

HIGHLIGHTS OF THIS ISSUE

These synopses are intended only as aids to the reader in identifying the subject matter covered. They may not be relied upon as authoritative interpretations.

INCOME TAX

Rev. Rul. 2008–8, page 340.

Cell captive guidance. This ruling explains how arrangements between an individual cell and its owner are analyzed for purposes of determining whether there is adequate risk shifting and risk distribution to constitute insurance.

Rev. Rul. 2008–9, page 342.

Federal rates; adjusted federal rates; adjusted federal long-term rate and the long-term exempt rate. For purposes of sections 382, 642, 1274, 1288, and other sections of the Code, tables set forth the rates for January 2008.

T.D. 9375, page 344.

Final regulations under section 7216 of the Code update the rules regarding the disclosure and use of tax return information by tax preparers. Among other things, the regulations finalize rules for taxpayers to consent to the disclosure or use of their tax return information by tax return preparers. The regulations either modify or clarify (i) the scope of the circumstances to which the rule apply, (ii) the circumstances in which an income tax return preparer may disclose or use tax return information without taxpayer consent, and (iii) the circumstances in which an income tax return preparer may rely upon a taxpayer's consent to disclose or use information that the income tax return preparer obtains in connection with the preparation of a return. The regulations are applicable to disclosures or uses of tax return information occurring on or after January 1, 2009.

Notice 2008–18, page 363.

This notice alerts life insurance companies to federal income tax issues that may arise as a result of the adoption of proposed Actuarial Guideline VACARVM and/or a proposed principles-based approach for calculating statutory reserves for life

insurance proposed Life PBR. This notice identifies areas in which the Treasury Department and the Service have concerns and invites comments on these and other issues.

Notice 2008–19, page 366.

Cell captive guidance. This notice requests comments on a specific framework for determining whether an individual cell or the protected cell company as a whole is treated as an insurance company for federal income tax purposes.

Rev. Proc. 2008–12, page 368.

This procedure provides guidance to tax return preparers regarding the format and content of consents to disclose and consents to use tax return information with respect to taxpayers filing a return in the Form 1040 series (e.g., Form 1040, Form 1040NR, Form 1040A, or Form 1040EZ) under regulations section 301.7216–3. This procedure also provides specific requirements for electronic signatures when a taxpayer executes an electronic consent to the disclosure or use of the taxpayer's tax return information.

Announcement 2008–7, page 379.

This document provides advance notice that the Treasury Department and the IRS are considering issuing rules in proposed regulations (REG–136596–07) regarding the disclosure and use of tax return information by tax return preparers. The rules would apply to the marketing of refund anticipation loans (RALs) and certain other products in connection with the preparation of a tax return and, as an exception to the general principle that taxpayers should have control over their tax return information that is reflected in final regulations published in T.D. 9375, provide that a tax return preparer may not obtain a taxpayer's consent to disclose or use tax return information for the purpose of soliciting taxpayers to purchase such products. This document invites comments from the public regarding these contemplated rules.

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Announcements of Disbarments and Suspensions begin on page 372.
Finding Lists begin on page ii.



ADMINISTRATIVE

T.D. 9375, page 344.

Final regulations under section 7216 of the Code update the rules regarding the disclosure and use of tax return information by tax preparers. Among other things, the regulations finalize rules for taxpayers to consent to the disclosure or use of their tax return information by tax return preparers. The regulations either modify or clarify (i) the scope of the circumstances to which the rule apply, (ii) the circumstances in which an income tax return preparer may disclose or use tax return information without taxpayer consent, and (iii) the circumstances in which an income tax return preparer may rely upon a taxpayer's consent to disclose or use information that the income tax return preparer obtains in connection with the preparation of a return. The regulations are applicable to disclosures or uses of tax return information occurring on or after January 1, 2009.

Rev. Proc. 2008-12, page 368.

This procedure provides guidance to tax return preparers regarding the format and content of consents to disclose and consents to use tax return information with respect to taxpayers filing a return in the Form 1040 series (e.g., Form 1040, Form 1040NR, Form 1040A, or Form 1040EZ) under regulations section 301.7216-3. This procedure also provides specific requirements for electronic signatures when a taxpayer executes an electronic consent to the disclosure or use of the taxpayer's tax return information.

Announcement 2008-6, page 378.

This announcement contains changes in filing procedures for Form 1042-S, *Foreign Person's U.S. Source Income Subject to Withholding*, filed electronically or magnetically. These changes are effective immediately.

Announcement 2008-7, page 379.

This document provides advance notice that the Treasury Department and the IRS are considering issuing rules in proposed regulations (REG-136596-07) regarding the disclosure and use of tax return information by tax return preparers. The rules would apply to the marketing of refund anticipation loans (RALs) and certain other products in connection with the preparation of a tax return and, as an exception to the general principle that taxpayers should have control over their tax return information that is reflected in final regulations published in T.D. 9375, provide that a tax return preparer may not obtain a taxpayer's consent to disclose or use tax return information for the purpose of soliciting taxpayers to purchase such products. This document invites comments from the public regarding these contemplated rules.

The IRS Mission

Provide America's taxpayers top quality service by helping them understand and meet their tax responsibilities and by applying

the tax law with integrity and fairness to all.

Introduction

The Internal Revenue Bulletin is the authoritative instrument of the Commissioner of Internal Revenue for announcing official rulings and procedures of the Internal Revenue Service and for publishing Treasury Decisions, Executive Orders, Tax Conventions, legislation, court decisions, and other items of general interest. It is published weekly and may be obtained from the Superintendent of Documents on a subscription basis. Bulletin contents are compiled semiannually into Cumulative Bulletins, which are sold on a single-copy basis.

It is the policy of the Service to publish in the Bulletin all substantive rulings necessary to promote a uniform application of the tax laws, including all rulings that supersede, revoke, modify, or amend any of those previously published in the Bulletin. All published rulings apply retroactively unless otherwise indicated. Procedures relating solely to matters of internal management are not published; however, statements of internal practices and procedures that affect the rights and duties of taxpayers are published.

Revenue rulings represent the conclusions of the Service on the application of the law to the pivotal facts stated in the revenue ruling. In those based on positions taken in rulings to taxpayers or technical advice to Service field offices, identifying details and information of a confidential nature are deleted to prevent unwarranted invasions of privacy and to comply with statutory requirements.

Rulings and procedures reported in the Bulletin do not have the force and effect of Treasury Department Regulations, but they may be used as precedents. Unpublished rulings will not be relied on, used, or cited as precedents by Service personnel in the disposition of other cases. In applying published rulings and procedures, the effect of subsequent legislation, regulations,

court decisions, rulings, and procedures must be considered, and Service personnel and others concerned are cautioned against reaching the same conclusions in other cases unless the facts and circumstances are substantially the same.

The Bulletin is divided into four parts as follows:

Part I.—1986 Code.

This part includes rulings and decisions based on provisions of the Internal Revenue Code of 1986.

Part II.—Treaties and Tax Legislation.

This part is divided into two subparts as follows: Subpart A, Tax Conventions and Other Related Items, and Subpart B, Legislation and Related Committee Reports.

Part III.—Administrative, Procedural, and Miscellaneous.

To the extent practicable, pertinent cross references to these subjects are contained in the other Parts and Subparts. Also included in this part are Bank Secrecy Act Administrative Rulings. Bank Secrecy Act Administrative Rulings are issued by the Department of the Treasury's Office of the Assistant Secretary (Enforcement).

Part IV.—Items of General Interest.

This part includes notices of proposed rulemakings, disbarment and suspension lists, and announcements.

The last Bulletin for each month includes a cumulative index for the matters published during the preceding months. These monthly indexes are cumulated on a semiannual basis, and are published in the last Bulletin of each semiannual period.

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Part I. Rulings and Decisions Under the Internal Revenue Code of 1986

Section 42.—Low-Income Housing Credit

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of February 2008. See Rev. Rul. 2008-9, page 342.

Section 162.—Trade or Business Expenses

26 CFR 1.162-1: Business expenses. (Also §§ 801, 831.)

Cell captive guidance. This ruling explains how arrangements between an individual cell and its owner are analyzed for purposes of determining whether there is adequate risk shifting and risk distribution to constitute insurance.

Rev. Rul. 2008-8

ISSUES

Under the facts described below, do the arrangements entered into between *X* and *Cell X*, and between the subsidiaries of *Y* and *Cell Y*, of *Protected Cell Company* constitute insurance for federal income tax purposes? If so, are amounts paid by *X* to *Cell X* and by the subsidiaries of *Y* to *Cell Y* deductible as “insurance premiums” under § 162 of the Internal Revenue Code?

FACTS

Protected Cell Company is a legal entity formed by *Sponsor* under the laws of *Jurisdiction A*. Pursuant to the laws of *Jurisdiction A*, *Protected Cell Company* has established multiple accounts, or cells, each of which has its own name and is identified with a specific participant, but is not treated as a legal entity distinct from *Protected Cell Company*. *Sponsor* owns all the common stock of *Protected Cell Company*. All of the non-voting preferred stock associated with each cell is owned by that cell’s participant or participants. The terms “common stock” and “preferred stock” as used in the *Protected Cell Company* and cell instruments do not necessarily reflect the federal income tax status of those instruments.

Each cell is funded by its participant’s capital contribution (the amount paid by

the participant for the preferred stock associated with its cell) and by “premiums” collected with respect to contracts to which the cell is a party. Each cell is required to pay out claims with respect to contracts to which it is a party. The income, expense, assets, liabilities, and capital of each cell are accounted for separately from the income, expense, assets, liabilities, and capital of any other cell and of *Protected Cell Company* generally. The assets of each cell are statutorily protected from the creditors of any other cell and from the creditors of *Protected Cell Company*. *Protected Cell Company* maintains non-cellular assets and capital representing the minimum amount of capital necessary to maintain its charter. Each cell may make distributions with respect to the class of stock that corresponds to that cell, regardless of whether distributions are made with respect to any other class of stock. In the event a participant ceases its participation in *Protected Cell Company*, the participant is entitled to a return of the assets of the cell in which it participated, subject to any outstanding obligations of that cell.

A company like *Protected Cell Company* is sometimes referred to as a protected cell company, a segregated account company or segregated portfolio company.

Situation 1

X, a domestic corporation, owns all the preferred stock issued with respect to *Cell X*. Each year, *X* enters into a 1-year contract, or arrangement, whereby *Cell X* “insures” the professional liability risks of *X*, either directly or as a reinsurer of those risks. The amounts *X* pays as “premiums” under the annual arrangement are established according to customary industry rating formulas. In all respects, *X* and *Cell X* conduct themselves consistently with the standards applicable to an insurance arrangement between unrelated parties. In implementing the arrangement, *Cell X* may perform any necessary administrative tasks, or it may outsource those tasks at prevailing commercial market rates. *X* does not provide any guarantee of *Cell X*’s performance, and all funds and business records of *X* and *Cell X* are

separately maintained. *Cell X* does not loan any funds to *X*. *Cell X* does not enter into any arrangements with entities other than *X*. Taking into account the total assets of *Cell X*, both from capital contributions and from amounts received pursuant to the annual arrangement with *X*, *Cell X* is adequately capitalized relative to the risks assumed under that arrangement.

Situation 2

The facts are the same as in *Situation 1*, except that *Y*, a domestic corporation, owns all the preferred stock issued with respect to *Cell Y*. *Y* also owns all of the stock of 12 domestic subsidiaries that provide professional services. Each subsidiary in the *Y* group has a geographic territory comprised of a state in which the subsidiary provides professional services. The subsidiaries of *Y* operate on a decentralized basis. The services provided by the employees of each subsidiary are performed under the general guidance of a supervisory professional for a particular facility of the subsidiary. The general categories of the professional services rendered by each of the subsidiaries are the same throughout the *Y* group. Together the 12 subsidiaries have a significant volume of independent, homogeneous risks.

Each year, each subsidiary of *Y* enters into a 1-year contract, or arrangement, with *Cell Y* whereby *Cell Y* “insures” the professional liability risks of that subsidiary, either directly or as a reinsurer of those risks. The amounts charged each subsidiary as “premiums” under the annual arrangements are established according to customary industry rating formulas. None of the subsidiaries have liability coverage for less than 5% nor more than 15% of the total risk insured by *Cell Y*. *Cell Y* retains the risk that it insures from the subsidiaries. In all respects, *Y*, *Cell Y*, and each subsidiary, conduct themselves consistently with the standards applicable to an insurance arrangement between unrelated parties. In implementing the arrangement, *Cell Y* may perform all necessary administrative tasks, or it may outsource those tasks at prevailing commercial market rates. Neither *Y* nor

any subsidiary of *Y* guarantees *Cell Y*'s performance, and all funds and business records of *Y*, *Cell Y*, and each subsidiary, are separately maintained. *Cell Y* does not loan any funds to *Y* or to any subsidiary of *Y*. *Cell Y* does not enter into any arrangements with entities other than *Y* or its subsidiaries. Taking into account the total assets of *Cell Y*, both from capital contributions from *Y* and from amounts received pursuant to the annual arrangements with the subsidiaries of *Y*, *Cell Y* is adequately capitalized relative to the risks assumed under those arrangements.

LAW

Section 162(a) of the Code provides, in part, that there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business. Section 1.162-1(a) of the Income Tax Regulations provides, in part, that among the items included in business expenses are insurance premiums against fire, storms, theft, accident or other similar losses in the case of a business.

Neither the Code nor the regulations define the terms insurance or insurance contract. The United States Supreme Court, however, has explained that in order for an arrangement to constitute insurance for federal income tax purposes, both risk shifting and risk distribution must be present. *Helvering v. LeGierse*, 312 U.S. 531 (1941).

Risk shifting occurs if a person facing the possibility of an economic loss transfers some or all of the financial consequences of the potential loss to the insurer, such that a loss by the insured does not affect the insured because the loss is offset by the insurance payment. Risk distribution occurs when the party assuming the risk distributes its potential liability among others, at least in part. *Beech Aircraft Corp. v. United States*, 797 F.2d 920, 922 (10th Cir. 1986). Risk distribution "emphasizes the broader, social aspect of insurance as a method of dispelling the danger of a potential loss by spreading its cost throughout a group", *Commissioner v. Treganowan*, 183 F.2d 288, 291 (2d Cir. 1950), and "involves spreading the risk of loss among policyholders." *Ocean Drilling & Exploration Co. v. United States*, 24 Cl. Ct. 714, 731 (1991) *aff'd*

per curiam, 988 F.2d 1135 (Fed. Cir. 1993). Risk distribution necessarily entails a pooling of premiums, so that a potential insured is not in significant part paying for its own risks. *See Humana, Inc. v. Commissioner*, 881 F.2d 247, 257 (6th Cir. 1989).

A transaction between a parent and its wholly-owned subsidiary does not satisfy the requirements of risk shifting and risk distribution if only the risks of the parent are insured. *See Stearns-Roger Corp. v. United States*, 774 F.2d 414 (10th Cir. 1985); *Carnation Co. v. Commissioner*, 640 F.2d 1010 (9th Cir. 1981), *cert. denied* 454 U.S. 965 (1981). However, courts have held that an arrangement between a parent and its subsidiary can constitute insurance when the parent's premiums are pooled with those of unrelated parties if (i) insurance risk is present, (ii) risk is shifted and distributed, and (iii) the transaction is of the type that is insurance in the commonly accepted sense. *See, e.g., Ocean Drilling & Exploration Co.; AMERCO, Inc. v. Commissioner*, 979 F.2d 162 (9th Cir. 1992); Rev. Rul. 2002-89, 2002-2 C.B. 984. An arrangement between an insurance subsidiary and other subsidiaries of the same parent may qualify as insurance for federal income tax purposes, even if there are no insured policyholders outside the affiliated group, provided the requisite risk shifting and risk distribution are present. *See, e.g., Humana, Inc. v. Commissioner*, 881 F.2d 247 (6th Cir. 1989); *Kidde Industries v. U.S.*, 40 Fed. Cl. (1997); Rev. Rul. 2002-90, 2002-2 C.B. 985.

The qualification of an arrangement as an insurance contract does not depend on the regulatory status of the issuer. *See, e.g., Commissioner v. Treganowan*, 183 F.2d 288 (2d Cir. 1950) (arrangement with stock exchange "gratuity fund" treated as life insurance because the requisite risk shifting and risk distribution were present). *See also* Rev. Rul. 83-172, 1983-2 C.B. 107 (group issuing workmen's compensation insurance taxable as an insurance company even though not recognized as an insurance company under state law); Rev. Rul. 83-132, 1983-2 C.B. 270 (non-corporate business entity taxable as an insurance company if it is primarily engaged in the business of issuing insurance contracts). The same principles apply to determine the insurance contract status of an

arrangement involving a cell of a protected cell company as apply to determine the status of an arrangement with any other issuer.

ANALYSIS

In order to determine the nature of an arrangement for federal income tax purposes, it is necessary to consider all the facts and circumstances in a particular case, including not only the terms of the arrangement, but also the entire course of conduct of the parties. Thus, an arrangement that purports to be an insurance contract but lacks the requisite risk distribution may instead be characterized as a deposit arrangement, a loan, a contribution to capital (to the extent of net value, if any) an indemnity arrangement that is not an insurance contract, or otherwise, based on the substance of the arrangement between the parties. The proper characterization of the arrangement may determine whether the issuer qualifies as an insurance company and whether amounts paid under the arrangement may be deductible.

Under the facts presented, all the income, expense, assets, liabilities and capital of *Cell X* are separately accounted for and, upon liquidation, become the property of *X*, who is the sole shareholder with respect to *Cell X*. The amounts *X* pays as premiums under the 1-year agreement to "insure" its professional liability risks are held by *Cell X*, together with any capital and surplus, for the satisfaction of *X*'s claims. The premiums that *Cell X* earns from its arrangement with *X* constitute 100% of its total premiums earned during the taxable year; the liability coverage *Cell X* provides to *X* accounts for all the risks borne by *Cell X*. In the event of a claim, payment will be made to *X* out of *X*'s own premiums and contributions to the capital of *Cell X*; no amount may be paid out of any other cell in satisfaction of any claims by *X*. The arrangement between *X* and *Cell X* is akin to an arrangement between a parent and its wholly-owned subsidiary, which, in the absence of unrelated risk, lacks the requisite risk shifting and risk distribution to constitute insurance. Because *Cell X* does not enter into arrangements with any policyholders other than *X*, the arrangement between *X* and *Cell X* is not an insurance contract for federal income tax purposes, and *X* may not deduct

amounts paid pursuant to the arrangement as “insurance premiums” under § 162. See Rev. Rul. 2005–40, 2005–2 C.B. 4 (arrangement lacks necessary risk distribution, and therefore does not qualify as insurance, if the issuer of the arrangement contracts with only a single policyholder); Rev. Rul. 2002–89, 2002–2 C.B. 984 (amounts paid by a domestic parent corporation to its wholly owned insurance subsidiary are not deductible as insurance premiums if the parent’s premiums are not sufficiently pooled with those of unrelated parties).

All the income, expense, assets, liabilities and capital of *Cell Y* likewise are separately accounted for, and upon liquidation, become the property of *Y*, who is the sole shareholder with respect to *Cell Y*. Under the arrangements between the 12 subsidiaries of *Y* and *Cell Y*, the subsidiaries shift to *Cell Y* their professional liability risks in exchange for premiums that are determined at arms-length. Those premiums are pooled such that a loss by one subsidiary is not in substantial part, paid from its own premiums. The subsidiaries of *Y* and *Cell Y* conduct themselves in all respects as would unrelated parties to a traditional insurance relationship. Had the subsidiaries of *Y* entered into identical arrangements with a sibling corporation that was regulated as an insurance company, the arrangements would constitute insurance and amounts paid pursuant to the arrangements would be deductible as insurance premiums under § 162. See Rev. Rul. 2002–90, 2002–2 C.B. 985. The fact that the subsidiaries’ risks were instead shifted to a cell of a protected cell company, and distributed within that cell, does not change this result. Accordingly, the arrangements between *Cell Y* and each subsidiary of *Y* are insurance contracts for federal income tax purposes; amounts paid pursuant to those arrangements are insurance premiums, deductible under § 162 if the requirements for deduction are otherwise satisfied.

HOLDINGS

In Situation 1, the annual arrangement between *Cell X* and *X* does not constitute insurance for federal income tax purposes. In Situation 2, the arrangements between *Cell Y* and each subsidiary of *Y* do constitute insurance for federal income tax

purposes; amounts paid pursuant to those arrangements are deductible as insurance premiums under § 162 if the requirements for deduction are otherwise satisfied.

ADDITIONAL GUIDANCE

The Internal Revenue Service and the Treasury Department are aware that further guidance may be needed in this area. Notice 2008–19, this Bulletin, requests comments on further guidance that addresses when a cell of a *Protected Cell Company* is treated as an insurance company for federal income tax purposes.

DRAFTING INFORMATION

The principal author of this revenue ruling is Chris Lieu of the Office of the Associate Chief Counsel (Financial Institutions & Products). For further information regarding this revenue ruling, contact Mr. Lieu at (202) 622–3970 (not a toll-free call).

Section 280G.—Golden Parachute Payments

Federal short-term, mid-term, and long-term rates are set forth for the month of February 2008. See Rev. Rul. 2008-9, page 342.

Section 382.—Limitation on Net Operating Loss Carryforwards and Certain Built-In Losses Following Ownership Change

The adjusted applicable federal long-term rate is set forth for the month of February 2008. See Rev. Rul. 2008-9, page 342.

Section 412.—Minimum Funding Standards

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of February 2008. See Rev. Rul. 2008-9, page 342.

Section 467.—Certain Payments for the Use of Property or Services

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of February 2008. See Rev. Rul. 2008-9, page 342.

Section 468.—Special Rules for Mining and Solid Waste Reclamation and Closing Costs

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of February 2008. See Rev. Rul. 2008-9, page 342.

Section 482.—Allocation of Income and Deductions Among Taxpayers

Federal short-term, mid-term, and long-term rates are set forth for the month of February 2008. See Rev. Rul. 2008-9, page 342.

Section 483.—Interest on Certain Deferred Payments

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of February 2008. See Rev. Rul. 2008-9, page 342.

Section 642.—Special Rules for Credits and Deductions

Federal short-term, mid-term, and long-term rates are set forth for the month of February 2008. See Rev. Rul. 2008-9, page 342.

Section 807.—Rules for Certain Reserves

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of February 2008. See Rev. Rul. 2008-9, page 342.

Section 846.—Discounted Unpaid Losses Defined

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of February 2008. See Rev. Rul. 2008-9, page 342.

Section 1274.—Determination of Issue Price in the Case of Certain Debt Instruments Issued for Property

(Also Sections 42, 280G, 382, 412, 467, 468, 482, 483, 642, 807, 846, 1288, 7520, 7872.)

Federal rates; adjusted federal rates; adjusted federal long-term rate and the long-term exempt rate. For purposes of sections 382, 642, 1274, 1288, and other

sections of the Code, tables set forth the rates for January 2008.

Rev. Rul. 2008-9

This revenue ruling provides various prescribed rates for federal income tax purposes for February 2008 (the current month). Table 1 contains the short-term, mid-term, and long-term applicable fed-

eral rates (AFR) for the current month for purposes of section 1274(d) of the Internal Revenue Code. Table 2 contains the short-term, mid-term, and long-term adjusted applicable federal rates (adjusted AFR) for the current month for purposes of section 1288(b). Table 3 sets forth the adjusted federal long-term rate and the long-term tax-exempt rate described in section 382(f). Table 4 contains the ap-

propriate percentages for determining the low-income housing credit described in section 42(b)(2) for buildings placed in service during the current month. Finally, Table 5 contains the federal rate for determining the present value of an annuity, an interest for life or for a term of years, or a remainder or a reversionary interest for purposes of section 7520.

REV. RUL. 2008-9 TABLE 1				
Applicable Federal Rates (AFR) for February 2008				
	<i>Period for Compounding</i>			
	<i>Annual</i>	<i>Semiannual</i>	<i>Quarterly</i>	<i>Monthly</i>
<i>Short-term</i>				
AFR	3.11%	3.09%	3.08%	3.07%
110% AFR	3.43%	3.40%	3.39%	3.38%
120% AFR	3.74%	3.71%	3.69%	3.68%
130% AFR	4.06%	4.02%	4.00%	3.99%
<i>Mid-term</i>				
AFR	3.51%	3.48%	3.46%	3.46%
110% AFR	3.87%	3.83%	3.81%	3.80%
120% AFR	4.22%	4.18%	4.16%	4.14%
130% AFR	4.57%	4.52%	4.49%	4.48%
150% AFR	5.29%	5.22%	5.19%	5.16%
175% AFR	6.18%	6.09%	6.04%	6.01%
<i>Long-term</i>				
AFR	4.46%	4.41%	4.39%	4.37%
110% AFR	4.91%	4.85%	4.82%	4.80%
120% AFR	5.36%	5.29%	5.26%	5.23%
130% AFR	5.81%	5.73%	5.69%	5.66%

REV. RUL. 2008-9 TABLE 2				
Adjusted AFR for February 2008				
	<i>Period for Compounding</i>			
	<i>Annual</i>	<i>Semiannual</i>	<i>Quarterly</i>	<i>Monthly</i>
Short-term adjusted AFR	2.84%	2.82%	2.81%	2.80%
Mid-term adjusted AFR	3.36%	3.33%	3.32%	3.31%
Long-term adjusted AFR	4.23%	4.19%	4.17%	4.15%

REV. RUL. 2008-9 TABLE 3
Rates Under Section 382 for February 2008

Adjusted federal long-term rate for the current month	4.23%
Long-term tax-exempt rate for ownership changes during the current month (the highest of the adjusted federal long-term rates for the current month and the prior two months.)	4.34%

REV. RUL. 2008-9 TABLE 4
Appropriate Percentages Under Section 42(b)(2) for February 2008

Appropriate percentage for the 70% present value low-income housing credit	7.92%
Appropriate percentage for the 30% present value low-income housing credit	3.40%

REV. RUL. 2008-9 TABLE 5
Rate Under Section 7520 for February 2008

Applicable federal rate for determining the present value of an annuity, an interest for life or a term of years, or a remainder or reversionary interest	4.2%
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Section 1288.—Treatment of Original Issue Discount on Tax-Exempt Obligations

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of February 2008. See Rev. Rul. 2008-9, page 342.

Section 7216.—Disclosure or Use of Information by Preparers of Returns

26 CFR 301.7216-1: Penalty for disclosure or use of tax return information.

T.D. 9375

DEPARTMENT OF THE TREASURY Internal Revenue Service 26 CFR Part 301

Guidance Necessary to Facilitate Electronic Tax Administration—Updating of Section 7216 Regulations

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains regulations to update the rules regarding the disclosure and use of tax return information by tax return preparers. Among other things, the regulations finalize rules for taxpayers to consent to the disclosure or use of their tax return information by tax return preparers.

DATES: Effective Date: These regulations are effective January 7, 2008.

Applicability Date: The regulations apply to disclosures or uses of tax return information occurring on or after January 1, 2009.

SUPPLEMENTARY INFORMATION:

Background

This document contains amendments to the Regulations on Procedure and Administration (26 CFR Part 301) under section 7216 of the Internal Revenue Code. These regulations strengthen taxpayers' ability to control their tax return information by requiring that tax return preparers give taxpayers specific information, including who will receive the tax return information and the particular items of tax return information that will be disclosed or used, to allow taxpayers to make knowing, informed, and voluntary decisions over the disclosure or use of their tax information by their tax return preparer.

Section 7216 imposes criminal penalties on tax return preparers who knowingly or recklessly make unauthorized disclosures or uses of information furnished to them in connection with the preparation of an income tax return. In addition, tax return preparers are subject to civil penalties under section 6713 for disclosure or use of this information unless an exception under the rules of section 7216(b) applies to the disclosure or use.

Section 7216 was enacted by section 316 of the Revenue Act of 1971, Public Law 92-178 (85 Stat. 529). In 1988, Congress modified the section by limiting the criminal sanction to knowing or reckless, unauthorized disclosures. Public Law 100-647 (102 Stat. 3749). At the same time, Congress enacted the civil penalty that is now found in section 6713. Public Law 100-647, §6242(a) (102 Stat. 3759). In 1989, Congress further modified section 7216, directing the Treasury Department to issue regulations permitting disclosures of tax return information for quality or peer reviews. Public Law 101-239, §7739(a) (103 Stat. 3759).

The Treasury Department and the IRS proposed regulations under section 7216 on December 20, 1972 (37 FR 28070). Final regulations were issued on March 29, 1974 (39 FR 11537). These regulations are divided into three parts: §301.7216-1 for general provisions and definitions; §301.7216-2 for disclosures and uses

that do not require formal taxpayer consent; and §301.7216-3 for disclosures and uses that require formal taxpayer consent. Since the regulations were adopted in 1974, the Treasury Department and the IRS have amended §301.7216-2 on occasion, but §§301.7216-1 and 301.7216-3 have remained unchanged.

A notice of proposed rulemaking (REG-137243-02, 2006-1 C.B. 317) was published in the **Federal Register** (70 FR 72954) on December 8, 2005. Concurrently with publication of the proposed regulations, the IRS published Notice 2005-93, 2005-2 C.B. 1204 (December 07, 2005), setting forth a proposed revenue procedure that would provide guidance to tax return preparers regarding the format and content of consents to disclose and consents to use tax return information under §301.7216-3.

Written comments were received in response to the notice of proposed rulemaking. A public hearing was held on April 4, 2006. Commentators appeared at the public hearing and commented on the notice of proposed rulemaking.

All comments were considered and are available for public inspection upon request. This preamble summarizes most of the comments received by the IRS and Treasury Department. After consideration of the written comments and the comments provided at the public hearing, the proposed regulations under section 7216 are adopted as revised by this Treasury decision.

Concurrently with publication of these regulations, the IRS is publishing a revenue procedure and an advanced notice of proposed rulemaking. The revenue procedure provides guidance on the format and content of consents to disclose or use tax return information under §301.7216-3 for taxpayers filing a return in the Form 1040 series, e.g., Form 1040, Form 1040NR, Form 1040A, or Form 1040EZ. The revenue procedure also provides specific guidance for electronic signatures when a taxpayer filing a return in the Form 1040 series executes an electronic consent to the disclosure or use of the taxpayer's tax return information.

The advanced notice of proposed rulemaking requests comments regarding a proposed rule under §301.7216-3 that a tax return preparer may not obtain a consent to disclose or use tax return infor-

mation for the purpose of the tax return preparer soliciting, or the taxpayer obtaining, a refund anticipation loan (RAL) or certain other products.

Summary of Comments

1. Preamble.

Some commentators recommended that the final regulations specify the existing revenue rulings, notices, and other guidance under section 7216 that continue to have effect under the final regulations. While the final regulations do not identify all guidance that has continuing effect, the section of this Treasury decision entitled "Effect on Other Documents" specifies guidance that Treasury and the IRS have determined as contrary to the regulations.

One commentator requested that the preamble of the regulations clarify whether a tax return preparer may offer for sale an insurance policy that will reimburse the taxpayer additional tax the taxpayer is required to pay under certain circumstances involving errors by the tax return preparer. Section 7216 and the regulations thereunder govern only a tax return preparer's disclosure or use of tax return information. To the extent that a tax return preparer offers a product, such as insurance, where the offer is based on the disclosure of tax return information to a third party, or where use of such tax return information serves as the basis for making the offer, section 7216 and the regulations thereunder only govern whether use or disclosure of the tax return information requires taxpayer consent.

2. §301.7216-1 Penalty for Disclosure or Use of Tax Return Information.

A. Statutory provisions.

Some commentators recommended that Treasury and the IRS seek legislative changes to section 7216. More specifically, these commentators recommended that the amount of the section 7216 criminal penalty be increased, that the amount of the section 6713 civil penalty be increased, and that the Code be amended to provide a private right of action against tax return preparers. Another commentator recommended amending section 7216 to provide a means to abate the penalty in cases where reasonable cause and good

faith is established. This commentator also recommended that Treasury and the IRS not attempt to regulate the disclosure or use of tax return information in the context of a criminal statute, section 7216, but that only civil penalties should apply.

Requests for statutory changes to sections 7216 and 6713 are outside of the scope of these regulations. Section 7216 expressly provides for Treasury to promulgate regulations to exempt certain disclosures or uses of information from the statute's criminal sanction. Although Treasury and the IRS do not have the regulatory authority to provide for a reasonable cause exception under section 7216, the criminal penalty provided for by that statute is premised on a finding of knowing or reckless conduct.

B. Tax return preparer.

One commentator requested expanding the definition of tax return preparer to include clerical staff involved in preparation of a tax return. Because the definition of tax return preparer in the regulations already encompasses clerical staff involved in the preparation of a return, no change is needed to address this comment.

While approving of the generally broad scope of the term "tax return preparer," one commentator expressed concern that the term did not cover employees of tax return preparers who do not personally assist in the preparation of tax returns or the provision of auxiliary services. That commentator recommended that section 7216 should nonetheless apply to any employee. This comment was not adopted. The statute applies only to persons "engaged in the business of preparing, or providing services in connection with the preparation of, returns." The regulations, however, do not permit disclosure by one employee of a tax return preparer to another employee of the tax return preparer on the basis of employment status alone. See Treas. Reg. §301.7216-2(c).

Based on recent amendments to section 7701(a)(36) of the Code (which post-amendment applies more generally to tax return preparers other than income tax returns), the final regulations were revised to omit the language in the proposed regulations pertaining to the lack of uniformity of the definition of tax return preparer provided in section 7701(a)(36) and the def-

inition of tax return preparer for purposes of section 7216.

C. Tax return information.

Some commentators expressed concern that the definition of tax return information encompasses an overly broad amount of information. One commentator recommended that a taxpayer's name, address, telephone number, e-mail address, and identification number should not be treated as tax return information. Another commentator recommended that a taxpayer's name, address, and other contact information should be available for a tax return preparer to use to provide the taxpayer with any information that the tax return preparer believes may be of interest to the taxpayer. These recommendations regarding tax return information were not adopted because information revealing the identity of, or how to contact, a person is information central to one's privacy and deserving of treatment as tax return information when submitted for, or in connection with, the preparation of a tax return. Section 301.7216-2(n), however, permits tax return preparers to make limited use of taxpayer's contact information to offer tax information or additional tax return preparation services to previous customers.

One commentator recommended eliminating language from the regulations providing that information maintained in a form that is associated with the tax return preparation becomes tax return information regardless of how the information was initially obtained. The commentator questioned whether non-tax return information could become tax return information as a result of the manner in which it is stored and maintained by the tax return preparer. Treasury and the IRS agree that section 7216 protects only information furnished to a tax return preparer for, or in connection with, the preparation of a return and that information does not become tax return information merely by the method in which the information is stored. The language in the proposed regulations that is the subject of the comment was included to recognize that the protections of section 7216 may extend to information furnished by persons other than the taxpayer, including information furnished by one person

within a firm to a tax return preparer employed by the same firm. In that situation, the information in the hands of the tax return preparer would be tax return information even if the person furnishing the information had obtained it other than in connection with the preparation of a tax return. Because this rule is evident from other provisions of the regulations, and the language commented upon may create confusion, the language has been removed from these regulations.

One commentator expressed concern that the proposed regulations improperly expand upon section 7216 by defining "tax return information" to include information derived or generated from tax return information. The commentator commented that section 7216 protects only information furnished to tax return preparers, and data that a tax return preparer derives from that information should not be considered data furnished to the tax return preparer. The commentator, therefore, recommended removing this language from the regulations.

The commentator's recommendation was not adopted. Information that a tax return preparer would typically derive from other information furnished in connection with the preparation of a return could include information on the taxpayer's entitlement to deductions, credits, losses or gains, the amounts thereof, and the amount of tax due. It would frustrate the purpose of the statute not to protect this information when a taxpayer has furnished the tax return preparer the means to derive it.

Similarly, the same commentator stated that the proposed regulations improperly expand upon the statute by defining "tax return information" to include "information received by the tax return preparer from the IRS in connection with the processing of such return." The commentator recommended eliminating this language from the regulations. This recommendation was not adopted. The statute protects information furnished to a tax return preparer for, or in connection with, preparation of a return and does not require that the taxpayer have furnished the information.

Some commentators approved of the proposed regulations' definition of tax return information, but expressed concern that Example 1 in §301.7216-1(b)(3)(ii)

suggests that information supplied to register tax preparation software is not tax return information unless the tax return preparer states during the registration process that it will provide updates to registrants. These commentators, therefore, recommended deleting that fact from the example. This recommendation was adopted to explicitly provide that all information furnished to register tax return preparation software is tax return information.

Some commentators expressed concern that if information furnished to register tax return preparation software was treated as tax return information, then tax return preparers would be required to obtain consent from taxpayers prior to updating the tax return preparation software. To address this concern, section 301.7216-2(c) of the regulations has been revised.

D. Disclosure and use.

One commentator stated that the definition of "use" is overly broad. The commentator proposed that the "use" of tax return information should not include tax return preparers informing taxpayers of the availability of products and services that tax return preparers offer that could benefit taxpayers. As an example, the commentator stated that informing a taxpayer about the availability of a refund anticipation loan based on the taxpayer's tax return information should not be a "use" of tax return information. This recommendation was not adopted. The regulations require consents for tax return preparers to use tax return information so that taxpayers themselves determine whether they want additional information regarding products and services that might benefit them. The potential uses of tax return information should be clearly described by tax return preparers and the potential uses must be consented to by taxpayers before such uses occur.

Two commentators recommended that tax return preparers should be responsible for subsequent disclosures or uses of tax return information by third parties to whom tax return preparers made an authorized disclosure of tax return information. This recommendation was not adopted because section 7216 does not apply to third parties who are not tax return preparers.

E. *Providing auxiliary services.*

Section 301.7216-1(b)(2)(iii) of the proposed regulations provides that a person is engaged in the business of providing auxiliary services in connection with the preparation of tax returns as described in paragraph (b)(2)(i)(B) of that section if, in the course of the person's business, the person holds himself out to tax return preparers or to taxpayers as a person who performs auxiliary services, whether or not providing the auxiliary services is the person's sole business activity and whether or not the person charges a fee for the auxiliary services. One commentator recommended broadening the definition of auxiliary services to include analysis of data for purposes of monitoring the tax return preparer's business for fraud prevention and provision of data storage services. These services as well as similar services are typical of the types of auxiliary services that can be provided to tax return preparers as contemplated by §301.7216-1(b)(2)(iii) and are already covered by the broad definition of auxiliary services in the regulations. The same commentator also recommended broadening the definition of auxiliary services to include the analysis of customer activity to improve services and assistance in connection with preparation for taxpayer audits. These services are already addressed in other parts of the regulations. See §§301.7216-2(o) and 301.7216-2(k).

F. *Exclusions under §301.7216-1(b)(2)(v).*

One commentator recommended that the express exclusion under §301.7216-1(b)(2)(v) of the proposed regulations of certain persons from the definition of tax return preparer should be extended to include persons who provide "a broad range of financial products and services . . . to customers of tax return preparers, including savings, transaction, and retirement accounts." The commentator's recommendation was not adopted as the regulations do not provide an exhaustive list of the persons identified as excluded from the definition of tax return preparer. To the extent the service providers suggested to be excluded by the commentator provide services only incidentally related to the preparation of the

return, these persons would be excluded under the regulation.

G. *Hyperlinks.*

One commentator recommended that the regulations should not treat as a disclosure by a tax return preparer the situation where a taxpayer is transferred from the tax return preparer's website to a different website and the taxpayer separately enters information on the different website. This recommendation was not adopted because the regulations already do not treat this fact pattern as a disclosure by the tax return preparer.

3. *§301.7216-2 Permissible Disclosures or Uses Without Consent of the Taxpayer.*

A. *Disclosures to the IRS.*

Section 301.7216-2(b) of the proposed regulations provides that tax return preparers may disclose to the IRS any tax return information the IRS requests to assist in the administration of electronic filing programs. One commentator requested limiting this rule to "specific necessary purposes, such as compliance by electronic return originators." This recommendation was not adopted. Return information in the hands of the IRS is already protected from unauthorized disclosure. See, e.g., section 6103.

Other commentators expressed concern regarding whether §301.7216-2(b) permitted disclosures of tax return information to the IRS in general. Because the purpose of these regulations is to protect taxpayers from the unauthorized uses and disclosures by tax return preparers, and because tax return information in the hands of the IRS is already protected from unauthorized disclosure, §301.7216-2(b) has been modified to clarify that return preparers may disclose any tax return information to the IRS for any purpose.

B. *Use by tax return preparer for purposes of updating software.*

Section 301.7216-2(c)(1) of the final regulations has been revised to provide that if a tax return preparer provides software to a taxpayer that is used in connection with the preparation or filing of a tax return, the tax return preparer may use the

taxpayer's tax return information to update the taxpayer's software for the purpose of addressing changes in IRS forms, e-file specifications and administrative, regulatory and legislative guidance or to test and ensure the software's technical capabilities without obtaining the taxpayer's consent under §301.7216-3.

C. *Disclosure to a tax return preparer within the same firm located outside of the United States.*

Section 301.7216-2(c) of the proposed regulations generally provides that an officer, employee, or member of a tax return preparer in the United States may disclose tax return information to another officer, employee, or member of the same tax return preparer located within the United States. Section 301.7216-2(c)(1) of the proposed regulations provides that the taxpayer must give consent under §301.7216-3 prior to any disclosure of tax return information by an officer, employee, or member of a tax return preparer in the United States to an officer, employee, or member of the same tax return preparer located outside of the United States or any territory or possession of the United States. One commentator expressed concern that this rule was too strict with respect to multinational companies and employees on assignment outside of the United States. This commentator stated that such taxpayers anticipate that their tax return information will be disclosed outside of the United States. This commentator recommended that consent under §301.7216-3 should not be required with respect to disclosures when the taxpayer is a multinational company or an individual taxpayer employed or on assignment outside of the United States and that an engagement letter explaining potential circumstances involving disclosures overseas ought to be permitted in these situations.

This recommendation was not adopted. As explained in the preamble to the proposed regulations, the Treasury Department and IRS believe that a separate explanation is required under these circumstances in order to advise taxpayers that their tax return information is being disclosed to tax return preparers located outside the United States. The final regulations, however, address the commentator's

request for additional flexibility with respect to the form and manner of the consent for taxpayers other than individuals. For tax return preparers providing tax return preparation services to taxpayers who do not file an income tax return in the Form 1040 series, e.g., Form 1040, Form 1040NR, Form 1040A, or Form 1040EZ, a consent to disclose tax return information outside the United States may be in any format, including an engagement letter to a client, as long as the consent provides sufficient information to enable the taxpayer to provide informed consent. For tax return preparers providing tax return preparation services to taxpayers who file an income tax return in the Form 1040 series, the regulations provide that the Secretary may issue guidance, by publication in the Internal Revenue Bulletin, proscribing the form and manner of the consent to disclose tax return information, including disclosure of return information outside the United States. This rule is consistent with the general rule adopted by these final regulations with respect to a tax return preparer's request for consent to disclose tax return information. See section 301.7216-3(a)(3).

Additionally, one commentator recommended that, rather than provide limitations on the disclosure of tax return information by a tax return preparer within the United States to another tax return preparer of the same firm who is located outside of the United States, the regulations should instead permit such disclosures without consent if the tax return preparer of the same firm outside of the United States consents to adhere to the rules of section 7216. This recommendation was not adopted because it does not inform taxpayers that their tax return information will be disclosed outside of the United States or allow taxpayers to control the decision whether their information is disclosed overseas.

D. Disclosures to other tax return preparers.

Section 301.7216-2(d) of the proposed regulations provides that disclosures between tax return preparers are authorized when the disclosures (i) assist in the preparation of a return; (ii) the services provided by the recipient of the disclosure are not substantive determinations or advice

affecting a taxpayer's reported tax liability; and (iii) the disclosure is to a tax return preparer located in the United States. Two commentators expressed concern that the phrase "substantive determinations or advice" is a vague standard and recommended the use of examples in the regulations that adequately define the phrase. The final regulations clarify the meaning of substantive determinations and provide an example to illustrate the operation of this rule.

One commentator recommended adopting the professional ethics rules of the American Institute of Certified Public Accountants (AICPA) on outsourcing in lieu of §301.7216-2(d) of the proposed regulations. Rule 102 of the AICPA Code of Professional Conduct requires that, prior to sharing confidential client information (such as a tax return) with a third-party service provider, an AICPA member must inform the client, preferably in writing, that the member may use a third-party service provider when providing professional services to the client. Unlike the rules in the regulations, the AICPA Code of Professional Conduct does not require that the client consent to the disclosure of tax return information when substantive determinations or advice are sought from third parties. Under the AICPA rules, AICPA members who use third-party service providers remain responsible for the work done by the service providers and they must contract with the third-party service provider for the service provider to monitor the confidentiality of the client's information to the third-party service provider. The commentator's recommendation that the regulations adopt only the protections of the AICPA ethics rules was not adopted. The Treasury Department and the IRS are concerned that taxpayers and tax return information would not be adequately protected if a tax return preparer could disclose tax return information to any third-party service provider without taxpayer consent to that disclosure.

One commentator recommended modifying §301.7216-2(d) of the proposed regulations to allow disclosures between franchisors and franchisees in the tax return preparation business according to the terms of their franchise agreement. The commentator's recommendation was not adopted because the existence of a written franchise agreement should not affect the

confidentiality of a taxpayer's tax return information.

One commentator critiqued §301.7216-2(d) because it will limit the benefits tax return preparation firms may enjoy from using foreign outsourcing. Foreign outsourcing is not prohibited by the final regulations, which permit the disclosure of tax return information outside of the United States if the taxpayer consents to such disclosure. One commentator recommended that tax return preparers should be allowed to disclose tax return information to third-party service providers subject to the requirements of the privacy provisions of Title V of the Gramm-Leach-Bliley Act, Public Law 106-102 (113 Stat. 1338) (GLBA). Specifically, the commentator proposed that the regulations should permit tax return preparers to: (1) execute a written contract with a service provider limiting the service provider's disclosure or use of tax return information; (2) select and retain service providers that are capable of safeguarding tax return information; and (3) implement contractual provisions requiring service providers to develop and maintain appropriate information safeguards. This recommendation was not adopted. While the requirements of section 7216 and these regulations do not override any requirements or restrictions of the GLBA, the sensitivity of tax return information justifies affording tax return information stronger protections than other information subject to the GLBA.

E. Disclosure pursuant to an order of a court, or an administrative order, demand, request, summons or subpoena which is issued in the performance of its duties by a Federal or State agency, the United States Congress, a professional association ethics committee or board, or the Public Company Accounting Oversight Board

One commentator recommended that the title of proposed §301.7216-2(f) be revised to add the word "request" following the word "demand," to align the subsection's title with the regulation's language in §301.7216-2(f)(5). This recommendation was adopted in the final regulation.

One commentator recommended replacing the phrase "professional ethics board" in proposed §301.7216-2(f) with the phrase "certain professional associ-

ation ethics committees or boards.” The commentator noted that this change would avoid confusion as to whether the reference to professional ethics boards means governmental entities that control licensing for CPAs or whether the phrase would include professional associations that have boards or committees that discipline their members, such as the AICPA or state and local bar associations. This recommendation was adopted, in part, by changing the phrase “professional ethics board” to “professional association ethics committee or board.” Section 301.7216–2(f)(4)(ii) separately addresses disclosures to government entities charged with licensing, registration, or regulation of tax return preparers.

One commentator recommended permitting disclosure of tax return information without taxpayer consent pursuant to disclosures required by Federal or State laws and administrative rules, but did not identify any specific rule or law that required a disclosure in circumstances contrary to either the preexisting regulations or the proposed regulations. Preexisting regulations already permitted disclosures pursuant to an order of a court or a Federal or State agency. These final regulations permit disclosures pursuant to an order of a court or an administrative order, demand, summons or subpoena that is issued in the performance of its duties by a Federal or State agency, the United States Congress, a professional association ethics committee or board, or the Public Company Accounting Oversight Board. The protections offered by limiting disclosures to responses to specific governmental or quasi-governmental requests provide appropriate protection for taxpayer privacy.

One commentator expressed concern about proposed §301.7216–2(f)(5) and the safeguarding of tax return information received by a professional association board or committee conducting an ethics investigation. The commentator recommended revising §301.7216–2(f)(5) to expressly prohibit professional associations from publishing as part of any resulting professional disciplinary determination the tax return information of a taxpayer furnished to them during an ethics investigation of a preparer unless the taxpayer provides consent. This recommendation was not adopted because section 7216 does not

provide for penalties against third parties who receive tax return information in this context.

One commentator recommended rewording proposed §301.7216–2(f)(6) to provide the following: “A written request from the Public Company Accounting Oversight Board (PCAOB) in connection with an inspection under section 104 of the Sarbanes-Oxley Act of 2002, 15 U.S.C. 7214, or an investigation under section 105 of such Act, 15 U.S. 7215, for use in accordance with such Act.” The commentator noted that this wording describes more clearly the situations in which disclosures to the PCAOB are permitted, and to permit registered firms and their associated persons to comply with their disclosure obligations under the Act. This recommendation was adopted.

One commentator expressed concern that permitting the disclosure of tax return information pursuant to a subpoena issued by the United States Congress is inconsistent with the rules regarding disclosures by the IRS to Congress under section 6103(f). The commentator stated that the regulations may provide a method to avoid the specific disclosure rules of section 6103(f), which are designed to protect taxpayers and prevent Congressional abuse of returns or return information. Another commentator recommended eliminating the term “demand” in §301.7216–2(f)(4)(i) because the commentator believes the term is too broad and could permit any Federal agency to simply ask for tax return information even if the agency does not have authority to issue “formal legal orders” compelling the disclosure. These recommendations were not adopted. Both Congress and Federal agencies are presumed to act in accordance with the law and there are other limitations on their abilities to seek tax return information.

F. Disclosure for use in securing legal advice, Treasury investigations, or court proceedings.

Final section 301.7216–2(g) has been revised to confirm that a tax return preparer may disclose tax return information to an attorney for purposes of the preparer securing legal advice.

G. Tax return preparers working for the same firm.

Section 301.7216–2(h)(1)(ii) provides that a tax return preparer’s law or accounting firm does not include any related or affiliated firms. Some commentators expressed concern that this rule reduces the application of the §301.7216–2 exceptions for tax return preparers that are structured as separate legal entities, but are closely related. One commentator recommended that the regulations be revised to provide that the “same firm” standard be determined in a manner similar to the rules for qualified employee plans for a single employer. This recommendation was not adopted. Taxpayers should have a clear understanding with whom they are dealing. Adopting this recommendation would require that a taxpayer understand complex rules about which separate legal entities are part of the “same firm” as their tax return preparer to be able to understand who might receive their tax return information. Additionally, a tax return preparer has the ability to obtain consent from a taxpayer to disclose tax return information to a related or affiliated firm.

H. Disclosure or use of tax return information in preparation for audit.

One commentator recommended that a tax return preparer should be permitted to disclose tax return information to another tax return preparer so that the second tax return preparer can provide assistance in connection with the audit of a return under the law of any State or political subdivision thereof, the District of Columbia, or any territory or possession of the United States. This comment was not adopted because §301.7216–2(k) already permits such disclosures.

I. Payment for tax preparation services.

Section 301.7216–2(l) provides that a tax return preparer may disclose and use, without the taxpayer’s written consent, tax return information that the taxpayer provides to the tax return preparer to pay for tax preparation services to the extent necessary to process the payment. One commentator recommended applying this rule to the collection of payments. This recommendation was adopted. The exception under §301.7216–2(l) for the collection of

payments is subject to the same limitations as the rule for processing payments. Only tax return information that the taxpayer provided to the tax return preparer to pay for tax return preparation services may be used to collect payment. This limitation precludes tax return preparers from using any other tax return information to collect on delinquent payments.

J. Lists for solicitation of tax return business.

Section 301.7216-2(n) of the proposed regulations provides that a tax return preparer may compile and maintain a separate list containing solely the names, addresses, e-mail addresses, and phone numbers of taxpayers whose tax returns the tax return preparer has prepared or processed. The proposed regulations also state that this list may be used by the compiler solely to contact the taxpayers on the list for the purpose of offering tax information or additional tax return preparation services. One commentator recommended adding that no mention of services or products other than those related to tax preparation services may be made. Treasury and the IRS agree that the prohibition on using the list to solicit business other than tax return preparation services could be strengthened, and have modified §301.7216-2(n) to address the commentator's concern.

K. Producing statistical information in connection with tax return preparation business.

Section 301.7216-2(o) of the proposed regulations permits a tax return preparer to use tax return information to prepare anonymous statistical compilations for limited purposes related to management or support of the tax return preparer's business. Two commentators recommended that the disclosure or use of tax return information in statistical compilations should be limited to "internal management" because "support" might be read to allow a tax return preparer to target specific customers with advertising. This recommendation was not adopted because §301.7216-2(o) specifically prohibits the disclosure or use of statistical compilations in connection with, or in support of, businesses other than tax return preparation, and use of lists to solicit additional tax

return preparation business is specifically governed, and limited, by §301.7216-2(n).

One commentator recommended that statistical compilations of tax return information that do not identify taxpayers should not be considered "tax return information" for purposes of section 7216. The commentator stated that if statistical information is treated as "tax return information," such a rule could prevent tax return preparers (especially tax return preparers that are publicly traded) from reporting essential data to financial regulators or to market participants to provide an accurate picture of the tax return preparer's performance and financial condition. In response to the concern raised by the commentator, the final regulation was modified to provide that the compiler of the statistical compilation may not disclose the compilation, or any part thereof, to any other person unless the disclosure of the statistical compilation is made in order to comply with financial accounting or regulatory reporting requirements or occurs in conjunction with the sale or other disposition of the compiler's tax return preparation business.

One commentator recommended that tax return preparers located within the same firm should be permitted, without obtaining consent, to use tax return information for "the management, support or maintenance of the tax return preparer's business." This recommendation was not adopted. Because the regulations already permit a tax return preparer to use tax return information to prepare statistical compilations for limited purposes related to management or support of the tax return preparer's business, it is unclear how the commentator's recommendation would further aid in the management or support of a tax return preparer's business.

One commentator recommended that the regulations require that "taxpayer identifying" data, such as names and social security numbers, be redacted from statistical information. This recommendation was not adopted. The regulations already require that statistical compilations must be "anonymous."

L. Quality or peer reviews.

Section 301.7216-2(p) of the proposed regulations provides that a quality or peer review may be conducted only by attor-

neys, certified public accountants, enrolled agents, and enrolled actuaries who are eligible to practice before the Internal Revenue Service. Some commentators recommended that this subsection of the proposed regulations should be revised to permit other professionals to participate in quality or peer reviews. This recommendation was not adopted. The restriction helps to prevent unauthorized disclosures of tax return information by limiting participation in such reviews to those persons subject to Circular 230, 31 C.F.R. Part 10.

M. Extraction of tax return information within software only for the purposes of reducing repetitive data entry.

One commentator recommended that the use of computer software designed to assist with the preparation of an income tax return should be allowed without consent to "extract" certain tax return information once entered, such as the taxpayer's name and address, and reprint such information in required fields on the same return in order to eliminate repetitive data entry. This comment was not adopted because the regulations do not prohibit such a use of tax return information where the information is being used for the permitted purpose of preparing the taxpayer's tax return.

4. Proposed §301.7216-3: Disclosures and Uses Authorized by Taxpayer Consent.

A. Consent to disclose tax return information.

Some commentators expressed concern that the proposed regulations authorize the IRS to make available for sale to third parties its internal records and data containing tax return information. This concern reflects a fundamental misunderstanding of the proposed regulations. The proposed regulations do not address any disclosure of tax return information by the IRS; the proposed regulations address only the disclosure and use of tax return information by tax return preparers. Separate laws, including section 6103, strictly protect the confidentiality of returns and return information in the hands of IRS employees and others.

Some commentators expressed concern that the proposed regulations would loosen the current rules regarding a tax return

preparer's ability to disclose a client's tax return information. This concern is based on a misunderstanding of the purpose and content of the proposed and preexisting regulations. Section 301.7216-3(a)(1) of the proposed regulations provides that, unless section 7216 or §301.7216-2 authorizes the disclosure of tax return information, a tax return preparer may not disclose a taxpayer's tax return information prior to obtaining consent from the taxpayer. Since 1974, section 301.7216-3(a)(2) has provided that, "[i]f a tax return preparer has obtained from a taxpayer a consent . . . , he may disclose the tax return information of such taxpayer to such third persons as the taxpayer may direct." Thus, the proposed regulations contained the same substantive rule that has been in place for over 30 years. Throughout the long-standing existence of former §301.7216-3(a)(2), there has been no objection to the provision that allowed taxpayers to provide informed consent to tax return preparers disclosing tax return information to third parties.

Nonetheless, commentators criticized the proposed rule, stating that it could allow tax return preparers to induce clients into providing unknowing or inadvertent consents to sell or otherwise disclose tax return information. Furthermore, they argue that disclosure to third parties could result in identity theft. Thus, one solution these commentators recommend is to prohibit taxpayers from ever consenting to the disclosure of their tax return information.

The Treasury Department and IRS did not adopt the commentators' recommendation. Rather, the final regulations retain the general rule that has been in place for more than 30 years recognizing that taxpayers should have control over their own tax return information and that taxpayers should, with appropriate limits and safeguards, be able to direct tax return preparers to disclose tax return information as taxpayers see fit. This rule parallels the statutory rule in section 6103(c) that allows taxpayers to consent to the IRS disclosing returns or return information to third parties of the taxpayer's choosing.

In addition, this rule is consistent with the privacy protection regime in the Health Insurance Portability and Accountability Act (HIPAA), Public Law 104-191 (110 Stat. 1936). HIPAA permits health care providers and health plans to disclose in-

formation about health status, provision of health care, or payment to a third party if they have obtained authorization from the individual patient.

While identity theft is a significant concern, Treasury and the IRS do not believe a generalized concern regarding the potential for criminal activity by third parties should preclude taxpayers from being able to direct the disclosure of tax return information to third parties for legitimate reasons of the taxpayer's own choosing, particularly in the absence of any evidence that disclosure of tax return information by tax return preparers has been a source of identity theft problems.

While the idea of a complete prohibition on consent to disclosure was rejected, Treasury and the IRS did revise §301.7216-3(b)(5), based on several factors. These factors include: 1) the fact that it is not necessary for tax return preparers to disclose certain taxpayer identifying information to other tax return preparers who are assisting them in preparing a return; 2) the important role a social security number (SSN) plays in the tax administration process, and the heightened potential for misuse when an SSN is readily associated with confidential information, such as tax return information; and 3) the heightened concern about the theft of an individual's confidential information resulting from disclosures outside the United States. Section 301.7216-3(b)(4) now provides that a tax return preparer located within the United States, including any territory or possession of the United States, may not obtain consent to disclose a taxpayer's SSN to a tax return preparer located outside of the United States or any territory or possession of the United States. Thus, if a tax return preparer located within the United States obtains consent from a taxpayer to disclose tax return information to another tax return preparer located outside of the United States, as provided under §§301.7216-2(c) and 301.7216-2(d), the tax return preparer located in the United States may not disclose the taxpayer's SSN, and the tax return preparer must redact or otherwise mask the taxpayer's SSN before the tax return information is disclosed outside of the United States. If a tax return preparer located within the United States initially receives or obtains a taxpayer's SSN from another tax return preparer located outside of the United

States, however, the tax return preparer within the United States may, without consent, retransmit the taxpayer's SSN to the tax return preparer located outside the United States that initially provided the SSN to the tax return preparer located within the United States. Where a taxpayer-client requests that a tax return preparer within the United States transfer the return preparation engagement to a tax return preparer located outside the United States, the preparer must still redact or otherwise mask the taxpayer's SSN before the information is disclosed and, in this situation, it will be incumbent upon the taxpayer to provide the SSN directly to the tax return preparer located abroad.

Some commentators recommended that the regulations provide taxpayers with the ability to informally initiate a request for the disclosure of tax return information from their tax return preparers without formally following the consent rules of §301.7216-3. This recommendation was not adopted. As a practical matter, it would be difficult to distinguish when a taxpayer informally initiates a request for the disclosure of tax return information and when tax return preparers merely claim that a taxpayer initiated the request for disclosure. Additionally, tax return preparers are always free to provide taxpayers their own returns and taxpayers may disclose tax return information to others directly.

Other commentators recommended that the regulations should prohibit disclosure to third-party solicitors and not allow taxpayers to consent to disclosures for the purpose of receiving solicitations because the risks to the taxpayer of providing consent inadvertently are too great in comparison to the benefit of receiving solicitations from third parties. This recommendation was not adopted because it denies taxpayers the ability to control and direct the disclosure of their own tax return information. If taxpayers do not wish to receive offers or solicitations from third parties, they can simply refuse to provide the consent needed for third parties to receive their tax return information. If a tax return preparer obtains written consent under circumstances that make the consent unknowing or uninformed, the consent would be invalid under the requirements of the regulations.

B. Consent to use of tax return information.

Section 301.7216-3 of the preexisting regulations provides that a consent to use tax return information does not apply for purposes of facilitating the solicitation of the taxpayer's use of any services or facilities furnished by a person other than the tax return preparer, unless the other person and the tax return preparer are members of the same affiliated group of corporations within the meaning of section 1504. The proposed regulations removed this "affiliated group" limitation because the affiliated group concept has little application in the context of modern return preparation businesses. The proposed regulations also reflected a determination by the IRS and Treasury Department that a taxpayer's ability to consent to a preparer's use of tax return information to solicit additional business should not be limited by arbitrary factors largely beyond the taxpayer's knowledge or control, such as the size, diversity, or organizational structure of the tax return preparer. Some commentators expressed concern that removal of the "affiliated group" limitation would make it easier for tax return preparers to disclose tax return information to third parties for marketing purposes. This comment reflects a misunderstanding of the nature of a consent governing a tax return preparer's use of tax return information. Use consents are limited to what a tax return preparer can do with tax return information in the tax return preparer's own hands; use consents cannot be used in connection with disclosures to third parties. Thus, identity theft or other abuses by third parties could not arise from taxpayers providing use consents to tax return preparers.

Further, prohibiting the commercial use of tax return information outright would result in no longer allowing legitimate uses of tax return information that have evolved over time as standard commercial practices. For example, tax return preparers could not use tax return information to advise taxpayers of strategies that may positively affect the taxpayers' finances such as individual retirement accounts or qualified tuition programs, or of the taxpayers' eligibility to participate in government benefit programs, such as food stamps.

C. Prohibit tax return preparers from disclosing tax return information for any reason unrelated to the preparation of a tax return.

Many commentators recommended prohibiting tax return preparers from disclosing tax return information for any purpose unrelated to the preparation of tax returns. This recommendation was not adopted because there are many legitimate purposes for the disclosure of tax return information identified in §301.7216-2, such as the disclosure of tax return information for the reporting of a crime or for an ethics investigation. Similarly, there are legitimate purposes, other than tax return preparation, when a taxpayer would choose to consent to the tax return preparer's disclosure of tax return information.

As an alternative, some commentators recommended that the regulations prohibit or greatly restrict the use or disclosure of tax return information for marketing purposes. They specifically recommended banning tax return preparers from disclosing tax return information in association with taxpayers seeking refund anticipation loans (RALs) and similar products. Treasury and the IRS did not adopt this recommendation because it was not contained in the proposed regulations and could have a significant impact on existing business practices. Concurrently with the publication of these final regulations, however, Treasury and the IRS are requesting comments on a proposed rule that, if ultimately adopted as final, would prohibit tax return preparers from using or disclosing tax return information for the purpose of soliciting, or the taxpayer obtaining, a RAL or certain other products.

Commentators also recommended that disclosure of tax return information by tax return preparers should be conditioned upon the existence of an agreement by third parties receiving the information that the tax return information will not be used for any purpose other than the purpose for which the information was provided. This recommendation was not adopted because policing agreements by third parties is outside the scope of section 7216. Section 7216 governs only the actions of tax return preparers.

D. Obtaining consent through engagement letters.

Some commentators recommended that when the regulations require consent to disclose or use tax return information, tax return preparers should be permitted to obtain such consent from "large taxpayers," such as large corporations, through an engagement letter. These commentators observed that it is ordinary business practice for tax return preparers and large taxpayers to negotiate and set the terms of the provision of services, including the preparation of income tax returns, in an engagement letter. This recommendation was adopted. Treasury and the IRS agree that requiring multiple, separate consents would impose a significant burden and could frustrate these taxpayers' ability to comply with tax laws and other regulatory and reporting requirements. Section 301.7216-3(a)(3) has been modified to provide a set of requirements regarding the format and content of consents to disclose and use tax return information with respect to taxpayers filing income tax returns in the Form 1040 series, *e.g.*, Form 1040, Form 1040NR, Form 1040A, or Form 1040EZ, and a separate set of requirements regarding the format and content of consents to disclose and use tax return information with respect to taxpayers filing all other tax returns. Under §301.7216-3(a)(3)(iii), for tax return preparers providing tax return preparation services to taxpayers who do not file an income tax return in the Form 1040 series, a consent to use or a consent to disclose may be in any format, including an engagement letter to a client, as long as the consent complies with the requirements of §301.7216-3(a)(3)(i).

E. Conditioning services on consent.

Section 301.7216-3(a)(1) provides that a consent to use or disclose tax return information must be knowing and voluntary. Section 301.7216-3(a)(1) has been modified to clarify that to condition the provision of services on the taxpayer's consent will make the consent involuntary and invalid unless §301.7216-3(a)(2) applies.

Section 301.7216-3(a)(2) provides that a tax return preparer may condition its provision of preparation services upon a taxpayer's consenting to disclosure of the taxpayer's tax return information to another

tax return preparer for the purpose of performing services that assist in the preparation of, or provide auxiliary services in connection with the preparation of, the tax return of the taxpayer. One commentator requested a clarification regarding whether a tax return preparer with offices within and outside of the United States is permitted to condition its provision of tax preparation services to a taxpayer outside of the United States on the taxpayer consenting to disclosure. The final regulations permit a tax return preparer with offices within and outside of the United States to condition its provision of tax preparation services to a taxpayer on the taxpayer's consenting to disclosure to a return preparer located outside the United States. An example was added to the final regulations to clarify this rule.

Other commentators recommended that the regulations should prohibit tax return preparers from conditioning the provision of any services upon consent. This recommendation was adopted by inserting the word "any" before "services" in §301.7216-3(a)(1), to which §301.7216-3(a)(2) provides the only exception.

F. Requests to consent after completed tax return provided to taxpayer.

Proposed section 301.7216-3(b)(2) provides that a tax return preparer may not request a taxpayer's consent to disclose or use tax return information after the tax return preparer provides a completed tax return to the taxpayer for signature. Commentators suggested that there may be legitimate circumstances where a request to consent is necessary in light of taxpayer preferences and is part of client service provided by the preparer. Specifically, the commentators gave the example of a taxpayer requesting that his or her tax return preparer disclose the past three years of the taxpayer's tax returns to his or her attorney for purposes of preparing the client's estate plan. Under the proposed regulation, a request for consent to disclose would be untimely in this situation, even though the taxpayer requests the disclosure as part of the client service provided by the tax return preparer. As indicated by the provisions regarding solicitation of other business that were included in the previous final regulations, the Treasury Department

and IRS believe that taxpayers should not be the subject of repetitive solicitation requests for business made by tax return preparers after the tax preparation engagement has ended. Consistent with previous final regulations, the final regulation in §301.7216-3(b)(2) has been modified to state that a tax return preparer may not request a taxpayer's consent to disclose or use tax return information for purposes of solicitation of business unrelated to tax return preparation after the tax return preparer provides a completed tax return to the taxpayer for signature. Under the final regulations, the preparer would not be precluded from requesting consent to disclose the past three years of the taxpayer's tax returns to his or her attorney for purposes of preparing the client's estate plan according to the example provided by commentators.

G. Prohibition on multiple requests for consent.

Proposed section 301.7216-3(b)(3) provides that if a taxpayer declines to provide consent to a disclosure or use of tax return information, a tax return preparer cannot make another request for consent. Some commentators recommended that the regulations permit a tax return preparer to clarify the purpose and extent of the consent if necessary after the taxpayer declines to provide consent, and that such a clarification should not be treated as a second request by the tax return preparer to obtain a consent. Another commentator stated that tax return preparers should be permitted to request consent whenever they wish so long as the consent properly describes the nature of, and reasons for, potential disclosures or uses. The commentators' recommendations were based upon the recognition that there may be legitimate reasons for the preparer to more thoroughly explain the request for consent and how the consent relates to the tax preparation engagement. However, Treasury and the IRS are concerned that lack of restrictions regarding multiple requests for consent regarding the same or similar request may cause undue pressure to consent where there are repetitious requests. In light of these concerns, section 301.7216-3(b)(3) has been modified to provide that, for purposes unrelated to a tax preparation engagement, if a taxpayer

declines a request for consent to the disclosure or use of tax return information, the tax return preparer may not solicit from the taxpayer another consent for a purpose substantially similar to that of the rejected request. Under this rule, there is no prohibition regarding the taxpayer independently asking the tax return preparer about a disclosure or use of the taxpayer's same tax return information after a declined consent request.

H. Multiple disclosures or multiple uses within a single consent form.

Section 301.7216-3(c)(1) of the proposed regulations provides that a taxpayer may consent to multiple disclosures within the same written document, or multiple uses within the same written document. One commentator recommended permitting taxpayers to consent to multiple disclosures and multiple uses with the same form. Another commentator recommended prohibiting a taxpayer from consenting to multiple disclosures within the same written document, or multiple uses within the same written document, in order to avoid potential taxpayer confusion. These recommendations were not adopted.

The proposed rule was intended to emphasize that disclosure and use are two distinct concepts, and a taxpayer may consider consenting to one and not the other. The comments to the proposed regulations demonstrated that there is potential for confusion regarding the distinction between disclosure and use. Treasury and the IRS believe it is appropriate to require separate consents in situations where there is a probability that the taxpayer could become confused over the distinction between use and disclosure. Section 301.7216-3(c)(1) of the final regulations provides that for taxpayers who are filers of returns in the Form 1040 series, the proposed rule is retained. The rule requiring separate consents is limited to individuals because use or disclosure of that tax return information involves situations where confusion is most likely to occur.

I. Disclosure of all information contained within a return.

Section 301.7216-3(c)(2) of the proposed regulations provides that a consent

authorizing the disclosure of all information contained within a return must set forth an explanation of the reason why a consent authorizing a more limited disclosure of tax return information is unsatisfactory for the purpose of the consent. Some commentators characterized this requirement as burdensome in certain situations and recommended eliminating this requirement. Commentators reasoned that a third-party service provider, such as the taxpayer's attorney, may request a copy of the return and the requirement to provide an explanation would interject the preparer between the requirements imposed by the third-party service provider and the taxpayer. In light of these concerns, section 301.7216-3(c)(2) of the final regulations modifies this provision to provide that where a consent authorizes the disclosure of a copy of the taxpayer's tax return or all information contained within a return, the consent must provide that the taxpayer has the ability to request a more limited disclosure of tax return information as the taxpayer may direct.

Some commentators concerned with marketing of tax return information recommended that disclosure of the entire tax return should not be permitted under any circumstances. The commentators' rationale was that disclosure of the entire return is never necessary for marketing purposes. This recommendation was not adopted because, in general, taxpayers should have control over their own tax return information and they should be able to direct tax return preparers to disclose tax return information as the taxpayers see fit.

J. Duration of consent.

Section 301.7216-3(b)(5) of the proposed regulations provides that no consent to the disclosure or use of tax return information may be effective for a period longer than one year from the date the taxpayer signed the consent. Some commentators expressed concern that the duration of consent may need to be effective for a period greater than one year. One commentator observed that when preparing expatriate tax returns, there may be circumstances when the due date for a foreign tax return or other related document is more than one year after the taxpayer signs the consent. Some commentators recommended

that taxpayers should be permitted to establish the duration of consent, and the one-year period should apply only if the taxpayer fails to specify a different duration of consent. This recommendation was adopted in the final regulations.

K. Consents read aloud.

Some commentators recommended that §301.7216-3 require that consents be read aloud by audio output. This recommendation was not adopted. This recommendation would impose a burdensome rule that is outside the norm of standard practices for obtaining consent.

5. General Comments.

Several commentators recommended rejecting all of the provisions of the proposed regulations under section 7216. The recommendations to reject the proposed regulations were not adopted. The proposed regulations were finalized to provide updates relating to uses and disclosures of tax return information in the electronic return preparation context and create an environment that allows taxpayers to make informed decisions regarding the disclosure or use of their tax return information.

Effect on Other Documents

The following publication is obsolete on or after January 1, 2009: Rev. Rul. 79-114, 1979-1 C.B. 441 (1979).

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and, because these regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f), the notice of proposed rulemaking preceding these regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal author of these regulations is Dillon Taylor, formerly of the Office of the Associate Chief Counsel (Procedure and Administration). For further information regarding these regulations, contact Lawrence Mack of the Office of the Associate Chief Counsel (Procedure and Administration) at 202-622-4940 (not a toll-free call).

* * * * *

Amendment to the Regulations

Accordingly, 26 CFR part 301 is amended as follows:

PART 301—PROCEDURE AND ADMINISTRATION

Paragraph 1. The authority citation for part 301 continues to read, in part, as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 301.7216-0 is added to read as follows:

§301.7216-0 Table of contents.

This section lists captions contained in §§301.7216-1 through 301.7216-3.

§301.7216-1 Penalty for disclosure or use of tax return information.

- (a) In general.
- (b) Definitions.
- (c) Gramm-Leach-Bliley Act.
- (d) Effective date.

§301.7216-2 Permissible disclosures or uses without consent of the taxpayer.

- (a) Disclosure pursuant to other provisions of the Internal Revenue Code.
- (b) Disclosures to the IRS.
- (c) Disclosures or uses for preparation of a taxpayer's return.
- (d) Disclosures to other tax return preparers.
- (e) Disclosure or use of information in the case of related taxpayers.
- (f) Disclosure pursuant to an order of a court, or an administrative order, demand, request, summons or subpoena which is issued in the performance of its duties by a Federal or State agency, the United States Congress, a professional association ethics

committee or board, or the Public Company Accounting Oversight Board.

(g) Disclosure for use in securing legal advice, Treasury investigations or court proceedings.

(h) Certain disclosures by attorneys and accountants.

(i) Corporate fiduciaries.

(j) Disclosure to taxpayer's fiduciary.

(k) Disclosure or use of information in preparation or audit of State or local tax returns or assisting a taxpayer with foreign country tax obligations.

(l) Payment for tax preparation services.

(m) Retention of records.

(n) Lists for solicitation of tax return business.

(o) Producing statistical information in connection with tax return preparation business.

(p) Disclosure or use of information for quality or peer reviews.

(q) Disclosure to report the commission of a crime.

(r) Disclosure of tax return information due to a tax return preparer's incapacity or death.

(s) Effective date.

§301.7216-3 Disclosure or use permitted only with the taxpayer's consent.

(a) In general.

(b) Timing requirements and limitations.

(c) Special rules.

(d) Effective date.

Par. 3. Section 301.7216-1 is revised to read as follows:

§301.7216-1 Penalty for disclosure or use of tax return information.

(a) *In general.* Section 7216(a) prescribes a criminal penalty for tax return preparers who knowingly or recklessly disclose or use tax return information for a purpose other than preparing a tax return. A violation of section 7216 is a misdemeanor, with a maximum penalty of up to one year imprisonment or a fine of not more than \$1,000, or both, together with the costs of prosecution. Section 7216(b) establishes exceptions to the general rule in section 7216(a) prohibiting disclosure and use. Section 7216(b) also authorizes the Secretary to promulgate regulations

prescribing additional permitted disclosures and uses. Section 6713(a) prescribes a related civil penalty for disclosures and uses that constitute a violation of section 7216. The penalty for violating section 6713 is \$250 for each prohibited disclosure or use, not to exceed a total of \$10,000 for a calendar year. Section 6713(b) provides that the exceptions in section 7216(b) also apply to section 6713. Under section 7216(b), the provisions of section 7216(a) will not apply to any disclosure or use permitted under regulations prescribed by the Secretary.

(b) *Definitions.* For purposes of section 7216 and §§301.7216-1 through 301.7216-3:

(1) *Tax return.* The term *tax return* means any return (or amended return) of income tax imposed by chapter 1 of the Internal Revenue Code.

(2) *Tax return preparer*—(i) *In general.* The term *tax return preparer* means:

(A) Any person who is engaged in the business of preparing or assisting in preparing tax returns;

(B) Any person who is engaged in the business of providing auxiliary services in connection with the preparation of tax returns, including a person who develops software that is used to prepare or file a tax return and any Authorized IRS *e-file* Provider;

(C) Any person who is otherwise compensated for preparing, or assisting in preparing, a tax return for any other person; or

(D) Any individual who, as part of their duties of employment with any person described in paragraph (b)(2)(i)(A), (B), or (C) of this section performs services that assist in the preparation of, or assist in providing auxiliary services in connection with the preparation of, a tax return.

(ii) *Business of preparing returns.* A person is engaged in the business of preparing tax returns as described in paragraph (b)(2)(i)(A) of this section if, in the course of the person's business, the person holds himself out to tax return preparers or taxpayers as a person who prepares tax returns or assists in preparing tax returns, whether or not tax return preparation is the person's sole business activity and whether or not the person charges a fee for tax return preparation services.

(iii) *Providing auxiliary services.* A person is engaged in the business of pro-

viding auxiliary services in connection with the preparation of tax returns as described in paragraph (b)(2)(i)(B) of this section if, in the course of the person's business, the person holds himself out to tax return preparers or to taxpayers as a person who performs auxiliary services, whether or not providing the auxiliary services is the person's sole business activity and whether or not the person charges a fee for the auxiliary services. Likewise, a person is engaged in the business of providing auxiliary services if, in the course of the person's business, the person receives a taxpayer's tax return information from another tax return preparer pursuant to the provisions of §301.7216-2(d)(2).

(iv) *Otherwise compensated.* A tax return preparer described in paragraph (b)(2)(i)(C) of this section includes any person who—

(A) Is compensated for preparing a tax return for another person, but not in the course of a business; or

(B) Is compensated for helping, on a casual basis, a relative, friend, or other acquaintance to prepare their tax return.

(v) *Exclusions.* A person is not a tax return preparer merely because he leases office space to a tax return preparer, furnishes credit to a taxpayer whose tax return is prepared by a tax return preparer, furnishes information to a tax return preparer at the taxpayer's request, furnishes access (free or otherwise) to a separate person's tax return preparation website through a hyperlink on his own website, or otherwise performs some service that only incidentally relates to the preparation of tax returns.

(vi) *Examples.* The application of §301.7216-1(b)(2) may be illustrated by the following examples:

Example 1. Bank B is a tax return preparer within the meaning of paragraph (b)(2)(i)(A) of this section, and an Authorized IRS *e-file* Provider. B employs one individual, Q, to solicit the necessary tax return information for the preparation of a tax return; another individual, R, to prepare the return on the basis of the information that is furnished; a secretary, S, who types the information on the returns into a computer; and an administrative assistant, T, who uses a computer to file electronic versions of the tax returns. Under these circumstances, only R is a tax return preparer for purposes of section 7701(a)(36), but all four employees are tax return preparers for purposes of section 7216, as provided in paragraph (b) of this section.

Example 2. Tax return preparer P contracts with department store D to rent space in D's store. D advertises that taxpayers who use P's services may charge the cost of having their tax return prepared

to their charge account with D. Under these circumstances, D is not a tax return preparer because it provides space, credit, and services only incidentally related to the preparation of tax returns.

(3) *Tax return information*—(i) *In general.* The term *tax return information* means any information, including, but not limited to, a taxpayer's name, address, or identifying number, which is furnished in any form or manner for, or in connection with, the preparation of a tax return of the taxpayer. This information includes information that the taxpayer furnishes to a tax return preparer and information furnished to the tax return preparer by a third party. Tax return information also includes information the tax return preparer derives or generates from tax return information in connection with the preparation of a taxpayer's return.

(A) Tax return information can be provided directly by the taxpayer or by another person. Likewise, tax return information includes information received by the tax return preparer from the IRS in connection with the processing of such return, including an acknowledgment of acceptance or notice of rejection of an electronically filed return.

(B) Tax return information includes statistical compilations of tax return information, even in a form that cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer. See §301.7216-2(o) for limited use of tax return information to make statistical compilations without taxpayer consent and to use the statistical compilations for limited purposes.

(C) Tax return information does not include information identical to any tax return information that has been furnished to a tax return preparer if the identical information was obtained otherwise than in connection with the preparation of a tax return.

(D) Information is considered "in connection with tax return preparation," and therefore tax return information, if the taxpayer would not have furnished the information to the tax return preparer but for the intention to engage, or the engagement of, the tax return preparer to prepare the tax return.

(ii) *Examples.* The application of this paragraph (b)(3) may be illustrated by the following examples:

Example 1. Taxpayer A purchases computer software designed to assist with the preparation and filing of her income tax return. When A loads the software onto her computer, it prompts her to register her purchase of the software. In this situation, the software provider is a tax return preparer under paragraph (b)(2)(i)(B) of this section and the information that A provides to register her purchase is tax return information because she is providing it in connection with the preparation of a tax return.

Example 2. Corporation A is a brokerage firm that maintains a website through which its clients may access their accounts, trade stocks, and generally conduct a variety of financial activities. Through its website, A offers its clients free access to its own tax preparation software. Taxpayer B is a client of A and has furnished A his name, address, and other information when registering for use of A's website to use A's brokerage services. In addition, A has a record of B's brokerage account activity, including sales of stock, dividends paid, and IRA contributions made. B uses A's tax preparation software to prepare his tax return. The software populates some fields on B's return on the basis of information A already maintains in its databases. A is a tax return preparer within the meaning of paragraph (b)(2)(i)(B) of this section because it has prepared and provided software for use in preparing tax returns. The information in A's databases that the software accesses to populate B's return, *i.e.*, the registration information and brokerage account activity, is not tax return information because A did not receive that information in connection with the preparation of a tax return. Once A uses the information to populate the return, however, the information associated with the return becomes tax return information. If A retains the information in a form in which A can identify that the information was used in connection with the preparation of a return, the information in that form is tax return information. If, however, A retains the information in a database in which A cannot identify whether the information was used in connection with the preparation of a return, then that information is not tax return information.

(4) *Use*—(i) *In general.* Use of tax return information includes any circumstance in which a tax return preparer refers to, or relies upon, tax return information as the basis to take or permit an action.

(ii) *Example.* The application of this paragraph (b)(4) may be illustrated by the following example:

Example. Preparer G is a tax return preparer as defined by paragraph (b)(2)(i)(A) of this section. If G determines, upon preparing a return, that the taxpayer is eligible to make a contribution to an individual retirement account (IRA), G will ask whether the taxpayer desires to make a contribution to an IRA. G does not ask about IRAs in cases in which the taxpayer is not eligible to make a contribution. G is using tax return information when it asks whether a taxpayer is interested in making a contribution to an IRA because G is basing the inquiry upon knowledge gained from information that the taxpayer furnished in connection with the preparation of the taxpayer's return.

(5) *Disclosure.* The term *disclosure* means the act of making tax return information

known to any person in any manner whatever. To the extent that a taxpayer's use of a hyperlink results in the transmission of tax return information, this transmission of tax return information is a disclosure by the tax return preparer subject to penalty under section 7216 if not authorized by regulation.

(6) *Hyperlink.* For purposes of section 7216, a hyperlink is a device used to transfer an individual using tax preparation software from a tax return preparer's webpage to a webpage operated by another person without the individual having to separately enter the web address of the destination page.

(7) *Request for consent.* A request for consent includes any effort by a tax return preparer to obtain the taxpayer's consent to use or disclose the taxpayer's tax return information. The act of supplying a taxpayer with a paper or electronic form that meets the requirements of a revenue procedure published pursuant to §301.7216-3(a) is a request for a consent. When a tax return preparer requests a taxpayer's consent, any associated efforts of the tax return preparer, including, but not limited to, verbal or written explanations of the form, are part of the request for consent.

(c) *Gramm-Leach-Bliley Act.* Any applicable requirements of the Gramm-Leach-Bliley Act, Public Law 106-102 (113 Stat. 1338), do not supersede, alter, or affect the requirements of section 7216 and §§301.7216-1 through 301.7216-3. Similarly, the requirements of section 7216 and §§301.7216-1 through 301.7216-3 do not override any requirements or restrictions of the Gramm-Leach-Bliley Act, which are in addition to the requirements or restrictions of section 7216 and §§301.7216-1 through 301.7216-3.

(d) *Effective/applicability date.* This section applies to disclosures or uses of tax return information occurring on or after January 1, 2009.

Par. 4. Section 301.7216-2 is revised to read as follows:

§301.7216-2 Permissible disclosures or uses without consent of the taxpayer.

(a) *Disclosure pursuant to other provisions of the Internal Revenue Code.* The provisions of section 7216(a) and §301.7216-1 shall not apply to any disclosure of tax return information if the

disclosure is made pursuant to any other provision of the Internal Revenue Code or the regulations thereunder.

(b) *Disclosures to the IRS.* The provisions of section 7216(a) and §301.7216-1 shall not apply to any disclosure of tax return information to an officer or employee of the IRS.

(c) *Disclosures or uses for preparation of a taxpayer's return—(1) Updating Taxpayers' Tax Return Preparation Software.* If a tax return preparer provides software to a taxpayer that is used in connection with the preparation or filing of a tax return, the tax return preparer may use the taxpayer's tax return information to update the taxpayer's software for the purpose of addressing changes in IRS forms, e-file specifications and administrative, regulatory and legislative guidance or to test and ensure the software's technical capabilities without the taxpayer's consent under §301.7216-3.

(2) *Tax return preparers located within the same firm in the United States.* If a taxpayer furnishes tax return information to a tax return preparer located within the United States, including any territory or possession of the United States, an officer, employee, or member of a tax return preparer may use the tax return information, or disclose the tax return information to another officer, employee, or member of the same tax return preparer, for the purpose of performing services that assist in the preparation of, or assist in providing auxiliary services in connection with the preparation of, the taxpayer's tax return. If an officer, employee, or member to whom the tax return information is to be disclosed is located outside of the United States or any territory or possession of the United States, the taxpayer's consent under §301.7216-3 prior to any disclosure is required.

(3) *Furnishing tax return information to tax return preparers located outside the United States.* If a taxpayer initially furnishes tax return information to a tax return preparer located outside of the United States or any territory or possession of the United States, an officer, employee, or member of a tax return preparer may use tax return information, or disclose any tax return information to another officer, employee, or member of the same tax return preparer, for the purpose of performing services that assist in the preparation of, or assist in providing auxiliary services

in connection with the preparation of, the tax return of a taxpayer by or for whom the information was furnished without the taxpayer's consent under §301.7216-3.

(4) *Examples.* The following examples illustrate this paragraph (c):

Example 1. Preparer P provides tax return preparation software to Taxpayer T for T to use in the preparation of its 2009 income tax return. For the 2009 tax year, and using T's tax return information furnished while registering for the software, P would like to update the tax return preparation software that T is using to account for last minute changes made to the tax laws for the 2009 tax year. P is not required to obtain T's consent to update the tax return preparation software. P may perform a software update regardless of whether the software update will affect T's particular return preparation activities.

Example 2. T is a client of Firm, which is a tax return preparer. E, an employee at Firm's State A office, receives tax return information from T for use in preparing T's income tax return. E discloses the tax return information to P, an employee in Firm's State B office; P uses the tax return information to process T's income tax return. Firm is not required to receive T's consent under §301.7216-3 prior to E's disclosure of T's tax return information to P because the tax return information is disclosed to an employee employed by the same tax return preparer located within the United States.

Example 3. Same facts as *Example 2* except T's tax return information is disclosed to FE who is located in Firm's Country F office. FE uses the tax return information to process T's income tax return. After processing, FE returns the processed tax return information to E in Firm's State A office. Because FE is outside of the United States, Firm is required to obtain T's consent under §301.7216-3 prior to E's disclosure of T's tax return information to FE.

Example 4. T, Firm's client, is temporarily located in Country F. She initially furnishes her tax return information to employee FE in Firm's Country F office for the purpose of having Firm prepare her U.S. income tax return. FE makes the substantive determinations concerning T's tax liability and forwards T's tax return information to FP, an employee in Firm's Country P office, for the purpose of processing T's tax return information. FP processes the return information and forwards it to Partner at Firm's State A office in the United States for review and delivery to T. Because T initially furnished the tax return information to a tax return preparer outside of the United States, T's prior consent for disclosure or use under §301.7216-3 was not required. An officer, employee, or member of Firm in the United States may use T's tax return information or disclose the tax return information to another officer, employee, or member of Firm without T's prior consent under §301.7216-3 as long as any disclosure or use of T's tax return information is within the United States. Firm is required to receive T's consent under §301.7216-3 prior to any subsequent disclosure of T's tax return information to a tax return preparer located outside of the United States.

(d) *Disclosures to other tax return preparers—(1) Preparer-to-preparer disclosures.* Except as limited in paragraph

(d)(2) of this section, an officer, employee, or member of a tax return preparer may disclose tax return information of a taxpayer to another tax return preparer (other than an officer, employee, or member of the same tax return preparer) located in the United States (including any territory or possession of the United States) for the purpose of preparing or assisting in preparing a tax return, or obtaining or providing auxiliary services in connection with the preparation of any tax return, so long as the services provided are not substantive determinations or advice affecting the tax liability reported by taxpayers. A substantive determination involves an analysis, interpretation, or application of the law. The authorized disclosures permitted under this paragraph (d)(1) include one tax return preparer disclosing tax return information to another tax return preparer for the purpose of having the second tax return preparer transfer that information to, and compute the tax liability on, a tax return of the taxpayer by means of electronic, mechanical, or other form of tax return processing service. The authorized disclosures permitted under this paragraph (d)(1) also include disclosures by a tax return preparer to an Authorized IRS e-file Provider for the purpose of electronically filing the return with the IRS. Authorized disclosures also include disclosures by a tax return preparer to a second tax return preparer for the purpose of making information concerning the return available to the taxpayer. This would include, for example, whether the return has been accepted or rejected by the IRS, or the status of the taxpayer's refund. Except as provided in paragraph (c) of this section, a tax return preparer may not disclose tax return information to another tax return preparer for the purpose of the second tax return preparer providing substantive determinations without first receiving the taxpayer's consent in accordance with the rules under §301.7216-3.

(2) *Disclosures to contractors.* A tax return preparer may disclose tax return information to a person under contract with the tax return preparer in connection with the programming, maintenance, repair, testing, or procurement of equipment or software used for purposes of tax return preparation only to the extent necessary for the person to provide the contracted services, and only if the tax return preparer ensures

that all individuals who are to receive disclosures of tax return information receive a written notice that informs them of the applicability of sections 6713 and 7216 to them and describes the requirements and penalties of sections 6713 and 7216. Contractors receiving tax return information pursuant to this section are tax return preparers under section 7216 because they are performing auxiliary services in connection with tax return preparation. See §301.7216-1(b)(2)(i)(B) and (D).

(3) *Examples.* The following examples illustrate this paragraph (d):

Example 1. E, an employee at Firm's State A office, receives tax return information from T for Firm's use in preparing T's income tax return. E makes substantive determinations and forwards the tax return information to P, an employee at Processor; Processor is located in State B. P places the tax return information on the income tax return and furnishes the finished product to E. E is not required to receive T's prior consent under §301.7216-3 before disclosing T's tax return information to P because Processor's services are not substantive determinations and the tax return information remained in the United States at Processor's State B office during the entire course of the tax return preparation process.

Example 2. Firm, a tax return preparer, offers income tax return preparation services. Firm's contract with its software provider, Contractor, requires Firm to periodically randomly select certain taxpayers' tax return information solely for the purpose of testing the reliability of the software sold to Firm. Under its agreement with Contractor, Firm discloses tax return information to Contractor's employee, C, who services Firm's contract without providing Contractor or C with a written notice that describes the requirements of and penalties under sections 7216 and 6713. C uses the tax return information solely for quality assurance purposes. Firm's disclosure of tax return information to C was an impermissible disclosure because Firm failed to ensure that C received a written notice that describes the requirements and penalties of sections 7216 and 6713.

Example 3. E, an employee of Firm in State A in the United States, receives tax return information from T for use in preparing T's income tax return. After E enters T's tax return information into Firm's computer, that information is stored on a computer server that is physically located in State A. Firm contracts with Contractor, located in Country F, to prepare its clients' tax returns. FE, an employee of Contractor, uses a computer in Country F and inputs a password to view T's income tax information stored on the computer server in State A to prepare T's tax return. A computer program permits FE to view T's tax return information, but prohibits FE from downloading or printing out T's tax return information from the computer server. Because Firm is disclosing T's tax return information outside of the United States, Firm is required to obtain T's consent under §301.7216-3 prior to the disclosure to FE. As provided in §301.7216-3(b)(5), however, Firm may not obtain consent to disclose T's social security number (SSN) to a tax return preparer located outside

of the United States or any territory or possession of the United States.

Example 4. A, an employee at Firm A, receives tax return information from T for Firm's use in preparing T's income tax return. A forwards the tax return information to B, an employee at another firm, Firm B, to obtain advice on the issue of whether T may claim a deduction for a certain business expense. A is required to receive T's prior consent under §301.7216-3 before disclosing T's tax return information to B because B's services involve a substantive determination affecting the tax liability that T will report.

(e) *Disclosure or use of information in the case of related taxpayers.* (1) In preparing a tax return of a second taxpayer, a tax return preparer may use, and may disclose to the second taxpayer in the form in which it appears on the return, any tax return information that the tax return preparer obtained from a first taxpayer if—

(i) The second taxpayer is related to the first taxpayer within the meaning of paragraph (e)(2) of this section;

(ii) The first taxpayer's tax interest in the information is not adverse to the second taxpayer's tax interest in the information; and

(iii) The first taxpayer has not expressly prohibited the disclosure or use.

(2) For purposes of paragraph (e)(1)(i) of this section, a taxpayer is related to another taxpayer if they have any one of the following relationships: husband and wife, child and parent, grandchild and grandparent, partner and partnership, trust or estate and beneficiary, trust or estate and fiduciary, corporation and shareholder, or members of a controlled group of corporations as defined in section 1563.

(3) See §301.7216-3 for disclosure or use of tax return information of the taxpayer in preparing the tax return of a second taxpayer when the requirements of this paragraph are not satisfied.

(f) *Disclosure pursuant to an order of a court, or an administrative order, demand, request, summons or subpoena which is issued in the performance of its duties by a Federal or State agency, the United States Congress, a professional association ethics committee or board, or the Public Company Accounting Oversight Board.* The provisions of section 7216(a) and §301.7216-1 will not apply to any disclosure of tax return information if the disclosure is made pursuant to any one of the following documents:

(1) The order of any court of record, Federal, State, or local.

(2) A subpoena issued by a grand jury, Federal or State.

(3) A subpoena issued by the United States Congress.

(4) An administrative order, demand, summons or subpoena that is issued in the performance of its duties by—

(i) Any Federal agency as defined in 5 U.S.C. 551(1) and 5 U.S.C. 552(f), or

(ii) A State agency, body, or commission charged under the laws of the State or a political subdivision of the State with the licensing, registration, or regulation of tax return preparers.

(5) A written request from a professional association ethics committee or board investigating the ethical conduct of the tax return preparer.

(6) A written request from the Public Company Accounting Oversight Board in connection with an inspection under section 104 of the Sarbanes-Oxley Act of 2002, 15 U.S.C. 7214, or an investigation under section 105 of such Act, 15 U.S.C. 7215, for use in accordance with such Act.

(g) *Disclosure for use in securing legal advice, Treasury investigations or court proceedings.* A tax return preparer may disclose tax return information—

(1) To an attorney for purposes of securing legal advice;

(2) To an employee of the Treasury Department for use in connection with any investigation of the tax return preparer (including investigations relating to the tax return preparer in its capacity as a practitioner) conducted by the IRS or the Treasury Department; or

(3) To any officer of a court for use in connection with proceedings involving the tax return preparer (including proceedings involving the tax return preparer in its capacity as a practitioner), or the return preparer's client, before the court or before any grand jury that may be convened by the court.

(h) *Certain disclosures by attorneys and accountants.* The provisions of section 7216(a) and §301.7216-1 shall not apply to any disclosure of tax return information permitted by this paragraph (h).

(1) (i) A tax return preparer who is lawfully engaged in the practice of law or accountancy and prepares a tax return for a taxpayer may use the taxpayer's tax return information, or disclose the information to another officer, employee or member of the tax return preparer's law or ac-

counting firm, consistent with applicable legal and ethical responsibilities, who may use the tax return information for the purpose of providing other legal or accounting services to the taxpayer. As an example, a lawyer who prepares a tax return for a taxpayer may use the tax return information of the taxpayer for, or in connection with, rendering legal services, including estate planning or administration, or preparation of trial briefs or trust instruments, for the taxpayer or the estate of the taxpayer. In addition, the lawyer who prepared the tax return may disclose the tax return information to another officer, employee or member of the same firm for the purpose of providing other legal services to the taxpayer. As another example, an accountant who prepares a tax return for a taxpayer may use the tax return information, or disclose it to another officer, employee or member of the firm, for use in connection with the preparation of books and records, working papers, or accounting statements or reports for the taxpayer. In the normal course of rendering the legal or accounting services to the taxpayer, the attorney or accountant may make the tax return information available to third parties, including stockholders, management, suppliers, or lenders, consistent with the applicable legal and ethical responsibilities, unless the taxpayer directs otherwise. For rules regarding disclosures outside of the United States, see §301.7216-2(c) and (d).

(ii) A tax return preparer's law or accounting firm does not include any related or affiliated firms. For example, if law firm A is affiliated with law firm B, officers, employees and members of law firm A must receive a taxpayer's consent under §301.7216-3 before disclosing the taxpayer's tax return information to an officer, employee or member of law firm B.

(2) A tax return preparer who is lawfully engaged in the practice of law or accountancy and prepares a tax return for a taxpayer may, consistent with the applicable legal and ethical responsibilities, take the tax return information into account, and may act upon it, in the course of performing legal or accounting services for a client other than the taxpayer, or disclose the information to another officer, employee or member of the tax return preparer's law or accounting firm to enable that other officer, employee or member to

take the information into account, and act upon it, in the course of performing legal or accounting services for a client other than the taxpayer. This is permissible when the information is, or may be, relevant to the subject matter of the legal or accounting services for the other client, and consideration of the information by those performing the services is necessary for the proper performance of the services. In no event, however, may the tax return information be disclosed to a person who is not an officer, employee or member of the law or accounting firm, unless the disclosure is exempt from the application of section 7216(a) and §301.7216-1 by reason of another provision of §§301.7216-2 or 301.7216-3.

(3) *Examples.* The application of this paragraph may be illustrated by the following examples:

Example 1. A, a member of an accounting firm, renders an opinion on a financial statement of M Corporation that is part of a registration statement filed with the Securities and Exchange Commission. After the registration statement is filed, but before its effective date, B, a member of the same accounting firm, prepares an income tax return for N Corporation. In the course of preparing N's income tax return, B discovers that N does business with M and concludes that the information given by N should be considered by A to determine whether the financial statement opined on by A contains an untrue statement of material fact or omits a material fact required to keep the statement from being misleading. B discloses to A the tax return information of N for this purpose. A determines that there is an omission of material fact and that an amended statement should be filed. A so advises M and the Securities and Exchange Commission. A explains that the omission was revealed as a result of confidential information that came to A's attention after the statement was filed, but A does not disclose the identity of the taxpayer or the tax return information itself. Section 7216(a) and §301.7216-1 do not apply to B's disclosure of N's tax return information to A and A's use of the information in advising M and the Securities and Exchange Commission of the necessity for filing an amended statement. Section 7216(a) and §301.7216-1 would apply to a disclosure of N's tax return information to M or to the Securities and Exchange Commission unless the disclosure is exempt from the application of section 7216(a) and §301.7216-1 by reason of another provision of either this section or §301.7216-3.

Example 2. A, a member of an accounting firm, is conducting an audit of M Corporation, and B, a member of the same accounting firm, prepares an income tax return for D, an officer of M. In the course of preparing the return, B obtains information from D indicating that D, pursuant to an arrangement with a supplier doing business with M, has been receiving from the supplier a percentage of the amounts that the supplier invoices to M. B discloses this information to A who, acting upon it, searches in the course of the audit for indications of a kickback scheme. As

a result, A discovers information from audit sources that independently indicate the existence of a kickback scheme. Without revealing the tax return information A has received from B, A brings to the attention of officers of M the audit information indicating the existence of the kickback scheme. Section 7216(a) and §301.7216-1 do not apply to B's disclosure of D's tax return information to A, A's use of D's information in the course of the audit, and A's disclosure to M of the audit information indicating the existence of the kickback scheme. Section 7216(a) and §301.7216-1 would apply to a disclosure to M, or to any other person not an employee or member of the accounting firm, of D's tax return information furnished to B.

(i) *Corporate fiduciaries.* A trust company, trust department of a bank, or other corporate fiduciary that prepares a tax return for a taxpayer for whom it renders fiduciary, investment, or other custodial or management services may, unless the taxpayer directs otherwise—

(1) Disclose or use the taxpayer's tax return information in the ordinary course of rendering such services to or for the taxpayer; or

(2) Make the information available to the taxpayer's attorney, accountant, or investment advisor.

(j) *Disclosure to taxpayer's fiduciary.* If, after furnishing tax return information to a tax return preparer, the taxpayer dies or becomes incompetent, insolvent, or bankrupt, or the taxpayer's assets are placed in conservatorship or receivership, the tax return preparer may disclose the information to the duly appointed fiduciary of the taxpayer or his estate, or to the duly authorized agent of the fiduciary.

(k) *Disclosure or use of information in preparation or audit of State or local tax returns or assisting a taxpayer with foreign country tax obligations.* The provisions of paragraphs (c) and (d) of this section shall apply to the disclosure by any tax return preparer of any tax return information in the preparation of, or in connection with the preparation of, any tax return of the taxpayer under the law of any State or political subdivision thereof, of the District of Columbia, of any territory or possession of the United States, or of a country other than the United States. The provisions of section 7216(a) and §301.7216-1 shall not apply to the use by any tax return preparer of any tax return information in the preparation of, or in connection with the preparation of, any tax return of the taxpayer under the law of any State or political subdivision thereof, of the District of Columbia,

of any territory or possession of the United States, or of a country other than the United States. The provisions of section 7216(a) and §301.7216-1 shall not apply to the disclosure or use by any tax return preparer of any tax return information in the audit of, or in connection with the audit of, any tax return of the taxpayer under the law of any State or political subdivision thereof, the District of Columbia, or any territory or possession of the United States.

(l) *Payment for tax preparation services.* A tax return preparer may use and disclose, without the taxpayer's written consent, tax return information that the taxpayer provides to the tax return preparer to pay for tax preparation services to the extent necessary to process or collect the payment. For example, if the taxpayer gives the tax return preparer a credit card to pay for tax preparation services, the tax return preparer may disclose the taxpayer's name, credit card number, credit card expiration date, and amount due for tax preparation services to the credit card company, as necessary, to process the payment. Any tax return information that the taxpayer did not give the tax return preparer for the purpose of making payment for tax preparation services may not be used or disclosed by the tax return preparer without the taxpayer's prior written consent, unless otherwise permitted under another provision of this section.

(m) *Retention of records.* A tax return preparer may retain tax return information of a taxpayer, including copies of tax returns, in paper or electronic format, prepared on the basis of the tax return information, and may use the information in connection with the preparation of other tax returns of the taxpayer or in connection with an examination by the Internal Revenue Service of any tax return or subsequent tax litigation relating to the tax return. The provisions of paragraph (n) of this section regarding the transfer of a taxpayer list also apply to the transfer of any records and related papers to which this paragraph applies.

(n) *Lists for solicitation of tax return business.* A tax return preparer may compile and maintain a separate list containing solely the names, addresses, e-mail addresses, and phone numbers of taxpayers whose tax returns the tax return preparer has prepared or processed. This list may be used by the compiler solely to con-

tact the taxpayers on the list for the purpose of offering tax information or additional tax return preparation services to such taxpayers. The compiler of the list may not transfer the taxpayer list, or any part thereof, to any other person unless the transfer takes place in conjunction with the sale or other disposition of the compiler's tax return preparation business. A person who acquires a taxpayer list, or a part thereof, in conjunction with a sale or other disposition of a tax return preparation business is subject to the provisions of this paragraph with respect to the list. The term *list*, as used in this paragraph (n), includes any record or system whereby the names and addresses of taxpayers are retained. The provisions of this paragraph (n) also apply to the transfer of any records and related papers to which this paragraph (n) applies.

(o) *Producing statistical information in connection with tax return preparation business.* A tax return preparer may use, for the limited purpose specified in this paragraph (o), tax return information to produce a statistical compilation of data described in §301.7216-1(b)(3)(i)(B). The purpose and use of the statistical compilation must relate directly to the internal management or support of the tax return preparer's tax return preparation business. The tax return preparer may not disclose or use the tax return information in connection with, or in support of, businesses other than tax return preparation. The compiler of the statistical compilation may not disclose the compilation, or any part thereof, to any other person unless disclosure of the statistical compilation is made in order to comply with financial accounting or regulatory reporting requirements or occurs in conjunction with the sale or other disposition of the compiler's tax return preparation business. A person who acquires a compilation, or a part thereof, in conjunction with a sale or other disposition of a tax return preparation business is subject to the provisions of this paragraph (o) with respect to the compilation as if the acquiring person had compiled it.

(p) *Disclosure or use of information for quality or peer reviews.* The provisions of section 7216(a) and §301.7216-1 shall not apply to any disclosure for the purpose of a quality or peer review to the extent necessary to accomplish the review. A quality or peer review is a review that is un-

dertaken to evaluate, monitor, and improve the quality and accuracy of a tax return preparer's tax preparation, accounting, or auditing services. A quality or peer review may be conducted only by attorneys, certified public accountants, enrolled agents, and enrolled actuaries who are eligible to practice before the Internal Revenue Service. See Department of the Treasury Circular 230, 31 CFR part 10. Tax return information may also be disclosed to persons who provide administrative or support services to an individual who is conducting a quality or peer review under this paragraph (p), but only to the extent necessary for the reviewer to conduct the review. Tax return information gathered in conducting a review may be used only for purposes of a review. No tax return information identifying a taxpayer may be disclosed in any evaluative reports or recommendations that may be accessible to any person other than the reviewer or the tax return preparer being reviewed. The tax return preparer being reviewed will maintain a record of the review including the information reviewed and the identity of the persons conducting the review. After completion of the review, no documents containing information that may identify any taxpayer by name or identification number may be retained by a reviewer or by the reviewer's administrative or support personnel. Any person (including administrative and support personnel) receiving tax return information in connection with a quality or peer review is a tax return preparer for purposes of sections 7216(a) and 6713(a).

(q) *Disclosure to report the commission of a crime.* The provisions of section 7216(a) and §301.7216-1 shall not apply to the disclosure of any tax return information to the proper Federal, State, or local official in order, and to the extent necessary, to inform the official of activities that may constitute, or may have constituted, a violation of any criminal law or to assist the official in investigating or prosecuting a violation of criminal law. A disclosure made in the *bona fide* but mistaken belief that the activities constituted a violation of criminal law is not subject to section 7216(a) and §301.7216-1.

(r) *Disclosure of tax return information due to a tax return preparer's incapacity or death.* In the event of incapacity or death of a tax return preparer, disclosure of tax return information may be made for the

purpose of assisting the tax return preparer or his legal representative (or the representative of a deceased tax return preparer's estate) in operating the business. Any person receiving tax return information under the provisions of this paragraph (r) is a tax return preparer for purposes of sections 7216(a) and 6713(a).

(s) *Effective/applicability date.* This section applies to disclosures or uses of tax return information occurring on or after January 1, 2009.

Par. 5. Section 301.7216-3 is revised to read as follows:

§301.7216-3 Disclosure or use permitted only with the taxpayer's consent.

(a) *In general*—(1) *Taxpayer consent.* Unless section 7216 or §301.7216-2 specifically authorizes the disclosure or use of tax return information, a tax return preparer may not disclose or use a taxpayer's tax return information prior to obtaining a written consent from the taxpayer, as described in this section. A tax return preparer may disclose or use tax return information as the taxpayer directs as long as the preparer obtains a written consent from the taxpayer as provided in this section. The consent must be knowing and voluntary. Except as provided in paragraph (a)(2) of this section, conditioning the provision of any services on the taxpayer's furnishing consent will make the consent involuntary, and the consent will not satisfy the requirements of this section.

(2) *Taxpayer consent to a tax return preparer furnishing tax return information to another tax return preparer.* (i) A tax return preparer may condition its provision of preparation services upon a taxpayer's consenting to disclosure of the taxpayer's tax return information to another tax return preparer for the purpose of performing services that assist in the preparation of, or provide auxiliary services in connection with the preparation of, the tax return of the taxpayer.

(ii) *Example.* The application of this paragraph (a)(2) may be illustrated by the following example:

Example. Preparer P, who is located within the United States, is retained by Company C to provide tax return preparation services for employees of Company C. An employee of Company C, Employee E, works for C outside of the United States. To provide tax return preparation services for E, P requires

the assistance of and needs to disclose E's tax return information to a tax return preparer who works for P's affiliate located in the country where E works. P may condition its provision of tax return preparation services upon E consenting to the disclosure of E's tax return information to the tax return preparer in the country where E works.

(3) *The form and contents of taxpayer consents*—(i) *In general.* All consents to disclose or use tax return information must satisfy the following requirements—

(A) A taxpayer's consent to a tax return preparer's disclosure or use of tax return information must include the name of the tax return preparer and the name of the taxpayer.

(B) If a taxpayer consents to a disclosure of tax return information, the consent must identify the intended purpose of the disclosure. Except as provided in §301.7216-3(a)(3)(iii), if a taxpayer consents to a disclosure of tax return information, the consent must also identify the specific recipient (or recipients) of the tax return information. If the taxpayer consents to use of tax return information, the consent must describe the particular use authorized. For example, if the tax return preparer intends to use tax return information to generate solicitations for products or services other than tax return preparation, the consent must identify each specific type of product or service for which the tax return preparer may solicit use of the tax return information. Examples of products or services that must be identified include, but are not limited to, balance due loans, mortgage loans, mutual funds, individual retirement accounts, and life insurance.

(C) The consent must specify the tax return information to be disclosed or used by the return preparer.

(D) If a tax return preparer to whom the tax return information is to be disclosed is located outside of the United States, the taxpayer's consent under §301.7216-3 prior to any disclosure is required. See §301.7216-2(c) and (d).

(E) A consent to disclose or use tax return information must be signed and dated by the taxpayer.

(ii) *The form and contents of taxpayer consents with respect to taxpayers filing a return in the Form 1040 series — guidance describing additional requirements for taxpayer consents with respect to Form 1040 series filers.* The Secretary may issue guidance, by publication

in the Internal Revenue Bulletin (see §601.601(d)(2)(ii)(b) of this chapter), describing additional requirements for tax return preparers regarding the format and content of consents to disclose and use tax return information with respect to taxpayers filing a return in the Form 1040 series, e.g., Form 1040, Form 1040NR, Form 1040A, or Form 1040EZ.

(iii) *The form and contents of taxpayer consents with respect to all other taxpayers.* A consent to disclose or use tax return information with respect to a taxpayer not filing a return in the Form 1040 series may be in any format, including an engagement letter to a client, as long as the consent complies with the requirements of §301.7216-3(a)(3)(i). Additionally, the requirements of §301.7216-3(c)(1) are inapplicable to consents to disclose or use tax return information with respect to taxpayers not filing a return in the Form 1040 series. Solely for purposes of a consent issued under §301.7216-3(a)(3)(iii), in lieu of identifying specific recipients of an intended disclosure under §301.7216-3(a)(3)(i)(B), a consent may allow disclosure to a descriptive class of entities engaged by a taxpayer or the taxpayer's affiliate for purposes of services in connection with the preparation of tax returns, audited financial statements, or other financial statements or financial information as required by a government authority, municipality or regulatory body.

(iv) *Examples.* The application of §301.7216-3(a)(3)(iii) may be illustrated by the following examples:

Example 1. Consistent with applicable legal and ethical responsibilities, Preparer Z sends its client, a corporation, Taxpayer C, an engagement letter. Part of the engagement letter requests the consent of Taxpayer C for the purpose of disclosing tax return information to an investment banking firm to assist the investment banking firm in securing long term financing for Taxpayer C. The engagement letter includes language and information that meets the requirements of §301.7216-3(a)(3)(i), including: (I) Preparer Z's name, Taxpayer C's name, and a signature and date line for Taxpayer C; and (II) a statement that "Taxpayer C authorizes Preparer Z to disclose the portions of Taxpayer C's 2009 tax return information to the firm retained by Taxpayer C necessary for the purposes of assisting Taxpayer C secure long term financing." The engagement letter satisfies the requirements of §301.7216-3(a)(3) for the disclosure of the information provided therein for the specific purpose stated.

Example 2. Consistent with applicable legal and ethical responsibilities, Preparer N sends its client, a corporation, Taxpayer D, an engagement letter. Part of the engagement letter requests the consent of Tax-

payer D for the purpose of disclosing tax return information to Preparer N's affiliated firms located outside of the United States for the purposes of preparation of Taxpayer D's 2009 tax return. The engagement letter includes language and information that meets the requirements of §301.7216-3(a)(3)(i), including: (I) Preparer N's name, Taxpayer D's name, and a signature and date line for Taxpayer D; (II) a statement that "Taxpayer D authorizes Preparer N to disclose Taxpayer D's 2009 tax return information to Preparer N's affiliates located outside of the United States for the purposes of assisting Preparer N prepare Taxpayer D's 2009 tax return"; and (III) a statement that, in providing consent, Taxpayer D acknowledges that its tax return information for 2009 will be disclosed to tax return preparers located abroad. The engagement letter satisfies the requirements of §301.7216-3(a)(3) for the disclosure of the information provided therein for the specific purpose stated.

(b) *Timing requirements and limitations*—(1) *No retroactive consent.* A taxpayer must provide written consent before a tax return preparer discloses or uses the taxpayer's tax return information.

(2) *Time limitations on requesting consent in solicitation context.* A tax return preparer may not request a taxpayer's consent to disclose or use tax return information for purposes of solicitation of business unrelated to tax return preparation after the tax return preparer provides a completed tax return to the taxpayer for signature.

(3) *No requests for consent after an unsuccessful request.* With regard to tax return information for each income tax return that a tax return preparer prepares, if a taxpayer declines a request for consent to the disclosure or use of tax return information for purposes of solicitation of business unrelated to tax return preparation, the tax return preparer may not solicit from the taxpayer another consent for a purpose substantially similar to that of the rejected request.

(4) *No consent to the disclosure of a taxpayer's social security number to a return preparer outside of the United States.* A tax return preparer located within the United States, including any territory or possession of the United States, may not obtain consent to disclose the taxpayer's social security number (SSN) to a tax return preparer located outside of the United States or any territory or possession of the United States. Thus, if a tax return preparer located within the United States (in-

cluding any territory or possession of the United States) obtains consent from a taxpayer to disclose tax return information to another tax return preparer located outside of the United States, as provided under §§301.7216-2(c) and 301.7216-2(d), the tax return preparer located in the United States may not disclose the taxpayer's SSN, and the tax return preparer must redact or otherwise mask the taxpayer's SSN before the tax return information is disclosed outside of the United States. If a tax return preparer located within the United States initially receives or obtains a taxpayer's SSN from another tax return preparer located outside of the United States, however, the tax return preparer within the United States may, without consent, retransmit the taxpayer's SSN to the tax return preparer located outside the United States that initially provided the SSN to the tax return preparer located within the United States.

(5) *Duration of consent.* A consent document may specify the duration of the taxpayer's consent to the disclosure or use of tax return information. If a consent agreed to by the taxpayer does not specify the duration of the consent, the consent to the disclosure or use of tax return information will be effective for a period of one year from the date the taxpayer signed the consent.

(c) *Special rules*—(1) *Multiple disclosures within a single consent form or multiple uses within a single consent form.* A taxpayer may consent to multiple uses within the same written document, or multiple disclosures within the same written document. A single written document, however, cannot authorize both uses and disclosures; rather one written document must authorize the uses and another separate written document must authorize the disclosures. Furthermore, a consent that authorizes multiple disclosures or multiple uses must specifically and separately identify each disclosure or use. See §301.7216-3(a)(3)(iii) for an exception to this rule for certain taxpayers.

(2) *Disclosure of entire return.* A consent may authorize the disclosure of all information contained within a return. A

consent authorizing the disclosure of an entire return must provide that the taxpayer has the ability to request a more limited disclosure of tax return information as the taxpayer may direct.

(3) *Copy of consent must be provided to taxpayer.* The tax return preparer must provide a copy of the executed consent to the taxpayer at the time of execution. The requirements of this paragraph (c)(3) may also be satisfied by giving the taxpayer the opportunity, at the time of executing the consent, to print the completed consent or save it in electronic form.

(d) *Effective/applicability date.* This section applies to disclosures or uses of tax return information occurring on or after January 1, 2009.

Linda E. Stiff,
Deputy Commissioner for
Services and Enforcement.

Approved December 21, 2007.

Eric Solomon,
Assistant Secretary of
the Treasury (Tax Policy).

(Filed by the Office of the Federal Register on January 3, 2008, 8:58 a.m., and published in the issue of the Federal Register for January 7, 2008, 73 F.R. 1058)

Section 7520.—Valuation Tables

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of February 2008. See Rev. Rul. 2008-9, page 342.

Section 7872.—Treatment of Loans With Below-Market Interest Rates

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of February 2008. See Rev. Rul. 2008-9, page 342.

Part III. Administrative, Procedural, and Miscellaneous

Life Insurance Reserves — Proposed AG VACARVM and Life PBR

Notice 2008–18

SECTION 1. PURPOSE

The purpose of this notice is to alert life insurance companies to federal income tax issues that may arise as a result of the adoption of proposed Actuarial Guideline VACARVM (Proposed AG VACARVM) and/or a proposed principles-based approach for calculating statutory reserves for life insurance (Proposed Life PBR). This notice identifies areas in which the Treasury Department and Internal Revenue Service (IRS) have concerns, and invites comments on these and other issues.

SECTION 2. BACKGROUND

.01 In general, a life insurance company must pay tax on its life insurance company taxable income, which is defined in section 801(b) to mean life insurance gross income less life insurance deductions. Life insurance gross income is defined in section 803(a) to mean the sum of (i) premiums, (ii) net decreases in certain reserves under section 807(a), and (iii) other amounts generally included by a taxpayer in gross income. Section 805(a)(2) authorizes a deduction for the net increase in certain reserves under section 807(b). The reserves taken into account under section 807(a) and (b) include life insurance reserves. Accordingly, clear reflection of taxable income of a life insurance company requires an appropriate measurement of the company's life insurance reserves.

.02 Methods of computing life insurance reserves are set forth section 807(d). Section 807(d)(1) provides generally that the amount of the life insurance reserve for any contract shall be the greater of the net surrender value of such contract under section 807(e)(1) or the federally prescribed reserve determined under section 807(d)(2). This amount cannot, however, exceed the amount that would be taken into account with respect to that contract in determining statutory reserves (*i.e.*, the aggregate reserve amount set forth

in the issuer's annual statement). Section 807(e)(1) states that the net surrender value of any contract shall be determined with regard to any penalty or charge that would be imposed on surrender but without regard to any market value adjustment on surrender. Section 807(d)(2) provides that the federally prescribed reserve for a contract is computed using (a) a tax reserve method, (b) the greater of the applicable Federal interest rate or the prevailing State assumed rate, and (c) the prevailing commissioners' standard tables for mortality and morbidity.

.03 With respect to annuity contracts, section 807(d)(3)(A)(ii) and 807(d)(3)(B)(ii) requires the use of a tax reserve method that is the Commissioners' Annuity Reserve Valuation Method (CARVM) prescribed by the National Association of Insurance Commissioners (NAIC) which is in effect on the date of the issuance of the contract. Likewise, with respect to life insurance contracts, section 807(d)(3)(A)(i) and 807(d)(3)(B)(i) requires the use of a tax reserve method that is the Commissioners' Reserve Valuation Method (CRVM) prescribed by the NAIC which is in effect on the date of the issuance of the contract. Other parameters, such as the interest rate and appropriate mortality tables, are likewise generally determined as of the date the contract is issued.

.04 Under section 816, an insurance company is a life insurance company if the sum of (1) its life insurance reserves, plus (2) unearned premiums, and unpaid losses (whether or not ascertained), on noncancellable life, accident, or health policies not included in life insurance reserves, comprise more than 50 percent of its total reserves. Life insurance reserves are defined as amounts (1) computed or estimated on the basis of recognized mortality or morbidity tables and assumed rates of interest, and (2) set aside to mature or liquidate, either by payment or reinsurance, future unaccrued claims arising from life insurance, annuity, and noncancellable accident and health insurance contracts (including life insurance or annuity contracts combined with noncancellable accident and health insurance) involving, at the time with respect to which the reserve

is computed, life, accident, or health contingencies. Reserves must be required by law to qualify as life insurance reserves.

.05 Section 7702(a) defines a life insurance contract as any contract that is a life insurance contract under the applicable law, but only if such contract (1) meets the cash value accumulation test of section 7702(b); or (2)(A) meets the guideline premium requirements of section 7702(c), and (B) falls within the cash value corridor of section 7702(d). A contract meets the guideline premium requirements if the sum of the premiums paid under such contract does not at any time exceed the guideline premium limitation as of such time. The term "guideline premium limitation" means, as of any date, the greater of the guideline single premium, or the sum of the guideline level premiums to such date. The term "guideline single premium" means the premium at issue with respect to future benefits under the contract. The determination of the guideline single premium is based, in part, on reasonable mortality charges that meet the requirements (if any) prescribed in regulations and that (except as provided in regulations) do not exceed the mortality charges specified in the prevailing commissioners' standard tables (as defined in section 807(d)(5)) as of the time the contract is issued.

.06 Two reserve methodology projects are underway with the American Academy of Actuaries (AAA) and National Association of Insurance Commissioners (NAIC). Proposed AG VACARVM would set forth a new Actuarial Guideline that would constitute CARVM for variable annuities. See "Actuarial Guideline VACARVM—CARVM for Variable Annuities Redefined," NAIC, 9/29/2007. An Actuarial Guideline is an interpretation by the NAIC of existing state valuation law and regulations. Proposed Life PBR would set forth a principles-based approach for calculating statutory reserves on life insurance contracts. This second project would take the form of a section of a proposed valuation manual that would be adopted pursuant to a proposed change to the standard valuation law. See "VM-20: Requirements for Princi-

ples-Based Reserves for Life Products,” NAIC, 9/29/2007.

.07 The purpose of Proposed AG VACARVM is to interpret the standards for the valuation of reserves for variable annuity and other contracts involving certain guaranteed benefits similar to those offered with variable annuities. The aggregate reserve for contracts falling within the scope of Proposed AG VACARVM would equal the greater of a standard scenario amount and a conditional tail expectation (CTE) amount. The standard scenario amount would be the aggregate amount of the reserves determined by applying a standard scenario to each of the contracts falling within the scope of the guideline. The CTE amount would represent the average of a specified percent of the largest accumulated deficiencies produced by a projection of the contracts falling within the scope of the guidance (and the assets supporting those contracts) over a range of stochastically generated scenarios using prudent estimate assumptions. For example, CTE (70) would equal the average of the largest 30 percent of the present value of accumulated deficiencies. Proposed AG VACARVM would include a methodology for allocating the aggregate reserve to the contracts falling within the scope of the Guideline. Once effective, Proposed AG VACARVM would affect all contracts issued on or after January 1, 1981.

.08 The purpose of Proposed Life PBR would be to define the minimum valuation standard under a principles-based approach for individual life insurance policies. The reported aggregate reserve for policies falling within the scope of Proposed Life PBR would equal an amount computed using a stochastic method (stochastic reserve), but not less than an amount calculated using a seriatim, deterministic method (deterministic reserve). The deterministic reserve would be determined using a seriatim (*i.e.*, contract-by-contract) approach based on a projection of net cash flows over a single scenario, using prudent estimate assumptions for parameters or variables that are not prescribed. The stochastic reserve would be calculated in the aggregate based on a projection of net cash flows over a range of stochastically generated scenarios, using prudent estimate assumed

values for all parameters and variables that are not prescribed or stochastically modeled, and then applying a prescribed CTE level. Proposed Life PBR would require that a reserve based on company-specific and industry experience serve as the basis for identifying (*i.e.*, mapping to) the NAIC prescribed table that must be used. Like Proposed AG VACARVM, Proposed Life PBR would include a methodology for allocating the aggregate reserve to the contracts falling within the scope of Life PBR. A company would be permitted to exclude certain policies from the stochastic modeling requirement if the policies met certain prescribed conditions.

SECTION 3. DISCUSSION

The Treasury Department and IRS are mindful that if sections 807, 816 and 7702 are not amended by Congress in anticipation of Proposed AG VACARVM and Proposed Life PBR, taxpayers will need timely guidance on how to file their federal income tax returns once Proposed AG VACARVM and Proposed Life PBR have been adopted. The Treasury Department and IRS believe that the issues raised in this notice are most appropriately considered together to the extent they affect both projects. Although these projects remain in development, the following paragraphs set forth a preliminary, nonexclusive list of federal income tax issues that have been identified. The paragraphs also identify some of the approaches that the Treasury Department and IRS may consider to address these issues, subject to further study and public comment.

.01 *Continued taxation of issuers under Part 1 of Subchapter L.* Some commentators have asked whether reserves determined under Proposed AG VACARVM or Proposed Life PBR would constitute “life insurance reserves” within the meaning of section 816(b). The Treasury Department and IRS think it would be inappropriate to apply a literal application of the 50-percent reserve ratio test of section 816(a), such that all life insurance companies would be taxed under part 2 of subchapter L, rather than part 1 of that subchapter, due solely to changes in the methodology of determining such reserves for purposes of statutory accounting. To prevent this result, if Proposed AG VACARVM or Proposed Life

PBR is adopted, the Treasury Department and IRS may publish guidance that would (i) require the continued use of statutory reserves for purposes of the reserve ratio test, even if those reserves are determined under Proposed AG VACARVM or Proposed Life PBR; (ii) require the continued use of CARVM or CRVM, as applicable, under such terms as applied before the adoption of Proposed AG VACARVM or Proposed Life PBR; (iii) apply principles similar to those of Prop. Reg. § 1.801-4(g) to ensure that reserves with respect to life insurance and annuity contracts are appropriately accounted for in the reserve ratio test of section 816(a); or (iv) require the use of only the standard scenario amount (in the case of Proposed AG VACARVM) or deterministic reserve (in the case of Proposed Life PBR) for purposes of the reserve ratio test.

.02 *Qualification of contracts as life insurance contracts.* Likewise, some commentators have asked whether the adoption of Proposed Life PBR would render it impossible for issuers of life insurance contracts to satisfy the requirement of section 7702(c)(3)(B) that reasonable mortality charges not exceed the mortality charges specified in “the commissioners’ standard mortality tables” as defined in section 807(d)(5). The Treasury Department and IRS think it is inappropriate for a change in statutory accounting under section 807(d) to effect a wholesale change in the standards for qualification of contracts as “life insurance contracts” under section 7702. To prevent this result, if Proposed Life PBR is adopted, the Treasury Department and IRS may (i) exercise the authority under section 7702(c)(3)(B) either to prescribe mortality tables or to permit the continued use of the 1980 Commissioners’ Standard Ordinary mortality and morbidity tables (1980 CSO tables) or the 2001 Commissioners’ Standard Ordinary mortality and morbidity tables (2001 CSO tables), as appropriate, to satisfy the reasonable mortality charge requirement of that section; or (ii) provide a reasonable interpretation of the prevailing commissioners’ standard mortality tables under section 807 that would not render the cross reference in section 7702(c)(3)(B) meaningless. See section 3.05, below.

.03 *Contract-by-contract versus aggregate reserves.* The Treasury Department and IRS believe that the standard scenario

or deterministic reserve determined under Proposed AG VACARVM or Proposed Life PBR would more closely resemble the methodology in effect when Congress enacted section 807 in 1984 than would the CTE amount or stochastic reserve. For example, a reserve determined under the standard scenario or under the deterministic reserve methodology (i) would be determined on a contract-by-contract basis; (ii) would be based upon an expected value, rather than the worst case tail of a distribution of outcomes; and (iii) in the case of Proposed AG VACARVM, would be determined based on standard, industry-wide interest rate and mortality factors, rather than on prudent estimates that vary from company to company. Both Proposed AG VACARVM and Proposed Life PBR would provide a methodology for apportioning stochastically-determined reserve amounts among individual contracts. The Treasury Department and IRS, however, are concerned more fundamentally that because the CTE amount (under Proposed AG VACARVM) or stochastic reserve (under Proposed Life PBR) would not represent an expected value of a company's obligations with respect to the underlying contracts, some or all of these amounts are nondeductible "solvency" or "contingency" reserves. If this concern is not satisfied, the Treasury Department and IRS may (i) permit a contract-by-contract apportionment of a stochastically-determined reserve, but with appropriate adjustments so that reserve reflects an expected value of the company's obligations (for example, by adjusting the CTE from 65 to 0, assuming that the chosen scenarios have a uniform probability distribution and the scenarios not chosen have a zero probability); (ii) conclude that the methodology of Proposed AG VACARVM or Proposed Life PBR is so different from that which was in effect when Congress enacted section 807 in 1984 that taxpayers must continue to apply section 807 as if Proposed AG VACARVM or Proposed Life PBR had not been adopted; or (iii) interpret the statutory cap under section 807(d)(1) and CARVM/CRVM under section 807(d)(2) to encompass only the standard scenario amount (in the case of Proposed AG VACARVM) or the deterministic reserve (in the case of Proposed Life PBR).

.04 *Prevailing state assumed interest rate.* Section 807(d)(2)(B) requires that the tax reserve with respect to a contract be determined using the greater of the applicable Federal interest rate (AFR) or the prevailing State assumed rate. It has been suggested that in the case of Proposed Life PBR, the absence of a single, prescribed interest rate means that taxpayers should be allowed to determine tax reserves simply using the AFR. This approach, however, would nullify an important safeguard against situations where the AFR is an inappropriately low rate for determining a fair valuation of the tax reserve with respect to a contract. Rather than interpret the term "prevailing State assumed interest rate" to refer to a null set, the Treasury Department and IRS may require the use of a rate that is the greater of the AFR and some other objective rate or rates, such as (i) the rate implicit in the aggregate reserves that are determined stochastically; (ii) the rate used by the company in pricing the contract; or (iii) the rate used to determine the deterministic reserve.

.05 *Prevailing mortality tables.* The Treasury Department and IRS are concerned that determining an aggregate reserve stochastically and, after the fact, using the reserve so determined to "map" to one of a large number of NAIC-approved mortality tables would not satisfy the requirement of section 807(d)(2) that the prevailing commissioners' standard tables be used for purposes of determining the tax reserve for a contract. If this concern is not satisfied, the Treasury Department and IRS may interpret the prevailing commissioners' standard mortality tables under section 807(d)(5) to mean either (i) the 2001 CSO mortality tables; (ii) the mortality tables, if any, which served as the basis for pricing the particular contract; (iii) if more than one standard mortality table or option could apply to a particular contract, whichever table generally would yield the lowest reserve for the contract (see section 807(d)(5)(E)); or (iv) in the case of Proposed AG VACARVM, the mortality tables used for purposes of determining the standard scenario amount with respect to a contract,

.06 *Transition rules: application to in-force contracts.* If Proposed AG VACARVM or Proposed Life PBR is adopted, it is anticipated the new rules would apply for federal income

tax purposes only to contracts that are issued after the date of adoption and not to previously issued contracts that are in force on that date, regardless of the applicability of the new rules to previously issued contracts for regulatory purposes. The Treasury Department and IRS assume this approach would render moot any issue concerning the applicability of a 10-year spread under section 807(f) for adjustments resulting from the adoption of these proposed rules.

.07 *Tax principles that override statutory accounting.* Notwithstanding the deference accorded statutory accounting under subchapter L, the Treasury Department and IRS do not anticipate changes to existing guidance that requires that tax principles override statutory accounting principles in appropriate cases. *See, e.g.,* § 1.801-4(e) (enumerating reserves and liabilities that do not qualify as life insurance reserves for federal income tax purposes).

.08 *Tax administration.* As a matter of tax administration, the Treasury Department and IRS are concerned that the degree of discretion that would be vested in taxpayers to determine the CTE amount (under Proposed AG VACARVM) or the stochastic reserve (under Proposed Life PBR) could render those amounts difficult or impossible for examiners to audit. These concerns will weigh heavily in the resolution of the issues identified in sections 3.01 through 3.07, and may weigh in favor of recognizing only the standard scenario amount (in the case of Proposed AG VACARVM) or the deterministic reserve (in the case of Proposed Life PBR).

SECTION 4. REQUEST FOR COMMENTS

.01 The Treasury Department and IRS request comments on the issues raised in this notice, and on any other issues that will need to be addressed if Proposed AG VACARVM or Proposed Life PBR are adopted by one or more states and Congress has not amended sections 807, 816 and 7702. In addition, comments are requested regarding the following issues: (i) What is the status of any efforts to model the effects of Proposed AG VACARVM or Proposed Life PBR, either on a company-by-company basis, a product-by-product basis, or

industry-wide? (ii) What is the relevance of a tax or regulatory characterization of Proposed AG VACARVM and Proposed Life PBR as CARVM or CRVM, respectively, for purposes of applying section 807? Does such a characterization limit or broaden the discretion of the Treasury Department and IRS to provide guidance? (For example, if Proposed AG VACARVM and Proposed Life PBR are characterized as CARVM or CRVM, respectively, for regulatory purposes, could the Treasury Department and IRS nevertheless conclude they do not constitute CARVM or CRVM as Congress envisioned those terms to apply in 1984; alternatively, if Proposed AG VACARVM and Proposed Life PBR were not characterized as CARVM or CRVM, respectively, for purposes of applying section 807, could Proposed AG VACARVM and Proposed Life PBR nonetheless be required as the appropriate tax reserve method under the authority of section 807(d)(3)(A)(iv)); (iii) what criteria or other parameters would limit the selection of scenarios taken into account in determining the CTE amount (under Proposed AG VACARVM) or the stochastic reserve (under Proposed Life PBR); and (iv) In the case of Proposed Life PBR, what is the appropriate treatment of company-specific expense, lapse and margin assumptions for purposes of applying section 807? For example, are such assumptions permitted to be taken into account at all, either for purposes of the federally-prescribed reserve or the statutory reserve cap? If so, what limits apply to a taxpayer's discretion with respect to those assumptions, and would a 10-year spread result under section 807(f) from the unlocking of those assumptions in later years?

.02 The Treasury Department and IRS are concerned about the use of a gross premium valuation methodology in the case of Proposed Life PBR, because such a methodology generally is not permitted under existing authorities. *See, e.g., Maryland Casualty Co. v. U.S.*, 251 U.S. 342 (1920), § 1.801-4(e), Rev. Rul. 77-451, 1977-2 C.B. 224. In general, a gross premium valuation takes into account the present value of all cash flows under the contract, including future death benefits, future surrender benefits, premiums, future profits, and future expenses. Thus, a

reserve determined using a gross premium valuation may include amounts, such as future expenses and margins, that are not now included in life insurance reserves for federal income tax purposes. How will a gross premium valuation under Proposed Life PBR differ from current valuation methods? Is the discretion to permit a gross premium valuation methodology for federal income tax purposes limited by sections 461 and 811, or by the deficiency reserve rule of section 807(d)(3)(C)? Are similar issues raised in the case of Proposed AG VACARVM? If not, are expense, policy owner behavior, surrender rates, and other parameters nonetheless included in the valuation of reserves under Proposed AG VACARVM?

.03. The Treasury Department and the IRS are concerned that, except in the case of the standard scenario under Proposed AG VACARVM, the proposed methods contemplate revising certain parameters and assumptions on an annual basis. How is this procedure consistent with the existing statutory framework that contemplates that such parameters and assumptions are determined as of the date a contract is issued, and, in general, are not adjusted thereafter? Would such annual changes in assumptions constitute a change of basis subject to a 10-year spread under section 807(f)?

.04 Comments should be submitted in writing on or before May 5, 2008, and should contain a reference to this Notice 2008-18. Comments may be submitted to CC:PA:LPD:PR (Notice 2008-18), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Alternatively comments may be submitted electronically via the following e-mail address: Notice.Comments@irscounsel.treas.gov. Please include "Notice 2008-18" in the subject line of any electronic communications.

.05 Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (Notice 2008-18), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC 20224. All comments will be available for public inspection and copying.

DRAFTING INFORMATION

The principal author of this notice is James A. Polfer of the Office of the Associate Chief Counsel (Financial Institutions & Products). For further information regarding this notice, contact Mr. Polfer at (202) 622-3970 (not a toll-free call).

Cell Captive Insurance Arrangements: Insurance Company Characterization and Certain Federal Tax Elections

Notice 2008-19

SECTION 1. PURPOSE

Rev. Rul. 2008-8, this Bulletin, provides guidance on the standards for determining whether an arrangement between a participant and cell of a Protected Cell Company (defined below) constitutes insurance for federal income tax purposes, and whether amounts paid to the cell are deductible as "insurance premiums" under § 162 of the Internal Revenue Code. The purpose of this notice is to request comments on further guidance to address issues that arise if those arrangements do constitute insurance, specifically (a) the status of such a cell as an insurance company within the meaning of §§ 816(a) and 831(c), and (b) some of the consequences of a cell's status as an insurance company.

SECTION 2. BACKGROUND

.01 Under §§ 816(a) and 831(c), an insurance company is any company more than half the business of which during the taxable year is the issuing of insurance or annuity contracts or the underwriting of risks underwritten by insurance companies. Although its name, charter powers, and subjection to State insurance laws are significant in determining the business which a company is authorized and intends to carry on, it is the character of the business actually done in the taxable year which determines whether a company is taxable as an insurance company under the Internal Revenue Code. Treas. Reg. § 1.801-3(a)(1).

.02 A taxpayer that qualifies as an insurance company is treated as a corporation under § 7701(a)(3), even if it would not otherwise be classified as a corporation for state law purposes or under other provisions of the Code. Thus, for example, in Rev. Rul. 83-132, 1983-2 C.B. 270, a non-corporate business entity was held to be an insurance company, and therefore a “corporation” within the meaning of § 7701(a)(3), because its primary and predominant business activity was underwriting insurance risks.

.03 An insurance company is subject to tax under either Part I or Part II of Subchapter L, as applicable, and is eligible to make a number of elections. For example, § 831(b) permits certain small insurance companies other than life insurance companies to elect to be taxed only on taxable investment income (and not on underwriting income); § 846(e) permits an insurance company to compute discounted unpaid losses using the company’s historical payment patterns, rather than the historical payment patterns determined by the Secretary under § 846(d); and § 953(d) generally permits a controlled foreign corporation to elect to be treated as a domestic corporation if it would qualify to be taxed under subchapter L (that is, as an insurance company) if it were a domestic corporation. *See also* Rev. Proc. 2003-47, 2003-2 C.B. 55 (setting forth procedural rules regarding the election under § 953(d)).

.04 A number of jurisdictions have statutes that provide for the chartering of a legal entity commonly known as a protected cell company, segregated account company or segregated portfolio company (“Protected Cell Company”). Rev. Rul. 2008-8, this Bulletin, sets forth facts that are typical of arrangements involving Protected Cell Companies and provides guidance on how to determine whether such an arrangement qualifies as insurance for federal income tax purposes.

.05 Section 3 of this Notice sets forth proposed guidance that would address (a) when a cell of a Protected Cell Company is treated as an insurance company for federal income tax purposes, and (b) some of the consequences of the treatment of a cell as an insurance company. The proposed guidance, if adopted, may take the form of a regulation, revenue ruling, revenue procedure, or other Internal Revenue Bulletin publication.

SECTION 3. PROPOSED GUIDANCE

.01 *In general.* The proposed guidance would include a rule to the effect that a cell of a Protected Cell Company would be treated as an insurance company separate from any other entity if:

(a) the assets and liabilities of the cell are segregated from the assets and liabilities of any other cell and from the assets and liabilities of the Protected Cell Company such that no creditor of any other cell or of the Protected Cell Company may look to the assets of the cell for the satisfaction of any liabilities, including insurance claims (except to the extent that any other cell or the Protected Cell Company has a direct creditor claim against such cell); and

(b) based on all the facts and circumstances, the arrangements and other activities of the cell, if conducted by a corporation, would result in its being classified as an insurance company within the meaning of §§ 816(a) or 831(c).

.02 *Effect of insurance company treatment at the cell level.* Consistent with the proposed rule:

(a) Any tax elections that are available by reason of a cell’s status as an insurance company would be made by the cell (or, in certain circumstances, by the parent of a consolidated group) and not by the Protected Cell Company of which it is a part;

(b) The cell would be required to apply for and receive an employer identification number (EIN) if it is subject to U.S. tax jurisdiction;

(c) The activities of the cell would be disregarded for purposes of determining the status of the Protected Cell Company as an insurance company for federal income tax purposes;

(d) The cell (or, in certain circumstances, the parent of a consolidated group) would be required to file all applicable federal income tax returns and pay all required taxes with respect to its income; and

(e) A Protected Cell Company would not take into account any items of income, deduction, reserve or credit with respect to any cell that is treated as an insurance company under section 3.01.

.03 *No inference.* No inference should be drawn regarding the treatment of a cell that does not meet the requirements to be treated as an insurance company separate from any other entity under section 3.01

or regarding the treatment of the Protected Cell Company of which it is a part.

.04 *Effective date.* The proposed guidance would be effective for the first taxable year beginning more than 12 months after the date the guidance is published in final form.

SECTION 4. REQUEST FOR COMMENTS

Statutes under which Protected Cell Companies are chartered differ among various jurisdictions, and cell arrangements differ among taxpayers due to variations in contractual terms. In order to ensure that entity classification and federal tax elections for Protected Cell Companies are both legally correct and administrable in all cases, the Service requests comments on the proposed guidance described in section 3 of this Notice. In particular, the Service requests comments on (a) what transition rules may be appropriate or necessary for Protected Cell Companies, or cells of such companies, if a Protected Cell Company is not currently following the rule in section 3.01, or if a cell of such a company qualifies as an insurance company for some taxable years but not for others; (b) what reporting, if any, would be necessary on the part of an individual cell to ensure that a Protected Cell Company has the information needed to comply with section 3.02(c) and (e); (c) whether different or special rules should apply with respect to foreign entities, including controlled foreign corporations; (d) whether further guidance would be needed concerning the proper treatment of Protected Cell Companies and their cells under the rules regarding consolidated returns. The Service also requests comments on what guidance, if any, would be appropriate concerning similar segregated arrangements that do not involve insurance. Written comments may be submitted to the Office of the Associate Chief Counsel (Financial Institutions & Products), Attention: Chris Lieu (Notice 2007-YY), Room 3552, CC:FIP:4, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC 20224. Alternatively, taxpayers may submit comments electronically to Notice.Comments@irs.counsel.treas.gov. The Service requests any comments by May 4, 2008.

DRAFTING INFORMATION

The principal author of this notice is Chris Lieu of the Office of the Associate Chief Counsel (Financial Institutions & Products). For further information regarding this notice, contact Mr. Chris Lieu at (202) 622-3970 (not a toll-free call).

*26 CFR 301.7216: Disclosure or use of information by preparers of returns.
(Also 26 CFR 301.7216-3; section 6713).*

Rev. Proc. 2008-12

SECTION 1. PURPOSE

This revenue procedure provides guidance to tax return preparers regarding the format and content of consents to disclose and consents to use tax return information with respect to taxpayers filing a return in the Form 1040 series, *e.g.*, Form 1040, Form 1040NR, Form 1040A, or Form 1040EZ, under section 301.7216-3 of the Regulations on Procedure and Administration (26 CFR Part 301). This revenue procedure also provides specific requirements for electronic signatures when a taxpayer executes an electronic consent to the disclosure or use of the taxpayer's tax return information.

SECTION 2. BACKGROUND

.01 In general, section 7216(a) of the Internal Revenue Code imposes criminal penalties on tax return preparers who knowingly or recklessly make unauthorized disclosures or uses of information furnished in connection with the preparation of an income tax return. A violation of section 7216 is a misdemeanor, with a maximum penalty of up to one year imprisonment or a fine of not more than \$1,000, or both, together with the costs of prosecution. Section 7216(b) establishes exceptions to the general rule in section 7216(a) and also authorizes the Secretary to promulgate regulations prescribing additional permitted disclosures and uses.

.02 Section 6713(a) prescribes a related civil penalty for unauthorized disclosures or uses of information furnished in connection with the preparation of an income tax return. The penalty for violating section

6713 is \$250 for each disclosure or use, not to exceed a total of \$10,000 for a calendar year. Section 6713(b) provides that the exceptions in section 7216(b) also apply to section 6713.

.03 Section 301.7216-3 provides that, unless section 7216 or § 301.7216-2 specifically permits the disclosure or use of tax return information, a tax return preparer may not disclose or use a taxpayer's tax return information prior to obtaining a consent from the taxpayer. Section 301.7216-3(a) provides that consent must be knowing and voluntary. Section 301.7216-3(a)(3)(i) prescribes the form and content requirements that all consents to disclose or use must include.

.04 Section 301.7216-3(a)(3)(ii) provides that the Secretary may, by publication in the Internal Revenue Bulletin, prescribe additional requirements for tax return preparers regarding the format and content of consents to disclose and consents to use tax return information with respect to taxpayers filing a return in the Form 1040 series, as well as the requirements for a valid signature on an electronic consent under section 7216. This revenue procedure provides such additional requirements.

SECTION 3. SCOPE

This revenue procedure applies to all tax return preparers, as defined in § 301.7216-1(b)(2), who seek consent to disclose or use tax return information pursuant to § 301.7216-3 with respect to taxpayers who file a return in the Form 1040 series, *e.g.*, Form 1040, Form 1040NR, Form 1040A, or Form 1040EZ.

SECTION 4. FORM AND CONTENT OF A CONSENT TO DISCLOSE OR A CONSENT TO USE FORM 1040 TAX RETURN INFORMATION

.01 Separate Written Document. Except as provided by § 301.7216-3(c)(1) (special rule for multiple disclosures or uses within a single consent form), and described in section 4.05, below, a taxpayer's consent to each separate disclosure or use of tax return information must be contained on a separate written document, which can be furnished on paper or electronically. For example, the separate written document may be provided as

an attachment to an engagement letter furnished to the taxpayer.

.02 A consent furnished to the taxpayer on paper must be provided on one or more sheets of 8½ inch by 11 inch or larger paper. All of the text on each sheet of paper must pertain solely to the disclosure or use the consent authorizes, and the sheet or sheets, together, must contain all the elements described in section 4.04 and, if applicable, comply with section 4.06. All of the text on each sheet of paper must also be in at least 12-point type (no more than 12 characters per inch).

.03 An electronic consent must be provided on one or more computer screens. All of the text placed by the preparer on each screen must pertain solely to the disclosure or use of tax return information authorized by the consent, except for computer navigation tools. The text of the consent must meet the following specifications: the size of the text must be at least the same size as, or larger than, the normal or standard body text used by the website or software package for direction, communications or instructions and there must be sufficient contrast between the text and background colors. In addition, each screen or, together, the screens must—

(1) contain all the elements described in section 4.04 and, if applicable, comply with section 4.06,

(2) be able to be signed as required by section 5 and dated by the taxpayer, and

(3) be able to be formatted in a readable and printer-friendly manner.

.04 Requirements for Every Consent. In addition to the requirements provided in § 301.7216-3, consents to disclose or use Form 1040 series tax return information must satisfy the following requirements—

(1) Mandatory statements in the consent. The following statements must be included in a consent under the circumstances described below, except that a tax return preparer may substitute the preparer's name where "we" or "our" is used.

(a) Consent to disclose tax return information in context other than tax preparation or auxiliary services. Unless a tax return preparer is obtaining a taxpayer's consent to disclose the taxpayer's tax return information to another tax return preparer for the purpose of performing services that assist in the preparation of, or provide auxiliary services (as defined in § 301.7216-1(b)(2)(ii)) in connection with

the preparation of, the tax return of the taxpayer, any consent to disclose tax return information must contain the following statements in the following sequence:

Federal law requires this consent form be provided to you. Unless authorized by law, we cannot disclose, without your consent, your tax return information to third parties for purposes other than the preparation and filing of your tax return. If you consent to the disclosure of your tax return information, Federal law may not protect your tax return information from further use or distribution.

You are not required to complete this form. If we obtain your signature on this form by conditioning our services on your consent, your consent will not be valid. If you agree to the disclosure of your tax return information, your consent is valid for the amount of time that you specify. If you do not specify the duration of your consent, your consent is valid for one year.

(b) Consent to disclose tax return information in tax preparation or auxiliary services context. If a tax return preparer is obtaining a taxpayer's consent to disclose the taxpayer's tax return information to another tax return preparer for the purpose of performing services that assist in the preparation of, or provide auxiliary services (as defined in § 301.7216-1(b)(2)(ii)) in connection with the preparation of, the tax return of the taxpayer, any consent to disclose tax return information must contain the following statements in the following sequence:

Federal law requires this consent form be provided to you. Unless authorized by law, we cannot disclose, without your consent, your tax return information to third parties for purposes other than the preparation and filing of your tax return. If you consent to the disclosure of your tax return information, Federal law may not protect your tax return information from further use or distribution.

You are not required to complete this form. Because our ability to disclose your tax return information to another tax return preparer affects the service that we provide to you and its cost, we may decline to provide you with service or change the terms of service that we provide to you if you do not sign this

form. If you agree to the disclosure of your tax return information, your consent is valid for the amount of time that you specify. If you do not specify the duration of your consent, your consent is valid for one year.

(c) Consent to use. All consents to use tax return information must contain the following statements in the following sequence:

Federal law requires this consent form be provided to you. Unless authorized by law, we cannot use, without your consent, your tax return information for purposes other than the preparation and filing of your tax return.

You are not required to complete this form. If we obtain your signature on this form by conditioning our services on your consent, your consent will not be valid. Your consent is valid for the amount of time that you specify. If you do not specify the duration of your consent, your consent is valid for one year.

(d) All consents must contain the following statement:

If you believe your tax return information has been disclosed or used improperly in a manner unauthorized by law or without your permission, you may contact the Treasury Inspector General for Tax Administration (TIGTA) by telephone at 1-800-366-4484, or by email at complaints@tigta.treas.gov.

(e) Mandatory statement in any consent to disclose tax return information to a tax return preparer located outside of the United States. If a tax return preparer to whom the tax return information is to be disclosed is located outside of the United States, the taxpayer's consent under § 301.7216-3 prior to any disclosure is required. See § 301.7216-2(c) and (d). All consents for disclosure of tax return information to a tax return preparer outside of the United States must contain the following statement:

This consent to disclose may result in your tax return information being disclosed to a tax return preparer located outside the United States.

(2) Affirmative consent. All consents must require the taxpayer's affirmative consent to a tax return preparer's disclosure or use of tax return information. A consent that requires the taxpayer to remove or "deselect" disclosures or uses that

the taxpayer does not wish to be made, *i.e.*, an "opt-out" consent, is not permitted.

(3) Signature. All consents to disclose or use tax return information must be signed by the taxpayer.

(a) For consents on paper, the taxpayer's consent to a disclosure or use must contain the taxpayer's signature.

(b) For electronic consents, a taxpayer must sign the consent by any method prescribed in section 5, below.

(4) Incomplete consents. A tax return preparer shall not present a consent form with blank spaces related to the purpose of the consent to the taxpayer for signature.

.05 Special rule for multiple disclosures within a single consent form or multiple uses within a single consent form. Section 301.7216-3(c)(1) provides that a taxpayer may consent to multiple uses within the same written document, or multiple disclosures within the same written document. Multiple disclosure consents and multiple use consents must provide the taxpayer with the opportunity, within the separate written document, to affirmatively select each separate disclosure or use. Further, the taxpayer must be provided the information in section 4.04 for each separate disclosure or use. The mandatory statements required in section 4.04(1) relating to use or disclosure need only be stated once in a multiple disclosure or multiple use consent.

.06 Disclosure of entire return. If, under § 301.7216-3(c)(2), a consent authorizes the disclosure of a copy of the taxpayer's entire tax return or all information contained within a return, the consent must provide that the taxpayer has the ability to request a more limited disclosure of tax return information as the taxpayer may direct.

SECTION 5. ELECTRONIC SIGNATURES

01. If a taxpayer furnishes consent to disclose or use tax return information electronically, the taxpayer must furnish the tax return preparer with an electronic signature that will verify that the taxpayer consented to the disclosure or use. The regulations under § 301.7216-3(a) require that the consent be knowing and voluntary. Therefore, for an electronic consent to be valid, it must be furnished in a man-

ner that ensures affirmative, knowing consent to each disclosure or use.

.02 A tax return preparer seeking to obtain a taxpayer's consent to the disclosure or use of tax return information electronically must obtain the taxpayer's signature on the consent in one of the following manners:

(a) Assign a personal identification number (PIN) that is at least 5 characters long to the taxpayer. To consent to the disclosure or use of the taxpayer's tax return information, the taxpayer may type in the pre-assigned PIN as the taxpayer's signature authorizing the disclosure or use. A PIN may not be automatically furnished by the software so that the taxpayer only has to click a button for consent to be furnished. The taxpayer must affirmatively enter the PIN for the electronic signature to be valid;

(b) Have the taxpayer type in the taxpayer's name and then hit "enter" to authorize the consent. The software must not automatically furnish the taxpayer's name so that the taxpayer only has to click a button to consent. The taxpayer must affirmatively type the taxpayer's name for the electronic consent to be valid; or

(c) Any other manner in which the taxpayer affirmatively enters 5 or more characters that are unique to that taxpayer that are used by the tax return preparer to verify the taxpayer's identity. For example, entry of a response to a question regarding a shared secret could be the type of information by which the taxpayer authorizes disclosure or use of tax return information.

SECTION 6. EXAMPLES

.01 The application of this revenue procedure is illustrated by the following examples:

(1) *Example 1.* Preparer P offers tax preparation services over the Internet. P wishes to use information the taxpayer provides during tax preparation of the taxpayer's Form 1040 to generate targeted banner advertisements (*i.e.*, electronic advertisements appearing on the computer screen based on the taxpayer's tax return information). In the course of advertising services and products, P wishes also to disclose to other third parties information that the taxpayer provides.

(a) P posts, in pertinent part, the following consent on the computer screen for taxpayers to indicate approval. If a taxpayer does not indicate approval, the tax return preparation software does not permit the taxpayer to use the software.

PRIVACY STATEMENT

Your privacy is very important to us at P. We are providing this statement to inform you about the types of information we collect from you, and how we may disclose or use that information in connection with the services we provide. This Privacy Statement describes the privacy practices of our company as required by applicable laws. . . . During the course of providing our services to you, we may offer you various other services that may be of interest to you based on our determination of your needs through analysis of your data. Your use of the services we offer constitutes a consent to our disclosure of tax information to the service providers. If at any time you wish to limit your receipt of promotional offers based upon information you provide, you may call us at the following. . . .

(b) Beneath this Privacy Statement, the following acknowledgment line appears next to two button images stating "yes" and "no:"

"I have read the Privacy Statement and agree to it by clicking here."

(c) If the taxpayer clicks "no," a message appears on the screen informing the taxpayer that tax return preparation will not proceed without the taxpayer agreeing to the company's Privacy Statement.

(d) P has failed to comply with the requirements of § 301.7216-3 and this revenue procedure. P has attempted to obtain consent from the taxpayer by making the use of the program contingent on the taxpayer's consent to P's disclosure and use of the taxpayer's tax return information for purposes other than tax preparation (*e.g.*, for use in displaying targeted banner advertisement). Thus, the consent is not voluntary, as required by § 301.7216-3(a). P has also failed to identify the tax return information that it will disclose or use, as required by § 301.7216-3(a)(3)(C), to identify the purposes of the disclosures and uses, as required by section § 301.7216-3(a)(3)(B), and to the extent that P intends to disclose the entire return based on the consent, P's consent has not provided that the taxpayer has the ability to request a more limited disclosure of tax return information as the taxpayer may direct as required by section 4.06. The single document attempts to have the taxpayer consent to both disclosures and uses, in violation of section 4.05. P has not used the mandatory statements required by section 4.04(1). The consent is not signed by the taxpayer because P has not provided a means for the taxpayer to electronically sign the consent in a form authorized by section 5. Finally, the consent is not dated as required by section 4.03(2).

(2) *Example 2.* Preparer Q offers tax preparation services over the Internet and wishes to use targeted banner advertisements during tax return preparation. Q contracts with Bank A regarding the advertisement

of Individual Retirement Accounts (IRAs). Preparer Q displays advertisements to the taxpayer only if the taxpayer's tax return information indicates that the services are relevant to the taxpayer (*i.e.*, they are targeted banner advertisements). A taxpayer using Q's software must enter a password to begin the process of preparing a return.

(a) Before the taxpayer starts providing tax return information, the following screen appears on Q's tax preparation program.

CONSENT TO USE OF TAX RETURN INFORMATION

Federal law requires this consent form be provided to you. Unless authorized by law, we cannot use, without your consent, your tax return information for purposes other than the preparation and filing of your tax return.

You are not required to complete this form. If we obtain your signature on this form by conditioning our services on your consent, your consent will not be valid. Your consent is valid for the amount of time that you specify. If you do not specify the duration of your consent, your consent is valid for one year.

For your convenience, Q has entered into arrangements with certain banks regarding the provision of Individual Retirement Accounts (IRAs). To determine whether this service may be of interest to you, Q will need to use your tax return information.

If you would like Q to use your tax return information to determine whether this service is relevant to you while we are preparing your return, please check the corresponding box if you are interested, provide the information requested below, and sign and date this consent to the use of your tax return information.

I, [INSERT NAME] authorize Q to use the information I provide to Q during the preparation of my tax return for 2006 to determine whether to offer me an opportunity to invest in an IRA.

Signature: [INSERT SIGNATURE AS PRESCRIBED UNDER SECTION 5]

Date: [INSERT DATE]

If you believe your tax return information has been disclosed or used improperly in a manner unauthorized by law or without your permission, you may contact the Treasury Inspector General for Tax Administration (TIGTA) by telephone at 1-800-366-4484, or by email at complaints@tigta.treas.gov.

(b) If the taxpayer selects the consent above, the taxpayer is directed to print the screen. Later, after the taxpayer has entered data to prepare his or her 2006 tax return, the following screen is displayed:

CONSENT TO DISCLOSURE OF TAX RETURN INFORMATION

Federal law requires this consent form be provided to you. Unless authorized by law, we cannot disclose, without your consent, your tax return information to third parties for purposes other than the preparation and filing of your tax return. If you consent to the disclosure of your tax return information, Federal law may not protect your tax return information from further use or distribution.

You are not required to complete this form. If we obtain your signature on this form by conditioning our services on your consent, your consent will not be valid. If you agree to the disclosure of your tax return information, your consent is valid for the amount of time that you specify. If you do not specify the duration of your consent, your consent is valid for one year.

You have indicated that you are interested in obtaining information on IRAs. To provide you with this information, Q must forward your tax return information, as indicated below, to the bank that provides this service.

If you would like Q to disclose your tax return information to the bank providing this service, please check the corresponding box for the service in which you are interested, provide the information requested below, and sign and date your consent to the disclosure of your tax return information.

I, [INSERT NAME], authorize Q to disclose to Bank A that portion of my tax return information for 2006 that is necessary for Bank A to contact me and provide information on obtaining an IRA or altering my contribution to an IRA for 2006.

Signature: [INSERT SIGNATURE AS PRESCRIBED UNDER SECTION 5]

Date: [INSERT DATE]

If you believe your tax return information has been disclosed or used improperly in a manner unauthorized by law or without your permission, you may contact the Treasury Inspector General for Tax Administration (TIGTA) by telephone at 1-800-366-4484, or by email at complaints@tigta.treas.gov.

If the taxpayer consents to the disclosure of the tax return information using the screen above, the taxpayer is directed to print the screen. Q will then

transmit only that portion of the taxpayer's tax return information for 2006 that is necessary for the bank authorized in the consent, Bank A, to provide the service.

(c) These two consent documents, above, satisfy the requirements of §301.7216-3(c) and this revenue procedure for the disclosure or use of the information provided therein for the specific purposes stated.

SECTION 7. EFFECTIVE DATE

This revenue procedure is effective after December 31, 2008.

SECTION 8. DRAFTING INFORMATION

The principal author of this revenue procedure is Dillon Taylor, formerly of the Office of Associate Chief Counsel (Procedure and Administration). For further information regarding this revenue procedure, contact Lawrence Mack of the Office of Associate Chief Counsel (Procedure and Administration) at 202-622-4940 (not a toll-free call).

Part IV. Items of General Interest

Announcement of Disciplinary Actions Involving Attorneys, Certified Public Accountants, Enrolled Agents, and Enrolled Actuaries — Reinstatements, Suspensions, Censures, Disbarments, and Resignations

Announcement 2008-5

Under Title 31, Code of Federal Regulations, Part 10, attorneys, certified public accountants, enrolled agents, and enrolled actuaries may not accept assistance from, or assist, any person who is under disbarment or suspension from practice before the Internal Revenue Service if the assistance relates to a matter constituting practice before the Internal Revenue Service and may not knowingly aid or abet another

person to practice before the Internal Revenue Service during a period of suspension, disbarment, or ineligibility of such other person.

To enable attorneys, certified public accountants, enrolled agents, and enrolled actuaries to identify persons to whom these restrictions apply, the Director, Office of Professional Responsibility, will announce in the Internal Revenue Bulletin

their names, their city and state, their professional designation, the effective date of disciplinary action, and the period of suspension. This announcement will appear in the weekly Bulletin at the earliest practicable date after such action and will continue to appear in the weekly Bulletins for five successive weeks.

Reinstatement To Practice Before the Internal Revenue Service

Under Title 31, Code of Federal Regulations, Part 10, The Director, Office of Professional Responsibility, may entertain a petition for reinstatement for any attorney, certified public accountant, enrolled

agent, or enrolled actuary censured, suspended, or disbarred, from practice before the Internal Revenue Service.

The following individuals' eligibility to practice before the Internal Revenue Service has been restored:

Name	Address	Designation	Date of Reinstatement
Cohen, Peter	Edison, NJ	CPA	June 01, 2004
Brunelle, Roswell J.	Queensbury, NY	CPA	June 10, 2004
Cohick, Jeffrey S.	Newville, PA	Enrolled Agent	October 30, 2004
Cotroneo, Nicholas	McLean, VA	CPA	February 28, 2007
Layson, David A.	Corydon, IN	Attorney	October 06, 2007
Tomasulo, Maria V.	Wantagh, NY	CPA	October 16, 2007
Emeziem, Kelechi C.	Antioch, CA	Attorney	October 17, 2007
Johnston, Gregory A.	Muscatine, IA	Attorney	October 17, 2007
Shapiro, Sidney C.	West Palm Beach, FL	CPA	October 29, 2007
Hubbard, Cynthia A.	Geneva, IL	Attorney	October 31, 2007
Moss, Steve E.	Henderson, NC	CPA	November 29, 2007
Schaffer, Robert J.	Baiting Hollow, NY	CPA	December 04, 2007
Woods, Dalton C.	Carrollton, TX	Enrolled Agent	December 04, 2007
Brown, Arthur I.	Miami, FL	CPA	December 14, 2007

Consent Suspensions From Practice Before the Internal Revenue Service

Under Title 31, Code of Federal Regulations, Part 10, an attorney, certified public accountant, enrolled agent, or enrolled actuary, in order to avoid the institution or conclusion of a proceeding for his or her disbarment or suspension from practice before the Internal Revenue Service,

may offer his or her consent to suspension from such practice. The Director, Office of Professional Responsibility, in his discretion, may suspend an attorney, certified public accountant, enrolled agent, or enrolled actuary in accordance with the consent offered.

The following individuals have been placed under consent suspension from practice before the Internal Revenue Service:

Name	Address	Designation	Date of Suspension
Bauman, John J.	Battle Creek, MI	CPA	Indefinite from October 1, 2007
Montgomery, Dwight M.	Redlands, CA	Attorney	Indefinite from October 1, 2007
Deku, John V.	Toledo, OH	Attorney	Indefinite from October 8, 2007
Ying, William F.	Beverly Hills, CA	CPA	Indefinite from October 9, 2007
Brill, Ann M.	Sheboygan, WI	CPA	Indefinite from October 10, 2007
Benvin, Anne C.	Phoenix, AZ	Enrolled Agent	Indefinite from October 22, 2007
Kingman, William B.	San Antonio, TX	Attorney	Indefinite from October 22, 2007
Nurney, J. Christopher	Hatboro, PA	CPA	Indefinite from October 22, 2007
Wren, Gary M.	Redding, CA	Enrolled Agent	Indefinite from October 29, 2007
Beck, Brian S.	Boston, MA	CPA	Indefinite from November 1, 2007
Draper, Jeffrey L.	Olathe, KS	CPA	Indefinite from November 1, 2007
Ehrlich, Gary P.	Chevy Chase, MD	CPA	Indefinite from November 1, 2007

Name	Address	Designation	Date of Suspension
Garrison, John C.	Prairie Village, KS	CPA	Indefinite from November 1, 2007
Greenslit, Wayne	Keene, NH	CPA	Indefinite from November 1, 2007
Moran, Philip D.	Salem, MA	Attorney	Indefinite from November 1, 2007
Wright, Cory	Reno, NV	CPA	Indefinite from November 1, 2007
Turbeville, Mary A.	Geyserville, CA	Enrolled Agent	Indefinite from November 16, 2007
Saffold, Rodger P.	Cleveland, OH	CPA	Indefinite from December 1, 2007
Voss, Patrick W.	Metairie, LA	CPA	Indefinite from December 1, 2007
Rosner, Ronald I.	Manahawkin, NJ	CPA	Indefinite from December 13, 2007
Johnson, Jr., Stanley	Miami, FL	Attorney	Indefinite from December 14, 2007

Expedited Suspensions From Practice Before the Internal Revenue Service

Under Title 31, Code of Federal Regulations, Part 10, the Director, Office of Professional Responsibility, is authorized to immediately suspend from practice before the Internal Revenue Service any practitioner who, within five years from the date

the expedited proceeding is instituted (1) has had a license to practice as an attorney, certified public accountant, or actuary suspended or revoked for cause or (2) has been convicted of certain crimes.

The following individuals have been placed under suspension from practice before the Internal Revenue Service by virtue of the expedited proceeding provisions:

Name	Address	Designation	Date of Suspension
Crotts, William P.	Phoenix, AZ	Attorney	Indefinite from October 16, 2007
Daugherty, Troy L.	Olathe, KS	Attorney	Indefinite from October 16, 2007

Name	Address	Designation	Date of Suspension
Driscoll, Jr., Wilfred C.	Somerset, MA	Attorney	Indefinite from October 16, 2007
Shah, Ashok S.	Manalapan, NJ	CPA	Indefinite from October 16, 2007
Sheline, Calvin L.	Camp Verde, AZ	CPA	Indefinite from October 16, 2007
Bosse, Leigh D.	Hillsborough, NH	Attorney	Indefinite from October 24, 2007
Webb, James E.	Nashville, TN	CPA	Indefinite from October 25, 2007
Gottschalk, Don E.	Cedar Falls, IA	Attorney	Indefinite from October 31, 2007
Joy, Steven B.	Paton, IA	Attorney	Indefinite from October 31, 2007
Smallwood, Teresa L.	Durham, NC	Attorney	Indefinite from November 2, 2007
Donaldson, James F.	Denver, CO	Attorney	Indefinite from November 15, 2007
Roux, Johnathan M.	Fair Oaks, CA	CPA	Indefinite from November 20, 2007
Linville, Wiley T.	Denver, CO	Attorney	Indefinite from December 4, 2007
Andrade, Sergio R.	Inver Grove Hghts, MN	Attorney	Indefinite from December 13, 2007
Arzani, Mitzi H.	Charlotte, NC	CPA	Indefinite from December 13, 2007
Catron, Stephen B.	Knoxville, TN	Attorney	Indefinite from December 13, 2007
Coulagouri, Louis A.	Moorestown, NJ	Attorney	Indefinite from December 13, 2007

Name	Address	Designation	Date of Suspension
Crown, Charles K.	Blakeslee, PA	CPA	Indefinite from December 13, 2007
George, Philip J.	Great Falls, VA	Attorney	Indefinite from December 13, 2007
Heitz, John P.	Oneill, NE	Attorney	Indefinite from December 13, 2007
Jones, William F.	Park Rapids, MN	Attorney	Indefinite from December 13, 2007
Khoury, Arthur M.	Lawrence, MA	Attorney	Indefinite from December 13, 2007
McGree, Charles A.	Fort Payne, AL	Attorney	Indefinite from December 13, 2007
Nason, George H.	Franklin, TN	Attorney	Indefinite from December 13, 2007
Owen, Thomas A.	Arlington, TX	Attorney	Indefinite from December 13, 2007
Ozulumba, Michael	Boston, MA	Attorney	Indefinite from December 13, 2007
Phillips, Mark A.	Elm Grove, WI	Attorney	Indefinite from December 13, 2007
Simpson, Joseph H.	Amite, LA	Attorney	Indefinite from December 13, 2007
Sipes, Laura A.	St. Charles, MO	Attorney	Indefinite from December 13, 2007
Sullivan, Joseph O.	Warwick, NY	Attorney	Indefinite from December 13, 2007
Szegda, Michael A.	Old Tappan, NJ	Attorney	Indefinite from December 13, 2007
Misch, Paul M.	Akron, OH	Attorney	Indefinite from December 17, 2007

Name	Address	Designation	Date of Suspension
Brenner, Allen L.	Long Beach, NY	Attorney	Indefinite from December 20, 2007
Cook, Rirchard B.	Cockeysville, MD	Attorney	Indefinite from December 20, 2007
Shang, Wade V.	S. San Francisco, CA	CPA	Indefinite from December 20, 2007

Suspensions From Practice Before the Internal Revenue Service After Appeal

Under Title 31, Code of Federal Regulations, Part 10, after a decision is issued by an Administrative Law Judge, either party may appeal to the Secretary of the Treasury. The following individuals have been placed under suspension from practice before the Internal Revenue Service **AFTER** an appeal:

Name	Address	Designation	Effective Date
Andrews, Ted E.	Avon, IN	CPA	Indefinite from October 19, 2007

Disbarments From Practice Before the Internal Revenue Service After Notice and an Opportunity for a Proceeding

Under Title 31, Code of Federal Regulations, Part 10, after notice and an opportunity for a proceeding before an administrative law judge, the following individuals have been disbarred from practice before the Internal Revenue Service:

Name	Address	Designation	Effective Date
Ruocchio, Raymond	Havertown, PA	CPA	April 30, 2007
Roseman, Eric W.	Scottsdale, AZ	CPA	August 20, 2007
Solomon, Stanley	Brooklyn, NY	CPA	September 04, 2007
Marks, Robert	Medfield, MA	Attorney	October 15, 2007

Censure Issued by Consent

Under Title 31, Code of Federal Regulations, Part 10, in lieu of a proceeding being instituted or continued, an attorney, certified public accountant, enrolled agent,

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The following individuals have consented to the issuance of a Censure:

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Villarreal, Ricardo	Houston, TX	EA	September 24, 2007
Meisgeier, Deborah K.	Richmond, TX	EA	October 16, 2007
O'Brien, Colleen D.	Winter Park, FL	CPA	October 24, 2007
Staver, Peter J.	Southgate, MI	Attorney	November 06, 2007
Weiss, Ira	Pittsburgh, PA	Attorney	November 29, 2007
Orr, William S.	Kerrville, TX	CPA	December 04, 2007
Whitsitt, Richard	Panama City, FL	CPA	December 04, 2007

Update to Publication 1187, Specifications for Filing Form 1042-S, Foreign Person's U.S. Source Income Subject to Withholding, Electronically or Magnetically, revised September 2006

Announcement 2008-6

This announcement supersedes Announcement 2007-110 and incorporates additional changes to Publication 1187, *Specifications for Filing Form 1042-S, Foreign Person's U.S. Source Income Subject to Withholding, Electronically or Magnetically*, revised September 2006. Continue to use this Publication along with the changes listed below for your Tax Year 2007 filing. The following changes are effective for Tax Year 2007 filed in calendar year 2008.

- An explanatory note was added to the Recipient 'Q' Record which reads: If you are a nominee that is the withholding agent under Code Section 1446, enter the Publicly Traded Partnership's (PTP) name and other information in the NQI/FLW-THR fields; positions 401-666.
- In the Recipient 'Q' Record, a new field, NQI/FLW-THR State Code, was added to positions 643-644. Enter the two-alpha character state code (see table Part A, Sec. 14). If a state code or APO/FPO is not applicable then blank fill.
- Additional instructions were added to the Recipient 'Q' Record, NQI/FLW-THR Country Code, positions 647-648. The instructions read: Enter the two-character Country Code abbreviation, where the NQI/FLW-THR is located. Enter

blanks if the NQI/FLW-THR has a U.S. address.

- The Field Title was changed and additional instructions were added to the Recipient 'Q' Record, NQI/FLW-THR Postal Code/ZIP Code, positions 649-657. The instructions read: Enter the alpha/numeric foreign postal code or U.S. ZIP Code for all U.S. addresses including territories, possessions and APO/FPO. Enter the code in the left most position and blank fill the remaining positions. **DO NOT** use hyphens or blanks between numbers or letters (*e.g.* if the postal code written as A6B 3C5 input as A6B3C5). Left-justify.
- Some of the Canadian Province codes have changed. Use the chart below to code your file.

Province Code

AB
BC
MB
NB
NL
NS
NT
NU
ON
PE
QC
SK
YT

Province

Alberta
British Columbia
Manitoba
New Brunswick
Newfoundland & Labrador
Nova Scotia
Northwest Territories
Nunavut
Ontario
Prince Edward Island
Quebec
Saskatchewan
Yukon Territory

If you have questions concerning the filing of Form 1042-S, *Foreign Person's U.S. Source Income Subject to Withholding*, please contact the Internal Revenue Service ECC-MTB toll-free at 866-455-7438.

Guidance Regarding Marketing of Refund Anticipation Loans (RALs) and Certain Other Products in Connection With the Preparation of a Tax Return

Announcement 2008-7

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Advance notice of proposed rulemaking (ANPRM).

SUMMARY: This document describes rules that the Treasury Department and the IRS are considering proposing, in a notice of proposed rulemaking, regarding the disclosure and use of tax return information by tax return preparers. The rules would apply to the marketing of refund anticipation loans (RALs) and certain other products in connection with the preparation of a tax return and, as an exception to the general principle that taxpayers should have control over their tax return information that is reflected in final regulations published in T.D. 9375 which is published elsewhere in this issue of the Bulletin, provide that a tax return preparer may not obtain a taxpayer's consent to disclose or use tax return information for the purpose

of soliciting taxpayers to purchase such products. This document invites comments from the public regarding these contemplated rules. All materials submitted will be available for public inspection and copying.

DATES: Written or electronic comments must be received by April 7, 2008.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG-136596-07), Room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG-136596-07), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC, or sent electronically via the Federal eRulemaking Portal at <http://www.regulations.gov> (IRS REG-136596-07).

FOR FURTHER INFORMATION CONTACT: Concerning submissions of comments, Kelly Banks at (202) 622-7180; concerning the proposals, Lawrence Mack at (202) 622-4940 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

This document describes rules that the Treasury Department and the IRS are considering proposing in a notice of proposed rulemaking regarding the marketing of refund anticipation loans (RALs) and certain other products identified below in connection with the preparation of a tax return.

The proposed rules would amend the Regulations on Procedure and Administration (26 CFR Part 301) under section 7216 of the Internal Revenue Code. Section 7216 was enacted by section 316 of the Revenue Act of 1971, Public Law 92-178 (85 Stat. 529, 1971), and has been amended several times since 1971. Section 7216 imposes criminal penalties on tax return preparers who knowingly or recklessly make unauthorized disclosures or uses of information furnished to them in connection with the preparation of an income tax return. In addition, tax return preparers are subject to civil penalties under section 6713 for disclosure or use of this information unless an exception under the rules of section 7216(b) applies to the disclosure or use.

A notice of proposed rulemaking (REG-137243-02, 2006-1 C.B. 317) was published in the **Federal Register** (70 FR 72954) on December 8, 2005. Concurrent with publication of the proposed regulations, the IRS published Notice 2005-93, 2005-2 C.B. 1204 (December 07, 2005), setting forth a proposed revenue procedure that would provide guidance to tax return preparers regarding the format and content of consents to use and consents to disclose tax return information under § 301.7216-3.

Among other recommendations received in response to the notice of proposed rulemaking published on December 8, 2005, a number of commentators recommended that the regulations prohibit or substantially restrict the disclosure or use of tax return information for marketing purposes. As described in the preamble of the final regulations published in T.D. 9375 which is published elsewhere in this

issue of the Bulletin, these commentators specifically recommended banning tax return preparers from disclosing or using tax return information for the purpose of soliciting refund anticipation loans (RALs) and similar products. The Treasury Department and the IRS did not adopt this recommendation in the final regulations that are being published concurrently with this ANPRM because of the significant policy issues that need to be considered and because they had not previously proposed a rule regarding the use or disclosure of tax return information for purposes of marketing of RALs and similar products.

This ANPRM addresses two major areas of concern that have been raised and describes rules that the Treasury Department and the IRS are considering proposing regarding the marketing of RALs and certain other products identified below in connection with the preparation of a tax return. It also solicits comments on specific issues as described herein.

Concerns Raised by RALs and Certain Other Products

Financial Incentive To Inflate Refunds

The Treasury Department and the IRS are concerned that RALs and certain other products may provide tax preparers with a financial incentive to take improper tax return positions in order to inappropriately inflate refund claims. In general, RAL amounts are capped by the amount of the refund claimed on a tax return. Therefore, a preparer who inappropriately inflates the amount of a refund is able, directly or indirectly through arrangement with a RAL provider, to collect a higher fee. Additionally, a significant number of RALs are made to taxpayers who claim the earned income tax credit (EITC). The Treasury Department and the IRS are concerned that the financial benefits of selling a RAL to a taxpayer can create an incentive for the preparer to not fully comply with due diligence requirements designed to ensure the accuracy of EITC claims. *See* section 6695(g).

Even when a flat fee is charged for RALs, it may be possible that a financial incentive to inappropriately inflate the amount of a refund exists. As an example, some merchants who offer tax preparation services may encourage customers to obtain RALs and spend the funds on the

merchant's products or services. To the extent that the preparer prepares a return that claims an inappropriately large refund, the taxpayer is enabled to purchase more of the merchant's products or services.

The Treasury Department and the IRS are concerned that overall tax compliance suffers when tax advisors or tax preparers benefit directly from maximizing a refund in preparing a tax return. Treasury Department Circular 230 restricts the ability of tax practitioners to charge contingent fees in certain circumstances when there are tax administration concerns. *See* 31 C.F.R. § 10.27. The Treasury Department and the IRS are considering whether similar restrictions should be placed on use or disclosure of tax return information by preparers who receive a financial benefit from the sale of an ancillary product, such as a RAL, rather than directly from the determination of a taxpayer's tax liability.

There are two other products that potentially raise similar concerns — refund anticipation checks (RACs) and audit insurance. A RAC is a post-refund product that allows taxpayers to pay for return preparation services out of their refunds. As with a RAL, a taxpayer will only qualify to purchase a RAC if a refund is claimed on the return. Audit insurance is a type of insurance that covers professional fees and other expenses incurred in responding to or defending against an audit by the IRS. Taxpayers who purchase audit insurance may be encouraged to take aggressive tax reporting positions if they believe the insurance will provide protection against the risk of an adjustment. The Treasury Department and the IRS generally believe that arrangements that create financial incentives for taxpayers or tax preparers to exploit the audit selection process undermine tax compliance.

Potential for Inappropriate Use by Tax Preparers

In responding to the proposed regulations, some commentators expressed concern that tax preparers are inappropriately profiting from marketing RALs and certain other products to relatively unsophisticated taxpayers who do not comprehend the full costs of the products. These commentators noted that RALs are marketed primarily to low-income taxpayers who receive the EITC, that these taxpayers generally have relatively low levels of financial expertise, and that these taxpayers are

more likely than other taxpayers to rely on the advice of their preparers. These commentators urged the IRS to amend the proposed regulations to protect these taxpayers from exploitation. The National Taxpayer Advocate also expressed similar concerns. *See* National Taxpayer Advocate FY 2007 Objectives Report to Congress, vol. II, *The Role of the IRS in the Refund Anticipation Loan Industry*, at 18 (June 30, 2006).

As a general rule, the Treasury Department and the IRS believe that taxpayers should have the ability to control the use or disclosure of their tax return information. Taxpayer control, however, must be balanced against the ability of the government to effectively administer the internal revenue laws, which includes guarding against (1) the potential lessening of tax compliance, (2) the potential exploitation of taxpayers described by certain commentators, and (3) the potential existence of inappropriate financial incentives for tax preparers to inflate tax refunds.

Explanation of Contemplated Rules

Sections 7216 and 6713 provide a broad prohibition against the disclosure and use of tax return information by return preparers. Statutory exceptions are provided for a "disclosure" pursuant to any other provision of the Internal Revenue Code or an order of a court and for a "use" by a preparer to assist the taxpayer in preparing his or her state and local tax returns and declarations of estimated tax. The statutory language also authorizes the Secretary to prescribe regulations permitting additional exceptions. Thus, tax return preparers may use or disclose tax return information beyond the statutory exceptions only if, and to the extent that, Treasury regulations expressly authorize such acts.

Among other exceptions, the regulations under section 7216 generally provide that preparers may use or disclose tax return information if the taxpayer provides consent. As a general rule, taxpayers should have the ability to control the use or disclosure of their tax return information. To address the tax administration concerns described above, the Treasury Department and the IRS are considering proposing regulations that would create an exception from the general consent framework prescribed by § 301.7216-3 for

RALs, RACs, audit insurance, and similar products. This exception would effectively separate the act of return preparation from the act of marketing or purchasing certain financial products by prohibiting the use of information obtained during the tax-preparation process for the non-tax administration purpose of marketing: (i) a RAL or a substantially similar product or service; (ii) a RAC or a substantially similar product or service; or (iii) audit insurance or a substantially similar product or service.

Proposed Effective Date

The Treasury Department and the IRS anticipate that these new proposed rules would apply for returns filed on or after January 1st of the year following the date of publication in the **Federal Register** as final or temporary regulations.

Request for Comments

Before a notice of proposed rulemaking is issued, consideration will be given

to any written comments (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. All comments will be available for public inspection and copying.

Specifically, comments are encouraged on the following questions:

1. If RALs and certain other products create a direct financial incentive for preparers to inflate tax refunds, are there alternative approaches that would eliminate or reduce this incentive?
2. If the marketing of RALs and certain other products exploit or have the potential to exploit certain taxpayers, is the approach described in this ANPRM better viewed as protecting taxpayers from exploitation or as restricting taxpayers' ability to control their tax return information? If the latter, is there an alternative approach that would address the concerns described above?

3. Should RACs be treated the same way as RALs and audit insurance, or do RACs present lesser concerns?
4. Are there other products that present significant concerns for tax compliance or taxpayer exploitation that should be addressed by regulation?

Drafting Information

The principal author of this advance notice of proposed rulemaking is Dillon Taylor, formerly of the Office of the Associate Chief Counsel (Procedure and Administration). For further information, contact Lawrence Mack of the Office of Associate Chief Counsel (Procedure and Administration) at 202-622-4940 (not a toll-free call).

Linda E. Stiff,
*Deputy Commissioner for
Services and Enforcement.*

(Filed by the Office of the Federal Register on January 3, 2008, 8:58 a.m., and published in the issue of the Federal Register for January 7, 2008, 73 F.R. 1131)

Definition of Terms

Revenue rulings and revenue procedures (hereinafter referred to as "rulings") that have an effect on previous rulings use the following defined terms to describe the effect:

Amplified describes a situation where no change is being made in a prior published position, but the prior position is being extended to apply to a variation of the fact situation set forth therein. Thus, if an earlier ruling held that a principle applied to A, and the new ruling holds that the same principle also applies to B, the earlier ruling is amplified. (Compare with *modified*, below).

Clarified is used in those instances where the language in a prior ruling is being made clear because the language has caused, or may cause, some confusion. It is not used where a position in a prior ruling is being changed.

Distinguished describes a situation where a ruling mentions a previously published ruling and points out an essential difference between them.

Modified is used where the substance of a previously published position is being changed. Thus, if a prior ruling held that a principle applied to A but not to B, and the new ruling holds that it applies to both A

and B, the prior ruling is modified because it corrects a published position. (Compare with *amplified* and *clarified*, above).

Obsoleted describes a previously published ruling that is not considered determinative with respect to future transactions. This term is most commonly used in a ruling that lists previously published rulings that are obsoleted because of changes in laws or regulations. A ruling may also be obsoleted because the substance has been included in regulations subsequently adopted.

Revoked describes situations where the position in the previously published ruling is not correct and the correct position is being stated in a new ruling.

Superseded describes a situation where the new ruling does nothing more than restate the substance and situation of a previously published ruling (or rulings). Thus, the term is used to republish under the 1986 Code and regulations the same position published under the 1939 Code and regulations. The term is also used when it is desired to republish in a single ruling a series of situations, names, etc., that were previously published over a period of time in separate rulings. If the new ruling does more than restate the substance

of a prior ruling, a combination of terms is used. For example, *modified* and *superseded* describes a situation where the substance of a previously published ruling is being changed in part and is continued without change in part and it is desired to restate the valid portion of the previously published ruling in a new ruling that is self contained. In this case, the previously published ruling is first modified and then, as modified, is superseded.

Supplemented is used in situations in which a list, such as a list of the names of countries, is published in a ruling and that list is expanded by adding further names in subsequent rulings. After the original ruling has been supplemented several times, a new ruling may be published that includes the list in the original ruling and the additions, and supersedes all prior rulings in the series.

Suspended is used in rare situations to show that the previous published rulings will not be applied pending some future action such as the issuance of new or amended regulations, the outcome of cases in litigation, or the outcome of a Service study.

Abbreviations

The following abbreviations in current use and formerly used will appear in material published in the Bulletin.

A—Individual.
Acq.—Acquiescence.
B—Individual.
BE—Beneficiary.
BK—Bank.
B.T.A.—Board of Tax Appeals.
C—Individual.
C.B.—Cumulative Bulletin.
CFR—Code of Federal Regulations.
CI—City.
COOP—Cooperative.
Ct.D.—Court Decision.
CY—County.
D—Decedent.
DC—Dummy Corporation.
DE—Donee.
Del. Order—Delegation Order.
DISC—Domestic International Sales Corporation.
DR—Donor.
E—Estate.
EE—Employee.
E.O.—Executive Order.

ER—Employer.
ERISA—Employee Retirement Income Security Act.
EX—Executor.
F—Fiduciary.
FC—Foreign Country.
FICA—Federal Insurance Contributions Act.
FISC—Foreign International Sales Company.
FPH—Foreign Personal Holding Company.
F.R.—Federal Register.
FUTA—Federal Unemployment Tax Act.
FX—Foreign corporation.
G.C.M.—Chief Counsel's Memorandum.
GE—Grantee.
GP—General Partner.
GR—Grantor.
IC—Insurance Company.
I.R.B.—Internal Revenue Bulletin.
LE—Lessee.
LP—Limited Partner.
LR—Lessor.
M—Minor.
Nonacq.—Nonacquiescence.
O—Organization.
P—Parent Corporation.
PHC—Personal Holding Company.
PO—Possession of the U.S.
PR—Partner.

PRS—Partnership.
PTE—Prohibited Transaction Exemption.
Pub. L.—Public Law.
REIT—Real Estate Investment Trust.
Rev. Proc.—Revenue Procedure.
Rev. Rul.—Revenue Ruling.
S—Subsidiary.
S.P.R.—Statement of Procedural Rules.
Stat.—Statutes at Large.
T—Target Corporation.
T.C.—Tax Court.
T.D.—Treasury Decision.
TFE—Transferee.
TFR—Transferor.
T.I.R.—Technical Information Release.
TP—Taxpayer.
TR—Trust.
TT—Trustee.
U.S.C.—United States Code.
X—Corporation.
Y—Corporation.
Z—Corporation.

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¹ A cumulative list of current actions on previously published items in Internal Revenue Bulletins 2007–27 through 2007–52 is in Internal Revenue Bulletin 2007–52, dated December 26, 2007.



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