

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

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subject: Opinion Concerning Consents Provided to the Social Security Administration for Disclosure of Return Information from the Earnings Database

This is in response to your request for assistance concerning consents supplied by individuals to the Social Security Administration (SSA) for disclosure of return information for purposes unrelated to federal tax administration.

ISSUES

1. Whether SSA may process consents for the disclosure of return information from its earnings database for purposes unrelated to federal tax administration.
2. Whether a consent is valid if it contains references to future tax years.
3. Whether the Service may enter into an interagency agreement with SSA for the processing of consents on the Service's behalf.

CONCLUSIONS

1. SSA may process consents to disclose return information from its earnings database because SSA is performing a tax administration function in maintaining the database, and the request for assistance is for information from that database.

2. A reference to future tax years does not invalidate the consent. However, the consents utilized by SSA for future tax years should be reasonably limited in time.
3. The Service may enter into an interagency agreement with SSA that would allow SSA to process the consents on the Service's behalf.

FACTS

The Office of Disclosure has learned that SSA has been making disclosures of information, including return information, pursuant to consents from individuals (on a form created specifically for these disclosures) authorizing SSA to disclose information about the individual's earnings, employers, and Social Security benefits. The consent forms contain a place for an individual's name, date of birth, Social Security number, signature, and date. Above the signature line is a paragraph authorizing SSA to disclose the listed information. The consents sometimes authorize SSA to disclose information about the individual's earnings, employers, and Social Security benefits for tax years far into the future.

Once SSA validates the consents, SSA queries seven SSA systems of records to extract the data to be disclosed. The systems of records queried include the Earnings Recording and Self-Employment Income System (Master Earnings File) (earnings database).¹ It is our understanding that some of the information disclosed by SSA is information received by SSA from the Service under section 6103(l)(1) of the Internal Revenue Code (Code) and is, therefore, return information.²

LAW AND ANALYSIS

Returns and return information are confidential, except as authorized under the Code. I.R.C. § 6103(a). Return information is defined, generally, as any information gathered by, collected by, created by, or otherwise in the hands of the Secretary in connection with determining a taxpayer's liability or potential liability under the Code. I.R.C. § 6103(b)(2). Absent such authority in the Code, disclosure is not permitted. Section 6103 contains six specific instances when SSA may redisclose return information received by it to specified third parties, none of which are applicable here. See I.R.C. § 6103(l)(5) (disclosures by SSA for return processing programs or epidemiological research), (l)(7) (disclosures by SSA to state and local governments for specified welfare programs), (l)(8) (disclosures by SSA to state and local child support agencies), (l)(11) (disclosures by SSA to the Office of Personnel Management), (l)(12)(A)

¹ The earnings database is SSA's database that includes information received from the Service under section 6103(l)(1)(A) (self-employment earnings information) and information from W-2s processed by SSA on the Service's behalf pursuant to the Combined Annual Wage Reporting Agreement (CAWR).

² If the information disclosed by SSA is not information SSA received from the Service under the Code, but rather is information received by SSA from sources independent of the Service, then the analysis in this memorandum does not apply.

(disclosures by SSA to Centers for Medicare and Medicaid Services), and (l)(16) (disclosures by SSA to the Trustee of the District of Columbia Retirement Protection Act of 1997).

In this instance, SSA is using consents to disclose the individuals' return information. Under section 6103(c), returns or return information may be disclosed to a designee of the taxpayer, pursuant to a consent executed by the taxpayer, provided the disclosure would not seriously impair Federal tax administration. In order to be a valid consent, the consent must: (1) be on a separate written document pertaining solely to the disclosure, (2) contain the taxpayer's identity information, the identity of the person to whom the disclosure is to be made, the return or return information to be disclosed, and the taxable years covered by the return, (3) be signed and dated by the taxpayer, and (4) be received by the Service (or an agent or contractor) within 120 days of when the consent was signed by the taxpayer. Treas. Reg. § 301.6103(c)-1(b)(1)-(2). Although normally the consent must be received by the Service or an agent or contractor of the Service, the regulations alternatively provide that the consent may be received by "a Federal government agency performing a Federal tax administration function in connection with a request for advice or assistance relating to such function."³ Treas. Reg. § 301.6103(c)-1(c)(3).

1. SSA is performing a Federal tax administration function in maintaining the earnings database, and therefore may process a consent to disclose information from that database.

"Tax administration" is defined as the "administration, management, conduct, direction, and supervision of the execution of the internal revenue laws or related statutes . . . and tax conventions to which the United States is a party" and "the development and formulation of Federal tax policy relating to existing or proposed internal revenue laws, related statutes, and tax conventions" and "includes assessment, collection, enforcement, litigation, publication, and statistical gathering functions under such laws, statutes, or conventions." I.R.C. § 6103(b)(4). Whether or not a statute is "related" to the internal revenue laws depends on the nature and purpose of the statute and the facts and circumstances in which the statute is being enforced or administered. See generally IRM 9.3.1.4.3.1.1.2 (stating that the key test in determining whether another statute is a related statute is where, under the facts and circumstances of the particular case, the other statute is considered related to the administration of the internal revenue laws).

³ A review of the section 6103(c) regulation file did not reveal any explanation for this language. The background section of the preamble to the Treasury Decision transmitting the proposed regulation references "certain Treasury Department agencies," and specifically the Financial Management Service, as a Federal government agency performing a tax administration function covered by this provision of the regulation. T.D. 8935, 66 Fed. Reg. 2261. In addition, the regulation file contains notes that refer to the Combined Annual Wage Reporting Agreement administered by SSA. This suggests that SSA may have been considered as an agency to which the provision in question applies.

SSA has possession of, and manages, its earnings database. Because SSA processes W-2s on the Service's behalf, the information taken from the W-2s, and the earnings database itself, is return information in SSA's hands, protected by section 6103. Judicial Watch, Inc. v. SSA, 799 F. Supp. 2d 91, 95-97 (D.D.C. 2011), aff'd, 701 F.3d 379 (D.C. Cir. 2012). SSA's processing of W-2s on the Service's behalf is a tax administration function because it is a component of the administration of the internal revenue laws (i.e., the processing of returns required by the Internal Revenue Code). Because SSA is performing a tax administration function in maintaining the earnings database, the regulation authorizes SSA is to process consents related to the earnings database information.

The regulations under section 6103(c) address the receipt of consents but do not specifically address their processing. See Treas. Reg. § 301.6103(c)-1(b)(2), (c)(3). Although the "processing" of a consent may be implicit in authorizing its receipt, there are several provisions of the Code and regulations that suggest that, although consents may be received by parties other than the Service, they still must be processed by the Service. Treas. Reg. § 301.6103(c)-1(c)(3) states that information may be disclosed "only to the extent considered necessary by the Internal Revenue Service to comply with the taxpayer's request or consent" (Emphasis added.) If other parties processed consents, the Service would have no means to determine what information was necessary to comply with the consent. Section 6103(e)(7) permits the disclosure of return information to any taxpayer entitled to a return, but only if "the Secretary" determines that disclosure of the return information would not seriously impair Federal tax administration. If other parties processed consents, the Service would have no control over whether disclosure of the information would seriously impair Federal tax administration. In this instance, however, the specific information to be disclosed under the consents is earnings information and there is no question of whether disclosure of that information is necessary to comply with the taxpayer's consent. Furthermore, this information would not normally be of a type that could seriously impair Federal tax administration. In addition, requiring the Service to process consents received by SSA would impose an undue burden on the Service. We therefore conclude that SSA may process consents for information from its earnings database for both W-2 and self-employment earnings information. This conclusion is limited to SSA's maintenance of the earnings database on behalf of the Service pursuant to the CAWR. Other recipients of return information under Title 26 cannot necessarily process consents for the disclosure of such information merely because they manage and maintain a database for their own purposes that contains return information.

SSA also uses the earnings database for purposes other than tax administration, that is, for purposes of its administration of the Social Security Act. I.R.C. § 6103(l)(1)(A). The earnings database includes return information, i.e., the self-employment earnings information, unrelated to SSA's tax administration function of processing W-2s. The maintenance of the earnings database can therefore be considered both a tax administration function and an SSA function. SSA is not authorized by section 6103 to redisclose the return information it receives for purposes of administration of the Social

Security Act absent the use of consents. Inasmuch as SSA lacks redisclosure authority for information it receives under section 6103(l)(1), if SSA were to eliminate the consent-based disclosures of return information, then any statistical analysis of information from the earnings database for purposes of administration of the Social Security Act would need to be undertaken by SSA itself, straining its resources.

Although we conclude that SSA may process consents for the disclosure of information from its earnings database, we note that the use of consents by government agencies for programmatic disclosures of return information is generally disfavored. Consents override the restrictions placed on the disclosure of return information contained in section 6103 and create programmatic exceptions to section 6103 not specifically authorized by Congress. Office of Tax Policy, Dep't of the Treasury, Report to the Congress on Scope and Use of Taxpayer Confidentiality and Disclosure Provisions, Vol. 1 at 72-73 (2000). If Treas. Reg. § 301.6103(c)-1(c)(3) broadly authorized any Federal agency that has a tax administration function to manage its own consent process with respect to the return information it receives, the Service would lose control over return information in the hands of other Federal agencies, since those agencies could create, manage, and operate programmatic consent-based programs without the knowledge, input, or control of the Service. This would be in direct conflict with the purpose and intent of section 6103. Accordingly, our opinion is limited to the narrow question of SSA's operation of a consent-based program to supply return information from its earnings database.

2. Consents to the Disclosure of Return Information for Future Tax Years Should be Reasonably Limited in Time

Under Treas. Reg. § 301.6103(c)-1, a valid consent must list the taxable year, or years, for which the return information is to be disclosed. Neither the Code nor the regulations addresses consents for future tax years. See I.R.C. § 6103(c); Treas. Reg. § 301.6103(c)-1. The instructions to Form 8821, *Tax Information Authorization*, specifically allow for consents for up to three future years (the taxpayer "may include on a tax information authorization only future tax periods that end no later than 3 years after the date the tax information authorization is received by the IRS"). Accordingly, a consent is not invalid merely because it contains future tax years.

The consents sometimes used by SSA purport to allow SSA to disclose an individual's information for tax years far into the future (or until year of death in the case of deceased individuals). This is well beyond three years after the date the consent would be received by the IRS. Accordingly, the consents should be limited to a reasonable period in time and new consents should be procured when this period expires. This is consistent with the Service's current policy with regard to consents for future tax years and allows the taxpayer to revisit the decision to consent to the disclosure periodically.

3. The Service May Enter Into a Contract With SSA for the Processing of Consents and the Disclosure of the Return Information

While we have concluded that SSA may itself process consents for the disclosure of return information from its earnings database under the section 6103(c) regulations, there is also support for the proposition that the Service may enter into an interagency agreement with SSA under section 6103(n) for the processing of such consents. Section 6103(n) and the regulations thereunder permit the Service to make disclosures of return information, to the extent necessary for tax administration purposes, to persons who have entered into written agreements with the Service for the provision of services. Treas. Reg. § 301.6103(c)-1(b)(2) requires a consent to be received by the Service, or an agent or contractor of the Service, in order for the consent to be valid. Although there is a suggestion that outside parties may only receive but not process consents on the Service's behalf because of the impairment and necessity determinations the Service must make regarding the disclosure of return information under section 6103(e)(7) and Treas. Reg. § 301.6103(c)-1(c)(3), we have concluded that the specific information to be disclosed under the subject consents would not normally be of a type that could seriously impair Federal tax administration. Nor is there is any question whether the disclosure of that information is necessary to comply with the taxpayer's consent. Therefore, the issue of whether the Service may delegate the impairment and necessity determinations to another party, in this case SSA, need not be reached. Accordingly, the Service may enter into an interagency agreement with SSA for the processing of consents for the disclosure of return information from its earnings database.

After the consents are determined to be valid and the disclosures permissible, the Service may enter into agreements with SSA for SSA to make the ultimate disclosures to recipients. Under Treas. Reg. § 301.6103(p)(2)(B)-1, a Federal, state, or local agency may disclose return information properly received under section 6103 to another recipient authorized to receive the return information under section 6103, but only if the Service determines, after receiving a written request, that the return information is "more readily available" from the Federal, state, or local agency than from the Service. In practice, the Service enters into Treas. Reg. § 301.6103(p)(2)(B)-1 agreements (so-called (p)(2)(B) agreements) authorizing one recipient of return information to disclose that information to another recipient. In order for the Service to enter into a (p)(2)(B) agreement, both the disclosing recipient and the receiving recipient must be authorized to receive the return information to be disclosed under section 6103. Treas. Reg. § 301.6103(p)(2)(B)-1(a). Therefore, once the intended recipients are determined to be authorized recipients of the information (i.e., the consents are validated), the Service may enter into a (p)(2)(B) agreement authorizing SSA to disclose the return information to the recipients.

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Please call (202) 317-5216 if you have any further questions.