adopted because section 7216 does not provide for penalties against third parties who receive tax return information in this context.

One commentator recommended rewording proposed §301.7216-2(f)(6) to provide the following: "A written request from the Public Company Accounting Oversight Board (PCAOB) in connection with an inspection under section 104 of the Sarbanes-Oxley Act of 2002, 15 U.S.C. 7214, or an investigation under section 105 of such Act, 15 U.S. 7215, for use in accordance with such Act." The commentator noted that this wording describes more clearly the situations in which disclosures to the PCAOB are

permitted, and to permit registered firms and their associated persons to comply with their disclosure obligations under the Act. This recommendation was adopted.

One commentator expressed concern that permitting the disclosure of tax return information pursuant to a subpoena issued by the United States Congress is inconsistent with the rules regarding disclosures by the IRS to Congress under section 6103(f). The commentator stated that the regulations may provide a method to avoid the specific disclosure rules of section 6103(f), which are designed to protect taxpayers and prevent Congressional abuse of returns or return information. Another commentator recommended eliminating the term “demand” in §301.7216-2(f)(4)(i) because the commentator believes the term is too broad and could permit any Federal agency to simply ask for tax return information even if the agency does not have authority to issue “formal legal orders” compelling the disclosure. These recommendations were not adopted. Both Congress and Federal agencies are presumed to act in accordance with the law and there are other limitations on their abilities to seek tax return information.

F. Disclosure for use in securing legal advice, Treasury investigations, or court proceedings.

Final section 301.7216-2(g) has been revised to confirm that a tax return preparer may disclose tax return information to an attorney for purposes of the preparer securing legal advice.

G. Tax return preparers working for the same firm.

Section 301.7216-2(h)(1)(ii) provides that a tax return preparer’s law or accounting firm does not include any related or affiliated firms. Some commentators expressed concern that this rule reduces the application of the §301.7216-2 exceptions

for tax return preparers that are structured as separate legal entities, but are closely related. One commentator recommended that the regulations be revised to provide that the “same firm” standard be determined in a manner similar to the rules for qualified employee plans for a single employer. This recommendation was not adopted.

Taxpayers should have a clear understanding with whom they are dealing. Adopting this recommendation would require that a taxpayer understand complex rules about which separate legal entities are part of the “same firm” as their tax return preparer to be able to understand who might receive their tax return information. Additionally, a tax return preparer has the ability to obtain consent from a taxpayer to disclose tax return information to a related or affiliated firm.

H. Disclosure or use of tax return information in preparation for audit.

One commentator recommended that a tax return preparer should be permitted to disclose tax return information to another tax return preparer so that the second tax return preparer can provide assistance in connection with the audit of a return under the law of any State or political subdivision thereof, the District of Columbia, or any territory or possession of the United States. This comment was not adopted because §301.7216-2(k) already permits such disclosures.

I. Payment for tax preparation services.

Section 301.7216-2(l) provides that a tax return preparer may disclose and use, without the taxpayer’s written consent, tax return information that the taxpayer provides to the tax return preparer to pay for tax preparation services to the extent necessary to process the payment. One commentator recommended applying this rule to the collection of payments. This recommendation was adopted. The exception under

§301.7216-2(l) for the collection of payments is subject to the same limitations as the rule for processing payments. Only tax return information that the taxpayer provided to the tax return preparer to pay for tax return preparation services may be used to collect payment. This limitation precludes tax return preparers from using any other tax return information to collect on delinquent payments.

J. Lists for solicitation of tax return business.

Section 301.7216-2(n) of the proposed regulations provides that a tax return preparer may compile and maintain a separate list containing solely the names, addresses, e-mail addresses, and phone numbers of taxpayers whose tax returns the tax return preparer has prepared or processed. The proposed regulations also state that this list may be used by the compiler solely to contact the taxpayers on the list for the purpose of offering tax information or additional tax return preparation services.

One commentator recommended adding that no mention of services or products other than those related to tax preparation services may be made. Treasury and the IRS agree that the prohibition on using the list to solicit business other than tax return preparation services could be strengthened, and have modified §301.7216-2(n) to address the commentator's concern.

K. Producing statistical information in connection with tax return preparation business.

Section 301.7216-2(o) of the proposed regulations permits a tax return preparer to use tax return information to prepare anonymous statistical compilations for limited purposes related to management or support of the tax return preparer's business. Two commentators recommended that the disclosure or use of tax return information in statistical compilations should be limited to "internal management" because "support"

might be read to allow a tax return preparer to target specific customers with advertising. This recommendation was not adopted because §301.7216-2(o) specifically prohibits the disclosure or use of statistical compilations in connection with, or in support of, businesses other than tax return preparation, and use of lists to solicit additional tax return preparation business is specifically governed, and limited, by §301.7216-2(n).

One commentator recommended that statistical compilations of tax return information that do not identify taxpayers should not be considered “tax return information” for purposes of section 7216. The commentator stated that if statistical information is treated as “tax return information,” such a rule could prevent tax return preparers (especially tax return preparers that are publicly traded) from reporting essential data to financial regulators or to market participants to provide an accurate picture of the tax return preparer’s performance and financial condition. In response to the concern raised by the commentator, the final regulation was modified to provide that the compiler of the statistical compilation may not disclose the compilation, or any part thereof, to any other person unless the disclosure of the statistical compilation is made in order to comply with financial accounting or regulatory reporting requirements or occurs in conjunction with the sale or other disposition of the compiler’s tax return preparation business.

One commentator recommended that tax return preparers located within the same firm should be permitted, without obtaining consent, to use tax return information for “the management, support or maintenance of the tax return preparer’s business.” This recommendation was not adopted. Because the regulations already permit a tax

return preparer to use tax return information to prepare statistical compilations for limited purposes related to management or support of the tax return preparer's business, it is unclear how the commentator's recommendation would further aid in the management or support of a tax return preparer's business.

One commentator recommended that the regulations require that "taxpayer identifying" data, such as names and social security numbers, be redacted from statistical information. This recommendation was not adopted. The regulations already require that statistical compilations must be "anonymous."

L. Quality or peer reviews.

Section 301.7216-2(p) of the proposed regulations provides that a quality or peer review may be conducted only by attorneys, certified public accountants, enrolled agents, and enrolled actuaries who are eligible to practice before the Internal Revenue Service. Some commentators recommended that this subsection of the proposed regulations should be revised to permit other professionals to participate in quality or peer reviews. This recommendation was not adopted. The restriction helps to prevent unauthorized disclosures of tax return information by limiting participation in such reviews to those persons subject to Circular 230, 31 C.F.R. Part 10.

M. Extraction of tax return information within software only for the purposes of reducing repetitive data entry.

One commentator recommended that the use of computer software designed to assist with the preparation of an income tax return should be allowed without consent to "extract" certain tax return information once entered, such as the taxpayer's name and address, and reprint such information in required fields on the same return in order to eliminate repetitive data entry. This comment was not adopted because the regulations

do not prohibit such a use of tax return information where the information is being used for the permitted purpose of preparing the taxpayer's tax return.

4. Proposed §301.7216-3: Disclosures and Uses Authorized by Taxpayer Consent.

A. Consent to disclose tax return information.

Some commentators expressed concern that the proposed regulations authorize the IRS to make available for sale to third parties its internal records and data containing tax return information. This concern reflects a fundamental misunderstanding of the proposed regulations. The proposed regulations do not address any disclosure of tax return information by the IRS; the proposed regulations address only the disclosure and use of tax return information by tax return preparers. Separate laws, including section 6103, strictly protect the confidentiality of returns and return information in the hands of IRS employees and others.

Some commentators expressed concern that the proposed regulations would loosen the current rules regarding a tax return preparer's ability to disclose a client's tax return information. This concern is based on a misunderstanding of the purpose and content of the proposed and preexisting regulations. Section 301.7216-3(a)(1) of the proposed regulations provides that, unless section 7216 or §301.7216-2 authorizes the disclosure of tax return information, a tax return preparer may not disclose a taxpayer's tax return information prior to obtaining consent from the taxpayer. Since 1974, section 301.7216-3(a)(2) has provided that, "[i]f a tax return preparer has obtained from a taxpayer a consent . . . , he may disclose the tax return information of such taxpayer to such third persons as the taxpayer may direct." Thus, the proposed regulations contained the same substantive rule that has been in place for over 30 years.

Throughout the long-standing existence of former §301.7216-3(a)(2), there has been no objection to the provision that allowed taxpayers to provide informed consent to tax return preparers disclosing tax return information to third parties.

Nonetheless, commentators criticized the proposed rule, stating that it could allow tax return preparers to induce clients into providing unknowing or inadvertent consents to sell or otherwise disclose tax return information. Furthermore, they argue that disclosure to third parties could result in identity theft. Thus, one solution these commentators recommend is to prohibit taxpayers from ever consenting to the disclosure of their tax return information.

The Treasury Department and IRS did not adopt the commentators' recommendation. Rather, the final regulations retain the general rule that has been in place for more than 30 years recognizing that taxpayers should have control over their own tax return information and that taxpayers should, with appropriate limits and safeguards, be able to direct tax return preparers to disclose tax return information as taxpayers see fit. This rule parallels the statutory rule in section 6103(c) that allows taxpayers to consent to the IRS disclosing returns or return information to third parties of the taxpayer's choosing.

In addition, this rule is consistent with the privacy protection regime in the Health Insurance Portability and Accountability Act (HIPAA), Public Law 104-191 (110 Stat. 1936). HIPAA permits health care providers and health plans to disclose information about health status, provision of health care, or payment to a third-party if they have obtained authorization from the individual patient.

While identity theft is a significant concern, Treasury and the IRS do not believe a

generalized concern regarding the potential for criminal activity by third parties should preclude taxpayers from being able to direct the disclosure of tax return information to third parties for legitimate reasons of the taxpayer's own choosing, particularly in the absence of any evidence that disclosure of tax return information by tax return preparers has been a source of identity theft problems.

While the idea of a complete prohibition on consent to disclosure was rejected, Treasury and the IRS did revise §301.7216-3(b)(5), based on several factors. These factors include: 1) the fact that it is not necessary for tax return preparers to disclose certain taxpayer identifying information to other tax return preparers who are assisting them in preparing a return; 2) the important role a social security number (SSN) plays in the tax administration process, and the heightened potential for misuse when an SSN is readily associated with confidential information, such as tax return information; and 3) the heightened concern about the theft of an individual's confidential information resulting from disclosures outside the United States. Section 301.7216-3(b)(4) now provides that a tax return preparer located within the United States, including any territory or possession of the United States, may not obtain consent to disclose a taxpayer's SSN to a tax return preparer located outside of the United States or any territory or possession of the United States. Thus, if a tax return preparer located within the United States obtains consent from a taxpayer to disclose tax return information to another tax return preparer located outside of the United States, as provided under §§301.7216-2(c) and 301.7216-2(d), the tax return preparer located in the United States may not disclose the taxpayer's SSN, and the tax return preparer must redact or otherwise mask the taxpayer's SSN before the tax return information is disclosed

outside of the United States. If a tax return preparer located within the United States initially receives or obtains a taxpayer's SSN from another tax return preparer located outside of the United States, however, the tax return preparer within the United States may, without consent, retransmit the taxpayer's SSN to the tax return preparer located outside the United States that initially provided the SSN to the tax return preparer located within the United States. Where a taxpayer-client requests that a tax return preparer within the United States transfer the return preparation engagement to a tax return preparer located outside the United States, the preparer must still redact or otherwise mask the taxpayer's SSN before the information is disclosed and, in this situation, it will be incumbent upon the taxpayer to provide the SSN directly to the tax return preparer located abroad.

Some commentators recommended that the regulations provide taxpayers with the ability to informally initiate a request for the disclosure of tax return information from their tax return preparers without formally following the consent rules of §301.7216-3. This recommendation was not adopted. As a practical matter, it would be difficult to distinguish when a taxpayer informally initiates a request for the disclosure of tax return information and when tax return preparers merely claim that a taxpayer initiated the request for disclosure. Additionally, tax return preparers are always free to provide taxpayers their own returns and taxpayers may disclose tax return information to others directly.

Other commentators recommended that the regulations should prohibit disclosure to third-party solicitors and not allow taxpayers to consent to disclosures for the purpose of receiving solicitations because the risks to the taxpayer of providing

consent inadvertently are too great in comparison to the benefit of receiving solicitations from third parties. This recommendation was not adopted because it denies taxpayers the ability to control and direct the disclosure of their own tax return information. If taxpayers do not wish to receive offers or solicitations from third parties, they can simply refuse to provide the consent needed for third parties to receive their tax return information. If a tax return preparer obtains written consent under circumstances that make the consent unknowing or uninformed, the consent would be invalid under the requirements of the regulations.

B. Consent to use of tax return information.

Section 301.7216-3 of the preexisting regulations provides that a consent to use tax return information does not apply for purposes of facilitating the solicitation of the taxpayer's use of any services or facilities furnished by a person other than the tax return preparer, unless the other person and the tax return preparer are members of the same affiliated group of corporations within the meaning of section 1504. The proposed regulations removed this "affiliated group" limitation because the affiliated group concept has little application in the context of modern return preparation businesses. The proposed regulations also reflected a determination by the IRS and Treasury Department that a taxpayer's ability to consent to a preparer's use of tax return information to solicit additional business should not be limited by arbitrary factors largely beyond the taxpayer's knowledge or control, such as the size, diversity, or organizational structure of the tax return preparer. Some commentators expressed concern that removal of the "affiliated group" limitation would make it easier for tax return preparers to disclose tax return information to third parties for marketing

purposes. This comment reflects a misunderstanding of the nature of a consent governing a tax return preparer's use of tax return information. Use consents are limited to what a tax return preparer can do with tax return information in the tax return preparer's own hands; use consents cannot be used in connection with disclosures to third parties. Thus, identity theft or other abuses by third parties could not arise from taxpayers providing use consents to tax return preparers.

Further, prohibiting the commercial use of tax return information outright would result in no longer allowing legitimate uses of tax return information that have evolved over time as standard commercial practices. For example, tax return preparers could not use tax return information to advise taxpayers of strategies that may positively affect the taxpayers' finances such as individual retirement accounts or qualified tuition programs, or of the taxpayers' eligibility to participate in government benefit programs, such as food stamps.

C. Prohibit tax return preparers from disclosing tax return information for any reason unrelated to the preparation of a tax return.

Many commentators recommended prohibiting tax return preparers from disclosing tax return information for any purpose unrelated to the preparation of tax returns. This recommendation was not adopted because there are many legitimate purposes for the disclosure of tax return information identified in §301.7216-2, such as the disclosure of tax return information for the reporting of a crime or for an ethics investigation. Similarly, there are legitimate purposes, other than tax return preparation, when a taxpayer would choose to consent to the tax return preparer's disclosure of tax return information.

As an alternative, some commentators recommended that the regulations

prohibit or greatly restrict the use or disclosure of tax return information for marketing purposes. They specifically recommended banning tax return preparers from disclosing tax return information in association with taxpayers seeking refund anticipation loans (RALs) and similar products. Treasury and the IRS did not adopt this recommendation because it was not contained in the proposed regulations and could have a significant impact on existing business practices. Concurrently with the publication of these final regulations, however, Treasury and the IRS are requesting comments on a proposed rule that, if ultimately adopted as final, would prohibit tax return preparers from using or disclosing tax return information for the purpose of soliciting, or the taxpayer obtaining, a RAL or certain other products.

Commentators also recommended that disclosure of tax return information by tax return preparers should be conditioned upon the existence of an agreement by third parties receiving the information that the tax return information will not be used for any purpose other than the purpose for which the information was provided. This recommendation was not adopted because policing agreements by third parties is outside the scope of section 7216. Section 7216 governs only the actions of tax return preparers.

D. Obtaining consent through engagement letters.

Some commentators recommended that when the regulations require consent to disclose or use tax return information, tax return preparers should be permitted to obtain such consent from “large taxpayers,” such as large corporations, through an engagement letter. These commentators observed that it is ordinary business practice for tax return preparers and large taxpayers to negotiate and set the terms of the

provision of services, including the preparation of income tax returns, in an engagement letter. This recommendation was adopted. Treasury and the IRS agree that requiring multiple, separate consents would impose a significant burden and could frustrate these taxpayers' ability to comply with tax laws and other regulatory and reporting requirements. 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, e.g., Form 1040, Form 1040NR, Form 1040A, or Form 1040EZ, 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. Under §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 §301.7216-3(a)(3)(i).

E. Conditioning services on consent.

Section 301.7216-3(a)(1) provides that a consent to use or disclose tax return information must be knowing and voluntary. Section 301.7216-3(a)(1) has been modified to clarify that to condition the provision of services on the taxpayer's consent will make the consent involuntary and invalid unless §301.7216-3(a)(2) applies.

Section 301.7216-3(a)(2) provides that 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 to another tax return preparer 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. One commentator requested a clarification regarding whether a tax return preparer with offices within and outside of the United States is permitted to condition its provision of tax preparation services to a taxpayer outside of the United States on the taxpayer consenting to disclosure. The final regulations permit a tax return preparer with offices within and outside of the United States to condition its provision of tax preparation services to a taxpayer on the taxpayer's consenting to disclosure to a return preparer located outside the United States. An example was added to the final regulations to clarify this rule.

Other commentators recommended that the regulations should prohibit tax return preparers from conditioning the provision of any services upon consent. This recommendation was adopted by inserting the word "any" before "services" in §301.7216-3(a)(1), to which §301.7216-3(a)(2) provides the only exception.

F. Requests to consent after completed tax return provided to taxpayer.

Proposed section 301.7216-3(b)(2) provides that a tax return preparer may not request a taxpayer's consent to disclose or use tax return information after the tax return preparer provides a completed tax return to the taxpayer for signature.

Commentators suggested that there may be legitimate circumstances where a request to consent is necessary in light of taxpayer preferences and is part of client service provided by the preparer. Specifically, the commentators gave the example of a taxpayer requesting that his or her tax return preparer disclose the past three years of the taxpayer's tax returns to his or her attorney for purposes of preparing the client's estate plan. Under the proposed regulation, a request for consent to disclose would be untimely in this situation, even though the taxpayer requests the disclosure as part of

the client service provided by the tax return preparer. As indicated by the provisions regarding solicitation of other business that were included in the previous final regulations, the Treasury Department and IRS believe that taxpayers should not be the subject of repetitive solicitation requests for business made by tax return preparers after the tax preparation engagement has ended. Consistent with previous final regulations, the final regulation in section 301.7216-3(b)(2) has been modified to state that 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. Under the final regulations, the preparer would not be precluded from requesting consent to disclose the past three years of the taxpayer's tax returns to his or her attorney for purposes of preparing the client's estate plan according to the example provided by commentators.

G. Prohibition on multiple requests for consent.

Proposed section 301.7216-3(b)(3) provides that if a taxpayer declines to provide consent to a disclosure or use of tax return information, a tax return preparer cannot make another request for consent. Some commentators recommended that the regulations permit a tax return preparer to clarify the purpose and extent of the consent if necessary after the taxpayer declines to provide consent, and that such a clarification should not be treated as a second request by the tax return preparer to obtain a consent. Another commentator stated that tax return preparers should be permitted to request consent whenever they wish so long as the consent properly describes the nature of, and reasons for, potential disclosures or uses. The commentators'

recommendations were based upon the recognition that there may be legitimate reasons for the preparer to more thoroughly explain the request for consent and how the consent relates to the tax preparation engagement. However, Treasury and the IRS are concerned that lack of restrictions regarding multiple requests for consent regarding the same or similar request may cause undue pressure to consent where there are repetitious requests. In light of these concerns, section 301.7216-3(b)(3) has been modified to provide that, for purposes unrelated to a tax preparation engagement, if a taxpayer declines a request for consent to the disclosure or use of tax return information, the tax return preparer may not solicit from the taxpayer another consent for a purpose substantially similar to that of the rejected request. 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.

H. Multiple disclosures or multiple uses within a single consent form.

Section 301.7216-3(c)(1) of the proposed regulations provides that a taxpayer may consent to multiple disclosures within the same written document, or multiple uses within the same written document. One commentator recommended permitting taxpayers to consent to multiple disclosures *and* multiple uses with the same form. Another commentator recommended prohibiting a taxpayer from consenting to multiple disclosures within the same written document, or multiple uses within the same written document, in order to avoid potential taxpayer confusion. These recommendations were not adopted.

The proposed rule was intended to emphasize that disclosure and use are two

distinct concepts, and a taxpayer may consider consenting to one and not the other. The comments to the proposed regulations demonstrated that there is potential for confusion regarding the distinction between disclosure and use. Treasury and the IRS believe it is appropriate to require separate consents in situations where there is a probability that the taxpayer could become confused over the distinction between use and disclosure. Section 301-7216-3(c)(1) of the final regulations provides that for taxpayers who are filers of returns in the Form 1040 series, the proposed rule is retained. The rule requiring separate consents is limited to individuals because use or disclosure of that tax return information involves situations where confusion is most likely to occur.

I. Disclosure of all information contained within a return.

Section 301.7216-3(c)(2) of the proposed regulations provides that a consent authorizing the disclosure of all information contained within a return must set forth an explanation of the reason why a consent authorizing a more limited disclosure of tax return information is unsatisfactory for the purpose of the consent. Some commentators characterized this requirement as burdensome in certain situations and recommended eliminating this requirement. Commentators reasoned that a third party service provider, such as the taxpayer's attorney, may request a copy of the return and the requirement to provide an explanation would interject the preparer between the requirements imposed by the third party service provider and the taxpayer. In light of these concerns, section 301.7216-3(c)(2) of the final regulations modifies this provision to provide that where a consent authorizes the disclosure of a copy of the taxpayer's tax return or all information contained within a return, the consent must provide that the

taxpayer has the ability to request a more limited disclosure of tax return information as the taxpayer may direct.

Some commentators concerned with marketing of tax return information recommended that disclosure of the entire tax return should not be permitted under any circumstances. The commentators' rationale was that disclosure of the entire return is never necessary for marketing purposes. This recommendation was not adopted because, in general, taxpayers should have control over their own tax return information and they should be able to direct tax return preparers to disclose tax return information as the taxpayers see fit.

J. Duration of consent.

Section 301.7216-3(b)(5) of the proposed regulations provides that no consent to the disclosure or use of tax return information may be effective for a period longer than one year from the date the taxpayer signed the consent. Some commentators expressed concern that the duration of consent may need to be effective for a period greater than one year. One commentator observed that when preparing expatriate tax returns, there may be circumstances when the due date for a foreign tax return or other related document is more than one year after the taxpayer signs the consent. Some commentators recommended that taxpayers should be permitted to establish the duration of consent, and the one-year period should apply only if the taxpayer fails to specify a different duration of consent. This recommendation was adopted in the final regulations.

K. Consents read aloud.

Some commentators recommended that §301.7216-3 require that consents be

read aloud by audio output. This recommendation was not adopted. This recommendation would impose a burdensome rule that is outside the norm of standard practices for obtaining consent.

5. General Comments.

Several commentators recommended rejecting all of the provisions of the proposed regulations under section 7216. The recommendations to reject the proposed regulations were not adopted. The proposed regulations were finalized to provide updates relating to uses and disclosures of tax return information in the electronic return preparation context and create an environment that allows taxpayers to make informed decisions regarding the disclosure or use of their tax return information.

Effect on Other Documents

The following publication is obsolete on or after January 1, 2009: Rev. Rul. 79-114, 1979-1 C.B. 441 (1979).

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and, because these regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f), the notice of proposed rulemaking preceding these regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal author of these regulations is Dillon Taylor, formerly of the Office of the Associate Chief Counsel (Procedure and Administration). For further information regarding these regulations contact Lawrence Mack of the Office of the Associate Chief Counsel (Procedure and Administration) at 202-622-4940 (not a toll-free call).

List of Subjects in 26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

Amendment to the Regulations

Accordingly, 26 CFR part 301 is amended as follows:

PART 301-- PROCEDURE AND ADMINISTRATION

Paragraph 1. The authority citation for part 301 continues to read, in part, as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 301.7216-0 is added to read as follows:

§301.7216-0 Table of contents.

This section lists captions contained in §§301.7216-1 through 301.7216-3.

§301.7216-1 Penalty for disclosure or use of tax return information.

- (a) In general.
- (b) Definitions.
- (c) Gramm-Leach-Bliley Act.
- (d) Effective date.

§301.7216-2 Permissible disclosures or uses without consent of the taxpayer.

- (a) Disclosure pursuant to other provisions of the Internal Revenue Code.
- (b) Disclosures to the IRS.
- (c) Disclosures or uses for preparation of a taxpayer's return.

- (d) Disclosures to other tax return preparers.
- (e) Disclosure or use of information in the case of related taxpayers.
- (f) Disclosure pursuant to an order of a court, or an administrative order, demand, request, summons or subpoena which is 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.
- (g) Disclosure for use in securing legal advice, Treasury investigations or court proceedings.
- (h) Certain disclosures by attorneys and accountants.
- (i) Corporate fiduciaries.
- (j) Disclosure to taxpayer's fiduciary.
- (k) Disclosure or use of information in preparation or audit of State or local tax returns or assisting a taxpayer with foreign country tax obligations.
- (l) Payment for tax preparation services.
- (m) Retention of records.
- (n) Lists for solicitation of tax return business.
- (o) Producing statistical information in connection with tax return preparation business.
- (p) Disclosure or use of information for quality or peer reviews.
- (q) Disclosure to report the commission of a crime.
- (r) Disclosure of tax return information due to a tax return preparer's incapacity or death.
- (s) Effective date.

§301.7216-3 Disclosure or use permitted only with the taxpayer's consent.

- (a) In general.
- (b) Timing requirements and limitations.
- (c) Special rules.
- (d) Effective date.

Par. 3. Section 301.7216-1 is revised to read as follows:

§301.7216-1 Penalty for disclosure or use of tax return information.

(a) In general. Section 7216(a) prescribes a criminal penalty for tax return preparers who knowingly or recklessly disclose or use tax return information for a purpose other than preparing a tax return. A violation of section 7216 is a misdemeanor, with a maximum penalty of up to one year imprisonment or a fine of not more than \$1,000, or both, together with the costs of prosecution. Section 7216(b) establishes exceptions to the general rule in section 7216(a) prohibiting disclosure and

use. Section 7216(b) also authorizes the Secretary to promulgate regulations prescribing additional permitted disclosures and uses. Section 6713(a) prescribes a related civil penalty for disclosures and uses that constitute a violation of section 7216. The penalty for violating section 6713 is \$250 for each prohibited disclosure or use, not to exceed a total of \$10,000 for a calendar year. Section 6713(b) provides that the exceptions in section 7216(b) also apply to section 6713. Under section 7216(b), the provisions of section 7216(a) will not apply to any disclosure or use permitted under regulations prescribed by the Secretary.

(b) Definitions. For purposes of section 7216 and §§301.7216-1 through 301.7216-3:

(1) Tax return. The term tax return means any return (or amended return) of income tax imposed by chapter 1 of the Internal Revenue Code.

(2) Tax return preparer- (i) In general. The term tax return preparer means:

(A) Any person who is engaged in the business of preparing or assisting in preparing tax returns;

(B) Any person who is engaged in the business of providing auxiliary services in connection with the preparation of tax returns, including a person who develops software that is used to prepare or file a tax return and any Authorized IRS *e-file* Provider;

(C) Any person who is otherwise compensated for preparing, or assisting in preparing, a tax return for any other person; or

(D) Any individual who, as part of their duties of employment with any person described in paragraph (b)(2)(i)(A), (B), or (C) of this section performs services that

assist in the preparation of, or assist in providing auxiliary services in connection with the preparation of, a tax return.

(ii) Business of preparing returns. A person is engaged in the business of preparing tax returns as described in paragraph (b)(2)(i)(A) of this section if, in the course of the person's business, the person holds himself out to tax return preparers or taxpayers as a person who prepares tax returns or assists in preparing tax returns, whether or not tax return preparation is the person's sole business activity and whether or not the person charges a fee for tax return preparation services.

(iii) Providing auxiliary services. 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).

(iv) Otherwise compensated. A tax return preparer described in paragraph (b)(2)(i)(C) of this section includes any person who- -

(A) Is compensated for preparing a tax return for another person, but not in the course of a business; or

(B) Is compensated for helping, on a casual basis, a relative, friend, or other

acquaintance to prepare their tax return.

(v) Exclusions. A person is not a tax return preparer merely because he 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 otherwise performs some service that only incidentally relates to the preparation of tax returns.

(vi) Examples. The application of §301.7216-1(b)(2) may be illustrated by the following examples:

Example 1. Bank B is a tax return preparer within the meaning of paragraph (b)(2)(i)(A) of this section, 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. Under these circumstances, only R is a tax return preparer for purposes of section 7701(a)(36), but all four employees are tax return preparers for purposes of section 7216, as provided in paragraph (b) of this section.

Example 2. Tax return preparer P contracts with department store D to rent space in D's store. D advertises that taxpayers who use P's services may charge the cost of having their tax return prepared to their charge account with D. Under these circumstances, D is not a tax return preparer because it provides space, credit, and services only incidentally related to the preparation of tax returns.

(3) Tax return information- (i) In general. The term tax return information means 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.

(A) Tax return information can be provided directly by the taxpayer or by another person. Likewise, tax return information includes information received by the tax return preparer from the IRS in connection with the processing of such return, including an acknowledgment of acceptance or notice of rejection of an electronically filed return.

(B) 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. See §301.7216-2(o) for limited use of tax return information to make statistical compilations without taxpayer consent and to use the statistical compilations for limited purposes.

(C) 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 otherwise than in connection with the preparation of a tax return.

(D) Information is considered "in connection with tax return preparation," and therefore tax return information, if the taxpayer would not have furnished the information to the tax return preparer but for the intention to engage, or the engagement of, the tax return preparer to prepare the tax return.

(ii) Examples. The application of this paragraph (b)(3) may be illustrated by the following examples:

Example 1. 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. In this situation, the software provider is a tax return preparer under paragraph (b)(2)(i)(B) of this section 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.

Example 2. 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 paragraph (b)(2)(i)(B) of this section 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.

(4) Use--(i) In general. 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 to take or permit an action.

(ii) Example. The application of this paragraph (b)(4) may be illustrated by the following example:

Example. Preparer G is a tax return preparer as defined by paragraph (b)(2)(i)(A) of this section. If G determines, upon preparing a return, that the taxpayer is eligible to make a contribution to an individual retirement account (IRA), G will ask whether the taxpayer desires to make a contribution to an IRA. G does not ask about IRAs in cases in which the taxpayer is not eligible to make a contribution. G is using tax return information when it asks whether a taxpayer is interested in making a contribution to an IRA because G is basing the inquiry upon knowledge gained from information that the taxpayer furnished in connection with the preparation of the taxpayer's return.

(5) Disclosure. The term disclosure means the act of making tax return information known to any person in any manner whatever. To the extent that a

taxpayer's use of a hyperlink results in the transmission of tax return information, this transmission of tax return information is a disclosure by the tax return preparer subject to penalty under section 7216 if not authorized by regulation.

(6) Hyperlink. For purposes of section 7216, a hyperlink is a device used to transfer an individual 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 of the destination page.

(7) Request for consent. A request for consent includes any effort by a tax return preparer to obtain the taxpayer's consent to use or disclose the taxpayer's tax return information. The act of supplying a taxpayer with a paper or electronic form that meets the requirements of a revenue procedure published pursuant to §301.7216-3(a) is a request for a consent. When a 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.

(c) Gramm-Leach-Bliley Act. Any applicable requirements of the Gramm-Leach-Bliley Act, Public Law 106-102 (113 Stat. 1338), do not supersede, alter, or affect the requirements of section 7216 and §§301.7216-1 through 301.7216-3. Similarly, the requirements of section 7216 and §§301.7216-1 through 301.7216-3 do not override any requirements or restrictions of the Gramm-Leach-Bliley Act, which are in addition to the requirements or restrictions of section 7216 and §§301.7216-1 through 301.7216-3.

(d) Effective/applicability date. This section applies to disclosures or uses of tax return information occurring on or after January 1, 2009.

Par. 4. Section 301.7216-2 is revised to read as follows:

§301.7216-2 Permissible disclosures or uses without consent of the taxpayer.

(a) Disclosure pursuant to other provisions of the Internal Revenue Code. The provisions of section 7216(a) and §301.7216-1 shall not apply to any disclosure of tax return information if the disclosure is made pursuant to any other provision of the Internal Revenue Code or the regulations thereunder.

(b) Disclosures to the IRS. The provisions of section 7216(a) and §301.7216-1 shall not apply to any disclosure of tax return information to an officer or employee of the IRS.

(c) Disclosures or uses for preparation of a taxpayer's return--(1) Updating Taxpayers' Tax Return Preparation Software. If a tax return preparer provides software to a taxpayer that is used in connection with the preparation or filing of a tax return, the tax return preparer may use the taxpayer's tax return information to update the taxpayer's software for the purpose of addressing changes in IRS forms, e-file specifications and administrative, regulatory and legislative guidance or to test and ensure the software's technical capabilities without the taxpayer's consent under §301.7216-3.

(2) Tax return preparers located within the same firm in the United States. If a taxpayer furnishes tax return information to a tax return preparer located within the United States, including any territory or possession of the United States, an officer, employee, or member of a tax return preparer may use the tax return information, or disclose the tax return information to another officer, employee, or member of the same tax return preparer, for the purpose of performing services that assist in the preparation of, or assist in providing auxiliary services in connection with the preparation of, the taxpayer's tax return. If an officer, employee, or member to whom the tax return information is to be disclosed is located outside of the United States or any territory or possession of the United States, the taxpayer's consent under §301.7216-3 prior to any disclosure is required.

(3) Furnishing tax return information to tax return preparers located outside the United States. If a taxpayer initially furnishes tax return information to a tax return preparer located outside of the United States or any territory or possession of the United States, an officer, employee, or member of a tax return preparer may use tax return information, or disclose any tax return information to another officer, employee, or member of the same tax return preparer, for the purpose of performing services that assist in the preparation of, or assist in providing auxiliary services in connection with the preparation of, the tax return of a taxpayer by or for whom the information was furnished without the taxpayer's consent under §301.7216-3.

(4) Examples. The following examples illustrate this paragraph (c):

Example 1. Preparer P provides tax return preparation software to Taxpayer T for T to use in the preparation of its 2009 income tax return. For the 2009 tax year, and using T's tax return information furnished while registering for the software, P would like to update the tax return preparation software that T is using to account for last minute changes made to the tax laws for the 2009 tax year. P is not required to obtain T's consent to update the tax return preparation software. P may perform a software update regardless of whether the software update will affect T's particular return preparation activities.

Example 2. T is a client of Firm, which is a tax return preparer. E, an employee at Firm's State A office, receives tax return information from T for use in preparing T's income tax return. E discloses the tax return information to P, an employee in Firm's State B office; P uses the tax return information to process T's income tax return. Firm is not required to receive T's consent under §301.7216-3 prior to E's disclosure of T's tax return information to P because the tax return information is disclosed to an employee employed by the same tax return preparer located within the United States.

Example 3. Same facts as Example 2 except T's tax return information is disclosed to FE who is located in Firm's Country F office. FE uses the tax return information to process T's income tax return. After processing, FE returns the processed tax return information to E in Firm's State A office. Because FE is outside of the United States, Firm is required to obtain T's consent under §301.7216-3 prior to E's disclosure of T's tax return information to FE.

Example 4. T, Firm's client, is temporarily located in Country F. She initially furnishes her tax return information to employee FE in Firm's Country F office for the purpose of having Firm prepare her U.S. income tax return. FE makes the substantive determinations concerning T's tax liability and forwards T's tax return information to FP,

an employee in Firm's Country P office, for the purpose of processing T's tax return information. FP processes the return information and forwards it to Partner at Firm's State A office in the United States for review and delivery to T. Because T initially furnished the tax return information to a tax return preparer outside of the United States, T's prior consent for disclosure or use under §301.7216-3 was not required. An officer, employee, or member of Firm in the United States may use T's tax return information or disclose the tax return information to another officer, employee, or member of Firm without T's prior consent under §301.7216-3 as long as any disclosure or use of T's tax return information is within the United States. Firm is required to receive T's consent under §301.7216-3 prior to any subsequent disclosure of T's tax return information to a tax return preparer located outside of the United States.

(d) Disclosures to other tax return preparers- (1) Preparer-to-preparer disclosures. Except as limited in paragraph (d)(2) of this section, an officer, employee, or member of a tax return preparer may disclose tax return information of a taxpayer to another tax return preparer (other than an officer, employee, or member of the same tax return preparer) located in the United States (including any territory or possession of the United States) for the purpose of preparing or assisting in preparing a tax return, or obtaining or providing auxiliary services in connection with the preparation of any tax return, so long as the services provided are not substantive determinations or advice affecting the tax liability reported by taxpayers. A substantive determination involves an analysis, interpretation, or application of the law. The authorized disclosures permitted under this paragraph (d)(1) include 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. The authorized disclosures permitted under this paragraph (d)(1) also include disclosures by a tax return preparer to an Authorized IRS *e-file* Provider for the purpose of electronically filing the return with the IRS. Authorized disclosures also include disclosures by a tax return preparer to a second tax return preparer for the purpose of making information concerning the return available to the taxpayer. This would include, for example, whether the return has been accepted or rejected by the

IRS, or the status of the taxpayer's refund. Except as provided in paragraph (c) of this section, a tax return preparer may not disclose tax return information to another tax return preparer for the purpose of the second tax return preparer providing substantive determinations without first receiving the taxpayer's consent in accordance with the rules under §301.7216-3.

(2) Disclosures to contractors. A tax 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 for purposes of tax return preparation only to the extent necessary for the person to provide the contracted services, and only if the tax return preparer ensures that all individuals who are to receive disclosures of tax return information receive a written notice that informs them of the applicability of sections 6713 and 7216 to them and describes the requirements and penalties of sections 6713 and 7216. Contractors receiving tax return information pursuant to this section are tax return preparers under section 7216 because they are performing auxiliary services in connection with tax return preparation. See §301.7216-1(b)(2)(i)(B) and (D).

(3) Examples. The following examples illustrate this paragraph (d):

Example 1. E, an employee at Firm's State A office, receives tax return information from T for Firm's use in preparing T's income tax return. E makes substantive determinations and forwards the tax return information to P, an employee at Processor; Processor is located in State B. P places the tax return information on the income tax return and furnishes the finished product to E. E is not required to receive T's prior consent under §301.7216-3 before disclosing T's tax return information to P because Processor's services are not substantive determinations and the tax return information remained in the United States at Processor's State B office during the entire course of the tax return preparation process.

Example 2. Firm, a tax return preparer, offers income tax return preparation services. Firm's contract with its software provider, Contractor, requires Firm to periodically randomly select certain taxpayers' tax return information solely for the purpose of testing the reliability of the software sold to Firm. Under its agreement with Contractor, Firm discloses tax return information to Contractor's employee, C, who services Firm's contract without providing Contractor or C with a written notice that

describes the requirements of and penalties under sections 7216 and 6713. C uses the tax return information solely for quality assurance purposes. Firm's disclosure of tax return information to C was an impermissible disclosure because Firm failed to ensure that C received a written notice that describes the requirements and penalties of sections 7216 and 6713.

Example 3. E, an employee of Firm in State A in the United States, receives tax return information from T for use in preparing T's income tax return. After E enters T's tax return information into Firm's computer, that information is stored on a computer server that is physically located in State A. Firm contracts with Contractor, located in Country F, to prepare its clients' tax returns. FE, an employee of Contractor, uses a computer in Country F and inputs a password to view T's income tax information stored on the computer server in State A to prepare T's tax return. A computer program permits FE to view T's tax return information, but prohibits FE from downloading or printing out T's tax return information from the computer server. Because Firm is disclosing T's tax return information outside of the United States, Firm is required to obtain T's consent under §301.7216-3 prior to the disclosure to FE. As provided in §301.7216-3(b)(5), however, Firm may not obtain consent to disclose T's social security number (SSN) to a tax return preparer located outside of the United States or any territory or possession of the United States.

Example 4. A, an employee at Firm A, receives tax return information from T for Firm's use in preparing T's income tax return. A forwards the tax return information to B, an employee at another firm, Firm B, to obtain advice on the issue of whether T may claim a deduction for a certain business expense. A is required to receive T's prior consent under §301.7216-3 before disclosing T's tax return information to B because B's services involve a substantive determination affecting the tax liability that T will report.

(e) Disclosure or use of information in the case of related taxpayers. (1) In preparing a tax return of a second taxpayer, a tax return preparer may use, and may disclose to the second taxpayer in the form in which it appears on the return, any tax return information that the tax return preparer obtained from a first taxpayer if--

(i) The second taxpayer is related to the first taxpayer within the meaning of paragraph (e)(2) of this section;

(ii) The first taxpayer's tax interest in the information is not adverse to the second taxpayer's tax interest in the information; and

(iii) The first taxpayer has not expressly prohibited the disclosure or use.

(2) For purposes of paragraph (e)(1)(i) of this section, a taxpayer is related to

another taxpayer if they have any one of the following relationships: husband and wife, child and parent, grandchild and grandparent, partner and partnership, trust or estate and beneficiary, trust or estate and fiduciary, corporation and shareholder, or members of a controlled group of corporations as defined in section 1563.

(3) See §301.7216-3 for disclosure or use of tax return information of the taxpayer in preparing the tax return of a second taxpayer when the requirements of this paragraph are not satisfied.

(f) Disclosure pursuant to an order of a court, or an administrative order, demand, request, summons or subpoena which is 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. The provisions of section 7216(a) and §301.7216-1 will not apply to any disclosure of tax return information if the disclosure is made pursuant to any one of the following documents:

- (1) The order of any court of record, Federal, State, or local.
- (2) A subpoena issued by a grand jury, Federal or State.
- (3) A subpoena issued by the United States Congress.
- (4) An administrative order, demand, summons or subpoena that is issued in the performance of its duties by--
 - (i) Any Federal agency as defined in 5 U.S.C. 551(1) and 5 U.S.C. 552(f), or
 - (ii) A State agency, body, or commission charged under the laws of the State or a political subdivision of the State with the licensing, registration, or regulation of tax return preparers.
- (5) A written request from a professional association ethics committee or board investigating the ethical conduct of the tax return preparer.
- (6) A written request from the Public Company Accounting Oversight Board in connection with an inspection under section 104 of the Sarbanes-Oxley Act of 2002, 15

U.S.C. 7214, or an investigation under section 105 of such Act, 15 U.S.C. 7215, for use in accordance with such Act.

(g) Disclosure for use in securing legal advice, Treasury investigations or court proceedings. A tax return preparer may disclose tax return information--

(1) To an attorney for purposes of securing legal advice;

(2) To an employee of the Treasury Department for use in connection with any investigation of the tax return preparer (including investigations relating to the tax return preparer in its capacity as a practitioner) conducted by the IRS or the Treasury Department; or

(3) To any officer of a court for use in connection with proceedings involving the tax return preparer (including proceedings involving the tax return preparer in its capacity as a practitioner), or the return preparer's client, before the court or before any grand jury that may be convened by the court.

(h) Certain disclosures by attorneys and accountants. The provisions of section 7216(a) and §301.7216-1 shall not apply to any disclosure of tax return information permitted by this paragraph (h).

(1) (i) A tax return preparer who is lawfully engaged in the practice of law or accountancy and prepares a tax return for a taxpayer may use the taxpayer's tax return information, or disclose the information to another officer, employee or member of the tax return preparer's law or accounting firm, consistent with applicable legal and ethical responsibilities, who may use the tax return information for the purpose of providing other legal or accounting services to the taxpayer. As an example, a lawyer who prepares a tax return for a taxpayer may use the tax return information of the taxpayer for, or in connection with, rendering legal services, including estate planning or administration, or preparation of trial briefs or trust instruments, for the taxpayer or the estate of the taxpayer. In addition, the lawyer who prepared the tax return may disclose the tax return information to another officer, employee or member of the same firm for

the purpose of providing other legal services to the taxpayer. As another example, an accountant who prepares a tax return for a taxpayer may use the tax return information, or disclose it to another officer, employee or member of the firm, for use in connection with the preparation of books and records, working papers, or accounting statements or reports for the taxpayer. In the normal course of rendering the legal or accounting services to the taxpayer, the attorney or accountant may make the tax return information available to third parties, including stockholders, management, suppliers, or lenders, consistent with the applicable legal and ethical responsibilities, unless the taxpayer directs otherwise. For rules regarding disclosures outside of the United States, see §301.7216-2(c) and (d).

(ii) A tax return preparer's law or accounting firm does not include any related or affiliated firms. For example, if law firm A is affiliated with law firm B, officers, employees and members of law firm A must receive a taxpayer's consent under §301.7216-3 before disclosing the taxpayer's tax return information to an officer, employee or member of law firm B.

(2) A tax return preparer who is lawfully engaged in the practice of law or accountancy and prepares a tax return for a taxpayer may, consistent with the applicable legal and ethical responsibilities, take the tax return information into account, and may act upon it, in the course of performing legal or accounting services for a client other than the taxpayer, or disclose the information to another officer, employee or member of the tax return preparer's law or accounting firm to enable that other officer, employee or member to take the information into account, and act upon it, in the course of performing legal or accounting services for a client other than the taxpayer. This is permissible when the information is, or may be, relevant to the subject matter of the legal or accounting services for the other client, and consideration of the information by those performing the services is necessary for the proper performance of the services. In no event, however, may the tax return information be disclosed to a person who is

not an officer, employee or member of the law or accounting firm, unless the disclosure is exempt from the application of section 7216(a) and §301.7216-1 by reason of another provision of §§301.7216-2 or 301.7216-3.

(3) Examples. The application of this paragraph may be illustrated by the following examples:

Example 1. A, a member of an accounting firm, renders an opinion on a financial statement of M Corporation that is part of a registration statement filed with the Securities and Exchange Commission. After the registration statement is filed, but before its effective date, B, a member of the same accounting firm, prepares an income tax return for N Corporation. In the course of preparing N's income tax return, B discovers that N does business with M and concludes that the information given by N should be considered by A to determine whether the financial statement opined on by A contains an untrue statement of material fact or omits a material fact required to keep the statement from being misleading. B discloses to A the tax return information of N for this purpose. A determines that there is an omission of material fact and that an amended statement should be filed. A so advises M and the Securities and Exchange Commission. A explains that the omission was revealed as a result of confidential information that came to A's attention after the statement was filed, but A does not disclose the identity of the taxpayer or the tax return information itself. Section 7216(a) and §301.7216-1 do not apply to B's disclosure of N's tax return information to A and A's use of the information in advising M and the Securities and Exchange Commission of the necessity for filing an amended statement. Section 7216(a) and §301.7216-1 would apply to a disclosure of N's tax return information to M or to the Securities and Exchange Commission unless the disclosure is exempt from the application of section 7216(a) and §301.7216-1 by reason of another provision of either this section or §301.7216-3.

Example 2. A, a member of an accounting firm, is conducting an audit of M Corporation, and B, a member of the same accounting firm, prepares an income tax return for D, an officer of M. In the course of preparing the return, B obtains information from D indicating that D, pursuant to an arrangement with a supplier doing business with M, has been receiving from the supplier a percentage of the amounts that the supplier invoices to M. B discloses this information to A who, acting upon it, searches in the course of the audit for indications of a kickback scheme. As a result, A discovers information from audit sources that independently indicate the existence of a kickback scheme. Without revealing the tax return information A has received from B, A brings to the attention of officers of M the audit information indicating the existence of the kickback scheme. Section 7216(a) and §301.7216-1 do not apply to B's disclosure of D's tax return information to A, A's use of D's information in the course of the audit, and A's disclosure to M of the audit information indicating the existence of the kickback scheme. Section 7216(a) and §301.7216-1 would apply to a disclosure to M, or to any other person not an employee or member of the accounting firm, of D's tax return

information furnished to B.

(i) Corporate fiduciaries. A trust company, trust department of a bank, or other corporate fiduciary that prepares a tax return for a taxpayer for whom it renders fiduciary, investment, or other custodial or management services may, unless the taxpayer directs otherwise--

(1) Disclose or use the taxpayer's tax return information in the ordinary course of rendering such services to or for the taxpayer; or

(2) Make the information available to the taxpayer's attorney, accountant, or investment advisor.

(j) Disclosure to taxpayer's fiduciary. If, after furnishing tax return information to a tax return preparer, the taxpayer dies or becomes incompetent, insolvent, or bankrupt, or the taxpayer's assets are placed in conservatorship or receivership, the tax return preparer may disclose the information to the duly appointed fiduciary of the taxpayer or his estate, or to the duly authorized agent of the fiduciary.

(k) Disclosure or use of information in preparation or audit of State or local tax returns or assisting a taxpayer with foreign country tax obligations. The provisions of paragraphs (c) and (d) of this section shall apply to the disclosure by any tax return preparer of any tax return information in the preparation of, or in connection with the preparation of, any tax return of the taxpayer under the law of any State or political subdivision thereof, of the District of Columbia, of any territory or possession of the United States, or of a country other than the United States. The provisions of section 7216(a) and §301.7216-1 shall not apply to the use by any tax return preparer of any tax return information in the preparation of, or in connection with the preparation of, any tax return of the taxpayer under the law of any State or political subdivision thereof, of the District of Columbia, of any territory or possession of the United States, or of a country other than the United States. The provisions of section 7216(a) and §301.7216-1 shall not apply to the disclosure or use by any tax return preparer of any tax return

information in the audit of, or in connection with the audit of, any tax return of the taxpayer under the law of any State or political subdivision thereof, the District of Columbia, or any territory or possession of the United States.

(l) Payment for tax preparation services. A tax return preparer may use and disclose, without the taxpayer's written consent, tax return information that the taxpayer provides to the tax return preparer to pay for tax preparation services to the extent necessary to process or collect the payment. For example, if the taxpayer gives the tax return preparer a credit card to pay for tax preparation services, the tax return preparer may disclose the taxpayer's name, credit card number, credit card expiration date, and amount due for tax preparation services to the credit card company, as necessary, to process the payment. Any tax return information that the taxpayer did not give the tax return preparer for the purpose of making payment for tax preparation services may not be used or disclosed by the tax return preparer without the taxpayer's prior written consent, unless otherwise permitted under another provision of this section.

(m) Retention of records. A tax return preparer may retain tax return information of a taxpayer, including copies of tax returns, in paper or electronic format, prepared on the basis of the tax return information, and may use the information in connection with the preparation of other tax returns of the taxpayer or in connection with an examination by the Internal Revenue Service of any tax return or subsequent tax litigation relating to the tax return. The provisions of paragraph (n) of this section regarding the transfer of a taxpayer list also apply to the transfer of any records and related papers to which this paragraph applies.

(n) Lists for solicitation of tax return business. A tax return preparer may compile and maintain a separate list containing solely the names, addresses, e-mail addresses, and phone numbers of taxpayers whose tax returns the tax return preparer has prepared or processed. This list may be used by the compiler solely to contact the taxpayers on the list for the purpose of offering tax information or additional tax return

preparation services to such taxpayers. The compiler of the list may not transfer the taxpayer list, or any part thereof, to any other person unless the transfer takes place in conjunction with the sale or other disposition of the compiler's tax return preparation business. A person who acquires a taxpayer list, or a part thereof, in conjunction with a sale or other disposition of a tax return preparation business is subject to the provisions of this paragraph with respect to the list. The term list, as used in this paragraph (n), includes any record or system whereby the names and addresses of taxpayers are retained. The provisions of this paragraph (n) also apply to the transfer of any records and related papers to which this paragraph (n) applies.

(o) Producing statistical information in connection with tax return preparation business. A tax return preparer may use, for the limited purpose specified in this paragraph (o), tax return information to produce a statistical compilation of data described in §301.7216-1(b)(3)(i)(B). The purpose and use of the statistical compilation must relate directly to the internal management or support of the tax return preparer's tax return preparation business. The tax return preparer may not disclose or use the tax return information in connection with, or in support of, businesses other than tax return preparation. The compiler of the statistical compilation may not disclose the compilation, or any part thereof, to any other person unless disclosure of the statistical compilation is made in order to comply with financial accounting or regulatory reporting requirements or occurs in conjunction with the sale or other disposition of the compiler's tax return preparation business. A person who acquires a compilation, or a part thereof, in conjunction with a sale or other disposition of a tax return preparation business is subject to the provisions of this paragraph (o) with respect to the compilation as if the acquiring person had compiled it.

(p) Disclosure or use of information for quality or peer reviews. The provisions of section 7216(a) and §301.7216-1 shall not apply to any disclosure for the purpose of a quality or peer review to the extent necessary to accomplish the review. A quality or

peer review is a review that is undertaken to evaluate, monitor, and improve the quality and accuracy of a tax return preparer's tax preparation, accounting, or auditing services. A quality or peer review may be conducted only by attorneys, certified public accountants, enrolled agents, and enrolled actuaries who are eligible to practice before the Internal Revenue Service. See Department of the Treasury Circular 230, 31 CFR part 10. Tax return information may also be disclosed to persons who provide administrative or support services to an individual who is conducting a quality or peer review under this paragraph (p), but only to the extent necessary for the reviewer to conduct the review. Tax return information gathered in conducting a review may be used only for purposes of a review. No tax return information identifying a taxpayer may be disclosed in any evaluative reports or recommendations that may be accessible to any person other than the reviewer or the tax return preparer being reviewed. The tax return preparer being reviewed will maintain a record of the review including the information reviewed and the identity of the persons conducting the review. After completion of the review, no documents containing information that may identify any taxpayer by name or identification number may be retained by a reviewer or by the reviewer's administrative or support personnel. Any person (including administrative and support personnel) receiving tax return information in connection with a quality or peer review is a tax return preparer for purposes of sections 7216(a) and 6713(a).

(q) Disclosure to report the commission of a crime. The provisions of section 7216(a) and §301.7216-1 shall not apply to the disclosure of any tax return information to the proper Federal, State, or local official in order, and to the extent necessary, to inform the official of activities that may constitute, or may have constituted, a violation of any criminal law or to assist the official in investigating or prosecuting a violation of criminal law. A disclosure made in the bona fide but mistaken belief that the activities constituted a violation of criminal law is not subject to section 7216(a) and §301.7216-1.

(r) Disclosure of tax return information due to a tax return preparer's incapacity or death. In the event of incapacity or death of a tax return preparer, disclosure of tax return information may be made for the purpose of assisting the tax return preparer or his legal representative (or the representative of a deceased tax return preparer's estate) in operating the business. Any person receiving tax return information under the provisions of this paragraph (r) is a tax return preparer for purposes of sections 7216(a) and 6713(a).

(s) Effective/applicability date. This section applies to disclosures or uses of tax return information occurring on or after January 1, 2009.

Par. 5. Section 301.7216-3 is revised to read as follows:

§301.7216-3 Disclosure or use permitted only with the taxpayer's consent.

(a) In general--(1) Taxpayer consent. Unless section 7216 or §301.7216-2 specifically authorizes 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, as described in this section. A tax return preparer may disclose or use tax return information as the taxpayer directs as long as the preparer obtains a written consent from the taxpayer as provided in this section. The consent must be knowing and voluntary. Except as provided in paragraph (a)(2) of this section, conditioning the provision of any services on the taxpayer's furnishing consent will make the consent involuntary, and the consent will not satisfy the requirements of this section.

(2) Taxpayer consent to a tax return preparer furnishing tax return information to another tax return preparer. (i) 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 to another tax return preparer 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.

(ii) Example. The application of this paragraph (a)(2) may be illustrated by the following example:

Example. Preparer P, who is located within the United States, is retained by Company C to provide tax return preparation services for employees of Company C. An employee of Company C, Employee E, works for C outside of the United States. To provide tax return preparation services for E, P requires the assistance of and needs to disclose E's tax return information to a tax return preparer who works for P's affiliate located in the country where E works. P may condition its provision of tax return preparation services upon E consenting to the disclosure of E's tax return information to the tax return preparer in the country where E works.

(3) The form and contents of taxpayer consents--(i) In general. All consents to disclose or use tax return information must satisfy the following requirements--

(A) A taxpayer's consent to a tax return preparer's disclosure or use of tax return information must include the name of the tax return preparer and the name of the taxpayer.

(B) If a taxpayer consents to a disclosure of tax return information, the consent must identify the intended purpose of the disclosure. Except as provided in §301.7216-3(a)(3)(iii), if a taxpayer consents to a disclosure of tax return information, the consent must also identify the specific recipient (or recipients) of the tax return information. If the taxpayer consents to use of tax return information, the consent must describe the particular use authorized. For example, if the tax return 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

for which the tax return preparer may solicit use of the tax return information. Examples of products or services that must be identified include, but are not limited to, balance due loans, mortgage loans, mutual funds, individual retirement accounts, and life insurance.

(C) The consent must specify the tax return information to be disclosed or used by the return preparer.

(D) If a tax return preparer to whom the tax return information is to be disclosed is located outside of the United States, the taxpayer's consent under §301.7216-3 prior to any disclosure is required. See §301.7216-2(c) and (d).

(E) A consent to disclose or use tax return information must be signed and dated by the taxpayer.

(ii) The form and contents of taxpayer consents with respect to taxpayers filing a return in the Form 1040 series – guidance describing additional requirements for taxpayer consents with respect to Form 1040 series filers. The Secretary may issue guidance, by publication in the Internal Revenue Bulletin (see §601.601(d)(2)(ii)(b) of this chapter), describing additional requirements for tax return preparers regarding the format and content of consents to disclose and use tax return information with respect to taxpayers filing a return in the Form 1040 series, e.g., Form 1040, Form 1040NR, Form 1040A, or Form 1040EZ.

(iii) The form and contents of taxpayer consents with respect to all other taxpayers. A consent to disclose or use tax return information with respect to a taxpayer not filing a return in the Form 1040 series may be in any format, including an engagement letter to a client, as long as the consent complies with the requirements of

§301.7216-3(a)(3)(i). Additionally, the requirements of §301.7216-3(c)(1) are inapplicable to consents to disclose or use tax return information with respect to taxpayers not filing a return in the Form 1040 series. Solely for purposes of a consent issued under §301.7216-3(a)(3)(iii), in lieu of identifying specific recipients of an intended disclosure under §301.7216-3(a)(3)(i)(B), a consent may allow disclosure to a descriptive class of entities engaged by a taxpayer or the taxpayer's affiliate for purposes of services in connection with the preparation of tax returns, audited financial statements, or other financial statements or financial information as required by a government authority, municipality or regulatory body.

(iv) Examples. The application of §301.7216-3(a)(3)(iii) may be illustrated by the following examples:

Example 1. Consistent with applicable legal and ethical responsibilities, Preparer Z sends its client, a corporation, Taxpayer C, an engagement letter. Part of the engagement letter requests the consent of Taxpayer C for the purpose of disclosing tax return information to an investment banking firm to assist the investment banking firm in securing long term financing for Taxpayer C. The engagement letter includes language and information that meets the requirements of §301.7216-3(a)(3)(i), including: (I) Preparer Z's name, Taxpayer C's name, and a signature and date line for Taxpayer C; and (II) a statement that "Taxpayer C authorizes Preparer Z to disclose the portions of Taxpayer C's 2009 tax return information to the firm retained by Taxpayer C necessary for the purposes of assisting Taxpayer C secure long term financing." The engagement letter satisfies the requirements of §301.7216-3(a)(3) for the disclosure of the information provided therein for the specific purpose stated.

Example 2. Consistent with applicable legal and ethical responsibilities, Preparer N sends its client, a corporation, Taxpayer D, an engagement letter. Part of the engagement letter requests the consent of Taxpayer D for the purpose of disclosing tax return information to Preparer N's affiliated firms located outside of the United States for the purposes of preparation of Taxpayer D's 2009 tax return. The engagement letter includes language and information that meets the requirements of §301.7216-3(a)(3)(i), including: (I) Preparer N's name, Taxpayer D's name, and a signature and date line for Taxpayer D; (II) a statement that "Taxpayer D authorizes Preparer N to disclose Taxpayer D's 2009 tax return information to Preparer N's affiliates located outside of the United States for the purposes of assisting Preparer N prepare Taxpayer D's 2009 tax return"; and (III) a statement that, in providing consent, Taxpayer D acknowledges that

its tax return information for 2009 will be disclosed to tax return preparers located abroad. The engagement letter satisfies the requirements of §301.7216-3(a)(3) for the disclosure of the information provided therein for the specific purpose stated.

(b) Timing requirements and limitations--(1) No retroactive consent. A taxpayer must provide written consent before a tax return preparer discloses or uses the taxpayer's tax return information.

(2) 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.

(3) No requests for consent after an unsuccessful request. With regard to tax return information for each income tax return that a tax return preparer prepares, if a taxpayer declines 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.

(4) No consent to the disclosure of a taxpayer's social security number to a return preparer outside of the United States. A tax return preparer located within the United States, including any territory or possession of the United States, may not obtain consent to disclose the taxpayer's social security number (SSN) to a tax return preparer located outside of the United States or any territory or possession of the United States. Thus, if a tax return preparer located within the United States (including any territory or possession of the United States) obtains consent from a taxpayer to disclose tax return information to another tax return preparer located outside of the United States, as

provided under §§301.7216-2(c) and 301.7216-2(d), the tax return preparer located in the United States may not disclose the taxpayer's SSN, and the tax return preparer must redact or otherwise mask the taxpayer's SSN before the tax return information is disclosed outside of the United States. If a tax return preparer located within the United States initially receives or obtains a taxpayer's SSN from another tax return preparer located outside of the United States, however, the tax return preparer within the United States may, without consent, retransmit the taxpayer's SSN to the tax return preparer located outside the United States that initially provided the SSN to the tax return preparer located within the United States.

(5) Duration of consent. A consent document may specify the duration of the taxpayer's consent to the disclosure or use of tax return information. If a consent agreed to by the taxpayer does not specify the duration of the consent, the consent to the disclosure or use of tax return information will be effective for a period of one year from the date the taxpayer signed the consent.

(c) Special rules--(1) Multiple disclosures within a single consent form or multiple uses within a single consent form. A taxpayer may consent to multiple uses within the same written document, or multiple disclosures within the same written document. A single written document, however, cannot authorize both uses and disclosures; rather one written document must authorize the uses and another separate written document must authorize the disclosures. Furthermore, a consent that authorizes multiple disclosures or multiple uses must specifically and separately identify each disclosure or use. See §301.7216-3(a)(3)(iii) for an exception to this rule for certain taxpayers.

(2) Disclosure of entire return. A consent may authorize the disclosure of all

information contained within a return. A consent authorizing the disclosure of an entire return must provide that the taxpayer has the ability to request a more limited disclosure of tax return information as the taxpayer may direct.

(3) Copy of consent must be provided to taxpayer. The tax return preparer must provide a copy of the executed consent to the taxpayer at the time of execution. The requirements of this paragraph (c)(3) may also be satisfied by giving the taxpayer the opportunity, at the time of executing the consent, to print the completed consent or save it in electronic form.

(d) Effective/applicability date. This section applies to disclosures or uses of tax return information occurring on or after January 1, 2009.

/s/ Linda E. Stiff
Deputy Commissioner for Services and Enforcement.

Approved: December 21, 2007

/s/ Eric Solomon
Assistant Secretary of the Treasury (Tax Policy).