

**Office of Chief Counsel
Internal Revenue Service
memorandum**

CC:PA:06:STWilliams
POSTN-117446-11

UILC: 6103.14-00

date: July 14, 2011

to: Nathaniel Boyd
Disclosure Technical Advisor (Office of Disclosure)

from: Julie C. Schwartz
Senior Counsel
(Procedure & Administration)

subject: Retention of Returns and Return Information upon Contract Completion

This advice responds to your request for assistance. This advice may not be used or cited as precedent.

ISSUES

Whether a contract appraiser who receives returns or return information under I.R.C. § 6103(n) may: (1) disclose the returns or return information to a state licensing board; and (2) retain the returns or return information after the completion of the contract under Internal Revenue Service Acquisition Procedures (IRSAP) clause 1052.224-9000(c).

CONCLUSIONS

- (1) Pursuant to I.R.C. § 6103(n), a contract appraiser may not disclose any returns or return information in his possession to a state licensing board.
- (2) IRSAP clause 1052.224-9000(c) reflects the safeguards imposed by the IRS, consistent with I.R.C. §§ 6103(n) and (p)(4). The clause does not allow a contract appraiser to retain returns or return information, but rather, requires a contract appraiser to certify that all data processed during the performance of the contract is completely purged from all data storage components and that no output be retained after the contract is completed. The one exception -- if it is impossible for a contract appraiser to purge all return information from his systems -- does not apply in this situation.

PMTA 2011-22

BACKGROUND

The IRS hires appraisers to appraise various types of assets in connection with determining a taxpayer's potential tax liabilities and satisfaction of those liabilities. The IRS procures appraisal services by entering into contracts with the appraisers. Access to, and the creation of returns and return information, is a necessary part of the appraisers' performance of such contracts. In order to enter into such contracts, appraisers must agree to comply with certain conditions and requirements prescribed by the IRS to protect the confidentiality of the tax information and to prevent unauthorized accesses and disclosures. Treas. Reg. § 301.6103(n)-1(e); Treas. Reg. § 301.6103(p)(4)-1; Pub. 1075, Tax Information Security Guidelines for Federal, State and Local Agencies. As such, the contracts entered into between the IRS and the appraisers include standard clauses addressing the appraisers' access to, use, and disclosure of returns and return information, the sanctions for unauthorized access or disclosure of that tax information, and safeguarding requirements placed on the appraisers. The conditions and requirements that must be included in these contracts are found in the IRSAP Manual. See IRSAP Manual, Parts 1004.2, 1024.9001, and 1052.224-9000.

Recently, one contract appraiser informed the IRS that his state licensing board requires that he retain records related to appraisals performed and that he is obligated to produce those records upon the board's request. See, e.g., D.C. Mun. Regs. tit. 17, § 2319 (2011); 18 Va. Admin. Code § 130-20-180 (2011). The contract appraiser argues that, for this reason, he must retain returns and return information received under any contracts he enters with the IRS to perform appraisal services and that he interprets IRSAP clause 1052.224-9000(c) to allow such retention because this state law requirement makes it impossible for him to purge the tax information. We understand that this issue has apparently not been specifically raised before.

DISCUSSION

Section 6103(a) prohibits the disclosure of returns and return information, except as authorized by the Code. Section 6103(n) provides an exception that allows the IRS to disclose returns and return information to a contractor for the purposes of acquiring services related to tax administration. See Treas. Reg. § 301.6103(n)-1(a)(1). A contractor who receives and generates returns or return information under I.R.C. § 6103(n) is subject to the confidentiality rules, safeguarding obligations, and the related civil and criminal penalties for unauthorized access and disclosure of those returns or return information. See I.R.C. §§ 6103(a)(3), 7431(a)(2), 7213(a)(1), and 7213A(a)(1)(B).

A contractor may not disclose returns or return information obtained in connection with services performed under section 6103(n) unless specifically authorized by the taxpayer (I.R.C. § 6103(c)), another provision of the Internal Revenue Code, or the regulations under I.R.C. § 6103(n). I.R.C. § 6103(a)(3) and (n). The regulations under I.R.C.

§ 6103(n) authorize a contractor to further disclose returns and return information: (1) to certain officers or employees of the contractor; (2) when authorized in writing by the Service, to the extent necessary to carry out the purposes described in Treas. Reg. § 301.6103(n)-1(a); or (3) for another purpose authorized by I.R.C. § 6103, subject to the conditions of Treas. Reg. § 301.6103(p)(2)(B)-1. Treas. Reg. § 301.6103(n)-1(a)(2) and (4). Absent the written consent of the taxpayer, there is no other provision in the Code that would authorize the appraiser's disclosure of returns and return information to a state licensing board as a condition of maintaining his state license.

IRSAP clause 1052.224-9000(c)(4) provides:

The contractor certifies that the data processed during the performance of this contract shall be completely purged from all data storage components of his/her computer facility and no output will be retained by the contractor at the time the IRS work is completed. *If immediate purging of all data storage components is not possible*, the contractor certifies that any IRS data remaining in any storage component will be safeguarded to prevent unauthorized inspection or disclosure.

(emphasis added). Although the highlighted language acknowledges a circumstance under which a contractor may retain the returns and return information in his possession after completion of the contract, that language does not extend to the situation presented by the appraiser. The "impossibility" contemplated by this language deals with technological limitations. In fact, we understand from Safeguards personnel that they could not think of, nor had they ever come across, any circumstance where purging would not be possible. Safeguards staff further explained that the IRS will overwrite residual data with dummy data as necessary to ensure that all tax information is destroyed. But, if that rare situation would arise, the clause is a reminder that contractors must continue to safeguard any returns or return information that they retain. The IRS established these procedures to ensure that the contractor does not retain any tax information unless it is physically impossible for the contractor to remove such information from his systems. In those situations, the IRSAP clause takes the only possible approach of requiring the contractor to safeguard the tax information. To ensure continued safekeeping, a later IRSAP clause allows the IRS to inspect the contractor's facilities if necessary.

The idea that a state licensing board requirement for retention of an appraiser's work product, including any confidential returns and return information he has, is the reason that it is impossible for a contract appraiser to purge information from his systems is contrary to the purpose of the clause, particularly where disclosure of the tax information to the licensing board violates I.R.C. § 6103. Therefore, we conclude that IRSAP clause 1052.224-9000(c) does not allow a contract appraiser to retain returns or return information after the completion of a contract in order to satisfy the state licensing board requirement.

The Uniform Standards of Professional Appraisal Services (USPAP) establishes requirements for appraisers in order for them to maintain a high level of public trust in appraisal services. USPAP 2010-2011 Preamble. The USPAP is a set of guidelines for appraisers to follow and is not enforceable as law. While the USPAP Ethics Rule contains a five year appraisal file retention requirement similar to what the appraiser here mentioned, the Ethics Rule also states that an appraiser must be aware of, and comply with, all confidentiality and privacy laws and regulations applicable in an assignment. USPAP 2010-2011 Ethics Rule, Confidentiality. Furthermore, the USPAP contains a Jurisdictional Exception Rule stating that if any applicable law or regulation precludes compliance with any part of USPAP, only that part of USPAP becomes void for that assignment. USPAP 2010-2011 Jurisdictional Exception Rule. It is clearly anticipated by the USPAP that its guidelines and requirements may, in some circumstances, conflict with the law and the USPAP makes clear the law governs. Thus, without statutory or regulatory authority to retain or disclose tax information, the USPAP would agree that the appraiser should destroy or return all tax information as provided in the contract. Should this issue arise again, you may wish to contact personnel in Governmental Liaison, who may be able to engage states on this matter.

Please call (202) 622-7950 if you have any further questions.