

or its minimum asset amount (as defined in paragraph (i)(5)(ii)(C) of this section) for the immediately preceding taxable year, reduced by the amount of taxes imposed on the supporting organization under subtitle A of the Internal Revenue Code during the immediately preceding taxable year.

(C) *Minimum asset amount.* For purposes of this paragraph (i)(5), a supporting organization's minimum asset amount for the immediately preceding taxable year is 3.5 percent of the excess of the aggregate fair market value of all of the supporting organization's non-exempt-use assets (determined under paragraph (i)(8) of this section) in that immediately preceding taxable year over the acquisition indebtedness with respect to such non-exempt-use assets (determined under section 514(c)(1) without regard to the taxable year in which the indebtedness was incurred), increased by—

(1) Amounts received or accrued during the immediately preceding taxable year as repayments of amounts which were taken into account by the organization to meet the distribution requirement imposed in § 1.509(a)–4(i)(5)(ii)(A) for any taxable year;

(2) Amounts received or accrued during the immediately preceding taxable year from the sale or other disposition of property to the extent that the acquisition of such property was taken into account by the organization to meet the distribution requirement imposed in § 1.509(a)–4(i)(5)(ii)(A) for any taxable year; and

(3) Any amount set aside under § 1.509(a)–4(i)(6)(v) to the extent it is determined during the immediately preceding taxable year that such amount is not necessary for the purposes for which it was set aside and such amount was taken into account by the organization to meet the distribution requirement imposed in § 1.509(a)–4(i)(5)(ii)(A) for any taxable year.

(i)(5)(ii)(D) through (i)(7) [Reserved]. For further guidance, see § 1.509(a)–4(i)(5)(ii)(D) through (i)(7).

(8) *Valuation of non-exempt-use assets.* For purposes of determining its distributable amount for a taxable year, a supporting organization determines its minimum asset amount, as defined in paragraph (i)(5)(ii)(C) of this section, by determining the aggregate fair market value of all of its non-exempt-use assets in the immediately preceding taxable year. For these purposes, the determination of the aggregate fair market value of all non-exempt-use assets shall be made using the valuation methods described in § 53.4942(a)–2(c) of this chapter. The aggregate fair

market value of the supporting organization's non-exempt-use assets shall not be reduced by any amount that is set aside under § 1.509(a)–4(i)(6)(v). For these purposes, the non-exempt-use assets of the supporting organization are all assets of the supporting organization other than—

(i) Assets described in § 53.4942(a)–2(c)(2)(i) through (iv) of this chapter (with “supporting organization” being substituted for “foundation” or “private foundation” and “August 17, 2006” being substituted for “December 31, 1969”); and

(ii) Exempt-use assets, which are assets that are used (or held for use) to carry out the exempt purposes of the supporting organization's supported organization(s) (determined by applying the principles described in § 53.4942(a)–2(c)(3) of this chapter) by either—

(A) The supporting organization; or  
(B) One or more supported organizations, but only if the supporting organization makes the asset available to the supported organization(s) at no cost (or nominal rent) to the supported organization(s).

(i)(9) through (l) [Reserved]. For further guidance, see § 1.509(a)–4(i)(9) through (l).

(m) *Effective/applicability date.* This section is effective on December 28, 2012. The applicability of this section expires on or before December 21, 2015.

**PART 53—FOUNDATION AND SIMILAR EXCISE TAXES**

■ **Par. 4.** The authority citation for part 53 continues to read as follows:

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

■ **Par. 5.** Section 53.4943–11 is amended by revising the section heading and adding paragraphs (f) and (g) to read as follows:

**§ 53.4943–11 Effective/applicability date.**

\* \* \* \* \*

(f) *Special transitional rule for private foundations that qualified as Type III supporting organizations before August 17, 2006.* The present holdings of a private foundation that qualified as a Type III supporting organization under section 509(a)(3) immediately before August 17, 2006, and that was reclassified as a private foundation under section 509(a) on or after August 17, 2006, solely as a result of the rules enacted by section 1241 of the Pension Protection Act of 2006, Public Law 109–280 (120 Stat. 780), will be determined using the same rules that apply to Type III supporting organizations under section 4943(f)(7).

(g) *Special transitional rule for Type III supporting organizations created as*

*trusts before November 20, 1970.* A trust that qualifies as a Type III supporting organization under section 509(a)(3) and meets the requirements of § 1.509(a)–4(i)(9) of this chapter will be treated as a “functionally integrated Type III supporting organization” for purposes of section 4943(f)(3)(A).

**PART 602—OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT**

■ **Par. 6.** The authority citation for part 602 continues to read as follows:

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

■ **Par. 7.** In § 602.101, paragraph (b) is amended by adding the following entry in numerical order to the table to read as follows:

**§ 602.101 OMB Control numbers.**

CFR part or section where identified and described	Current OMB Control No.
* * * * *	
(b) * * *	
1.509(a)–4 .....	1545–2157
* * * * *	

**Steven T. Miller,**  
*Deputy Commissioner for Services and Enforcement.*

Approved: December 19, 2012.

**Mark J. Mazur,**  
*Assistant Secretary of the Treasury (Tax Policy).*

[FR Doc. 2012–31050 Filed 12–21–12; 4:15 pm]

**BILLING CODE 4830–01–P**

**DEPARTMENT OF TREASURY**

**Internal Revenue Service**

**26 CFR Part 301**

[TD 9608]

RIN 1545–B185

**Disclosure or Use of Information by Preparers of Returns**

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Final regulations and removal of temporary regulations.

**SUMMARY:** This document contains final regulations that provide rules relating to the disclosure or use of tax return information by tax return preparers. These regulations provide updated guidance affecting tax return preparers regarding the use of information related to lists for solicitation of tax return

business; the disclosure or use of statistical compilations of data under section 7216 of the Internal Revenue Code (Code) by a tax return preparer in connection with, or in support of, a tax return preparer's tax return preparation business; and the disclosure or use of information for the purpose of performing conflict reviews.

**DATES:** *Effective date:* These regulations are effective on December 28, 2012.

*Applicability date:* For date of applicability see § 301.7216–2(s).

**FOR FURTHER INFORMATION CONTACT:** Emily M. Lesniak, (202) 622–4910 (not a toll-free number).

**SUPPLEMENTARY INFORMATION:**

**Background**

This document contains final regulations amending the Regulations on Procedure and Administration (26 CFR part 301). On January 4, 2010, the IRS and the Treasury Department published a notice of proposed rulemaking (REG–131028–09) in the **Federal Register** (75 FR 94), cross-referencing temporary regulations (TD 9478, 75 FR 48), providing rules relating to the ability of a tax return preparer to use tax return information for the purposes of compiling, maintaining, and using lists for solicitation of tax return business under § 301.7216–2T(n); to disclose or use statistical compilations of data described in § 301.7216–1(b)(3)(i)(B) under § 301.7216–2T(o); and to disclose or use tax return information for the purpose of performing conflict reviews under § 301.7216–2T(p) without taxpayer consent. The modifications to § 301.7216–2(o) in the temporary and proposed regulations were made following the issuance of Notice 2009–13 (2009–6 IRB 447 (February 9, 2009)), and the receipt of comments submitted in response to that Notice. These comments were summarized in the preamble to TD 9478. No public hearing on the notice of proposed rulemaking was requested or held. Written and electronic comments responding to the notice of proposed rulemaking were received. All comments were considered and are available for public inspection at [www.regulations.gov](http://www.regulations.gov) or upon request. After reconsideration of all the comments, the proposed regulations, with minor clarifications and revisions to ensure the language of the regulations is internally consistent and technically correct, are adopted by this Treasury decision. This preamble summarizes the significant comments received by the IRS and Treasury.

**Summary of Comments**

The IRS and Treasury received seven (7) comments in response to the proposed regulations. Some of the discussion contained in the comments did not relate to the rules in the proposed regulations but instead was directed towards other unrelated content contained in the section 7216 regulations or other published guidance pertaining to section 7216. This Summary of Comments focuses solely on comments relating to the proposed regulations and does not address comments relating to other published guidance pertaining to section 7216, which are outside the scope of this rule.

*1. Comments Relating to § 301.7216–2(n) of the Proposed Regulations*

**A. Use of the List**

As proposed, § 301.7216–2(n) allows tax return preparers to maintain a list of limited tax return information that may be used by the compiler to contact taxpayers to provide tax information and general business or economic information or analysis for educational purposes or to solicit tax return preparation services.

One commentator asked to expand the acceptable list maintenance purposes to include solicitation of “accounting services” “consistent with legal and ethical responsibilities.” The commentator explained that these accounting services include, for example, assistance with bookkeeping, the preparation of payroll returns, and the preparation of regulatory returns. The commentator also included the preparation of state and local income tax returns as an accounting service. The preparation of state and local income tax returns is, however, tax return preparation expressly authorized by the statute, and use of the list is permissible to solicit this service.

The language of section 7216(a)(2) prohibits the use of “any such information for any purposes other than to prepare, or assist in the preparing, of any such return \* \* \*” except as specifically excepted by section 7216(b). The IRS and Treasury have determined that it is inconsistent with the purpose of section 7216 to exercise regulatory authority to provide an exception under section 7216 for the use of tax return information to solicit accounting services. Taxpayers may consent in writing to allow tax return preparers to use their tax return information to solicit non-tax return preparation services, such as the accounting services listed by the commentator. Accordingly, to the extent the commentator requested the inclusion of accounting services as

a list maintenance purpose, this comment was not adopted.

The proposed regulations provide: “This list may be used by the compiler solely to contact the taxpayers on the list for the purpose of providing tax information and general business or economic information or analysis for educational purposes, or soliciting additional tax return preparation services. The list may not be used to solicit any service or product other than tax return preparation services.” A commentator asked that the final regulations clarify this statement. The commentator specifically asked whether, under the rule set forth in the proposed regulations, articles could be included in a newsletter that address several topics that do not constitute tax return preparation services.

Under the final regulations, a tax return preparer may, without taxpayer consent, compile a list of certain taxpayer specific information that may be used to contact the taxpayers on the list for two purposes: (1) Providing tax information and general business or economic information or analysis for educational purposes, and (2) soliciting additional tax return preparation services. A tax return preparer may not use the list to solicit non-tax return preparation services. The final regulations do not attempt to describe every scenario that may constitute either a permissible or prohibited use of the list. Rather, a tax return preparer seeking to use tax return information in the manner proposed by the commentator must carefully consider, on a case-by-case basis, the specific content of a particular newsletter article to ensure that the content meets the requirements of § 301.7216–2(n). For example, a newsletter that summarizes recent case law or describes current legal developments would be considered to be for educational or informational purposes and a permissible use of the list. If a tax return preparer wishes to solicit non-tax return preparation services in the preparer's newsletter, a consent must be obtained from clients that authorizes the use of specified tax return information to solicit those non-tax return preparation services in the preparer's newsletter.

The final regulations retain the provisions in the proposed regulations that require written consent for all other purposes not expressly allowed by the regulations. This is consistent with the congressional discussion regarding section 7216, which provides that “[section 7216] simply preserves the confidentiality of information provided by the taxpayer to the one who prepares the returns as a professional act.” Senate

Discussion on Conference Report, 117 Cong. Record S. 18,627 (daily ed. November 15, 1971) (statement of Sen. Mathias). This floor discussion further provides that “[p]resumably, where appropriate, the Treasury Department will permit the use of the information within the business organization of the preparer of the return if the taxpayers [sic] has indicated in writing that he desires the information to be used by the organization for some purpose specifically benefitting the taxpayer.” (Emphasis added). House Discussion on Conference Report, 117 Cong. Rec. H12,118 (daily ed. Dec. 9, 1971) (statement of Rep. Mills).

#### B. Authorized Delivery Methods

One commentator recommended that the proposed regulations be clarified to state that § 301.7216–2(n)(1) permits a tax return preparer to use any delivery method that employs or is based on the list information sanctioned by that regulation provision. The commentator expressed a concern that the two examples provided in the temporary regulations limited the method of delivery to only email or U.S. mail. The examples were not intended to limit the scope of the rule. The final regulations authorize any delivery method that will facilitate direct contact with the taxpayers on the list through the use of only the information authorized for compilation of a list under § 301.7216–2(n). The examples were modified to clarify this point.

#### C. Limits on Tax Return Information Contained in Lists

One commentator suggested removing any limits on the tax return information a tax return preparer may include in compiling and maintaining lists for the solicitation of tax return business under § 301.7216–2(n). This comment appears to be based upon an interpretation that the policy of section 7216 was intended to protect only privacy concerns. Section 7216(b)(3) provides the Secretary with broad authority to issue regulations authorizing specific disclosures or uses of tax return information. When publishing regulations allowing for these disclosures or uses, the IRS and Treasury must balance congressional intent and concerns for the protection of sensitive taxpayer data with the benefits taxpayers may receive from the proposed disclosures or uses. Removal of all restrictions on the allowable types of tax return information that may be included in the compilation and maintenance of lists is inconsistent with section 7216’s underlying purpose. The proposed regulations expanded the

types of tax return information a tax return preparer may use to compile a list for the purpose of soliciting tax return preparation business in a manner consistent with the purpose of section 7216 and the regulations. Accordingly, this comment was not adopted.

The commentator also stated that the temporary regulations contained ambiguous and vague language that required clarification regarding the entities and form numbers that may be maintained, such as whether an S corporation can be distinguished from a C corporation or whether a Form 1120 can be distinguished from a Form 1120–S. The rule and examples in the regulations already address whether entity classifications maintained in a list pursuant to § 301.7216–2(n) include individuals and the types of businesses that would file different types of returns. The regulations provide that the “specific type of business entity” may be maintained in the list. Further, Example 1 in § 301.7216–2(n)(2) illustrates that tax return preparers may limit the provision of information based upon filer type. In addition, the income tax return form number refers to the form number that appears on the first page of the particular tax return form that the tax return preparer prepares (for example, Form 1120–S). To clarify this point, a parenthetical has been added to § 301.7216–2(n).

One commentator stated that the proposed regulations should be clarified regarding whether nontax return information may be included in a list maintained pursuant to § 301.7216–2(n) and that the regulations should be modified to state that nontax return information can be included in the list with the allowed items of tax return information. This comment was not adopted. The inclusion of nontax return information in the list could facilitate circumvention of the restrictions of section 7216 as to items of tax return information that may not be kept on the list by permitting tax return preparers to obtain the tax return information from other sources. In any event, if tax return preparers wish to include additional information in a list, they may obtain consent to do so from their clients. The language in § 301.7216–2(n), however, has been clarified to eliminate any potential confusion arising from the wording of the provision.

One commentator recommended that the IRS and Treasury issue guidance, pursuant to the terms of § 301.7216–2T(n), to further expand the types of tax return information that may be included in a list compiled for solicitation of tax return business. This comment was not adopted. This comment requested that

the tax return information that may be included in a list compiled for solicitation purposes be expanded to include tax schedules filed, certain information regarding tax preparation software, the date taxpayers file their returns, the employer identification number of taxpayers’ employers, the number and age of taxpayers’ dependents, and whether taxpayers file with a tax balance due. The IRS and Treasury considered adding each item to the information that may be included in a list compiled for solicitation of tax return business. Including these items, however, would be inconsistent with the taxpayer protection purpose of section 7216, as demonstrated by the congressional discussion. Moreover, certain items present a risk of abuse by tax return preparers that would exceed any potential benefit to the taxpayer.

#### 2. Comments Relating to § 301.7216–2(o) of the Proposed Regulations

##### A. Clarify meaning of “Bona Fide Research” and “Public Policy Discussions”

One commentator recommended that the final regulations clarify the meaning of “bona fide research” and “public policy discussions” by explicitly including examples of individuals or entities that engage in these activities, including lawmakers, academics, nonprofit organizations, and other agencies that facilitate tax policy. While these individuals and entities may, at times, conduct bona fide research or engage in public policy discussions, tax return preparers must determine, on a case-by-case basis, whether a disclosure or use is in support of bona fide research or public policy discussions. For example, public policy discussions would include discussion of the implications of legislative amendments and tax reform proposals.

##### B. Limitations on the Use and Purpose of Statistical Compilations of Data

One commentator recommended limiting the discretion afforded to tax return preparers to determine appropriate disclosures of statistical compilations. The commentator expressed concern that tax return preparers will disclose more information than is lawfully permissible or even sell data to third parties. This comment was not adopted. The availability of anonymous statistical compilations can assist lawmakers and others in the private and public sectors in discussing, formulating, and implementing sound tax policy. The final regulations sufficiently limit the construction of the statistical

compilations to prevent the disclosure of any individual's tax return information. In addition, § 301.7216-2(o)(1) specifically prohibits the sale of a statistical compilation of data except in conjunction with the transfer of assets made pursuant to the sale or other disposition of the tax return preparer's tax return preparation business. Finally, there are penalties imposed by sections 7216 and 6713 for the improper disclosure or use of tax return information.

One commentator recommended removing all restrictions on the disclosure or use of anonymous statistical compilations. This comment was not adopted. The purpose of section 7216 and its accompanying regulations is to preserve taxpayer confidentiality by protecting taxpayers from the unauthorized disclosures or uses of sensitive tax return information by tax return preparers. Eliminating all restrictions on the use of statistical compilations would contravene this purpose and could increase opportunities for taxpayer's personal information to be improperly disclosed or misused. In particular, it is possible to craft statistical compilations in a way that allows for the data to be associated with a particular taxpayer.

One commentator recommended that the restriction on the disclosure or use of anonymous statistical information be eliminated to allow for the compilation of statistically anonymous information relating to the dollar amounts of refunds, credits, or deductions. This comment was not adopted. Section 7216 authorizes the IRS and Treasury to promulgate rules regulating how tax return preparers may disclose or use tax return information while ensuring that the taxpayer protection purpose of section 7216 is fulfilled. Eliminating all restrictions on the use of statistical compilations regarding the dollar amounts of refunds, credits, or deductions would provide tax return preparers the unfettered ability to use tax return information. This would undermine the purpose and basic protections of preventing inappropriate disclosure or use of tax return information by tax return preparers afforded by section 7216.

One commentator requested that volunteer income tax assistance programs be exempted from the restrictions on the disclosure or use of statistical compilations for marketing or advertising purposes. This comment was not adopted. Taxpayers who receive volunteer income assistance and taxpayers who receive tax preparation assistance from compensated preparers deserve the same protection of their tax

return information. Section 301.7216-2(o) already makes appropriate allowances for a preparer's status as a participant in a volunteer income tax assistance program by allowing for use of statistical compilations in fundraising activities conducted by volunteer return preparation programs and other entities described in section 501(c). As a result, IRS and Treasury believe that the regulations already address the concerns expressed by this commentator.

### 3. Comments Relating to § 301.7216-2(p) of the Proposed Regulations

No comments were received in response to § 301.7216-2(p) of the proposed regulations, and § 301.7216-2(p) is being finalized without change.

### 4. Effective Date of TD 9478

One commentator questioned the appropriateness of applying § 301.7216-2(o) of the temporary regulations contained in TD 9478 with an immediate effective date, stating that one provision of this section is more restrictive than prior guidance (Notice 2009-13) indicated. The commentator requested that the effective date of this particular proposal be made fully prospective and only after regulations are finalized. This comment was not adopted for the following reasons.

By its specific terms, Notice 2009-13 expired on December 31, 2009, while TD 9478 is applicable to disclosures or uses of tax return information occurring on or after January 4, 2010. Because there is no conflicting or overlapping period of application of this related guidance, tax return preparers could not have relied upon Notice 2009-13 beyond December 31, 2009. As TD 9478 was not applicable until January 4, 2010, there is no retroactive application of the rule contained in that Treasury decision.

Further, Notice 2009-13 requested comments, and comments in response to the notice were taken into account in the drafting and publication of TD 9478. As explained in the preamble to TD 9478, concerns were expressed regarding the scope of the language used in Notice 2009-13 on this specific issue. The amendments provided in TD 9478 are responsive to public comments on and a logical outgrowth of the language in Notice 2009-13.

Finally, the general rule under section 7216 prohibits the disclosure or use of tax return information unless a written consent is obtained or an exception applies. With the expiration of Notice 2009-13 on December 31, 2009, the uses of statistical compilations allowed for in the notice were no longer permissible. If § 301.7216-2(o) was made effective only

upon publication of the final regulations, as the commentator seems to suggest, neither the exceptions provided for in Notice 2009-13 nor those provided for in § 301.7216-2T(o) would be applicable after December 2009. The permissible use of statistical compilations without taxpayer consent would be more, not less, restrictive than if § 301.7216-2(o) had not been published as a temporary regulation.

### Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866, as supplemented by Executive Order 13563. 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 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(e) of the Code, the temporary regulations and the proposed regulations preceding these final regulations were published in the **Federal Register** to provide notice and the opportunity to comment. Pursuant to section 7805(f) of the Code, the proposed regulations preceding these regulations were submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business, and no comments were received.

### Drafting Information

The principal authors of these regulations are Skyler K. Bradbury and Emily M. Lesniak, Office of the Associate Chief Counsel (Procedure and Administration).

### List of Subjects in 26 CFR Part 301

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

### 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 301.7216-0 is amended by revising the entries for

§ 301.7216–2, paragraphs (n), (o), and (p) to read as follows:

**§ 301.7216–0 Table of contents.**

\* \* \* \* \*

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

\* \* \* \* \*

(n) Lists for solicitation of tax return preparation business.

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

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

\* \* \* \* \*

**§ 301.7216–0T [Removed]**

■ **Par. 3.** Section 301.7216–0T is removed.

■ **Par. 4.** Section 301.7216–2 is amended by revising paragraphs (n), (o), (p), and (s) to read as follows:

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

\* \* \* \* \*

(n) *Lists for solicitation of tax return preparation business.* (1) A tax return preparer, other than a person who is a tax return preparer solely because the person provides auxiliary services as defined in § 301.7216–1(b)(2)(iii), may compile and maintain a separate list containing solely items of tax return information. The following items of tax return information are permissible: The names, mailing addresses, email addresses, phone numbers, taxpayer entity classification (including “individual” or the specific type of business entity), and income tax return form number (for example, Form 1040–EZ) of taxpayers whose tax returns the tax return preparer has prepared or processed. The Internal Revenue Service may issue guidance, by publication in the Internal Revenue Bulletin (see § 601.601(d)(2)(ii)(b) of this chapter), describing other types of information that may be included in a list compiled and maintained pursuant to this paragraph. This list may be used by the compiler solely to contact the taxpayers on the list for the purpose of providing tax information and general business or economic information or analysis for educational purposes, or soliciting additional tax return preparation services. The list may not be used to solicit any service or product other than tax return preparation services. The compiler of the list may not transfer the taxpayer list, or any part thereof, to any other person unless the transfer takes place in conjunction with the sale or other disposition of the compiler’s tax return preparation business. Due diligence conducted prior to a proposed

sale of a compiler’s tax return preparation business is in conjunction with the sale or other disposition of a compiler’s tax return preparation business and will not constitute a transfer of the list if conducted pursuant to a written agreement that requires confidentiality of the tax return information disclosed and expressly prohibits the further disclosure or use of the tax return information for any purpose other than that related to the purchase of the tax return preparation business. A person who acquires a taxpayer list, or a part thereof, in conjunction with a sale or other disposition of a tax return preparation business falls under the provisions of this paragraph with respect to the list. The term *list*, as used in this paragraph (n), includes any record or system whereby the types of information expressly authorized for inclusion in a taxpayer list pursuant to the terms of this paragraph (n) are retained. The provisions of this paragraph (n) also apply to the transfer of any records and related papers to which this paragraph (n) applies.

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

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

*Example 2.* Preparer B is a tax return preparer as defined by § 301.7216–1(b)(2)(i)(A). Preparer B maintains a list of taxpayer clients containing the information allowed by this paragraph (n). Preparer B provides monthly federal income tax information updates in the form of a newsletter to all of her taxpayer clients by

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

(o) *Producing statistical information in connection with tax return preparation business.* (1) A tax return preparer may use tax return information, subject to the limitations specified in this paragraph (o), to produce a statistical compilation of data described in § 301.7216–1(b)(3)(i)(B). The purpose for and disclosure or use of the statistical compilation requiring data acquired during the tax return preparation process must relate directly to the internal management or support of the tax return preparer’s tax return preparation business, or to bona fide research or public policy discussions concerning state or federal taxation. A tax return preparer may not disclose the statistical compilation, or any part thereof, to any other person unless disclosure of the statistical compilation is anonymous as to taxpayer identity, does not disclose an aggregate figure containing data from fewer than ten tax returns, and is in direct support of the tax return preparer’s tax return preparation business or of bona fide research or public policy discussions concerning state or federal taxation. A statistical compilation is anonymous as to taxpayer identity if it is in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer. For purposes of this paragraph, marketing and advertising is in direct support of the tax return preparer’s tax return preparation business provided the marketing and advertising is not false, misleading, or unduly influential. This paragraph, however, does not authorize the disclosure or use in marketing or advertising of any statistical compilations, or part thereof, that

identify dollar amounts of refunds, credits, or deductions associated with tax returns, or percentages relating thereto, whether or not the data are statistical, averaged, aggregated, or anonymous. Disclosures made in support of fundraising activities conducted by volunteer return preparation programs and other organizations described in section 501(c) of the Internal Revenue Code (Code) in direct support of their tax return preparation businesses are not marketing and advertising under this paragraph. A tax return preparer who produces a statistical compilation of data described in § 301.7216-1(b)(3)(i)(B) may disclose the compilation to comply with financial accounting or regulatory reporting requirements whether or not the statistical compilation is anonymous as to taxpayer identity or discloses an aggregate figure containing data from fewer than ten tax returns.

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

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

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

*Example 2.* Preparer B is a tax return preparer as defined by § 301.7216-

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

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

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

(p) *Disclosure or use of information for quality, peer, or conflict reviews.* (1) The provisions of section 7216(a) and § 301.7216-1 shall not apply to any disclosure for the purpose of a quality or peer review to the extent necessary to accomplish the review. A quality or peer review is a review that is undertaken to evaluate, monitor, and improve the quality and accuracy of a tax return preparer's tax preparation, accounting, or auditing services. A quality or peer review may be conducted only by attorneys, certified public accountants, enrolled agents, and enrolled actuaries who are eligible to practice before the Internal Revenue Service. See Department of the Treasury Circular 230, 31 CFR part 10. Tax return information may also be disclosed to persons who provide administrative or

support services to an individual who is conducting a quality or peer review under this paragraph (p), but only to the extent necessary for the reviewer to conduct the review. Tax return information gathered in conducting a review may be used only for purposes of a review. No tax return information identifying a taxpayer may be disclosed in any evaluative reports or recommendations that may be accessible to any person other than the reviewer or the tax return preparer being reviewed. The tax return preparer being reviewed will maintain a record of the review, including the information reviewed and the identity of the persons conducting the review. After completion of the review, no documents containing information that may identify any taxpayer by name or identification number may be retained by a reviewer or by the reviewer's administrative or support personnel.

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

(3) Any person (including administrative and support personnel) receiving tax return information in connection with a quality, peer, or conflict review is a tax return preparer for purposes of sections 7216(a) and

6713(a). Tax return information disclosed and used for purposes of a quality, peer, or conflict review shall not be disclosed or used for any other purpose.

\* \* \* \* \*

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

**§ 301.7216–2T [Removed]**

■ **Par. 5.** Section 301.7216–2T is removed.

**Stephen T. Miller,**

*Deputy Commissioner for Services and Enforcement.*

Approved: December 20, 2012.

**Mark J. Mazur,**

*Assistant Secretary of the Treasury (Tax Policy).*

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**DEPARTMENT OF LABOR**

**Mine Safety and Health Administration**

**30 CFR Part 100**

**RIN 1219–AB81**

**Criteria and Procedures for Proposed Assessment of Civil Penalties; Inflation Adjustment**

**AGENCY:** Mine Safety and Health Administration, Labor.

**ACTION:** Final rule.

**SUMMARY:** The Mine Safety and Health Administration (MSHA) is revising its civil penalty assessment amounts to adjust for inflation. The Federal Civil Penalties Inflation Adjustment Act of 1990, (Inflation Adjustment Act) as amended by the Debt Collection Improvement Act of 1996, requires the Agency to adjust civil penalties for inflation at least once every four years according to the formula specified in the Inflation Adjustment Act. The revised penalties apply to citations and orders issued on or after the effective date of this rule.

**DATES:** *Effective Date:* January 28, 2013.

**FOR FURTHER INFORMATION CONTACT:**

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693–9440 (voice), or 202–693–9441 (facsimile).

**SUPPLEMENTARY INFORMATION:**

**I. Background**

The Federal Civil Penalties Inflation Adjustment Act of 1990 (Inflation Adjustment Act, Public Law 101–410, 104 Stat. 890 (28 U.S.C. 2461 note)), as amended by the Debt Collection Improvement Act of 1996 (DCIA), (Pub. L. 104–134, 110 Stat. 1321), requires MSHA to review and, where appropriate, adjust its civil penalties for inflation, based on the cost of living, at least once every four years. It prescribes the formula for any such adjustments. MSHA last adjusted its civil penalties for inflation in 2008 (73 FR 7206).

Section 5(b) of the Inflation Adjustment Act provides an inflation adjustment formula that defines a “cost-of-living” adjustment as—

\* \* \* the percentage (if any) for each civil monetary penalty by which—

(1) the Consumer Price Index for the month of June of the calendar year preceding the adjustment, exceeds

(2) the Consumer Price Index for the month of June of the calendar year in which the amount of such civil monetary penalty was last set or adjusted pursuant to law.

Section 5(a) included criteria for rounding the cost-of-living adjustment amount as follows:

Any increase \* \* \* shall be rounded to the nearest—

(1) multiple of \$10 in the case of penalties less than or equal to \$100;

(2) multiple of \$100 in the case of penalties greater than \$100 but less than or equal to \$1,000;

(3) multiple of \$1,000 in the case of penalties greater than \$1,000 but less than or equal to \$10,000;

(4) multiple of \$5,000 in the case of penalties greater than \$10,000 but less than or equal to \$100,000;

(5) multiple of \$10,000 in the case of penalties greater than \$100,000 but less than or equal to \$200,000; and

(6) multiple of \$25,000 in the case of penalties greater than \$200,000.

Section 3(3) of the Inflation Adjustment Act defines the term “Consumer Price Index” (CPI) to mean “the Consumer Price Index for all-urban consumers published by the Department of Labor.”

Section 7 of the Inflation Adjustment Act provides that the first adjustment of a civil monetary penalty under the Act may not exceed 10 percent of such penalty.

The Inflation Adjustment Act only requires that the cost-of-living adjustment and rounding formula be applied to penalties that were statutorily established by Congress. The Mine Act,

as amended, contains eight statutory penalties. Consequently, MSHA applied the formula to its statutory civil penalties in 30 CFR Part 100 and is adjusting the maximum penalty for failure to provide timely notification to the Secretary under section 103(j) of the Mine Act, in § 100.4(c), from \$60,000 to \$65,000. In addition, MSHA is increasing the maximum penalty for flagrant violations under Section 110(b)(2) of the Mine Act, in § 100.5(e), from \$220,000 to \$242,000. Applying the formula to the remaining statutory civil penalties, regarding the maximum civil penalty for regular assessments in § 100.3(a)(1), the two minimum penalties for unwarrantable failure violations in § 100.4(a) and (b), the minimum penalty for failure to timely report accidents in § 100.4(c), maximum daily penalty in § 100.5(c), and the maximum smoking penalty in § 100.5(d), did not result in inflation adjustments because the increases under the inflation adjustment formula were rounded to zero pursuant to the Inflation Adjustment Act’s rounding rules.

The Administrative Procedure Act (APA) requires that rulemakings be published in the **Federal Register** and that, generally, agencies provide an opportunity for public comment. Notice and an opportunity for public comment are not required, however, when the agency “for good cause finds” that notice and comment “are impracticable, unnecessary, or contrary to the public interest” (5 U.S.C. 553(b)(B)).

The decision whether to make adjustments and the amount of any adjustments for these Civil Penalties are prescribed by the Inflation Adjustment Act and are not within MSHA’s discretion. MSHA is required to perform mathematical computations based on published cost-of-living data and adjust its penalties accordingly. For this reason, the Agency has determined that there is good cause that public notice and comment are unnecessary and contrary to the public interest, and that this rule should be published in final form. In accordance with the APA, this final rule is effective 30 days after date of publication in the **Federal Register**.

MSHA last updated civil penalties according to the Inflation Adjustment Act on February 7, 2008 (73 FR 7206, Feb. 7, 2008).

**II. Section-by-Section Analysis**

*A. Section 100.3—Determination of Penalty Amount; Regular Assessment*

Existing § 100.3(a)(1) provides the criteria for determining regular penalty assessments and specifies a maximum