

under section 355(e), relating to the recognition of gain on certain distributions of stock or securities in connection with an acquisition of stock of the distributing corporation or of stock of the corporation whose stock is distributed. In response to written comments received and comments presented at a public hearing held on March 2, 2000, these proposed regulations are being withdrawn. New proposed regulations (REG-107566-00) covering the same matters as the withdrawn proposed regulations are being issued elsewhere in this issue of the **Federal Register**.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Withdrawal of Notice of Proposed Rulemaking

Accordingly, under the authority of 26 U.S.C. 7805 and 26 U.S.C. 355(e)(5), the notice of proposed rulemaking (REG-116733-98) that was published in the **Federal Register** on August 24, 1999 (64 FR 46155) is withdrawn.

Robert E. Wenzel,

Deputy Commissioner of Internal Revenue.

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 301

[REG-104906-99]

RIN 1545-AX04

Third Party Contacts

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations providing guidance on third-party contacts made with respect to the determination or collection of tax liabilities. The proposed 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 proposed regulations potentially affect all taxpayers whose Federal tax liabilities are being determined or collected by the IRS.

DATES: Written and electronic comments and requests for a public hearing must be received on or before April 2, 2001.

ADDRESSES: Send submission to: CC:M&SP:RU (REG-104906-99), room

5226, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 5 p.m. to: CC:M&SP:RU (REG-104906-99), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC. Alternatively, taxpayers may submit comments electronically via the Internet by selecting the "Tax Regs" option on the IRS Home Page, or by submitting comments directly to the IRS Internet site at http://www.irs.gov/tax_reg/reglist.html.

FOR FURTHER INFORMATION CONTACT:

Concerning the regulations, Bryan T. Camp, 202-622-3620 (not a toll-free number); concerning submissions, Sonya Cruse at 202-622-7180 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document contains proposed regulations amending the Procedure and Administration Regulations (26 CFR part 301) relating to the exercise by officers and employees of the IRS of the authority given them under section 7602 of the Internal Revenue Code (Code). Section 3417 of the IRS Restructuring and Reform Act of 1998 (RRA 1998), Public Law 105-206 (112 Stat. 685), amends section 7602 to prohibit IRS officers or employees from contacting any person other than the taxpayer with respect to the determination or collection of the taxpayer's liability without first giving the taxpayer reasonable advance notice that such contacts may be made. The section further requires that a record of the persons contacted be provided to the taxpayer both periodically and upon the taxpayer's request. The section sets forth a number of exceptions to its requirements. These proposed regulations interpret and implement the amendments made by section 3417 of RRA 1998.

Explanation of Provisions

Section 3417 of RRA 1998 amended section 7602 to prohibit IRS officers or 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.

Section 3417 was added to the bill by the Senate Finance Committee. In explaining the reasons for its proposal, the Senate Finance Committee expressed a concern that third-party

contacts "may have a chilling effect on the taxpayer's business and could damage the taxpayer's reputation in the community," and that taxpayers "should have the opportunity to resolve issues and volunteer information before the IRS contacts third parties." S. Rep. No. 174, 105th Cong., 2nd Sess. 77 (1998). At the same time, the Senate Finance Committee stated that "[c]ontacts with government officials relating to matters such as the location of assets or the taxpayer's current address are not restricted by this provision." *Id.*

As originally drafted by the Senate Finance Committee, the third-party contact rule would have prohibited most IRS contacts with third parties prior to taxpayer notification of the specific contact to be made. It contained exceptions for notification of contacts (i) that were authorized by a taxpayer, (ii) that would jeopardize collection, or (iii) with respect to pending criminal investigations. The requirement for specific pre-contact notice was modified by the Conference Committee to require only a generalized notice of IRS intent to contact third parties, followed by post-contact notice of specific contacts. Further, the exceptions were expanded to include situations that might involve reprisal against the third party or any other person. With regard to the general, pre-contact notice, the Conference Report states that "this notice will be provided as part of an existing IRS notice provided to taxpayers." H.R. Rep. No. 599, 105th Cong., 2nd Sess. at 277 (1998).

The provision as enacted and the particular changes made by the Conference Committee to the Senate proposal support an interpretative approach that balances taxpayers' business and reputational interests, articulated as the principal impetus for the Senate proposal, with third parties' privacy interests and the IRS' responsibility to administer the internal revenue laws effectively. The replacement of specific pre-contact identification of intended third-party contacts, as proposed by the Senate, with a general pre-contact notice accompanied by post-contact identification, still enables taxpayers to come forward with information before third parties are contacted. The modifications still allow taxpayers to address business or reputational concerns arising from IRS contact with third parties, but accomplish this result without impeding the ability of the IRS to make those third-party contacts that are necessary to administer the internal revenue laws. The maintenance of the exceptions proposed in the Senate

version and the addition of an exception for situations involving potential reprisal express Congressional concern that the business and reputational interests of taxpayers be balanced with the privacy and safety interests of third parties and that certain types of investigations (*i.e.*, those involving jeopardy and potential criminal prosecution) be excepted from the statute.

Accordingly, the proposed regulations attempt to balance among the taxpayer, third party, and governmental interests implicated by the statute. The IRS and Treasury invite public comments on the following specific issues addressed by these proposed regulations, as well as any other issue raised by the new requirements for third-party contacts.

The Meaning of "Person Other Than the Taxpayer" When Contacting Business Entities

Section 7602(c) applies to contacts with "any person other than the taxpayer." The "person" contacted may be a business entity rather than an individual. IRS employees must often contact employees of business entities. These contacts arise in two situations. First, IRS employees examining a business taxpayer generally must communicate with employees of the taxpayer. Second, in the course of determining or collecting any taxpayer's liability, an IRS employee may need to contact employees of a third-party business entity. For example, when an IRS employee contacts a bank or other business, the IRS employee actually communicates with an employee of the bank or business.

With respect to the first situation, when an IRS employee contacts an employee of a taxpayer under examination, the proposed regulations provide that a taxpayer's employee is not a "person other than the taxpayer" when acting within the scope of his or her employment. Several rationales underlie this position. First, corporations may speak and act only through individuals. Moreover, state law generally provides that employers are responsible for their employees, regardless of the form under which the employer does business, when the employees are acting within the scope of their employment. It seems reasonable, therefore, to treat employees who are acting within the scope of their employment as being part of the business taxpayer under examination. Second, this approach is consistent with how employees are treated elsewhere in the Internal Revenue Code. See I.R.C. 7609(c)(2)(A) (summons issued to any person who is the taxpayer under

investigation "or any officer or employee of such person" not considered a summons issued to a third party). From an administrative standpoint, IRS employees examining a business generally rely on certain individuals designated by the taxpayer to provide information and direct the IRS to whichever employees can best provide that information. The regulations will not affect this current examination practice and business taxpayers will continue to be informed about contacts with their employees pursuant to current procedures.

With respect to the second situation, where an IRS employee contacts a third party that is a business entity, the proposed regulations provide that when an employee of the business is contacted while acting within the scope of his or her employment, the "person other than the taxpayer" to be recorded and reported to the taxpayer is the business entity and not any individual employee. Two rationales support this position. First, contacts with a business' employees should not be treated as contacts with persons other than the taxpayer because employees acting within the scope of their employment are most appropriately viewed as being part of the business entity being contacted. Second, the individual employee's privacy interest in not having his or her identity recorded by the government and reported to the taxpayer outweighs the taxpayer's interest in learning the name of the individual employee *in addition to* the identity of the business contacted. The most relevant information for the taxpayer is the identity of the business contacted, which information enables the taxpayer to contact the appropriate individuals within the business to address any business or reputational concerns that might result from the IRS contact.

Request for Comments

The IRS and the Treasury Department are interested in receiving comments on the extent to which employees of business entities should be considered "persons other than the taxpayer" apart from the business entity being contacted. The comments should assume that employees are contacted within the scope of their employment. The comments should articulate how well or poorly the proposed regulation, or any proposed alternative, balances taxpayer interests in their community reputations or businesses with third parties' interests in their privacy and with the IRS' obligation to administer the tax laws fairly and effectively.

The Meaning of "With Respect to a Determination or Collection" of Tax

Section 7602(c) prohibits IRS employees from contacting any person other than "the" taxpayer "with respect to" the determination or the collection of the tax liability of "such" taxpayer. The term "with respect to" indicates a required nexus between the contact and one of the two enumerated purposes of determining or collecting tax. The use of the words "the" and "such" imply a single affected taxpayer whose liability is being determined. The statute and committee reports do not describe with greater specificity the type of contacts that should be considered "with respect to" the determination or collection of a tax liability, nor how close a nexus must exist between a contact and the purposes described in section 7602(c).

Examination and collection activity is critical to the IRS' mission of "helping [taxpayers] understand and meet their tax responsibilities." Administering the tax laws, however, involves more activities than an individual IRS employee examining a single return selected for audit or collecting unpaid taxes. It also includes: locating taxpayers who may not have fulfilled a filing or payment obligation, monitoring information returns, performing compliance checks to help identify which returns to examine, investigating leads from newspapers and other sources to identify non-filers and underreporters, providing services to taxpayers such as issuing Private Letter Rulings or determining employment status, tracing lost payments, and exchanging information with other taxing authorities and other federal agencies. Moreover, the examination of a single return may significantly affect other taxpayers. For example, adjustments to items attributable to partnerships or other pass-through entities may significantly affect partners or other investors in flow-through entities. Likewise, adjustments on returns of corporate taxpayers may significantly affect the corporations' shareholder liabilities. Broadly stated, almost every third-party contact made by IRS employees could be seen as "with respect to the determination or collection" of tax in that almost every contact may indirectly affect the liability of one or more taxpayers. Not every contact, however, has a direct and immediate nexus to the determination or collection of a particular taxpayer's liability.

The proposed regulations generally provide that a contact must be directly connected to the purpose of determining or collecting an identified taxpayer's

liability before the contact is subject to the statute, in contrast to making every contact which may affect a person's liability subject to the statute. An interpretation that requires each IRS employee to report each contact to every taxpayer whose liability could potentially be affected by the contact is overbroad, potentially unadministrable, and could needlessly alarm taxpayers whose returns were not actually being examined and would not in fact be selected for examination. Conversely, an interpretation that a contact was not "with respect to" the determination of liability until a return had been formally selected for examination would unduly elevate administrative concerns over taxpayer business and reputational interests. If a bank is contacted about a particular taxpayer, for example, the reputational concerns caused by the contact do not depend on whether the taxpayer is under formal examination at the time or is merely being screened as part of a process to identify returns for examination. Therefore, although the proposed regulations require a direct connection between the contact and the purpose of examining or collecting a liability of an identified taxpayer's liability before the contact is subject to the statute, they do not require that a formal examination be opened. They instead provide a series of tests and examples to identify classes of contacts which should or should not be subject to the statute under this standard, regardless of whether a formal examination has been opened.

Request for Comments

The IRS and the Treasury Department are interested in receiving comments on the types of contacts that should be considered to be "with respect to the determination or collection of the liability of such taxpayer" and, when one contact may indirectly affect the liabilities of more than one taxpayer, which taxpayers should receive the general advance notice.

Reports of Persons Contacted

Section 7602(c)(2) requires the IRS to report "periodically" to taxpayers the persons contacted during such period and to provide reports to taxpayers upon request. The statute does not specify the time that should elapse between reports or requests.

The proposed regulations provide that the periodic report should be produced once each year, and that taxpayers should be allowed to request the report more frequently, subject to any reasonable restrictions that the IRS may impose. In deciding what restrictions may be reasonable, the IRS may look to

other, similar statutes for guidance. For example, section 6103(e)(8) allows one ex-spouse to request a report on whether the IRS has attempted to collect a joint liability from the other ex-spouse and how much of the joint liability has been collected. Like section 7602(c), section 6103(e)(8) places no restrictions on the number of requests. Nonetheless, the House Ways and Means Committee Report explaining section 6103(e)(8) suggested that "the IRS may develop procedures to address the frequency of such requests" and that "one request per quarter would be a reasonable rate unless the taxpayer had good cause to seek more frequent information." H.R. Rep. No. 506, 104th Congress, 1st Session (1997) at 32.

A mandatory annual reporting rule, coupled with taxpayers' ability to request more frequent reports, is reasonable because a one-year cycle should be sufficiently long such that only one report would usually have to be provided to most taxpayers and yet sufficiently short, particularly in light of taxpayer ability to request more frequent reports, to enable taxpayers to address any business or reputational concerns raised by the third-party contacts. To enable the IRS to institute appropriate automated procedures to handle this requirement, the IRS plans to begin the annual mailings in the year 2001. In the interim, the IRS will provide taxpayers with reports of contacts upon request according to the guidelines contained in these proposed regulations.

Request for Comments

The IRS and Treasury are interested in receiving comments on how to interpret "periodically" for purposes of periodically providing a record of persons contacted to the taxpayer and whether and on what basis to impose reasonable limits or conditions on the frequency with which taxpayers may request reports.

Record of Person Contacted

Section 7602(c)(2) requires the IRS to give taxpayers a "record of persons contacted" both periodically and upon request. IRS employees do not obtain information from every person who is contacted with respect to the determination or collection of the taxpayer's liabilities. Moreover, when the accuracy of the information received is self-proving, IRS employees have no need to learn the identity of the persons they contact. For these reasons, the IRS does not request or learn the identity of every third party contacted. For example, an IRS employee who is trying to locate a taxpayer may talk with various persons other than the taxpayer.

In these situations, the identity of the persons contacted is not relevant to the location information sought because the information will either lead to the taxpayer or not.

The proposed regulations provide that, as a general standard, the "record of persons contacted" should give the taxpayer information that, if known to the IRS employee, reasonably identifies the person contacted. The proposed regulations, however, do not require IRS employees to obtain information about third parties that they would not otherwise obtain. The proposed regulations also do not require disclosure to the taxpayer of any information about the third-party other than the identity information known to the employee at the time of the contact. Finally, the proposed regulations provide a bright-line rule that naming the person contacted will always satisfy the general standard of reasonable identification. This approach is consistent with the policy articulated by other privacy and disclosure statutes that the United States government will not disclose any more information about citizens in its possession than necessary to administer the laws. *See generally* 5 U.S.C. § 552a.

The general standard recognizes taxpayer interests by providing taxpayers a reasonable opportunity to learn the identity of the person contacted. The proposed regulations also recognize third-party privacy interests and the IRS' interest in not making unnecessary inquiries of third parties by requiring the IRS to report only the fact of a contact and not to make new inquiries of the third parties that would not otherwise be made. To interpret the statute otherwise would require IRS employees to intrude further into the affairs of third parties than is necessary to administer the tax laws and would adversely affect the willingness of third parties to provide information to the IRS.

An additional issue is the type of identifying information that should be included in the record when the name of the third party is not known or obtained by the IRS employee making the contact. The proposed regulations recognize that the information, other than a name, that would reasonably identify a person contacted will depend on the facts and circumstances of the contact. While the proposed regulations give an example where the place of contact might reasonably identify a person, the regulations intentionally do not set forth any specific list of characteristics to record. This approach is consistent with the interpreting the statute to require that only the fact of

the contact be recorded and not to require IRS employees to obtain more information about third parties than is otherwise necessary to administer the tax laws.

Request for Comment

The IRS and Treasury are interested in receiving comments on the type of information that should be included in the record of persons contacted which is provided to a taxpayer. Specifically, when the name of the third party is known, should additional information be included in the record of persons contacted? When the name of the third party is not known, what information should be included in the record of persons contacted?

Reprisal Exception

Section 7602(c) does not apply when the Secretary has good cause to believe that providing either the pre-contact notice or the post-contact record "may involve reprisal against any person." When contacting a third party, IRS employees often do not know the details of the relationship, if any, between the third party and the taxpayer and so often do not know whether reporting the contact to the taxpayer may result in harm to any person, particularly the third party being contacted. At times, an IRS employee may have information that constitutes good cause to believe that reporting a contact may result in harm to someone. In the absence of this information, however, the IRS employee cannot know whether potential exists for reprisal without asking the third party. Under interim procedures, IRS employees generally inform the person contacted of the statute's requirements and ask whether the person has any concern that reprisal might occur against any person if the contact is reported to the taxpayer. The IRS experience under these interim procedures has been that few persons assert a fear of reprisal.

The proposed regulations interpret the statute to elevate third-party concerns about reprisal above taxpayers' business or reputational interests. The proposed regulations provide that "reprisal" encompasses not only physical harm, but also emotional or economic harm. The proposed regulations provide that a statement by the person contacted that harm may occur against any person is good cause to believe that reprisal may occur. Because third parties will ordinarily be better able than the IRS to evaluate their relationship with the taxpayer, the IRS must be permitted to rely on a third party's claim of potential reprisal without separately investigating every

such claim. Further, to require IRS employees to investigate every claim of potential reprisal would divert resources from investigating tax liabilities to investigating third parties. Such a requirement would place a heavy administrative burden on the IRS, intrude into the third party's affairs, and require IRS employees to make judgments that they are not well positioned to make. Finally, the proposed regulation reflects the IRS' interim experience during which few persons expressed a fear of reprisal even when told that if they feared reprisal, their identity would not be reported to the taxpayer. This experience suggests that third parties generally will not express a fear of reprisal simply to keep their names off the contact lists.

The proposed regulations provide that information from any source, not only the third party contacted, may constitute good cause to believe that reprisal may occur. The proposed regulations also provide, however, that IRS employees are under no duty to investigate or determine for each contact whether good cause exists to believe that reprisal may occur. Finally, the proposed regulations provide that a mere desire for privacy will not be treated as a fear of reprisal and, in this respect, the statute requires that third-party privacy interests yield to taxpayers' interests in learning of IRS contacts. The examples clarify that third parties cannot simply request to be kept off the list of contacts reported to taxpayers.

Request for Comments

The IRS and Treasury are interested in receiving comments discussing the appropriate standards for "reprisal" for purposes of excluding third parties' identities from the record of persons contacted.

Contacts With Other Government Entities

Section 7602(c) applies to contacts with any person other than the taxpayer.

The statute contains no explicit exception for contacts with government entities. The Senate Finance Committee report, however, states that "[c]ontacts with government officials relating to matters such as the location of assets or the taxpayer's current address are not restricted by this provision." S. Rep. No. 105-174, at 77 (1998). This report language suggests that Congress did not generally consider government contacts to implicate taxpayer business and reputational interests to the same degree as other types of third-party contacts.

In determining and collecting taxes, IRS employees often contact other

government entities. For example, IRS employees may need to contact: county court clerks to retrieve land records or case files; state Secretary of State offices to retrieve corporate records; state Motor Vehicle offices to obtain license and vehicle registration information; the United States Post Office to obtain change of address information; or foreign governments to obtain information about taxpayer assets, location, or transactions. IRS employees may need to confer with non-IRS Treasury employees, Department of Justice employees, and other federal government employees with respect to the determination or collection of a taxpayer's liability. IRS employees also may need to contact bankruptcy trustees and other officers and employees of courts.

The proposed regulations provide that, generally, contacts with government entities need not be reported because they generally do not implicate the concerns that underlie the statute's enactment. Government contacts are much less likely than nongovernment contacts to affect taxpayers' reputations among persons with whom taxpayers have business relationships. Moreover, many government officials are under duties not to disclose IRS contacts to the general public. Additionally, government offices, like databases, generally serve as repositories of information on large groups of people. Inquiries for that information, whether made by the IRS or any other agency, are a routine part of the work performed by the contacted government office and generally should not affect a taxpayer's community reputation or business. The administrative burden on the IRS of maintaining and providing to taxpayers records of government contacts would be substantial because of the high volume of government contacts. Moreover, contacts with government offices are often made to locate taxpayers or their assets, which fact presents situations where pre-contact notice may not be feasible and attempts to comply with that requirement could delay and otherwise impair administration of the tax laws.

Some government contacts, however, may affect taxpayers' business relationships with the government and so will be treated as subject to the statute. The proposed regulations recognize taxpayers' interest in their business relations with government entities by providing that contacts concerning a taxpayer's conduct of business with the particular government office contacted will be subject to the statute.

Request for Comments

The IRS and Treasury are interested in receiving comments on the extent to which contacts with government entities should be excluded from section 7602(c)'s requirements. The comments should articulate how well or poorly the proposed regulation, or any suggested alternative, balances taxpayer interests in their community reputations or businesses with third parties' interests in their privacy and with the IRS' obligation to administer the tax laws fairly and effectively.

Special Analyses

This notice of proposed rulemaking 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 proposed 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, these proposed regulations will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Comments and Requests for a Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (a signed original and eight (yes, 8) copies) and electronic comments that are submitted timely to the IRS. The IRS and Treasury Department specifically request comments on the clarity of the proposed regulations and how they can be made easier to understand. All comments will be available for public inspection and copying. A public hearing may be conducted if requested in writing by any person who timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the hearing will be published in the **Federal Register**.

Drafting Information

The principal author of these proposed regulations is Bryan T. Camp of the Office of Assistant Chief Counsel (General Litigation). Other personnel from the IRS and Treasury Department have also participated in their drafting and development.

List of Subjects in 26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes,

Penalties, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 301 is proposed to be 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 both periodically and 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.* 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 any other person who, through a written agreement with the IRS, is subject to disclosure restrictions consistent with section 6103. 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). 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.

(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 which 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 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, telephone number, that he is with the IRS, 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) of this section, acting within the scope of his or her employment;

(B) Any computer database or web site 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 web sites 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) 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 I, subchapter D (Deferred Compensation), 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), 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), 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.

(ii) *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.

(iii) *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 assessable penalty) and does not include the liability for any tax imposed by any other jurisdiction nor any liability imposed by other federal statutes.

(iv) *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.

(v) *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 sections 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.

(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 officer 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 officer has revealed the identity of the taxpayer, regardless of whether the revenue officer 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 unit 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 which 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 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.

(e) *Post-contact reports—(1) Periodic reports.* A record of persons contacted must be reported to the taxpayer periodically, but no less frequently than once a year. The period of time between these periodic reports shall be called "the reporting period." The periodic report must be mailed to the taxpayer's last known address.

(2) *Requested reports.* A taxpayer may request a record of persons contacted in any manner which 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.

(3) *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 inquiries 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)(3)(ii), the term "entity" means any business (whether operated as a sole proprietorship, disregarded entity under Treas. Reg. 301.7701-2, or otherwise), trust, estate, partnership, association, company, corporation, or similar organization.

(4) *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.

(5) *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 Mr. John Doe. The employee may record the contact as being with Mr. John Doe and is not required by this regulation to collect or record any other identity information. The taxpayer will receive a report that Mr. John Doe was contacted.

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 contact may be reported as being with a person on the street in front of 500 Fernwood. Later contacts with either person during the same reporting period need not be reported again.

Example 3. A revenue officer seeking to collect a taxpayer's unpaid tax liability obtains loan documents from a bank where the taxpayer applied for a loan. After reviewing the documents, the revenue officer talks with the loan officer at the bank who handled the application. The revenue officer 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 loan officer is not a person other than the taxpayer because the loan officer is acting within the scope of her employment.

Example 4. An IRS employee issues a summons to a third party with respect to the determination or collection 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 separately reported 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. In addition, later contacts with this third party during the same reporting period need not be reported.

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 which shows the identity of the third party. This third-party contact need not be maintained in a record or list separately reported 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) 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) This section does not entitle any person to prevent or delay an IRS employee from contacting any individual or entity.

(2) *Jeopardy.* (i) 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 being 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 which 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 which 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 which may be relevant to any tax examination or collection activity.

(ii) In the jeopardy situations described in this paragraph (f)(2), the IRS employee must 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 good cause to believe that reprisal may occur. This section does not require the IRS employee making the contact to question further 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. A revenue officer 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 revenue officer 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 then 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. The same facts as 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. A revenue officer is seeking to collect unpaid taxes owed jointly by a husband and wife who are recently divorced. From reading the court divorce file, the revenue officer 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 revenue officer contacts the ex-wife's new employer to verify salary information provided by the ex-wife, the revenue officer 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 thereby identify a confidential informant whose identity would be protected under section 6103(h)(4).

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

(g) *Effective Date.* This section is applicable on the date the final regulations are published in the **Federal Register**.

Charles O. Rossotti,

Commissioner of Internal Revenue.

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 70

[FRL-6925-4]

Clean Air Act Full Approval of Operating Permits Programs in Washington

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to fully approve the operating permits program submitted by the State of Washington. Washington's operating permits program was submitted in response to the directive in the 1990 Clean Air Act Amendments that permitting authorities develop, and submit to EPA, programs for issuing operating permits to all major stationary sources and to certain other sources within the permitting authority's jurisdiction. In the Final Rules section of this **Federal Register**, EPA is approving the Washington operating permits program as a direct final rule without prior proposal because the Agency views this as a noncontroversial action and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this action, no further activity is contemplated. If EPA receives adverse