

Enhance Confidentiality and Disclosure Protections

#38 LIMIT REDISCLOSURES AND UNAUTHORIZED USES OF TAX RETURNS AND TAX RETURN INFORMATION OBTAINED THROUGH § 6103-BASED “CONSENT” DISCLOSURES

Present Law

Under IRC § 6103, tax returns and tax return information generally must be kept confidential and may not be disclosed. This general rule is subject to certain exceptions, including an exception for disclosures requested or consented to by the taxpayer.¹²⁶ For example, a taxpayer may request that the IRS disclose his or her tax return or tax return information, or sign a form providing consent to the disclosure, when the taxpayer is applying for a mortgage and the lending bank requires the documents for income-verification purposes.¹²⁷ A taxpayer may request or provide a consent to disclosure in other circumstances as well.

Under present law, recipients of a taxpayer’s tax return or tax return information are not prohibited from using it for other purposes other than the purpose for which the taxpayer granted consent or from re-disclosing it. In theory, recipients may share the information with an affiliate, sell it, or even publish it. A bank might use the information to market ancillary products to the taxpayer.

Reasons for Change

It is widely agreed that tax returns and tax return information should be kept confidential except in circumstances where a compelling need exists for the disclosure. Maintaining general confidentiality and defining exceptions as narrowly as possible to accomplish their intended purposes protects taxpayers and promotes tax compliance.

If a taxpayer applies for a mortgage or must provide his tax return or tax return information to a third party for another purpose, the third party should be limited to using it only for the intended purpose, and should not be permitted to disclose it further without the express, written permission of the taxpayer.

Recommendation

Amend IRC § 6103 to provide that persons designated by a taxpayer to receive tax returns or tax return information may not use the information for any purpose other than the limited purpose for which the authorization was granted and may not disclose the information to any other party without the express, written permission of the taxpayer.¹²⁸

126 See IRC § 6103(c). See also Treas. Reg. § 301.6103(c)-1.

127 The taxpayer often signs a copy of Form 4506-T, *Request for Transcript of Tax Return*, which gives the lender access to the taxpayer’s return information relating to the tax periods or years specified on the form.

128 For legislative language generally consistent with this recommendation, see Taxpayer First Act, H.R. 5444, 115th Cong. § 18302 (2018); Taxpayer First Act of 2018, S. 3246, 115th Cong. § 1002 (2018).

#39 AUTHORIZE THE TREASURY DEPARTMENT TO ISSUE GUIDANCE SPECIFIC TO IRC § 6713 REGARDING THE DISCLOSURE OR USE OF TAX RETURN INFORMATION BY PREPARERS

Present Law

IRC §§ 7216 and 6713 impose criminal and civil sanctions, respectively, on preparers who, with the requisite level of intent,¹²⁹ disclose or use tax return information for any purpose other than preparing or assisting in the preparation of a tax return, except as expressly permitted by statute or regulation. Exceptions to the broad prohibition in IRC § 6713 are provided in IRC § 6713(b), which states that the rules of IRC § 7216(b) apply. IRC § 7216(b) authorizes the Secretary to create regulatory exceptions to the criminal penalty statute. Thus, the current statutory framework seemingly requires that exceptions be made either to both the criminal and civil statutes or to neither.

Reasons for Change

IRC § 6713 has historically been identified as the civil counterpart to the criminal penalty imposed on tax return preparers under IRC § 7216. The criminal penalty regime under IRC § 7216 is substantially harsher than the civil penalty regime under IRC § 6713.¹³⁰ The Treasury Department is understandably reluctant to subject preparers to criminal sanctions except for egregious conduct, so it has used its regulatory authority to carve out broad exceptions from the general prohibition on the disclosure or use of tax return information set forth in IRC § 7216.¹³¹

Because the exceptions under IRC § 7216 (criminal statute) are deemed to apply to IRC § 6713 (civil statute), there is no room for the Treasury Department and the IRS to designate the disclosure or use of tax return information for certain questionable business practices or the sale of certain products with high abuse potential as civil violations without also making them criminal violations. Therefore, disclosures and uses with high abuse potential are generally permitted. The Treasury Department and the IRS would be more likely to strengthen taxpayer protections against the improper disclosure or use of taxpayer return information by return preparers if they are given the flexibility to promulgate separate regulations applicable to the civil penalty, without concern that the criminal penalty would also apply.¹³²

Recommendation

Amend IRC § 6713 to authorize the Secretary to prescribe regulations under IRC § 6713.

¹²⁹ Unlike IRC § 7216, IRC § 6713 does not require that the disclosure or use be knowing or reckless.

¹³⁰ IRC § 6713 imposes a \$250 penalty for each improper disclosure or use. In contrast, IRC § 7216 makes the preparer guilty of a misdemeanor, and upon conviction, the preparer will be fined not more than \$1000 or imprisoned not more than one year, or both, together with the costs of prosecution.

¹³¹ See Treas. Reg. § 301.7216-2.

¹³² IRC § 7805(a) provides the Secretary general authority to promulgate regulations under Code provisions. However, because IRC § 7216(b)(3) provide the Secretary express authority to carve out exceptions, IRC § 6713 should provide similar authority.

#40 ALLOW A PERIOD OF NOTICE AND COMMENT ON NEW INTERGOVERNMENTAL AGREEMENTS AND REQUIRE THAT THE IRS NOTIFY TAXPAYERS BEFORE THEIR DATA IS TRANSFERRED TO A FOREIGN JURISDICTION

Present Law

Present law does not require a period for notice and comment before the U.S. government enters into new intergovernmental agreements (IGAs) and does not provide for the notification of taxpayers before their data is transferred to foreign jurisdictions.

Reasons for Change

The Foreign Account Tax Compliance Act generally requires foreign financial institutions (FFIs) to provide the U.S. with information regarding foreign accounts held by U.S. taxpayers. Typically, this information exchange occurs via IGAs, under which FFIs furnish the information to their local tax authority, which in turn transfers it to the U.S. These IGAs also generally incorporate reciprocity, pursuant to which the U.S. agrees to provide the foreign jurisdiction with information regarding accounts maintained in the U.S. regarding its citizens.

We are concerned that the IRS cannot ensure the data on U.S. taxpayers transferred by FFIs is used properly by IGA partners. We are also concerned that the data transfers to foreign recipients do not conform to cybersecurity standards established by the National Institute of Standards and Technology.

The IRS has identified the risks inherent in its data transfers to IGA partners, but has determined that these risks are acceptable. The data being disclosed and potentially breached, however, relate to taxpayers, not to the IRS. Taxpayers, rather than the IRS, are exposed to the consequences of data theft or misuse potentially arising during or after information transfers to foreign partners pursuant to IGAs. These taxpayers could, among other things, be the victims of identity theft or the targets of persecution within foreign jurisdictions, with outcomes ranging from substantial inconvenience to serious economic damage to harassment, and even physical danger. Currently, taxpayers have no voice in these IGAs and receive no specific notification that their personal information is being transferred outside of U.S. jurisdiction. If informed that IGA negotiations or data transfers were pending, taxpayers would have an opportunity to provide the U.S. government with potentially important information to minimize risks to their property and physical safety.

Recommendation

Amend IRC § 1474 to add a new subsection (g)(1) to require the public announcement of IGAs for notice and comment by taxpayers; a new subsection (g)(2) to require that, as part of this announcement, the IRS specify the extent to which the proposed IGA partner jurisdiction complies with the cybersecurity standards to which U.S. federal agencies are held and the taxpayer privacy standards that govern the IRS; and a new subsection (g)(3) to require that, barring unique and compelling circumstances, taxpayers be informed prior to the transfer of their individual information pursuant to the terms of an IGA.