

New Restriction on Using Tax Return Information to Impact Lenders

November 14, 2019

A change in federal law effective on December 28, 2019 will prohibit lenders and other parties who receive a taxpayer's tax return information from the Internal Revenue Service ("IRS") from sharing that information with any third party without the taxpayer's express consent. This change will impact any lender who sells (or may sell) loans to a third party, as a borrower's tax return information is generally made available to purchasers and prospective purchasers of loans.

Under current law, a lender or other party seeking a taxpayer's tax return information must have the taxpayer expressly authorize the IRS to provide such information. The lender or other party is not currently under any restriction from sharing that tax return information with third parties, and such sharing is common when loans are sold in the secondary market. To address this issue, the Taxpayer First Act signed into law earlier this year added a prohibition on anyone receiving a taxpayer's tax return information from the IRS from using the information for any purpose other than for the express purpose for which the taxpayer gave consent and from disclosing the information to any other person without "the express permission of, or request by, the taxpayer."

This amendment will potentially have a significant impact on lenders who obtain taxpayer information in connection with loan originations and then sell or seek to sell loans to third parties. It is common to make such taxpayer information available to purchasers and prospective purchasers of loans, including to Fannie Mae and Freddie Mac. Effective December 28, 2019, a lender will have to have the taxpayer's express consent to make that information available to any third party.

There is no specific language that must be used to obtain the taxpayer's consent to the sharing of information with third parties. On November 8, 2019, the Mortgage Industry Standards Maintenance Organization ("MISMO[®]") issued sample wording for lenders to use to address this new requirement. This wording can be accessed through this link: <http://www.mismo.org/standards-and-resources/additional-tools-and-resources/taxpayer-consent-language>. Please note that certain MISMO[®] intellectual property requirements may apply when using the organization's exact language. The MISMO[®] wording is not required and lenders are free to develop their own wording.

As noted, this amendment takes effect on December 28, 2019. Accordingly, taxpayer information cannot be shared with third parties on or after that date unless the taxpayer's consent has been obtained. Both Fannie Mae and Freddie Mac have stated that signed taxpayer consent forms must be obtained for loans sold to or securitized by

those agencies on or after that date, and that loan servicers must obtain consent on or after that date when tax return information is obtained as part of the servicing function (for example, when processing a loan modification).

If you have any questions regarding this amendment, please feel free to contact Joseph D. Simon at (516) 357-3710 or via email at jsimon@cullenanddykman.com, Kevin Patterson at (516) 296-9196 or via email at kpatterson@cullenanddykman.com, Elizabeth A. Murphy at (516) 296-9154 or via email at emurphy@cullenanddykman.com, or Mandy Xu at (516) 357-3850 or via email at mxu@cullenanddykman.com.

Practices

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Attorneys

- Joseph D. Simon
- Kevin Patterson
- Elizabeth A. Murphy