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BEFORE THE DIRECTOR OF THE DEPARTMENT OF FINANCE OF THE STATE OF IDAHO

STATE OF IDAHO, DEPARTMENT OF FINANCE, CONSUMER FINANCE BUREAU, Complainant, vs. WALL & ASSOCIATES, INC., A VIRGINIA CORPORATION, Respondent.	Docket No. 2019-9-10 **FINAL ORDER ADOPTING AND AMENDING HEARING OFFICER PRELIMINARY ORDER**

The Director of the Department of Finance (the "Director") has reviewed the: (1) Decision and Order Regarding Complainant's Motion for Preliminary Order and Respondent's Motion for Summary Judgment, dated June 14, 2021 ("June 14, 2021 Order"); (2) Order Re: Motion for Reconsideration, also dated June 14, 2021; (3) Order Re: Motion for Reconsideration, dated July 16, 2021 ("July 16, 2021 Order"); (4) Amended Order Regarding Complainant's Motion for Preliminary Order and Respondent's Motion for Summary Judgment and Respondent's Motion for Reconsideration, dated July 30, 2021; (4) Order Regarding Restitution and Penalties, dated January 4, 2022 ("January 4, 2022 Order"); (5) Order Re: Motion for Reconsideration, dated

February 7, 2022 ("February 7, 2022 Order"); and (6) Order Regarding Restitution, Penalties and Costs, dated March 7, 2022 (collectively, the "Orders"), issued by David V. Nielsen, the duly appointed hearing officer in this matter. The Director has also reviewed the extensive record in this matter, including the briefing of both sides and the most recent briefing: (1) Respondent Wall & Associates, Inc.'s Brief in Support of Its Request for a Final Order Different From the Preliminary Order Entered On January 4, 2022 And The Hearing Officer's Two Interlocutory Orders Entered on June 14, 2021, submitted April 18, 2022; and (2) the Department's Response Memorandum on Review to Director, submitted May 9, 2022.

As detailed below, the Director hereby finds that much of the legal analysis, authorities, and conclusions reached by the hearing officer in the Orders comprise the correct legal analysis and application of governing law to the facts in the record before this agency. As explained below, the Director exercises her discretion to reach a different result regarding the restoration of fees in this matter. Based on the record in this matter, and pursuant to Idaho Code § 26-2244 and -2248, and § 67-5245, the Director enters the following Findings of Facts and Conclusions of Law (which incorporates much of the analysis and conclusions of law of the hearing officer) and orders it as a Final Order in this matter.

I. FINDINGS OF FACTS

A. Procedural History

The State of Idaho, Department of Finance, Consumer Finance Bureau (the "Department") filed a Verified Complaint for Order to Cease and Desist and for Monetary Penalty (the "C&D Order") on December 3, 2019. Wall & Associates, Inc. ("Respondent" or "Wall") contested the C&D Order. The parties litigated and negotiated various discovery issues, including a joint Petition to the District Court, which resulted in an Order Directing Production of Information and Documents, issued on June 29, 2020. On July 31, 2020, the Department filed an Amended Verified

Complaint for Order to Cease and Desist and for Monetary Penalty, which is the governing pleading in this administrative proceeding.

In January of 2021, the parties filed the equivalent of cross-motions for summary judgment. In support of the motions, the parties submitted several declarations and numerous exhibits. The parties also submitted Stipulated Facts ("SF"), which attached exhibits A-P. After briefing and oral argument, the hearing officer issued his initial order (an interlocutory order), the June 14, 2021 Order that concluded that Wall's business of tax debt counseling and negotiation fell within the scope of the Idaho Collection Agency Act ("ICAA") and its licensing requirement for all debt counselors; Wall had committed fifty-four separate violations of the ICAA from 2011 to 2020; and Wall was ordered to cease and desist from further unlicensed activities or other violations of the ICAA. The parties were ordered to submit materials to address the remaining issue of sanctions.

Wall requested reconsideration of those substantive findings of liability, and the hearing officer entered the July 16, 2021 Order that considered and rejected numerous legal arguments for why the ICAA and its licensing requirement should not apply to Wall. After further extensive briefing and oral argument, the hearing officer entered the January 4, 2022 Order that awarded monetary penalties of $162,000 ($3,000 per violation); full restitution of fees to ten of Wall's Idaho clients at issue; restitution of 75% of fees to the remaining forty-four of Wall's Idaho clients at issue; and costs of the investigation and administrative proceeding. Wall filed another motion for reconsideration, and the hearing officer entered the February 7, 2022 Order that considered and rejected the various legal arguments raised.

On February 17th, the Department filed a Memorandum of Fees and Costs ("Memo of Fees"), with supporting declarations, seeking $38,875 in fees and $3,141.60 in costs. Exhibit A to the Memo of Fees also attached a final statement of fees paid by each Idaho client and a calculation

of the total amount previously ordered by the hearing officer (the 75% and 100% splits). Wall did not file a response. On March 7, 2022, the hearing officer entered his preliminary order that both incorporated his prior orders and added the final calculations of restitution and fees and costs. The order concluded that the ICAA is applicable to Wall's business, and that Wall committed fifty-four violations of the ICAA. It further ordered that the proper remedy is an order to cease and desist; a monetary penalty of $162,000; restitution to fifty-four Idahoans of $507,635.50 (75% restoration of fees to forty-four clients and 100% restoration of fees to ten clients); and fees and costs to the Department of $42,016.60.

On March 21st, Wall petitioned the Director to review the various orders from the hearing officer, including the most recent March 7, 2022 preliminary order. On March 28, 2022, the Director entered her Order Granting Respondent's Petition For Review, pursuant to Idaho Administrative Procedures Act Rule 04.11.01.730(d). Thereafter, both parties submitted a final brief addressing the various issues raised in this proceeding.

B. 2011 Complaint and Wall's Initial Communications with the Department

Wall is a Virginia corporation that has not registered to do business with the Idaho Secretary of State. SF, ¶ 2; I.C. § 30-21-502(a). Wall is solely owned by Ken Wall. *See* Deposition of Patrick "Mark" Yates ("Yates Depo."), p. 140, lines 19–20, attached as Exhibit A to the Declaration of Counsel in Support of Motion for Preliminary Order, filed January 19, 2021 ("1st Counsel Dec.").

In 2011, the Department received a consumer complaint concerning Wall from AM and VM[1] of Meridian, Idaho. *See* Declaration of Celia Kinney ("Kinney Dec."), filed January 19, 2021, Ex. A. AM and VM provided a detailed summary of interactions with Wall and its various

[1] For privacy, in this final order, abbreviations are used instead of the names of Wall's clients.

employees from January of 2011 through September of 2011. *Id.* AM and VM stated that they contracted with Wall for assistance with resolving taxes owed to the Internal Revenue Service (IRS) and Idaho State Tax Commission, paid $7,800 to Wall (a down payment of $3,000 and monthly payments totaling $4,800), and could not identify any benefit received after months of trying to contact Wall for assistance. *Id.* Here is a portion of that detailed complaint:

> In early August of 2011, my husband and I decided to cease services with Wall and Associates and requested a full refund be paid out. During the week of August 10th, [AM] and I received a letter notifying us that Wall and Associates had stopped working on our case and were no longer going to represent us. On August 10th I called and spoke with Christian Rosa asking her if our case was closed or open. She indicated it was still active and open. She also suggested I call Mellissa Riehl, who works in billing. I called Ms. Riehl and she informed me that our case was closed and that in order to reinstate their service I would have to pay all back payments owed. I asked to speak to Mark Yates, CEO and the individual who sent the letter. She said he wasn't available … I asked to be transferred to his direct line and she said that wasn't a possibility. … I called Wall and Associates and asked to speak to a supervisor, manager, attorney anyone who over sees the distribution of cases. I was told by the individual who answered the phone … that I should speak with Christiana Rosa. Demanding to speak to someone in management I was transferred to Jennifer Smith. Ms. Smith said her title was that of "case supervisor." While speaking with Ms. Smith I gave her every account that [AM] and I had experienced with Wall and Associates, that there was zero communication on Wall and Associates part other than a rare return of a phone call and that of a monthly statement asking for more money. Ms. Smith gave the impression she would check into our case and that she would be assigning it to an individual whose position was to investigate complaints. That individual was Clarissa Campbell. Within two days I was contacted by Ms. Campbell. During Ms. Campbell's call she explained to me that her committee was going to meet that Friday and to discuss my case and that she would contact me afterward to let me know what was decided. … By the following Monday I called Ms. Campbell, only to be told that the meeting was postponed and wouldn't take place until that Monday afternoon. Ms. Campbell didn't contact us that week. On Friday I called her and she said that the Monday meeting was moved to Friday and that she promised to get back to [us] later that day. For almost a month this was the run-around we were given by Ms. Campbell.

Id. AM and VM sued Wall in the Small Claims Department of the Ada County Fourth District Court and on October 30, 2012, obtained a final judgment against Wall for $5,000 (the jurisdictional limit for damages) plus $102 in costs. *Id.*, Ex. D. Wall appealed to the District Court where the Court entered an Order Denying Appellant's Motion for Relief from Judgment. *Id.*, Ex.

E. Wall refused to voluntarily pay this judgment and avoided collection attempts by a licensed Idaho debt collection company. *Id.*, ¶ 3 and Ex. F.

In 2011, the Department contacted Wall regarding the complaint from AM and VM, and Wall responded to indicate that it "worked diligently on the [AM and VM] tax problems" and that "[t]his business is not the practice of law, and neither is it within the regulated debt services identified in your letter." *Id.*, Ex. G. The Department and Wall communicated back and forth via letter regarding the Department's position that Wall was a debt counselor and subject to the ICAA. *Id.*, Exs. G-K. On March 6, 2012, the Department's counsel, Deputy Attorney General Brian Nicholas, stated:

> Thank you for your letter of February 17, 2012. However, nothing you stated changes the basic facts. Wall and Associates, Inc. took money from [AM and VM] for the purpose of settling a debt owed by [AM and VM]. Accordingly, Wall and Associates is acting as a debt counselor as that term is defined in Idaho law.
>
> **At this point there is no reason for a continued dialogue. Wall and Associates needs to either obtain a license or quit doing business as a debt counselor in Idaho. It may do other business activities in Idaho without being licensed, but if Wall and Associates takes clients' money to settle outstanding debts, it needs to be licensed.**
>
> Within twenty-one (21) days from the date of this letter, please have Wall and Associates make application for a license or advise the Idaho Department of Finance that it will no longer operate in Idaho performing activities described in Idaho Code § 26-2223(7). This would include taking money from clients to settle debts owed to the IRS or the State of Idaho. Otherwise, the Department will take the legal and administrative remedies it has available, including the issuance of a Cease and Desist Order.

Id., Ex. K (emphasis added). Wall did not seek a license nor did it send a letter to the Department indicating that it was no longer performing activities as a debt counselor in Idaho. Nothing in the record indicates that Wall informed the Department that it was going to change nothing and ignore the requirement of getting licensed. The Department did not take any further action. The Department's next interaction with Wall did not occur until approximately 2018.

C. Recent Complaints Resulting in This Administrative Action

Despite the warning from the Department, Wall did not stop taking money from Idaho clients to settle outstanding tax debts owed to the IRS or the State of Idaho. As disclosed by Wall in 2020 as part of this contested case, Wall contracted with three new Idaho clients in 2012, two in 2014, three in 2015, one in 2016, four in 2017, nineteen in 2018, twelve in 2019, and eight in 2020. Declaration of Counsel ("2nd Counsel Dec."), filed August 13, 2021, Ex. 1. It is not known how many more Idaho clients Wall has contracted with since June of 2020, since Wall has not supplemented its disclosures of its clients and the Department has not required updated information. Notwithstanding this contested case and the various rulings by the hearing officer, nothing in the record indicates that Wall has ever stopped accepting Idaho clients for its tax debt counseling/negotiating business. For example, a search on the website for the Real Yellow Pages still returns an advertisement for Wall & Associates, with an address in Boise, as "Taxes-Consultants & Representatives …." https://www.yellowpages.com/boise-id/mip/wall-associates-507331076 (August 23, 2022). Wall has stated, "Wall will comply with the Idaho Collection Agency licensing requirements if that is the final decision of the Department or the Idaho Courts after the issuance of the Department's final decision." *See* Declaration of P. Mark Yates In Opposition to the State of Idaho, Department of Finance, Consumer Finance Bureau, Motion for Penalties, filed on August 27, 2021 ("Yates Penalties Dec."), ¶ 64.

In March of 2018, the Department received a complaint via email from MG of Nampa, Idaho regarding Wall. Kinney Dec., Ex. M. He described how Wall said it could help him with resolving his tax debt but had not accomplished anything after five months. *Id.* MG stated, "I have paid them a lot of money and they haven't not [sic] given me the service I was told I would get and feel [sic] that I am being scammed." *Id*.

On January 3, 2019, the Department received a complaint from MP of Mountain Home, Idaho regarding Wall. *Id.*, Ex. N. In her written description, MP claimed that she was lied to by Wall regarding various issues, including about the filing of additional tax returns, about who at Wall was an attorney, and about the timetable for working on the tax issues. *Id.*

The Department also learned of an additional complaint from MM of Boise, Idaho to the Better Business Bureau, dated February 2, 2017. *Id.*, Ex. L. MM stated,

> In February 2015 I retained Wall & Associates to help settle a tax matter with the IRS. I've paid $10,250. I was told in the beginning it would be 10-12 mo. to settle. Its been 2 yrs. They don't return phone calls. I don't even speak to lead employees anymore. I only speak to interns. I've made multiple complaints in past 6-8 mo. They were supposed to send an Offer & Compromise in Nov 2016. They still haven't relayed the offer to the IRS.

Id. The Department commenced an investigation into Wall. On December 3, 2019, it initiated this administrative enforcement action against Wall for unlicensed debt counselor activities.

D. Wall's Business Practices

Wall had its Idaho clients sign a written "Agreement," which form remained mostly the same from 2011 through 2020. SF, ¶ 6, Exs. F, G, & H. The agreements provided that, in exchange for fixed initial and ongoing monthly fees that the clients agree to pay Wall, Wall promises the customers that it will "represent you administratively before the taxing authorities" regarding specific taxes and specific years that are manually written into the corresponding blank spaces. *Id.* This monthly fee structure creates a potential disincentive for Wall to finish its work on behalf of the client. Fees do not appear to be capped. *Id.*

For some client contracts, Wall had clients agree to pay a percentage of any eventual tax savings (*e.g.* 10%), in addition to the initial and monthly fees. SF, Exs. F & G. The record does not contain any evidence of Wall receiving any performance fee from Idaho clients. SF, Ex. P.

In its marketing materials, Wall presented itself as having superior skills negotiating a reduction and resolution of tax debts. For example, Wall's advertisement in the Idaho Yellow Page, located under "Attorneys - Taxes" and "Taxes - Consultants and Representatives", states: "Reduce IRS Tax Debt", "High Settlement Rate", "Wall and Associates, Inc. saved taxpayers in excess of $136 MILLION DOLLARS in last 5 years." SF, Exs. A & B. On yellowpages.com, Wall advertised, "In most cases we're able to settle outstanding taxes, penalties and accumulated interest for a fraction of the amount due" and "We're here to negotiate on your behalf." SF, Ex. C. On wallandassociates.net, it advertised, "Then, we work hard to negotiate a final resolution to their past due tax debts and get their lives back to normal once and for all."; "We negotiate with the IRS to help make your tax problems go away!!"; "Our tax professionals aggressively negotiate on behalf of taxpayers until a settlement is reached that is sensible and affordable for our clients with the state tax department."; and "We have been able to reduce our client's tax debts by over $150 million dollars! We specialize in reducing, removing or restructuring unpaid Federal, State and city tax debts for individuals or businesses." SF, Ex. D & E.

Wall listed (208) area code phone numbers in its Idaho advertisements, making it appear that these numbers originated in Idaho, but they did not ring to offices in Idaho and were not answered in Idaho. SF, Exs. A & B. Wall advertises that it has offices nationwide, including Idaho. SF, Ex. B ("LOCAL OFFICES TO SERVE YOU"), Ex. C ("950 W Bannock St. Ste 1100, Boise, ID 83702"); Kinney Dec., Exs. C & S (Boise address listed). However, the sole Idaho "office" was not an ongoing office but was a temporary rental space owned or managed by Regus where Wall would conduct sales pitches to potential new clients. Kinney Dec., Exs. T & U. Service work for contracted Idaho clients was conducted by personnel in Virginia, or perhaps Tennessee, and not out of Idaho.

Among other communications, Wall's standard business practice was to send a letter to all new clients, typically within one to two weeks of the signing of the initial written agreement. SF ¶ 7, Ex. I & J. Through 2019, the letter included the following statements:

> **You have hired us to negotiate your tax debt with the IRS and the State of Idaho.** Our strategy in resolving these matters has been very successful for many years. Please be aware that we will most likely begin the negotiation of your tax matter with a low figure, or offer amount. We are well versed in our negotiation skills and tactics and realize that most of the time this amount will be increased by the IRS. However, beginning negotiations with a low figure is beneficial to you as our client as the IRS is almost always certain to raise this figure as we pursue settlement.
>
> It is imperative that as your representative, our office handle all contact with the taxing authorities. We ask that you refrain from contacting the IRS and State of Idaho directly while we represent you. …

SF, Ex. I (emphasis added). Starting in 2020, after the Department had commenced this enforcement case, Wall changed the language in its standard letter to new clients to remove the reference to "tax debt" and instead state: "You have hired us to provide administrative representation for your tax matter with the IRS and State of Idaho." SF, Ex. J. Nothing in the record suggests this change in terminology changed any actual services Wall provided to clients.

Another standard practice of Wall was to send a packet of information to new customers explaining Wall's services and introducing them to Wall staff who may be working on their matter. Here is some of the standard language sent to new clients:

> You should expect W&A to always negotiate in your best interest. You should expect us to respond timely to the IRS and negotiate where appropriate. You should not expect us to be magicians. While W&A has proven very successful in **negotiating its clients' tax debts**, you should understand that it takes a cooperative effort between our clients and our company in order to achieve success.
>
> Further, you can expect the IRS to move slowly at times in finalizing a resolution. They have little or no reason to move quickly and sometimes can force a taxpayer to give up in frustration by delaying resolution. Do NOT give up! W&A is aware of IRS tactics and will take all necessary action to move your case forward as quickly as possible while keeping your case in a favorable position for resolution.

SF, Ex. K (emphasis added). As shown above, Wall's marketing and communications with clients referred to "tax debts" and the negotiation or resolution of "tax debts" owed by its clients. Wall does not contract to assist clients with any other type of debt.

Wall's tax debt assistance to clients can take on various forms (in addition to negotiating the reduction of the debt, through an Offer in Compromise or payment plans), including assisting with addressing lien or other on-going collection/levy issues; counseling with the client regarding the need to file past tax returns; and counseling with the client regarding various IRS or other tax authority policies, procedures, rules, and written communications. *See* Yates Penalties Dec., ¶ 3. It is unclear how often Wall employees appear on behalf of clients in any IRS administrative hearing, and how often, if at all, that occurred with the 54 Idaho residents that were Wall's clients from 2011 to 2020.

Wall informs clients (beginning with the initial written Agreement) that it does not provide any legal assistance related to taxes: "Our services apply only to administrative tax practice and hearings. The company provides no legal services, and does not represent persons in any state or federal court whatsoever. If you desire legal services, you must contract for such services separately. This is not a solicitation to provide legal services." SF, Ex. F. If legal assistance is needed, then its sister company, the law firm E. Kenneth Wall PC (also owned by Kenneth Wall), offers its separate services for a separate fee. *Id.*

Wall also does not prepare tax returns. For example, if it contracts to help a client that has not filed past tax returns, Wall informs that client that they must file all past tax returns and refers that client to a sister company, Atlas Tax Service owned by Mena McCarthy, wife of Kenneth Wall, that provides tax return preparation services for an additional fee: "If you would like to speak with a representative from Atlas Tax Service regarding preparation of your unfiled returns for

these tax years, we would be more than happy to make the referral. Please understand that Atlas Tax Services is a separate company with its own fee structure." SF, ¶ 8, Ex. L; Yates Depo., 144:11-147:2.

Wall's form, pre-printed contracts with clients contain the following term: "This agreement is deemed entered into in Virginia and is subject to the laws of Virginia. Jurisdiction for any action by you, or by Company, to enforce this agreement, or concerning charges under this agreement, shall be exclusively in the Virginia courts located in Fairfax County, Virginia." SF, Exs. F, G, H. Beginning in 2014, Wall added a mandatory arbitration provision to the client contract that required all arbitration to occur in Virginia and through an arbitration service (the McCammon Group) headquartered in Virginia. SF, Exs. G & H. Nothing in the Wall contracts with clients or in the record suggests that these contract terms were negotiable or that the clients had access to legal counsel when agreeing to these terms. SF, Exs. F, G, H. The current McCammon Group website indicates that it would not handle arbitrations where no counsel had consulted with the debtors regarding the initial agreement to arbitrate:

> All parties must be represented by counsel unless The McCammon Group gives consent in exceptional circumstances.
> ….
> "Generally, McCammon does not handle arbitrations pursuant to External Agreements unless all of the parties have either: (a) executed the External Agreement after consulting with counsel at the time of executing or developing the External Agreement; or (b) at the time of the initiation of the Claims, or the response thereto, agree through counsel to arbitrate the Claims and Counterclaims and to be bound by these Rules. (If the facts referenced in this paragraph come into question, the party initiating the Arbitration shall have the burden of demonstrating them to McCammon.)"

https://www.mccammongroup.com/services/arbitration/.

E. Wall's Disclosed Results for Idaho Clients Since 2011

This administrative enforcement action was brought initially focused on bringing Wall into compliance with the ICAA's licensing requirements. As such, the Department has not

performed an in-depth investigation of Wall's business practices related to its 54 Idaho clients from 2011 to 2020. As detailed above, the Department currently is aware of four complaints from the 54 clients. The record does not currently contain interviews of any of the 54 clients regarding what benefit they each received from contracting with Wall, how that compares to the fees they each paid, or whether they consider themselves satisfied with Wall's efforts.

Wall's current CEO provided declaration testimony recounting the work Wall did for each of the fifty-four Idaho residents. Yates Penalties Dec., ¶¶ 7-59. The assistance appears to have been substantial for some of its clients and less so for others. *Id.* The testimony also suggests that some clients obtained assistance even where the tax debt was not explicitly reduced through the Offer in Compromise process. For example, the first listed clients apparently obtained an installment agreement with the IRS to pay $100 a month, despite a tax bill that was not reduced from $64,340. *Id.* ¶¶ 7-8. As another example, the second listed clients are apparently still in the process of getting the IRS to hopefully accept late-filed taxes, which may eliminate their tax debt altogether. *Id.* ¶ 9. The CEO's declaration is filled with similar descriptions of potential value obtained for the various Idaho clients, which includes avoiding levy and other collection actions, reaching installment agreements, obtaining abatements, obtaining non-collectible status, and counseling regarding best strategies for various debt issues, including how to best benefit from the applicable statutes of limitation. *Id.* ¶ 7-59. The CEO's declaration also states that some clients terminated their contract with Wall for reasons other than dissatisfaction, others were explicitly satisfied when they terminated, and others are still working with Wall. *Id.* ¶¶ 7-59; *see, e.g.*, ¶ 31 ("H was happy with Wall's services and chose to end services …."); ¶ 32 ("J stated that he was satisfied with this outcome and Wall's

work."). These assertions are currently uncontested as the record contains no testimony from the clients regarding their experiences and services received.

The record also shows that fees paid by various clients differ dramatically. For example, one client paid $98,000 in fees for work that began in 2012; others paid $60,800 (client since 2018), $40,100 (2012), $37,250 (2012), $36,300 (2011), 28,500 (2018), and $22,500 (2019) (collectively, seven "Outlier Clients"). SF, Ex. P. Another six clients have paid between $13,000 and $15,000. The remaining 41 clients have all paid less than $13,000, with sixteen paying less than $5,000 and another nineteen paying between $5,000 and $10,000. *Id.* Some of the high overall fees were partially caused by much higher monthly fees. For example, almost all clients paid a monthly fee of $400-500, but four clients paid monthly fees of $1000 or $1200; all four of those clients are among the seven Outlier Clients. SF, Ex. P.

The testimony from Wall's CEO states that the client paying $98,000 received the benefit of a negotiated installment agreement of $2,500 a month and "was satisfied with this outcome and Wall's work." Yates Penalties Dec., ¶ 32. Wall's CEO stated that the client that paid $60,800 received help with various levy and lien issues; the client that paid $40,100 received help submitting two Offers in Compromise that were rejected; the client that paid $37,250 received help in getting a levy released and submitting an offer in compromise that was rejected; the client that paid $36,300 was helped submitting offers in compromise that have not been accepted and in avoiding further collection efforts of the IRS; the client that paid $28,500 was helped (since 2018) to get a payment plan that is not yet in place; and the client that paid $22,500 was helped (since 2019) to work out a payment plan that is not yet in place. *Id.*, ¶¶ 54, 34, 11, 25, 50, and 23.

Wall did not provide any evidence showing the time expended for any of the clients, including for the Outlier Clients. *Id.* Wall's contracts with debtors state, "You agree that the Company is not required to and shall not provide any accounting of time spent on your tax problem, nor of any specific charges, nor of any application of your fee to specific services under this agreement." SF, Exs. F, G, H. Wall did not provide evidence explaining how fees for non-legal and non-tax preparation work related to tax debts could reasonably reach from $20,000 to $90,000. Yates Penalties Dec., ¶¶ 1-64. In fact, in this proceeding, Wall's CEO does not even discuss or attempt to explain the specific fee amounts charged to each Idaho client or how they relate to specific work done for the client. *Id.*

F. Other Recent Regulatory Actions and Investigations Against Wall

Several states have brought investigations and civil actions against Wall based on allegations of consumer protection violations. For example, on September 13, 2017, the Virginia Attorney General filed a civil Complaint against Wall that alleged dozens of violations of the Virginia Consumer Protection Act, including misrepresenting to consumers:

- "the geographic origin of its services;"
- "that Wall's salespeople were 'tax consultants,' 'tax experts,' or tax analysts;"
- "about who would be providing tax services to them and the experience, knowledge, qualifications, training, authorization, and certification of the Wall employees;"
- "the average or typical outcome or results for Wall customers;"
- "specific potential outcomes;"
- "the amount of fees consumers would have to pay Wall to resolve their case;"
- "that Wall could perform tax preparation services;" and
- "about IRS practices, including the false statements that 'IRS personnel are well aware that over 99% of all installment agreements are defaulted upon' or that tax penalties 'are used to measure the performance of IRS managers.'"

See https://www.oag.state.va.us/consumer-protection/files/Lawsuits/wall-assoc-Complaint.pdf. The claims have similarities with the various complaints from Idaho residents, detailed above. The claims are still unproven; the on-line docket for the Circuit Court for Fauquier County shows that

the case is set for trial to commence in April of 2024. *See* http://ewsocis1.courts.state.va.us/CJISWeb/CaseDetail.do. Wall is a Virginia-based company.

On December 11, 2018, Minnesota's Attorney General filed a civil Complaint against Wall that alleged similar consumer protection violations. *State of Minnesota v. Wall & Associates Inc.*, Fourth Judicial District Court Hennepin County, Minnesota, File No. 27-CV-18-19874. The Second Amended Complaint, which also includes claims against two Wall executives, provides:

> … By its own account, Wall & Associates advertises its tax debt settlement services "[e]verywhere"—via television, radio, direct mailings, and the internet. Through its advertisements and representations, Wall & Associates falsely leads consumers who are interested in Wall & Associates' tax debt settlement services to believe that they will meet with Wall & Associates' supposed tax experts at one of the company's permanent offices in Minnesota to discuss their tax problems. In reality, consumers meet with a Wall & Associates salesperson at a temporary, rented office space. Wall & Associates' salespersons then falsely promise substantial reductions in consumers' tax debts in a short period of time in order to induce consumers to enter into debt settlement services agreements with Wall & Associates. Under such agreements, Wall & Associates charges consumers large fees—in some instances totaling more than $15,000— before fully (if ever) performing its promised services. Wall & Associates' conduct violates Minnesota's consumer protection laws ….

See https://publicaccess.courts.state.mn.us/CaseSearch. The on-line case docket shows that the matter has not yet been set for trial, so the claims are not proven. *Id.*

Wall also has a business office in Tennessee, and Tennessee's Attorney General has been litigating for several years with Wall related to an investigation into Wall's business practices. *See In Re Wall and Associates, Inc.*, Case No. 18-0561-I (commenced in May of 2018) and Case No. 18-0606-I, in the Chancery Court for the Twentieth Judicial District of Davidson County, Tennessee; *see also In re Wall & Assocs., Inc.*, No. M202001687COAR3CV, 2021 WL 5274809, at *1 (Tenn. Ct. App. Nov. 12, 2021) (finding no error in order compelling Wall to fully respond to investigative subpoena and imposing monetary sanctions).

G. Warnings to Consumers About Tax Relief Companies Generally

The Federal Trade Commission website contains an article entitled "Tax Relief Companies." It states,

> Tax relief companies use the radio, television and the internet to advertise help for taxpayers in distress. If you pay them an upfront fee, which can be thousands of dollars, these companies claim they can reduce or even eliminate your tax debts and stop back-tax collection by applying for legitimate IRS hardship programs. The truth is that most taxpayers don't qualify for the programs these fraudsters hawk, their companies don't settle the tax debt, and in many cases don't even send the necessary paperwork to the IRS requesting participation in the programs that were mentioned. Adding insult to injury, some of these companies don't provide refunds, and leave people even further in debt.
>
> Some taxpayers who filed complaints with the Federal Trade Commission (FTC) reported that, after signing up with some of these companies and paying thousands of dollars in upfront fees, the companies took even more of their money by making unauthorized charges to their credit cards or withdrawals from their bank accounts.
>
> If you owe back taxes and don't know how you're going to pay the debt, the FTC, the nation's consumer protection agency, says don't panic, take a deep breath, and consider your options. If you are having trouble paying bills, it's often better to try to work out a payment plan with the creditor yourself than to pay someone else to negotiate a plan for you. The same is true when you owe money to the IRS or your state comptroller.

https://consumer.ftc.gov/articles/tax-relief-companies. Similarly, the IRS has posted warnings to taxpayers about what it calls Offer in Compromise mills ("OIC mills"):

> As the 6th item on the 2022 "Dirty Dozen" scams warning list, the Internal Revenue Service today cautioned taxpayers with pending tax bills to contact the IRS directly and not go to unscrupulous tax companies that use local advertising and falsely claiming they can resolve unpaid taxes for pennies on the dollar.
>
> "No one can get a better deal for taxpayers, than they can usually get for themselves by working directly with the IRS to resolve their tax issues," said IRS Commissioner Chuck Rettig. "Taxpayers can check online for their best deal, as well as calling a specialized collection line where they can get fast service by using voice and chat bots or opting to speak with a live phone assistor."
>
> Offer in Compromise (OIC) "mills" make outlandish claims usually in local advertising regarding how they can settle a person's tax debt for pennies on the dollar. The reality usually is that taxpayers pay the OIC mill a fee to get the same deal they could have gotten on their own by working directly with the IRS.
>
> The IRS has compiled the annual Dirty Dozen list for more than 20 years as a way of alerting taxpayers and the tax professional community about scams and schemes. …

> OIC mills are a problem all year long but tend to be more visible right after the filing season is over and taxpayers are trying to resolve their tax issues perhaps after receiving a balance due notice in the mail.
>
> For those who feel they need help, there are many reputable tax professionals available, and there are important tools that can help people find the right practitioner for their needs. IRS.gov is a good place to start scoping out what to do.
>
> These "mills" contort the IRS program into something it's not — misleading people with no chance of meeting the requirements while charging excessive fees, often thousands of dollars.
>
> An "offer," or OIC, is an agreement between a taxpayer and the IRS that resolves the taxpayer's tax debt. The IRS has the authority to settle, or "compromise," federal tax liabilities by accepting less than full payment under certain circumstances. However, some promoters are inappropriately advising indebted taxpayers to file an OIC application with the IRS, even though the promoters know the person won't qualify. This costs honest taxpayers money and time.

https://www.irs.gov/newsroom/dirty-dozen-irs-urges-anyone-having-trouble-paying-their-taxes-to-avoid-anyone-claiming-they-can-settle-tax-debt-for-pennies-on-the-dollar-known-as-oic-mills. In its 2020 release, the IRS explained:

> These scams are commonly called OIC "mills," which cast a wide net for taxpayers, charge them pricey fees and churn out applications for a program they're unlikely to qualify for. Although the OIC program helps thousands of taxpayers each year reduce their tax debt, not everyone qualifies for an OIC. In Fiscal Year 2019, there were 54,000 OICs submitted to the IRS. The agency accepted 18,000 of them.
>
> Individual taxpayers can use the free online Offer in Compromise Pre-Qualifier tool to see if they qualify. The simple tool allows taxpayers to confirm eligibility and provides an estimated offer amount. Taxpayers can apply for an OIC without third-party representation; but the IRS reminds taxpayers that if they need help, they should be cautious about whom they hire.

see IRS Dirty Dozen notices for 2020, 2021, and 2022 at https://www.irs.gov/newsroom/dirty-dozen. These statements by the FTC and IRS do not specify any particular company and do not mention Wall. These statements are relevant to show some of the concerns related to tax debt negotiator/counselors in general.

H. The Idaho Collection Agency Act Regulates Debt Counselors

The ICAA was originally enacted to address collection agencies and most of its provisions are still focused towards regulating those businesses. Idaho Code § 26-2221 *et seq*. However, the

statute was amended many years ago to add debt counselors and credit counselors (referred to herein, collectively, as debt counselors) as additional regulated businesses. The statute contains a few provisions that are unique to debt counselors. *See* §§ 26-2223 (1) & (7), -2229(3)(a) & (b), and -2232A.

The definition of debt counselor in the ICAA is broad and makes no attempt to limit itself to any specific type of underlying debt. The definition states:

> (7) Engage or offer to engage in this state in the business of receiving money from debtors for application or payment to or prorating of a debt owed to, any creditor or creditors of such debtor, **or** engage or offer to engage in this state in the business of providing counseling or other services to debtors in the management of their debts, **or** contracting with the debtor to effect the adjustment, compromise, or discharge of any account, note or other indebtedness of the debtor.

Idaho Code § 26-2223 (emphasis added); *see also* § 26-2222(9) (definition of "'Debt counselor' or 'Credit counselor' means any person engaged in any of the activities enumerated in" § 26-2223(7)).

The ICAA is an important consumer protection statutory regime as it relates to debt counselor businesses and their dealings with potentially vulnerable debtors. The ICAA requires debt counselors to obtain and maintain a license with the Department. § 26-2223. In order to obtain and maintain the license, the ICAA requires disclosures of relevant information about the debt counselor and on-going compliance, as defined by the ICAA. §§ 26-2224, -2225, & -2227. The ICAA puts limitations on certain debt counselor fees, imposes some refund requirements, and requires surety bonds. §§ 26-2229(3) & -2232A. The ICAA requires debt counselors to keep business records and make them readily available to the Department for review, and the ICAA gives the Department the ability to regularly examine the business of debt counselors and to use subpoena powers to investigate concerns or complaints. §§ 26-2228, -2234, & -2236. The ICAA permits the Department to hold debt counselors accountable for misrepresentations to their client

debtors, lack of fitness in their business practices, or unfair or deceptive business practices. §§ 26-2226, -2227, & -2229A. The ICAA authorizes the Department to bring civil or administrative enforcement actions (and make criminal referrals) regarding violations of the ICAA by debt counselors. §§ 26-2244, -2245, and -2247. In sum, this regulatory licensing regime provides deterrence and important on-going oversight of this industry.

The ICAA's definition of debt counselor does not specify any type of debt counseling business that would be excluded. There is no mention of any specific type of underlying debt that is included or excluded, *i.e.* there is no mention of tax debt or consumer debt or any other specific type of debt.

The ICAA does define the term creditor and uses a very broad definition – "any person who offers or extends credit creating a debt or to whom a debt is owed"; except that it incorporates the term "person," which is also a defined term that makes no mention of a government: " 'Person' means any individual, corporation, association, partnership, limited liability partnership, trust, company, limited liability company, or unincorporated association." It is unclear why governmental entities are not listed in the definition of "person" or "creditor" found at Section 26-2222(6) or how that implicates licensees who counsel or negotiate regarding tax debts. The definition of creditor in the ICAA is much more relevant to the ICAA's provisions regulating collection agencies that are acting on behalf of creditors.

Becoming licensed as a debt counselor in Idaho is not expensive or complicated. The initial annual fee is $150, plus $20 for each employee that is contacting Idaho debtors. The annual renewal fee is $100, plus $20 for each employee that is contacting Idaho debtors. The licensee must also maintain a surety bond in an amount calculated based on the amount of fees paid by Idaho clients. The licensee must submit initial paperwork with disclosures about the business, its

owners, contracts, revenues, agents, etc. The licensee then typically files annual updates of those disclosures when it renews the license. The application and renewal forms are on the Department website and all forms are completed through a streamlined on-line process through NMLS (the Nationwide Multistate Licensing System). *See* https://www.finance.idaho.gov/industry/collection-agencies/forms/.

The Department currently has more than fifty licensed companies that do debt counseling and/or debt settlement. *See* https://www.finance.idaho.gov/licensee-search/. One of those is Instant Tax Solutions, LLC ("ITS"), a business that appears to have many similarities to Wall. When the Department contacted ITS in December of 2019 regarding its need to be licensed, ITS agreed, submitted its license application in February of 2020, and entered into a Consent Order admitting that it should have been licensed under the ICAA and paying a small fine. *See* https://www.finance.idaho.gov/legal/administrative-actions/consumer-finance/documents/instant-tax-solutions-llc-2020-9-03-consent-order.pdf.

I. Tax Debt Versus Other Debts

Tax debts are similar to other debts in many ways: there are specific amounts owed by an obligor to an obligee, mechanisms for calculating the obligations, enforceable collection rights for the obligee, and legal protections for the obligor and its assets. Tax debts, like most or all debts, have their own state and federal laws that govern the rights of the obligor and the obligee and those laws can vary significantly depending on the jurisdiction.

In other ways, tax debts are different from other debts. Tax debts are a debt owed to a governmental entity (though not the only type of debt that can be owed to a governmental entity) rather than to an individual or business entity. Tax debts arise from a unique legal regime related to the sovereign taxing authority. Other debts arise from various other legal regimes: *e.g.*,

intentional torts, negligent torts, strict liability torts, contract breaches, contract obligations, unjust enrichment, consequential damages, criminal restitution, revolving debt, secured loans, unsecured loans, medical bills, utility bills, installment credit, trade credit, etc.

Tax debt counselors are accused of many of the same improper practices that are a regulator's concern regarding any type of debt counselor: overpromising; using uninformed representatives to act as salespersons to obtain clients; overcharging fees; charging large up-front fees despite doing little up-front work; taking advantage of desperate, uninformed, and unsophisticated clients; promising results in order to sign a client up even though nothing can be promised about what a creditor will accept; having too many clients to provide the promised services; delaying work on files and thereby obtaining greater on-going fees; promising much shorter turnarounds than should be expected or attained; not providing good customer service or communication; charging fees that significantly erode or even exceed the debt reduction obtained; obfuscating the work actually being done; not doing sufficient up-front assessment to know what likely result could be obtained for the client; using marketing/advertising that is misleading and overly optimistic; marketing with statistics that are incorrect and misleading; and misleading the clients about the real limitations of what services a non-lawyer can provide.

J. Wall Is Not Licensed Under the ICAA or Exempt.

Wall does not hold and has never held a license under Title 26, Chapter 22, Idaho Code, the ICAA. SF, ¶2. Wall is also not an organization that is identified in Idaho Code Section 26-2239 as exempt from the ICAA. SF, ¶3.

II. CONCLUSIONS OF LAW

A. Director Review

The Director is ultimately responsible for enforcement of the ICAA. *See* I.C. § 26-2228 (1) ("the director shall: (1) Administer and enforce the provisions and requirements of this act ….") & (4) ("issue orders … that, in the opinion of the director, are necessary to execute, enforce, and effectuate the purpose of this act"); § 26-2244 ("Whenever it appears to the director … the director may order …."). As such, where the Director reviews a preliminary order from a hearing officer, the Director reviews all legal and factual issues *de novo* based on the agency record, gives no deference to any findings or conclusions of the hearing officer, and can issue a different final order. *See* I.C. § 67-5245 ("(7) The head of the agency … shall exercise all of the decision-making power that he would have had if the agency head had presided over the hearing."); § 67-5246(3).

As discussed below, the Director agrees with and adopts much of the legal reasoning, interpretation of statute, findings of violations, and sanctions chosen by the hearing officer; however, the Director also enters this Final Order that makes changes to various aspects of the preliminary order from the hearing officer.

B. Tax Debt Counselor Is A Debt Counselor Under ICAA

For the many reasons stated by the hearing officer in his various Orders, which are incorporated herein, Wall's actions related to its Idaho resident clients are actions that fall within the definition of a debt counselor, as defined in Idaho Code Section 26-2223(7): "contracting with the debtor to effect the adjustment, compromise, or discharge of any account, note or other indebtedness of the debtor." *See* June 14, 2021 Order, pp. 5-23; July 16, 2021 Order, pp. 1-5. A tax debt counselor, such as Wall, falls within that broad statutory definition of a debt counselor.

The hearing officer's conclusions of law are amended to add that Wall's actions related to its Idaho resident clients are also actions that fall within the other definition of a debt counselor, as defined in Idaho Code Section 26-2223(7): "engage or offer to engage in this state in the business of providing counseling or other services to debtors in the management of their debts." Wall's written communications to clients and the declaration of its CEO filed in this proceeding confirm that it is providing counseling and other services to tax debtors regarding the management of their tax debts owed to one or more taxing authorities. *Supra*, Part I.C-E.

For the many reasons stated by the hearing officer in his various preliminary orders, which are incorporated herein, tax debt counselors are regulated by the ICAA and fall within the scope of the intended meaning of the statutory language. For the many reasons stated by the hearing officer in his various preliminary orders, which are incorporated herein, the Director rejects Walls arguments that it should be allowed to perform unregulated debt counselor work with Idaho residents merely because it limits its debt counseling to tax debts. *See* June 14, 2021 Order, pp. 5-23; July 16, 2021 Order, pp. 1-5.

As the IRS made clear in its Dirty Dozen notices, tax debt counselors are a significant risk to Idaho residents; that risk is substantially similar to the risks from all other debt counselors the Idaho Legislature chose to regulate under the ICAA. This risk is further shown by the allegations of the lawsuits brought against Wall in Virginia and Minnesota, including the four complaints brought by Idaho residents against Wall. As a remedial statute, the ICAA is interpreted broadly to apply to all debt counselors, including tax debt counselors. *See Smith v. Glenns Ferry Highway Dist.*, 166 Idaho 683, 693, 462 P.3d 1147, 1157 (2020) ("However, we interpret remedial statutes broadly 'to satisfy their remedial purposes.'").

The ICAA's definitions of "creditor" and "person," that do not refer to a governmental entity, were not intended to remove tax debt counselors from the scope of the ICAA. If that were the intent of the Legislature, it could have so stated directly and clearly. In addition, the two definitions of debt counselor at issue here, do not even use the term "creditor."

The ICAA's limits on the fee of a debt counselor and its requirements related to refunds are not proof that the Legislature intended to exclude tax debt counselors from the scope of the ICAA. If that were the intent of the Legislature, it could have so stated directly and clearly. Those fee and refund provisions can be interpreted consistent with their general application to all debt counselors, including tax debt counselors. For example, if tax debt counselors are not typically counseling on and negotiating the reduction of tax debts that can be considered unsecured, then that fee limitation provision would be inapplicable, rather than somehow removing tax debt counselors from the scope of the entire ICAA.

Wall's claims of federal preemption are rejected. *See Idaho Dep't Of Health & Welfare v. McCormick*, 153 Idaho 468, 471, 283 P.3d 785, 788 (2012) ("In determining whether state law is preempted, we begin with a presumption of no preemption. …. Essentially, this Court must find that a state law is directly contrary to the congressional intent behind a federal statute before state law will be preempted.") (internal quotation omitted). The hearing officer addressed this issue correctly in the Orders. There is nothing in requiring licensure of Wall that "stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress." *Id.*, 153 Idaho at 471, 283 P.3d at 788. If there were any conflict between federal law and some aspect of the ICAA, then preemption would only be applicable to that limited conflict and would not preempt the entire ICAA. *Id.* Here, there is no evidence in the record that any federal regulator is doing anything to regulate Wall and its main business of contracting with debtors to submit Offers in

Compromise, negotiate tax debts, and help avoid tax levies and other involuntary collection actions. In fact, the IRS's repeated warnings about OIC mills suggests that it welcomes state regulation in this area to help protect tax debtors; this licensing and related regulation by the Department is complementary and compatible with any federal law related to persons representing tax debtors before the IRS. *Cf. Eric M. Berman, P.C. v. City of New York*, 25 N.Y.3d 684, 691, 37 N.E.3d 82, 87 (2015) ("Rather, the regulatory schemes can be seen as complementary to, and compatible with, one another."). Wall also has not presented any case law suggesting that states are preempted from requiring licensure of tax debt counselors. *Cf. Transportation Credit Serv. Ass'n v. Systran Fin. Servs. Corp.*, No. CIV. 03-1342-MO, 2004 WL 1920799, at *2 (D. Or. Aug. 26, 2004) ("Especially in light of plaintiff's failure to cite any legal authority on the issue of preemption, plaintiff has failed to overcome the presumption in favor of allowing a state to exercise its police power.").

Wall has and is engaging in conduct as a debt counselor without a license in violation of Idaho Code Section 26-2223(1) and (7).

C. Violation of ICAA For Unlicensed Activities

The ICAA prohibits unlicensed debt counselor activities:

> No person shall without complying with the terms of this act and obtaining a license from the director: (1) Operate as a … debt counselor … in this state. …. (7) … engage or offer to engage in this state in the business of providing counseling or other services to debtors in the management of their debts, or contracting with the debtor to effect the adjustment, compromise, or discharge of any account, note or other indebtedness of the debtor.

I.C. § 26-2223. Wall has engaged in 54 separate violations of unlicensed debt counselor activities from 2011 to 2020 by entering into contracts with 54 separate Idaho residents to "provide counseling or other services … in the management of their debts" and "to effect the adjustment, compromise, or discharge of … [their] indebtedness," in the form of tax debts.

D. Discretionary Sanctions For Violations

For violations of the ICAA, including violations of its licensing requirements of Section 26-2223, the Director is statutorily entitled to order the violator to cease and desist and to impose several types of monetary sanctions:

> (2) Whenever … the director finds that any person has engaged in any act, practice, or omission constituting a violation of any provision of this act … , the director may order the person to cease and desist from such acts, practices or omissions and:
> (a) Impose a civil penalty of not more than five thousand dollars ($5,000) for each violation upon any person found to have violated any provision of this act …;
> (b) Issue an order restoring to any person in interest any consideration that may have been acquired or transferred in violation of this act …; and
> (c) Issue an order that the person violating this act or a rule adopted or an order issued under this act pay costs, which in the discretion of the director may include an amount representing reasonable attorney's fees and reimbursement for investigative efforts.

I.C. § 26-2244. Within the limits stated in the statute, the Director exercises her discretion to determine which specific types and amounts of sanctions to impose. *See, e.g.*, *Williams v. Idaho State Bd. of Real Est. Appraisers*, 157 Idaho 496, 509–10, 337 P.3d 655, 668–69 (2014) ("[T]he selection of administrative sanctions is vested in the agency's discretion."); *Knight v. Dep't of Ins.*, 124 Idaho 645, 650–51, 862 P.2d 337, 342–43 (Ct. App. 1993); *Pan Am. Assur. Co. v. Dep't of Ins.*, 121 Idaho 884, 887, 828 P.2d 913, 916 (Ct. App. 1992) ("Recognizing that the Director had authority to assess a penalty five times that amount, we conclude that the penalty was reasonable."); *see also Saberi v. Commodity Futures Trading Comm'n*, 488 F.3d 1207, 1215 (9th Cir. 2007) ("An agency's imposition of sanctions is reviewed for an abuse of discretion.").

The following aggravating circumstances apply to these 54 violations and impact what remedies should be imposed: Wall's knowledge, since 2011, that Idaho's regulator of debt counselors considered Wall's business to fit that statutory definition and Idaho's regulator's direct communication to Wall that it should not contract with any further Idaho residents without first obtaining the required debt counselor license; Wall's intentional decision to not comply with that

mandate from Idaho's regulator and to not tell the Idaho regulator that it was choosing not to abide by its licensing requirement; the extended length of the non-compliance, allowing Wall to go unregulated in Idaho (or anywhere it appears) for many years; the significant number of impacted Idaho residents who dealt with an unlicensed and unregulated debt counselor; the Idaho Legislature's determination that unlicensed debt counseling activity is a felony, pursuant to Idaho Code § 26-2238(2); Wall's on-going unlicensed advertising to Idaho resident's, despite this administrative action and the preliminary orders from the hearing officer; Wall's misleading advertising to Idaho debtors about having a local office in Boise when it merely rents office space temporarily for specific meetings with prospective clients; Wall's various methods, including the terms in its form contracts, used to make it difficult for any Idaho client to seek redress; and Wall's ten-year refusal to pay a small claim's judgment owed to an Idaho resident.

Wall is ordered to cease and desist from further violations of the ICAA, including its on-going violation of the licensing requirement found in Section 26-2223.

1. Civil penalty

The Director has the discretion to award a civil monetary penalty of up to $5,000 per violation. *See* Idaho Code § 26-2244(2)(a). The legislature has not defined the factors that the Director is to consider in imposing civil penalties pursuant to Section 26-2244(2)(a). Courts, in similar situations, analyze various factors when determining the amount of a civil penalty. *See, e.g.*, *State v. Macko*, No. HHDCV126031858S, 2016 WL 4268383, at *12 (Conn. Super. Ct. Aug. 1, 2016) ("Where the legislature has not specifically defined the factors that a court is to consider in imposing a civil penalty, courts are often guided by those factors established by related federal law."); *Kimmelman v. Henkels & McCoy, Inc.*, 108 N.J. 123, 137, 527 A.2d 1368, 1375 (1987) ("Since this is our first decision relating to the calculation of civil penalties under the Antitrust

Act, we take this opportunity to delineate some of the factors that courts should consider in setting civil penalties under the Act": good or bad faith of defendant, defendant's ability to pay, amount of profits obtained from illegal activity, injury to the public, duration of the conspiracy, existence of criminal or treble damage actions, past violations); *see also United States v. Reader's Dig. Ass'n, Inc.*, 662 F.2d 955, 967 (3d Cir. 1981) ("In determining the size of the penalty to be assessed against the Digest, the district court, relying on our *Papercraft* decision, took five factors into consideration: (1) the good or bad faith of the defendants; (2) the injury to the public; (3) the defendant's ability to pay; (4) the desire to eliminate the benefits derived by a violation; and (5) the necessity of vindicating the authority of the FTC.").

Here, important factors are deterrence and enforcement of the statutory regulatory program. *See, e.g.*, *State ex rel. DeWine v. A & L Salvage*, 987 N.E.2d 307, 322 (Ohio Ct. App. 2013) ("'Civil penalties can be used as a tool to implement a regulatory program.' Substantial penalties are used as a mechanism to deter conduct contrary to the regulatory program. In order to be an effective deterrent to violations, civil penalties should be large enough to hurt the offender but not cause bankruptcy.") (internal citations omitted); *United States Dep't of Just. v. Daniel Chapter One*, 89 F. Supp. 3d 132, 148–54 (D.D.C. 2015), aff'd, 650 F. App'x 20 (D.C. Cir. 2016) ("If a penalty is '[t]o have any deterrent effect, [it] must be large enough to be more than just ... an acceptable cost of doing business.'") (internal citation omitted).

For the many reasons stated by the hearing officer in his various preliminary orders, which are incorporated herein, plus the consideration of the aggravating factors above, the Director exercises her discretion to impose a civil penalty of $3,000 per violation (60% of the max penalty), for a total civil penalty of $162,000. *See* January 4, 2022 Order, pp. 1-2; February 7, 2022 Order, pp. 1-2. A significant civil penalty is particularly important to deterrence of future violations where

Wall was told in 2011 that it was violating the ICAA, Wall was aware or should have been aware of the possible statutory sanctions for getting caught pursuing further unlicensed activities, but Wall still chose to proceed with violating the ICAA. In fact, Wall appears to still be openly violating the ICAA, refusing to become licensed while this action is on-going. The civil penalty cannot merely be the "cost of doing business" for Wall. The facts to date show that if Wall is going to comply with this regulatory regime created by the Idaho Legislature, then Wall will need a significant penalty to convince it of the importance of compliance.

2. Restoring Fees Acquired In Violation of the ICAA

The Director has the discretion to refund fees for Wall's Idaho clients: "an order restoring to any person in interest any consideration that may have been acquired or transferred in violation of this act." *See* Idaho Code Section 26-2244(2)(b). By this plain language, the Director has authority to return all fees that were earned by an unlicensed debt counselor, *i.e.* "acquired … in violation of this act." Here, however, the Director is exercising her discretion to not provide a blanket restoration of all fees. Rather, the Director is choosing to limit the restoration of fees pursuant to principles of restitution and/or disgorgement. "[R]estitution aims to make the damaged persons whole, while disgorgement aims to deprive the wrongdoer of ill-gotten gains." *S.E.C. v. Drexel Burnham Lambert, Inc.*, 956 F. Supp. 503, 507 (S.D.N.Y. 1997)); *see also Asher v. McMillan*, 169 Idaho 701, 707, 503 P.3d 172, 178 (2021) ("In restitution cases, the aim is to provide a remedy where one party has conferred a benefit on another which it would be unjust to retain.") (citing to Restatement (Third) of Restitution and Unjust Enrichment (2011)).

At this time, for many of the Idaho clients of Wall, the Department does not have sufficient evidence to suggest that restoring all fees would make all clients "whole" or deprive Wall of "ill-gotten gains." For many of the clients, the evidence in the record is unclear regarding what value

was obtained and who or what was to blame (if anyone) for their failure to obtain lasting relief. *Supra*, Part I.E. For other clients, it appears that they obtained or may have obtained some value from contracting with Wall. *Id.* At this point, the testimony of clients regarding their experience is not in the record, since this is an enforcement action related to unlicensed activity rather than other improper conduct. *Id.*

Restoring all fees to clients, as permitted under the statute's plain language, could serve as the ultimate deterrent against Wall's failure to license and bring itself within the regulatory program; however, the deterrence factor is already addressed, at least in part, through the civil penalty imposed above. In short, under the specific facts of this case and these violations, the Director chooses not to restore all fees paid.

The Director finds, however, that the evidence is sufficient to support restoration of fees for some clients who were harmed in the fees they were overcharged. Four Idaho clients submitted complaints to the Department explaining how they had been harmed both in fees paid and in stress caused by Wall's business practices: AM and VM, MP, MG, and MM. *Supra*, Part I.B-C. In response, Wall submitted some documents and some discussion regarding each client. Yates Penalties Dec., ¶¶ 26 (MG); 40 (MM); 44 (MP); and 62 (AM and VM). Weighing and evaluating the evidence, the Director finds that these clients did not get what they paid for and should have fees, partially or fully, returned.

As to AM and VM, Wall provides no evidence to suggest that it is entitled to keep any of the fees it received. *Id.*, ¶ 62. Wall is ordered to repay the entire fees of $7,800, which should have been paid back many years ago. Similarly, the evidence in the record indicates that MG ultimately received no value for his fees and suffered significant stress from Wall's inaction, so those fees are ordered to be repaid in the amount of $6,300. *Id.*, ¶ 26. MP paid $10,800, and Wall claims she

was benefited both in receiving help with two lien releases from the State of Idaho and in getting some help with filing tax returns (though, not actually preparing the tax returns, which was outside the scope of the contract). *Id.*, ¶ 44. Based on that evidence, Wall will refund $9,000 in excessive fees. MM paid $10,375 in fees and he seems to have ultimately received the most assistance per the testimony and documents submitted by Wall. *Id.*, ¶ 40. MM's complaint to the BBB indicated that he had been waiting approximately two years for Wall to submit an Offer in Compromise. Wall's records suggest that it finally acted after that complaint was made to the BBB. *Id.*, Exs. 86-94. Therefore, Wall will repay eighteen months of monthly payments at $350 per month, for a total of $6,300.

Regarding the seven Outlier Clients, Wall failed to explain the excessive fees charged that are both outliers in amount and resulted in very little quantifiable benefits to the clients, as admitted by Wall. *Supra*, Part I.E. Therefore, these outlier fees, which were acquired by an unlicensed debt counselor in violation of the ICAA, need to be restored to clients. Balancing the factors of prohibiting excessive and unearned fees against evidence of some significant time and efforts expended, Wall is required to return 75% of all fees paid by these Outlier Clients. Thus, the Director requires the following refunds: $73,500 to J, $45,600 to CT and MT, $30,075 to GK, $27,937.50 to TB, $27,225 to MG, $21,375 to DS, and $16,875 to the MG and JG. Thus, Wall will keep 25% of its fees charged, to reflect its work that it has performed for these seven Outlier Clients that were overcharged. For example, Wall is keeping $24,500 for its work on behalf of J (an amount that is still well in excess of what almost all other clients paid), despite the fact that Wall was unsuccessful in most of its efforts for J.

In sum, the Director could require the return of all fees earned by an unlicensed debt counselor. However, in the exercise of discretion, the Director has determined to limit the return

of fees based on her application of principles of restitution/disgorgement and related to the most striking examples of improper fees. The Director finds that the evidence shows that eleven Idaho clients are entitled to be restored fees that they were overcharged by Wall. Wall shall restore fees totaling $271,987.50 for the eleven harmed Idaho clients. The restoration/disgorgement of these fees also acts as additional deterrence.

The remedies statute in the ICAA does not mention pre-judgment interest; therefore none is awarded, which has significant impact on the recovery by these harmed clients. I.C. § 26-2244.

Wall's arguments about a statute of limitation are rejected. This administrative action was brought to enforce the licensing regime of the ICAA that provides important consumer protections for Idaho debtors. The ICAA, including its remedy provision, does not contain a statute of limitation. No statute of limitation or statute of repose applies to limit the administrative recovery by the Department, on behalf of Idaho clients, of the fees acquired by Wall through violations of the ICAA. *See Int. of Doe*, 168 Idaho 389, 483 P.3d 932, 936 (2020) ("Moreover, statutes of limitation themselves reflect policy determinations of the legislature. … [W]e are not free to enact policy by inserting a statute of limitation where the legislature has not provided one."); *Beale v. State, Dept. of Labor*, 139 Idaho 356, 79 P.3d 715 (2003). In addition, the Department has not been dilatory in bringing this action. It was Wall that failed to alert the Department of its decision to ignore the Department's licensing request; had Wall alerted the Department that it was going to continue violating the ICAA, perhaps all of this would have been resolved back in 2012. Once the Department got another complaint in early 2018, alerting it of the on-going issue, it brought an administrative enforcement action less than two years later, after its investigation and after failed attempts to resolve the matter consensually. *Supra*, Part I.B.

3. Attorney Fees and Costs

The Director has the discretion to award costs against Wall, including the discretion to "include an amount representing reasonable attorney's fees and reimbursement for investigative efforts." *See* Idaho Code Section 26-2244(2)(c).

The Director has reviewed the Declaration of Counsel Regarding Fees, filed on February 17, 2022, and finds the fees to be reasonable both in the hourly rate and in the number of hours. The Director also finds the costs requested (court reporter expenses for one deposition and two hearings), pursuant to the Memo of Fees and Declaration of Erin Van Engelen, both also filed on February 17, 2022, to be reasonable and supported in the record. Wall did not file an opposition to the Memo of Fees or specifically to the amount or type of fees and costs requested.

After an investigation and several years of hotly contested litigation and many hundreds of pages of briefing, the Director concludes that the fees requested by the Department's counsel significantly understate the true expense of this action to hold Wall accountable for its violations of the ICAA. *See* Declaration of Counsel Regarding Fees, filed February 17, 2022, ¶ 6. In addition, the Department's counsel has undoubtedly expended significantly more hours filing a 58-page brief related to Wall's Petition to Review, which were hours incurred after the filing of the Memo of Fees and therefore not included in that request. The Department has not prevailed on all issues in this contested case, namely on the full refund of all fees. Thus, balancing these factors (the Department's significant understatement of fees plus its additional fees incurred but not yet submitted balanced against Wall's limited success in retaining some of its fees), the Director will exercise her discretion to award the fees and costs initially requested by the Department: $38,875 in fees and $3,141.60 in costs. In other words, additional fees (beyond the $38,875) will not be awarded to the Department for prevailing on most issues related to Wall's Petition for Review.

Copies of the hearing officer's various substantive Orders, containing legal analysis incorporated into this Final Order, are attached to this Final Order as Exhibits A-E.

III. ORDER

Pursuant to Idaho Code Section 26-2244, the Director **ORDERS** that:

1. Wall is ordered to cease and desist acts and practices constituting unlicensed debt counselor or credit counselor activity in Idaho, as defined in I.C. § 26-2223(7) and as further explained herein, unless or until it becomes licensed pursuant to the ICAA (Idaho Code Title 26, Chapter 22).

2. Regarding Wall's current Idaho clients, Wall shall discontinue providing services to them and terminate any agreements/contracts with these clients within 30 days of this Final Order if Wall has not first become licensed under the ICAA.

3. Respondent is ordered to pay penalties of $3,000 per violation for fifty-four (54) violations in the total amount of $162,000 to the Idaho Department of Finance pursuant to Idaho Code Section 26-2244(2)(a).

4. Respondent is ordered to restore $271,987.50 in fees to eleven harmed Idaho clients, by paying those fees over to the Idaho Department of Finance, to then be returned to harmed clients, pursuant to Idaho Code Section 26-2244(2)(b).

5. Respondent is ordered to pay to the Idaho Department of Finance fees and costs in the total amount of $42,016.60, pursuant to Idaho Code Section 26-2244(2)(c).

6. Any prior rulings that the orders in this matter are not subject to public disclosure are no longer applicable or in effect. This order and the prior orders entered herein are to be treated by the Department as they would in the normal course under the Idaho Public Records law (Idaho Code Title 74, Chapter 1), which includes various exemptions. *See, e.g.*, Idaho Code §§ 74-104(1)

(incorporating exemptions from other state or federal law), 74-106(4) (certain personal records), and 74-106(5) (information in an income or other tax return). The Director (as well as the parties) is aware and mindful of the State of Idaho, Ada County, Fourth Judicial District Court's Order In the Matter of Contested Case (concerning this matter) in Case No. CV01-20-10059 entered June 29, 2020, authorizing and directing the production by Wall of records containing taxpayer information as well as directing the parties to maintain the confidentiality of records produced. Nothing in this order is intended to change the effect of that court order or the application of the Idaho Public Records law. To confirm, the Director specifically notes and directs that specific taxpayer information, to the extent it is included in this and prior orders, shall remain confidential and exempt from disclosure to the public pursuant to exemptions referenced above. The Department is authorized to release only copies of orders or other related documents to the public with such confidential taxpayer information redacted. This does not preclude the Department from sharing orders in this matter or records produced by Wall containing taxpayer information in a full and unredacted manner with other state regulators or law enforcement officials including, but not limited to, state attorneys general with the understanding that such information is confidential.

7. This is a Final Order of the Director and as such, the relief ordered herein, both monetary and injunctive, is immediately due and payable and otherwise effective.

NOTIFICATION OF RIGHTS

This is a Final Order of the Department of Finance. Any party may file a motion for reconsideration of this final order within fourteen (14) days of the service date of this order. The agency will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. *See* Section 67-5246(4), Idaho Code. Any such petition for reconsideration must be in writing and addressed to:

Loren K. Messerly
Deputy Attorney General
Idaho Department of Finance
P.O. Box 83720
Boise, Idaho 83720-0031

Pursuant to Idaho Code §§ 67-5270 and 67-5272, any party aggrieved by this final order or orders previously issued in this case may appeal this final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which:

a. A hearing was held;
b. The final agency action was taken;
c. The party seeking review of the order resides; or
d. The real property or personal property that was the subject of the agency action is located.

An appeal must be filed within twenty-eight (28) days (a) of the service date of this final order, (b) of an order denying a petition for reconsideration, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See Section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.

IT IS SO ORDERED.

DATED this 30th day of August 2022.

Patricia R. Perkins, Director
Idaho Department of Finance

CERTIFICATE OF SERVICE

I hereby certify that on the 30th of August 2022, I caused to be served an accurate copy of the FINAL ORDER ADOPTING AND AMENDING HEARING OFFICER PRELIMINARY ORDER upon all parties of record in the proceeding to the following, in the manner indicated below:

Thomas A. Donovan Department of Finance PO BOX 83720 Boise, ID 83720-0031	[ ] U.S. mail, postage prepaid [ ] certified mail [ ] facsimile: [X] email: tom.donovan@finance.idaho.gov
Trevor L. Hart Perry Law, P.C. The Henry Rust Building 2627 W. Idaho Street Boise, ID 83702	[ ] U.S. mail, postage prepaid [ ] certified mail [ ] facsimile: [X] email: tlh@perrylawpc.com
William F. Mohrman Mohrman, Kaardal & Erickson, P.A. 150 South Fifth Street, Suite 3100 Minneapolis, MN 55402	[ ] U.S. Mail, postage prepaid [ ] Certified mail [ ] Facsimile: [X] Email: mohrman@mklaw.com

Lisa Baker
Assistant to the Director

EXHIBIT A

DAVID V. NIELSEN, ISB NO. 3607
P.O. Box 1192
Boise, Idaho 83701
Telephone: (208)336-5525
Facsimile: (208) 336-8848
nielsendavidv@qwestoffice.net

BEFORE THE DIRECTOR OF THE DEPARTMENT OF FINANCE

STATE OF IDAHO

STATE OF IDAHO, DEPARTMENT OF FINANCE, CONSUMER FINANCE BUREAU, Complainant, v. WALL & ASSOCIATES, INC., A VIRGINIA CORPORATION, Respondent.	Docket No. 2019-9-10 **DECISION AND ORDER REGARDING COMPLAINANT'S MOTION FOR PRELIMINARY ORDER AND RESPONDENT'S MOTION FOR SUMMARY JUDGMENT**

This matter having come before the Hearing Officer on the Motion of Complainant (the Department) for Preliminary Order and the Respondent's Motion for Summary Judgment the following decision is entered.

The complaint filed in this matter concerns the activities of Respondent Wall & Associates, Inc., a Virginia corporation (hereinafter "Wall") which is engaged in the business of negotiating tax liabilities of individuals with state and federal taxing authorities and obtaining settlement or compromised outcomes for such liabilities. This matter arises following the filing of a number of consumer complaints with the Department against Wall dating back to 2011. These complaints alleged that Wall had failed to provide contracted for services concerning tax debt negotiation and resolution services.

Through discovery conducted in this case the Department has identified a number of Idaho consumers which entered into contracts with Wall to provide services advertised as debt counseling or tax relief negotiation, tax debt negotiation and resolution services.

The Department as far back as 2011 had engaged in discussions with Wall about the claimed need for Wall to obtain licensing under the Idaho Collection Agency Act, Idaho Code § 26-2221, et seq. (The Act) as a debt or credit counselor. The Department contended that Wall was engaged in the business of debt or credit counseling, or other debt negotiation services and as such was within the purview of the Act and therefore required to be licensed and regulated under these provisions.

Wall rejected this claim and continued operations.

More recently, in 2018 and 2019, the Department received further complaints regarding the activities of Wall. These complaints by Idaho consumers concerned protests over alleged inadequate results obtained by Wall in the services performed as well as claims that excessive fees were charged.

Evidence submitted by stipulation establishes that Wall contracted with fifty four Idaho consumers over the time period of 2011 through 2020. Stipulated Facts, Exhibit P.

In the pending matter the Department's Complaint contends that Wall is in violation of the Act by failing to be licensed for the activities it performs. The Department seeks an Order requiring Wall to cease and desist from continuing activities in the state until such licensing is obtained. The Department also seeks civil penalties for the multiple alleged violations of conducting business while unlicensed. Additionally the Department contends that fees charged by Wall to consumers exceeded permissible amounts under the Act.

While presented initially by the Department as a Motion for Preliminary Order and by Wall as a Motion for Summary Judgment, this matter is being considered as one which presents cross motions for summary judgment.

Pursuant to I.R.C.P. 56(c) summary judgment may be granted if upon the submission of matters of record it is established that there exists no genuine issue of material fact and what remains is purely a question of law.

The determination of whether a party is entitled to summary judgment is to be based upon the pleadings, depositions and admissions on file, together with the affidavits, if any, submitted by the parties. See, *Olson v. Freeman*, 117 Idaho 706, 791 P.2d 1285 (1990); *Badell v. Beeks*, 115 Idaho 101, 765 P.2d 125 (1988); *Boise Car & Truck v. Waco*, 108 Idaho 780, 702 P.2d 818 (1985); *Mitchell v. Siqueiros,* 99 Idaho 396, 582 P.2d. 1074 (1978). See also, *Ambrose Ex Rel. v. Buhl Joint School District No. 412,* 126 Idaho 581, 887 P.2d. 1088 (Idaho Ct. App. 1994).

Upon a motion for summary judgment, all controverted facts are liberally construed in favor of the non-moving party. *Gregory* v. *Stallings,* 468 P.3d 253, 258 (2020); *Tusch Enterprises v. Coffin*, 113 Idaho 37, 740 P.2d 1022 (1987); *Doe v. Durtschi*, 110 Idaho 466, 716 P.2d 1238 (1986). Likewise, all reasonable inferences which can be made from the record shall be made in favor of the party resisting the motion. *Meridian Bowling Lanes, Inc. v. Meridian Athlete Ass'n, Inc.* 105 Idaho 509, 670 P.2d 1294 (1983); *Kline v. Clinton*, 103 Idaho 116, 645 P.2d 350 (1982).

The parties have provided in the presentation of their respective motions extensive materials including the following pleadings and matters of record:

1. Department's Motion for Preliminary Order;

2. Department's Memorandum in Support of Motion for Preliminary Order;

3. Respondent's Memorandum in Support of Motion for Summary Judgment;

4. Respondent's Memorandum in Opposition;

5. Department's Reply Memorandum in Support of Motion for Preliminary Order;

6. Declaration of Counsel in Support of Motion for Preliminary Order and supporting exhibits;

7. Declaration of Counsel in Support of Respondent's Motion for Summary Judgment and supporting exhibits;

8. Declaration of Yates and supporting Exhibits;

9. Declaration of Celia Kinney;

10. Memorandum in Opposition to Respondent's Motion for Summary Judgment;

11. Respondent's Reply Memorandum in Support of Motion for Summary Judgment;

12. Motion to Strike Portions of Yates' Declaration;

13. Response to Motion to Strike; and

14. Stipulated Facts.

Upon review of the pleadings and materials submitted along with oral argument on these motions what is apparent is that this matter is ultimately one of statutory construction and interpretation of the applicable language of the Act.

> Guidance is initially found under Idaho Code § 73-113 (1) which states as follows:
>
> The language of a statute should be given its plain, usual and ordinary meaning. Where a statute is clear and unambiguous, the expressed intent of the legislature shall be given effect without engaging in statutory construction. The literal words of a statute are the best guide to determining legislative intent.
>
> If the language in the statute is ambiguous, Idaho Code § 73-113 (2) provides:
>
> If a statute is capable of more than one (1) conflicting construction, the reasonableness of the proposed interpretations shall be considered, and the statute must be construed as a

whole. Interpretations which would render the statute a nullity, or which would lead to absurd results, are disfavored.

The Act provides for the licensing and regulation of certain agencies in Idaho as set out in the language of Idaho Code § 26-2223. Under this provision a "Collection agency, debt counselor, credit counselor, or credit repair organization" is required to obtain a license. As indicated "No person shall without complying with the terms of this act and obtaining a license from the director" undertake any of the enumerated acts. The operative issue here is whether Wall's activities fall within the scope of these provisions and therefore require licensing.

Subsection (1) provides:

> (1) Operate as a collection agency, debt counselor, credit counselor, or credit repair organization in this state.

The Department concedes initially, as to subsection (1) that the subject activities of Wall are not within two of the listed categories of collection activities. That is first, debt collection activities and second, credit repair organizations. See Idaho Code § 26-2222(3) and (5). Rather, at issue here is the scope of the third category, that of "debt counselor" or "credit counselor".

As indicated in Idaho Code§ 26-2222(9) "'Debt counselor' or 'credit counselor' means any person engaged in any of the activities enumerated in subsection (7) of Idaho Code § 26-2223.

These activities concern certain conduct which is described as follows:

> (7) Engage or offer to engage in this state in the business of receiving money from debtors for application or payment to or prorating of a debt owed to, any creditor or creditors of such debtor, or engage or offer to engage in this state in the business of providing counseling or other services to debtors in the management of their debts, or contracting with the debtor to effect the adjustment, compromise or discharge of any account, note or other indebtedness of the debtor.

The Department asserts that the actions of Wall fall within the language of the second and third listed activities of this subsection. That is Wall provides "counseling or other services to debtors in the management of their debts" and/or Wall adjusts, compromises or discharges debtors accounts, notes or other indebtedness. These contentions focus upon Wall's activities to compromise

or satisfy the tax liabilities of their clients.

It is noted that the provisions of Idaho Code § 26-2223(7) are listed by way of the disjunctive "or" and therefore to fall within the scope of the language a party need only engage in any one of the enumerated activities not all of the enumerated activities.

Wall in response does not dispute that they provide counseling or services to adjust or compromise a client's liabilities but contend that the subject tax obligations for which Wall performs services, do not fall within the scope of "debt" as found under the subject Idaho Code provisions.

The Act as a whole and in particular the language of the pertinent Idaho Code §§ 26-2222 and 26-2223 do not contain a definition of the terms "debt," "debtor," or "indebtedness." In the language at issue, Idaho Code § 26-2222(9) contains merely a cross-referential definition of "debt counselor" as a person engaged in the activities enumerated in § 26-2223(7).

The parties have presented arguments regarding the definition which should be used for the term "debt" and in particular whether that definition would ultimately encompass tax obligations.

Following the guideline that the language of a statute should be given its plain, usual and ordinary meaning, the initial question which arises in the interpretation of this language is whether the term debt is one which has such a plain and ordinary meaning or is instead ambiguous. As indicated, Idaho Code §73-113 (2) provides:

If a statute is capable of more than one (1) conflicting construction, the reasonableness of the proposed interpretations shall be considered.

In general debts refer to obligations and liabilities to pay another party. Webster's Dictionary and Black's Law Dictionary defines "debt" and in turn debtor" as "1. Something owed, as money, goods, or services. 2. An obligation or liability to pay or render something to

another." *Webster's* II *New College* Dictionary (1995), p. 291. A "debtor" is defined as, "1. One who owes something to another." *Id.* A "debt" is also defined as: "1. Liability on a claim; a specific sum of money due by agreement or otherwise." Black's Law Dictionary, (10th ed.) p. 488. "Debtor" is further defined as: "1. Someone who owes an obligation to another, esp. an obligation to pay money." *Id.* at 490.

Wall advances a number of arguments which they assert preclude the interpretation of the definition of debt to include a tax obligation. This includes distinctions between the nature and enforcement of the obligation and the government based origin of the liability. As examples Wall notes the differences in definitions under federal statutes, See e.g. 15 U.S.C. § 1692a (5) as well as exemption and bankruptcy discharge status. See e.g. 11 U.S.C. § 523 and Idaho Code § 11-607. Also cited are rulings from other jurisdictions which have distinguished tax from debt noting that the characteristics of a tax is one which imposes an enforced contribution which differs from an obligation based upon contract or an agreement between parties. See e.g. *State ex rel. Tillman v. Dist. Court of Tenth Judicial Dist. in & for Fergus County,* 53 P.2d 107 (Mont. 1936); *Scott v. Travelers Indem. Co.,* 384 S.W.2d 38 (Tenn. 1964).

A review of Idaho case law reveals that the Idaho Supreme Court has, however, under different circumstances had call in the past to interpret the meaning of "tax" as it related to the term "debt". In the analysis of the two terms and their relation to each other, the Court in the interpretation of a then piece of territorial legislation, was confronted with the question of whether tax is encompassed within the meaning of debt. As determined by the Court:

> It is quite true that there are scarcely any two words in the language that have precisely the same shade of meaning or signification in all their uses or combinations. Much more is this true of these terms. The term "tax" may and does not in every sense or connection comprehend all the shades of meaning conveyed by the word " debt," but the latter may, and often does, in all correctness, include or convey the same idea we wish to express by the former, in at least its' less technical sense, and many times much more.

Haas v. Misner & Lamkin 1 Idaho 170, 174 (1867), 1867 WL 2032.

In the analysis, the Idaho Supreme Court considered authority from other jurisdictions, including California, which had held a tax was not a debt, but rejected that interpretation. The matter at hand in *Haas* concerned the allowed form of payment for debts, coin versus currency, and which conflicting law in that regard controlled. *Haas*, however, was subsequently criticized, without being directly overturned, by the Idaho Supreme Court in the case of *Crutcher v. Sterling* 1 Idaho 306 (1869). Following the ruling in *Haas*, the United States Supreme Court had issued its decision in the case of *Lane County v. Oregon*, 74 U. S. 71 (1868). The United States Supreme Court adopted the logic expressed by the California courts (the same authority rejected by the Idaho court in *Haas*) and in that decision ruled opposite to that of the Idaho Supreme Court in *Haas*. *Crutcher*, while highlighting these contrary views, nonetheless notes that the ruling in *Haas* remained the law of the territory until overruled or superseded. *Crutcher*, 1 Idaho at 309.

Although ruling on a separate piece of then territorial legislation, which is obviously different than the subject provision of the current Idaho Code, the analysis of the court in *Haas* should not be ignored. It is a reasoned examination of the same basic issue as presented here. Is a tax a debt, at that time for purposes establishing what is an acceptable form of payment for a liability; here whether a party within the scope of certain activities, is engaging in acts concerning a debt or on behalf of a debtor. The reasonableness of the historical interpretation of the term debt as including tax is therefore evident. Preference for this already established interpretation can be given.

Tax being a form of debt has also been recognized more recently by the Idaho Supreme Court and the Idaho Court of Appeals as part of language used by the Idaho courts when referencing a tax obligation and characterizing such as a debt. See e.g. *Bills v. State of Idaho*,

Department of Revenue and Taxation, 110 Idaho 113, 714 P.2d 82 (Idaho Ct. App. 1986); See also, *Christian v. Mason*, 219 P.3d 473, 148 Idaho 149 (2009); *Idaho State Tax Com'n v. I R Trucking Trust*, 144 Idaho 20, 156 P.3d 521 (2007); *Swope v. Swope*, 112 Idaho 974, 739 P.2d 273 (1987); *Thomas v. Thomas*, 119 Idaho 709, 809 P.2d 1188 (Idaho Ct App. 1991);

The analysis though does not end there in the consideration of what construction is reasonable. When statutory analysis is undertaken, the tribunal is to ascertain the legislative intent and give effect to that intent. *State v. Beard,* 135 Idaho 641, 646, 22 P.3d 116,121 (Idaho Ct.App. 2001). To ascertain such intent, not only must the literal words of the statute be examined, but also the context of those words, the public policy behind the statute, and its legislative history. *Id.*

As further noted, Idaho Code §73-113 (2) provides: the statute must be construed as a whole. Interpretations which would render the statute a nullity, or which would lead to absurd results, are disfavored. Next, the tribunal is to "give effect to all the words and provisions of the statute so that none will be void, superfluous, or redundant." *Nelson v. Evans,* 166 Idaho 815,820, 464 P.3d 301, 306 (2020) (quoting *State v. Dunlap,* 155 Idaho 345, 313 P.3d 1, 18(2013)). See also, *State of Idaho* v. *Huckabay,* 48109, 2021 WL 402526, (Idaho Feb. 5, 2021).

Wall has presented extensive arguments regarding statutory interpretation and an examination of legislative intent to support its position that an interpretation of debt as including tax liabilities here would violate rules of statutory construction and is precluded.

Wall asserts that the intent of the statute is in part apparent from subsequent modifications made to the language of Idaho Code § 26-2223, which Wall contends illustrate changes showing restrictive application of the provisions. Further noted is a previous Supreme Court case critical of the broad language of this section. See, *Davis v. Prof. Bus. Services, Inc.*, 109 Idaho 810, 712 P 2d 511 (1985).

An examination of the statutory history in order to ascertain legislative intent, however, reveals the contrary, an expansion of the scope of the statutory provision and the activities enumerated and regulated by the Department.

Prior to 1990 the language of the statute concerned activities involving collection agencies and credit counselors. In 1990 the section had added to it the then new category of "debt counselor". This change expanded the section to regulate both credit and debt counseling. As indicated in the Statement of Purpose of the legislation, "(t)he purpose of the proposal was to create a new category of licensee in the Collection agency law called debt counselor". See, Statement of Purpose RS 24232 S1618, Senate State Affairs Minutes 3/12/1990; see also, Hart Reply Declaration Exhibit 2. These statutory changes are not viewed as ones which illustrate an intent to narrow the scope of the statute's application.

Following these changes, in 2002 the provision was again amended. The origin of the language at issue in this matter comes from those amendments. Those changes modified section (7) of the statute and added the language:

> providing (counseling) or other services to debtors in the management of their debts, and contracting with the debtor to effect the adjustment, compromise or discharge of any account, note or other indebtedness of the debtor.

See, Hart Reply Declaration Exhibit 4.

In 2008 the "and" which qualified the phrase beginning with "contracting" was changed to an "or". Also added was the qualifying phrase "in this state".

Following 2008, the statute now reads as is at issue in this matter:

> (7) Engage or offer to engage in this state in the business of receiving money from debtors for application or payment to or prorating of a debt owed to, any creditor or creditors of such debtor, or engage or offer to engage in this state in the business of providing counseling or other services to debtors in the management of their debts, or contracting with the debtor to effect the adjustment, compromise or discharge of any account, note or other indebtedness of the debtor.

See, Hart Reply Declaration Exhibit 5.

That is as of 1990, the regulation expands to add "debt counselor" to the previous named regulated licensee category of "credit counselor", then in 2002 adding a designation of "other" services to modify the term counseling. Following this is the addition of a descriptive phrase regarding work performed for the debtor. This language while initially phrased in the conjunctive with an "and" was then in 2008 changed to the disjunctive "or" giving an additional expansion to the language scope.

Telling also is additional language in the statement of purpose found in the Senate Journal for 2002 which indicates that the modifications in the language were to "Revise conduct prohibited absent compliance with the provisions of Chapter 22, Title 26." See, Senate Journal 1/16/2002; Hart Reply Declaration Exhibit 4.

The effect of these amendments is interpreted as a continual expansion of the enumerated activities covered and regulated under the provision. The revisions continue in a pattern illustrating an intent to broaden rather than reduce the scope of regulation.

It should be noted that the previous Idaho Supreme Court decision of *Davis* cited by Wall, was issued in 1985, prior to the subject language amendments.

The analysis of the provision and determination of the legislative intent though, is also dependent upon the context of the language of the statute. In this regard Wall asserts that several canons of statutory construction result in the conclusion that the provision must be read as not including tax within the meaning of debt. Under the doctrine of *ejusdum generis* it is argued that the interpretation must be done in a manner which limits the scope of the phrase "other indebtedness of the debtor". This principal of interpretation is explained as that "where general words of a statute follow an enumeration of persons or things, such general words will be

construed as meaning persons or things of a like or similar class or character to those specifically enumerated". See, *Pepple v. Headrick*, 64 Idaho 132, 128 P.2d 757 (1942).

Wall argues that this doctrine, as well as the maxim *noscitur a sociis*, that a word is known by the company it keeps, provides a limit on any interpretation given to the language of the statute. Wall argues that the phrase "other indebtedness of the debtor" is strictly limited to items the same as that preceding the language, that is "account" or "note". Terms which are argued to not include tax liabilities.

Ejusdum generis as a doctrine of construction though is not as conclusive as advanced by Wall. Note should be made that the interpretation of this rule as advanced by Wall is a somewhat narrow reading of the application. As indicated in at least one definition, "the rule, however, does not necessarily require that the general provision be limited in its scope to the identical things specifically named. Nor does it apply when the context manifests a contrary intention." Black's Law Dictionary Revised Fourth Edition (1968).

The case of *In re Winton Lumber Co.*, 57 Idaho 131, 63 P.2d 664 (1936) is instructive:

> the rule (that of ejusdem generis) can be used only as an aid in ascertaining the legislative intent, and not for the purpose of controlling the intention or of confining the operation of a statute within narrower limits than was intended by the lawmakers...;

Further,

> Other rules of construction are equally potent, especially the primary rule which suggests that the intent of the legislature is to be found in the ordinary meaning of the words of the statute. The sense in which general words, or any words, are intended to be used furnishes the rule of interpretation, and that is to be collected from the context; and a narrower or more extended meaning will be given, according as the intention is thus indicated. The doctrine of *ejusdem generis* yields to the rule that an act should be so construed as to carry out the object sought to be accomplished by it, so far as that object can be collected from the language employed.

Id; 57 Idaho at 135-36, 63 P.2d at 668 (1936).

See also, *Alegria v. Idaho First Nat Bank,* 111 Idaho 314, 316, 723 P.2d 858, 860 (1986); (Consideration of the purpose of the legislation rather than using ejusdem generis to determine a more narrow meaning); *Willard v. First Security Bank of Idaho,* 69 Idaho 265, 206 P.2d 770 (1949). The effect of the rule does not limit or restrict the general category to those previous specific terms but things of a like class.

In the examination of intent, also of note here, is that in the subject language of Idaho Code § 26-2223 (7) the "of any account, note or other indebtedness" uses the word "any" as a determiner in the sentence. As such, with the placement before the list of subject nouns, it is being used in the strong rather than weak form in an affirmative manner. This evidences a class which is not limited. The use here indicates all of the potential subject items of the class of indebtedness. This is supported by the further use of the word "other" prior to "indebtedness" in the sentence. In other words "any" modifies "account", "note" and "other indebtedness." This further supports a broad reading of the terms.

Wall also argues that an interpretation of the term "indebtedness" in Idaho Code § 26-2223 (7) cannot be in a broad manner such as to include tax within the meaning, as that would render the preceding language of the section, that which lists "account, note" superfluous. This argument though, fails to address the reverse consequence. That is if "account" and "note" were intended as the sole types of obligations to be included, the later qualifier "other indebtedness" would then be unnecessary. This again presents an indicator of the intent to be of greater inclusion not less in the phrase "other indebtedness."

The statutory framework, however, must be construed as a whole in the interpretation in order to find insight into the underlying intent.

> [s]eparate statutes dealing with the same subject matter should be construed harmoniously, if at all possible, so as to further the legislative intent. *State v. Paul,* 118 Idaho 717, 800 P.2d 113 (Ct.App.1990). This is especially true when the statutes to be

interpreted have been enacted by the same session of the legislature. *State* v. *Casselman,* 69 Idaho 237, 205 P.2d 1131 (1949).

State v. *Maland,* 124 Idaho 537, 540, 861 P.2d 107, 110 (Id. Ct. App. 1993).

An additional argument advanced by Wall, focuses upon the use of the word "indebtedness" or "other indebtedness" in the various subsections of I. C. § 26-2223 and potential inconsistencies if the terms are to include tax within their scope. This concerns language found in subsections (2), (3) and (6) of the statute. These arguments also note the distinction in the enumerated listing found in subsection (7) of the statute with "account, note" compared to "account, bill, claim" found in subsections (2) and (3) of the statute. These distinctions and arguably the underlying intent with the language can be addressed by noting that subsections (2), (3) and (6) concern a number of activities and in those subsections, actions of collection agencies, and not that as addressed in the latter language as found in subsection (7).

The use and phrasing of the word "indebtedness" is not uniform in the statute and its subsections. The word is used in connection with the word "other," also in the phrase "any form of," and simply as "the" indebtedness. While a term appearing in several places in a statutory text should be and generally is read the same way each time it appears, consistent meaning does yield to the convention of applicable language phrasing. Here variations can be interpreted as the result of the distinctions found in expressing the scope of different enumerated activities to be regulated. Wall notes in particular the use of "any form of indebtedness" as in Idaho Code § 26-2223 subsection (6) compared to that of "other indebtedness" of subsection (7). Wall, argues that these differences indicate a more narrow meaning in subsection (7). This again is answered by the use of the word "any" as a modifier to the language.

Consideration of the use of the language to determine intent does to some degree raise questions, in light of corresponding changes made to other statutory provisions within the same

code chapter. As would be expected amendments to Idaho Code § 26-2223 were not made in isolation. Amendments when made in 1990, 2002 and 2008 were also made to Idaho Code § 26-2222, the definitional statute found in this chapter.

Wall's arguments note that the interpretation of the definition of "debt" should be tied to that of "creditor" as used in these statutory sections. Wall argues that the limits by definition of the term "creditor," which includes a reference to "person", thereby excluding a liability to a governmental entity, establishes the scope of the corresponding term "debt". See Idaho Code § 26-2222 (6) and (14). This argument is rejected as not directly illustrative of the intent of the subject language at issue and does not directly limit the scope of the definitions of debt and indebtedness. The limits and modifications of those statutory provisions are not such to directly impact the language of the provision in question. While this carries effect on the potential application of certain parts of Idaho Code § 26-2223 (7) it is not determinative as to the meaning of the terms at issue.

Of more direct concern, however, is the change in the statutory history of the definition of "Debt counselor" found in Idaho Code § 26-2222 (9). It is noted that the cross reference of this subsection, to enumerated activities under Idaho Code § 26-2223, has changed in the course of the various amendments to both Idaho Code § 26-2222 and 2223. Initially this term was defined by activities more narrow than currently expressed. The definition when combined with that of "Credit counselor" in the 2008 amendment (again, the current language version) places the language at issue in this matter within the definition of acts by both a "Debt counselor" and a "Credit counselor". This was not always the configuration of the statutory language.

This can be argued to reflect on the intent of the legislature in the original meaning of the provision and in turn the scope of the subject language under consideration. The nature of the amendment though and the progress of continued expansion of the statutory scope of regulation

address this concern. Further, the current language of the provision (adopted in 2008) clearly expanded the definition section when placing both "Debt counselor" and "Credit counselor" within a combined definition section (Idaho Code § 26-2222 (9)). One which now covers a number of enumerated activities under Idaho Code § 26-2223 previously separated under earlier subsections of the statute. Although the subject language of current subsection (7) was originally listed as that of a "Credit" not "Debt" counselor, this language was subsequently modified in 2008 to place the activities at issue under the definition of, as expressed above, both "Debt counselor" and "Credit counselor". As noted this had an effect of expanding the applicable language, not restricting regulated activities. As expressed in *Gonzalez* v. *Thacker, 148 Idaho 879, 883,* 231 P.3d 524, 528 (2009):

> where an amendment is made it carries with it the presumption that the Legislature intended the statute thus amended to have a meaning different than theretofore accorded it.

If intent prior to that of 2002 is interpreted as not to include the subject activities within that of a "Debt counselor" this was amended and changed in 2008. As further noted in the House journal notes for the 2008 session House Bill No. 451 was:

> Amending Section 26-2222, to revise and add definitions; Amending Section 26-2223, to provide correct terminology, ... and to make technical corrections; (capitalization omitted).

Of additional note is that the State may use third parties to collect taxes on its behalf. See Idaho Code § 63-119. This statutory provision also requires that any such third party, namely a collection agency, comply with the provisions of Idaho Code chapter 22, Title 26. This would include the provisions of Idaho Code § 26-2223. If indebtedness were to not include tax, meaning the party performing this job is not collecting an obligation within the type of debts recognized within the scope of the Act, then why would the party be required to comply with the licensing mandates and other requirements of the Act? Wall asserts that the provisions of Idaho Code § 26-2223

pertaining to collection agencies, those parties with whom the State may contract to perform such work, would under Idaho Code § 26-2223 subsections (2) and (3) be collecting a "claim," and not "other indebtedness".

Wall notes that the scope of certain bankruptcy provisions would place "tax' within the meaning of "claim" which is defined as any "right to payment". See 11 U.S.C. § 101(5). This argument is not persuasive. While under the bankruptcy code, a "tax" may fall within the meaning of "claim" it is not apparent that the use of the term "claim" in Idaho Code § 26-2223 subsections (2) and (3) was to specifically place the third party collection of taxes on behalf of the State, within the scope of the Act. Subsections (2) and (3) utilize the term "indebtedness" and it is more readily interpreted to include tax within that term rather than "claim".

This is also in line with statutory language found in Title 63 Chapter 30. That of Idaho Code § 63-3050 which reads: "Any tax owed... shall constitute a debt to the state of Idaho." Although not definitional or directly controlling, the language of this statute was in effect at the time of the amendments to the subject provisions of Title 26 and can be taken as a further indicator of the scope intended by the legislature. A third party used by the State to collect a tax is collecting a debt or indebtedness and therefore is required to comply with provisions of the Act.

Wall argues that interpretation of indebtedness to include tax is precluded based upon the language of Idaho Code § 26-2229 regarding fee restrictions for debt counselors. Wall also contends that such an interpretation would prohibit fees from being charged under the language of the statute. Subsection 3(b) of the statue is as follows:

> Debt counselors... shall not charge or accept as a fee for their services more than twenty percent (20%) of the principal amount of the debtor's unsecured debt at the time of contracting for services...

Wall contends that taxes are secured obligations and that the language of Idaho Code § 26-2229 establishes that the Act only applies to unsecured debt. Then by result, a tax, argued to be a form of secured debt, cannot be within the scope of the Act.

Both parties have presented detailed arguments regarding the secured versus unsecured status of taxes and the process by which the obligation is enforced. The status, however, is not determinative of the issue of the scope of debt and indebtedness under Idaho Code § 26-2223. While statutes of the same Chapter should be read in a harmonious manner, the language of Idaho Code § 26-2229 does not indicate an intent to limit the Act solely to unsecured debt. The language of the Act, statutory history materials and case authority, do not establish such a limit on the scope of the Act. The listed exemptions found in Idaho Code § 26-2239 concern enforcement and collection of a number of types of secured debt. The inclusion of these exemptions speaks to the application of the Act to this type of debt. The language of the fee limitation is limited to, as stated, fees charged on unsecured debt. In turn Wall's arguments that these limitations preclude services for taxes, whether secured or unsecured, fails.

Wall next asserts that application of the Act to tax liabilities would also require accountants and other debtor representatives to be licensed. This result is argued to illustrate that the legislative intent was not so broad as to include taxes, based on the claimed absurd results of the extension of licensing requirements to presently unlicensed parties. Wall notes that certified public accountants in Idaho do not register, indicating the Department does not actually enforce the Act as argued in this action and that the intent of the language was not to bring accountants within the purview of the Act. See, e.g., Declaration of Trevor L. Hart In Response, Exhibit 3. Wall argues in turn that the limited scope of exemptions found in Idaho Code § 26-2239 further supports the claim that either the Act does not include tax obligations or represents selective enforcement.

These arguments though are not sufficient to either rise to the level of estoppel or to directly determine the meaning of the statutory language at issue. The activities of an accountant do not automatically fall within the language of the subject statutes nor is the issue of such application, beyond the possible impact in determining legislative intent, one for determination in this action.

The meaning of debt, debtor and indebtedness is interpreted here under the subject Idaho Code § 26-2223 (7) to include tax within the scope of the statutory language.

As discussed above, even though conflicting constructions have been advanced by the Respondent, the alleged disparate meanings do not show, even if an ambiguity exists as asserted, an intent under the language of the statute to limit the scope of the terms "debt," "debtor," and "indebtedness" to exclude a tax liability. This is supported by the showing of a legislative intent to expand the scope of regulated activities under the statute. The context of the language as amended through the years is to include a broader list of covered activities not one narrower. As a result "debt," "debt" and "other indebtedness" is interpreted not to be restrictive but expansive as to what obligation or liability is within the scope of the statutory regulation. This is in accord with context and ordinary usage of the subject language, and compatible with the surrounding statutes into which the provision is integrated. This reading provides that the term may but does not always include a tax. This also does not frustrate an evident statutory purpose in the expansion of regulated activities in this statutory provision.

This is also in conformance with the apparent statutory purpose of protecting consumers by way of requiring registration of parties whose activities fall within the purview of the statute. See, *Davis v. Prof. Bus. Services, Inc.*, 109 Idaho 810, 712 P 2d 511 (1985).

The Department contends that Wall as a result of terminology used in their advertisements to consumers uses the term "debt" in such a manner that Wall should be estopped from now

claiming the term does not include taxes. See, Stipulated Facts, Exhibits A, B, D, E, I, and K. While relevant in showing the activities of Wall as to potential violations of licensing requirements, these activities do not rise to a level where Wall is estopped to assert the non-application of registration requirements.

The result of the above statutory interpretation now raises the question of whether the activities of Wall are within the scope of the statute and in turn require Wall to obtain licensing. The Department argues that the activities of Wall are within the scope of both subsections of Subsection (7) namely the "counseling or other services to debtors in the management of their debts" and the "contracting with..." section. The evidence submitted does not directly support the claims of the Department as to activities which would establish "counseling" in a traditional ordinary meaning.

The record is, however, sufficient to establish actions which illustrate Wall has engaged in activities which are intended on behalf of a debtor to "effect the adjustment, compromise, or discharge..." of its indebtedness. Evidence submitted in this matter by stipulation supports the conclusion that the activities of Wall are within the language of subsection (7) of Idaho Code § 26-2223. See, Stipulated Facts, paragraphs 5-11, Exhibits F-K. Based in part upon the client agreement executed by Wall, Stipulated Facts, Exhibits F, G and H, it is apparent that Wall agrees to act on behalf of the client to at a minimum "compromise" the tax liability of said client, activity clearly within the subject statutory language. See also, Stipulated Facts, Exhibits I-K.

Exemptions from the requirement of obtaining licensing under Idaho Code § 26-2239 have not been established to apply to Wall. No evidence has been submitted which would place Wall within any of the enumerated categories. See Idaho Code § 26-2239; Stipulated Facts, Pages 2-3.

Wall has also presented arguments that federal law preempts application of the Act. Wall notes in particular an Internal Revenue Circular, number 230 pertaining to requirements of 31

CFR Part 10 and regulations regarding appearance and practice before the Department of Treasury and the IRS. Wall presents a conflict preemption argument, contending that the Idaho licensing requirement imposes impermissible restrictions on Wall to negotiate on behalf of clients before the IRS. Wall cites to the case of *Sperry v. Florida*, 373 U.S. 379 (1963) in support of the claim that the Act is therefore superseded.

The Department has presented in its materials a decision rendered by a Minnesota District court which confronted a similar preemption argument. *State of Minnesota V. Wall & Associates* (District Court Fourth Judicial District, County of Hennepin, File No. 27-CV-19-19874, Decision dated 8/1/2019). The analysis by that tribunal is persuasive. The federal regulations do not contain an expression that Congress in those regulations intended to preempt state law. Further, the federal regulations do not preclude supplemental or additional state regulation. Idaho's Act would require Wall to be licensed; this is not a bar to the allowance of Wall to represent clients before the IRS.

Preemption is also noted as being disfavored in the area of traditional state police powers. See e.g. *Medtronic, Inc. v. Lohr,* 518 U.S. 470,485 (1996). The requirements to establish preemption are not met in this case. Idaho has within its police powers the authority to regulate credit and debt counselors, *Hankins v. Spaulding*, 78 Idaho 533, 307 P.2d 222 (1957). The state licensing requirement is not in conflict with the subject federal regulations.

Wall presents multiple arguments related to the provisions of Title 63 Chapter 40, The Idaho Taxpayer Bill of Rights. Initially, in that Chapter, the definition section found in Idaho Code § 63-4001 characterizes tax as that of a "liability" or "obligation" and does not use the word "debt". This does not though, preclude a finding that such liability or obligation is within the meaning of that term. It is also weighed against the previously noted language found in Title 63 Chapter 30, in Idaho Code § 63-3050 which characterizes a tax as constituting a debt.

Wall also argues that the Idaho Taxpayer Bill of Rights prevents or invalidates application of the Act's licensing requirement, as it would prevent Idaho citizens from freely nominating any party of their choice to represent them, in contravention to the protection of the rights expressed in Chapter 40. These arguments regarding the Taxpayer Bill of Rights do not invalidate the interpretation of debt as including a tax. The scope of representation under the Taxpayer Bill of Rights before the State Tax Commission does not automatically entail matters which would require licensing under the Act. It cannot be concluded that enforcement of the Act would preclude or unduly restrict the rights of Idaho taxpayers. Further, registration of certain parties under the Act is not somehow a bar to Idahoans selecting a representative.

Wall also contends that the Department should be estopped from asserting the present claims that Wall is subject to the Act. This defense is rejected as inapplicable as against the Department under these facts. *Hollingsworth v. Thompson*, 478 P 3d. 312 (2020); *Sagewillow, Inc. v. Idaho Dep't of Water Res.*, 138 Idaho 831, 845, 70 P.3d 669, 683 (2003); The course of events between these parties does not represent grounds sufficient to establish a showing of manifest injustice as required. *See, e.g. City of Sandpoint v. Sandpoint Ind. Hwy. Dist.*, 126 Idaho 145, 151, 879 P.2d 1078, 1084 (1994). Wall's claims of selective enforcement based upon an assertion that other potential parties would be subject to the Act if the registration requirement is extended to Wall, similarly do not reach the level which would warrant application of quasi-estoppel against the Department.

Wall further argues that the Department's action is subject to the statute of limitations found in Idaho Code § 5-218 and 5-224. These limitations do not apply to the actions of the State when acting in its sovereign capacity to enforce a public right. *Young Electric Sign Company v. State ex rel. Winder*, 135 Idaho 804, 25 P.3d 117 (2001).

Next, Wall asserts that the doctrine of *desuetude* precludes application of the Act as a result of a history of non-enforcement by the Department. Although a period of time did elapse between the actions of the Department in 2011 and 2019 it is not apparent that this delay is of a sufficient time period to support a determination that the Department consistently failed to enforce the Act such that it would be determined as void. See Kinney Declaration, Exhibit O-R. Exchanges made between the parties also belie potential claims of inadequate notice and fairness due to selective enforcement, common concerns in the application of the doctrine.

Wall has presented arguments alleging that the Act is unconstitutional. This question is by Idaho Rules of Administrative Procedure 04.11.01.000, Rule 415, outside of the scope of authority of the Hearing Officer.

IT IS HEREBY ORDERED that Wall's Motion for Summary Judgment is hereby denied as to the request to dismiss the Department's claims against Wall.

Further, at this time the Department's Motion for Preliminary Order is hereby granted as to a finding that:

1) That Wall and Associates, Inc. has and is engaging in conduct as a debt counselor without a license in violation of Idaho Code Section 26-2223(1) and (7);
2) That Wall has engaged in fifty-four (54) separate violations from 2011 to 2020;
3) That, pursuant to Idaho Code section 26-2244(1) Wall is ordered to cease and desist all future conduct within the scope of the Idaho Collection Agency Act, Title 26, Chapter 22, Idaho Code and all future violations of the Act unless and until it becomes licensed thereunder;
4) That pursuant to Idaho Rules of Administrative Procedure 04.11.01.000, Rule 564, the parties submit further materials within 14 days of the date of this preliminary order, including

briefing, regarding the penalties and restitution sought by the Department, in the event of a filing of a Motion for Reconsideration of this Preliminary Order, the timeline for such filing shall be extended until the resolution of such Motion for Reconsideration;

5) That this decision and preliminary Order shall at present remain confidential and not open and available to the public.

NOTIFICATION OF RIGHTS

This is a preliminary order of the Hearing Officer. It can and will become final without further action of the Department of Finance unless any party petitions for reconsideration before the Hearing Officer or appeals to the Director for the Department of Finance (or the designee of the Director). Any party may file a motion for reconsideration of this preliminary order with the Hearing Officer within fourteen (14) days of the service date of this order. The Hearing Officer will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. *See* Idaho Code §67-5243(3).

Within fourteen (14) days after (a) the service date of this preliminary order, (b) the service date of the denial of a petition for reconsideration of this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration of this preliminary order, any party may in writing appeal or take exception to any part of the preliminary order and file briefs in support of the party's position on any issue in the proceeding to the Director of the Department of Finance (or the designee of the Director.) Otherwise, this preliminary order will become a final order of the Department of Finance.

If any party appeals or takes exception to this preliminary order, opposing parties shall have twenty-one (21) days to respond to any party's appeal within the Department of Finance. Written briefs in support of or taking exception to the preliminary order shall

be filed with the Director of the Department of Finance (or the designee of the Director). The Director may review the preliminary order on his own motion.

If the Director of the Department of Finance (or his designee) grants a petition to review the preliminary order, the Director (or his designee) will allow all parties an opportunity to file briefs in support of or taking exception to the preliminary order and may schedule oral argument in the matter before issuing a final order. The Director (or his designee) will issue a final order within fifty-six (56) days of receipt of the written briefs or oral argument, whichever is later, unless waived by the parties for good cause shown. The Director (or his designee) may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order.

Pursuant to Idaho Code §§ 67-5270 and 67-5272, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which: (1) the hearing was held, (2) the final agency action was taken, (3) the party seeking review of the order resides, or operates its principal place of business in Idaho, or (4) the real property or personal property that was the subject of the Department's action is located.

This appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. *See* Idaho Code § 67-5273. The fling of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.

DATED this 14th day of June, 2021.

By: David V. Nielsen
David V. Nielsen
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of June, 2021, I served a true and correct copy of the foregoing by delivering the same to each of the following party, by the method indicated below, addressed as follows:

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BEFORE THE DIRECTOR OF THE DEPARTMENT OF FINANCE

STATE OF IDAHO

STATE OF IDAHO, DEPARTMENT OF FINANCE, CONSUMER FINANCE BUREAU, Complainant, v. WALL & ASSOCIATES, INC., A VIRGINIA CORPORATION, Respondent.	Docket No. 2019-9-10 **ORDER RE: MOTION FOR RECONSIDERATION**

This matter having come before the Hearing Officer on the Motion of Respondent for reconsideration of the Hearing Officer's Decision and Order Regarding Complainant's Motion For Preliminary Order And Respondent's Motion For Summary Judgment, dated June 14, 2021, the following decision is entered.

The Respondent in this matter has presented several arguments for reconsideration, which will be addressed in turn.

Wall initially argues that the use of the term "principal" in Idaho Code § 26-2229 (3) (b) demonstrates that taxes cannot be within the definition of debt, as the limitations imposed under that section regarding fee limitations, to that of 20% of the principal amount owed, cannot be applied to a tax liability. Wall argues that "principal" does not fit within meaning of a sum owed as a tax obligation. As asserted, "principal" is argued to be incapable of application to obligations other than those from a private (meaning non government) lenders. Further argument contends again that a tax

liability is always a secured obligation, thus effectively precluding application of the fee limitation provision and illustrating that the interpretation of tax as a debt leads to absurd results in such statutory construction. Wall notes that the term "principal" is not used in the Idaho Code or in reviewed Idaho case authority to describe an amount owed as a tax liability.

As to the last point here, this absence of the term "principal" when describing a tax obligation in the Idaho Code, is not determinative. Regarding the use of the term "principal" in the Act and in Idaho Code § 26-2229 , the term is not defined. The ready application of a meaning which includes that of the underlying or base amount of the subject obligation or liability is, however, apparent. As noted by the Department "principal "is commonly defined in terms of the "sum of money owed". It is not without reasonable basis to use such a meaning in the potential application of Idaho Code § 26-2229.

There is also insufficient authority to support Wall's assertion that "principal" only refers to an obligation arising from a private non governmental source. As further noted by the Department, tax obligations are certainly subject to additional charges, such as interest and penalties based upon the initial sum owed. Interpretation of this underlying original amount as an origin or "principal" sum does not lead to absurd results. Wall's further arguments that this restriction renders Wall incapable from being able to collect a fair or adequate fee are also not determinative. The fee limitation provision found in Idaho Code § 26-2229 does not preclude any number of potential configurations, flat, hourly, etc. which could be utilized. The restrictions of Idaho Code § 26-2229 state a ceiling on charges which may be imposed. The question of the adequacy of fees charged does not itself indicate that the legislature intended to preclude taxes as being within obligations regulated under the Act.

Concerning the renewed arguments regarding secured versus unsecured status of a tax obligation, as stated in the decision and order, the language of Idaho Code § 26-2229 does not

indicate an intent to limit the Act solely to unsecured debt. The language of the Act, statutory history materials and case authority, do not establish such a limit on the scope of the Act.

Wall next contends that the Decision and Order failed to adequately address the issue of the definition of Creditor and the impact of that definition on the meaning of "debt" and "debtor" within the language of Idaho Code § 26-2223. This argument fails. The definition of creditor is not interpreted, as found under the Act, to be a basis for excluding tax from the meaning of debt. The limitations of 'creditor" within the language of the Act, does not directly limit the term "debt".

Next, in the Motion, Wall asserts as argued earlier in the original Motion for Summary Judgement, that the doctrine of construction, e*jusdum generis,* precludes the interpretation of the subject language of Idaho Code § 26-2223(7) to include tax within the definition of debt. This argument though has not presented any additional basis which would require a change in the earlier decision and order. While *ejusdum generis* is part of the methodology used in undertaking a statutory analysis it does not automatically result in the restrictive interpretation argued by Wall in this matter. The use of the phrase "or other indebtedness" does not when following the words "account" and "note" restrict "other indebtedness" to solely obligations arising from accounts or notes. "Other indebtedness" is from the context, interpreted to be a broader more inclusive reference. Again, the use, when preceded by the word, earlier in the subject language, of "any" indicates all of the potential subject items of the class of indebtedness.

Wall notes that it does not contend the language of the statute is limited solely to that of an account or note but "other indebtedness" must be limited to similar liabilities, those which are exclusively private, not governmental based liabilities. This argument though ignores the noted inclusive use of the term "any" as language preceding the terms "account" and "note" in subpart (7). Wall's arguments attempt to impose a narrow interpretation of the statutory language and

restrictive reading of the use of *ejusdum generis.* The doctrine is an aid in the determination of the intention of the statute, not a rigid application rule that precludes the underlying object of the language which is interpreted to include an indebtedness such as a tax imposed upon an individual.

Next as to the effect of Idaho Code § 63-3050 and § 63-119 the arguments presented similarly do not reach the level nor present new grounds which warrant a revision of the early decision. The interpretation of Idaho Code § 63-3050 by the Idaho Supreme Court has not indicated that the underlying obligation is something other than a debt as indicated by the statute. The enforcement method may entail means used to collect as per a lien foreclosure but that itself does not change the character of the obligation to something which would restrict the meaning of the term "debt" as applied under the Act.

Wall also notes the reference made to the decision of *Haas v. Misner & Lamkin,* 1 Idaho 170, 174 (1867), 1867 WL 2032 and argues that this opinion is not of authoritative value. This decision was not the determinative basis for the rulings entered in the Decision and Order of June 14, 2021. As noted, the analysis in that case was a reasoned examination of the same basic issue at hand in this matter and was considered in the determination of the ultimate interpretation of the term. The Officer notes the statutory analysis undertaken in the Decision.

Wall has cited the decision of *Lemhi County v. Boise Livestock Loan Co.,* 47 Idaho 712, 278 P. 214 (1929) in support of the proposition that the Idaho Supreme Court has subsequently determined that taxes are not debts. *Lemhi County*, notwithstanding, as was noted in the Decision and Order of the Hearing Officer, the Idaho Supreme Court has recognized in language and characterization, taxes as debts in several decisions, See e.g. *Bills v. State of Idaho, Department of Revenue and Taxation*, 110 Idaho 113, 714 P.2d 82 (Idaho Ct. App. 1986); See

also, *Christian v. Mason*, 219 P.3d 473, 148 Idaho 149 (2009); *Idaho State Tax Com'n v. I R Trucking Trust*, 144 Idaho 20, 156 P.3d 521 (2007); *Swope v. Swope*, 112 Idaho 974, 739 P.2d 273 (1987); *Thomas v. Thomas*, 119 Idaho 709, 809 P.2d 1188 (Idaho Ct App. 1991).

The arguments presented by Respondent in the Motion for Reconsideration do not provide sufficient grounds to overturn the Order.

IT IS HEREBY ORDERED that the Respondent's Motion for Reconsideration is denied. Further,

1) Pursuant to Idaho Rules of Administrative Procedure 04.11.01.000, Rule 564, the parties are to submit further materials within 14 days of the date of this Order, including briefing, regarding the penalties and restitution sought by the Department.

2) That this decision and the preliminary Decision and Order dated June 14, 2021 shall at present remain confidential and not open and available to the public.

DATED this 14th day of July, 2021.

By: David V. Nielsen
David V. Nielsen
Hearing Officer

NOTIFICATION OF RIGHTS

This is a preliminary order of the Hearing Officer. It can and will become final without further action of the Department of Finance unless any party petitions for reconsideration before the Hearing Officer or appeals to the Director for the Department of Finance (or the designee of the Director). Any party may file a motion for reconsideration of this preliminary order with the Hearing Officer within fourteen (14) days of the service date of this order. The Hearing Officer will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. *See* Idaho Code §67-5243(3).

Within fourteen (14) days after (a) the service date of this preliminary order, (b) the service date of the denial of a petition for reconsideration of this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration of this preliminary order, any party may in writing appeal or take exception to any part of the preliminary order and file briefs in support of the party's position on any issue in the proceeding to the Director of the Department of Finance (or the designee of the Director.) Otherwise, this preliminary order will become a final order of the Department of Finance.

If any party appeals or takes exception to this preliminary order, opposing parties shall have twenty-one (21) days to respond to any party's appeal within the Department of Finance. Written briefs in support of or taking exception to the preliminary order shall be filed with the Director of the Department of Finance (or the designee of the Director). The Director may review the preliminary order on his own motion.

If the Director of the Department of Finance (or his designee) grants a petition to review the preliminary order, the Director (or his designee) will allow all parties an

opportunity to file briefs in support of or taking exception to the preliminary order and may schedule oral argument in the matter before issuing a final order. The Director (or his designee) will issue a final order within fifty-six (56) days of receipt of the written briefs or oral argument, whichever is later, unless waived by the parties for good cause shown. The Director (or his designee) may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order.

Pursuant to Idaho Code §§ 67-5270 and 67-5272, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which: (1) the hearing was held, (2) the final agency action was taken, (3) the party seeking review of the order resides, or operates its principal place of business in Idaho, or (4) the real property or personal property that was the subject of the Department's action is located.

This appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. *See* Idaho Code § 67-5273. The fling of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.

DATED this 14th day of July, 2021.

By: David V. Nielsen

David V. Nielsen
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of July, 2021, I served a true and correct copy of the foregoing by delivering the same to each of the following party, by the method indicated below, addressed as follows:

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BEFORE THE DIRECTOR OF THE DEPARTMENT OF FINANCE

STATE OF IDAHO

STATE OF IDAHO, DEPARTMENT OF FINANCE, CONSUMER FINANCE BUREAU, Complainant, v. WALL & ASSOCIATES, INC., A VIRGINIA CORPORATION, Respondent.	Docket No. 2019-9-10 **ORDER REGARDING RESTITUTION AND PENALTIES**

This matter having come before the Hearing Officer on the Motion of Complainant (the Department) to impose penalties and order restitution following entry of the Order regarding the parties cross Motions for Summary Judgement the following decision is entered.

The Department seeks penalties pursuant to Idaho Code Section 26-2244 (2)(a) which provides for a maximum penalty of $5,000.00 for each code violation.

The Department also seeks restitution based upon Idaho Code Section 26-2244(2)(b) and language which provides for the issuance of an order "restoring any person in interest any consideration that may have been acquired or transferred in violation of this act..."

Both parties acknowledge that under Idaho Code Section 26-2244(2) the ultimate imposition of an award of restitution and/ or penalties is a discretionary matter.

Turning first to the subject of penalties, based upon the prior determination that Wall

and Associates, Inc. has and is engaging in conduct as a debt counselor without a license, in violation of Idaho Code Section 26-2223(1) and (7), and that Wall has engaged in fifty four (54) separate violations from 2011 to 2020. Respondent is ordered pursuant to Idaho Code Section 26-2244 (2)(a) to pay a civil penalty to the Department of Finance of $3,000 per violation, for a total penalty amount of $162,000.

Next as to the award of potential restitution, both parties have presented numerous materials regarding the activities of Respondent as concerns the fifty four Idaho clients. Respondent performed services for these clients from the time period of 2011 through 2019.

The Department has presented in its arguments several calculation methods for a potential restitution recovery. The first is the simplest method, which is a straight return of all fees expended by all fifty four Idaho clients of Respondent. As part of this argument the Department's focus is upon the underlying failure of Respondent to follow the directions of the Department and obtain licensing when requested and the continuation of unlicensed activities known to be in violation of the registration requirements. The Department asserts that a full restitution of all sums paid is therefore warranted. This amount is calculated at $661,339.00. Exhibit 1, Declaration of Counsel for the Department.

The second calculation method advanced by the Department is an alternate method which attempts to limit the restitution award to those Idaho clients who failed to receive, as asserted by the Department, a financial benefit from the services provided by Respondent. The Department contends that the examination of client file materials produced, reveal only eight of the fifty four Idaho clients received a benefit as a result of engaging the services of Respondent. This sum is then calculated at $576,681.00. Exhibit 1, Declaration of Counsel for the Department; *See also*, Exhibit P to Stipulated Facts.

A third alternate calculation method presented by the Department is based upon the language of Idaho Code Section 26-2229(3)(b) which provides a fee limitation for charges made by debt counselors. This section limits charges which may be imposed for services to 20% of the amount of a client's debt and a 50% refund requirement in the event of contract cancellation. These percentage amounts are advanced by the Department as a means to calculate partial restitution sums for certain groupings of clients based upon their underlying tax obligations when they entered into contracts with Respondent or for clients who received no settlement of their debts through the services of Respondent.

An initial matter raised by the Respondent concerns the potential application of a statute of limitations for any consideration of penalties to be imposed. Respondent asserts that pursuant to Idaho Code Section 5-218 a three year statute of limitation applies in this matter and that as a result any penalty calculation must use this time period as a cut off for any restitution sought. This argument is, however, refuted by the decision of *Beale v. State Dept of Labor*, 139 Idaho 356, 79 P.3d 715 (Idaho 2003) which determined that the application of Idaho Code Section 5-218 concerns a "civil action" which is limited to "proceedings commenced in a court of law" *Id* at 359, 79 P.3d at 718. The subject administrative action would therefore not be within the scope of Idaho Code Section 5-218. *See also Yesco v. State, ex rel., Winder*, 25 P.3d 117, 135 Idaho 804 (2001).

Respondent has further countered the restitution arguments of the Department with claims addressing both problems in the methodology of the restitution amount calculation as well as the underlying question of whether the requested award is unconstitutionally excessive and impermissible as a violation of the Eight Amendment. Further, Respondent notes that it was denied the capability to present certain defenses in this action, those raising constitutional

questions, as the scope of the Hearing Officer's authority under IDAPA 04.11.01.415 prohibited consideration of those matters. This denial of the opportunity to present a complete defense is advanced as grounds to refrain from granting the requested relief.

Respondent also, as part of what is interpreted as a form of exculpatory argument, notes that the course of proceedings by the Department against Respondent occurred over an extended time frame, one argued to be created by the Department, and one which should be considered in any potential restitution calculation. To that end it is emphasized that the Department initially contacted the Respondent regarding the issue of licensing in 2011. Exhibits 57 and 58, P. Mark Yates Response Declaration. At that time the Department notified Respondent of the conclusion of the Department that Respondent was required to obtain licensing. An exchange of correspondence between the parties continued for several months into 2012. The Department apparently ceased its efforts at that time and not until later in 2019 did the Department subsequently commence the current action.

Respondent argues in part, that the Department should not at present be granted the request for restitution as the Department failed during the time from 2012 until the present action was filed, to issue a formal cease and desist order and thereby allowed Respondent to continue with actions the Department now claims to warrant the imposition of penalties. In essence, that the delay in seeking ultimate enforcement, allowed Respondent, unprotested, to continue acts for a time period of approximately seven years. While not being claimed as a form of estoppel, Respondent is asserting that it should not be now penalized for activities which the Department could have sought to stop at an earlier date. Respondent contends this form of punishment is not consistent with the purpose of regulatory enforcement which should instead be directed towards compliance and avoidance of future misconduct not punishment for past acts.

Respondent also presents numerous arguments regarding the difficulties in adopting the Department's restitution calculations. For reasons expressed below, several of these have merit.

As argued throughout these proceedings, the activities of Respondent are, even though as determined by the Hearing Officer to be within the scope of licensing requirements of a "debt counselor", multi faceted, especially when a review is undertaken of the client file materials submitted in this matter. Exhibits 2-55, Declaration of Counsel for the Department; Exhibits 1-156, Declaration of P. Mark Yates in Opposition. The activities of Respondent vary dependent upon the client's tax situation and status of any collection and/or enforcement proceedings. This becomes important when considering the underlying basis for calculating an amount to award with the remedy of restitution.

A decision cited by Respondent is noteworthy, *State ex rel. Kidwell v. Master Distributors, Inc.,* 101 Idaho 447, 615 P.2d 116, (Idaho 1980) considered a restitution award under the Idaho Consumer Protection Act, and indicated that the discretion to award restitutionary relief should be exercised with a view toward the purposes of the subject act and be remedial and not a penalty assessment. *Id* at 456, 615 P. 2d at 124. The purpose with the subject Act while not identical to that of the Consumer Protection Act is similar, and is directed at least in part to "correct certain abusive practices..." (Statement of Legislative Purpose 1990) and is also viewed broadly to protect the public. Deterrence is also an important concern as well as an attempt to restore, if possible, the status quo between the parties which existed prior to the improper acts. *See, e.g. Kidwell* at 456, 615 P. 2d at 124.

Respondent also advances a key concern with an award of restitution, which is that of the question of unjust enrichment with an award of a full return of all monies paid by the Idaho clients. That is if, as argued by the Department, all fees incurred are ordered to be repaid, would

not those clients who hired Respondent, and received the benefits of the services of Respondent, obtain an improper windfall should all of their paid fees be returned to them? Respondent argues that the "status quo ante" expressed by the Court in the cited case *Kidwell* also supports this concern.

Respondent also notes that the Idaho Supreme Court has recognized that an award of restitution under certain circumstances must reflect and offset expenses incurred by a party. *See, e.g. Agstar Fin. Servs., ACA v. Nw. Sand & Gravel, Inc.*, 168 Idaho 358, 483 P.3d 415 (2021) (consideration of the Restatement (Third) of Restitution and Unjust Enrichment § 18 (2011).) This decision though, upon review is based upon principles in part derived from sections of the Restatement (Third) of Restitution and Unjust Enrichment, Numbers 18 and 65, which do not apply in this matter being restitution of a type different from that at issue.

More directly applicable is Section 51 of the Restatement (Third) of Restitution and Unjust Enrichment, pertaining to Enrichment by Misconduct. While the application of that section has not been found to be the subject of an Idaho State appellate decision, the language of this section is instructive for guidance. Of note is that remedies under this type of restitution are focused upon disgorgement of profits realized by the wrongdoer. On this issue a Ninth Circuit decision interpreting the scope of restitution under the Idaho Consumer Protection Act, *Edmark Auto, Inc. v. Zurich American Insurance Company* (US Dst Ct Ninth Circuit, 2020) 2020 WL 127979, determined that such disgorgement was within restitution as provided under that Act.

Under this Section, and comments thereto, the calculation of profits is noted as net rather than gross. This would allow an offset for expenses incurred. Further language of the Section also notes in the calculation of net profits, the consideration of other factors, *e.g.* credits,

deductions, apportionment, etc. in the calculation. This goes to the concern of the issue of benefits conferred to the Idaho clients of Respondent.

When considered as grounds for a potential offset of an award of restitution, a clear difficulty exists in making any such calculation with a mathematical certainty. Initially the very question of what those benefits are arises. The Department argues that a basic determination of what ultimate tax relief was obtained by a client is an easy means to designate which client received any "benefit" from Respondent's services. Respondent, however, argues that this method is not appropriate as client services are alleged to provide instead a diverse range of potential benefits, some not always capable of simple financial calculation. As indicated, in the arena of tax liability, forgiveness or negotiation of the amount owed is not the only relief potentially obtained. A few examples being levy relief, timing of refunds, discharge of liens, collection timing modification, lien subordination, temporary cessation of collection actions, etc.. Declaration of P. Mark Yates in Opposition. Also certain Idaho clients did not apparently engage Respondent for the purpose of tax liability reduction but instead other tax related matters. *e.g.* Exhibits 3 and 40, Declaration of Counsel for the Department.

Of additional concern is the difficulty of accurately determining even in those matters where a reduction of the tax obligation was accomplished, the potential relative nature of the benefit obtained. This in light of the disparate circumstances of each client and the wide distinction in results, that is tax savings percentages, when compared to initial underlying liabilities. Further compounding this difficulty is the comparison of fees imposed to that of the underlying liability. Certain clients paid large fees relative to the underlying liability, *e.g.* Exhibits 14, 25, 30, 31, 35 and 54, Declaration of Counsel for the Department. Some as a result

of protracted activities, *e. g.* Exhibits 35 and 54, some not, *e.g.* Exhibits 25 and 38, Declaration of Counsel for the Department

Respondent also argues that consideration of the impact of awarding restitution for clients which still have pending files with Respondent should also be made. Respondent asserts that characterizing these clients as not having received benefits is improper as the ultimate nature of relief to be provided to them is indeterminate. It is argued that the ongoing status of their files preclude a determination that no benefit to them has been conferred. In turn it would be inappropriate to conclude they have not received benefits from services still being rendered and not yet finished. Next, Respondent contends that the Department seeks restitution and penalties for actions undertaken on behalf of certain clients which are not within the scope of the alleged violations. That is not all of Respondents activities concerned services which constitute "debt" counseling for a client and should therefore be excluded from any damage calculation.

All of these matters figure into the calculation of what if any restitution to award. An examination of the extensive client file materials produced, Exhibits 2-55, Declaration of Counsel for the Department; Exhibits 1-156, Declaration of P. Mark Yates in Opposition, and the consideration of the course of events giving rise to this action lead this Hearing Officer to find and conclude that a full return of all funds paid by all of the Idaho clients would not be an appropriate equitable form of relief and not a return to the status quo as intended by the language of the restitution allowance under Idaho Code Section 26-2244(2)(b). Nevertheless, the goal of repaying the consideration advanced by these clients as a result of Respondent's improper acts is served by the repayment of a portion of such consideration for those clients who after review are determined to have received benefits from the services performed by Respondent. As a result in part, of the difficulties in calculating any benefit offsets in terms of a dollar amount, it is instead

the opinion of this Hearing Officer that consideration of the restoration of the status quo and disgorgement of profits is best served by an allowance of a percentage reduction in the award provided.

The award of restitution made here also takes into consideration Respondent's arguments that it is inappropriate to award a return of fees to a present client for whom services have not yet been concluded. The ongoing nature of the work for the client does not diminish, however, the fact that such activity is in violation of the subject registration requirements. It would also not be appropriate to award restitution solely based upon the status of file termination in light of the goal of deterrence with such an award.

In the calculation method to be used here, first, while Respondent asserts an entitlement to offset client expenses incurred, the record submitted does not contain an adequate showing to establish what those amounts in fact are. However, with the exception of a select number of Idaho clients, as the entire client fees are not being awarded, this amount, that of underlying expenses and their calculation, is an issue which is therefore moot.

Next, as to the offset for benefits conferred to clients, the following determination is made. Certain Idaho clients can be found to have not received any appreciable benefit from Respondent's services. These clients, described by Client number on Exhibit 1 from that of Declaration of Counsel in Support of Complainant's Memorandum of Restitution and Penalties, shall be awarded as restitution a full return of all the fees paid to Respondent. To the extent that Respondent has failed to substantiate what costs were incurred with these clients and potentially offset from the amount of restitution, such costs shall not be subtracted from these restitutionary awards.

These clients are, Client 9, Carpenter, Lynn; Client 14, Farris, Roger; Client 16, Fuller, William; Client 21, Gary, Scott; Client 23, Hernandez, Maria; Client 33, McAchran, Veronica & Aaron; Client 39, Pierce, Misty; Client 47, Stanford, Roy; Client 48, Stropkai, Alan; Client 51, Van Leuven, Shane. The amounts of such fees to be returned shall be subject to calculation following the submission of a true and accurate statement by Respondent of such fees paid by these clients.

The remaining Idaho clients, it being determined that they have received benefits from services rendered and which are subject to offset in a restitution calculation, are upon consideration of matters discussed above, awarded restitution in the amount of Seventy Five percent (75%) of total fees paid by the remaining Idaho clients as noted on Exhibit 1 from that of Declaration of Counsel in Support of Complainant's Memorandum of Restitution and Penalties.

These clients are: Client 1, Alonzo, Sylvia and Ramon; Client 2 Ames, Dawnett; Client 3, Ball, Barbara; Client 4, Ball, Tim; Client 4 Bicandi, Candice; Client 6, Brito, Nick; Client 7, Brumbach, Kim; Client 8, Burkett, Leon; Client 10 Clark, Brian, Lance, Densie; Client 11, Colson, Steve; Client 12, Crowley, Melissa; Client 13, Elder, frank; Client 15, Fraser, Richard and Jennifer; Client 17, Galan, Mary and Joe; Client 18 Genther, Tenna; Client 19, Goodsen, Michael; Client 20, Gray, Michael; Client 22, Hamblin, Matthew; Client 24, Hoggatt, Lynda; Client 25, Hyde, Ronald; Client 26, Johnson(Superior Chain); Client 27, Johnson, Thomas; Client 28, Kiser, Glenn; Client 29, Kisman, Ruth; Client 30, Kroshus, James; Client 31, Landry, Conrad; Client 32, Maciosek (Oct Country); Client 34, Miller, Jennifer; Client 35, Moncarr, Mark; Client 36, Moore, Ezra; Client 37, Nord, Darin; Client 38, Novak, scott; Client 40, Porr, Evander; Client 41, Rich, Penny; Client 42, Ridinger, Tim; Client 43, Shrposhire, Brett; Client 44, Skinner, Evan; Client 45, Smith, Danny; Client 46, Smith, Dwight; Client 49, Taylor, Clay

and Marcene; Client 50, trotter, Richard; Client 52, Villasenor, Rogelio; Client 53, Wren, Gregory; Client 54, Wright, Gerald. The amounts of such fees to be returned shall be subject to calculation following the submission of a true and accurate statement by Respondent of such fees paid by these clients.

It is recognized that a restitution award of this amount does not, from the perspective of the client provide a full dollar return of all consideration paid, but any such award to accomplish the goals with such a remedy must acknowledge that a full dollar return would allow the clients to receive benefits at no cost. This also is not permissible.

IT IS HEREBY ORDERED that the Complainant's Motion for Damages and Penalties is GRANTED.

IT IS HEREBY FURTHER ORDERED:

1. That the Complainant, the Department, within 14 days, submit a proposed Order providing for an award consistent with the above decision and order containing as follows:

(a) an award of penalties in an amount of $3,000.00 for each of fifty four (54) separate violations of Idaho Code Section 26-2223(1) and (7);

(b) an award of restitution of all fees paid by certain Idaho clients of Respondent, those being; Client 9, Carpenter, Lynn; Client 14, Farris, Roger; Client 16, Fuller, William; Client 21, Gary, Scott; Client 23, Hernandez, Maria; Client 33, McAchran, Veronica & Aaron; Client 39, Pierce, Misty; Client 47, Stanford, Roy; Client 48, Stropkai, Alan; Client 51, Van Leuven, Shane;

(c) an award of restitution for the remaining 44 Idaho clients of Respondent in an amount of of Seventy Five percent (75%) of total fees paid by each not previously named Idaho client;

These clients are: Client 1, Alonzo, Sylvia and Ramon; Client 2 Ames, Dawnett; Client 3, Ball, Barbara; Client 4, Ball, Tim; Client 4 Bicandi, Candice; Client 6, Brito, Nick; Client 7, Brumbach, Kim; Client 8, Burkett, Leon; Client 10 Clark, Brian, Lance, Densie; Client 11, Colson, Steve; Client 12, Crowley, Melissa; Client 13, Elder, frank; Client 15, Fraser, Richard and Jennifer; Client 17, Galan, Mary and Joe; Client 18 Genther, Tenna; Client 19, Goodsen, Michael; Client 20, Gray, Michael; Client 22, Hamblin, Matthew; Client 24, Hoggatt, Lynda; Client 25, Hyde, Ronald; Client 26, Johnson(Superior Chain); Client 27, Johnson, Thomas; Client 28, Kiser, Glenn; Client 29, Kisman, Ruth; Client 30, Kroshus, James; Client 31, Landry, Conrad; Client 32, Maciosek (Oct Country); Client 34, Miller, Jennifer; Client 35, Moncarr, Mark; Client 36, Moore, Ezra; Client 37, Nord, Darin; Client 38, Novak, scott; Client 40, Porr, Evander; Client 41, Rich, Penny; Client 42, Ridinger, Tim; Client 43, Shrposhire, Brett; Client 44, Skinner, Evan; Client 45, Smith, Danny; Client 46, Smith, Dwight; Client 49, Taylor, Clay and Marcene; Client 50, trotter, Richard; Client 52, Villasenor, Rogelio; Client 53, Wren, Gregory; Client 54, Wright, Gerald.

(d) the manner and method of calculating and making such restitution payments including notification procedures;

(e) an award of the actual cost of the Department's investigation and the actual cost of this administrative proceeding, pursuant to Idaho Code Section 30-14-604(e) and/or Idaho Code Section 12-117.

Following submission of this proposed order the Hearing Officer shall issue a further Order consistent with the above determination.

2. In the event of a filing of a Motion for Reconsideration of this Interlocutory Order, the timeline for such filing shall be extended until the resolution of such Motion for Reconsideration;

3. That this decision and Interlocutory Order shall at present remain confidential and not open and available to the public.

NOTIFICATION OF RIGHTS

This is an Interlocutory order of the Hearing Officer. Any party may file a motion for reconsideration of this order with the Hearing Officer within fourteen (14) days of the service date of this order.

DATED this 4th day of January, 2022.

By: David V. Nielsen

David V. Nielsen
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of January, 2022, I served a true and correct copy of the foregoing by delivering the same to each of the following party, by the method indicated below, addressed as follows:

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EXHIBIT D

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BEFORE THE DIRECTOR OF THE DEPARTMENT OF FINANCE

STATE OF IDAHO

STATE OF IDAHO, DEPARTMENT OF FINANCE, CONSUMER FINANCE BUREAU, Complainant, v. WALL & ASSOCIATES, INC., A VIRGINIA CORPORATION, Respondent.	Docket No. 2019-9-10 **ORDER RE: MOTION FOR RECONSIDERATION**

This matter having come before the Hearing Officer on the Motion of Respondent for reconsideration of the Hearing Officer's Decision and Order Regarding Restitution and Penalties, dated January 4, 2022, the following decision is entered.

The Respondent in this matter has presented several arguments for reconsideration. Initially, of note is that there is insufficient authority to support Respondent's assertion that the order should be reconsidered and reduced based upon an alleged failure to take into account past outcomes for companies engaged in similar activities. Prior awards, while instructive, are not a constraint or limit on the amounts which can be awarded in the subject action.

Further, is the fact that the earlier penalties were apparently the result of negotiated consent orders. The grounds and basis to enter into a negotiated conclusion and willingness to compromise potential expenses and exposure are different factors than those under current consideration. What transpired in those matters may inform, but does not limit the penalties here.

Next, as clearly indicated in the statutory language, the subject penalty of $3,000.00 per violation is within the allowable amount for such penalties. This amount was considered and determined appropriate based upon the number of violations, the activities involved and the goals inherent in statutes of this type.

This sum is both an effective sanction and deterrent. The suggestion that the amount should instead constitute a small or *de minimus* penalty provides little incentive to promote licensing compliance and provide warning to others to not engage in unlicensed activities. The character and magnitude of the harm threatened by the continuation of unlicensed activity further supports this penalty.

Respondent next argues as to the restitution awards granted, that these awards are subject to a statute of limitations defense and cannot be imposed for the time period claimed by the Department. This argument though, is not persuasive as established by the previously cited decisions of *Beale v. State Dept of Labor*, 139 Idaho 356, 79 P.3d 715 (Idaho 2003) and *Yesco v. State, ex rel., Winder*, 25 P.3d 117, 135 Idaho 804 (2001).

Next, Respondent contends that the restitution awards are improper based upon *Williams v. Idaho State Board of Real Estate Appraisers*, 157 Idaho 496, 337 P. 3d 655 (2014). This is an argument which is based on the proposition that the goal of deterrence is not attained by an order of restitution nor is it inherently fair to impose such an award against a party who asserts a reliance on the Department's failure to prosecute this matter earlier in time. This argument is in essence a claim of estoppel. Even though now argued as a "waiver" by the Department, Respondent is asserting that it should not be held accountable for acts which it claims to have undertaken in reliance on the lack of further action by the Department. As determined and previously ruled upon in the Decision concerning the earlier motions for Preliminary Order and for Summary Judgment this argument is

rejected. The Respondent proceeded with a course of activity which it knew to be, in the view of the Department, in violation of the licensing requirements. Respondent proceeded knowing the Department's position. The holding in *Williams* does not warrant modification of the penalty or award of restitution.

A further ground for reconsidering the award is argued by the claim that the award improperly imposes upon Respondent, the obligation to repay amounts without providing an offset for overhead expenses. As stated in the Order, Respondent has failed to provide an adequate record to establish what those amounts in fact are. Respondent now, following the previous submission of materials, argues that it should be allowed a further opportunity to present such evidence. A showing of why such materials were not or could not have submitted in connection with the original briefing or even with the materials submitted with the motion for reconsideration was not provided. At this juncture, again no evidence has been presented sufficient to establish what these argued offset expenses are, nor that in fact Respondent can establish what specific expenses are uniquely attributable to the subject client files. Absent such evidence the Order will not be modified.

Respondent further argues that the Order providing restitution is punitive in nature and improper. Respondent notes several clients' files and contends that these clients who are alleged to have received favorable results, are examples that an award returning fees to these clients and others would be an inequitable punishment upon Respondent. As should be apparent, however, the consideration of what return was provided to Respondent's clients was considered in the subject award granted.

The percentage offset, while not an exact calculation for each client, provided a global means in part to account for the derived client benefits. The offset providing for a reduction from the

potential return of the entirety of the fees, recognizes the argument of an inequity in an award which would provide the clients with both a benefit from services provided and a return of the fees charged. As indicated in the Order, given the inherent difficulty of ascertaining and calculating what the "benefit" should be held to mean or translate to economically, resulted in this determination. Of note, is that even if benefits were provided to a client, such benefits do not preclude a restitution award which grants the return of potentially all fees charged. The unreasonableness and unfairness asserted by Respondent is tempered by the very language of Idaho Code Section 26-2244 which provides an allowance for the return of "any consideration" as a result of a finding of a violation.

Extensive review of the materials presented was made in this action. What is clear from the client files was the Respondent on average imposed significant fees to clients and the attempt to restore status quo is served by the award provided. In the consideration and weighing of the amounts charged the Idaho customers, the return of a majority portion of these fees is determined to be the appropriate means. The surrender of monies obtained from the cited individuals is not punitive but instead restorative. The relief provided was within the allowable scope of the statute and discretion of the hearing officer.

The arguments presented by Respondent in the Motion for Reconsideration do not provide sufficient grounds to overturn the Order.

IT IS HEREBY FURTHER ORDERED:

1. That the Respondent's Motion for Reconsideration is denied.
2. The Order Regarding Restitution and Penalties, dated January 4, 2022, is amended as to subpart 1(e) to state "an award of the actual cost of the Department's investigation and the actual costs of this administrative proceeding, pursuant to Idaho Code Section 26-2244(2) and/or Idaho Code Section 12-117".

3. The Department shall as directed in the Order Regarding Restitution and Penalties, dated January 4, 2022, submit a proposed Order providing for an award consistent with the language of the Order dated January 4, 2022 and this Order on Reconsideration.

4. That this decision shall at present remain confidential and not open and available to the public.

DATED this 7th day of February, 2022.

By: David V. Nielsen
David V. Nielsen
Hearing Officer

NOTIFICATION OF RIGHTS

This is an Interlocutory order of the Hearing Officer.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of February, 2022, I served a true and correct copy of the foregoing by delivering the same to each of the following party, by the method indicated below, addressed as follows:

Thomas A. Donovan State of Idaho Department of Finance P.O. Box 83720 Boise, ID 83720-0031	☒ U.S. Mail ☐ Hand-Delivered ☐ Overnight mail ☐ Facsimile ☒ E-mail
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EXHIBIT E

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BEFORE THE DIRECTOR OF THE DEPARTMENT OF FINANCE

STATE OF IDAHO

STATE OF IDAHO, DEPARTMENT OF FINANCE, CONSUMER FINANCE BUREAU, Complainant, v. WALL & ASSOCIATES, INC., A VIRGINIA CORPORATION, Respondent.	Docket No. 2019-9-10 **ORDER REGARDING RESTITUTION, PENALTIES AND COSTS**

This matter having come before the Hearing Officer following the entry of the Order Regarding Restitution and Penalties, dated January 4, 2022; and the Order Re: Motion for Reconsideration dated February 7, 2022, which followed the entry of the Order Regarding Complainant's Motion for Preliminary Order and Respondent's Motion for Summary Judgment dated June 14, 2021; and the Order Re: Motion for Reconsideration dated July 16, 2021.

All prior orders referenced above are incorporated herein by reference, and further modified as provided for herein. To resolve and confirm remaining issues and conclude this matter, the Hearing Officer enters the following Preliminary Order Awarding Restitution, Penalties, and Costs and further removes to the extent detailed below, the previously imposed Confidentiality Requirements.

The relief entered herein is based on the prior determination that Respondent engaged in fifty-four (54) separate violations of Idaho Code Section 26-2223(1) and (7), and the relief entered here is based on Idaho Code Section 26-2244(2)(a), (b), and (c).

1. Pursuant to Idaho Code Section 26-2244(2), Respondent is ordered to cease and desist acts and practices constituting unlicensed debt counselor or credit counselor activity in Idaho described in Idaho Code Section 26-2223(7) unless and until it becomes licensed pursuant to the ICAA (Idaho Code Title 26, Chapter 22).

2. Regarding Respondent's current Idaho clients, Respondent shall discontinue providing services to them and terminate any agreements/contracts with these clients within 30 days of this order becoming final if Respondent has not first become licensed under the ICAA.

3. Respondent is ordered to pay penalties of three thousand dollars $3,000 per violation for fifty-four (54) violations in the total amount of one hundred sixty two thousand dollars ($162,000.00) to the Idaho Department of Finance pursuant to Idaho Code Section 26-2244(2)(a).

4. Respondent is ordered to pay restitution to its fifty-four (54) Idaho clients in the total amount of five hundred seven thousand six hundred thirty-five dollars and fifty cents ($507,635.50). The specific amounts of restitution and identities of the respective Idaho Wall & Associates, Inc. consumers are set forth in Exhibit A attached hereto and incorporated herein, which exhibit is confidential and exempt from public disclosure. Respondent is ordered to pay this total restitution amount, upon this order becoming final, to the Idaho Department of Finance for the ministerial function of being returned as restitution, in the amounts and to the affected Idaho consumers as set forth in Exhibit A. Restitution payments received pursuant to this order shall not become assets of the Department.

5. Respondent is ordered to pay to the Idaho Department of Finance fees and costs in the total amount of forty two thousand sixteen dollars and sixty cents ($42,016.60) (consisting of court reporting and transcription costs of three thousand one hundred forty one dollars and sixty cents ($3,141.60), and attorney fees in the amount of thirty eight thousand eight hundred seventy five dollars ($38,875.00) pursuant to Idaho Code Sections 26-2244(2)(c).

6. The prior restrictions regarding the public disclosure of certain matters in this action are lifted to the following extent. This order and the prior orders entered herein are to be treated by Complainant as they would in the normal course under the Idaho Public Records law (Idaho Code Title 74, Chapter 1), subject to the applicable exemptions of Idaho Code §§ 74-104(1); 74-106(4), and 74-106(5). Subject to those restrictions, the Hearing Officer (as well as the parties) is aware and mindful of the State of Idaho, Ada County, Fourth Judicial District Court's Order *In the Matter of Contested Case* (concerning this matter) in Case No. CV01-20-10059 entered June 29, 2020, authorizing and directing the production by Wall & Associates of records containing taxpayer information as well as directing the parties to maintain the confidentiality of records produced. Nothing in this order is intended to change the effect of that court order or the application of the Idaho Public Records law. To confirm, the Hearing Officer specifically notes and directs that specific taxpayer information, to the extent it is included in this and prior orders, shall remain confidential and exempt from disclosure to the public pursuant to exemptions referenced above. The Department is authorized to release only copies of orders or other related documents to the public with such confidential taxpayer information redacted. This does not preclude the Department from sharing orders in this matter or records produced by Wall containing taxpayer information in a full and unredacted manner with other state regulators or

law enforcement officials including, but not limited to, state attorneys general with the understanding that such information is confidential.

7. All of the relief ordered herein, both monetary and injunctive, will become immediately due and payable and otherwise effective upon this order becoming final and effective as provided below.

NOTIFICATION OF RIGHTS

This is a preliminary order of the Hearing Officer. It can and will become final without further action of the Department of Finance unless any party petitions for reconsideration before the Hearing Officer or appeals to the Director for the Department of Finance (or the designee of the Director). Any party may file a motion for reconsideration of this preliminary order with the Hearing Officer within fourteen (14) days of the service date of this order. The Hearing Officer will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. *See* Idaho Code § 67-5243(3).

Within fourteen (14) days after (a) the service date of this preliminary order, (b) the service date of the denial of a petition for reconsideration of this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration of this preliminary order, any party may in writing appeal or take exception to any part of the preliminary order and file briefs in support of the party's position on any issue in the proceeding to the Director of the Department of Finance (or the designee of the Director.) *See* Idaho Code § 67-5245. Otherwise, this preliminary order will become a final order of the

Department of Finance.

If any party appeals or takes exception to this preliminary order, opposing parties shall have twenty-one (21) days to respond to any party's appeal within the Department of Finance. Written briefs in support of or taking exception to the preliminary order shall be filed with the Director of the Department of Finance (or the designee of the Director). The Director may review the preliminary order on her own motion.

If the Director of the Department of Finance (or her designee) grants a petition to review the preliminary order, the Director (or her designee) will allow all parties an opportunity to file briefs in support of or taking exception to the preliminary order and may schedule oral argument in the matter before issuing a final order. The Director (or her designee) will issue a final order within fifty-six (56) days of receipt of the written briefs or oral argument, whichever is later, unless waived by the parties for good cause shown. The Director (or her designee) may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order.

Pursuant to Idaho Code §§ 67-5270 and 67-5272, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which: (1) the hearing was held, (2) the final agency action was taken, (3) the party seeking review of the order resides, or operates its principal place of business in Idaho, or (4) the real property or personal property that was the subject of the Department's action is located.

This appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. *See* Idaho Code § 67-5273. The fling of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.

DATED this March 7, 2022,

David V. Nielsen
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of March, 2022, I served a true and correct copy of the foregoing by delivering the same to each of the following party, by the method indicated below, addressed as follows:

Thomas A. Donovan
State of Idaho
Department of Finance
P.O. Box 83720
Boise, ID 83720-0031
tom.donovan@finance.idaho.gov

- ☒ U.S. Mail
- ☐ Hand-Delivered
- ☐ Overnight mail
- ☐ Facsimile
- ☒ E-mail

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David V. Nielsen