



What you need to know about regulations under IRC Section 7216 and how they affect your marketing efforts

Effective Jan. 1, 2009, rules on the disclosure and use of confidential tax return information by tax return preparers for tax-return-only clients are greatly tightened. IRC Section 7216, *Disclosure or use of information by preparers of returns*, is designed to protect confidential financial or contact information from being given out to and used by third parties and to regulate the use of this information by the firm for nontax purposes.

Violation of the code section can result in serious penalties. So it's important to understand when Sec. 7216 applies and how to comply.

Although this overview is intended to provide guidance, it's no substitute for making sure you have a firm grasp of the regulation's concepts. Given the severity of penalties, we recommend that you consult an attorney with expertise in this area to ensure you're in compliance.

Old dog, new tricks

The tax law has been on the books since 1971, when Congress imposed criminal penalties on tax return preparers who disclosed or used tax return information without authorization. But the IRS recently modified the regulations under Sec. 7216 with the goal of better protecting taxpayers' tax return information, particularly in today's technologically advanced business environment where electronic theft and security data breaches are all too common.

The updated regulations generally prohibit "tax return preparers" from disclosing or using clients' "tax return information" for purposes other than tax return preparation without taxpayers' knowing, informed and voluntary consent. They also provide specific exceptions that allow preparers to disclose or use return information without taxpayer consent.

Moreover, tax return preparers are prohibited from disclosing tax-return-only client information to a third party except when the tax return preparer:

1. Must disclose the information to a tax return processor for purposes of preparing the client's return;
2. Participates in a peer review; and



3. Must comply with federal, state or local laws – for example, in response to a summons or subpoena.

Terms redefined

Here's how old terms have been redefined under the new regulations:

The tax return preparer. This definition has been broadened to include not only those preparing tax returns, but also anyone assisting with the preparation of a return, casual preparers and electronic return originators or e-filers. Even administrative assistants are bound by the regulations if they help prepare returns for your office.

When you outsource work and provide subcontractors with tax return information, they're subject to the same provisions and penalties. So informing them in writing of the rules and penalties is mandatory.

Tax return information. The definition has been updated to include any information received from the taxpayer or a third party (such as a financial institution) used in the preparation of a tax return and any information obtained in connection with the preparation of the return. Naturally, documents, worksheets, compilations, correspondence and the like are protected, but so is basic contact information such as taxpayers' names, addresses and e-mail addresses.

Impact on marketing communications

In regard to distribution of print and e-newsletters, as well as similar marketing communications, the impact of the changes should be relatively limited. Why? Because, in many cases, the regulations won't require you to obtain taxpayer consent.

First, the regulations permit tax return preparers to make limited use of previous tax return clients' contact information (name, address, e-mail address, phone number) to offer tax information or additional tax return preparation services to them. So, if your newsletter or other marketing communication addresses tax information, it's OK to send to any contacts.

Second, disclosing or using information that doesn't fall under the Sec. 7216 definition of "tax return information" isn't prohibited by the regulations. If you've gathered your client's contact information through another means, such as by providing them with another product or service (including tax planning or consulting), you may use that information without getting their consent.



So, the only times you need to get consent from clients before sending them your newsletter or similar marketing communication are when:

1. Your newsletter doesn't include any tax information, *and*
2. The only way you have access to the clients' contact information is from their tax return data.

However, if you plan to use a mail house or third-party distributor to send print or e-mail newsletters to your tax-return-only clients (whose contact information was obtained from tax return data), you should obtain the clients' consents prior to doing so. **Please note:** If you subscribe to PDI's Flex-E-letter service, we are *not* considered a third-party distributor under the regulations. That's because we aren't responsible for e-mailing the e-newsletter to your clients, nor do we have access to your clients' e-mail addresses.

Unfortunately, certain realities of the business world seem to have been ignored when crafting the changes to the regulations. The contact information you've obtained for a tax return client may have been provided to you numerous times in different ways, and then updated many more times over the years. You may not actually be capable of answering how you originally obtained the information, or how many different ways you've received it. In most cases, we would expect that this leads to the conclusion that the contact information may be used for newsletter and similar marketing communication purposes, even those that don't relate at all to taxes.

Signed, sealed and delivered

In situations where you do need to obtain consent to disclose or use tax return information, you must obtain such consent *before* the tax returns are provided to the client for signature. And you must obtain the client's signed and dated consent on paper or electronically before you can disclose tax return information to anyone.

Separate consents are required for separate disclosures and uses. Consents must:

- Identify the intended purpose of the disclosure or use,
- Identify the recipients and describe the particular authorized information to be disclosed or used, and
- Include the name of the tax return preparer and the name of the taxpayer.

The regulations under Sec. 7216 provide applicable mandatory language for the consent form. Essentially it requires the form to say that:



1. Signing the consent isn't a requirement and that, if he or she does sign, a time period can be set for the duration of that consent — otherwise, the consent is effective for one year from the date signed, and
2. The Treasury Inspector General for Tax Administration can be contacted if the taxpayer believes that his or her tax return information has been disclosed or used improperly.

Keep in mind that retroactive consents are prohibited, and if the taxpayer doesn't consent, *you may not ask again.*

Electronic consents are also permitted, and are subject to rules that are analogous to hard copy consents. Specifically, electronic consents must be in the same type as the Web site's standard text, contain the client's affirmative consent (as opposed to an "opt-out" clause), and be signed and dated by the client. You can find additional information about consent forms, and IRS-approved language, at <http://www.irs.gov/efile/article/0,,id=201520,00.html>.

Consequences of violations

Although there are likely only limited circumstances where Sec. 7216 will apply to your newsletter and similar marketing communication efforts, it's critical to identify the situations where it does apply and obtain the necessary consent, because the consequences of violations can be severe.

Noncompliance is considered, under Sec. 7216, to be a criminal penalty punishable as a misdemeanor that could result in imprisonment for up to one year, a fine of not more than \$1,000, or both, for each violation. In addition to the criminal penalties, Sec. 6713(a) imposes civil penalties using the same criteria as Sec. 7216, including \$250 for each prohibited disclosure or use, not to exceed \$10,000 for a calendar year.

Ensuring compliance

Here we've focused on marketing communication issues related to Sec. 7216 and the new regulations. But it's important to note that the regulations have much broader implications you need to be aware of. For example, if you use or consult with an offshore contractor in relation to tax return preparation, you must inform tax return clients that their tax return information may be disclosed to a tax return preparer located outside the United States and obtain a signed form consenting to the disclosure. As mentioned at the outset of this article, it's critical that you understand how these



regulations may apply to the particularities of your firm, and we urge you to consult with an attorney before taking any actions that may create exposure for your firm under Sec. 7216.

In terms of marketing, keep tax-only contact data for clients from whom you require consent forms separate from contact information for clients for whom you do other work and who, therefore, aren't subject to the Sec. 7216 rules. This will help ensure you don't distribute newsletters or similar marketing communication pieces using contact information subject to the rules without obtaining proper consent.