

MSP
#6**PREPARER ACCESS TO ONLINE ACCOUNTS: Granting Uncredentialed Preparers Access to an Online Taxpayer Account System Could Create Security Risks and Harm Taxpayers****RESPONSIBLE OFFICIALS**

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TAXPAYER RIGHTS IMPACTED¹

- *The Right to Be Informed*
- *The Right to Quality Service*
- *The Right to Pay No More Than the Correct Amount of Tax*
- *The Right to Confidentiality*

DEFINITION OF PROBLEM

The National Taxpayer Advocate has advocated for years that the IRS develop an online account system for taxpayers.² A recent draft of the IRS Compliance Concept of Operations (CONOPS) identified online account access as one of the top ten initiatives needed to achieve its compliance vision.³ Pursuant to the draft CONOPS, online account access would enable taxpayers, preparers, and authorized third parties to securely interact with the IRS to obtain return information, submit payments, and receive status updates.⁴ Accordingly, the National Taxpayer Advocate has the following concerns regarding preparer access to taxpayers' online accounts:

- Only preparers who are subject to IRS oversight should have access to taxpayers' online accounts;
- The IRS should clearly define the scope of preparers' access to online accounts;

1 See Taxpayer Bill of Rights, available at www.TaxpayerAdvocate.irs.gov/taxpayer-rights.

2 See, e.g., National Taxpayer Advocate 2013 Annual Report to Congress vol. 2, 67-96 (Research Study: *Fundamental Changes to Return Filing and Processing Will Assist Taxpayers in Return Preparation and Decrease Improper Payments*); Most Serious Problem: *Taxpayer Access to Online Account System: As the IRS Develops an Online Account System, It May Do Less to Address the Service Needs of Taxpayers Who Wish to Speak with an IRS Employee Due to Preference or Lack of Internet Access or Who Have Issues that Are Not Conducive to Resolution Online*, *supra*.

3 IRS, *IRS Enterprise Concept of Operations (CONOPS): Overview of SB/SE and W&I, LB&I, and TE/GE CONOPS 25* (Jan. 15, 2015); See Most Serious Problem: *Taxpayer Service: The IRS Has Developed a Comprehensive "Future State" Plan That Aims to Transform the Way It Interacts with Taxpayers, But Its Plan May Leave Critical Taxpayer Needs and Preferences Unmet*, *supra*.

4 IRS, *Compliance Capabilities Initiative: Draft Blueprint for the Vision 10-2, 21-30* (June 19, 2014); IRS, *IRS Enterprise Concept of Operations (CONOPS): Taxpayer Advocate Service Briefing 5, 10-2* (July 28, 2015) (on file with the National Taxpayer Advocate).

- The online account system should enable the taxpayer to maintain strict control over preparer authorizations, including approved actions; and
- The IRS should develop and implement procedures to ensure that preparers do not exceed their authority when accessing taxpayers' online accounts.

We are also concerned that the IRS plans to expand the third-party designee authorization on Form 1040 to include e-file software providers and Electronic Return Originators (EROs). By checking off the box, taxpayers would give these entities broad authorizations to perform actions that are likely beyond what most taxpayers realize.

ANALYSIS OF PROBLEM

Background

A recent draft of the IRS Compliance CONOPS envisions that the IRS will develop an online account system that enables taxpayers, preparers, and authorized third parties to securely interact with the IRS to obtain return information, submit payments, and receive status updates. It will also enable those taxpayers and authorized preparers to perform “self-correction” functions such as verifying return changes the IRS made, updating or amending returns, and providing additional documents.⁵

The IRS Should Permit Online Account Access to Only Preparers Subject to IRS Oversight

The IRS currently plans to enable the taxpayer to maintain control over whom can gain access to the account.⁶ However, the IRS does not have any plans currently in development to restrict preparer access to the online account system by type of preparer. The National Taxpayer Advocate is concerned that the IRS will expose taxpayers to potential harm due to preparer incompetence or misconduct if it does not restrict access to only those preparers subject to IRS oversight pursuant to Circular 230.⁷

Preparers subject to IRS oversight under Circular 230 include attorneys, certified public accountants, enrolled agents, enrolled actuaries, and enrolled retirement plan agents.⁸ In addition, pursuant to Revenue Procedure 2014-42, preparers who have obtained the voluntary Annual Filing Season Program (AFSP) Record of Completion can represent taxpayers before the IRS during an examination of a tax return or claim for refund they prepared. Preparers can voluntarily obtain an AFSP Record of Completion each calendar year if they successfully complete 18 hours of continuing education (CE) from IRS-approved CE providers, which includes a six-hour Annual Federal Tax Refresher (AFTR) course, obtain a score of at least 70 percent in the associated AFTR examination,⁹ and agree to be subject to the duties and restrictions relating to practice before the IRS in Subpart B and § 10.51 of Circular 230 for the entire period covered by the AFSP Record of Completion.¹⁰ After December 31, 2015, the IRS will no longer allow non-credentialed preparers without the AFSP Record of Completion to engage in limited practice on

5 IRS, *IRS Enterprise Concept of Operations (CONOPS): Overview of SB/SE and W&I, LB&I, and TE/GE CONOPS* 25 (Jan. 15, 2015); IRS, *IRS Enterprise Concept of Operations (CONOPS): Taxpayer Advocate Service Briefing* 5, 10-12 (July 28, 2015) (on file with the National Taxpayer Advocate).

6 IRS, *Compliance Capabilities Initiative: Draft Blueprint for the Vision 19* (June 19, 2014); IRS, *IRS Enterprise Concept of Operations (CONOPS): Taxpayer Advocate Service Briefing* 5, 10-2 (July 28, 2015) (on file with the National Taxpayer Advocate).

7 31 U.S.C. § 10.3.

8 *Id.*

9 Rev. Proc. 2014-42, § 4.05(2)(a), I.R.B. 2014-29 (July 14, 2014).

10 *Id.*

If the IRS does not limit online account access to only preparers subject to Circular 230 oversight, it could harm taxpayers and consequently, increase compliance issues.

returns they prepare after that date. Accordingly, the National Taxpayer Advocate believes that the IRS should restrict access to the online account to only preparers subject to Circular 230 oversight. As set forth below, the IRS has the ability to monitor and enforce this requirement because it has preparer tax identification numbers (PTINs) for these individuals. If the IRS does not limit online account access to only preparers subject to Circular 230 oversight, it could harm taxpayers and consequently, increase compliance issues. Without instituting safeguards on access to the system, the IRS could inadvertently facilitate or perpetuate preparer misconduct. Uncredentialed preparers could gain access, interact with the IRS on the taxpayer's behalf, and potentially address notices, proposed adjustments, or even proposed correctable errors without the taxpayer's consent or knowledge.¹¹ Although the vast majority of return preparers are conscientious and ethical, the IRS has ample evidence and experience to show that there are some return preparers who are committing refund fraud¹² or are negligent, and that certain payroll service providers who have access to employer accounts also embezzle funds and cover their tracks by changing account information.¹³

Further, in 2014, TAS commissioned a survey by Russell Research to better understand the needs and circumstances of taxpayers eligible to use the low income taxpayer clinics (LITCs).¹⁴ The survey findings raise fundamental questions about the appropriateness of relying on preparers as intermediaries for the low income population, especially the Spanish speakers in this category, and particularly with the unregulated return preparer population. Nearly half of all LITC-eligible taxpayers used return preparers, as did approximately 75 percent of Spanish-speaking eligible taxpayers. However, the survey participants reported that a significant percentage of these preparers did not satisfy the very basic statutory requirements

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- 11 For more detail on the National Taxpayer Advocate's position on the proposed correctable error legislation, see *The National Taxpayer Advocate's 2014 Annual Report to Congress: Hearing Before the H. Comm. on Oversight and Government Reform, Subcomm. on Government Operations*, 114th Cong. 34-5 (2015) (written testimony of Nina E. Olson, National Taxpayer Advocate).
 - 12 *Id.*; see National Taxpayer Advocate 2014 Annual Report to Congress 543-44; National Taxpayer Advocate Fiscal Year 2015 Objectives Report to Congress 71-8; and National Taxpayer Advocate 2013 Annual Report to Congress 61-74 (Most Serious Problem: *Regulation of Return Preparers: Taxpayers and Tax Administration Remain Vulnerable to Incompetent and Unscrupulous Return Preparers While the IRS Is Enjoined from Continuing Its Efforts to Effectively Regulate Return Preparers*).
 - 13 *The National Taxpayer Advocate's 2014 Annual Report to Congress: Hearing Before the H.R. Comm. on Oversight and Government Reform, Subcomm. on Government Operations*, 114th Cong. 20-3 (Apr. 15, 2015) (written testimony of Nina E. Olson, National Taxpayer Advocate); National Taxpayer Advocate 2014 Annual Report to Congress 218-24 (Most Serious Problem: *Offers in Compromise: The IRS Needs to Do More to Comply With the Law Regarding Victims of Payroll Service Provider Failures*); National Taxpayer Advocate 2012 Annual Report to Congress 426-44 (Most Serious Problem: *Early Intervention, Offers in Compromise, and Proactive Outreach Can Help Victims of Failed Payroll Service Providers and Increase Employment Tax Compliance*); National Taxpayer Advocate 2012 Annual Report to Congress 553-59 (Legislative Recommendation: *Protect Taxpayers and the Public Fisc from Third-Party Misappropriation of Payroll Taxes*); National Taxpayer Advocate 2007 Annual Report to Congress 337-54 (Most Serious Problem: *Third Party Payers*); National Taxpayer Advocate 2007 Annual Report to Congress 538-44 (Legislative Recommendation: *Taxpayer Protection From Third Party Payer Failures*); National Taxpayer Advocate 2004 Annual Report to Congress 394-99 (Legislative Recommendation: *Protection from Payroll Service Provider Misappropriation*).
 - 14 Russell Research, *Topline Findings from a Taxpayer Advocate Service Survey of Taxpayers Who Are Eligible to Use IRS's Low Income Taxpayer Clinics (LITC)* 5 (July 2014). TAS oversees and administers the LITC grant program for the IRS. The IRS awards matching grants to organizations that provide representation to low income individuals who need help resolving tax problems with the IRS. See IRC § 7526. At least 90 percent of the taxpayers represented by an LITC must have incomes that do not exceed 250 percent of the federal poverty level. See IRC § 7526(b)(1)(B)(i). The U.S. Department of Health and Human Services publishes yearly poverty guidelines in the *Federal Register*, which the IRS uses to establish the 250 percent threshold for LITC representation. For the 2015 poverty guidelines, see 80 Fed. Reg. 3236-3237 (Jan. 22, 2015).

under IRC §§ 6695(a) and (b).¹⁵ For example, the participants reported that the preparer did not sign the return or did not give the taxpayer a copy more than 15 percent of the time. This percentage rose to more than 30 percent for Spanish-speaking eligible taxpayers.¹⁶ Accordingly, TAS will continue to advocate to protect taxpayers from any harm imposed by giving third parties access to taxpayers' online accounts.

The IRS Should Clearly Define the Scope of Preparers' Access to Online Accounts

The IRS has not yet defined exactly what a preparer can do on behalf of the taxpayer upon gaining access to the taxpayer's online account. According to the CONOPS, preparers would be able to securely interact with the IRS to obtain return information, submit payments, and receive status updates. Authorized preparers would also be able to perform "self-correction" functions such as verifying return changes made by the IRS, updating or amending returns, and providing additional documents.¹⁷ TAS remains concerned about the scope of this self-correction authority. For example, it is unclear whether these self-correction actions could include addressing adjustments made pursuant to the agency's math error authority.¹⁸ Of particular concern is the planned ability of preparers to verify return changes made by the IRS as well as update or amend returns on behalf of the taxpayer, especially if the IRS does not limit access only to those preparers subject to IRS oversight.

Without any restrictions on type of preparer, there is a greater chance that vulnerable taxpayers could be harmed by preparers who prey upon the elderly, low income, and taxpayers with disabilities. Consider the possibility that preparers will develop a boilerplate form for the taxpayer to sign to authorize the preparer to conduct the above-referenced actions. If the preparer either fraudulently or negligently prepares an inaccurate return, the IRS may have just given the preparer the ability to cover his or her tracks. It is also possible that the taxpayer will not become aware of the problem for a long time. Finally, the preparer's actions could severely prejudice the taxpayer's procedural rights. For example, if the preparer accepts math error adjustments without the taxpayer's knowledge, the taxpayer may lose the right to contest the change in the U.S. Tax Court.¹⁹

The Online Account System Should Enable the Taxpayer to Maintain Strict Control Over Preparer Authorizations

TAS believes that the IRS should give the taxpayer strict and detailed control over preparer authorizations and develop procedures for the taxpayer to fine-tune them on the online account. While some

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- 15 IRC § 6695(a) imposes a penalty on a tax return preparer for failure to provide a copy of the return to the taxpayer, unless the failure is due to reasonable cause and not to willful neglect. IRC § 6695(b) imposes a penalty on a tax return preparer for failure to sign a return when required by regulation to do so, unless the failure is due to reasonable cause and not to willful neglect.
- 16 Russell Research, *Topline Findings from a Taxpayer Advocate Service Survey of Taxpayers Who Are Eligible to Use IRS's Low Income Taxpayer Clinics (LITC)* 5 (July 2014). For more information on the LITC-eligible taxpayer study, see National Taxpayer Advocate 2014 Annual Report to Congress vol. 2, 1-26 (Research Study: *Low Income Taxpayer Clinic Program: A Look at Those Eligible to Seek Help From the Clinics*).
- 17 IRS, *IRS Enterprise Concept of Operations (CONOPS): Overview of SB/SE and W&I, LB&I, and TE/GE CONOPS* 25 (Jan. 15, 2015); IRS, *Compliance Capabilities Initiative: Draft Blueprint for the Vision* 10-2, 21-30 (June 19, 2014); IRS, *IRS Enterprise Concept of Operations (CONOPS): Taxpayer Advocate Service Briefing* 5, 10-2 (July 28, 2015) (on file with the National Taxpayer Advocate).
- 18 The National Taxpayer Advocate has written extensively about her various concerns regarding the expansion of math error authority under IRC § 6213(g). See, e.g., National Taxpayer Advocate 2014 Annual Report to Congress 163-71 (Most Serious Problem: *Math Error Notices: The IRS Does Not Clearly Explain Math Error Adjustments, Making It Difficult for Taxpayers to Understand and Exercise Their Rights*).
- 19 IRC § 6213(b)(1) provides that a taxpayer has no right to petition the Tax Court upon receiving a math error notice. IRM 21.5.4.1, *General Math Error Procedures Overview* (Oct. 1, 2014). In math or clerical error cases, the service may assess and send a notice of assessment of additional tax without using deficiency procedures.

taxpayers may not have close relationships with their preparers, others have long-term relationships and completely trust their preparer to interact with the IRS on their behalf. A taxpayer can decide the limits of the authority he or she wants to convey to a preparer but must avoid signing boilerplate forms giving the preparer broad access to the online account system with minimal restrictions. The IRS should bring IRS Form 2848, *Power of Attorney and Declaration of Representative*, into the 21st century by building the online account system to provide specific checkboxes addressing authorizations for each type of action a preparer could take on behalf of the taxpayer on the online account system. For example, the checkboxes could include some of the following actions:²⁰

- Provide the IRS any information that is missing from the taxpayer's return;
- Obtain from the IRS information about the processing of the taxpayer's return or the status of the taxpayer's refund or payment(s);
- Receive copies of notices or transcripts related to the taxpayer's return, upon request; and
- Respond to certain IRS notices about math errors, offsets, and return preparation.

TAS believes that the IRS should give the taxpayer strict and detailed control over preparer authorizations and develop procedures for the taxpayer to fine-tune them on the online account.

These proposed checkboxes are also relevant to the current plans of the IRS to expand the third-party designee authorization on Form 1040 to include e-file software providers and EROs. By checking off one box, the taxpayer would give the software provider or ERO, whichever is applicable, the blanket authority to perform any or all of the actions included in the four bullets above. The rationale for this expansion is to enable the parties to obtain refund status information from the IRS, so that they can inform the taxpayer and subsequently, the IRS will receive fewer calls from the taxpayers seeking this information. However, there is no reason the software provider or ERO should have the authority to perform all of the actions listed. In fact, the taxpayer, if given the choice, probably would not agree to provide the authority to these parties to perform most of the actions listed.

The IRS Should Develop and Implement Procedures to Track Preparer Access and Restrict Unauthorized Activities

Once the taxpayer specifies the preparer's authorities for the online account system, the IRS must develop a method to track preparer access and restrict all unauthorized activities. The IRS should build the system to prevent unauthorized activities from happening in the first place. As discussed above, the system should first restrict access to only those preparers subject to IRS oversight pursuant to Circular 230. It also should build the online account system so it validates the preparer's PTIN information. If the system determines the preparer is unregulated and did not take part in the voluntary AFSP, then it could automatically block certain authorization checkboxes. The checkboxes ensure that everyone involved in a transaction knows exactly what the taxpayer has authorized the preparer to do.

Under agency law, the preparer is acting as the taxpayer's agent. Accordingly, pursuant to the Doctrine of Apparent Authority (sometimes referred to as the Doctrine of Ostensible Authority), any reasonable third party is allowed to rely on the agent's actions, unless the third party has reason to know that the agent's

²⁰ The four bullets listed are the actions for which the taxpayer designates a third party after Line 79 of tax year 2014 Form 1040, *U.S. Individual Income Tax Return*. IRS Form 1040 Instructions 2014. However, ideally, the check boxes should have plain language explanations that have been reviewed by members of the Taxpayer Advocacy Panel (TAP) and LITCs, who have experience communicating with vulnerable populations and also represent them in situations where preparers have taken unauthorized actions.

actions are unauthorized. Therefore, the IRS is allowed to rely on the preparer's actions, unless it has reason to know that the taxpayer did not grant the preparer authority to conduct certain transactions. In fact, under agency law and the Doctrine of Apparent Authority, the taxpayer may be liable for any of the preparer's unauthorized actions if he or she granted a blanket authorization on the online account system, even if the taxpayer had an agreement with the preparer to conduct only one specific type of transaction.²¹ The taxpayer would then have to seek recourse against the preparer and may be left to correct those errors, made by the preparer's unauthorized transaction conducted by the preparer, on his or her own.

The Doctrine of Apparent Authority assumes that the third party, the IRS, did not have reason to know that the agent, the preparer, was conducting an unauthorized action. However, the significant occurrence of return preparer fraud may be enough to give the IRS reason to know or appreciate the potential risk for unauthorized actions by unscrupulous preparers.²² Therefore, there is a possibility that the taxpayer will not be liable for the unauthorized actions of the preparer if the IRS has reason to know of the potential risk. Further, if the IRS creates the online account system with blanket authorizations as the only available option, the IRS may have difficulty holding the taxpayer liable because it is not making an effort to protect its interests by mitigating the known risk of unauthorized actions.²³ The IRS should give serious consideration to this issue as it develops the process for taxpayer authorizations on the system.

Because the taxpayer may be held responsible for the preparer's actions, whether authorized or not, it is crucial that the taxpayer is aware of all the actions taken by the preparer on the taxpayer's online account.

Because the taxpayer may be held responsible for the preparer's actions, whether authorized or not, it is crucial that the taxpayer is aware of *all* the actions taken by the preparer on the taxpayer's online account. Therefore, whenever a preparer takes any type of action on the online account system, including merely accessing the account, the system should alert the taxpayer, in a manner specified by the taxpayer, such as by email or text. Though TAS anticipates IRS hesitation to bombard the taxpayer with messages from the system, it believes the taxpayer needs to know when the preparer accesses the system and exactly what type of transaction the preparer conducted. If the taxpayer feels uncomfortable with the action taken, he or she should then have the ability to report a grievance based on information provided in each system alert communication. Most importantly, this alert system would provide notice to the taxpayer of unauthorized actions and enable the taxpayer to take immediate steps to undo them.

In addition, if the system does not prevent unauthorized actions, the IRS could violate IRC § 6103 if it inappropriately discloses taxpayer information to an unauthorized preparer accessing the system. Unauthorized access also infringes upon the taxpayer's *right to confidentiality*.²⁴ While the IRC provides civil and criminal penalties for inappropriate uses and disclosures by preparers of tax return information, the IRS should issue guidance specifically applying the provisions to unauthorized access to the online

21 RESTATEMENT (THIRD) OF AGENCY § 2.03 (2006).

22 For a recent discussion on return preparer fraud issues, see National Taxpayer Advocate Fiscal Year 2016 Objectives Report to Congress 34-7 (Area of Focus: *The IRS Agrees It Should Issue Refunds to Victims of Return Preparer Fraud, But It Has Been Slow to Develop Necessary Procedures*). At the end of FY 2015, TAS had 272 return preparer fraud cases in total inventory. Data obtained from TAMIS for FY 2015 (Nov. 1, 2015) (Data represents open cases with Special Case Code PF). The current inventory of return preparer fraud cases includes unresolved cases received in prior FYs.

23 RESTATEMENT (SECOND) OF TORTS § 918 (1979) ("One is not prevented from recovering damages for a particular harm resulting from a tort if the tortfeasor intended the harm or was aware of it and was recklessly disregarding of it, unless the injured person with knowledge of the danger of the harm intentionally or heedlessly failed to protect his own interests.").

24 Taxpayer Bill of Rights, available at www.TaxpayerAdvocate.irs.gov/taxpayer-rights.

account system.²⁵ In addition, the IRS should revise Circular 230 sanctions to include sanctions for those preparers who conduct, or attempt to conduct, unauthorized transactions on the online account system.

The IRS should develop procedures to enable the taxpayer to undo any unauthorized transactions conducted by the preparer. For example, if the preparer accepts a math error adjustment without the authorization of the taxpayer, the taxpayer could lose the opportunity to seek independent review by the U.S. Tax Court. The IRS should develop procedures to reverse the unauthorized acceptance of the math error adjustment and institute deficiency procedures.²⁶

CONCLUSION

As the IRS develops a new online account system for taxpayers, the National Taxpayer Advocate has concerns about preparer access to such system. First, due to the potential for incompetent or unscrupulous preparers to use the system to impose significant harm on taxpayers, it is prudent to restrict access to only those preparers who are already subject to IRS oversight. If the IRS does not restrict access to preparers subject to Circular 230 oversight, it should evaluate the actions preparers can take on the system to protect taxpayers from harm imposed by preparer misconduct. Furthermore, taxpayers are the best equipped to determine the boundaries of the preparer's online access and should have the ability to maintain strict control over preparer authorizations. Finally, such safeguards are meaningless unless the IRS can ensure that preparers do not go beyond those specific authorized activities.

²⁵ IRC §§ 7216, 6713.

²⁶ Treasury should revise Circular 230 to include a sanction for unauthorized access to the online account system. We recommend Treasury revise § 10.51, *Incompetence and Disreputable Conduct*, 31 C.F.R. Part 10, to include specific reference to unauthorized access to the online account system. However, such sanctions may not be applicable to preparers who are not subject to IRS oversight under Circular 230.

RECOMMENDATIONS

The National Taxpayer Advocate recommends the IRS:

1. Limit preparer access to the taxpayer online account system to only those preparers subject to IRS oversight under Circular 230.
2. Develop the online account system so it validates the preparer's PTIN information. If the preparer is not subject to Circular 230 oversight, the system should block certain authorization checkboxes automatically.
3. Develop the online account system so that the taxpayer can adjust preparer authorizations by checking a separate box for each type of action the designated preparer can take on the taxpayer's behalf. The checkboxes should use plain language explanations that Taxpayer Advocacy Panel members and Low Income Taxpayer Clinics have reviewed.
4. Develop procedures to track preparer access to the taxpayer's online account and verify the taxpayer authorized the actions taken.
5. Develop procedures to automatically alert the taxpayer of any preparer activities on the online account system and provide information to the taxpayer on how to report unauthorized access.
6. Work with the Department of Treasury to issue guidance specifically applying the provisions of IRC §§ 6713 and 7216 to unauthorized access to the online account system.²⁷ In addition, the IRS should work with Treasury to revise Circular 230 sanctions to include sanctions for preparers who conduct, or attempt to conduct, unauthorized transactions on the online account system.

²⁷ IRC §§ 7216, 6713.