

returns prepared on or after December 18, 2002.

The commentator focused on the scope of the direct relation requirement that applies to LITCs that represent taxpayers in controversies. The commentator observed that, for a nonfiler to obtain the benefits of an offer in compromise or installment agreement, it is sometimes necessary for an LTC to prepare a number of the nonfiler's returns for prior years. The commentator requested clarification as to whether preparation of the prior-year returns is directly related to the nonfiler's controversy with the IRS. As in the commentator's example, in cases where the preparation of a taxpayer's return is required to resolve a controversy for which an LTC is representing a taxpayer, such preparation would be treated under these final regulations as directly related to that controversy.

These regulations do not address the definition of a nominal fee. The Treasury Department and the IRS specifically requested comments on the need for a definition of a nominal fee and the factors that should be considered in defining a nominal fee. No comments were received on this topic. The Treasury Department and the IRS conclude that the definition of nominal fee should not be addressed in these regulations at this time. The final regulations do not specifically address the qualifications of an LTC under section 7526. The Treasury Department and IRS reiterate the view, originally stated in the preamble of the proposed regulations, that a qualified LTC may not provide return preparation assistance other than assistance directly related to a controversy with the IRS or assistance that is an ancillary part of an ESL outreach program.

Special Analyses

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

Drafting Information

The principal author of the regulations is Brinton T. Warren of the Office of Associate Chief Counsel (Procedure and Administration), Administrative Provisions and Judicial Practice Division.

List of Subjects in 26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 301 is amended as follows:

PART 301—PROCEDURE AND ADMINISTRATION

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

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

Par. 2. Section 301.7701-15 is amended by:

1. Removing the language "and" at the end of paragraph (a)(7)(iii).
2. Removing the period at the end of paragraph (a)(7)(iv) and adding a semicolon in its place.
3. Adding paragraphs (a)(7)(v) through (a)(7)(viii).

The additions read as follows:

§ 301.7701-15 Income tax return preparer.

* * * * *

(a) * * *

(7) * * *

(v) Any individual who provides tax assistance as part of a qualified Low-Income Taxpayer Clinic (LITC), as defined by section 7526, subject to the requirements of paragraphs (a)(7)(vii) and (viii) of this section; and

(vi) Any organization that is a qualified Low-Income Taxpayer Clinic (LITC), as defined by section 7526, subject to the requirements of paragraphs (a)(7)(vii) and (viii) of this section.

(vii) Paragraphs (a)(7)(v) and (vi) of this section apply only if any assistance with a return of tax or claim for refund under subtitle A is directly related to a controversy with the Internal Revenue Service for which the qualified LTC is providing assistance, or is an ancillary part of an LTC program to inform individuals for whom English is a second language about their rights and responsibilities under the Internal Revenue Code.

(viii) Notwithstanding paragraph (a)(7)(vii) of this section, paragraphs (a)(7)(v) and (vi) of this section do not

apply if an LTC charges a separate fee or varies a fee based on whether the LTC provides assistance with a return of tax or claim for refund under subtitle A, or if the LTC charges more than a nominal fee for its services.

* * * * *

David A. Mader,

Assistant Deputy Commissioner of Internal Revenue.

Approved: December 11, 2002.

Pamela F. Olson,

Assistant Secretary for Tax Policy.

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 301

[TD 9028]

RIN 1545-AX04

Third Party Contacts

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations providing guidance on third-party contacts made with respect to the determination or collection of tax liabilities. The regulations reflect changes to section 7602 of the Internal Revenue Code made by section 3417 of the Internal Revenue Service Restructuring and Reform Act of 1998. The regulations potentially affect all taxpayers whose Federal tax liabilities are being determined or collected by the IRS.

DATES: *Effective Dates:* These regulations are effective on December 18, 2002.

Applicability Dates: For the date of applicability, see section 301.7602-2(g).

FOR FURTHER INFORMATION CONTACT: Robert A. Miller, 202-622-3630 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

Section 3417 of the IRS Restructuring and Reform Act of 1998 (RRA 1998), Public Law 105-206 (112 Stat. 685), amended section 7602 by adding section 7602(c). This provision prohibits IRS officers and employees from contacting any person, other than the taxpayer, with respect to the determination or collection of the taxpayer's liability without giving the taxpayer reasonable advance notice that contacts with

persons other than the taxpayer may be made.

On January 2, 2001, the IRS published in the **Federal Register** a notice of proposed rulemaking (66 FR 32479) to interpret and implement section 7602(c). Two written comments were received but a public hearing was not held. The proposed regulations, as revised by this Treasury decision, are substantially adopted.

As described more fully in the preamble to the proposed regulations, the final regulations balance a taxpayer's business and reputational interests with third parties' privacy interests and the IRS' responsibility to administer the internal revenue laws effectively. By providing general pre-contact notice followed by post-contact identification, these final regulations enable a taxpayer to come forward with information required by the IRS before third parties are contacted. The taxpayer's business and reputational interests therefore can be addressed without impeding the IRS' ability to make those third-party contacts that are necessary to administer the internal revenue laws.

These final regulations do not finalize the provisions in the proposed regulations regarding periodic reports. Subsequent to the issuance of the proposed regulations, the IRS determined that the issuance of periodic reports may result in harm to third parties and, accordingly, has determined that periodic reports should not be issued. Taxpayers will continue to receive pre-contact notice and may specifically request from the IRS reports of persons contacted.

Comments on the Proposed Regulations

§ 301.7602-2(e)(3)(ii)—Post Contact Reports

The proposed regulations provided that for contacts with the employees, officers, or fiduciaries of any entity who are acting within the scope of their employment or relationship, it is sufficient to record the entity as the person contacted.

One commentator noted that there may be situations where the name of a specific employee of a business should be recorded and made available to the taxpayer. The commentator suggests adopting a "safe harbor" rule that requires that the name of the party contacted be recorded whenever there is any doubt about how the contact should be recorded. The commentator stated that whenever an employee of a business is contacted due to his or her personal knowledge or business relationship with the taxpayer, the name

of the specific employee contacted should be recorded in the contact record rather than (or in addition to) the name of the business entity.

This comment has not been adopted in the final regulations. The final regulations do not prevent IRS employees from providing more than the name of the entity in the record of contact when an employee of a business is contacted. Because the information being sought typically is that of the entity, and not of any specific employee outside of their capacity as an employee, requiring the identification of the specific employees contacted is not required to provide notice to the taxpayer of the contact made and may impede the IRS' ability to obtain information from the entity.

§ 301.7602-2(f)(3)—Reprisal Exception

The proposed regulations provided that a statement by the person contacted that harm may occur is good cause for the IRS to believe that reprisal may occur. Such contacts are not reported by the IRS to the taxpayer.

One commentator asserted that the proposed regulations are inconsistent with the statute's origin and purpose because the proposed regulations (i) subordinate the rights given to taxpayers to the rights of third parties and the IRS; (ii) provide an insufficient threshold for determining whether good cause exists to conclude that reprisal may occur; (iii) permit a third party to express concerns that providing notice to the taxpayer may result in reprisal against another person; (iv) permit the IRS to make a reprisal determination based upon information obtained from any source; and (v) permit the IRS to make a reprisal determination without peer or supervisory review. In brief, the commentator argued that the scope of what would be considered reprisal is too broad and that the determination of when reprisal would be considered to exist is too lenient. The commentator claimed that the adoption of the proposed regulations would render the requirement in section 7602(c) to provide taxpayers with a record of persons contacted a nullity.

The Treasury Department and the IRS do not agree that the proposed regulations are either too broad with respect to what will be considered reprisal or too permissive with respect to the determination of whether the potential for reprisal exists. As a general matter, by including a reprisal exception to the notice requirements of section 7602(c), Congress recognized that the rights of taxpayers to receive notice of third-party contacts must be balanced with the rights of third parties to be free

from adverse consequences that may result from the IRS providing such notice. The reprisal exception reflects Congress' determination that a taxpayer's right to know whom the IRS has contacted is outweighed by a third party's right to be free from any reprisal. Moreover, since the statute's effective date, the IRS has been operating under reprisal procedures consistent with the proposed regulations. Based upon the small number of reprisal concerns expressed to date, the Treasury Department and the IRS believe that the final regulations, which make no change to the proposed regulations with respect to this issue, appropriately balance the competing interests reflected in the statute and will not render section 7602(c)(2) a nullity.

More specifically, the Treasury Department and the IRS believe that a third party is in the best position to evaluate its relationship with a taxpayer and the potential for reprisal if a contact with that third party is reported by the IRS to the taxpayer. Requiring the IRS to investigate each claim of potential reprisal, including supervisory review of a reprisal determination, would place a heavy administrative burden on the IRS and, more importantly, would intrude into the third party's affairs and require IRS employees to make judgments that they are not well positioned to make. For these reasons, the final regulations do not adopt the "probable cause" standard suggested by the commentator. In addition, the rights provided to a taxpayer under section 7602(c) (*i.e.*, prior notice that contacts with third parties may be made and a record of persons contacted) cannot be equated with a person's Fourth Amendment right to be free from unreasonable searches and seizures.

In addition, the statute clearly contemplates that the reprisal exception is not limited to concerns of reprisal against the third party contacted. The reprisal exception applies when providing notice to the taxpayer "may involve reprisal against *any person*." section 7602(c)(3)(B) (emphasis added). The statutory exception also does not restrict the source of information that can be used in making a reprisal determination. In certain cases, an IRS employee may be in possession of information that is unknown to the third party contacted but which suggests that reprisal may occur against another person if the contact with the third party is reported to the taxpayer.

Finally, limiting the reprisal exception to physical harm would be inconsistent with the statute and Congress' clear concern that third parties be free from adverse

consequences as a result of being contacted by the IRS regarding a taxpayer's liability. Congress did not define or limit the kind of reprisal situations with which it was concerned. Excluding economic, emotional, or other types of harm would significantly diminish the third-party protections provided by the reprisal exception.

Modifications of Proposed Regulations

§ 301.7602-2(c)(1)(i)

The proposed regulations stated that for purposes of section 7602(c), an IRS employee includes, inter alia, a person who, through a written agreement with the IRS, is subject to disclosure restrictions consistent with section 6103. The final regulations provide that an IRS employee includes a person described in section 6103(n), an officer or employee of such person, and a person who is subject to disclosure restrictions pursuant to a written agreement in connection with the solicitation of an agreement described in section 6103(n) and its implementing regulations. This change was made to provide a legally precise statement of the rule and to clarify that persons who provide tax administration services to the IRS and who enter into nondisclosure agreements with the IRS, as well as prospective bidders who enter into nondisclosure agreements, are treated as IRS employees for purposes of section 7602(c).

§ 301.7602-2(c)(1)(ii) Example 3

The regulations provide that returning unsolicited telephone calls or speaking with persons other than the taxpayer as part of an attempt to speak to the taxpayer are not initiations of third-party contacts. This provision is illustrated by *Example 3*, where a revenue agent trying to contact the taxpayer to discuss the taxpayer's pending examination twice calls the taxpayer's place of business. The first call is answered by a receptionist, and the second call is answered by the office answering machine. The example in the regulations states that in both situations the employee leaves a message "stating only his name, telephone number, that he is with the IRS, and asks that the taxpayer call him." The phrase "that he is with the IRS" has been deleted from the example in the final regulations because there may be situations where it would be inappropriate for an IRS employee to identify his or her employer in a telephone conversation or message that can be seen or heard by persons other than the taxpayer. See section 6304(b)(4).

§ 301.7602-2(c)(3)(ii)

The final regulations add *Examples 6(a)* and *6(b)* to illustrate the application of the third-party contact rules to audits of TEFRA partnerships.

§ 301.7602-2(d)(2)

The regulations provide that the pre-contact notice need not be provided to a taxpayer for third-party contacts when advance notice has otherwise been provided to the taxpayer pursuant to another statute, regulation or administrative procedure. The proposed regulations provide that the Collection Due Process (CDP) notice furnished under section 6330 and its regulations is an example of a situation where the pre-contact notice requirement is fulfilled by another notice. The final regulations modify the proposed regulations to clarify that CDP notices sent to taxpayers pursuant to section 6330 and its regulations constitute reasonable advance notice that contacts with third parties may be made for purposes of effectuating a levy.

§ 301.7602-2(f)(7)

The final regulations add examples to illustrate the application of the nonadministrative contacts exception.

Special Analyses

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

Drafting Information

The principal author of these regulations is Charles B. Christopher of the Office of Associate Chief Counsel, Procedure & Administration (Collection, Bankruptcy & Summonses Division).

List of Subjects in 26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 301 is amended as follows:

PART 301—PROCEDURES AND ADMINISTRATION

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

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

Par. 2. Section 301.7602-2 is added to read as follows:

§ 301.7602-2 Third party contacts.

(a) *In general.* Subject to the exceptions in paragraph (f) of this section, no officer or employee of the Internal Revenue Service (IRS) may contact any person other than the taxpayer with respect to the determination or collection of such taxpayer's tax liability without giving the taxpayer reasonable notice in advance that such contacts may be made. A record of persons so contacted must be made and given to the taxpayer upon the taxpayer's request.

(b) *Third-party contact defined.* Contacts subject to section 7602(c) and this regulation shall be called "third-party contacts." A third-party contact is a communication which—

- (1) Is initiated by an IRS employee;
 - (2) Is made to a person other than the taxpayer;
 - (3) Is made with respect to the determination or collection of the tax liability of such taxpayer;
 - (4) Discloses the identity of the taxpayer being investigated; and
 - (5) Discloses the association of the IRS employee with the IRS.
- (c) *Elements of third-party contact explained—*(1) *Initiation by an IRS employee—*(i) *Explanation—*(A) *Initiation.* An IRS employee initiates a communication whenever it is the employee who first tries to communicate with a person other than the taxpayer. Returning unsolicited telephone calls or speaking with persons other than the taxpayer as part of an attempt to speak to the taxpayer are not initiations of third-party contacts.

(B) *IRS employee.* For purposes of this section, an IRS employee includes all officers and employees of the IRS, the Chief Counsel of the IRS and the National Taxpayer Advocate, as well as a person described in section 6103(n), an officer or employee of such person, or a person who is subject to disclosure restrictions pursuant to a written agreement in connection with the solicitation of an agreement described in section 6103(n) and its implementing

regulations. No inference about the employment or contractual relationship of such other persons with the IRS may be drawn from this regulation for any purpose other than the requirements of section 7602(c).

(ii) *Examples.* The following examples illustrate this paragraph (c)(1):

Example 1. An IRS employee receives a message to return an unsolicited call. The employee returns the call and speaks with a person who reports information about a taxpayer who is not meeting his tax responsibilities. Later, the employee makes a second call to the person and asks for more information. The first call is not a contact initiated by an IRS employee. Just because the employee must return the call does not change the fact that it is the other person, and not the employee, who initiated the contact. The second call, however, is initiated by the employee and so meets the first element.

Example 2. An IRS employee wants to hire an appraiser to help determine the value of a taxpayer's oil and gas business. At the initial interview, the appraiser signs an agreement that prohibits him from disclosing return information of the taxpayer except as allowed by the agreement. Once hired, the appraiser initiates a contact by calling an industry expert in Houston and discusses the taxpayer's business. The IRS employee's contact with the appraiser does not meet the first element of a third-party contact because the appraiser is treated, for section 7602(c) purposes only, as an employee of the IRS. For the same reason, however, the appraiser's call to the industry expert does meet the first element of a third-party contact.

Example 3. A revenue agent trying to contact the taxpayer to discuss the taxpayer's pending examination twice calls the taxpayer's place of business. The first call is answered by a receptionist who states that the taxpayer is not available. The IRS employee leaves a message with the receptionist stating only his name and telephone number, and asks that the taxpayer call him. The second call is answered by the office answering machine, on which the IRS employee leaves the same message. Neither of these phone calls meets the first element of a third-party contact because the IRS employee is trying to initiate a communication with the taxpayer and not a person other than the taxpayer. The fact that the IRS employee must either speak with a third party (the receptionist) or leave a message on the answering machine, which may be heard by a third party, does not mean that the employee is initiating a communication with a person other than the taxpayer. Both the receptionist and the answering machine are only intermediaries in the process of reaching the taxpayer.

(2) *Person other than the taxpayer—*
(i) *Explanation.* The phrases “person other than the taxpayer” and “third party” are used interchangeably in this section, and do not include—

(A) An officer or employee of the IRS, as defined in paragraph (c)(1)(i)(B) of this section, acting within the scope of his or her employment;

(B) Any computer database or website regardless of where located and by whom maintained, including databases or web sites maintained on the Internet or in county courthouses, libraries, or any other real or virtual site; or

(C) A current employee, officer, or fiduciary of a taxpayer when acting within the scope of his or her employment or relationship with the taxpayer. Such employee, officer, or fiduciary shall be conclusively presumed to be acting within the scope of his or her employment or relationship during business hours on business premises.

(ii) *Examples.* The following examples illustrate this paragraph (c)(2):

Example 1. A revenue agent examining a taxpayer's return speaks with another revenue agent who has previously examined the same taxpayer about a recurring issue. The revenue agent has not contacted a “person other than the taxpayer” within the meaning of section 7602(c).

Example 2. A revenue agent examining a taxpayer's return speaks with one of the taxpayer's employees on business premises during business hours. The employee is conclusively presumed to be acting within the scope of his employment and is therefore not a “person other than the taxpayer” for section 7602(c) purposes.

Example 3. A revenue agent examining a corporate taxpayer's return uses a commercial online research service to research the corporate structure of the taxpayer. The revenue agent uses an IRS account, logs on with her IRS user name and password, and uses the name of the corporate taxpayer in her search terms. The revenue agent later explores several Internet web sites that may have information relevant to the examination. The searches on the commercial online research service and Internet websites are not contacts with “persons other than the taxpayer.”

(3) *With respect to the determination or collection of the tax liability of such taxpayer—*(i) *Explanation—*(A) *With respect to.* A contact is “with respect to” the determination or collection of the tax liability of such taxpayer when made for the purpose of either determining or collecting a particular tax liability and when directly connected to that purpose. While a contact made for the purpose of determining a particular taxpayer's tax liability may also affect the tax liability of one or more other taxpayers, such contact is not for that reason alone a contact “with respect to” the determination or collection of those other taxpayers' tax liabilities. Contacts to determine the tax status of a pension plan under chapter 1, subchapter D (Deferred Compensation) of the Internal Revenue Code, are not “with respect to” the determination of plan participants' tax liabilities. Contacts to determine the

tax status of a bond issue under chapter 1, subchapter B, Part IV (Tax Exemption Requirements for State and Local Bonds) of the Internal Revenue Code, are not “with respect to” the determination of the bondholders' tax liabilities. Contacts to determine the tax status of an organization under chapter 1, subchapter F (Exempt Organizations) of the Internal Revenue Code, are not “with respect to” the determination of the contributors' liabilities, nor are any similar determinations “with respect to” any persons with similar relationships to the taxpayer whose tax liability is being determined or collected.

(B) *Determination or collection.* A contact is with respect to the “determination or collection” of the tax liability of such taxpayer when made during the administrative determination or collection process. For purposes of this paragraph (c) only, the administrative determination or collection process may include any administrative action to ascertain the correctness of a return, make a return when none has been filed, or determine or collect the tax liability of any person as a transferee or fiduciary under chapter 71 of Title 26.

(C) *Tax liability.* A *tax liability* means the liability for any tax imposed by Title 26 of the United States Code (including any interest, additional amount, addition to the tax, or penalty) and does not include the liability for any tax imposed by any other jurisdiction nor any liability imposed by other Federal statutes.

(D) *Such taxpayer.* A contact is with respect to the determination or collection of the tax liability of “such taxpayer” when made while determining or collecting the tax liability of a particular, identified taxpayer. Contacts made during an investigation of a particular, identified taxpayer are third-party contacts only as to the particular, identified taxpayer under investigation and not as to any other taxpayer whose tax liabilities might be affected by such contacts.

(ii) *Examples.* The following examples illustrate the operation of this paragraph (c)(3):

Example 1. As part of a compliance check on a return preparer, an IRS employee visits the preparer's office and reviews the preparer's client files to ensure that the proper forms and records have been created and maintained. This contact is not a third-party contact “with respect to” the preparer's clients because it is not for the purpose of determining the tax liability of the preparer's clients, even though the agent might discover information that would lead the agent to recommend an examination of one or more of the preparer's clients.

Example 2. A revenue agent is assigned to examine a taxpayer's return, which was prepared by a return preparer. As in all such examinations, the revenue agent asks the taxpayer routine questions about what information the taxpayer gave the preparer and what advice the preparer gave the taxpayer. As a result of the examination, the revenue agent recommends that the preparer be investigated for penalties under section 6694 or 6695. Neither the examination of the taxpayer's return nor the questions asked of the taxpayer are "with respect to" the determination of the preparer's tax liabilities within the meaning of section 7602(c) because the purpose of the contacts was to determine the taxpayer's tax liability, even though the agent discovered information that may result in a later investigation of the preparer.

Example 3. To help identify taxpayers in the florist industry who may not have filed proper returns, an IRS employee contacts a company that supplies equipment to florists and asks for a list of its customers in the past year in order to cross-check the list against filed returns. The employee later contacts the supplier for more information about one particular florist who the employee believes did not file a proper return. The first contact is not a contact with respect to the determination of the tax liability of "such taxpayer" because no particular taxpayer has been identified for investigation at the time the contact is made. The later contact, however, is with respect to the determination of the tax liability of "such taxpayer" because a particular taxpayer has been identified. The later contact is also "with respect to" the determination of that taxpayer's liability because, even though no examination has been opened on the taxpayer, the information sought could lead to an examination.

Example 4. A revenue officer, trying to collect the trust fund portion of unpaid employment taxes of a corporation, begins to investigate the liability of two corporate officers for the section 6672 Trust Fund Recovery Penalty (TFRP). The revenue officer obtains the signature cards for the corporation's bank accounts from the corporation's bank. The contact with the bank to obtain the signature cards is a contact with respect to the determination of the two identified corporate officers' tax liabilities because it is directly connected to the purpose of determining a tax liability of two identified taxpayers. It is not, however, a contact with respect to any other person not already under investigation for TFRP liability, even though the signature cards might identify other potentially liable persons.

Example 5. The IRS is asked to rule on whether a certain pension plan qualifies under section 401 so that contributions to the pension plan are excludable from the employees' incomes under section 402 and are also deductible from the employer's income under section 404. Contacts made with the plan sponsor (and with persons other than the plan sponsor) are not contacts "with respect to" the determination of the tax liabilities of the pension plan participants because the purpose of the contacts is to determine the status of the plan, even though

that determination may affect the participants' tax liabilities.

Example 6(a). The IRS audits a TEFRA partnership at the partnership (entity) level pursuant to sections 6221 through 6233. The tax treatment of partnership items is at issue, but the respective tax liabilities of the partners may be affected by the results of the TEFRA partnership audit. With respect to the TEFRA partnership, contacts made with employees of the partnership acting within the scope of their duties or any partner are not section 7602(c) contacts because they are considered the equivalent of contacting the partnership. Contacts relating to the tax treatment of partnership items made with persons other than the employees of the partnership who are acting within the scope of their duties or the partners are section 7602(c) contacts with respect to the TEFRA partnership, and reasonable advance notice should be provided by sending the appropriate Letter 3164 to the partnership's tax matters partner (TMP). Individual partners who are merely affected by the partnership audit but who are not identified as subject to examination with respect to their individual tax liabilities need not be sent Letters 3164.

Example 6(b). In the course of an audit of a TEFRA partnership at the partnership (entity) level, the IRS intends to contact third parties regarding transactions between the TEFRA partnership and specific, identified partners. In addition to the partnership's TMP, the specific, identified partners should also be provided advance notice of any third-party contacts relating to such transactions.

(4) *Discloses the identity of the taxpayer being investigated—(i) Explanation.* An IRS employee discloses the taxpayer's identity whenever the employee knows or should know that the person being contacted can readily ascertain the taxpayer's identity from the information given by the employee.

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

Example 1. A revenue agent seeking to value the taxpayer's condominium calls a real estate agent and asks for a market analysis of the taxpayer's condominium, giving the unit number of the taxpayer's condominium. The revenue agent has revealed the identity of the taxpayer, regardless of whether the revenue agent discloses the name of the taxpayer, because the real estate agent can readily ascertain the taxpayer's identity from the address given.

Example 2. A revenue officer seeking to value the taxpayer's condominium calls a real estate agent and, without identifying the taxpayer's unit, asks for the sales prices of similar units recently sold and listing prices of similar units currently on the market. The revenue officer has not revealed the identity of the taxpayer because the revenue officer has not given any information from which the real estate agent can readily ascertain the taxpayer's identity.

(5) *Discloses the association of the IRS employee with the IRS.* An IRS employee discloses his association with

the IRS whenever the employee knows or should know that the person being contacted can readily ascertain the association from the information given by the employee.

(d) *Pre-contact notice—(1) In general.* An officer or employee of the IRS may not make third-party contacts without providing reasonable notice in advance to the taxpayer that contacts may be made. The pre-contact notice may be given either orally or in writing. If written notice is given, it may be given in any manner that the IRS employee responsible for giving the notice reasonably believes will be received by the taxpayer in advance of the third-party contact. Written notice is deemed reasonable if it is—

(i) Mailed to the taxpayer's last known address;

(ii) Given in person;

(iii) Left at the taxpayer's dwelling or usual place of business; or

(iv) Actually received by the taxpayer.

(2) *Pre-contact notice not required.*

Pre-contact notice under this section need not be provided to a taxpayer for third-party contacts of which advance notice has otherwise been provided to the taxpayer pursuant to another statute, regulation or administrative procedure. For example, Collection Due Process notices sent to taxpayers pursuant to section 6330 and its regulations constitute reasonable advance notice that contacts with third parties may be made in order to effectuate a levy.

(e) *Post-contact reports—(1) Requested reports.* A taxpayer may request a record of persons contacted in any manner that the Commissioner reasonably permits. The Commissioner may set reasonable limits on how frequently taxpayer requests need be honored. The requested report may be mailed either to the taxpayer's last known address or such other address as the taxpayer specifies in the request.

(2) *Contents of record—(i) In general.* The record of persons contacted should contain information, if known to the IRS employee making the contact, which reasonably identifies the person contacted. Providing the name of the person contacted fully satisfies the requirements of this section, but this section does not require IRS employees to solicit identifying information from a person solely for the purpose of the post-contact report. The record need not contain any other information, such as the nature of the inquiry or the content of the third party's response. The record need not report multiple contacts made with the same person during a reporting period.

(ii) *Special rule for employees.* For contacts with the employees, officers, or

fiduciaries of any entity who are acting within the scope of their employment or relationship, it is sufficient to record the entity as the person contacted. A fiduciary, officer or employee shall be conclusively presumed to be acting within the scope of his employment or relationship during business hours on business premises. For purposes of this paragraph (e)(2)(ii), the term *entity* means any business (whether operated as a sole proprietorship, disregarded entity under § 301.7701-2 of the regulations, or otherwise), trust, estate, partnership, association, company, corporation, or similar organization.

(3) *Post-contact record not required.* A post-contact record under this section need not be made, or provided to a taxpayer, for third-party contacts of which the taxpayer has already been given a similar record pursuant to another statute, regulation, or administrative procedure.

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

Example 1. An IRS employee trying to find a specific taxpayer's assets in order to collect unpaid taxes talks to the owner of a marina. The employee asks whether the taxpayer has a boat at the marina. The owner gives his name as John Doe. The employee may record the contact as being with John Doe and is not required by this regulation to collect or record any other identifying information.

Example 2. An IRS employee trying to find a specific taxpayer and his assets in order to collect unpaid taxes talks to a person at 502 Fernwood. The employee asks whether the taxpayer lives next door at 500 Fernwood, as well as where the taxpayer works, what kind of car the taxpayer drives and whether the camper parked in front of 500 Fernwood belongs to the taxpayer. The person does not disclose his name. The employee may record the contact as being with a person at 502 Fernwood. If the employee then makes the same inquiries of another person on the street in front of 500 Fernwood, and does not learn that person's name, the latter contact may be reported as being with a person on the street in front of 500 Fernwood.

Example 3. An IRS employee examining a return obtains loan documents from a bank where the taxpayer applied for a loan. After reviewing the documents, the employee talks with the loan officer at the bank who handled the application. The employee has contacted only one "person other than the taxpayer." The bank and not the loan officer is the "person other than the taxpayer" for section 7602(c) purposes. The contact with the loan officer is treated as a contact with the bank because the loan officer was an employee of the bank and was acting within the scope of her employment with the bank.

Example 4. An IRS employee issues a summons to a third party with respect to the determination of a taxpayer's liability and properly follows the procedures for such summonses under section 7609, which requires that a copy of the summons be given to the taxpayer. This third-party contact need

not be maintained in a record of contacts available to the taxpayer because providing a copy of the third-party summons to the taxpayer pursuant to section 7609 satisfies the post-contact recording and reporting requirement of this section.

Example 5. An IRS employee serves a levy on a third party with respect to the collection of a taxpayer's liability. The employee provides the taxpayer with a copy of the notice of levy form that shows the identity of the third party. This third-party contact need not be maintained in a record of contacts available to the taxpayer because providing a copy of the notice of levy to the taxpayer satisfies the post-contact recording and reporting requirement of this section.

(f) *Exceptions.* (1) *Authorized by taxpayer—(i) Explanation.* Section 7602(c) does not apply to contacts authorized by the taxpayer. A contact is "authorized" within the meaning of this section if—

(A) The contact is with the taxpayer's authorized representative, that is, a person who is authorized to speak or act on behalf of the taxpayer, such as a person holding a power of attorney, a corporate officer, a personal representative, an executor or executrix, or an attorney representing the taxpayer; or

(B) The taxpayer or the taxpayer's authorized representative requests or approves the contact.

(ii) *No prevention or delay of contact.* This section does not entitle any person to prevent or delay an IRS employee from contacting any individual or entity.

(2) *Jeopardy—(i) Explanation.* Section 7602(c) does not apply when the IRS employee making a contact has good cause to believe that providing the taxpayer with either a general pre-contact notice or a record of the specific person contacted may jeopardize the collection of any tax. For purposes of this section only, good cause includes a reasonable belief that providing the notice or record will lead to—

(A) Attempts by any person to conceal, remove, destroy, or alter records or assets that may be relevant to any tax examination or collection activity;

(B) Attempts by any person to prevent other persons, through intimidation, bribery, or collusion, from communicating any information that may be relevant to any tax examination or collection activity; or

(C) Attempts by any person to flee, or otherwise avoid testifying or producing records that may be relevant to any tax examination or collection activity.

(ii) *Record of contact.* If the circumstances described in this paragraph (f)(2) exist, the IRS employee must still make a record of the person

contacted, but the taxpayer need not be provided the record until it is no longer reasonable to believe that providing the record would cause the jeopardy described.

(3) *Reprisal—(i) In general.* Section 7602(c) does not apply when the IRS employee making a contact has good cause to believe that providing the taxpayer with either a general pre-contact notice or a specific record of the person being contacted may cause any person to harm any other person in any way, whether the harm is physical, economic, emotional or otherwise. A statement by the person contacted that harm may occur against any person is sufficient to constitute good cause for the IRS employee to believe that reprisal may occur. The IRS employee is not required to further question the contacted person about reprisal or otherwise make further inquiries regarding the statement.

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

Example 1. An IRS employee seeking to collect unpaid taxes is told by the taxpayer that all the money in his and his brother's joint bank account belongs to the brother. The IRS employee contacts the brother to verify this information. The brother refuses to confirm or deny the taxpayer's statement. He states that he does not believe that reporting the contact to the taxpayer would result in harm to anyone but further states that he does not want his name reported to the taxpayer because it would appear that he gave information. This contact is not excepted from the statute merely because the brother asks that his name be left off the list of contacts.

Example 2. Assume the same facts as in *Example 1*, except that the brother states that he fears harm from the taxpayer should the taxpayer learn of the contact, even though the brother gave no information. This contact is excepted from the statute because the third party has expressed a fear of reprisal. The IRS employee is not required to make further inquiry into the nature of the brothers' relationship or otherwise question the brother's fear of reprisal.

Example 3. An IRS employee is examining a joint return of a husband and wife, who recently divorced. From reading the court divorce file, the IRS employee learns that the divorce was acrimonious and that the ex-husband once violated a restraining order issued to protect the ex-wife. This information provides good cause for the IRS employee to believe that reporting contacts which might disclose the ex-wife's location may cause reprisal against any person. Therefore, when the IRS employee contacts the ex-wife's new employer to verify salary information provided by the ex-wife, the IRS employee has good cause not to report that contact to the ex-husband, regardless of whether the new employer expresses concern about reprisal against it or its employees.

(4) *Pending criminal investigations—(i) IRS criminal investigations.* Section

7602(c) does not apply to contacts made during an investigation, or inquiry to determine whether to open an investigation, when the investigation or inquiry is—

(A) Made against a particular, identified taxpayer for the primary purpose of evaluating the potential for criminal prosecution of that taxpayer; and

(B) Made by an IRS employee whose primary duties include either identifying or investigating criminal violations of the law.

(ii) *Other criminal investigations.* Section 7602(c) does not apply to contacts which, if reported to the taxpayer, could interfere with a known pending criminal investigation being conducted by law enforcement personnel of any local, state, Federal, foreign or other governmental entity.

(5) *Governmental entities.* Section 7602(c) does not apply to any contact with any office of any local, state, Federal or foreign governmental entity except for contacts concerning the taxpayer's business with the government office contacted, such as the taxpayer's contracts with or employment by the office. The term *office* includes any agent or contractor of the office acting in such capacity.

(6) *Confidential informants.* Section 7602(c) does not apply when the employee making the contact has good cause to believe that providing either the pre-contact notice or the record of the person contacted would identify a confidential informant whose identity would be protected under section 6103(h)(4).

(7) *Nonadministrative contacts—(i) Explanation.* Section 7602(c) does not apply to contacts made in the course of a pending court proceeding.

(ii) *Examples.* The following examples illustrate this paragraph (f)(7):

Example 1. An attorney for the Office of Chief Counsel needs to contact a potential witness for an upcoming Tax Court proceeding involving the 1997 and 1998 taxable years of the taxpayer. Section 7602(c) does not apply because the contact is being made in the course of a pending court proceeding.

Example 2. While a Tax Court case is pending with respect to a taxpayer's 1997 and 1998 income tax liabilities, a revenue agent is conducting an examination of the taxpayer's excise tax liabilities for the fiscal year ending 1999. Any third-party contacts made by the revenue agent with respect to the excise tax liabilities would be subject to the requirements of section 7602(c) because the Tax Court proceeding does not involve the excise tax liabilities.

Example 3. A taxpayer files a Chapter 7 bankruptcy petition and receives a discharge. A revenue officer contacts a third party in order to determine whether the taxpayer has

any exempt assets against which the IRS may take collection action to enforce its federal tax lien. At the time of the contact, the bankruptcy case has not been closed. Although the bankruptcy proceeding remains pending, the purpose of this contact relates to potential collection action by the IRS, a matter not before or related to the bankruptcy court proceeding.

(g) *Effective Date.* This section is applicable on December 18, 2002.

David A. Mader,

Assistant Deputy Commissioner of Internal Revenue.

Pamela F. Olson,

Assistant Secretary of the Treasury.

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DEPARTMENT OF JUSTICE

Bureau of Prisons

28 CFR Part 540

[BOP-1064-F]

RIN 1120-AA59

Incoming Publications: Nudity and Sexually Explicit Material or Information

AGENCY: Bureau of Prisons, Justice.

ACTION: Final rule.

SUMMARY: In this document, we finalize our interim final rule which implemented a statutory provision prohibiting the Bureau of Prisons (Bureau) from using appropriated funds to “distribute or make available any commercially published information or material” that features nudity or is sexually explicit. We now publish this rule as a final rule and further clarify that “commercially published information or material” includes photographs or other pictorial depictions.

DATES: This rule is effective on December 18, 2002.

ADDRESSES: Rules Unit, Office of General Counsel, Bureau of Prisons, 320 First Street, NW., Washington, DC 20534.

FOR FURTHER INFORMATION CONTACT: Sarah Qureshi, Office of General Counsel, Bureau of Prisons, phone (202) 307-2105.

SUPPLEMENTARY INFORMATION:

History of This Rule

The Fiscal Year 1997 Omnibus Budget Act (Pub. L. 104-208) first required that we use no funds available to the Bureau “to distribute or make available any commercially published information or

material to a prisoner when it is made known to [us] that such information or material is sexually explicit or features nudity.”

On November 6, 1996, we published procedures implementing this provision in the Act as an interim final rule (61 FR 57568). The rule, effective December 1, 1996, became 28 CFR 540.70-540.72.

Within the two months after publishing this rule, we received six comments from individuals challenging the constitutionality of the statutory provisions underlying these rules on First Amendment grounds. The commenters generally argued that denying inmates access to information or material that is sexually explicit or features nudity violated their constitutional right to freedom of speech and communication.

Before we could respond to these comments, a group of inmates and publishers promptly challenged the constitutionality of the policy implemented by these rules in the case of *Amatel v. Reno*, 975 F. Supp. 365 (D.D.C. 1997). On August 12, 1997, the court in *Amatel* issued a nationwide preliminary injunction prohibiting us from using these procedures. We then suspended application of these rules.

On September 15, 1998, the U.S. Court of Appeals for the District of Columbia Circuit reversed the district court's preliminary injunction. *Amatel v. Reno*, 156 F.3d 192 (D.C. Cir. 1998) (rehearing *en banc* denied Dec. 23, 1998). They further appealed to the U.S. Supreme Court, which denied certiorari on June 24, 1999, *Amatel v. Reno*, 119 S. Ct. 2392 (1999).

Amatel upheld the apparent constitutionality of this statutory provision. By lifting the injunction, the U.S. Court of Appeals in *Amatel* allowed us to reimplement the policy mandated by statute through these rules.

What We Are Doing Now

In this rule, we finalize 28 CFR 540.70 through 540.72, as originally published in 1996 (61 FR 57568). We also amend § 540.72(b)(1) to clarify that “commercially published information or material” includes photographs or other pictorial depictions in response to a recent trend towards receipt of such prohibited materials. These photographs often arrive as commercially published information or material and are, therefore, prohibited by this rule. Although our previous definition of commercially published information or material did not explicitly include photographs or pictorial depictions, that prohibition is certainly implicit.

The Fiscal Year 1997 Omnibus Budget Act (Pub. L. 104-208) (1997 Budget Act)