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No. 91621-7

SUPREME COURT OF THE STATE OF WASHINGTON

DOUGLAS M. DEWAR,

Respondent,

v.

KENNETH SMITH and JANE DOE SMITH, husband and wife, and their marital community property composed thereof; TRANER SMITH & CO. PLLC, a Washington professional limited liability company,

Petitioners.

PETITION FOR REVIEW

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STATE OF WASHINGTON
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IDENTITY OF PETITIONER

Defendants/Appellants, Kenneth and Jane Doe Smith and Traner Smith & Co., PLLC, respectfully submit this petition for review.

CITATION TO COURT OF APPEALS DECISION

This petition seeks review of the Court of Appeals's decision filed January 26, 2015, *Dewar v. Smith*, 342 P.3d 328 (Wash. Ct. App. 2015); App. 1-15. On March 20, 2015, the Court of Appeals denied motions for reconsideration filed by both Petitioners and Respondent. App. 16.

ISSUES PRESENTED FOR REVIEW

1. Whether federal law conflicts with, and thus preempts, the imposition of liability under state tort law upon a CPA for a statement that allegedly was misleading because it failed to disclose confidential tax return information that federal law precludes the CPA from directly or indirectly disclosing?

2. Whether, in a case of first of impression, the Court of Appeals erroneously imposed a duty of care upon a CPA to a non-client governing the CPA's communications concerning the client's federally protected confidential tax return information where the Court of Appeals: (a) grounded its analysis on the existence of an amorphous, generalized duty of all professionals to act in the public interest and thus misapplied the multi-factor test set out in *Trask v. Butler*, 123 Wn.2d 835, 872 P.2d

1080 (1994); and (b) reached a result directly contrary to *Stewart Title Guaranty Co. v. Sterling Savings Bank*, 178 Wn.2d 561, 311 P.3d 1 (2013), in which this Court rejected the imposition of a duty on the part of an attorney to a non-client under analogous circumstances.

STATEMENT OF THE CASE

This case arises out of a dispute over a federal tax refund, allegedly assigned to pay a debt, but taken by the debtor to Thailand to avoid payment. By permitting the absconder's accountants to be held liable, the decision below puts a CPA's absolute obligations under federal law to maintain the confidentiality of client information in direct conflict with an expansively conceived state law duty to protect third parties and the public generally. The Court should accept review to bring needed clarity to Washington law and correct an erroneous extension of that law to require CPAs to violate their federal duties of confidentiality.

Plaintiff/Respondent Douglas Dewar ("Dewar") alleges that Defendants/Appellants/Petitioners Ken Smith and Traner Smith & Co., PLLC's (collectively "Traner Smith"), a CPA firm, assisted Brad Beddall ("Beddall") in diverting Beddall's 2009 federal income tax refund checks that Beddall had agreed to give to Dewar pursuant to a Property Settlement Agreement ("Agreement") between Dewar and Beddall. Under the Agreement, Beddall agreed to allow Dewar to review Beddall's

return and receive the tax refund. Once the return was filed, Beddall changed the address to which the refund checks were to be delivered from his attorney's office to Traner Smith's office. Beddall later directed Traner Smith to provide the checks to his son-in-law. Beddall took the money to Thailand. Dewar seeks to hold Traner Smith responsible for its client's defalcation.

Factual Background. Dewar and Beddall were joint venturers for years on many real estate projects. CP 70-71. In 2006, Beddall and Dewar undertook a condominium-conversion project ("Project"). CP 72-73; CP 345-73. By mid-2009, the Project was losing large amounts of money, and Beddall told Dewar that he wanted out of the Project and all related contractual obligations owed to Dewar. CP 73-74. Dewar declined to release Beddall, and on December 23, 2009, he sued Beddall for breach of loan documents related to the Project. *Id.*; CP 285, ¶ 7.5.

Dewar, a CPA and the accountant for the Project, believed that Beddall was entitled to a large tax refund arising from the debts associated with the Project. CP 76 at 33-34; CP 283-87, ¶¶ 4, 7.5 & 10. The parties began discussing a settlement contemplating that Beddall would seek a tax refund to be used to fund the settlement. *Id.* In March 2010, the parties executed the Agreement, under which Beddall agreed to transfer title to the Project property to Dewar and to engage Traner Smith to prepare

Beddall's 2009 federal income tax return. CP 281-93, 431-71. Beddall agreed that his tax refund would be worth at least $1,000,000. *Id.* Traner Smith had no involvement in the negotiations between Dewar and Beddall that culminated in the Agreement and is not a party to any agreement between Beddall and Dewar. CP 28, ¶ 2. The Agreement included a Special Power of Attorney and an IRS Form 2848, each of which purported to assign or transfer Beddall's rights related to the tax refund to his attorney, John Hatch ("Hatch"). CP 291-93.

In February 2010, while Dewar and Beddall continued to negotiate the Agreement, Beddall formally retained Traner Smith to prepare Beddall's 2009 federal income tax return. CP 27, ¶ 1; CP 515-20. Traner Smith agreed that it would prepare the relevant tax documents and not disclose Beddall's tax information to any third party for any purpose, other than to prepare the return, without Beddall's consent. *Id.* The engagements do not mention Dewar, the lawsuit, or the Agreement. *Id.*

At the outset of Traner Smith's engagement, Beddall explicitly permitted Traner Smith to work with Dewar to prepare the return. CP 28-29, ¶ 3. Shortly after the return was filed, Beddall directed Traner Smith to cease discussing the return with Hatch. CP 33, ¶ 14; CP 60 at 26-27; CP 61 at 32:22-25; CP 62 at 33:1-21. Beddall directed that Traner Smith communicate with no one but him about the return. *Id.* Traner Smith did

not know why Beddall had revoked his authority to communicate with Hatch and Dewar, (CP 33, ¶ 14), and it had no knowledge of the dealings among Hatch, Dewar, and Beddall. CP 431-71; CP 28, ¶ 2.

As filed, the return provided for the refund checks to be sent to Hatch. CP 33, ¶ 15. In May 2010, Beddall asked Ken Smith ("Smith") of Traner Smith about the status of the refund. *Id.*; CP 59 at 24; CP 60 at 25. Smith replied that Beddall could reach an IRS agent through Traner Smith's practitioner hotline. *Id.* Other than dialing the IRS phone number and sitting through the conference, Smith did not participate at all in Beddall's call with the IRS. *Id.* During the call, Beddall asked the IRS agent to change the address on the return from Hatch's address to Traner Smith's address. *Id.*

In June 2010, after the 2009 tax return had been filed, Dewar requested another copy of "the 2009 Form 1040 [Traner Smith] prepared for B[eddall]." CP 828; CP 35, ¶ 18; CP 34-35, ¶¶ 16-19. After receiving permission from Beddall, Traner Smith emailed Dewar "the filed tax returns . . . as requested for Brad Beddall." CP 831; CP 33-34, ¶¶ 14-15; CP 60 at 26-27; CP 61 at 32:19-23; CP 62 at 33:1-21. Smith did not have access to any copy of the return with the address change. *Id.*

Beddall later instructed Traner Smith to deliver the refund checks to his son-in-law, and in July 2010 Traner Smith did so. CP 35-36, ¶ 20.

On August 16, 2010, Beddall emailed Dewar and Hatch, advising that he had taken the refund money to Thailand. CP 36, ¶ 21; CP 522. Beddall forwarded this email to Traner Smith. *Id.* This was the first time that Traner Smith learned that Beddall did not intend to provide or actually provide the tax refund to Dewar or Hatch. *Id.*; CP 63 at 39:10-13. After receiving the email, Traner Smith withdrew from Beddall's engagement. CP 36, ¶ 21. Months later, Dewar commenced this action. CP 1153-77.

Proceedings Below. On November 8, 2012, the trial court granted Dewar's motion for partial summary judgment, holding that, pursuant to *Trask v. Butler*, 123 Wn.2d 835, 872 P.2d 1081 (1994), Traner Smith owed a duty to disclose Beddall's confidential tax information to Dewar and that its failure to do so constituted negligent misrepresentation. CP 215-18; CP 766-78. The trial court also denied Traner Smith's motion for partial summary judgment to dismiss contract claims. CP 219-21. On March 20, 2013, the trial court granted Dewar's further motion for partial summary judgment, fixing the damages resulting from Traner Smith's alleged negligent misrepresentation. CP 15-18. During the pendency of Traner Smith's motions for discretionary review, Dewar voluntarily dismissed all of his claims, save for negligence, negligent misrepresentation, and breach of third-party beneficiary contract. CP 4-6.

The Court of Appeals affirmed the trial court order determining

duty and negligent misrepresentation as a matter of law. Division One held that federal law preempted any state tort duty to disclose confidential tax information. 342 P.3d at 332-33. However, Division One further held that Traner Smith had "choices" when presented with Dewar's June 2010 request for Beddall's return. *Id.* In particular, Division One held that, as a matter of law, Traner Smith had a duty to provide Dewar with "inquiry notice" regarding the change of address, and that such notice could have been provided by performing a "noisy withdrawal" from Traner Smith's engagement with Beddall. *Id.* The Court of Appeals reversed and remanded, however, finding that Dewar had failed to establish that Traner Smith's breach proximately caused Dewar's damages. The parties each filed motions for reconsideration, which were denied on March 20, 2015.

ARGUMENT

Review is necessary because Division One's ruling forces Washington CPAs to choose between disclosing confidential tax return information and thereby committing a federal crime, or adhering to federal law and facing state tort liability. The ruling pits Washington common law against federal law and the Constitution of the United States. Moreover, because the duties that a CPA owes to third parties, and a CPA's duty to disclose tax information (if only indirectly) are matters of first impression in this state, there is a substantial public impact element to

disposition of this case. Review should be granted to resolve these issues.

I. The "choices" identified by the Court of Appeals are irreconcilable with the requirements of federal law.

The Court of Appeals correctly concluded that federal law prohibited Traner Smith from directly advising Dewar of Beddall's May 2010 instruction to the IRS to change the address for issuance of his refund checks or of Beddall's subsequent instruction to Traner Smith to give the checks to his son-in-law. 342 P.3d at 332. The Court of Appeals, however, then determined that "when Dewar requested a copy of Beddall's return [in June 2010], Smith had choices besides disclosing taxpayer information in violation of federal law or transmitting the misleading original return." *Id.* In the Court of Appeals's view, Traner Smith could have either "told Dewar that he couldn't share any further information because Beddall had revoked his consent to disclosure" or Traner Smith "could also have made a 'noisy withdrawal' of representation." *Id.* at 332-33. These purported "choices" are in reality not choices at all because they fail to comport with the expansive protection of tax information under federal law and Traner Smith's reciprocal broad obligations under the federal regime to safeguard the confidentiality of its client's information and honor its client's directives not to disclose that information. The Court of Appeals held, in effect, that

Traner Smith had a state law duty to find a way to disclose indirectly with a wink and a nod what would be a federal crime to disclose directly.

"The doctrine of preemption has its roots in the constitutional maxim that the laws of the United States are the supreme law of the land." *Pioneer First Fed. Savs. & Loan Ass'n v. Pioneer Nat'l Bank*, 98 Wn.2d 853, 856, 659 P.2d 481, 484 (1983). "There are three classes of preemption: express preemption, field preemption and conflict preemption." *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1022 (9th Cir. 2013) (internal quotation marks and citation omitted), *cert. denied*, 134 S. Ct. 1876 (2014). "Conflict preemption occurs where (1) it is impossible to comply with both state and federal law or (2) state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 800, 225 P.3d 213, 225 (2009) (internal quotation marks and citation omitted); *see also Ariz. v. United States,* 132 S. Ct. 2492, 2501 (2012) (same).

Here, the obligations imposed by federal law are unequivocal: without Beddall's consent, Traner Smith was prohibited from disclosing any information furnished to it in connection with the preparation of Beddall's return or using any such information for any purpose other than preparing the return. 26 U.S.C. § 7216(a); *see also id.* § 6713 (prescribing monetary penalties). The "taxpayer information" encompassed by these

prohibitions includes "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." Treas. Reg. § 301.7216-1(b)(3) (emphasis added).

Not only is the scope of information subject to strict confidentiality broadly defined, the means of unauthorized dissemination or use are defined in equally broad terms. "Disclosure" for purposes of federal law "means the act of making tax return information known to any person in any manner whatever." *Id.* § 301.7216-1(b)(5). Similarly, "use" of tax information "includes any circumstances in which a tax return preparer refers to, or relies upon, tax return information as the basis to take or permit an action." *Id.* § 301.7216-1(b)(4). In no event could Traner Smith "disclose" or "use" Beddall's tax return information—including the address communicated to the IRS by Beddall post-filing—without Beddall's express written consent, *id.* § 301.7216-3(a)(1), which Beddall had indisputably revoked as of May 2010. CP 33-34, ¶¶ 14-15; CP 60 at 26-27; CP 61 at 32:22-25; CP 62 at 33:1-21.

In light of the clarity and breadth of the federal strictures, the Court of Appeals's suggested alternatives to Traner Smith's literal compliance with Dewar's June 2010 request for Beddall's filed return are not really choices at all. Both a "noisy withdrawal" and notifying Dewar of

Beddall's revocation of his consent to share tax information with Dewar present a direct and positive conflict with the dictates of federal law.

The Court of Appeals cited no authority, other than Dewar's naked suggestion at oral argument, that a "noisy withdrawal" furnished a valid option under the relevant professional code. Unlike the rules governing lawyers in Washington, which explicitly recognize a lawyer's ability to give notice of his or her withdrawal to third parties and to "disaffirm or withdraw" any work product, *see* RPC 1.6 cmt. 25, the parallel rules governing a CPA's duty of confidentiality contain no such recognition.[1]

But even assuming the governing professional standards recognized the concept of a "noisy withdrawal," the Court of Appeals does not explain how Traner Smith could make any "noise" without disclosing or using Beddall's protected tax information. Disaffirmance of Beddall's return would either have occasioned a direct disclosure of the amended address as the basis for the disaffirmance or would have constituted an indirect disclosure or use of the same information. Indeed, the whole point of making "noise" under the Court of Appeals's rationale could only be to alert Dewar that there had been a change in Beddall's tax return so

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[1] See WAC 4-30-050(3) (prohibiting CPAs' disclosure without consent of "any confidential communication or information pertaining to the client obtained in the course of performing professional services"); AICPA Code of Prof'l Conduct ET § 301 (prohibiting disclosure of "any confidential client information without the specific consent of the client").

that he could take action. On their face, the applicable federal definitions of "disclose" and "use" embrace indirect, as well as direct, dissemination of the protected tax information: "disclosure" includes "making tax return information known to any person *in any manner whatever*," and "use" means "*any circumstance*" in which Traner Smith "refers to, or *relies upon*, tax return information as the basis to take or permit an action." Given these standards, using the changed address on the return as the basis for a "noisy withdrawal" would have run afoul of federal law in the same manner as an express unauthorized disclosure.

As this Court has observed in a different context, "What cannot be done directly because of constitutional restriction cannot be accomplished indirectly by legislation which accomplishes the same result." *State ex rel. Troy v. Yelle*, 27 Wn.2d 99, 102, 176 P.2d 459, 461 (1947) (internal quotation marks and citation omitted). Constitutionally-based preemption principles dictate the same reasoning as the Court reconciles the requirements of federal statutory law and state tort law. The Court of Appeals's proffered approach not only makes it impossible for Traner Smith to comply with both federal requirements and state tort law, its conception of state tort duties also conflicts with the federal scheme because it renders state tort law "an obstacle to the accomplishment of the full purposes and objectives of Congress." *Satomi*, 167 Wn.2d at 800, 225

P.3d at 225. By criminalizing disclosure of confidential tax information, the Internal Revenue Code unmistakably evidences Congress's intent to ensure that the information clients provide to their tax preparers for purposes of their returns remains confidential. The fulsome expression of this congressional policy contained in the implementing regulations underscores the objective of protecting sensitive information, and in turn, facilitating taxpayers' compliance and payment. By compelling Washington CPAs to look for ways to evade the letter of federal law and obliquely communicate about protected information to third parties, the Court of Appeals's decision, at a minimum, undermines the means chosen by Congress to protect taxpayers and frustrates the congressional objective of encouraging Code compliance by all taxpayers.

The Court of Appeals's proffered "quieter" alternative to "noisy withdrawal" fares no better. Notifying Dewar that Beddall had revoked his prior consent to permit Traner Smith to share tax information with Dewar is similarly irreconcilable with federal requirements. Beddall's revocation of his prior consent itself constitutes "tax return information" as defined by federal regulation, because it qualifies as "*any* information . . . furnished in *any form or manner* for, *or in connection with*, the preparation of a tax return." Treas. Reg. § 301.7216-1(b)(3) (emphasis added). Beddall's revocation is information that Beddall provided to

Traner Smith solely in the context and by virtue of the preparation of his federal return. *Id.* § 301.7216-1(b)(3)(D) (defining information supplied "in connection with" a tax return as information that "taxpayer would not have furnished . . . but for the intention to engage, or the engagement of, the tax return preparer to prepare the tax return"). Putting Dewar on "inquiry notice" by advising him of Beddall's revoked consent both constitutes a "use" of confidential information (since Traner Smith would have "relie[d] upon" the revocation "as the basis to take . . . an action," *id.* § 301.7216-1(b)(4)(i)) and the same type of indirect disclosure that cannot be countenanced to evade an express restriction.[2]

In short, the Court of Appeals's attempts to harmonize the incompatible demands of federal law and state tort law fall short. Given the conflict between the two, under the facts here, federal laws criminalizing breach of client confidentiality preempt application of state law negligence principles. The trial court's orders addressing Dewar's negligence-based claims should have been reversed in their entirety.

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[2] Nor do preemption principles support the "silent" option of Traner Smith simply withdrawing in June 2010 without any notice to Dewar or Hatch. Under Supreme Court jurisprudence, "an actor seeking to satisfy both his federal- and state-law obligations is not required to cease acting altogether in order to avoid liability. Indeed, if the option of ceasing to act defeated a claim of impossibility, impossibility pre-emption would be all but meaningless." *Mut. Pharm. v. Bartlett*, 133 S. Ct. 2466, 2477 (2013) (internal quotation marks and citation omitted). The "purposes and objectives" strand of conflict preemption also applies. *Satomi*, 167 Wn.2d at 806, 225 P.3d at 228.

II. The Court of Appeals's recognition of a duty owed to a non-client misapplies the *Trask* factors and conflicts with *Stewart Title.*

The Court of Appeals's holding that Traner Smith owed Dewar any state law duty suffers from three fundamental defects, which if left uncorrected will undermine settled expectations about accountants' duties and sow confusion and disloyalty.

First, the Court of Appeals relied on the notion that "Smith had a statutory and common law duty of care to act in the public interest." 342 P.3d at 334. Such guiding principles are far too slender a reed, however, to the bear the weight of the expansive duties to third parties fashioned by the Court of Appeals. Diffuse notions of acting in the public interest must yield to the specific rules imposed by state and federal law and explicit professional standards, which themselves vindicate the public interest by balancing considerations and ensuring an ethical, loyal accounting profession. As the AICPA Code declares, "[i]ntegrity requires a member to be, among other things, honest and candid *within the constraints of client confidentiality.*" AICPA Code of Prof'l Conduct ET § 54.02.

Neither of the authorities upon which the Court of Appeals relies supports the creation of third party duties to non-clients based on a simple public interest rationale. *ESCA Corporation v. KPMG Peat Marwick*, 135 Wn.2d 820, 959 P.2d 651 (1998), addressed application of comparative

fault principles to negligent misrepresentation claims. *Id.* at 823, 825-26, 959 P.2d at 652-53. Nowhere in that decision did this Court suggest that a CPA's general need to act in the public interest could serve as the basis for liability to non-clients. To the contrary, while *ESCA* involved a negligent misrepresentation claim against a client's auditor, the Court was not asked, and did not have occasion to address, the circumstances under which CPAs can owe duties to third parties. Nor did ESCA involve federally protected individual taxpayer information. *Donatelli v. D.R. Strong Consulting Engineers, Inc.*, 179 Wn.2d 84, 312 P.3d 620 (2013), is even further afield. That case considered whether the independent duty doctrine (formerly the economic loss rule) applied to misrepresentations that induced a party to enter into a contract. Traner Smith and Dewar had no contract, and Dewar does not claim fraudulent inducement. This Court noted in *Donatelli* that "design professionals also owe duties to their clients and the public to act with reasonable care," *id.* at 92, 312 P.3d at 624, but it did so in illustrating the need to identify the scope of the independent *contractual* duties assumed by the defendant. While it makes sense that a structural engineer owes duties to the public to make sure that the buildings it designs do not fall down, *Donatelli* and the cases it cites furnish no support for the Court of Appeals's conclusion here that a CPA preparing an individual tax return owes similar duties to non-clients.

Second, the Court of Appeals misapplied the multi-factor test set forth in *Trask v. Butler*, 123 Wn.2d 835, 872 P.2d 1080 (1994), in holding that Traner Smith owed a duty to Dewar. Under *Trask*, "the threshold question is whether the plaintiff is an intended beneficiary of the transaction to which the advice pertained. . . . [N]o further inquiry need be made unless such an intent exists." *Id.* at 843, 872 P.2d at 1084. Here, the Court of Appeals concluded that Dewar's claim cleared this threshold because "Beddall and Dewar expressly intended the tax return prepared by Smith to benefit Dewar." 342 P.3d at 335. This analysis, however, poses the wrong question because it focuses on Beddall's and Dewar's intent, *i.e.*, the intent expressed in the Agreement, as opposed to Beddall's and Traner Smith's intent as expressed in the Traner Smith engagement letters.[3]

Relatedly, the Court of Appeals also erroneously applied the fifth and sixth *Trask* factors, "the policy of preventing future harm" and "the extent to which the profession would be unduly burdened by a finding of liability." 123 Wn.2d at 843, 872 P.2d at 1084. This Court observed in

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[3] Similarly, because there is no evidence of any intent by Traner Smith and Beddall for Dewar to be the primary beneficiary of the Traner Smith-Beddall engagement, Dewar's third-party beneficiary claim must also fail as a matter of law. Dewar's and Beddall's intent via-a-vis the Agreement is irrelevant both to the determination of intent under *Trask* and Dewar's claim for breach of contract on a third-party beneficiary theory. Moreover, as discussed further below, Dewar's third-party beneficiary contract claim is precluded by this Court's decision in *Stewart Title*.

Trask that "[t]he policy considerations against finding a duty to a nonclient are the strongest where doing so would detract from the attorney's ethical obligations to the client." *Id.* at 844, 872 P.2d at 1085. Given the clear ethical—as well as regulatory and statutory—imperative that Traner Smith refrain from disclosing client confidences without consent, these final *Trask* factors counsel *against* the imposition of a duty. In relying on public duties to support its *Trask* analysis, the Court of Appeals failed to accord any weight to the specific duty of client confidentiality that circumscribes and overrides the generalized duty to act in the public interest. Under such a rationale, these *Trask* factors would invariably militate in favor of finding third-party duties because broad standards of conduct governing most professions could always justify expanding the scope of a professional's potential liability.[4]

Third, the decision below fails to comport with this Court's most recent application of the *Trask* factors in *Stewart Title Guaranty Co. v. Sterling Savings Bank*, 178 Wn.2d 561, 311 P.3d 1 (2013). In *Stewart Title*, this Court held that defense counsel retained by an insurer on behalf

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[4] The Court of Appeals's balancing of the fourth *Trask* factor—"the closeness of the connection between the defendant's conduct and the injury—also misses the mark. 123 Wn.2d at 843, 872 P.2d at 1084. The Court of Appeals found such a close connection because "Dewar remained ignorant of the changed address" on Beddall's return. 342 P.3d at 335. The Court of Appeals's analysis conflicts with its later—and correct—conclusion that Dewar failed to establish proximate causation given Beddall's ability to act without any assistance from Traner Smith. *Id.* at 337.

of its insured owed no tort duty to the insurer, such that the insurer could not state a claim for professional negligence against the attorneys. The *Stewart Title* court determined that the insurer's and insured's alignment of interests "does not by itself show that the attorney or client *intended* the insurer to benefit from the attorney's representation of the insured." *Id.* at 567, 311 P.3d at 4. Likewise, the defense counsel's duty to keep the insurer informed of the status of the underlying proceeding was also insufficient to clear the *Trask* hurdles. *Id.* at 568, 311 P.3d at 5.

The facts here are even less compelling than those rejected as inadequate in *Stewart Title*. Dewar cannot even claim the status of a third-party payor, as Beddall himself directly retained and paid Traner Smith. CP 56 at 10:24-11:11; CP 515-20. Traner Smith's duty to keep Dewar informed of the status of the tax return was even narrower than the attorney's duty to inform the insurer in *Stewart Title*, as Dewar had no direct relationship with Traner Smith via engagement letter or otherwise, and Beddall retained—and exercised—his right to revoke prior consent to disclosure. The Court of Appeals correctly observed that "Dewar had no preexisting obligation to provide accounting services for Beddall," 342 P.3d at 336, but rather than a point of distinction with *Stewart Title*, this circumstance reinforces the conclusion that the facts here are even farther away from supporting a finding of duty.

If the Court concludes, as it should, that federal law preempts the imposition of state tort liability under the circumstances presented, the Court need not address the balancing of policy considerations for which *Trask* calls. However, it is critical that this Court take up and resolve some or all of these issues. The accounting profession in Washington has ordered itself around the existing legal norms reflected in the foregoing cases. If a sea change is warranted in state law, it should come only after careful consideration by this Court.[5]

CONCLUSION

For the foregoing reasons, Smith respectfully requests that the Court accept review in this case, reverse the Court of Appeals's decision to the extent that it sustained Dewar's negligence and negligent misrepresentation claims, and direct the entry of judgment in Smith's favor with respect to all of Dewar's remaining claims.

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[5] The Court of Appeals also erred in sustaining the trial court's conclusion that Traner Smith's conduct constituted a breach of duty as a matter of law based on an affirmative misrepresentation. 342 P.3d at 336. Under the Restatement, furnishing false information gives rise to liability if the defendant "fails to exercise reasonable care or competence in obtaining or communicating the information." Restatement (Second) of Torts § 552(1). "What is reasonable is, as in other cases of negligence, dependent upon the circumstances," and "[t]he question is one for the jury, unless the facts are so clear as to permit only one conclusion." *Id.*, cmt. e. The reasonableness analysis required under the Restatement must account for the specific request to which Traner Smith was responding and its (un)awareness of the purpose for the request (*see id.,* cmt. a), the duties of non-disclosure attendant under federal and state law, and what Traner Smith reasonably believed Dewar himself would have known based on his own career as a CPA concerning the version of the return to which Traner Smith would have had access. The reasonableness of Traner Smith's actions must, at a minimum, be left to a jury.

Dated: April 20, 2015

Respectfully submitted,

By:

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DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on April 20, 2015, I caused service of the foregoing pleading on each and every attorney of record herein:

VIA LEGAL MESSENGER and E-Mail

Mr. Robert Gould
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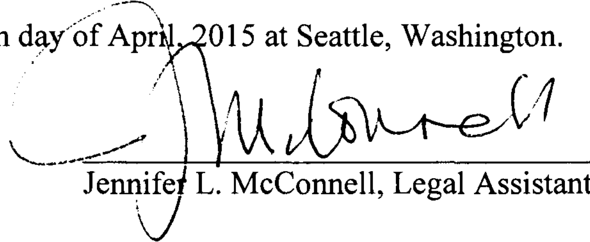
DATED this 20th day of April, 2015 at Seattle, Washington.



Jennifer L. McConnell, Legal Assistant

APPENDIX

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C

Court of Appeals of Washington,
Division 1.
Douglas M. DEWAR, Respondent,
v.
Kenneth SMITH and Jane Doe Smith, husband and wife, and the marital community composed thereof; Traner Smith & Co.PLLC, a Washington professional limited liability company, Petitioners.

Nos. 69701–3–I, 70190–8–I.
Jan. 26, 2015.

Background: Debtor sued creditor's CPA for breach of duty owed to third-party beneficiary, breach of fiduciary duties, and other claims. The Superior Court, Snohomish County, Michael T. Downes, J., granted partial summary judgment in favor of creditor, finding that CPA owed duty of care and committed negligent misrepresentation, and determined amount of damages.

Holdings: On grant of CPA's petition for discretionary review, the Court of Appeals, Leach, J., held that:
(1) federal prohibition on disclosing tax return information did not preclude finding that CPA committed negligent misrepresentation;
(2) CPA owed duty of care to creditor;
(3) evidence supported finding breach of duty and reliance elements of negligent misrepresentation claim;
(4) genuine issue of material fact existed as to whether CPA's misrepresentation proximately caused creditor's injury; and
(5) settlement agreement was not contrary to federal tax law.

Affirmed in part, reversed in part, and remanded.

West Headnotes

[1] Accountants 11A

11A Accountants
11Ak9 k. Duties and liabilities to third persons. Most Cited Cases

Federal prohibition on disclosing address on debtor's tax return, after debtor revoked his consent for CPA to disclose any tax return information to creditor, did not require CPA to send misleading copy of original return to creditor and, thus, did not preclude finding that CPA committed negligent misrepresentation; original return reflected that refund would be sent to debtor's attorney consistent with creditor and debtor's settlement agreement, and when creditor requested copy of debtor's tax return, CPA could have requested developer's consent to share the amended return, told creditor that developer had revoked his consent to disclose, or made a "noisy withdrawal" after debtor changed the return address. 26 U.S.C.A. §§ 6713(a), 7216(a); 26 C.F.R. § 301.7216–1(b)(3)(i); WAC 4–30–050(3).

[2] Accountants 11A

11A Accountants
11Ak9 k. Duties and liabilities to third persons. Most Cited Cases

CPA who prepared debtor's tax return owed duty of care to creditor, as a third party, not to mislead him about debtor's return, on which debtor had changed address for refund without creditor's knowledge, so as to support claim that CPA committed negligent misrepresentation; CPA had statutory and common law duty of care to act in the public interest, CPA knew the

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relevant terms of the settlement agreement between debtor and creditor, CPA knew agreement expressly intended CPA's professional services and the resultant tax refund to benefit creditor, and CPA knew the importance to creditor of the address for refund shown on the return. West's RCWA 18.04.015(b); WAC 4–30–048 .

[3] Attorney and Client 45 ⚷26

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k26 k. Duties and liabilities to adverse parties and to third persons. Most Cited Cases

Under test for determining when an attorney owes a duty of care to a nonclient, for purposes of a legal malpractice claim, a court must consider: (1) the extent to which the transaction was intended to benefit the plaintiff; (2) the foreseeability of harm to the plaintiff; (3) the degree of certainty that the plaintiff suffered injury; (4) the closeness of the connection between the defendant's conduct and the injury; (5) the policy of preventing future harm; and (6) the extent to which the profession would be unduly burdened by a finding of liability.

[4] Attorney and Client 45 ⚷26

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k26 k. Duties and liabilities to adverse parties and to third persons. Most Cited Cases

Under balancing test for determining when an attorney owes a duty of care to a nonclient for purposes of a legal malpractice claim, the extent to which the transaction was intended to benefit the plaintiff presents the threshold inquiry; if the attorney's client did not intend the representation to benefit a nonclient, that nonclient has no standing to sue.

[5] Accountants 11A ⚷9

11A Accountants
11Ak9 k. Duties and liabilities to third persons. Most Cited Cases

Evidence supported finding that CPA breached duty of care to creditor as third party not to mislead him regarding debtor's tax return, and that creditor relied on CPA's misrepresentation, as elements of claim that CPA committed negligent misrepresentation; CPA knew the material terms of creditor and debtor's settlement agreement and knew or should have known that return would guide creditor in business decisions related to the agreement, CPA conveyed the return under circumstances he knew to be misleading, creditor relied on that misleading information, remained ignorant of debtor's breach of the agreement, and so did not act to protect his own interests, and, given the history of open communication about the return among all parties, creditor reasonably relied on the information CPA provided.

[6] Fraud 184 ⚷13(3)

184 Fraud
184I Deception Constituting Fraud, and Liability Therefor
184k8 Fraudulent Representations
184k13 Falsity and Knowledge Thereof
184k13(3) k. Statements recklessly made; negligent misrepresentation. Most Cited Cases

Fraud 184 ⚷58(1)

184 Fraud
184II Actions
184II(D) Evidence
184k58 Weight and Sufficiency
184k58(1) k. In general. Most Cited

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Cases

To prove negligent misrepresentation, a party must establish by clear, cogent, and convincing evidence that: (1) the defendant supplied information that was false for the guidance of the plaintiff in a business transaction, (2) the defendant knew or should have known that the information was for the purpose of guiding the plaintiff in a business transaction, (3) the defendant was negligent in obtaining or communicating the false information, (4) the plaintiff relied on the information, (5) the plaintiff's reliance was reasonable, and (6) the false information proximately caused the plaintiff damages. Restatement (Second) of Torts § 552.

[7] Judgment 228 ⚷181(33)

228 Judgment
228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(15) Particular Cases
228k181(33) k. Tort cases in general. Most Cited Cases

Genuine issue of material fact existed as to whether CPA's misrepresentation regarding debtor's tax return proximately caused creditor's injury, thus precluding summary judgment in creditor's negligent misrepresentation action against CPA.

[8] Negligence 272 ⚷373

272 Negligence
272XIII Proximate Cause
272k373 k. Necessity of and relation between factual and legal causation. Most Cited Cases

Proximate cause has two elements: cause in fact and legal causation.

[9] Negligence 272 ⚷375

272 Negligence
272XIII Proximate Cause
272k374 Requisites, Definitions and Distinctions
272k375 k. In general. Most Cited Cases

Negligence 272 ⚷379

272 Negligence
272XIII Proximate Cause
272k374 Requisites, Definitions and Distinctions
272k379 k. "But-for" causation; act without which event would not have occurred. Most Cited Cases

"Cause in fact," as an element of proximate cause, is the actual, "but for," cause of the injury.

[10] Negligence 272 ⚷383

272 Negligence
272XIII Proximate Cause
272k374 Requisites, Definitions and Distinctions
272k383 k. Remoteness and attenuation; mere condition or occasion. Most Cited Cases

"Legal causation," as an element of proximate cause, focuses on whether, as a matter of policy, the connection between the ultimate result and the tortfeasor's act is too remote or attenuated to impose liability.

[11] Negligence 272 ⚷1713

272 Negligence
272XVIII Actions
272XVIII(D) Questions for Jury and Directed

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Verdicts
272k1712 Proximate Cause
272k1713 k. In general. Most Cited Cases

Court may determine proximate cause as a matter of law where the facts are undisputed and reasonable minds could not differ; but proximate cause is usually the province of the jury because it involves determining what actually occurred.

[12] Compromise and Settlement 89 ⚿9

89 Compromise and Settlement
89I In General
89k7 Validity
89k9 k. Legality of consideration. Most Cited Cases

Internal Revenue 220 ⚿4973

220 Internal Revenue
220XXVIII Refunding Taxes
220XXVIII(A) In General
220k4973 k. Right to proceeds; interception of refunds. Most Cited Cases

Settlement agreement between debtor and creditor, which sought to transfer debtor's tax refund to creditor, was not contrary to federal tax law; agreement relied upon authorized procedures to accomplish the transfer, as debtor signed form naming attorney as representative to sign return and receive refund, debtor had option to initial paragraph limiting attorney's authority to receive, but not to endorse or cash, the refund checks, but did not initial that section, consistent with provisions in the agreement stating that attorney would endorse and convert the tax refund to good and available funds and immediately disburse it to creditor. 26 C.F.R. §§ 601.503, 601.504(a)(5), 601.506; 31 C.F.R. § 240.13.

***329** Sam Breazeale Franklin, Lee Smart PS Inc, Timothy D. Shea, Attorney at Law, Seattle, WA, for Petitioner.

***330** Robert B. Gould, Attorney at Law, ynnwood, WA, for Respondent.

LEACH, J.

¶ 1 On discretionary review, we consider the extent of an accountant's duty to a third party. Certified public accountant (CPA) Kenneth Smith and the accounting firm Traner Smith & Company PLLC (collectively Smith) challenge the trial court's summary award of a $1,375,930.86 judgment to Douglas Dewar for Smith's alleged negligent misrepresentations about a client's tax return and related activities. Smith also challenges the denial of his request for summary judgment on contract claims. Dewar asks this court to allow him to supplement the record with information not considered by the trial court.

¶ 2 We agree that Smith breached a duty he owed to Dewar. But Dewar has not established as a matter of law that Smith's negligent misrepresentation proximately caused his damages, and disputed issues of material fact preclude summary judgment on the remaining issues considered by the trial court. We deny Dewar's motion to supplement the record. We reverse and remand for further proceedings consistent with this opinion.

FACTS

¶ 3 Bradley Beddall, a real estate developer, and Dewar, Beddall's financier and accountant, participated over the years in many real estate joint ventures. Around 2006, Dewar and Beddall began a condominium conversion project for the Lea Hill Condominiums. The details of the documentation of their respective obligations and the associated entities they used for the project are not important to our analysis. Therefore, we will describe all transactions and documents as taking place directly between Dewar

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and Beddall.

¶ 4 By 2009, the local real estate market had declined, the project had floundered, Beddall owed to Dewar about $3,900,000, and Beddall could no longer meet his obligations. In July 2009, Beddall told Dewar that he wanted out of the project and all associated obligations that he owed Dewar. Dewar would not release Beddall. In late 2009, Dewar sued Beddall for breach of loan documents. The parties then discussed settlement for several months.

¶ 5 In January 2010, Beddall signed a quit claim deed conveying the Lea Hill property to Dewar. This deed stated it was effective December 29, 2009, and preserved Beddall's liability to Dewar. In March 2010, Dewar and Beddall signed a settlement agreement, also having a stated effective date of December 29, 2009. Beddall's attorney, Jonathan Hatch, also signed the agreement and agreed to be bound by it. Critical to the agreement was Dewar's belief that Beddall could obtain a large tax refund based upon his losses from the project.

¶ 6 As a result, the agreement required that Beddall transfer title to the Lea Hill property, which generated losses, to Dewar and hire the accounting firm of Traner Smith to timely file Beddall's 2009 tax return, seeking a refund of not less than $1,000,000. The agreement gave Dewar the right of "review, evaluation, and approval" of the tax return in his "sole and absolute discretion." Beddall "irrevocably and permanently" assigned the tax refund to Dewar. The agreement contained provisions intended to ensure Dewar's receipt of the tax refund, which the Internal Revenue Service (IRS) would issue in Beddall's name.

¶ 7 Beddall signed an "irrevocable" power of attorney and appropriate IRS Form 2848 authorizing attorney Hatch to sign the tax return, receive and negotiate the refund check, and deliver the funds to Dewar. Hatch agreed to sign and file the return after Dewar approved it. He also agreed to deliver all refund proceeds to Dewar.

¶ 8 Smith was not a party to the settlement agreement and did not sign it. Smith's engagement letter to Beddall does not mention Dewar. But Kenneth Smith knew the content of the settlement agreement and its purpose. During his preparation of Beddall's tax return, Smith had a copy of the agreement. Consistent with the Hatch–Beddall power of attorney and IRS forms, Smith prepared the return for Hatch's signature.

***331** ¶ 9 On April 15, 2010, Hatch signed the completed tax return, which had Beddall's address on it. As the settlement agreement required, Smith transmitted the return to Dewar for his review. The same day, Dewar notified Smith that the return contained three errors: the omission of Beddall's foreign bank accounts, a missing entry for Beddall's sale of an apartment house, and the return address, which the settlement agreement required to be Hatch's, not Beddall's. Dewar concluded, "The only change I insist on is the address change." [FN1] After Smith changed the address, Hatch returned to Smith's office to sign the amended return, which Smith filed the same day.

FN1. In an e-mail earlier that day, in which he asked about the tax return, Dewar instructed Smith, "Be sure to use Hatch's address."

¶ 10 Shortly after Smith filed the return, Beddall instructed him to stop discussing the matter with Hatch and to communicate about the return only with Beddall. In May 2010, after Beddall asked about the status of the refund, Smith placed a conference call between Beddall, Smith, and an IRS representative via an IRS practitioner's hotline. During the call, Beddall asked the IRS representative to change the address on his tax return from Hatch's address to Smith's address. This changed the address to which the IRS would send

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any refund from Hatch's to Smith's. Smith was on the line but did not participate in the conversation.

¶ 11 In early June, Dewar learned that he could no longer access Beddall's tax return online. He sent an e-mail to Hatch, with a copy to Smith, asking Hatch to confirm with Smith Dewar's right to review the tax return. Dewar also asked that Hatch or Smith contact the IRS about the status of the refund. In response, Smith forwarded to Dewar a copy of the original tax return with Hatch's address. Smith did not tell Dewar or Hatch that Beddall had amended the address on the return or in any manner indicate that the copy he provided was not currently correct in all aspects. From both the settlement agreement and the events of April 15, Smith knew about the importance of the return address to Dewar.

¶ 12 In July 2010, the IRS sent four refund checks totaling $1,206,703.32 to Smith's office. Smith notified Beddall, who instructed him to deliver the checks to Beddall's son-in-law, Ron Rubin. Smith did so.

¶ 13 On August 16, 2010, Beddall sent an e-mail to Dewar and Hatch. He stated that he had the tax refund money in Thailand, offered to pay Dewar $500,000 "right now," and offered to "set up an account with $200,000 for future/current legal costs or judgments." Beddall forwarded this e-mail to Smith and also called Jonathan Hatch that day. Smith withdrew from his engagement with Beddall.

¶ 14 Dewar sued Traner Smith and Kenneth Smith for conversion, civil conspiracy, tortious interference with contractual relationship, breach of implied contract, breach of duty owed to third-party beneficiary, breach of fiduciary duties, and violation of the Consumer Protection Act, chapter 19.86 RCW. On November 9, 2012, the trial court granted Dewar's motion for partial summary judgment to establish that Smith owed Dewar a duty of care. The court also concluded that Smith committed negligent misrepresentation when the address on the tax return was changed, he received the checks, and he gave them to Rubin without disclosing these actions to Dewar and Hatch. On the same day, the trial court denied Smith's motion for partial summary judgment to dismiss contract claims. Smith filed a motion for discretionary review in this court.

¶ 15 On March 21, 2013, the trial court granted Dewar's motion for partial summary judgment as to Dewar's damages caused by Smith's negligent misrepresentation. The court concluded that Dewar "has been damaged as a direct, undisputed, proximate cause of [Smith's] negligent misrepresentation in the principal amount of $1,375,930.86." [FN2] Smith again petitioned this court for discretionary review. On May 23, 2013, the trial court struck the parties' trial date pending appellate review. On the same day, Dewar ***332** voluntarily dismissed some remaining claims without prejudice.

> FN2. In the same order, the court denied without prejudice Dewar's motion for entry of a final judgment under CR 54(b).

¶ 16 On August 2, 2013, a commissioner of this court granted discretionary review, consolidating Smith's two petitions. On January 30, 2014, Dewar filed a motion to supplement the record with a January 2014 stipulation and agreed order between Kenneth Smith and the Board of Accountancy in disciplinary proceedings.

STANDARD OF REVIEW

¶ 17 This court reviews a partial summary judgment order de novo, engaging in the same inquiry as the trial court.[FN3] It considers the evidence in the light most favorable to the nonmoving party and draws all reasonable inferences in that party's favor.[FN4] Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.[FN5]

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FN3. *Macias v. Saberhagen Holdings, Inc.*, 175 Wash.2d 402, 407, 282 P.3d 1069 (2012); *Woo v. Fireman's Fund Ins. Co.*, 161 Wash.2d 43, 52, 164 P.3d 454 (2007).

FN4. *Lakey v. Puget Sound Energy, Inc.*, 176 Wash.2d 909, 922, 296 P.3d 860 (2013).

FN5. CR 56(c).

ANALYSIS

Federal Preemption

[1] ¶ 18 Smith contends that federal law preempts the trial court's decision because federal statutes prohibit him from making any disclosures about Beddall's tax return without Beddall's express consent. To support this contention, Smith cites 26 U.S.C. § 6713(a) (1989), which imposes penalties on a tax return preparer who "(1) discloses any information furnished to him for, or in connection with, the preparation of any such return, or (2) uses any such information for any purpose other than to prepare, or assist in preparing, any such return." Similarly, 26 U.S.C. § 7216(a) (1989) provides that a tax return preparer who "knowingly or recklessly" discloses or uses tax return information "shall be guilty of a misdemeanor" and subject to criminal penalties. Smith points out that federal law defines "tax return information" as "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." FN6

FN6. Treas. Reg. § 301.7216–1(b)(3)(i) (2008).

¶ 19 Dewar responds that Smith knew about the property settlement agreement and, with Beddall's consent, gave opinions and freely shared information among Beddall, Dewar, and Hatch as contemplated by the agreement. This included Smith's transmission of the completed tax return to Dewar for his prefiling review and approval. Dewar argues that Smith should not be able to "waive the confidential relationship when they so desire and as contemplated by the contract" and then later "use it as a sword in their defense of what they in fact did." Smith responds that by the time Dewar inquired about the status of the refund and requested a copy of Beddall's tax return, Beddall had instructed him (Smith) not to discuss the tax return with anyone but Beddall. Therefore, Smith was no longer authorized to disclose any of Beddall's tax return information.

¶ 20 We agree with Smith that once Beddall revoked his consent, federal law prohibited Smith from disclosing confidential tax information, including addresses. FN7 This federal prohibition preempts any state law tort duty to disclose. But when Dewar requested a copy of Beddall's return, Smith had choices besides disclosing taxpayer information in violation of federal law or transmitting the misleading original return. He could have requested Beddall's consent to share the amended return. If, as expected, Beddall refused, Smith could have told Dewar that he couldn't share any further information because Beddall had revoked his consent to ***333** disclosure. As Dewar noted at oral argument, Smith could also have made a "noisy withdrawal" of representation after Beddall changed the return address. Neither response would convey to Dewar the false assurance that the return still contained Hatch's address, and neither would have violated any legal or professional requirements. Smith's federal preemption argument fails because federal law did not require him to make the misleading response he provided.

FN7. 26 U.S.C. § 7216(a); Treas. Reg. § 301.7216–1(b)(3)(i); WAC 4–30–050(3) (Accountants "must not without the specific consent of the client or the heirs, successors, or authorized representatives of the client disclose any confidential communication or

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information pertaining to the client obtained in the course of performing professional services.").

The Duty of Care and Trask v. Butler[FN8]

FN8. 123 Wash.2d 835, 872 P.2d 1080 (1994).

[2] ¶ 21 Smith challenges the trial court's decision that Smith owed Dewar a duty. He argues that neither statutory nor common law, including our Supreme Court's decision in *Trask v. Butler,* establishes any accountant's duty to third parties.

¶ 22 Federal and state laws and regulations, as well as the American Institute of Certified Public Accountants *Code of Professional Conduct* (AICPA Code), define the duties of certified public accountants.[FN9] The AICPA Code states that accountant members have the obligation to serve the public interest [FN10] and "should perform all professional responsibilities with the highest sense of integrity," which "can accommodate the inadvertent error and the honest difference of opinion [but] cannot accommodate deceit or subordination of principle." "Integrity also requires a member to observe the principles of objectivity and independence and of due care." [FN11] Washington laws regulating accountancy also emphasize the policy and purpose of protecting the public interest.[FN12] In the context of financial statements and records, a CPA violates the code of conduct by making or permitting a transmission of "materially false and misleading information." [FN13]

FN9. See WAC 4–30–048, recognizing AICPA as an "[a]uthoritative bod[y]" governing CPAs; http:// www. aicpa. org/ Research/ Standards/ Codeof Conduct/ Downloadable Documents/ 2009 Codeof Professional Conduct. pdf. This link is to the June 1, 2009, version of the code, which is the version in force at the time of most of the events described here.

FN10. AICPA Code of Professional Conduct ET § 53 (art. II).

FN11. AICPA Code of Professional Conduct ET § 54 (art. III).

FN12. RCW 18.04.015(b).

FN13. AICPA Code of Professional Conduct ET § 102.02 (102–1).

¶ 23 The AICPA Code and Treasury Department Circular No. 230 also prohibit a practitioner, including a CPA, from representing a client before the IRS if that representation would involve a conflict of interest. Circular 230 defines a conflict of interest as a situation where "[t]here is a significant risk that the representation ... will be materially limited by the practitioner's responsibilities to another client, a former client or a third person, or by a personal interest of the practitioner." [FN14] Under state and federal law, CPAs also have a duty of confidentiality.[FN15]

FN14. 31 C.F.R. § 10.29(a)(2) (2007). This section also appears in Circular 230 § 10.29(a)(2). A practitioner may represent a client despite a conflict of interest if the practitioner reasonably believes that he or she will be able to represent both clients, the representation is not prohibited by law, and both clients expressly waive the conflict and give informed consent in writing at the time the existence of the conflict is known. 31 C.F.R. § 10.29(b); *see also* WAC 4–30–040; AICPA Code of Professional Conduct ET § 102.03 (102–2).

FN15. 26 U.S.C. §§ 7216(a), 6713; 26 C.F.R. § 301.7216–3(a) (2008); WAC 4–30–050(3).

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¶ 24 A CPA may rely in good faith on information furnished by the client. [FN16] A tax preparer "may not, however, ignore the implications of information furnished to, or actually known by, the practitioner, and must make reasonable inquiries if the information as furnished appears to be incorrect, inconsistent with an important fact or another factual assumption, or incomplete." [FN17]

FN16. 31 C.F.R. § 10.34(d) (2007); Treasury Department Circular No. 230 § 10.34(d).

FN17. 31 C.F.R. § 10.34(d); Treasury Department Circular No. 230 § 10.34(d).

¶ 25 Washington courts have imposed a duty of care to third parties on several classes of professionals. In *ESCA Corp. v.* ***334** *KPMG Peat Marwick,* [FN18] our Supreme Court identified circumstances where accountants had this duty. ESCA hired accounting firm KPMG to perform audits and prepare financial statements in support of ESCA's application for loans and a line of credit.[FN19] These financial statements mischaracterized ESCA's financial health, and the lending bank sustained substantial losses when ESCA could not repay the loans.[FN20] The bank sued KPMG for negligent representation. [FN21] Our Supreme Court held that the third-party bank could sue KPMG for negligent misrepresentation where the bank justifiably relied on KPMG's representations and audit information to make its business decisions.[FN22]

FN18. 135 Wash.2d 820, 959 P.2d 651 (1998).

FN19. *ESCA,* 135 Wash.2d at 823–24, 959 P.2d 651.

FN20. *ESCA,* 135 Wash.2d at 825, 959 P.2d 651.

FN21. *ESCA,* 135 Wash.2d at 825, 959 P.2d 651.

FN22. *ESCA,* 135 Wash.2d at 828, 959 P.2d 651.

¶ 26 Our Supreme Court imposed a similar duty on an engineering firm. In *Donatelli v. D.R. Strong Consulting Engineers, Inc.,*[FN23] a developer brought a negligent misrepresentation claim against an engineering firm after delays and cost overruns contributed to the developer's loss of the property in foreclosure. The court held that the engineering firm had a duty arising independently of its client contract to avoid negligent misrepresentations. Therefore, the developers could assert tort as well as contract claims. [FN24]

FN23. 179 Wash.2d 84, 86–87, 312 P.3d 620 (2013).

FN24. *Donatelli,* 179 Wash.2d at 98, 312 P.3d 620.

¶ 27 These statutes, rules, and Washington cases involving a professional's duty support the trial court's conclusion that Smith owed Dewar a duty of care. Smith had a statutory and common law duty of care to act in the public interest. And because he knew the relevant terms of the settlement agreement, he knew Beddall intended Smith's professional services and the resultant tax refund to benefit Dewar. From Dewar's critique of the original return, Smith knew the importance to Dewar of the taxpayer address shown on the return. This knowledge gave Smith a responsibility to a third person, Dewar, not to mislead him about the return. Given the settlement agreement provisions for the sharing of taxpayer information between Smith and nonclient Dewar and the history of Smith's compliance with those provisions, Dewar justifiably relied on the accuracy of Smith's later representations. As in *ESCA* and *Donatelli,* Smith owed a professional duty

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to avoid misrepresentations to third-party Dewar.

¶ 28 Smith attempts to distinguish *ESCA* because it involved financial statements intended for review by third parties, not confidential tax information. But Smith offers no persuasive reason to distinguish between misleading financial statements and misleading taxpayer information provided to a third party.

[3][4] ¶ 29 Our Supreme Court has also imposed a duty of care to certain third parties on attorneys. In *Trask v. Butler,* the court adopted a multifactor balancing test to determine when an attorney owes a duty of care to a nonclient. Under this test, a court must consider:

1. the extent to which the transaction was intended to benefit the plaintiff;

2. the foreseeability of harm to the plaintiff;

3. the degree of certainty that the plaintiff suffered injury;

4. the closeness of the connection between the defendant's conduct and the injury;

5. the policy of preventing future harm; and

6. the extent to which the profession would be unduly burdened by a finding of liability.[[FN25]]

FN25. *Trask,* 123 Wash.2d at 843, 872 P.2d 1080.

The first factor presents the threshold inquiry. If the attorney's client did not intend the representation to benefit a nonclient, that nonclient has no standing to sue.[FN26]

FN26. *Trask,* 123 Wash.2d at 842–43, 872 P.2d 1080.

¶ 30 Here, the trial court accepted Dewar's position that *Trask* supports the conclusion ***335** that Smith owed a duty to Dewar. Smith argues that the trial court improperly extended *Trask* to establish an accountant's duty of care to third parties. He contends that Dewar "failed to present any authority or evidence for the application of the *Trask* multi-factor test to CPAs and Traner Smith."

¶ 31 Although Washington courts have not applied the *Trask* analysis to CPAs, courts in other jurisdictions have done so. In *Glenn K. Jackson, Inc. v. Roe,*[FN27] the Ninth Circuit addressed a legal auditor's duty of care using a similar multifactor test. Surveying cases, the court in *Glenn K. Jackson* noted an "objective standard that looks to the specific circumstances to ascertain whether a supplier of information has undertaken to inform and guide a third party with respect to an identified transaction or type of transaction. If such a specific undertaking has been made, liability is imposed on the supplier." [FN28] And courts in Illinois, whose third-party beneficiary test our Supreme Court followed to create the *Trask* factors, [FN29] have explicitly held that an accountant may be liable to nonclient third parties when " 'the purpose and intent of the accountant-client relationship was to benefit or influence the third-party plaintiff.' " [FN30]

FN27. 273 F.3d 1192, 1195 (9th Cir.2001).

FN28. *Glenn K. Jackson,* 273 F.3d at 1200 n. 3.

FN29. *Trask,* 123 Wash.2d at 840, 842, 872 P.2d 1080.

FN30. *Builders Bank v. Barry Finkel & Assocs.,* 339 Ill.App.3d 1, 8, 790 N.E.2d 30, 273 Ill.Dec. 888 (2003) (quoting *Brumley v. Touche, Ross & Co.,* 139 Ill.App.3d 831,

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836, 487 N.E.2d 641, 93 Ill.Dec. 816 (1985)); *see also Kopka v. Kamensky,* 354 Ill.App.3d 930, 935, 821 N.E.2d 719, 290 Ill.Dec. 407 (2004); 225 Ill. Comp. Stat. 450/30.1 (2004) (under Illinois Public Accounting Act, accountant may be held liable to third party when accountant is "aware that a primary intent of the client was for the professional services to benefit or influence the particular person bringing the action").

¶ 32 Application of the *Trask* factors to this case supports our conclusion that Smith owed Dewar a duty as a third party. First, Beddall and Dewar expressly intended the tax return prepared by Smith to benefit Dewar. Second, Smith knew of the settlement agreement, which required Smith's employment. He had complied with the disclosure and review provisions of the settlement agreement. He knew or should have known that Beddall's address change on the return conflicted with his agreement with Dewar. The harm-diversion of the refund from Hatch, who agreed to deliver the refund proceeds to Dewar-was foreseeable. Third, in losing the benefit of his bargain, Dewar claims to have suffered injury. Fourth, because of Smith's action, Dewar remained ignorant of the changed address. He did not receive inquiry notice of a need to act to protect his interests before Beddall took possession of the refund checks. Therefore, a close connection exists between Smith's conduct and Dewar's claimed harm. Fifth and sixth, a policy to prevent future harm would support enforcing the duty of care that the AICPA Code, Washington case law, and state and federal law and regulations already impose on public accountants. Thus, imposing a duty would not unduly burden the accounting profession.

¶ 33 Smith emphasizes that he was not a party to the Dewar–Beddall settlement agreement and that his engagement letter with Beddall did not incorporate the agreement. In a statement of additional authorities, Smith cites two recent cases in support of his position, *Stewart Title Guaranty Co. v. Sterling Savings Bank*[FN31] and *Clark County Fire District No. 5 v. Bullivant Houser Bailey P.C.*[FN32]

FN31. 178 Wash.2d 561, 311 P.3d 1 (2013).

FN32. 180 Wash.App. 689, 324 P.3d 743, *review denied,* 181 Wash.2d 1008, 335 P.3d 941 (2014).

¶ 34 In *Stewart Title,* our Supreme Court held that neither the attorney nor the client intended the plaintiff title insurance company to be a beneficiary of an attorney-client contract created when the insurance company hired an attorney to defend its insured-client.[FN33] As a result, the title company could not satisfy the threshold first element of the *Trask* test. The court also held that an attorney's limited duty to inform a nonclient third-party payer does not give rise to a ***336** broad duty of care that would support a malpractice claim.[FN34] Similarly, in *Clark County Fire District No. 5,* Division Two held that the district and the attorney hired by the district's insurance company to defend the district did not intend the resulting legal representation of the fire district to benefit the insurer.[FN35]

FN33. *Stewart Title,* 178 Wash.2d at 567, 311 P.3d 1.

FN34. *Stewart Title,* 178 Wash.2d at 569, 311 P.3d 1.

FN35. *Clark County Fire District No. 5,* 180 Wash.App. at 694, 324 P.3d 743.

¶ 35 These cases are inapposite. In *Stewart Title* and *Clark County Fire District No. 5,* an insurance company hired an attorney to defend its insured and paid for that attorney, as presumably required by an underlying insurance policy. In contrast, Dewar had no preexisting obligation to provide accounting services for Beddall and was not a third-party payer who

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hired Smith to provide those services to Beddall. The settlement agreement required that Beddall hire Smith to prepare a tax return producing the tax refund that Beddall transferred to Dewar in the same agreement. Smith knew the agreement's material provisions. Thus, he knew that Dewar and Beddall intended that Smith's engagement would benefit Dewar. By including Dewar in the preparation and review of the tax return and later providing a copy of a tax return, Smith supplied information "to inform and guide a third party with respect to an identified transaction." [FN36] We affirm the trial court's conclusion that Smith owed Dewar a duty of care.

FN36. *Glenn K. Jackson,* 273 F.3d at 1200 n. 3.

Negligent Misrepresentation

¶ 36 The trial court also concluded that Smith breached the duty he owed to Dewar:

> The Court concludes as a matter of law that the Defendants in changing the address for which the Beddall 2009 tax return was to go from the offices of Edmonds attorney Jonathan Hatch to the Defendants' own office and further transmitting those checks to the taxpayer Brad Beddall's son-in-law and failing to disclose to Plaintiff and Jonathan Hatch the change of address, the receipt of the tax refunds, and the turning over of the tax refunds to Beddall's son-in-law is a negligent misrepresentation as a matter of law.

[5] ¶ 37 Smith contends that Dewar failed to establish all the elements of negligent misrepresentation, specifically challenging the trial court's decision about proximate cause and damages.

[6] ¶ 38 To prove negligent misrepresentation, a party must establish by clear, cogent, and convincing evidence that (1) the defendant supplied information that was false for the guidance of the plaintiff in a business transaction, (2) the defendant knew or should have known that the information was for the purpose of guiding the plaintiff in a business transaction, (3) the defendant was negligent in obtaining or communicating the false information, (4) the plaintiff relied on the information, (5) the plaintiff's reliance was reasonable, and (6) the false information proximately caused the plaintiff damages.[FN37]

FN37. *Donatelli,* 179 Wash.2d at 95 n. 3, 312 P.3d 620; RESTATEMENT (SECOND) OF TORTS § 552 (1977).

¶ 39 Smith claims that he cannot have committed misrepresentation by "silence" because "[w]here there is no duty to disclose, there can be no misrepresentation." But Dewar does not rely on Smith's "silence" to establish his claim. Rather, the core of Dewar's claim is an undisputed fact not mentioned in the trial court's order: Smith's knowing transmission of a misleading version of Beddall's tax return. At oral argument, Smith maintained that he fulfilled any duty he owed Dewar by securing Beddall's specific permission to disclose exactly what Dewar requested: the tax return Smith had originally prepared for Beddall. This assertion does not persuade us.

¶ 40 A supplier of information for the guidance of others must refrain not only from misrepresenting facts but also from communicating accurate information in a way that misleads.[FN38] Beddall's limited consent did not give Smith freedom to mislead Dewar; it only limited the ways he could avoid misleading him.

FN38. RESTATEMENT (SECOND) OF TORTS § 552 cmt. f.

***337** ¶ 41 The record contains undisputed evidence that establishes the breach of duty and reliance elements of negligent misrepresentation. First, Smith supplied the misleading tax return for Dewar's guid-

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ance in business. Second, Smith knew the material terms of the settlement agreement and knew or should have known that the tax return would guide Dewar in business decisions related to the settlement agreement. Third, Smith conveyed the tax return under circumstances he knew to be misleading. Fourth, Dewar relied on this misleading information, remained ignorant of Beddall's breach of the agreement, and so did not act to protect his own interests. Fifth, given the history of open communication about the return among all parties, Dewar reasonably relied on the information Smith provided.

[7][8][9][10][11] ¶ 42 However, Dewar does not establish as a matter of law the sixth element, proximate causation between Smith's misrepresentation and his injury. "Proximate cause has two elements: cause in fact and legal causation." FN39 "Cause in fact" is the actual, "but for," cause of the injury.FN40 "Legal causation" focuses on whether, as a matter of policy, the connection between the ultimate result and the tortfeasor's act is too remote or attenuated to impose liability.FN41 The court may determine proximate cause as a matter of law where the facts are undisputed and "reasonable minds could not differ." FN42 But proximate cause is usually the province of the jury because it involves determining what actually occurred.FN43

FN39. *Schooley v. Pinch's Deli Mkt., Inc.,* 134 Wash.2d 468, 474, 951 P.2d 749 (1998).

FN40. *Michaels v. CH2M Hill, Inc.,* 171 Wash.2d 587, 609–10, 257 P.3d 532 (2011).

FN41. *Michaels,* 171 Wash.2d at 611, 257 P.3d 532.

FN42. *Hertog v. City of Seattle,* 138 Wash.2d 265, 275, 979 P.2d 400 (1999); *Schooley,* 134 Wash.2d at 478, 951 P.2d 749; *Brust v. Newton,* 70 Wash.App. 286, 291–92, 852 P.2d 1092 (1993).

FN43. *Michaels,* 171 Wash.2d at 610, 257 P.3d 532; *Brust,* 70 Wash.App. at 291–92, 852 P.2d 1092.

¶ 43 Smith's undisputed misrepresentation kept Dewar from knowing that Beddall had changed the return address and, thus, the refund recipient. Dewar's injury is not in dispute. But we cannot say as a matter of law that without Smith's misrepresentation, Dewar would have avoided those damages.

¶ 44 Correct information from Smith-either a "noisy withdrawal" or notice to Dewar that Beddall had revoked his authority to disclose-should have alerted Dewar that he needed to act to protect his interests. He could have demanded information from Beddall or sought to enforce the settlement agreement in court. But, as the taxpayer, Beddall had the authority to amend his own tax return or revoke Hatch's power of attorney FN44 and direct the delivery of his refund. At the time of Smith's misrepresentation, Beddall lived in Thailand. In short, Dewar has not yet presented evidence, much less undisputed evidence, that Smith's exercise of reasonable care would have allowed Dewar to prevent delivery of the refund to Beddall. The trial court erred when it resolved the issue of proximate cause in fact on summary judgment.

FN44. 26 C.F.R. § 601.505(a)(2) (1992).

¶ 45 The trial court also determined on summary judgment the amount of damages caused by Smith's negligent misrepresentation, $1,375,930.96. The record does not support this decision. Beddall's August 16, 2010, e-mail to Dewar included an offer to give him $500,000.00 of the refund. Therefore, the record contains some evidence that Dewar failed to mitigate his damages.

¶ 46 Smith argues that the trial court's damages

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ruling was wrong for two additional reasons. First, he contends that because Beddall's losses for tax purposes didn't occur until 2010, when he transferred the Lea Hill property to Dewar, Beddall could not claim these losses on his 2009 tax return. Therefore, he argues, Dewar's damages are illusory. We reject this argument. Smith identifies no evidence in the record showing any IRS challenge to Beddall's 2009 return. And even if the IRS at some point attempted to recoup the refund as erroneous or fraudulent, it would pursue Beddall as the taxpayer, not Dewar.

***338** [12] ¶ 47 Second, Smith argues that the settlement agreement is unenforceable because tax law does not permit the assignment of tax refunds. We disagree. Under federal law, a taxpayer may name a representative to sign a tax return or receive a refund.[FN45] On the version of the IRS Form 2848 that Beddall signed, the taxpayer had the option to initial a paragraph limiting the authority of the named representative "to receive, BUT NOT TO ENDORSE OR CASH, refund checks." Beddall did not initial this section to prevent Hatch from endorsing or cashing the refund checks. This was consistent with the settlement agreement, which provided that Hatch would "endorse and convert [the tax refund] to good and available funds" and "immediately disburse" it to Dewar. Federal law also permits a representative named in a power of attorney to endorse tax refund checks.[FN46] The settlement agreement relied upon authorized procedures to accomplish a transfer of Beddall's refund to Dewar.

FN45. 26 C.F.R. § 601.503, .504(a)(5), .506 (1992); IRS Form 2848, Power of Attorney and Declaration of Representative.

FN46. 31 C.F.R. § 240.13 (2004).

¶ 48 Although Smith fails to show that Dewar's damages are illusory, Dewar does not establish as a matter of law that Smith's misrepresentation proximately caused all of Dewar's claimed damages. The trial court erred in granting summary judgment on this issue.

Third–Party Beneficiary Contract

¶ 49 Finally, Smith argues that because Dewar was not intended to be a direct beneficiary of the engagement between Beddall and Smith, Dewar's claim for breach of a third-party beneficiary contract fails as a matter of law. Therefore, Smith asserts that the trial court erred in denying his motion for summary judgment on this claim. But the context of the contract between Beddail and Smith permits the inference that they both intended that contract to specifically benefit Dewar. This precludes summary judgment on this issue.

Dewar's Motion To Supplement the Record under RAP 9.11

¶ 50 Citing RAP 9.11,[FN47] Dewar seeks an order admitting a January 8, 2014, stipulation and agreed order between Kenneth Smith and the Washington State Board of Accountancy. We deny Dewar's motion. RAP 9.12 limits this court's review of a trial court order granting or denying summary judgment to evidence presented to the trial court. Because the trial court did not have the board's order, we cannot consider it on appeal. Our decision does not prevent Dewar from asking the trial court to consider this evidence and the legal theories it may support on remand.

FN47. RAP 9.11 allows the appellate court to admit additional evidence on the merits of a case under certain circumstances.

CONCLUSION

¶ 51 We affirm the trial court's ruling that Smith owed Dewar a duty of care and its denial of Smith's motion for summary judgment on contract claims. Because Dewar has not established that Smith's negligent misrepresentation proximately caused his

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damages or the amount of any damages, we reverse and remand for further proceedings consistent with this opinion.

WE CONCUR: LAU and COX, JJ.

Wash.App. Div. 1,2015.
Dewar v. Smith
342 P.3d 328

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DOUGLAS M. DEWAR,

Respondent,

v.

KENNETH SMITH and JANE DOE SMITH, husband and wife, and the marital community composed thereof; TRANER SMITH & CO. PLLC, a Washington professional limited liability company,

Petitioners.

No. 69701-3-I
(consolidated with
No. 70190-8-I)

ORDER DENYING MOTIONS FOR RECONSIDERATION

Petitioners Kenneth Smith and Jane Doe Smith and Traner Smith & Company PLLC, having filed a motion for reconsideration herein, and respondent Douglas M. Dewar, having also filed a motion for reconsideration herein, and the hearing panel having determined that the motions should be denied; now, therefore, it is hereby

ORDERED that the motions for reconsideration be, and the same are, hereby denied.

Dated this 20th day of March, 2015.

FOR THE COURT:

Leach, J.

Judge

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STATE OF WASHINGTON
2015 MAR 20 PM 1:33

I.R.C. § 6713

Effective:[See Text Amendments]

United States Code Annotated Currentness
Title 26. Internal Revenue Code (Refs & Annos)
Subtitle F. Procedure and Administration (Refs & Annos)
Chapter 68. Additions to the Tax, Additional Amounts, and Assessable Penalties
Subchapter B. Assessable Penalties
Part I. General Provisions

→→ § 6713. Disclosure or use of information by preparers of returns

(a) Imposition of penalty.--If any person who is engaged in the business of preparing, or providing services in connection with the preparation of, returns of tax imposed by chapter 1, or any person who for compensation prepares any such return for any other person, and who--

(1) discloses any information furnished to him for, or in connection with, the preparation of any such return, or

(2) uses any such information for any purpose other than to prepare, or assist in preparing, any such return,

shall pay a penalty of $250 for each such disclosure or use, but the total amount imposed under this subsection on such a person for any calendar year shall not exceed $10,000.

(b) Exceptions.--The rules of section 7216(b) shall apply for purposes of this section.

(c) Deficiency procedures not to apply.--Subchapter B of chapter 63 (relating to deficiency procedures for income, estate, gift, and certain excise taxes) shall not apply in respect of the assessment or collection of any penalty imposed by this section.

CREDIT(S)

(Added Pub.L. 100-647, Title VI, § 6242(a), Nov. 10, 1988, 102 Stat. 3749, § 6712, and renumbered § 6713, Pub.L. 101-239, Title VII, § 7816(v)(1), Dec. 19, 1989, 103 Stat. 2423.)

Current through P.L. 113-296 (excluding P.L. 113-235, 113-287, and 113-291) approved 12-19-2014

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I.R.C. § 7216

Effective:[See Text Amendments]

United States Code Annotated Currentness
Title 26. Internal Revenue Code (Refs & Annos)
Subtitle F. Procedure and Administration (Refs & Annos)
Chapter 75. Crimes, Other Offenses, and Forfeitures
Subchapter A. Crimes
Part I. General Provisions (Refs & Annos)
→→ § 7216. Disclosure or use of information by preparers of returns

(a) General rule.--Any person who is engaged in the business of preparing, or providing services in connection with the preparation of, returns of the tax imposed by chapter 1, or any person who for compensation prepares any such return for any other person, and who knowingly or recklessly--

(1) discloses any information furnished to him for, or in connection with, the preparation of any such return, or

(2) uses any such information for any purpose other than to prepare, or assist in preparing, any such return,

shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

(b) Exceptions.--

(1) Disclosure.--Subsection (a) shall not apply to a disclosure of information if such disclosure is made--

(A) pursuant to any other provision of this title, or

(B) pursuant to an order of a court.

(2) Use.--Subsection (a) shall not apply to the use of information in the preparation of, or in connection with the preparation of, State and local tax returns and declarations of estimated tax of the person to whom the information relates.

(3) Regulations.--Subsection (a) shall not apply to a disclosure or use of information which is permitted by regulations prescribed by the Secretary under this section. Such regulations shall permit (subject to such conditions as

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such regulations shall provide) the disclosure or use of information for quality or peer reviews.

CREDIT(S)

(Added Pub.L. 92-178, Title III, § 316(a), Dec. 10, 1971, 85 Stat. 529; amended Pub.L. 94-455, Title XIX, § 1906(b)(13)(A), Oct. 4, 1976, 90 Stat. 1834; Pub.L. 98-369, Div. A, Title IV, § 412(b)(10), July 18, 1984, 98 Stat. 792; Pub.L. 100-647, Title VI, § 6242(b), Nov. 10, 1988, 102 Stat. 3749; Pub.L. 101-239, Title VII, § 7739(a), Dec. 19, 1989, 103 Stat. 2404.)

Current through P.L. 113-296 (excluding P.L. 113-235, 113-287, and 113-291) approved 12-19-2014

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Treas. Reg. § 301.7216-1

C

Effective: January 7, 2008

Code of Federal Regulations Currentness
Title 26. Internal Revenue
Chapter I. Internal Revenue Service, Department of the Treasury
Subchapter F. Procedure and Administration
Part 301. Procedure and Administration (Refs & Annos)
Crimes, Other Offenses, and Forfeitures
Crimes
General Provisions
→ **§ 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,

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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 providing 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 Web site through a hyperlink on his own Web site, 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

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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 Web site through which its clients may access their accounts, trade stocks, and generally conduct a variety of financial activities. Through its Web site, 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 Web site 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,

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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 Web page to a Web page 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.

[T.D. 7310, 39 FR 11538, March 29, 1974; T.D. 9375, 73 FR 1067, Jan. 7, 2008]

SOURCE: 32 FR 15241, Nov. 3, 1967; T.D. 9610, 78 FR 5994, Jan. 28, 2013; T.D. 9628, 78 FR 49369, Aug. 14, 2013; T.D. 9679, 79 FR 41891, July 18, 2014; T.D. 9687, 79 FR 47264, Aug. 12, 2014, unless otherwise noted.

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AUTHORITY: 26 U.S.C. 7805.; Section 301.1474–1 also issued under 26 U.S.C. 1474(f).; Section 301.6011–2 also issued under 26 U.S.C. 6011(e).; Section 301.6011–3 also issued under 26 U.S.C. 6011.; Section 301.6011–5 also issued under 26 U.S.C. 6011.; Section 301.6011–6 also issued under 26 U.S.C. 6011(a).; Section 301.6011–7 also issued under 26 U.S.C. 6011(e).; Section 301.6033–4 also issued under 26 U.S.C. 6033.; Section 301.6036–1 also issued under 26 U.S.C. 6036.; Section 301.6037–2 also issued under 26 U.S.C. 6037.; Section 301.6039E–1 also issued under 26 U.S.C. 6039E.; Section 301.6050M–1 also issued under 26 U.S.C. 6050M.; Section 301.6061–1 also issued under 26 U.S.C. 6061.; Section 301.6081–2 also issued under 26 U.S.C. 6081(a).; Section 301.6103(c)–1 also issued under 26 U.S.C. 6103(c).; Section 301.6103(h)(4)–1 also issued under 26 U.S.C. 6103(h)(4) and 26 U.S.C. 6103(q).; Section 301.6103(j)(1)–1 also issued under 26 U.S.C. 6103(j)(1).; Section 301.6103(j)(1)–1T also issued under 26 U.S.C. 6103(j)(1).; Section 301.6103(j)(5)–1 also issued under 26 U.S.C. 6103(j)(5).; Section 301.6103(k)(6)–1 also issued under 26 U.S.C. 6103(k)(6).; Section 301.6103(k)(6)–1T also issued under 26 U.S.C. 6103(k)(6).; Section 301.6103(k)(9)–1 also issued under 26 U.S.C. 6103(k)(9) and 26 U.S.C. 6103(q).; Section 301.6103(l)–1 also issued under 26 U.S.C. 6103(q).; Section 301.6103(l)(14)–1 also issued under 26 U.S.C. 6103(l)(14).; Section 301.6103(l)(21)–(1) also issued under 26 U.S.C. 6103(l)(21) and 6103(q).; Section 301.6103(m)–1 also issued under 26 U.S.C. 6103(q).; Section 301.6103(n)–1 also issued under 26 U.S.C. 6103(n).; Section 301.6103(n)–2 also issued under 26 U.S.C. 6103(n).; Section 301.6103(n)–2 also issued under 26 U.S.C. 6103(q).; Section 301.6103(n)–2T also issued under 26 U.S.C. 6103(n).; Section 301.6103(p)(2)(B)–1 also issued under 26 U.S.C. 6103(p)(2).; Section 301.6103(p)(2)(B)–1T also issued under 26 U.S.C. 6103(p)(2).; Sections 301.6103(p)(4)–1 and 301.6103(p)(7)–1T also issued under 26 U.S.C. 6103(p)(4) and (7) and (q).; Section 301.6104(a)–6(d) is also issued under 5 U.S.C. 552.; Section 301.6104(b)–1(d)(4) is also issued under 5 U.S.C. 552.; Section 301.6104(d)–1(d)(3)(i) is also issued under 5 U.S.C. 552.; Section 301.6104(d)–2 also issued under 26 U.S.C. 6104(d)(3).; Section 301.6104(d)–3 also issued under 26 U.S.C. 6104(d)(3).; Section 301.6104(d)–4 also issued under 26 U.S.C. 6104(e)(3).; Section 301.6104(d)–5 also issued under 26 U.S.C. 6104(e)(3).; Section 301.6109–1 also issued under 26 U.S.C. 6109 (a), (c), and (d).; Section 301.6109–3 also issued under 26 U.S.C. 6109.; Section 301.6111–1T also issued under 26 U.S.C. 6111.; Section 301.6111–2T also issued under 26 U.S.C. 6111(f)(4).; Section 301.6111–3 also issued under 26 U.S.C. 6111.; Section 301.6111–3T also issued under 26 U.S.C. 6111.; Section 301.6112–1T also issued under 26 U.S.C. 6112.; Section 301.6114–1 also issued under 26 U.S.C. 6114.; Section 301.6222(a)–1T also issued under 26 U.S.C. 6230(k).; Section 301.6222(a)–2T also issued under 26 U.S.C. 6230(k).

Section 301.6222(b)–1T also issued under 26 U.S.C. 6230(k).; Section 301.6222(b)–2T also issued under 26 U.S.C. 6230(k).; Section 301.6222(b)–3T also issued under 26 U.S.C. 6230 (i) and (k).; Section 301.6223(a)–1T also issued under 26 U.S.C. 6230(k).; Section 301.6223(a)–2T also issued under 26 U.S.C. 6230(k).; Section 301.6223(b)–1T also issued under 26 U.S.C. 6230 (i) and (k).; Section 301.6223(b)–2T also issued under 26 U.S.C. 6230(k).; Section 301.6223(c)–1T also issued under 26 U.S.C. 6223(c) and 6230 (i) and (k).; Section 301.6223(e)–1T also issued under 26 U.S.C. 6230(k).; Section 301.6223(e)–2T also issued under 26 U.S.C. 6230 (i) and (k).; Section 301.6223(f)–1T also issued under 26 U.S.C. 6230(k).; Section 301.6223(g)–1T also issued under 26 U.S.C. 6223(g) and 6230 (i) and (k).; Section 301.6223(h)–1T also issued under 26 U.S.C. 6230 (i) and (k).; Section 301.6224(a)–1T also issued under 26 U.S.C. 6230(k).; Section 301.6224(b)–1T also issued under 26 U.S.C. 6230 (i) and (k).; Section 301.6224(c)–1T also issued under 26 U.S.C. 6230 (i)

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and (k).; Section 301.6224(c)–2T also issued under 26 U.S.C. 6230(k).; Section 301.6224(c)–3T also issued under 26 U.S.C. 6230 (i) and (k).; Section 301.6226(a)–1T also issued under 26 U.S.C. 6230(k).; Section 301.6226(b)–1T also issued under 26 U.S.C. 6230(k).; Section 301.6226(e)–1T also issued under 26 U.S.C. 6230(k).; Section 301.6226(f)–1T also issued under 26 U.S.C. 6230(k).; Section 301.6229(c)(2)–1 is also issued under 26 U.S.C. 6230(k).; Section 301.6229(c)(2)–1T is also issued under 26 U.S.C. § 6230(k).; Section 301.6231(a)(6)–1T also issued under 26 U.S.C. 6230(k).; Section 301.6231(a)(7)–1 also issued under 26 U.S.C. 6230 (i) and (k).; Section 301.6231(a)(7)–2 also issued under 26 U.S.C. 6230 (i) and (k).; Section 301.6231(a)(12)–1T also issued under 26 U.S.C. 6230(k) and 6231(a)(12).; Section 301.6231(c)–1 also issued under 26 U.S.C. 6231(c)(1) and (3).; Section 301.6231(c)–2 also issued under 26 U.S.C. 6231(c)(1) and (3).; Section 301.6231(c)–3T also issued under 26 U.S.C. 6230(k) and 6231(c).; Section 301.6231(c)–4T also issued under 26 U.S.C. 6230(k) and 6231(c).; Section 301.6231(c)–5T also issued under 26 U.S.C. 6230(k) and 6231(c).; Section 301.6231(c)–6T also issued under 26 U.S.C. 6230(k) and 6231(c).; Section 301.6231(c)–7T also issued under 26 U.S.C. 6230(k) and 6231(c).; Section 301.6231(c)–8T also issued under 26 U.S.C. 6230(k) and 6231(c).; Section 301.6231(d)–1T also issued under 26 U.S.C. 6230(k).; Section 301.6231(e)–1T also issued under 26 U.S.C. 6230(k).; Section 301.6231(e)–2T also issued under 26 U.S.C. 6230(k).; Section 301.6231(f)–1T also issued under 26 U.S.C. 6230 (i) and (k) and 6231(f).; Section 301.6233–1T also issued under 26 U.S.C. 6230(k) and 6233.; Section 301.6241–1T also issued under 26 U.S.C. 6241.; Section 301.6245–1T also issued under 26 U.S.C. 6245.; Section 301.6311–2 also issued under 26 U.S.C. 6311.; Section 301.6323(f)–(1)(c) also issued under 26 U.S.C. 6323(f)(3).; Section 301.6325–1T also issued under 26 U.S.C. 6326.; Section 301.6343–1 also issued under 26 U.S.C. 6343.; Section 301.6343–2 also issued under 26 U.S.C. 6343.; Section 301.6402–3 also issued under 95 Stat. 357 amending 88 Stat. 2351.; Section 301.6402–7 also issued under 26 U.S.C. 6402(i) and 6411(c).

Section 301.6404–2 also issued under 26 U.S.C. 6404.; Section 301.6404–3 also issued under 26 U.S.C. 6404(f)(3).; Section 301.6621–1 also issued under 26 U.S.C. 6230(k).; Section 301.6689–1T also issued under 26 U.S.C. 6689(a).; Section 301.7216–2, paragraphs (o) and (p) also issued under 26 U.S.C. 7216(b)(3).; Section 301.7216–3T also issued under 26 U.S.C. 7216.; Section 301.7502–1 also issued under 26 U.S.C. 7502.; Section 301.7502–2 also issued under 26 U.S.C. 7502.; Section 301.7507–1 also issued under 26 U.S.C. 597.; Section 301.7507–9 also issued under 26 U.S.C. 597.; Section 301.7508–1 also issued under 26 U.S.C. 7508(a)(1)(K).; Section 301.7508A–1 also issued under 26 U.S.C. 7508(a)(1)(K) and 7508A(a).; Section 301.7605–1 also issued under Section 6228(b) of the Technical and Miscellaneous Revenue Act of 1988.; Sections 301.7623–1 through 301.7623–4 also issued under 26 U.S.C. 7623.; Section 301.7624–1 also issued under 26 U.S.C. 7624.; Sections 301.7701(b)–1 through 301.7701(b)–9 also issued under 26 U.S.C. 7701(b)(11).; Section 301.7701(i)–1(g)(1) also issued under 26 U.S.C. 7701(i)(2)(D).; Section 301.7701(i)–4(b) also issued under 26 U.S.C. 7701(i)(3).; Section 301.9000–1 also issued under 5 U.S.C. 301 and 26 U.S.C. 6103(q) and 7804.; Section 301.9000–2 also issued under 5 U.S.C. 301 and 26 U.S.C. 6103(q) and 7804.; Section 301.9000–3 also issued under 5 U.S.C. 301 and 26 U.S.C. 6103(q) and 7804.; Section 301.9000–4 also issued under 5 U.S.C. 301 and 26 U.S.C. 6103(q) and 7804.; Section 301.9000–5 also issued under 5 U.S.C. 301 and 26 U.S.C. 6103(q) and 7804.; Section 301.9000–6 also issued under 5 U.S.C. 301 and 26 U.S.C. 6103(q) and 7804.; Section 301.9100–1T also issued under 26 U.S.C. 6081.; Section 301.9100–2T also issued under 26 U.S.C. 6081.; Section 301.9100–3T also issued under 26 U.S.C. 6081.; Section 301.9100–4T also issued under 26 U.S.C. 168(f)(8)(G).; Section

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301.9100–7T also issued under 26 U.S.C. 42, 48, 56, 83, 141, 142, 143, 145, 147, 165, 168, 216, 263, 263A, 448, 453C, 468B, 469, 474, 585, 616, 617, 1059, 2632, 2652, 3121, 4982, 7701; and under the Tax Reform Act of 1986, 100 Stat. 2746, sections 203, 204, 243, 311, 646, 801, 806, 905, 1704, 1801, 1802, and 1804.; Section 301.9100–8 also issued under 26 U.S.C. 1(i)(7), 41(h), 42(b)(2)(A)(ii), 42(d)(3), 42(f)(1), 42(g)(3), 42(i)(2)(B), 42(j)(5)(B), 121(d)(9), 142(i)(2), 165(l), 168(b)(2), 219(g)(4), 245(a)(10), 263A(d)(1), 263A(d)(3)(B), 263A(h), 460(b)(3), 643(g)(2), 831(b)(2)(A), 835(a), 865(f), 865(g)(3), 865(h)(2), 904(g)(10), 2056(b)(7)(c)(ii), 2056A(d), 2523(f)(6)(B), 3127, and 7520(a); the Technical and Miscellaneous Revenue Act of 1988, 102 Stat. 3324 [So in original; probably should read "102 Stat. 3342".], sections 1002(a)(23)(B), 1005(c)(11), 1006(d)(15), 1006(j)(1)(C), 1006(t)(18)(B), 1012(n)(3), 1014(c)(1), 1014(c)(2), 2004(j)(1), 2004(m)(5), 5012(e)(4), 6181(c)(2), and 6277; and under the Tax Reform Act of 1986, 100 Stat. 2746, section 905(a).; Sections 301.9100–9T, 301.9100–10T and 301.9100–11T also issued under 26 U.S.C. 1103 (g) and (h) and 6158(a).; Sections 301.9100–13T, 301.9100–14T and 301.9100–15T also issued under 26 U.S.C. 108(d)(8) and 1017(b)(3)(E).; Section 301.9100–16T also issued under 26 U.S.C. 463(d).

Treas. Reg. § 301.7216–1TREASREGS301.7216-1, 26 C.F.R. § 301.7216–1

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Treas. Reg. § 301.7216–2

C

Effective: December 28, 2012

Code of Federal Regulations Currentness
Title 26. Internal Revenue
Chapter I. Internal Revenue Service, Department of the Treasury
Subchapter F. Procedure and Administration
Part 301. Procedure and Administration (Refs & Annos)
Crimes, Other Offenses, and Forfeitures
Crimes
General Provisions
→ **§ 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.

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(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

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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

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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

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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 accounting 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).

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(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,

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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.

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(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 preparation business. (1) A tax return preparer, other than a person who is a tax return preparer solely because the person provides auxiliary services as defined in § 301.7216–1(b)(2)(iii), may compile and maintain a separate list containing solely items of tax return information. The following items of tax return information are permissible: The names, mailing addresses, email addresses, phone numbers, taxpayer entity classification (including "individual" or the specific type of business entity), and income tax return form number (for example, Form 1040–EZ) of taxpayers whose tax returns the tax return preparer has prepared or processed. The Internal Revenue Service may issue guidance, by publication in the Internal Revenue Bulletin (see § 601.601(d)(2)(ii)(b) of this chapter), describing other types of information that may be included in a list compiled and maintained pursuant to this paragraph. This list may be used by the compiler solely to contact the taxpayers on the list for the purpose of providing tax information and general business or economic information or analysis for educational purposes, or soliciting additional tax return preparation services. The list may not be used to solicit any service or product other than tax return preparation services. 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. Due diligence conducted prior to a proposed sale of a compiler's tax return preparation business is in conjunction with the sale or other disposition of a compiler's tax return preparation business and will not constitute a transfer of the list if conducted pursuant to a written agreement that requires confidentiality of the tax return information disclosed and expressly prohibits the further disclosure or use of the tax return information for any purpose other than that related to the purchase of the 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 falls under 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 types of information expressly authorized for inclusion in a taxpayer list pursuant to the terms of this paragraph (n) 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.

(2) Examples. The following examples illustrate this paragraph (n):

Example 1. Preparer A is a tax return preparer as defined by § 301.7216–1(b)(2)(i)(A). Preparer A's office is located in southeast Pennsylvania, and Preparer A prepares federal and state income tax returns for taxpayers who live in Pennsylvania, New Jersey, Maryland, and Delaware. Preparer A maintains a list of taxpayer clients containing the information allowed by this paragraph (n). Preparer A provides quarterly state income tax information updates to his individual taxpayer clients by email or U.S. mail. To ensure that his clients only receive the information updates that are relevant to them, Preparer A uses his list to direct his outreach efforts towards the relevant clients by searching his list to filter it by zip code and income tax return form number (Form 1040 and corresponding state income tax return form number). Preparer A may use the list information in this manner without taxpayer consent because he is providing tax information

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for educational or informational purposes and is targeting clients based solely upon tax return information that is authorized by this paragraph (n) (by zip code, which is part of a taxpayer's address, and by income tax return form number). Without taxpayer consent, Preparer A also may deliver this information to his clients by email, U.S. mail, or other method of delivery that uses only information authorized by this paragraph (n).

Example 2. Preparer B is a tax return preparer as defined by § 301.7216–1(b)(2)(i)(A). Preparer B maintains a list of taxpayer clients containing the information allowed by this paragraph (n). Preparer B provides monthly federal income tax information updates in the form of a newsletter to all of her taxpayer clients by email or U.S. mail. When Preparer B hires a new employee who participates or assists in tax return preparation, she announces that hire in the newsletter for the month that follows the hiring. Each announcement includes a photograph of the new employee, the employee's name, the employee's telephone number, a brief listing of the employee's qualifications, and a brief listing of the employee's employment responsibilities. Preparer B may use the tax return information described in this paragraph (n) in this manner without taxpayer consent because she is providing tax information for educational or informational purposes to provide general federal income tax information updates. Preparer B may include the new employee announcements in the form described because this is considered tax information for informational purposes, provided the announcements do not contain solicitations for non-tax return preparation services. Without taxpayer consent, Preparer B also may deliver this information to her clients by email, U.S. mail, or other method of delivery that uses only information authorized by this paragraph (n).

(o) Producing statistical information in connection with tax return preparation business. (1) A tax return preparer may use tax return information, subject to the limitations specified in this paragraph (o), to produce a statistical compilation of data described in § 301.7216–1(b)(3)(i)(B). The purpose for and disclosure or use of the statistical compilation requiring data acquired during the tax return preparation process must relate directly to the internal management or support of the tax return preparer's tax return preparation business, or to bona fide research or public policy discussions concerning state or federal taxation. A tax return preparer may not disclose the statistical compilation, or any part thereof, to any other person unless disclosure of the statistical compilation is anonymous as to taxpayer identity, does not disclose an aggregate figure containing data from fewer than ten tax returns, and is in direct support of the tax return preparer's tax return preparation business or of bona fide research or public policy discussions concerning state or federal taxation. A statistical compilation is anonymous as to taxpayer identity if it is in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer. For purposes of this paragraph, marketing and advertising is in direct support of the tax return preparer's tax return preparation business provided the marketing and advertising is not false, misleading, or unduly influential. This paragraph, however, does not authorize the disclosure or use in marketing or advertising of any statistical compilations, or part thereof, that identify dollar amounts of refunds, credits, or deductions associated with tax returns, or percentages relating thereto, whether or not the data are statistical, averaged, aggregated, or anonymous. Disclosures made in support of fundraising activities conducted by volunteer return preparation programs and other organizations described in section 501(c) of the Internal Revenue Code (Code) in direct support of their tax return preparation businesses are not marketing and advertising under this paragraph. A tax return preparer who produces a statistical compilation of data described in § 301.7216–1(b)(3)(i)(B) may disclose the compilation to comply with financial accounting or regulatory reporting requirements whether or not the statistical compilation is anonymous as to taxpayer identity or discloses an aggregate figure containing data from

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fewer than ten tax returns.

(2) A tax return preparer may not sell or exchange for value a statistical compilation of data described in § 301.7216–1(b)(3)(i)(B), in whole or in part, except in conjunction with the transfer of assets made pursuant to the sale or other disposition of the tax return preparer's tax return preparation business. The provisions of paragraph (n) of this section regarding the transfer of a taxpayer list also apply to the transfer of any statistical compilations of data to which this paragraph applies. A person who acquires a statistical compilation, or a part thereof, pursuant to the operation of this paragraph (o) or 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 compilation.

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

Example 1. Preparer A is a tax return preparer as defined by § 301.7216–1(b)(2)(i)(A). In 2009, A used tax return information to produce a statistical compilation of data for both internal management purposes and to support A's tax return preparation business. The statistical compilation included an aggregate figure containing the information that A prepared 32 S corporation tax returns in 2009. In 2010, A decided to embark upon a new marketing campaign emphasizing its experience preparing small business tax returns. In the campaign, A discloses the aggregate figure containing the number of S corporation tax returns prepared in 2009. A's disclosure does not include any information that can be associated with or identify any specific taxpayers. A may disclose the anonymous statistical compilation without taxpayer consent.

Example 2. Preparer B is a tax return preparer as defined by § 301.7216–1(b)(2)(i)(A). In 2010, in support of B's tax return preparation business, B wants to advertise that the average tax refund obtained for its clients in 2009 was $2,800. B may not disclose this information because it contains a statistical compilation reflecting average refund amounts.

Example 3. Preparer C is a tax return preparer as defined by § 301.7216–1(b)(2)(i)(A) and is a volunteer income tax assistance program. In 2010, in support of C's tax return preparation business, C submits a grant application to a charitable foundation to fund C's operations providing free tax return preparation services to low- and moderate-income families. In support of C's request, C includes anonymous statistical data consisting of aggregated figures containing data from ten or more tax returns showing that, in 2009, C provided services to 500 taxpayers, that 95 percent of the taxpayer population served by C received the Earned Income Tax Credit (EITC), and that the average amount of the EITC received was $3,300. Despite the fact that this information constitutes an average credit amount, C may disclose the information to the charitable foundation because disclosures made in support of fundraising activities conducted by volunteer income tax assistance programs and other organizations described in section 501(c) of the Code in direct support of their tax return preparation business are not considered marketing and advertising for purposes of § 301.7216–2(o)(1).

Example 4. Preparer D is a tax return preparer as defined by § 301.7216–1(b)(2)(i)(A). In December 2009, D produced an anonymous statistical compilation of tax return information obtained during the 2009 filing season. In 2010, D wants to disclose portions of the anonymous statistical compilation from aggregated figures containing data from ten or more tax returns in connection with the marketing of its financial advisory and asset planning services. D is required to receive taxpayer consent under § 301.7216–3 before disclosing the tax return information contained in the anonymous statistical compilation because the disclosure is not being made in support of D's tax return preparation business.

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(p) Disclosure or use of information for quality, peer, or conflict reviews. (1) 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 undertaken 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.

(2) The provisions of section 7216(a) and § 301.7216–1 shall not apply to any disclosure necessary to accomplish a conflict review. A conflict review is a review undertaken to comply with requirements established by any federal, state, or local law, agency, board or commission, or by a professional association ethics committee or board, to either identify, evaluate, or monitor actual or potential legal and ethical conflicts of interest that may arise when a tax return preparer is employed or acquired by another tax return preparer, or to identify, evaluate, or monitor actual or potential legal and ethical conflicts of interest that may arise when a tax return preparer is considering engaging a new client. Tax return information gathered in conducting a conflict review may be used only for purposes of a conflict 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 those responsible for identifying, evaluating, or monitoring legal and ethical conflicts of interest. No tax return information identifying a taxpayer may be disclosed outside of the United States or a territory or possession of the United States unless the disclosing and receiving tax return preparers have procedures in place that are consistent with good business practices and designed to maintain the confidentiality of the disclosed tax return information.

(3) Any person (including administrative and support personnel) receiving tax return information in connection with a quality, peer, or conflict review is a tax return preparer for purposes of sections 7216(a) and 6713(a). Tax return information disclosed and used for purposes of a quality, peer, or conflict review shall not be disclosed or used for any other purpose.

(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 viola-

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tion 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. Paragraphs (n), (o), and (p) of this section apply to disclosures or uses of tax return information occurring on or after December 28, 2012. All other paragraphs of this section apply to disclosures or uses of tax return information occurring on or after January 1, 2009.

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6104(d)(3).; Section 301.6104(d)–4 also issued under 26 U.S.C. 6104(e)(3).; Section 301.6104(d)–5 also issued under 26 U.S.C. 6104(e)(3).; Section 301.6109–1 also issued under 26 U.S.C. 6109 (a), (c), and (d).; Section 301.6109–3 also issued under 26 U.S.C. 6109.; Section 301.6111–1T also issued under 26 U.S.C. 6111.; Section 301.6111–2T also issued under 26 U.S.C. 6111(f)(4).; Section 301.6111–3 also issued under 26 U.S.C. 6111.; Section 301.6111–3T also issued under 26 U.S.C. 6111.; Section 301.6112–1T also issued under 26 U.S.C. 6112.; Section 301.6114–1 also issued under 26 U.S.C. 6114.; Section 301.6222(a)–1T also issued under 26 U.S.C. 6230(k).; Section 301.6222(a)–2T also issued under 26 U.S.C. 6230(k).

Section 301.6222(b)–1T also issued under 26 U.S.C. 6230(k).; Section 301.6222(b)–2T also issued under 26 U.S.C. 6230(k).; Section 301.6222(b)–3T also issued under 26 U.S.C. 6230 (i) and (k).; Section 301.6223(a)–1T also issued under 26 U.S.C. 6230(k).; Section 301.6223(a)–2T also issued under 26 U.S.C. 6230(k).; Section 301.6223(b)–1T also issued under 26 U.S.C. 6230 (i) and (k).; Section 301.6223(b)–2T also issued under 26 U.S.C. 6230(k).; Section 301.6223(c)–1T also issued under 26 U.S.C. 6223(c) and 6230 (i) and (k).; Section 301.6223(e)–1T also issued under 26 U.S.C. 6230(k).; Section 301.6223(e)–2T also issued under 26 U.S.C. 6230 (i) and (k).; Section 301.6223(f)–1T also issued under 26 U.S.C. 6230(k).; Section 301.6223(g)–1T also issued under 26 U.S.C. 6223(g) and 6230 (i) and (k).; Section 301.6223(h)–1T also issued under 26 U.S.C. 6230 (i) and (k).; Section 301.6224(a)–1T also issued under 26 U.S.C. 6230(k).; Section 301.6224(b)–1T also issued under 26 U.S.C. 6230 (i) and (k).; Section 301.6224(c)–1T also issued under 26 U.S.C. 6230 (i) and (k).; Section 301.6224(c)–2T also issued under 26 U.S.C. 6230(k).; Section 301.6224(c)–3T also issued under 26 U.S.C. 6230 (i) and (k).; Section 301.6226(a)–1T also issued under 26 U.S.C. 6230(k).; Section 301.6226(b)–1T also issued under 26 U.S.C. 6230(k).; Section 301.6226(e)–1T also issued under 26 U.S.C. 6230(k).; Section 301.6226(f)–1T also issued under 26 U.S.C. 6230(k).; Section 301.6229(c)(2)–1 is also issued under 26 U.S.C. 6230(k).; Section 301.6229(c)(2)–1T is also issued under 26 U.S.C. § 6230(k).; Section 301.6231(a)(6)–1T also issued under 26 U.S.C. 6230(k).; Section 301.6231(a)(7)–1 also issued under 26 U.S.C. 6230 (i) and (k).; Section 301.6231(a)(7)–2 also issued under 26 U.S.C. 6230 (i) and (k).; Section 301.6231(a)(12)–1T also issued under 26 U.S.C. 6230(k) and 6231(a)(12).; Section 301.6231(c)–1 also issued under 26 U.S.C. 6231(c)(1) and (3).; Section 301.6231(c)–2 also issued under 26 U.S.C. 6231(c)(1) and (3).; Section 301.6231(c)–3T also issued under 26 U.S.C. 6230(k) and 6231(c).; Section 301.6231(c)–4T also issued under 26 U.S.C. 6230(k) and 6231(c).; Section 301.6231(c)–5T also issued under 26 U.S.C. 6230(k) and 6231(c).; Section 301.6231(c)–6T also issued under 26 U.S.C. 6230(k) and 6231(c).; Section 301.6231(c)–7T also issued under 26 U.S.C. 6230(k) and 6231(c).; Section 301.6231(c)–8T also issued under 26 U.S.C. 6230(k) and 6231(c).; Section 301.6231(d)–1T also issued under 26 U.S.C. 6230(k).; Section 301.6231(e)–1T also issued under 26 U.S.C. 6230(k).; Section 301.6231(e)–2T also issued under 26 U.S.C. 6230(k).; Section 301.6231(f)–1T also issued under 26 U.S.C. 6230 (i) and (k) and 6231(f).; Section 301.6233–1T also issued under 26 U.S.C. 6230(k) and 6233.; Section 301.6241–1T also issued under 26 U.S.C. 6241.; Section 301.6245–1T also issued under 26 U.S.C. 6245.; Section 301.6311–2 also issued under 26 U.S.C. 6311.; Section 301.6323(f)–(1)(c) also issued under 26 U.S.C. 6323(f)(3).; Section 301.6325–1T also issued under 26 U.S.C. 6326.; Section 301.6343–1 also issued under 26 U.S.C. 6343.; Section 301.6343–2 also issued under 26 U.S.C. 6343.; Section 301.6402–3 also issued under 95 Stat. 357 amending 88 Stat. 2351.; Section 301.6402–7 also issued under 26 U.S.C. 6402(i) and 6411(c).

Section 301.6404–2 also issued under 26 U.S.C. 6404.; Section 301.6404–3 also issued under 26

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U.S.C. 6404(f)(3).; Section 301.6621–1 also issued under 26 U.S.C. 6230(k).; Section 301.6689–1T also issued under 26 U.S.C. 6689(a).; Section 301.7216–2, paragraphs (o) and (p) also issued under 26 U.S.C. 7216(b)(3).; Section 301.7216–3T also issued under 26 U.S.C. 7216.; Section 301.7502–1 also issued under 26 U.S.C. 7502.; Section 301.7502–2 also issued under 26 U.S.C. 7502.; Section 301.7507–1 also issued under 26 U.S.C. 597.; Section 301.7507–9 also issued under 26 U.S.C. 597.; Section 301.7508–1 also issued under 26 U.S.C. 7508(a)(1)(K).; Section 301.7508A–1 also issued under 26 U.S.C. 7508(a)(1)(K) and 7508A(a).; Section 301.7605–1 also issued under Section 6228(b) of the Technical and Miscellaneous Revenue Act of 1988.; Sections 301.7623–1 through 301.7623–4 also issued under 26 U.S.C. 7623.; Section 301.7624–1 also issued under 26 U.S.C. 7624.; Sections 301.7701(b)–1 through 301.7701(b)–9 also issued under 26 U.S.C. 7701(b)(11).; Section 301.7701(i)–1(g)(1) also issued under 26 U.S.C. 7701(i)(2)(D).; Section 301.7701(i)–4(b) also issued under 26 U.S.C. 7701(i)(3).; Section 301.9000–1 also issued under 5 U.S.C. 301 and 26 U.S.C. 6103(q) and 7804.; Section 301.9000–2 also issued under 5 U.S.C. 301 and 26 U.S.C. 6103(q) and 7804.; Section 301.9000–3 also issued under 5 U.S.C. 301 and 26 U.S.C. 6103(q) and 7804.; Section 301.9000–4 also issued under 5 U.S.C. 301 and 26 U.S.C. 6103(q) and 7804.; Section 301.9000–5 also issued under 5 U.S.C. 301 and 26 U.S.C. 6103(q) and 7804.; Section 301.9000–6 also issued under 5 U.S.C. 301 and 26 U.S.C. 6103(q) and 7804.; Section 301.9100–1T also issued under 26 U.S.C. 6081.; Section 301.9100–2T also issued under 26 U.S.C. 6081.; Section 301.9100–3T also issued under 26 U.S.C. 6081.; Section 301.9100–4T also issued under 26 U.S.C. 168(f)(8)(G).; Section 301.9100–7T also issued under 26 U.S.C. 42, 48, 56, 83, 141, 142, 143, 145, 147, 165, 168, 216, 263, 263A, 448, 453C, 468B, 469, 474, 585, 616, 617, 1059, 2632, 2652, 3121, 4982, 7701; and under the Tax Reform Act of 1986, 100 Stat. 2746, sections 203, 204, 243, 311, 646, 801, 806, 905, 1704, 1801, 1802, and 1804.; Section 301.9100–8 also issued under 26 U.S.C. 1(i)(7), 41(h), 42(b)(2)(A)(ii), 42(d)(3), 42(f)(1), 42(g)(3), 42(i)(2)(B), 42(j)(5)(B), 121(d)(9), 142(i)(2), 165(l), 168(b)(2), 219(g)(4), 245(a)(10), 263A(d)(1), 263A(d)(3)(B), 263A(h), 460(b)(3), 643(g)(2), 831(b)(2)(A), 835(a), 865(f), 865(g)(3), 865(h)(2), 904(g)(10), 2056(b)(7)(c)(ii), 2056A(d), 2523(f)(6)(B), 3127, and 7520(a); the Technical and Miscellaneous Revenue Act of 1988, 102 Stat. 3324 [So in original; probably should read "102 Stat. 3342".], sections 1002(a)(23)(B), 1005(c)(11), 1006(d)(15), 1006(j)(1)(C), 1006(t)(18)(B), 1012(n)(3), 1014(c)(1), 1014(c)(2), 2004(j)(1), 2004(m)(5), 5012(e)(4), 6181(c)(2), and 6277; and under the Tax Reform Act of 1986, 100 Stat. 2746, section 905(a).; Sections 301.9100–9T, 301.9100–10T and 301.9100–11T also issued under 26 U.S.C. 1103 (g) and (h) and 6158(a).; Sections 301.9100–13T, 301.9100–14T and 301.9100–15T also issued under 26 U.S.C. 108(d)(8) and 1017(b)(3)(E).; Section 301.9100–16T also issued under 26 U.S.C. 463(d).

Treas. Reg. § 301.7216–2TREASREGS301.7216-2, 26 C.F.R. § 301.7216–2

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Code of Federal Regulations Currentness
Title 26. Internal Revenue
Chapter I. Internal Revenue Service, Department of the Treasury
Subchapter F. Procedure and Administration
Part 301. Procedure and Administration (Refs & Annos)
Crimes, Other Offenses, and Forfeitures
Crimes
General Provisions
→ **§ 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 in-

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cludes 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 Taxpayer 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 with respect to a taxpayer filing a return in the Form 1040 Series--(i) In general. Except as provided in paragraph (b)(4)(ii) of this section, 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) with respect to a taxpayer filing a return in the Form 1040 Series, for example, Form 1040, Form 1040NR, Form 1040A, or Form 1040EZ, 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 (including any territory or possession of the United States) obtains consent from an individual 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 tax-

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payer'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. For purposes of this section, a tax return preparer located outside of the United States does not include a tax return preparer who is continuously and regularly employed in the United States or any territory or possession of the United States and who is in a temporary travel status outside of the United States.

(ii) Exception. A tax return preparer located within the United States, including any territory or possession of the United States, may obtain consent to disclose the taxpayer's SSN to a tax return preparer located outside of the United States or any territory or possession of the United States only if the tax return preparer within the United States discloses the SSN to a tax return preparer outside of the United States through the use of an adequate data protection safeguard as defined by the Secretary in guidance published in the Internal Revenue Bulletin (see § 601.601(d)(2)(ii)(b) of this chapter) and verifies the maintenance of the adequate data protection safeguards in the request for the taxpayer's consent pursuant to the specifications described by the Secretary in guidance published in the Internal Revenue Bulletin.

(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.

[T.D. 7310, 39 FR 11540, March 29, 1974; T.D. 9375, 73 FR 1073, Jan. 7, 2008; T.D. 9409, 73 FR 37806, July 2, 2008; T.D. 9437, 73 FR 76217, Dec. 16, 2008]

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Section 301.6222(b)–1T also issued under 26 U.S.C. 6230(k).; Section 301.6222(b)–2T also issued under 26 U.S.C. 6230(k).; Section 301.6222(b)–3T also issued under 26 U.S.C. 6230 (i) and (k).; Section 301.6223(a)–1T also issued under 26 U.S.C. 6230(k).; Section 301.6223(a)–2T also issued under 26 U.S.C. 6230(k).; Section 301.6223(b)–1T also issued under 26 U.S.C. 6230 (i) and (k).; Section 301.6223(b)–2T also issued under 26 U.S.C. 6230(k).; Section 301.6223(c)–1T also issued under 26 U.S.C. 6223(c) and 6230 (i) and (k).; Section 301.6223(e)–1T also issued under 26 U.S.C. 6230(k).; Section 301.6223(e)–2T also issued under 26 U.S.C. 6230 (i) and (k).; Section 301.6223(f)–1T also issued under 26 U.S.C. 6230(k).; Section 301.6223(g)–1T also issued

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under 26 U.S.C. 6223(g) and 6230 (i) and (k).; Section 301.6223(h)–1T also issued under 26 U.S.C. 6230 (i) and (k).; Section 301.6224(a)–1T also issued under 26 U.S.C. 6230(k).; Section 301.6224(b)–1T also issued under 26 U.S.C. 6230 (i) and (k).; Section 301.6224(c)–1T also issued under 26 U.S.C. 6230 (i) and (k).; Section 301.6224(c)–2T also issued under 26 U.S.C. 6230(k).; Section 301.6224(c)–3T also issued under 26 U.S.C. 6230 (i) and (k).; Section 301.6226(a)–1T also issued under 26 U.S.C. 6230(k).; Section 301.6226(b)–1T also issued under 26 U.S.C. 6230(k).; Section 301.6226(e)–1T also issued under 26 U.S.C. 6230(k).; Section 301.6226(f)–1T also issued under 26 U.S.C. 6230(k).; Section 301.6229(c)(2)–1 is also issued under 26 U.S.C. 6230(k).; Section 301.6229(c)(2)–1T is also issued under 26 U.S.C. § 6230(k).; Section 301.6231(a)(6)–1T also issued under 26 U.S.C. 6230(k).; Section 301.6231(a)(7)–1 also issued under 26 U.S.C. 6230 (i) and (k).; Section 301.6231(a)(7)–2 also issued under 26 U.S.C. 6230 (i) and (k).; Section 301.6231(a)(12)–1T also issued under 26 U.S.C. 6230(k) and 6231(a)(12).; Section 301.6231(c)–1 also issued under 26 U.S.C. 6231(c)(1) and (3).; Section 301.6231(c)–2 also issued under 26 U.S.C. 6231(c)(1) and (3).; Section 301.6231(c)–3T also issued under 26 U.S.C. 6230(k) and 6231(c).; Section 301.6231(c)–4T also issued under 26 U.S.C. 6230(k) and 6231(c).; Section 301.6231(c)–5T also issued under 26 U.S.C. 6230(k) and 6231(c).; Section 301.6231(c)–6T also issued under 26 U.S.C. 6230(k) and 6231(c).; Section 301.6231(c)–7T also issued under 26 U.S.C. 6230(k) and 6231(c).; Section 301.6231(c)–8T also issued under 26 U.S.C. 6230(k) and 6231(c).; Section 301.6231(d)–1T also issued under 26 U.S.C. 6230(k).; Section 301.6231(e)–1T also issued under 26 U.S.C. 6230(k).; Section 301.6231(e)–2T also issued under 26 U.S.C. 6230(k).; Section 301.6231(f)–1T also issued under 26 U.S.C. 6230 (i) and (k) and 6231(f).; Section 301.6233–1T also issued under 26 U.S.C. 6230(k) and 6233.; Section 301.6241–1T also issued under 26 U.S.C. 6241.; Section 301.6245–1T also issued under 26 U.S.C. 6245.; Section 301.6311–2 also issued under 26 U.S.C. 6311.; Section 301.6323(f)–(1)(c) also issued under 26 U.S.C. 6323(f)(3).; Section 301.6325–1T also issued under 26 U.S.C. 6326.; Section 301.6343–1 also issued under 26 U.S.C. 6343.; Section 301.6343–2 also issued under 26 U.S.C. 6343.; Section 301.6402–3 also issued under 95 Stat. 357 amending 88 Stat. 2351.; Section 301.6402–7 also issued under 26 U.S.C. 6402(i) and 6411(c).

Section 301.6404–2 also issued under 26 U.S.C. 6404.; Section 301.6404–3 also issued under 26 U.S.C. 6404(f)(3).; Section 301.6621–1 also issued under 26 U.S.C. 6230(k).; Section 301.6689–1T also issued under 26 U.S.C. 6689(a).; Section 301.7216–2, paragraphs (o) and (p) also issued under 26 U.S.C. 7216(b)(3).; Section 301.7216–3T also issued under 26 U.S.C. 7216.; Section 301.7502–1 also issued under 26 U.S.C. 7502.; Section 301.7502–2 also issued under 26 U.S.C. 7502.; Section 301.7507–1 also issued under 26 U.S.C. 597.; Section 301.7507–9 also issued under 26 U.S.C. 597.; Section 301.7508–1 also issued under 26 U.S.C. 7508(a)(1)(K).; Section 301.7508A–1 also issued under 26 U.S.C. 7508(a)(1)(K) and 7508A(a).; Section 301.7605–1 also issued under Section 6228(b) of the Technical and Miscellaneous Revenue Act of 1988.; Sections 301.7623–1 through 301.7623–4 also issued under 26 U.S.C. 7623.; Section 301.7624–1 also issued under 26 U.S.C. 7624.; Sections 301.7701(b)–1 through 301.7701(b)–9 also issued under 26 U.S.C. 7701(b)(11).; Section 301.7701(i)–1(g)(1) also issued under 26 U.S.C. 7701(i)(2)(D).; Section 301.7701(i)–4(b) also issued under 26 U.S.C. 7701(i)(3).; Section 301.9000–1 also issued under 5 U.S.C. 301 and 26 U.S.C. 6103(q) and 7804.; Section 301.9000–2 also issued under 5 U.S.C. 301 and 26 U.S.C. 6103(q) and 7804.; Section 301.9000–3 also issued under 5 U.S.C. 301 and 26 U.S.C. 6103(q) and 7804.; Section 301.9000–4 also issued under 5 U.S.C. 301 and 26 U.S.C. 6103(q) and 7804.; Section 301.9000–5 also issued under 5 U.S.C. 301 and 26 U.S.C. 6103(q) and 7804.; Section 301.9000–6 also

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issued under 5 U.S.C. 301 and 26 U.S.C. 6103(q) and 7804.; Section 301.9100–1T also issued under 26 U.S.C. 6081.; Section 301.9100–2T also issued under 26 U.S.C. 6081.; Section 301.9100–3T also issued under 26 U.S.C. 6081.; Section 301.9100–4T also issued under 26 U.S.C. 168(f)(8)(G).; Section 301.9100–7T also issued under 26 U.S.C. 42, 48, 56, 83, 141, 142, 143, 145, 147, 165, 168, 216, 263, 263A, 448, 453C, 468B, 469, 474, 585, 616, 617, 1059, 2632, 2652, 3121, 4982, 7701; and under the Tax Reform Act of 1986, 100 Stat. 2746, sections 203, 204, 243, 311, 646, 801, 806, 905, 1704, 1801, 1802, and 1804.; Section 301.9100–8 also issued under 26 U.S.C. 1(i)(7), 41(h), 42(b)(2)(A)(ii), 42(d)(3), 42(f)(1), 42(g)(3), 42(i)(2)(B), 42(j)(5)(B), 121(d)(9), 142(i)(2), 165(l), 168(b)(2), 219(g)(4), 245(a)(10), 263A(d)(1), 263A(d)(3)(B), 263A(h), 460(b)(3), 643(g)(2), 831(b)(2)(A), 835(a), 865(f), 865(g)(3), 865(h)(2), 904(g)(10), 2056(b)(7)(c)(ii), 2056A(d), 2523(f)(6)(B), 3127, and 7520(a); the Technical and Miscellaneous Revenue Act of 1988, 102 Stat. 3324 [So in original; probably should read "102 Stat. 3342".], sections 1002(a)(23)(B), 1005(c)(11), 1006(d)(15), 1006(j)(1)(C), 1006(t)(18)(B), 1012(n)(3), 1014(c)(1), 1014(c)(2), 2004(j)(1), 2004(m)(5), 5012(e)(4), 6181(c)(2), and 6277; and under the Tax Reform Act of 1986, 100 Stat. 2746, section 905(a).; Sections 301.9100–9T, 301.9100–10T and 301.9100–11T also issued under 26 U.S.C. 1103 (g) and (h) and 6158(a).; Sections 301.9100–13T, 301.9100–14T and 301.9100–15T also issued under 26 U.S.C. 108(d)(8) and 1017(b)(3)(E).; Section 301.9100–16T also issued under 26 U.S.C. 463(d).

Treas. Reg. § 301.7216–3TREASREGS301.7216-3, 26 C.F.R. § 301.7216–3

Current through April 9, 2015; 80 FR 19036

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Wash. Admin. Code 4-30-050

C

Washington Administrative Code Currentness
Title 4. Accountancy, Board of
Chapter 4-30. General Provisions
Ethics and Prohibited Practices

4-30-050. What are the requirements concerning records and clients confidential information?

(1) **Client:** The term 'client' as used throughout WAC 4-30-050 and 4-30-051 includes former and current clients. For purposes of this section, a client relationship has been formed when confidential information has been disclosed by a prospective client in an initial interview to obtain or provide professional services.

(2) **Sale or transfer of client records:** No statement, record, schedule, working paper, or memorandum, including electronic records, may be sold, transferred, or bequeathed without the consent of the client or his or her personal representative or assignee, to anyone other than one or more surviving partners, shareholders, or new partners or new shareholders of the licensee, partnership, limited liability company, or corporation, or any combined or merged partnership, limited liability company, or corporation, or successor in interest.

(3) **Confidential client communication or information:** Licensees, CPA-Inactive certificate holders, nonlicensee firm owners and employees of such persons must not without the specific consent of the client or the heirs, successors, or authorized representatives of the client disclose any confidential communication or information pertaining to the client obtained in the course of performing professional services.

This rule also applies to confidential communications and information obtained in the course of professional tax compliance services unless state or federal tax laws or regulations require or permit use or disclosure of such information.

Consents may include those requirements of Treasury Circular 230 and IRC Sec. 7216 for purposes of this rule, provided the intended recipients are specifically and fully identified by full name, address, and other unique identifiers.

(4) This rule does not:

(a) Affect in any way the obligation of those persons to comply with a lawfully issued subpoena or summons;

(b) Prohibit disclosures in the course of a quality review of a licensee's attest, compilation, or other reporting services governed by professional standards;

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(c) Preclude those persons from responding to any inquiry made by the board or any investigative or disciplinary body established by local, state, or federal law or recognized by the board as a professional association; or

(d) Preclude a review of client information in conjunction with a prospective purchase, sale, or merger of all or part of the professional practice of public accounting of any such persons.

Statutory Authority: RCW 18.04.055(2), 18.04.405(1). WSR 13-04-011, S 4-30-050, filed 1/25/13, effective 2/25/13. Statutory Authority: RCW 18.04.055(2), 18.04.390 (4)(b), and 18.04.405(1). WSR 11-06-062, amended and recodified as S 4-30-050, filed 3/2/11, effective 4/2/11; WSR 08-18-016, S 4-25-640, filed 8/25/08, effective 9/25/08; WSR 05-01-137, S 4-25-640, filed 12/16/04, effective 1/31/05; WSR 03-24-033, S 4-25-640, filed 11/25/03, effective 12/31/03. Statutory Authority: RCW 18.04.055(2). WSR 02-22-082, S 4-25-640, filed 11/5/02, effective 12/31/02. Statutory Authority: RCW 18.40.055 (18.04.055). WSR 93-22-046, S 4-25-640, filed 10/28/93, effective 11/28/93.

WAC 4-30-050, WA ADC 4-30-050

Current with amendments adopted through the 15-06 Washington State Register dated, March 18, 2015.

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Code of Professional Conduct and Bylaws

As of June 1, 2009

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Appendix 050

ET Section 53

Article II—The Public Interest

Members should accept the obligation to act in a way that will serve the public interest, honor the public trust, and demonstrate commitment to professionalism.

.01 A distinguishing mark of a profession is acceptance of its responsibility to the public. The accounting profession's public consists of clients, credit grantors, governments, employers, investors, the business and financial community, and others who rely on the objectivity and integrity of certified public accountants to maintain the orderly functioning of commerce. This reliance imposes a public interest responsibility on certified public accountants. The public interest is defined as the collective well-being of the community of people and institutions the profession serves.

.02 In discharging their professional responsibilities, members may encounter conflicting pressures from among each of those groups. In resolving those conflicts, members should act with integrity, guided by the precept that when members fulfill their responsibility to the public, clients' and employers' interests are best served.

.03 Those who rely on certified public accountants expect them to discharge their responsibilities with integrity, objectivity, due professional care, and a genuine interest in serving the public. They are expected to provide quality services, enter into fee arrangements, and offer a range of services—all in a manner that demonstrates a level of professionalism consistent with these Principles of the Code of Professional Conduct.

.04 All who accept membership in the American Institute of Certified Public Accountants commit themselves to honor the public trust. In return for the faith that the public reposes in them, members should seek continually to demonstrate their dedication to professional excellence.

ET Section 54

Article III—Integrity

To maintain and broaden public confidence, members should perform all professional responsibilities with the highest sense of integrity.

.01 Integrity is an element of character fundamental to professional recognition. It is the quality from which the public trust derives and the benchmark against which a member must ultimately test all decisions.

.02 Integrity requires a member to be, among other things, honest and candid within the constraints of client confidentiality. Service and the public trust should not be subordinated to personal gain and advantage. Integrity can accommodate the inadvertent error and the honest difference of opinion; it cannot accommodate deceit or subordination of principle.

.03 Integrity is measured in terms of what is right and just. In the absence of specific rules, standards, or guidance, or in the face of conflicting opinions, a member should test decisions and deeds by asking: "Am I doing what a person of integrity would do? Have I retained my integrity?" Integrity requires a member to observe both the form and the spirit of technical and ethical standards; circumvention of those standards constitutes subordination of judgment.

.04 Integrity also requires a member to observe the principles of objectivity and independence and of due care.

ET Section 300

RESPONSIBILITIES TO CLIENTS

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ET Section 301

Confidential Client Information

.01 Rule 301—Confidential client information A member in public practice shall not disclose any confidential client information without the specific consent of the client.

This rule shall not be construed (1) to relieve a member of his or her professional obligations under rules 202 [ET section 202.01] and 203 [ET section 203.01], (2) to affect in any way the member's obligation to comply with a validly issued and enforceable subpoena or summons, or to prohibit a member's compliance with applicable laws and government regulations, (3) to prohibit review of a member's professional practice under AICPA or state CPA society or Board of Accountancy authorization, or (4) to preclude a member from initiating a complaint with, or responding to any inquiry made by, the professional ethics division or trial board of the Institute or a duly constituted investigative or disciplinary body of a state CPA society or Board of Accountancy.

Members of any of the bodies identified in (4) above and members involved with professional practice reviews identified in (3) above shall not use to their own advantage or disclose any member's confidential client information that comes to their attention in carrying out those activities. This prohibition shall not restrict members' exchange of information in connection with the investigative or disciplinary proceedings described in (4) above or the professional practice reviews described in (3) above.

[As amended January 14, 1992.]

Interpretations under Rule 301—Confidential Client Information

[.02] [301-1]—[Deleted]

[.03] [301-2]—[Deleted]

.04 301-3—Confidential information and the purchase, sale, or merger of a practice Rule 301 [ET section 301.01] prohibits a member in public practice from disclosing any confidential client information without the specific consent of the client. The rule provides that it shall not be construed to prohibit the review of a member's professional practice under AICPA or state CPA society authorization.

For purposes of rule 301 [ET section 301.01], a review of a member's professional practice is hereby authorized to include a review in conjunction with a prospective purchase, sale, or merger of all or part of a member's practice. The member must take appropriate precautions (for example, through a written confidentiality agreement) so that the prospective purchaser does not disclose any information obtained in the course of the review, since such information is deemed to be confidential client information.

Members reviewing a practice in connection with a prospective purchase or merger shall not use to their advantage nor disclose any member's confidential client information that comes to their attention.

[Effective February 28, 1990.]