

From: Hartford Susan L
Sent: Friday, September 29, 2017 4:46 PM
To: Olson Nina E; Baek Laura
Cc: Feldman Janice R; Drexler Kenneth J
Subject: FW: 6103 and EFIN status - request for PMTA

Hi Nina/Laura. At your request, we have worked with CC:PA to address [REDACTED] whether the IRS may disclose information about the status of a franchisee's EFIN to the owner of the franchise. Please see the attached opinion and then let me know if you have any further questions.

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Office of Chief Counsel
Internal Revenue Service
memorandum

CC:PA:07:WRowe
PRENO-120161-17

UILC: 6103.00-00, 6103.02-02

date: September 29, 2017

to: Nina E. Olson
National Taxpayer Advocate

from: Richard G. Goldman
Deputy Associate Chief Counsel
(Procedure & Administration)



subject: Limitations on Disclosing Electronic Filing Identification Numbers (Disclosure
Limitations on Electronic Filing Identification Numbers (EFIN))

ISSUE

With respect to a tax preparation firm that owns multiple franchises, may the Service disclose the status of each franchisee's electronic filing identification number (EFIN) to the tax preparation firm?

CONCLUSION

Because some IRS *e-file* providers are individuals rather than firms, the Privacy Act restricts the Service from disclosing an individual IRS *e-file* provider's EFIN information in absence of written consent of that individual or a statutory exception. The Service may consider revising the routine use statement in the Internal Revenue Service System of Records Notice or implementing a consent-based program in order to disclose the status of an EFIN to a tax preparation firm.

BACKGROUND

The Service assigns an electronic filing identification number (EFIN) to identify an individual or firm that has completed the Service's *e-file* application to become an authorized IRS *e-file* provider. The individual or firm uses either its employer identification number (EIN) or the sole proprietor's Social Security Number (SSN), if it does not have an EIN, to apply for an EFIN. The EFIN is needed in order to electronically file tax returns and is included with all electronic return data transmitted to the Service by the firm or individual.

Publication 3112, IRS e-file Application and Participation, provides participation requirements and necessary steps to obtain an EFIN. To safeguard IRS *e-file*, the Service completes suitability checks regularly on IRS *e-file* providers, principals, and responsible officials. If the results of a suitability check indicate that a firm or individual does not meet or adhere to IRS *e-file* requirements, the Service may revoke or sanction the IRS *e-file* provider, disqualifying them from participating in IRS *e-file*. An EFIN may be placed in "inactive" status, which means the EFIN cannot be used by the IRS e-file provider to transmit electronic return data unless the status is manually updated to "valid/active." See IRM 3.24.10.3.10(1).

ANALYSIS

Both section 6103 of the Internal Revenue Code and the Privacy Act of 1974, 5 U.S.C. § 552a (Privacy Act), impose limitations on the information that the Service may disclose and the circumstances under which disclosures may be made. Section 6103(a) provides that returns and return information may not be disclosed unless the disclosure is authorized by some provision of Title 26. Similarly, the Privacy Act prohibits the disclosure of any record contained in a system of records without the written consent of the individual to whom the record pertains, unless one of twelve statutory exceptions applies. See 5 U.S.C. § 552a(b).

Section 6103

Section 6103(b)(2)(A) defines "return information," subject to the disclosure restrictions of 6103(a), as follows:

[A] taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other offense.

Section 6103(b)(6) further refines that definition by providing that the term "taxpayer identity" means "the name of a person with respect to whom a return is filed, his mailing address, his taxpayer identifying number (as described in section 6109), or a combination thereof." Among the identifying numbers described in section 6109 is the identifying number of a tax return preparer, a category that includes EFINs. See I.R.C. § 6109(a)(4).

While EFINs are included in the list of identifying numbers described in section 6109, here, an EFIN is not “taxpayer identity” information. An IRS *e-file* provider’s EFIN is not a taxpayer identifying number, as that term is defined in section 6103(b)(6), because the return data electronically transmitted by an EFIN holder is transmitted with respect to another taxpayer, not the IRS *e-file* provider. In contrast, when return data is transmitted with respect to the IRS *e-file* provider itself, the IRS *e-file* provider uses its EIN or SSN as its identifying number, not its EFIN. While an EFIN is not taxpayer identity information, an EFIN listed on a tax return is the return information of the taxpayer with respect to whom that return was submitted. See IRC § 6103(b)(2). When an EFIN is not associated with a tax return, it does not relate to any taxpayer vis-à-vis the taxpayer’s liabilities under the Internal Revenue Code and, therefore, falls outside the scope of section 6103(b)(2)’s definition of return information.

The Privacy Act

Although an EFIN that is not associated with a return is not return information under section 6103, the Service may not release any EFIN information pertaining to an individual unless such release complies with the requirements of the Privacy Act. As noted above, the Privacy Act prohibits the disclosure to any other person or agency of any individual’s record contained in a system of records without the written consent of the individual to whom the record pertains, or unless one of twelve statutory exceptions applies. See 5 U.S.C. § 552a(b). For purposes of the Privacy Act, a “record” is any item, collection, or grouping of information about an individual maintained by an agency that includes the individual’s name, identifying number, or other identifying particular assigned to such individual. 5 U.S.C. § 552a(a)(4). A “system of records” is a group of records under the control of the agency from which information is retrieved by the name or other identifying particular of the individual to whom the record pertains. 5 U.S.C. § 552a(a)(5).

The Privacy Act defines an “individual” to include only a citizen of the United States or an alien lawfully admitted for permanent residence. 5 U.S.C. § 552a(a)(2). Firms do not have any Privacy Act rights and, therefore, the Privacy Act only controls with respect to those IRS *e-file* providers that are individuals, including sole proprietors. The Service cannot disclose an individual IRS *e-file* provider’s EFIN information from a system of records in absence of written consent of that individual or a statutory exception.

One of the twelve statutory exceptions to the Privacy Act’s general prohibition on disclosure allows the disclosure of records for a “routine use.” 5 U.S.C. § 552a(b)(3). Subsection (a)(7) of the statute defines “routine use” as “the use of such record for a purpose which is compatible with the purpose for which it was collected.” In order for a use to qualify as “routine,” the statute also requires that the agency describe the use in the system of records notices that are published in the Federal Register. See 5 U.S.C. § 552a(e)(4)(D). By including these notices in the Federal Register, agencies provide the public with constructive notice of how the agency’s records might be used.

EFIN records are records contained in a system of records, as those terms are defined in the Privacy Act. EFIN records are contained within System of Records Notice Treasury/IRS 22.062—Electronic Filing Records—Treasury/IRS, 80 Fed. Reg. 54064, 54081 (Sept. 8, 2015). Among the routine uses of such records described in the Federal Register is to “[d]isclose to the public the names and addresses of . . . electronic return transmitters . . . who have been suspended, removed, or otherwise disciplined. The Service may also disclose the effective date and duration of the suspension, removal, or other disciplinary action.” IRS System of Records Notice 22.062 – Electronic Filing Records, 80 Fed. Reg. 54064, 54081-82 (Sept. 8, 2015). To the extent that an individual IRS *e-file* provider has been suspended, removed, or otherwise disciplined, this routine use may apply to allow specific notification to the franchisee’s parent of the suspension, removal, or other disciplinary action.

This routine use exception emphasized in the paragraph above, however, does not broadly permit the Service to disclose the status of an individual’s EFIN as “inactive,” “valid/active,” or “dropped”. See IRM 3.24.10.3.10(1). If the Service changes an individual IRS *e-file* provider’s EFIN status to “inactive,” but has not yet suspended, removed, or otherwise disciplined the individual, the routine exception does not apply to permit disclosure of the EFIN’s status. As an example, IRM 4.21.1.16(14) instructs that an IRS *e-file* provider’s EFIN is to be put in “inactive” status if it is determined that the provider is not operating at the physical address on record. The provider is not otherwise disciplined and may contact the Service to provide updated information that is necessary re-activate the EFIN.

Due to the shortcomings of the existing routine use statement, if the Service wishes to make broader disclosure of EFIN status to a tax preparation firm that owns franchises, the Service may consider whether to revise the routine use statement in the Internal Revenue Service System of Records Notice to provide as a routine use the disclosure of a franchisee’s EFIN status, including EFINS in inactive, valid/active, or dropped status, to its parent firm. To qualify as a “routine use,” the use must be for a “purpose which is compatible with the purpose for which it was collected.” 5 U.S.C. § 552a(a)(7). Because EFINS are assigned to protect the integrity of the IRS *e-file* system, disclosure of EFIN status to a franchise’s parent would be compatible with the purpose for which the EFIN was collected.

Alternatively, the Service may consider implementing a consent-based program to disclose the status of an EFIN to a tax preparation firm. See 5 U.S.C. § 552a(b) (“No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains . . .”) (emphasis added). While the term “written consent” is not defined under the Privacy Act, the OMB guidelines instruct that the consent provision does not permit a blanket or open-ended consent clause. See Privacy Act Implementation: Guidelines and Responsibilities, 40 Fed. Reg. 28,948, 28,954 (July 9, 1975), available at http://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/implementation_g

uidelines.pdf ("At a minimum, the consent clause should state the general purposes for, or types of recipients, to which disclosure may be made."); see also Perry v. FBI, 759 F.2d 1271, 1276 (7th Cir. 1985) (upholding disclosure because release was "not so vague or general that it is questionable whether [plaintiff] knew what he was authorizing or whether the [agency] knew what documents it could lawfully release"), rev'd en banc on other grounds, 781 F.2d 1294 (7th Cir. 1986).

The Privacy Act does not prescribe a time limitation but consents to the disclosure of information must be reasonably limited in time and must identify the year(s) for which the information is to be disclosed. Although no specific time limitation is prescribed under the Privacy Act, we recommend that consents be limited to no more than three future years, which is consistent with the Service's current policy with regard to consents under section 6103(c) for future tax years. See Instructions to Form 8821, *Tax Information Authorization* ("[T]he IRS will not record on the CAF system future tax years or periods listed that exceed 3 years from December 31 of the year that the IRS receives the tax information authorization."); see also Tierney v. Schweiker, 718 F.2d 449 (D.C. Cir. 1983) (finding a consent under section 6103(c) to be invalid which contained no expiration date and left the taxable years covered open-ended). Limiting consent to a reasonable period in time allows an individual to periodically revisit the decision to consent to the disclosure. New consents may be procured when the time period under the existing consent expires.

To conclude, EFIN information not associated with a tax return is not return information and the Service is not prohibited by section 6103 from providing such information to a tax preparation firm that owns multiple franchises. Also, the Privacy Act does not restrict the IRS from disclosing the EFIN information of a firm which is not a sole proprietor. However, because some IRS *e-file* providers are individuals rather than firms, the Privacy Act restricts the Service from disclosing an individual IRS *e-file* provider's EFIN information in absence of written consent of that individual or a statutory exception. For the reasons described in this memorandum, we recommend that the Service consider revising the routine use statement in the Internal Revenue Service System of Records Notice on electronic filing records or implementing a consent-based program in order to authorize the disclosure of the status of an individual IRS *e-file* provider's EFIN information to a tax preparation firm.

Please contact William M. Rowe at (202) 317-6834 if you have any questions about this matter.

cc: Special Counsel to the National Taxpayer Advocate