

Part III - Administrative, Procedural, and Miscellaneous

DISCLOSURE OF STATISTICAL COMPILATIONS OF ANONYMOUS TAX RETURN INFORMATION UNDER SECTION 7216

Notice 2009-13

PURPOSE

This notice provides interim guidance relating to the ability of a tax return preparer to disclose and use statistical compilations of anonymous tax return information (i.e., information in a form that cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer) described in §301.7216-1(b)(3)(i)(B) in support of a tax return preparer's tax return preparation business. This notice provides guidance on the tax return information a tax return preparer may use to compile anonymous statistical information that the tax return preparer may disclose without taxpayer consent. The ability of a tax return preparer to disclose and use statistical compilations of tax return information that contain any taxpayer identifying information is not addressed in this notice and continues to be governed by §301.7216-2(o).

BACKGROUND

On January 3, 2008, the Treasury Department and IRS issued final regulations under section 7216 (TD 9375) applicable to disclosures or uses of tax return information occurring on or after January 1, 2009. The final regulations replaced previously issued final regulations that remained applicable to disclosures or uses of tax return information occurring prior to January 1, 2009. The final regulations included §301.7216-1(b)(3)(i)(B) which, for disclosures and uses of tax return information occurring on or after January 1, 2009, provides that tax return information includes statistical

compilations of tax return information, including information in a form that cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer. The final regulations also included the addition of §301.7216-2(o), which provides limited purposes for when a tax return preparer may use tax return information to produce statistical compilations and for when it may use or disclose the produced statistical compilation. Section 301.7216-2(o) currently allows a tax return preparer to use statistical compilations if such use directly supports the tax return preparer's tax return preparation business. However, §301.7216-2(o) also currently prohibits the disclosure of all statistical compilations, both taxpayer-identifying and anonymous, unless the disclosure 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. This notice provides interim guidance with respect to the ability of a tax return preparer to disclose and use statistical compilations of anonymous tax return information data in support of its tax return preparation business.

The Treasury Department and IRS have become aware that, under current §301.7216-2(o), tax return preparers may not disclose anonymous statistical compilations for other purposes that may provide benefits to taxpayers generally or to the public as a whole. Anonymous statistical data disclosed within the constraints provided by the interim guidance described in this notice may be used by tax return preparers to assist taxpayers in making informed choices about filing options and tax return preparers. The availability of anonymous statistical data can be useful from a public policy perspective, as the availability of such data can assist lawmakers, academics, non-profits and other agencies in the facilitation of sound tax policy analysis

and decisions. In addition, volunteer tax return preparers that provide free tax return preparation services to low- and moderate-income taxpayers and families would be able to demonstrate the impact of their efforts in order to obtain and administer funding necessary for their continued operation.

The interim guidance provides that tax return preparers may use and disclose, without taxpayer consent, statistical compilations of tax return information to support the tax return preparer's tax return preparation business, but any disclosure of a statistical compilation must be in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer. To further ensure anonymity, this interim guidance prohibits the disclosure of statistical compilations with cells containing data from fewer than twenty-five tax returns. Finally, the sale or exchange for value of all or any part of an anonymous statistical compilation is prohibited except if the sale occurs in conjunction with the transfer of assets made pursuant to the sale or other disposition of the tax return preparer's tax return preparation business.

This interim guidance continues to prohibit disclosure of anonymous statistical compilations of average refund, credit, or rebate amounts, or a part thereof, for purposes of advertising or marketing. The Treasury Department and IRS are concerned that advertising and marketing that discloses average refund, credit, or rebate amounts could create inaccurate expectations on the part of taxpayers and improper incentives on the part of tax return preparers to meet those expectations at the expense of tax return accuracy. Accordingly, in the case of the use or disclosure in advertising and marketing of statistical compilations of average refund, credit, or rebate amounts, this interim guidance retains the existing rules governing the use and

disclosure of statistical compilations found in §301.7216-2(o). In addition, the IRS will continue to rely on all existing enforcement powers to address concerns regarding advertising and marketing claims by tax return preparers.

The Treasury Department and the IRS believe that this interim guidance appropriately balances concerns regarding safeguarding the confidentiality of tax return information against the tax industry's (public, private, and governmental) need to evaluate and use anonymous tax return information. The Treasury Department and the IRS will apply the rules set forth in this notice during 2009 while devoting further consideration, including the consideration of any public comments in response to this notice, to whether this interim guidance should be adopted by regulations or further modified.

INTERIM GUIDANCE UNDER SECTION 7216

A tax return preparer may use 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. A tax return preparer who produces a statistical compilation of data described in §301.7216-1(b)(3)(i)(B) may not disclose the compilation, or any part thereof, to any other person unless disclosure of the statistical compilation is anonymous as to taxpayer identity, does not disclose cells containing data from fewer than twenty-five tax returns, and is in direct support of the tax return preparer's tax return preparation business. A statistical compilation is anonymous as to taxpayer identity for purposes of this interim guidance if it is in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular

taxpayer. For purposes of this interim guidance, marketing and advertising is in direct support of the tax return preparer's tax return preparation business as long as the marketing and advertising is not false, misleading, or unduly influential. However, this interim guidance does not apply to the use or disclosure in marketing or advertising of statistical compilations containing or reflecting average amounts of refund, credit, or rebate, which use and disclosure will continue to be governed by the provisions of §301.7216-2(o). Fundraising activities conducted by Volunteer Income Tax Assistance programs and other organizations described in section 501(c) of the Internal Revenue Code in direct support of their tax return preparation services are not marketing and advertising under this interim guidance. For purposes of this interim guidance, "tax return preparation business" includes bona fide research or public policy discussions concerning state or federal taxation or requiring data acquired during the tax return preparation process. Except as provided in this interim guidance, the provisions of §301.7216-2(o) apply to the use and disclosure of statistical compilations of tax return information.

A tax return preparer may not sell or exchange for value a statistical compilation of data described in §301.7216-1(b)(3)(i)(B), in whole or in part, except in conjunction with the transfer of assets made pursuant to the sale or other disposition of the tax return preparer's tax return preparation business.

EXAMPLES

The interim guidance described by this notice may be illustrated by the following examples.

Example 1. Preparer A is a tax return preparer as defined by §301.7216-1(b)(2)(i)(A). In 2008, A used tax return information to produce a statistical compilation

of data for both internal management purposes and to support A's tax return preparation business. The statistical compilation included a cell containing the information that A prepared thirty-two S corporation tax returns in 2008. In 2009, A decides to embark upon a new marketing campaign emphasizing its experience preparing small business tax returns. In the campaign, A discloses the cell containing the number of S corporation tax returns prepared in 2008. A's disclosure does not include any information that can be associated with or that can identify any specific taxpayers. A may disclose the anonymous statistical compilation without taxpayer consent because it complies with the interim guidance described in this notice.

Example 2. Preparer B is a tax return preparer as defined by §301.7216-1(b)(2)(i)(A). In 2009, in support of B's tax preparation business, B advertises that the average tax refund obtained for its clients in 2008 was \$2,800. B may not disclose this information because it contains a statistical compilation reflecting average refund amounts.

Example 3. Preparer C is a tax return preparer as defined by §301.7216-1(b)(2)(i)(A) and is a Volunteer Income Tax Assistance program. In 2009, in support of C's tax preparation business, C makes a grant request to a charitable foundation to fund C's operations providing free tax preparation services to low- and moderate-income families. In support of C's request, C includes anonymous statistical data showing that, in 2008, C provided services to 500 taxpayers, that 95% of the taxpayer population served by C received the Earned Income Tax Credit (EITC), and that the average amount of the EITC received was \$3,300. C may disclose this information because it contains an anonymous statistical compilation, is in direct support of their tax return preparation services, and is consistent with this interim guidance.

Example 4. Preparer D is a tax return preparer as defined by §301.7216-1(b)(2)(i)(A). In December 2007 D produced an anonymous statistical compilation of tax return information obtained during the 2007 filing season. In 2009, D discloses portions of the anonymous statistical compilation in connection with the marketing of its financial advisory and asset planning services. D is required to receive taxpayer consent under §301.7216-3 before disclosing the tax return information contained in the anonymous statistical compilation because the disclosure is not being made in support of the tax return preparation business.

EFFECTIVE DATE

This interim guidance applies to disclosures of anonymous statistical compilations of tax return information occurring on or after February 9, 2009. This interim guidance expires on the earlier of the date that it is superseded or December 31, 2009.

REQUESTS FOR COMMENTS

Interested parties are invited to submit comments on this notice and modifications to §301.7216-2(o) by May 10, 2009. Comments should be submitted to: Internal Revenue Service, CC:PA:LPD:PR (Notice 2009-13), Room 5203, P.O. Box 7604, Ben Franklin Station, Washington, DC 20224. Alternatively, comments may be hand-delivered Monday through Friday between the hours of 8:00 a.m. to 4:00 p.m. to: CC:PA:LPD:PR (Notice 2009-13), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, N.W., Washington, DC. Comments may also be submitted electronically via the following e-mail address: Notice.Comments@irs.counsel.treas.gov. Please include Notice in the subject line of any electronic submission.

DRAFTING INFORMATION

The principal author of this notice is Molly K. Donnelly, Office of the Associate Chief Counsel (Procedure and Administration). For further information regarding this notice, contact Molly K. Donnelly at (202) 622-4940 (not a toll-free call).