

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

CC:PA:07:ALMielke  
PRENO-107910-11

date: May 16, 2011

to: Executive Technical Advisor to the Director  
Governmental Liaison & Disclosure

from: Senior Counsel, Branch 7  
Procedure & Administration

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subject:

Treas. Reg. § 301.6103(c)-1(d)(2)(i) and the Combined Federal/State Filing Program

This memorandum responds to your request for advice concerning the Service's Combined Filing Programs. Specifically, you asked for our views as to the scope of the Combined Federal/State Filing Program as it appears in Treas. Reg. § 301.6103(c)-1(d)(i).

#### Background

The Combined Federal/State Filing Program consists of two distinct offerings. The first program permits taxpayers to combine their electronic filings of federal and state income tax returns. This part of the program has been in existence since 1997 and predates the promulgation of Treas. Reg. § 301.6103(c)-1(d)(2)(i). Prior to promulgation of this regulation, the taxpayer had to prepare and file "two packets", one for the IRS and one for the state. It also required the taxpayer to execute a consent authorizing the IRS to furnish the "state packet" to the state. Upon promulgation of the regulation, this program was streamlined. Accordingly, it was no longer necessary for the taxpayer to submit "two packets" or to execute the consent. More recently, the IRS expanded the Combined Filing Program to include taxpayers/payers that file certain information returns electronically (e.g., Forms 1098, Forms 1099-DIV, 1099-INT, and 5498). See Publication 1220, *Specifications for Filing Forms 1097, -BTC, 1098, 1099, 3921, 3922, 5498, 8935, and W2G Electronically*, (September 2010).

Pursuant to Treas. Reg. § 301.6103(c)-1(d)(2)(i), a taxpayer's participation in a combined return filing program between the IRS and a state constitutes the taxpayer's consent for the IRS to disclose (1) taxpayer identity information (i.e., name, address, and taxpayer identification number), (2) taxpayer signature; and (3) items of common data. The regulation defines "common data" as "information reflected on a federal return that the state requires by law to be attached to or included on the state return." By participating in the Combined Federal/State Filing Program, the taxpayer is put on notice that his participation is consent for the IRS to disclose these enumerated items from his electronically filed return.<sup>1</sup>

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<sup>1</sup> Under Treas. Reg. § 301.6103(c)-1(d)(2)(ii), the IRS is required to include in any forms or instructions language that clearly informs the taxpayer that, by participating in the program, the taxpayer consents to the IRS's disclosure of the enumerated items.

All of the enumerated items received by the IRS under the Combined Federal/State Filing Program are treated, for purposes of IRC § 6103, as if they had been received directly by the state from the taxpayer. As such, these items are not subject to the general confidentiality rules of IRC § 6103 that would otherwise apply.<sup>2</sup> The IRS shares the enumerated items with the applicable state, and the state is free to use these items for purposes other than state tax administration, as permitted by applicable state law.

Under IRC § 6103(d), returns and return information with respect to specified taxes are available to state tax agencies, or their legal representatives, solely for state tax administration purposes. As part of the federal-state exchanges under section 6103(d)(1), the IRS and states regularly exchange information, including changes to taxpayers' returns as a result of information reporting or examination. All such information remains subject to the confidentiality rules of IRC § 6103 and may only be used for state tax administration purposes.

Your office expressed several concerns with respect to the Combined Federal/State Filing Program. First, you were uncomfortable with the IRS's reliance on taxpayer consent to operate this program. See, e.g., *Department of Treasury's Report to The Congress on Scope and Use of Taxpayer Confidentiality and Disclosure Provisions* (October 2000) (Section 6103 Report). Second, the Form 6847 did not contain all of the specified items of information required of general purpose consents under Treas. Reg. § 301.6103(c)-1(b). Third, because these items of return information are disclosed to the state tax agency pursuant to consent instead of a section 6103(d)(1) return information exchange program, these items were no longer subject to the confidentiality rules. Your office has indicated its preference that this information be shared under the authority of section 6103(d); the Federation of Tax Administrators (FTA) would like to retain the status quo.

### Legal Analysis

We appreciate your office's sensitivity to the position set forth in Treasury's Section 6103 Report, which, at page 73, disfavors reliance on taxpayer consent to operate a program. When Congress overhauled the taxpayer confidentiality rules with the passage of the Tax Reform Act of 1976, it created a careful balance among taxpayers' expectations of privacy, the impact on our voluntary self-assessment system, and the needs of the program or agency seeking access to this information. Reliance upon consents undermines that careful balance. When promulgating Treas. Reg. § 301.6103(c)-1(d)(2)T a year after conclusion of the Section 6103 Report, Treasury and the IRS carefully limited the scope of its use. According to the preamble to the regulation, the intent was to reduce the burden on taxpayers so that they did not have to file the same returns twice, thereby improving the efficiency of tax administration. TD 8935, 2001-1 C.B. 702.

When a state requires a taxpayer to attach, or include, all or part of his federal return with his state filing, the regulation gives that taxpayer a choice. He may choose to file his federal and state returns separately, or he may choose to combine his return filing electronically with the IRS. When the taxpayer chooses the combined filing, the IRS treats the common data on the electronically filed return the same way as that data would be treated if the taxpayer filed

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<sup>2</sup> Under Treas. Reg. § 301.6103(c)-1(d)(2)(ii), the IRS cannot disclose the items of common data unless there are "provisions of State law protecting the confidentiality" of such information.

separate federal and state returns. For example, when a taxpayer files his return with the state's taxing agency, and the state return includes a copy of the Schedule A from his Form 1040, this copy of the Schedule A is not subject to 6103 confidentiality.<sup>3</sup>

We see a distinction between incorporation of this type of consent into the Combined Federal/State Filing Program and the typical use of taxpayer consent by agencies for use in their nontax administration programs. Under the Combined Federal/State Program, the state is receiving the exact same information it would receive had the taxpayer chosen to file his state tax return directly with it, and with the same ability to use that information. In contrast, when another agency implements a consent-based program, it receives returns or return information it otherwise would not have access to at all, or would not have the freedom to use in the same way.

With respect to your concern that Form 6847 does not meet the specificity required of general purpose consents, we agree that it does not. However, the Combined Federal/State Filing Program's "built in consent" is of more limited use than the general purpose consent described in Treas. Reg. § 301.6103(c)-1(b). TD 9054, 2003-1 C.B. 909. In fact, the regulation provides that the requirements for consent under paragraphs 1(a) and (b) are not applicable to the Combined Federal/State Filing Program. Treas. Reg. § 301.6103(c)-1(d). In any event, Form 6847 is not necessary and, according to Pub. 1220, the IRS has already eliminated its use.

Finally, because the Combined Federal/State Filing Program permits only a very discrete universe of return information to be shared outside of the parameters of section 6103(d), and given the program's relatively unremarkable tenure over the years since the regulation was promulgated, we do not see any reason to make a change.

Please call (202) 622-4570 if you have any further questions.

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<sup>3</sup> Section 6103(p)(8)(A) requires that states requiring taxpayers to attach parts of their Federal return, or information contained therein, to their state return, the so-called "wraparound material," must adopt sufficient privacy protections. However, section 6103(p)(8)(B) provides that the state is free to use the "wraparound material" as state laws permit, even if such laws allow for nontax administration uses.