IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Wall and Associates Inc., Petitioner, vs. State of Idaho Department of Finance, Consumer Finance Bureau, Respondent.	Case No. CV01-22-16278 Decision on Judicial Review

Currently before the Court is a Petition for Judicial Review, filed October 28, 2022,[1] that requests review of the Idaho Department of Finance's Final Order Adopting and Amending Hearing Officer Preliminary Order in Agency Case No. 2019-9-10 captioned as *State of Idaho, Department of Finance, Consumer Finance Bureau, Complainant v. Wall & Associates, Inc Respondent*, issued on April 30, 2022 ("Final Decision and Order").

The Respondent filed an Amended Notice of Lodging of Agency Record and Transcript with the Agency on December 12, 2022. The Record and Transcripts were filed with the Court on December 29 and 30, 2022.[2] The Table of Contents for the Agency record is available as part of the Notice of Filing, filed December 29, 2022. The Department of Finance produced separate transcripts for hearings on March 10, 2021 and September 28, 2021. The Agency Record contains 19 "volumes."[3] The Court entered the Stipulated Protective Order related to the Record on January 1, 2023.

The parties fully and timely briefed the Petition for Judicial Review. Petitioner Wall & Associates, Inc. ("Wall") filed its brief in support of the Petition on March 2, 2023.[4] The Department of Finance responded on April 28, 2023.[5] The Petitioner replied

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1 Petition for Judicial Review ("Petition"), filed Oct. 28, 2022.

2 The parties stipulated to seal the unredacted Record and Transcripts

3 Each Record "volume" appears as a separate document in the electronic record, with the exception of Volume 11 that is filed in the digital records in two parts.

4 Petitioner's Brief ("Brief"), filed Mar. 2, 2023.

5 Respondent's Brief ("Response"), filed Apr. 28, 2023.

on June 2, 2023.[6] The District Court heard oral arguments on the Petition on August 8, 2023.[7]

Appearances:[8] Williams Mohran for Petitioner[9]
Loren Messerly for Respondent[10]

I. FACTUAL AND PROCEDURAL BACKGROUND

Petitioner Wall & Associates, Inc ("Wall") "is a Virginia corporation engaged in the business of representing taxpayers administratively before the IRS or state revenue departments such as the Idaho Department of Revenue. Wall is not registered to do business with the Idaho Secretary of State.[11]

The Petitioner represents clients to include,[12] but is not limited to, services concerning tax debt negotiation and resolution and "representing taxpayers on tax liabilities owed to either the [Internal Revenue Service (IRS)] or Idaho Department of Revenue."[13] Additionally, Wall's tax debt assistance to clients includes, "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."[14] Wall does not provide legal services and cannot "assist the client in resolving the tax liability either through civil litigation or defense of a criminal tax enforcement proceeding."[15] Rather, Wall assists clients who owe taxes to the IRS

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6 Petitioner's Reply Brief ('Reply"), filed June 2, 2023.

7 Oral arguments were held by videoconference.

8 James Simieri with the Attorney General's Office was present on WebEx to observe the hearing.

9 Trevor Hart also appeared for the Petitioner but did not present argument to the Court.

10 Thomas Donovan also appeared for the Respondent but did not present argument to the Court.

11 R. p. 00397 (Stipulated facts, ¶ 2).

12 The Director extensively addressed Wall's Business Practices in its findings of fact in the Final Order. *See* R. pp. 03181-03185.

13 Petition, p. 6. Wall's Counsel previously described Wall's business as "representing people who haven't paid their taxes. Some people haven't filed tax returns for years. These are people who have violated laws and Wall's trying to help extricate themselves from that, much like lawyers do. Sometimes those people are just – they're not happy with anything." *3/10/21 Tr.*, p. 54 ll:17-22.

14 R. p. 03184 (citing Yates Penalties Dec., ¶ 3, found at R. pp. 02066-2954).

15 Petitioner's Brief, p. 4.

through voluntary settlement services.[16] Before the IRS, Wall provides services for negotiating the reduction of the debt through an Offer in Compromise or by establishing payment plans.[17] There is no dispute that Wall only provides representation for clients related to taxes and that it does not offer services related to any other type of debt.

The Respondent is the Idaho Department of Finance ("Respondent" or "Department"). The parties agree the Respondent is charged under Idaho law with enforcing the provisions of the Idaho Collection Agency Act ("ICAA" or "Act"), Idaho Code § 26-2221, *et seq.* See Idaho Code § 26-2248 ("The administration of the provisions of this act shall be under the general supervision and control of the director…"). There is no dispute that Wall has never applied for, and has never been issued, any license under the Act.[18]

Patricia R. Perkins was the Director of the Department of Finance during all times relevant to these proceedings (hereinafter "Director").

1. Facts Leading to Agency Action

In September of 2011, the Department became aware that Wall was entering into agreements with Idaho citizens after the Department received a complaint related to Wall's provision of services.[19] The Department provided notice on three instances between November 2011 and March 2012 that it believed Wall to be in violation of the ICAA and indicating Wall need to no longer operate in Idaho or apply for a license with the Department. The Department communicated with Wall and its counsel at the time, informing Wall of the Department's position that Wall should be licensed as a debt counselor or credit counselor under the Act before providing its services in Idaho.[20] Wall

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16 Petitioner's Brief, p. 4.

17 Wall's Counsel stated, "there's all this evidence that Wall tries to negotiate compromises for their clients with the IRS. I admit that. We don't need to hear anymore argument about that. That's what Wall does, in part. When Wall's clients owe money to the IRS, yeah, one of the things Wall will do is try to get those claims compromised." 3/10/21 Tr., p. 58 ll: 9-14.

18 See R. p. 00397 (Stipulated Facts providing that "Wall is not licensed as a debt collector, debt counselor, or credit counselor under the Act.").

19 R. p. 00004, ¶ 8. *See also* R. p. 00496 (Kinney Declaration, ¶ 4 (Kinney is employed by the Department as a Consumer Affairs Officer).

20 R. p. 00004, ¶ 11. *See also* R. p. 00496 (Kinney Declaration, ¶ 4, Exhibits G and I). Exhibit G is a letter, dated November 30, 2011, from the Department to Wall's attorney and provides in part:

rejected the Department's position in a letter and Wall asserted its contrary position and continued entering into agreements with Idaho Citizens.[21] The Department responded on March 6, 2012, providing in relevant part:

> 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.

(emphasis added).[22]

There is no evidence of further communication between the Department and Wall at that time. Wall continued entering into agreements with Idaho Citizens. No further action was taken by the Department at that time and there is no indication they followed up with Wall.

> The Idaho Collection Agency Act (Act) § 26-2223 defines debt/ credit counseling, in part, as "contracting with the debtor to effect an adjustment, compromise or discharge of any account note or other indebtedness of the debtor." The practice of law is not a factor in the above-mentioned requirements of licensure.
>
> Based on the abovementioned Act's definition of debt / credit counseling services and the explanation and documentation which outlines the services provided by your client, it is the Department's position that Wall and Associates, Inc. was required to be licensed prior to providing debt/ credit counseling activities to the ____ or other Idaho clients."

R. pp. 00522-523. Exhibit I is a responsive letter from the Department to Wall's attorney, dated February 7, 2012, that contains the Department's arguments that respond to Wall's reasoning that the ICAA does not apply. R. pp. 00528-530.

[21] R. p. 03179 (Final Order). *See also* R. p. 00496 (Kinney Declaration, ¶ 4, Exhibits H and J).

[22] R. p. 03179 (Final Order), pp. 03308-3309 (Order on Reconsideration). *See also* R. p. 00496 (Kinney Declaration, ¶ 4, Exhibit K (R. p. 00535).

Then, in January of 2019, the Department received two additional complaints related to Wall that were forwarded from the Consumer Protection Division of the Idaho Office of Attorney General ("OAG").[23]

2. Proceedings Before the Department of Finance

On December 3, 2019, the Department filed a Verified Complaint for Order to Cease and Desist and for Monetary Penalty and Notice of the Opportunity to Request a Hearing against Wall ("Complaint").[24] The Complaint requested the "issuance of an order pursuant to Idaho Code § 26-2244(1) of the Act, requiring [Wall] to immediately cease and desist from violating the Act, to include engaging in unlicensed debt and credit counseling activity in Idaho, and further for an order pursuant to Idaho Code § 26-2244(2)(a) against [Wall] for a civil penalty of not more than $5,000 per violation."[25]

Wall answered and requested a hearing.[26] David V. Nielsen was appointed as the hearing officer on the Complaint ("Nielsen" or "Hearing Officer").[27] The Department set a hearing on September 15, 2020 with discovery and evidentiary deadlines.[28] Nielsen then reset the hearing on March 30, 2021.[29]

The Department filed an Amended Verified Complaint on July 31, 2020[30] including additional facts related to Wall's business practices, including allegations that Wall had fifty-four Idaho clients between 2011 and 2020, additional agreements in Idaho, and amending the requested relief to include additional monetary damages.[31] Wall answered.[32]

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23 R. p. 00005, ¶ 12. *See also* R. pp. 03180-3182 (Final Order) ("In March of 2018, the Department received a complaint via email from MG of Nampa, Idaho regarding Wall…. On January 3, 2019, the Department received a complaint from MP of Mountain Home, Idaho regarding Wall…. The Department also learned of an additional complaint from MM of Boise, Idaho to the Better Business Bureau, dated February 2, 2017.").

24 R. pp. 00001-16.

25 R. pp. 00001-2.

26 R. pp. 000017-28.

27 R. pp. 00029-31, Neilson was appointed on Jan. 29, 2020.

28 R. pp. 00054-56, Notice of Hearing, filed Mar. 30, 2020.

29 R. pp. 00368-70.

30 R. pp. 00352-62.

31 *See generally* R. pp. 00352-62. *See also* R. p. 01666.

In January of 2021, the parties filed the equivalent of cross-motions for summary judgment, submitting several declarations and numerous exhibits in support of these motions. The parties also submitted Stipulated Facts ("SF") with attached exhibits A-P.[33] A hearing before Hearing Officer Nielsen[34] was held on March 10, 2021 on (1) the Department's Motion for Preliminary Order;[35] (2) Wall's Motion for Summary Judgment via Preliminary Order;[36] and (3) the Department's Motion to Strike portions of the Yates Declaration[37] filed in opposition to the Department's motion.[38] At the hearing, the parties were allowed an opportunity to argue the Motion to Strike and Hearing Officer Nielson asked questions to the parties on the matter.[39] Hearing Officer Nielson then on the record granted in part and denied in part the Motion to Strike portions of the Yates Declaration[40] before hearing oral arguments on the remaining motions. Nielson deemed the matters submitted and indicated he would issue a written decision at the end of the hearing.[41]

The Department's requested relief in the Amended Complaint is, in part, as follows:

a. Finding that Respondent, Wall & Associates, Inc., has engaged in business in Idaho constituting that of a debt counselor without a license as required from the Department, and further directing Respondent to cease and desist its unlicensed debt counselor activity in Idaho unless and until it obtains a license therefor (sic);

b. Requiring Respondent to pay a civil monetary penalty in the amount of $5,000 per violation for unlicensed activity, in the subtotal amount of $275,000;

c. Requiring Respondent to pay a civil monetary penalty in the amount of $5,000 per violation of Idaho Code § 26-2229(3)(b) for improper fees charged or accepted, in the subtotal amount based on proof to be presented at the hearing, which amount shall not exceed $250,000;

d. Restoring to all Idaho consumers the entire fees they paid to Respondent while Respondent was unlicensed in Idaho in violation of the Act, or if that relief is not entered by the Director, alternatively and at a minimum, restoring to all Idaho consumers the fees they paid to the Respondent that exceeded the amounts authorized by Idaho Code § 26-2229(3)(b)….

32 R. pp. 00599-610.

33 R. pp. 00396-469. The Stipulated exhibits are as follows:

- Related to "Advertising and marketing materials used in Idaho or generally including Idaho during the relevant time period has included the following exhibits: Exhibit A; Exhibit B; Exhibit C (yellowpages.com information Bates No.s DOF 0003 – 0005); Exhibit

Wall later filed a Motion for Reconsideration of the Hearing Officer's Decision to Strike Paragraphs from the Yates Declaration.[42]

3. Hearing Officer's Written Decisions

On June 14, 2021, the Hearing Officer filed a Decision and Order Regarding Complainant's Motion for Preliminary Order and Respondent's (Wall's) Motion for Summary Judgment ("Hearing Officer's Decision").[43] The Hearing Officer granted the Complainant's motion and determined "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."[44] The Hearing Officer also filed an Order Re: Motion for Reconsideration related to the motion to strike portion of the Yeats Declaration,[45] which reversed the Hearing Officer's decision to strike paragraph 32 but denied any further reconsideration.

D (wallandassociates.net information Bates No.s DOF 0432 – 0437); and Exhibit E (wallandassociates.net information Bates No.s DOF 0675 – 0679);

- The three general forms of agreement that Wall used with Idaho clients from 2011 to 2020 are Exhibits F, G, and H;
- The Form Letters sent to new clients, "typically within one to two weeks of the signing of the written agreement" are Exhibit I and Exhibit J;
- An example packet sent to a client who signed a contract sometime in 2020 is set forth in the attached Exhibit K;
- An example a letter sent to clients to file unfiled tax returns is attached as Exhibit L;
- Copies of blank Forms 2848 Power of Attorney and Form 8821 Declaration of
- Representative to allow Wall to interact with taxing authorities are attached as Exhibits M and N;
- Form 433-A Collection Information Statement for Wage Earners and Self-Employed Individuals is attached as Exhibit O;
- Exhibit P is a list of 54 Idaho clients Wall has entered into written agreements to provide services to since 2011.

[34] *See* 3/10/21 Tr., pp. 5-6.

[35] R. pp. 00470-473. Department's Motion for Preliminary Order, filed Jan. 19, 2021.

[36] R. pp. 00611-613. Wall's Motion for Summary Judgment via Preliminary Order, filed Jan. 19, 2021.

[37] R. pp. 00969-1512 (The Yates Declaration contains 61 exhibits).

Wall then requested reconsideration of the June 14, 2021 Hearing Officer's Decision substantive findings that the ICAA requirements applied to Wall. The Hearing Officer then denied reconsider in his July 16, 2021 Order, finding "The arguments presented by Respondent in the Motion for Reconsideration do not provide sufficient grounds to overturn the Order" and finding, despite the numerous arguments from Wall, that the ICAA and its licensing requirement apply to Wall.[46]

A hearing was set on September 28, 2021 on the issue of restitution and penalties[47] and on January 4, 2022, the Hearing Officer issued an Order Regarding Restitution and Penalties awarding to the Department monetary penalties of $162,000 ($3,000 per violation); full restitution of fees to ten of Wall's Idaho clients; restitution of 75 percent of fees to the remaining forty-four of Wall's Idaho clients; and awarding costs of the investigation and administrative proceeding against Wall. [48] Wall moved for reconsideration but reconsideration was denied.[49] On March 7, 2022,[50] the Hearing Officer entered his Preliminary Order incorporating his prior orders and adding the final awards of restitution, fees and costs. The Preliminary Order concluded that the ICAA applies to Wall's business, that Wall had committed fifty-four violations of the ICAA, that the proper remedies under the Act was an Order for Wall to cease and desist, and

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38 R. pp. 01513-1518. The Department filed a Motion to Strike portions of the Yates Declaration that filed in opposition to the Department's motion on Feb. 9, 2021.

39 *See* 3/10/21 Tr., pp. 9-16.

40 3/10/21 Tr., p. 16-17. The Court struck the following paragraphs form the Yates Declaration filed February 9, 2021: 26, 27, 29, 30, 31, 32, 36, and 37. Therefore, the Court denied the motion to strike as to paragraphs 2, 5, 6, 7, 8, 9, 13, 28, 64 and 67. *See R*. pp. 01514-1517. Further, the Hearing Officer informed Wall of its right to request reconsideration. 3/10/21 Tr., p. 17 ll:4-6.

41 3/10/21 Tr, pp. 125-127.

42 R. pp. 01645-1651.

43 R. pp. 01665-1690.

44 R. p. 03176.

45 R. pp. 01732-1739.

46 R. pp. 01732-1736.

47 R. pp. 02955-2957.

48 R. pp. 02959-2971.

49 R. pp. 3003-3007.

50 R. pp. 03039-3048.

ordered penalties against Wall of $162,000 to be paid to the Department, restitution of $507,635.50 to be paid by Wall to the fifty-four Idaho Clients, and ordered Wall to pay $42,016.60 in fees and costs.[51]

4. Final Order Adopting and Amending Hearing Officer's Preliminary Order[52]

Wall filed a Notice of Appeal of the Hearing Officer's Two Interlocutory Orders Entered on June 14, 2021, the Preliminary Order entered January 4, 2022, and the Preliminary Order entered March 7, 2022. The Director granted the Petition for Review and the parties briefed the issues.

The Director issued her "Final Order Adopting and Amending Hearing Officer Preliminary Order" (the "Final Order") in the administrative proceeding on August 30, 2022.[53] The Director found violations of the Idaho Collection Agency Act ("ICAA") and imposed a sanction of an injunction, civil penalties, restoration of fees, and attorney fees and costs.[54] The Director provided in part:

> [T]he 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

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51 R. p. 03041. The March 7, 2022, Order provides in part "All prior orders reference above are incorporated herein by reference, and further modified as provide for herein…" referencing the Order for restitution and Penalties, dated January 4, 2022; Order Re: Motion for reconsideration dated February 7, 2022 which followed 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. The fees and costs included $3,141.60 in costs and $38,875.00 in attorney fees.

52 The Director identified as part of its Final Order that Wall was facing "other recent regulatory actions and investigations." R. pp. 03188-3189. The Director specifically noted the following: (1) that "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"; that 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"; 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." To the extent these investigations or decisions are relevant to the determination of the appeal before this Court, they are specifically cited and addressed in this decision. This Court notes that none of the cited cases address the applicability of Idaho Code § 26-2223 to the regulation of Wall's business practices.

53 R. pp. 03208-3209.

54 Id.

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.

The Director incorporated the Hearing Officer's determinations to the extent they were not directly addressed it the Final Order. Specifically, the Director entered an order as follows:

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 ICCA (Idaho Code Title 26, Chapter 22).

2. Regarding Wall's current Idaho clients, Wall shall discontinue providing services to them and terminate and 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 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 the Idaho Department of Finance fees and costs in the total amount of $42, 016.60, pursuant to Idaho Code Section 26-244(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…

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.[55]

Wall filed a Motion for Reconsideration of the Director's August 30, 2022 Final Order[56] asking the Director to reconsider (1) "the legal conclusion that the ICAA applies to tax

[55] R. pp. 03208-3209.

[56] R. pp. 03275-3283.

debt counselors like Wall…", (2) "her discretionary decision to restore $45,600 in fees to clients CT and MT and $73,500 in fees to client J," and (3) her discretionary decision to impose a penalty of $162,000."[57] The Department responded.[58] The Director issued an Order Denying Respondent's Motion for Reconsideration on October 3, 2022 that effectively ending the administrative proceedings.[59]

Petitioner Wall then timely filed this appeal in District Court appealing the administrative decisions and proceedings.

II. STANDARD OF REVIEW

Judicial review of an agency action is governed by the Idaho Administrative procedures Act ("IDAPA"), (IDAHO CODE § 67-5270), and the district court acts as an appellate court. *Wheeler v. Idaho Dep't of Health & Welfare,* 147 Idaho 257, 260, 207 P.3d 988, 991 (2009). Idaho Code § 67-5279(3) governs the scope of judicial review, stating:

> [T]he court shall affirm the agency action unless the court finds that the agency's findings, inferences, conclusions, or decisions are:
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> (a) in violation of constitutional or statutory provisions;
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> (b) in excess of the statutory authority of the agency;
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> (c) made upon unlawful procedure;
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> (d) not supported by substantial evidence on the record as a whole; or
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> (e) arbitrary, capricious, or an abuse of discretion.

The party challenging the agency decision must show that the agency erred in a manner specified in Idaho Code § 67-5279(3), and that a substantial right of the petitioner has been prejudiced. IDAHO CODE § 67-5279(4). *See In re Idaho Dep't of Water Res. Amended Final Order Creating Water Dist. No. 170,* 148 Idaho 200, 205, 220 P.3d 318, 323 (2009). "Only those whose challenge to a decision demonstrates actual harm or violation of fundamental rights, not the mere possibility thereof, shall be entitled to a remedy or reversal of a decision." IDAHO CODE § 67-6535(3).

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57 See R. p. 03300.

58 R. pp. 03287-3298.

59 R. pp. 03299-3311.

"A strong presumption of validity favors an agency's actions," (*Chisholm v. Idaho Dep't of Water Res.,* 142 Idaho 159, 162, 125 P.3d 515, 518 (2005) ((*citing Young Elec. Sign Co. v. State ex rel. Winder,* 135 Idaho 804, 807, 25 P.3d 117, 120 (2001))), and the burden of proof is on the party challenging the agency decision. *Druffel v. State, Dep't of Transp.,* 136 Idaho 853, 855, 41 P.3d 739, 741 (2002).

With few exceptions, "judicial review of disputed issues of fact must be confined to the agency record." IDAHO CODE §§ 67-5276, -5277. *See also Dovel v. Dobson,* 122 Idaho 59, 61, 831 P.3d 527, 529 (1992) ("In an appeal from an agency decision,… review is limited to the record."). An "agency's factual determinations are binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record." *Eddins v. City of Lewiston,* 150 Idaho 30, 33, 244 P.3d 174, 177 (2010); IDAHO CODE § 67-5279(1) ("The court shall not substitute its judgement for that of the agency as to the weight of the evidence on questions of fact.").

"Substantial evidence is relevant evidence that a reasonable mind might accept to support a conclusion. *In re Idaho Dep't of Water,* 148 Idaho at 212, 220, P.3d at 330 (*citing Pearl v. Bd. of Prof'l Discipline of Idaho State Bd. of Med.,* 137 Idaho 107, 112, 44 P.3d 1162, 1167 (2002)) (internal quotations omitted). "Substantial evidence is more than a scintilla of proof, but less than a preponderance." *Id.*

III. ANALYSIS

The Court finds the Petitioner's arguments on review can generally be divided into these major categories: (1) Does the ICAA apply to tax debts and, therefore, to Wall? And, if so, (2) Did the Department abuse its discretion in imposing the penalties and restoration fees in this case? (3) Wall's arguments that the Hearing Officer striking evidence from consideration was improper, and (4) Wall's arguments against attorney fees.

1. Whether the ICAA Licensing Requirements Apply to Wall

Wall argues the Idaho Collection Agency Act does not apply to Wall's representation of taxpayers, including Idaho taxpayers, for the following reasons:

(a) the Act does not include amounts owed for taxes in the definition of "debt" in the Act (under either a plain-language reading or when evaluating other evidence of the legislative intent);

(b) the application of the Act to Wall's representation of taxpayers, including Idaho taxpayers, before the IRS is preempted under the Supremacy Clause;

(c) the Idaho Taxpayer's Bill of Rights, Idaho Code § 63-4000 et seq., controls over the ICAA;

(d) the ICAA is unconstitutional as applied to businesses providing tax advice or advocacy;

(e) the Director's interpretation is not entitled to deference in determining whether the Act applies to tax debts so the Act should not be construed broadly.

In analyzing these arguments, the Court considers that Idaho Code § 26-2223 provides in relevant part:

> Collection agency, debt counselor, credit counselor, or credit repair organization--License required
>
> No person shall without complying with the terms of this act and obtaining a license from the director:
>
> (1) Operate as a … debt counselor, [or] credit 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.

Idaho Code § 26-2239 provides ten express exemptions from the Act,[60] and there is no dispute that the exemptions do not apply to Wall.[61] However, Wall argues that tax

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[60] Idaho Code § 26-2239 states:

> The provisions of this act shall not apply to the following: (1) Persons licensed to practice law in this state, … Such exemption shall not apply to an attorney engaged in a separate business conducting the activities authorized by this act;
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> (2) Any regulated lender …to the extent that the regulated lender, subsidiary, affiliate or agent collects for the regulated lender or engages in acts governed by this act which are incidental to the business of a regulated lender;
>
> (3) Any bank, trust company, credit union, insurance company or industrial loan company authorized to do business in this state;
>
> (4) Any federal, state or local governmental agency or instrumentality;
>
> (5) Any real estate broker or real estate salesman licensed under the laws of and residing within this state while engaged in acts authorized by his real estate license;
>
> (6) Any person authorized to engage in escrow business in this state while engaged in authorized escrow business;

advisors were not included as an express exemption because it was not anticipated that tax advisors would fall under the purview of the Act and require an exemption.

Idaho Code § 26-2222(9) defines "debt counselor" or "credit counselor" as "any person engaged in any of the activities enumerated in subsection (7) of section 26-2223." The Act does not define "debt", "debtor," or "indebtedness."

The parties disagree on whether Idaho Code § 26-2223, when looking at the plain language of the entirety of the Act, requires Wall to be licensed for the services it performs for Idaho consumers. The issues are whether it is Idaho Legislature's intention that a tax be considered a "debt" or form of "indebtedness," and whether Wall falls within the Act's definition of a "debt counselor" or "credit counselor."

a. Legal Standards for Interpreting the Act

The interpretation of a statute is a question of law. *Hayes v. City of Plummer*, 159 Idaho 168, 170, 357 P.3d 1276, 1278 (2015). This Court's primary objective in interpreting a statute is to derive the Legislature's intent. *Hayden Lake Fire Prot. Dist. v. Alcorn,* 141 Idaho 307, 312, 109 P.3d 161, 166 (2005). Legislative intent is determined by examining the literal words of the statute, the reasonableness of proposed constructions, the public policy behind the statute, and its legislative history. *City of Idaho Falls v. H-K Contractors, Inc.*, 163 Idaho 579, 416 P.3d 951 (2018). Statutory interpretation begins with the literal language of the statute. *Idaho Power Co. v. Idaho Dep't of Water Res.*, 151 Idaho 266, 272, 255 P.3d 1152, 1158 (2011). "An unambiguous statute must be given its plain, usual, and ordinary meaning." *Flying Elk Inv., LLC v. Cornwall,* 149 Idaho 9, 15, 232 P.3d 330, 336 (2010). *See also* IDAHO CODE § 73-113(1) ("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

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(7) Any mortgage lender …except a mortgage lender engaged in a separate business conducting the activities authorized by this act;

(8) Any court-appointed trustee, receiver or conservator;

(9) Any telephone corporation …;

(10) Any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom he is so related or affiliated and if the principal business of such person is not the collection of debts.

61 R. pp. 397-398 (Stipulated Facts).

legislature shall be given effect without engaging in statutory construction."). A statute "is ambiguous where reasonable minds might differ or be uncertain as to its meaning." *Stonebrook Const., LLC v. Chase Home Fin., LLC*, 152 Idaho 927, 931, 277 P.3d 374, 378 (2012). "Only where the language is ambiguous will this Court look to rules of construction for guidance and consider the reasonableness of proposed interpretations." *Eller v. Idaho State Police*, 165 Idaho 147, 156, 443 P.3d 161, 170 (2019). *See also* IDAHO CODE § 73-113(2) ("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"). "In construing a statute, this Court will not deal in any subtle refinements of the legislation, but will ascertain and give effect to the purpose and intent of the legislature, based on the whole act and every word therein, lending substance and meaning to the provisions." *Curlee v. Kootenai Cnty. Fire & Rescue*, 148 Idaho 391, 398, 224 P.3d 458, 465 (2008).

i. Whether the Court Should Interpret the Act Broadly

The Department argues the Act should be interpreted broadly as a remedial statute. Wall argues that, based on Idaho caselaw, the Act should not be interpreted broadly.[62]

The courts interpret remedial statutes[63] broadly "to satisfy their remedial purposes." *See e.g.*, *Smith v. Glenns Ferry Highway Dist.*, 166 Idaho 683, 693, 462 P.3d 1147, 1157 (2020); *Eller v. Idaho State Police*, 165 Idaho 147, 156, 443 P.3d 161, 170 (2019)(citing in part 3 SUTHERLAND, § 60.2 (7th ed. 2007) ("[R]emedial statutes are those that provide a remedy, or improve or facilitate remedies already existing, for the enforcement of rights or redress of injuries.")). Idaho Code § 26-2229A requires, "Every licensee or person required to be licensed under this chapter and its agents shall deal openly, fairly, and honestly without deception in the conduct of its business activities in this state under this chapter." Further, Idaho Code § 26-2229 limits the amount a debt settlement counselor or credit counselor can charge or collect from debtors, providing in relevant part for this case:

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62 Petitioner's Brief, p. 37.

63 A "remedial law" is "A statute that corrects or modifies an existing law; esp., a law providing a new or different remedy when the existing remedy, if any, is inadequate." BLACK'S LAW DICTIONARY, *Remedial Law* (11th ed. 2019).

> Debt counselors or credit counselors who do not receive, hold or disburse funds from debtors for payment to creditors 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 for the management of debt. In the event of cancellation of the contract by the debtor prior to its successful completion, the debt counselor or credit counselor shall refund fifty percent (50%) of any collected fees associated with the amount of debt remaining unsettled at the time of the termination of the contract.

IDAHO CODE § 26-2229(3)(b). In reading the Act as a whole, this Court finds that the broader purpose of the Act is to protect consumers, specifically debtors, by requiring the registration of parties whose activities fall within the purview of the statute for oversight by the Department. *See* D*avis v. Prof. Bus. Services, Inc.*, 109 Idaho 810, 712 P 2d 511 (1985). Therefore, this Court finds that the Act contains prescriptive requirements for the protection of Idaho debtors so the Act is remedial and should be broadly interpreted to effectuate the purpose of protecting Idaho consumers and/or debtors.

Wall argues that the Act should not be interpreted broadly based on controlling caselaw and citing *Davis v. Pro. Bus. Servs., Inc.*, 109 Idaho 810, 712 P.2d 511 (1985).[64] In *Davis*, the Idaho Supreme Court addressed a prior version of Idaho Code § 26-223[65] and specifically addressed the definition of "collection agencies," along with subsections (2) and (5) which are not at issue in this case. The Davis Court opined in relevant part related to these subsections specifically:

> The language of I.C. § 26–2223 is extremely broad. Conceivably, it could be said to cover any person who receives payment, even in the name of the creditor, for another. This could potentially include a billing clerk, receptionist, secretary, or anyone else who participates in an accounts

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64 Petitioner's Brief, pp. 37-38.

65 The *Davis* court quoted the relevant language of Idaho Code § 26-2223 as follows:

> No person shall without complying with the terms of this act and obtaining a permit from the director: (1) Conduct a collection agency, collection bureau or collection office in this state.
>
> (2) Engage, either directly or indirectly in this state in the business of collecting or receiving payment for others of any account, bill, claim or other indebtedness.
>
> ....
>
> (5) Engage in any activity which indicates, directly or indirectly, that a third party may be involved in affecting any collections.

> receivable processing activity, other than the creditor itself. We are unable to perceive that the legislature so intended.

Based on the holding in *Davis* and the principles of statutory interpretation, the Court finds the controlling determination for the relevant language of Idaho Code § 26-2223 is the Idaho Legislature's intention related to the Department's determination of whether a tax is a debt and whether Wall falls within the definition of a "debt counselor" or "credit counselor."

Based on the foregoing, the Court finds it is appropriate to broadly interpret the relevant provisions in Idaho Code § 26-2223 as part of a remedial act as long as the interpretation is consistent with the legislative intent.

ii. Whether the Director's Interpretation of the Act is Entitled to Deference

"An agency's interpretation of a statute that it is entrusted with administering is entitled to deference so long as it is reasonable and not contrary to the express language of the statute." *Kaseburg v. State, Bd. of Land Comm'rs*, 154 Idaho 570, 577, 300 P.3d 1058, 1065 (2013)(ctiting *Two Jinn, Inc. v. Idaho Dep't of Ins.,* 154 Idaho 1, 3, 293 P.3d 150, 152 (2013)). The court applies a four-pronged test to determine the appropriate level of deference to the agency interpretation, "whether: (1) the agency is responsible for administration of the rule in issue; (2) the agency's construction is reasonable; (3) the language of the rule does not expressly treat the matter at issue; and (4) any of the rationales underlying the rule of agency deference are present." *Duncan v. State Bd. of Acct*., 149 Idaho 1, 3, 232 P.3d 322, 324 (2010). The underlying rationales for the rule of deference are: (1) that a practical interpretation of the rule exists; (2) the presumption of legislative acquiescence; (3) reliance on the agency's expertise in interpretation of the rule; (4) the rationale of repose; and (5) the requirement of contemporaneous agency interpretation. *Id.*

> "If the underlying rationales are absent then their absence may present reasons justifying the court in adopting a statutory construction which differs from that of the agency." If the four-prong test is met, then courts must give "considerable weight" to the agency's interpretation of the statute.

Preston v. Idaho State Tax Comm'n, 131 Idaho 502, 504, 960 P.2d 185, 187 (1998)(quoting in part *J.R. Simplot Co. v. Idaho State Tax Comm'n,* 120 Idaho 849, 862,

820 P.2d 1206, 1219 (1991)). If "a court concludes that the agency is not entitled to receive considerable weight to its interpretation based on the lack of justifying rationales for deference, then the agency's interpretation will be left to its persuasive force. " *Simplot*, 120 Idaho 862-63, 820 P.2d 1219-20. Still, the "ultimate authority to construe statutory language" is the courts. *Kaseburg*, 154 Idaho at 577, 300 P.3d at 1065.

Wall argues the "Director's interpretation of Idaho Code § 26-2223(7) fails all four prongs" so the Director's interpretation of the Act is not entitled to deference.[66] The Department argues the Director's statutory interpretations of the ICCA in her Final Order are entitled to deference because "[t]he initial three-prongs for agency statutory construction deference are present"[67] and "three of the five rationales underlying agency deference are applicable."[68]

The Court addresses each prong separately below since the Petitioner raised arguments on each prong.

First, Wall acknowledges it is clear that the Director is charged with administering the ICAA, which contains the statute at issue in this case.[69] However, Wall argues that the "Director cannot apply the Act to tax representatives because tax representatives and taxpayers are regulated by the Idaho Tax Commission and the Idaho Board of Accountancy."[70] While the Court acknowledges Wall's arguments, the Court does not find that Wall's arguments actually address this first prong. The Court finds that the statutes at issue for interpretation in this case are part of the ICAA and the Department of Finance and its Director are responsible for the administration of the ICAA. Therefore, the Court finds that the first prong supports a finding of deference to the Department of Finance's statutory interpretation of the ICAA.

Second, the Court addresses whether the agency's construction is reasonable. Wall argues the Director's interpretation is unreasonable because "(i) no tax representatives have ever thought they needed to obtain a license under the Act since

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66 Petitioner's Brief, pp. 27-30

67 Response, pp. 8-9.

68 Id. at pp. 9-13.

69 Petitioner's Brief, p. 27.

70 Id.

its enactment in 2008, (ii) no accounting firm has ever obtained a license under the Act, (iii) tax representatives cannot charge taxpayers for services under the Act and (iv) … the Director's interpretation is 'outside her lane.'"[71] The Department counters that "the Director's construction of the statute is reasonable in concluding that the broad definition of debt counselor found in Idaho Code § 26-2223 is intended to apply to businesses that contract with debtors to help them settle any or all of their debts, including their tax debts." This Court finds the Department of Finance's interpretation is reasonable. Having some facts that weigh against the Director's interpretation does not make her interpretation unreasonable. As addressed in the preceding paragraph, the Director's interpretation of terms in the ICCA is "in her lane." Finally, the Court finds there is evidence in the record establishing that the Department interpreted the Act to include tax debt counselors/ advisors as early as 2011.

Third, the Court considers whether the language of the rule does not expressly treat the matter at issue. Wall argues the "Act by its precise terms does not apply to tax obligations because the government is excluded in the definition of a creditor under the Act and nowhere in the Act does it mention the word 'taxes'."[72] The Department argues the statute is unambiguous and the plain meaning of its terms applies to tax debts. Alternatively, the Department argues that this prong is still met even if an ambiguity exists. This Court finds that it is not determinative that the express language of the Act does not include the word "taxes." The Director addressed the term "creditor" as used in the ICAA as follows:

> 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

71 Id. at pp. 27-28.

72 Id. at p. 29.

> provisions regulating collection agencies that are acting on behalf of creditors.[73]

The Court agrees that the term "creditor" does not control when interpreting Idaho Code § 26-2223(1) and (7) as applied to Wall. Neither of these provisions address creditors—instead, these provisions specifically relate to "debts" and "debtors." These provisions do not expressly require that a debt be attributable to a "creditor" as defined by the Act. So, the Court finds this third prong supports deference to the Director's interpretation.

Finally, the Court considers whether any of the rationales underlying the rule of agency deference are present. The Department argues that underlying rationales (1), (3), and (4) support deference in this case.[74] Wall asserts that a practical interpretation of the rule does not exist, specifically arguing that "the Director's interpretation is not 'practical' because Wall cannot charge for its services under the Act and the Director has no statutory competence to understand or regulate tax advisors."[75] The Department argues the Director's interpretation is practical because Wall is easily able to comply with ICAA, the Department employs the same tools and oversight to any debt settlement company under the Act, and tha the Department has experience since the 1970s serving the purpose of the Act by overseeing the debt collection industry and protecting vulnerable debtors. Idaho Code § 26-2229 provides that "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 for the management of debt." The Director addressed the issue of payments for secured tax debts—i.e. real property tax liens—providing:

> 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

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73 R. p. 03193.

74 The Department does not dispute that underlying rationales (2) (the presumption of legislative acquiescence) and (5) (the requirement of contemporaneous agency interpretation) are not present in this case. Response, p. 9.

75 Petitioner's Brief, p. 28.

> 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.[76]

Therefore, the Court does not find the Director's interpretation of the Act prohibits Wall from charging for its debt counseling services, even those with secured tax debts. So, the Court finds the Director's interpretation is practical and that this underlying rationale supports a this Court's deference to the Department's interpretation

Wall argues "the rationale of agency expertise is expressly missing because it is the Idaho Board of Accountancy and Idaho Tax Commission which have expertise over tax issues."[77] The Department points to its more than fifty years' of experience overseeing the debt collection industry and its experience with debt settlement[78] providing expertise necessary to oversee tax debt advisors. The Department argues there is no reason to exclude tax debt settlement businesses like Wall from the Department's oversight to protect Idahoan debtors,[79] including for tax debt relief. The Director addressed "Warnings to Consumers About Tax Relief Companies Generally," acknowledging ongoing concerns with consumer protections associated with "tax relief companies" and "officer in compromise mills" that purport to get a better deal for tax payer in resolving unpaid taxes than is available working directly with the IRS.[80] The Director determined there is sufficient basis to "show some of the concerns related to tax debt negotiator/counselors in general."[81] The Court finds this is finding of fact is supported by substantial evidence in the record and this Court therefore finds it appropriate to consider acknowledged and identifiable concerns with the tax debt negotiators/counselors in relation to consumer protection. Although the Idaho Board of Accountancy and Idaho Tax Commission have expertise in tax issues, the Court does not find that their expertise precludes the Department of Finance from also having

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76 R. p. 03198.

77 Petitioner's Brief, p. 28.

78 Response, p. 12.

79 Id.

80 R. pp. 03190-03191 (Final Order).

81 Id at p. 03191.

expertise to regulate to protect debt consumers. Because the Department of Finance has a long history of regulating debt, the Court finds the Department of Finance has sufficient expertise and finds this underlying rationale supports this Court giving deference to the Department's interpretation.

Finally, the Petitioner argues "the rationale of repose does not exist because the Director made her interpretation of the Act less than one year ago."[82] The Department argues that, although the Final Order was only issued within the last year, Wall was put on notice in 2011 of the Department's position that Wall needed to be licensed and had previously rejected Wall's arguments that tax debt representatives did not fall within the ICAA and the Director's authority.[83] The Court finds that the Department's communications with Wall between November of 2011 and March of 2012 were unequivocal and opined that Wall must be licensed under the Act in order to provide its services to Idaho citizens. This Court also notes that on August 4, 2020, the Director entered a Consent Order that required Instant Tax Advisors operating in Idaho to be licensed under the ICAA in order to provide tax debt settlement services.[84] So, the Department is actively applying its interpretation of the ICAA's requirements to other businesses operating in Idaho. The Court finds the Department's position has been clear for over ten years so the rationale of repose weighs in favor of the Department.

Considering the analysis above, this Court finds it appropriate to give "considerable weight" to the Department's interpretation under the four-prong deference test articulated in *J.R. Simplot Co. v. Idaho State Tax Comm'n*, 120 Idaho 849, 820 P.2d 1206 (1991). Therefore, when addressing any ambiguity in the ICAA, the Court gives deference to the Director's interpretation.

b. Whether the ICAA's Terms Apply to Wall

Both Wall and the Department argue that the Act's language is clear and unambiguous.[85] Further, Wall and the Department agree that the main issue for

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82 Petitioner's Brief, p. 28.

83 R. p. 03179.

84 R. pp. 00546-553.

85 Petitioner's Brief, p. 25; Response, p. 14.

interpretation are the definitions of "debt counselor" and "credit counselor" found at Idaho Code § 26-2222(9), which incorporates a portion of Idaho Code § 26-2223(7).

Specifically, Wall argues that Idaho Code §26-2223 (7) is clear and unambiguous and does not apply to tax debts. Alternatively, Wall argues that even if the statute is ambiguous when applied to tax debt counselors/advisors, "the Director's Interpretation Fails to Construe the Statute as a Whole and Leads to Absurd Results." The Department argues the Act's language is broad and clearly includes tax debt so the Director's interpretation is reasonable because the "plain purpose of the statute [is] to regulate the debt settlement industry, whatever the business model, to protect vulnerable Idaho debtors."[86]

The parties dispute whether "debt" as used in the Act includes a "tax."[87] The Act does not define "debt", "debtor," or "indebtedness." The Director determined that a "Tax Debt Counselor Is A Debt Counselor Under ICAA."[88] Specifically, the Hearing Officer found (and the Director incorporated this finding) that "[t]he meaning of debt, debtor and indebtedness is interpreted here under the subject Idaho Code § 26-2223(7) to include tax within the scope of statutory language."[89]

Wall argues that taxes are not "debts" because they are "legal pecuniary obligation imposed on taxpayers subject to criminal enforcement."[90] Wall cites the Idaho Taxpayer Bill of Rights, Idaho Code § 63-4001, *et. seq*., in support of its plain-language argument. Idaho Code § 63-4001 defines "tax obligation" as "any legally owed tax liability, including tax, fees, penalty and interest, or any tax form required to be filed." IDAHO CODE § 63-4001(5). Wall argues that "debt" cannot mean "taxes" since the

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86 Response, p. 16.

87 Although not dispositive of the issue, the Court notes that in Wall's materials to clients and/or potential clients, Wall refers to its business as dealing with "tax debts" and the negotiation or resolution of "tax debts" owed by its clients. *See* R. pp. 00404-405 (Stipulated Facts Exhibit A and B ("Reduce IRS Tax Debt")); R. pp. 00413, 00419 (Stipulated Facts, Exhibits C and D ("Wall & Associates, Inc,. is an administrative tax resolution company founded by a tax attorney focused on helping taxpayers reduce, remove, and resolve unpaid Federal, State, and City tax debts…")); R. pp. 00437(Stipulated Facts, Exhibit I) ("You have hired us to negotiate your tax debt with the IRS and State of Idaho.")); R. p. 00451 (Stipulated Facts, Exhibit K) ("While W$A has proven very successful in negotiating client's tax debts…")).

88 R. p. 03196.

89 R., p. 01683.

90 Petitioner's Brief, p. 30.

Idaho Constitution[91] prohibits imprisonment for debt "except in cases of fraud" but Idaho Code § 63-3075 permits taxpayers may be imprisoned for failure to pay.

The Court starts with the plain language of the ICAA to define terms included within the Act but not specifically defined by the Act. A "debt" is "1. Liability on a claim; a specific sum of money due by agreement or otherwise; 2. The aggregate of all existing claims against a person, entity, or state." BLACK'S LAW DICTIONARY, *Debt* (11th ed. 2019). A "debtor" is "Someone who owes an obligation to another, esp. an obligation to pay money…" BLACK'S LAW DICTIONARY, *Debtor* (11th ed. 2019). Finally, "indebtedness" is "1. The quality, state, or condition of owing money. 2. Something owed; a debt." BLACK'S LAW DICTIONARY, *Indebtedness* (11th ed. 2019).

The Court also considers the definition of "tax" which is "A charge, usu. monetary, imposed by the government on persons, entities, transactions, or property to yield public revenue." BLACK'S LAW DICTIONARY, *Tax* (11th ed. 2019).

> A tax is not a debt in the ordinary sense of that word since the obligation to pay taxes does not rest on any contract express or implied, or on the consent of the taxpayer. However, a tax is considered to be a liability or obligation, and may be a debt under a particular statute, or for remedial purposes. In some jurisdictions, a tax is held to be nothing more than a debt due by the citizen to the taxing power.

84 C.J.S. *Taxation* § 3 (August 2023 update). Further, the Court notes that the Idaho Income Tax Act specifically references "tax debt" in Idaho Code § 63-3077D addressing agreements for collection of tax between the state and federal agencies. Additionally, Idaho Code § 63-3050 reads: "Any tax owed…shall constitute a debt to the State of Idaho." While not determinative, these additional statutes reference unpaid taxes and, in certain situations, refer to this as tax debt.

Above, the Court found the Act was meant to be read broadly in pursuit of its purpose of protecting consumers. The Court finds that the plain understanding of debt is an outstanding amount due and owing that is not limited by the additional terms. So, the Court finds a plain language reading of the terms "debt" and "debtor" in the ICAA supports finding that the Department can regulate tax debts under the ICAA.

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[91] Art. I, § 15, of the Idaho Constitution provides in full, "There shall be no imprisonment for debt in this state except in cases of fraud."

Wall next argues that, because the ICAA defines "creditor" in a manner that excludes governmental entities, a tax liability cannot be a "debt" under the Act.[92] Under the Act, "creditor" means "any person who offers or extends credit creating a debt or to whom a debt is owed" and "person" means "any individual, corporation, association, partnership, limited liability partnership, trust, company, limited liability company, or unincorporated association." IDAHO CODE § 26-2222(6), (14). The Hearing Officer addressed Wall's argument, stating:

> 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.[93]

The Director then also addressed Wall's arguments that the Act's restriction on "creditors" shows a tax cannot be a debt, finding:

> It is unclear why governmental entities are not listed in the definition of "person" or "creditor" found at Section 26-222(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.[94]
>
> …
>
> 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."[95]

This Court agrees with the Department and finds that "creditor" does not modify the terms "debt" or "debt counselor." Also, this Court finds the distinctive use of both "credit counselor" and "debt counselor" in the Act's definitions section and in Idaho Code § 26-2223 indicates that "debt counseling" is not limited to debts owed to

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92 Reply, p. 2.

93 R. p. 01679.

94 R. p. 03193.

95 R. p. 03198.

creditors, or nongovernmental parties. Rather, "debt counselor" should be read more broadly to give meaning to each term as used in the Act and to not render any term superfluous.

Wall then argues the Idaho Legislature intended to exclude "tax debt," from "debt" and "indebtedness." When addressing the legislative intent outside of a plain language determination, this Court gives deference to the Department's decision based on the finding above. The Department relied on the Preliminary Hearing Officer's and Director's reasoning and analysis is its responsive arguments.

First, Wall argues that the 2008 amendments to the Act demonstrate that taxes are not debts under the Act.[96] The Hearing Officer addressed the legislative history particular to amending the Act related to "debt counselors," by providing in part:

> An examination of the statutory history in order to ascertain legislative intent…reveals…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 to it 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 license in the collection agency law called debt counselor…" 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…
>
> That is as of 1990, the regulation expands to add "debt counselor" to the previously regulated license 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."
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> Telling also is the 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…

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96 Petitioner's Brief, pp. 31-33.

> The effect of these amendments is interpreted as continual expansion of the enumerated activities covered and regulated under the provision. The revisions continue in a pattern illustrating and intent to broaden rather than reduce the scope of regulation.[97]

This Court agrees with the Hearing Officer's determination that the Act's 2008 amendments broadened the regulatory scope of the Act and show the Legislature's intent to further regulate the debt industry in Idaho rather than narrow any interpretation of the term "debt."

Wall argues the 2008 changes to Idaho Code § 26-2229 that added subsection (3)(b) restricted the 2008 amendments to Idaho Code § 26-2223(7) to only those activities involving "unsecured debt." Idaho Code § 26-2229 provides in relevant part:

> Debt counselors or credit 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 for the management of debt. In the event of cancellation of the contract by the debtor prior to its successful completion, the debt counselor or credit counselor shall refund fifty percent (50%) of any collected fees associated with the amount of debt remaining unsettled at the time of the termination of the contract.

Wall argues this provision essentially precludes companies like Wall and accountants from charging fees for their services because tax liabilities are "secured."[98] The Hearing Officer's Preliminary Order addressed Wall's argument, stating:

> 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.

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97 R. pp. 01674-1675.

98 Petitioner's Brief, pp. 32-33.

The Director further addressed this argument in the Final Order, stating:

> 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.[99]

The Court agrees with the Hearing Officer's conclusion that a fee regulation for "unsecured debt" does not provide or even imply that the Act only regulates "unsecured debt." Rather, this Court finds that the Act's limitation on fees is specific to "unsecured debt." If the Legislature had intended to restrict the Act's application to only unsecured debt, the Court finds that, based on the purpose of this Act and the finding that consumers with secured debt are no less in need of protection than those with only unsecured debt, that the Legislature would have expressly included this limitation. Since the Legislature did not, this Court will not read such provision into the statute.

Wall also takes exception to the word "principal" and argues this term does not apply to tax liabilities.[100] "Principal" at its most basic is understood to mean "[t]he amount of a debt, investment, or other fund, not including interest, earnings, or profits." BLACK'S LAW DICTIONARY, *Principal* (11th ed. 2019). Therefore, the Court finds Wall's argument unavailing that the term "principal" does not apply to the taxpayer's outstanding tax amount due. Although the term "principal" is not commonly used when referring to taxes, it does not mean that it is not a readily identifiable or quantifiable amount under the Act.

Idaho Code § 26-2222(9) defines "debt counselor" or "credit counselor" as "any person engaged in any of the activities enumerated in subsection (7) of section 26-2223." Idaho Code § 26-2223(7) then lists the following activities in part, "[1] Engage or offer to engage in this state in the business of receiving money from debtors for

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99 R. p. 03198.

100 Petitioner's Brief, p. 33.

application or payment to or prorating of a debt owed to, any creditor or creditors of such debtor, or [2] 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 [3] contracting with the debtor to effect the adjustment, compromise, or discharge of any account, note or other indebtedness of the debtor." For ease of reference, hereinafter this Court will refer to the provisions in section 26-2223(7) as numbered in this paragraph. Idaho Code § 26-227(1) requires a license to "[o]perate as a … debt counselor, [or] credit counselor…"

The Director determined that "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)."[101]

Since the parties agree that Idaho Code § 26-223(7), provision [1], does not apply to this case, the Court will not further address provision [1].

Wall argues that it "does not engage in providing 'counseling or other services' to its clients in the 'management of their debts'"[102] under Provision [2]. In the Preliminary Order, the Hearing Officer concluded that the Department failed to establish that Wall was in violation of provision [2] because there was insufficient showing "as to activities which would establish 'counseling' in a traditional ordinary meaning."[103]

Still, the Hearing Officer addressed provision [3] and found the "record sufficient to establish action which illustrate Wall [had] engaged in activities which are intended on behalf of a debtor to 'effect the adjustment, compromise, or discharge…' of its indebtedness," relying on the matter submitted by stipulation by the parties where Wall agrees "to act on the behalf of the client to, at a minimum "compromise" the tax liability of said client, activity clearly within the subject statutory language.[104]

The Director agreed with the Hearing Officer's determination about provision [3] in the Final Order,[105] but the Director also determined in the Final Order that Wall's

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101 R. p. 03199.

102 Petitioner's Brief, p. 33.

103 R. p. 01684.

104 Id.

105 R. p. 03196 ("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

actions were sufficient to find that Wall acted as an unlicensed debt counselor in violation of provision [2]. The Director stated in part:

> 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.[106]

Wall argues that the Director's interpretation violated the rules of interpretation because "concluding Wall's negotiation of settlements with the IRS constitutes 'counseling or other services' would render the third activity under §26-2223 (7) superfluous which negotiating settlements is expressly addressed in the third category of §26-2223 (7)."[107] Wall argues the Director failed to identify how Wall provided counseling or other services other than Wall representing taxpayers before the IRS.[108]

The Director extensively addressed in her findings of fact Wall's Business Practices.[109] The Director noted, "The ICAA's definition of debt counselor does not specify any type of debt counseling business that would be excluded" including those for tax debts.[110] The Director also noted the purpose of the Act and the broad purpose of protecting debt consumers. More importantly, the Director addressed this argument on reconsideration, finding:

> The statutory definition of debt counselor is written broadly, with three alternative definitions combined to effect the remedial purpose of capturing all potential debt counseling activities….The ICAA requires licensure of debt counselors involved in one or more of the following three types of business practices: taking money from debtors and paying

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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.").

106 R. p. 03197.

107 Petitioner's Brief, p. 34.

108 Id.

109 R. pp. 03181-03185.

110 R. p. 03193.

> creditors of the debtor, counseling or related services to the debtor for management of the debts, and contracting with the debtor to effect the adjustment, compromise, or discharge of their debt. I.C. § 26-2223(7). If any part of the three-definition is applicable, then Wall falls within the definition of a debt counselor.
>
> Certainly, the vast majority of what Wall does for its clients seems to be helping effect the "adjustment, compromise, or discharge" of tax debts. That is the key part of the definition at tissue. However, the statutory definition also covers debt counseling work that is just with the debtor and "management of their debts." Wall's own evidence made it clear that it did more than just acting on behalf of clients to negotiate with third party taxing authorities regarding tax debt. Wall also claims that it counsels with the clients regarding "management" of many other aspect of their tax debts: advising and assisting with lien removal, advising on tax return and amended tax return filing issues, advising and assisting with currently not collectible status, advising on wage garnishment issues, advising on innocent spousal rule application, advising and assisting with tax levies, advising on the CP 200 letter, etc.…
>
> In sum, Wall's business touches on two aspects of potential debt counselor work covered by the ICAA: negotiating debt "adjustment, compromise, or discharge" with third party obliges and counseling the debtors regarding many aspects of the "management of their debts." These two parts of the definition, as applied to Wall, are complimentary and not superfluous or duplicative. Nor does the addition of an "s" on "management of debts" suggest anything other than the fact that the drafters were matching plurals… Nor is Wall's business comparable to the business of an accountant; i.e. the Director's finding that aspects of Wall's business fit within the meaning of counseling and debtor regarding "management of their debts" has no relevance to whether an accountant's business would fit into that meaning.[111]

In review of this Decision on reconsideration and that it specifically addressed each argument Wall raised in this Petition for Judicial Review related to whether provision [2] specifically applies to Wall, this Court finds the Director did not err in finding that Wall falls within the provision [2] definition for debt counselor. The Director addressed the many activities that Wall itself purports to provide for its clients and noted that many of these activities have Wall advising the clients on the management of their debts. This Court is not persuaded that the addition of the "s" on "debts" in provision [2] somehow requires evidence of more than one separate and distinct debts before provision [2] applies. Finally, the Court agrees that the Act applies to Wall. This Court

[111] R. pp. 03302-3303.

will not extrapolate that decision to address a hypothetical applicability to any other business or type of business not at issue before the Court in this Petition for Judicial Review. Therefore, provision [2] applies to Wall so Wall is required to be licensed under the ICAA.

Wall argues that the interpretive doctrines of *noscitur a sociis* and *ejusdem generis* prevent application of the third category under §2223(7) to tax representatives.[112] Provision [3] requires licensing for persons "contracting with the debtor to effect the adjustment, compromise, or discharge of any account, note or other indebtedness of the debtor." Specifically, Wall argues that the term "indebtedness" must be determined through the consideration of the particularities of the terms "account" and "note," which are terms associated with "voluntary indebtedness."[113] In short, Wall argues "other indebtedness" should be construed to mean only that indebtedness that is voluntarily assumed by a debtor. Wall argues "other indebtedness" cannot refer to taxes because taxes are involuntary so Provision [3] does not apply to contracts for the "the adjustment, compromise, or discharge" of tax debts.

The Hearing Officer addressed this argument, finding:

> In the examination of intent, is that in the subject language of Idaho Code § 26-2223(7) the "of any account, note or other indebtedness" used 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 that weak form in an affirmative manner. This evidences a 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" in the sentence This further supports a broad reading of the terms.
>
> Wall also argue 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, not" superfluous. This argument fails though to consider the reverse consequence. That is if "account" and "note" were intended as the sole type of obligations to be included, the later qualifier "other indebtedness" would then be unnecessary. This

112 Petitioner's Brief, pp. 35-37.

113 Petitioner's Brief, p. 36.

> again presents an indicator of the intent to be of greater inclusion not less in the phrase "other indebtedness."[114]

The Court finds that the qualifier forces the reading of the phrase to be "any other indebtedness." Based on the other provisions in the Act, and the Act's broad purpose, the Court finds that the term "other indebtedness" is not limited to voluntary debts. This Court finds the term "other indebtedness" as included in provision [3] includes tax debts. Wall does not dispute that it entered into contracts for the compromise of tax debts, which the Department recognized was a standard included term in Wall's contracts with Idaho citizens. Therefore, provision [3] also applies to Wall and Wall is also required to be licensed under this provision in the Act.

Further, the Court finds that, overall, the Director's interpretation is reasonable by rejecting arguments that companies or persons can perform unregulated debt counselor work for Idaho residents merely because that company or person limits its services to only addressing tax debts. Although there were arguments that other statutes apply to tax debts/liabilities, the Petitioner has failed to show that any other statute or regulation provides oversight for Idaho consumers related to companies advertising to and profits derived as tax debt/liability advisors.

So, the District Court affirms the Director's decision that from 2011 until 2022 Wall was engaging in conduct as a debt counselor without a license in violation of Idaho Code Section 26-2223(1) and (7).

c. Whether the ICAA Statutes as Applied to Wall are Federally Preempted

Wall argues the ICAA is federally preempted by federal statute and regulations, specifically 31 U.S.C. §330(a), which addresses practice before the Department of Treasury, and 31 C.F.R., part 10, which addresses practice before the IRS.[115]

Whether Idaho law is preempted through the operation of the Supremacy Clause of the U.S. Constitution is a question of law. *See e.g.*, *In re Estate of Mundell,* 124 Idaho 152, 153, 857 P.2d 631, 632 (1993).

> Federal law may preempt state law in one of two ways. First, if Congress has shown the intent to occupy a given field, any state incursion into that

114 R. p. 01677.

115 Petitioner's Brief, p. 40.

> field is preempted by federal law. Second, even if the field is not preempted, if state law conflicts with federal law, it is preempted to the extent of the conflict. In order to find that a state law has been preempted, this Court must determine that the law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." 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.

Christian v. Mason, 148 Idaho 149, 152, 219 P.3d 473, 476 (2009)(internal citations omitted). "The preemption of state law is not to be readily inferred." *Mundell*, 124 Idaho at 153, 857 P.2d at 632.

Wall argues that 31 U.S.C.A. § 330(a) preempts the Idaho Collection Agency Act. 31 U.S.C.A. § 330(a) allows the Secretary of the Treasury to "regulate the practice of representatives of persons before the Department of the Treasury" and allows nonlawyers to appear as representatives.[116] Wall cites *Sperry v. State of Fla. ex rel. Fla. Bar*, 373 U.S. 379, 83 S. Ct. 1322, 10 L. Ed. 2d 428 (1963), to support its argument that the licensing requirement in ICAA impermissibly attempts to "control practice before the IRS" and, therefore, the ICAA is preempted by federal law. This Court finds the decision in *Sperry* is not analogous to the facts in this case. In *Sperry,* the Supreme Court determined that federal statutes allowed practice before Patent Office by nonlawyers so the Florida law "could not enjoin a nonlawyer registered to practice before the United States Patent Office from preparing and prosecuting patent applications in Florida." That Florida law was preempted because it restricted all nonlawyers from practice before the U.S. Patent Office which was a state law in direct conflict with the federal law.

Under the ICAA, the state licensing requirements do not categorically enjoin tax debt advisors from appearing before the IRS, rather it simply requires such debt advisors to obtain a license from Idaho's Department of Finance. Stated simply, the ICAA does not enjoin all tax debt advisors who comply with the other regulatory requirements from appearing before the IRS in contravention of federal statute or regulation. The ICAA only requires them to obtain a license from the Idaho Department

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116 31 U.S.C.A. § 330(a); 31 C.F.R. §§10.3(b)-(d), 10.4.

of Finance if they are providing that service within Idaho. This Court finds regulation of this nature is not preempted.

Wall also argues that the "the IRS has enacted regulations governing the amounts an enrolled agent can charge a represented taxpayer."[117] 31 C.F.R. §10.27 provides:

> (a) In general. A practitioner may not charge an unconscionable fee in connection with any matter before the Internal Revenue Service.
>
> (b) Contingent fees—(1) Except as provided in paragraphs (b)(2), (3), and (4) of this section, a practitioner may not charge a contingent fee for services rendered in connection with any matter before the Internal Revenue Service.

The Court does not find the federal provisions above are in direct conflict with the ICAA's limitation on fees. The limitation on fees in Idaho Code §26-2229 (3)(b) provides in part that "Debt counselors or credit 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 for the management of debt," and also requires the return of fees on any canceled contract. The federal and state rules can easily be read together as to address the reasonable fees a tax debt counselor/advisor can charge in Idaho.

Further, the Court finds the Department of Finance thoroughly addressed Wall's arguments of federal preemption as part of the issued decisions. The Director addressed Wall's claims of federal preemption, stating:

> 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

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117 Petitioner's Brief, p. 41.

> 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.").[118]

The Hearing Officer addressed the issue of federal preemption in his reasoning, stating in part:

> Wall notes in particular an Internal Revenue Circular, number 30 pertaining to requirements of 31 CFR Part 10 and regulation regarding appearance and practice before the Department of Treasury and the IRS. Wall presents a conflict preemption argument, contending the Idaho licensing requirement imposes impermissible restrictions on Wall to negotiate on behalf of clients before the IRS…
>
> 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 noted as being disfavored in the areas 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 federal regulations.[119]

The District Court finds that Wall has failed to overcome its burden to show through the federal statutes and regulations cited either an intent for the federal laws to occupy the

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118 R. pp. 03198-3199.

119 R. pp. 01684-1685.

field or that the federal and state laws conflict. Therefore, the Court finds federal law does not preempt the Act from requiring licenses for tax debt advisors. The Court affirms the above analyses of the Director and Hearing Officer as consistent with the law.

d. Whether the Idaho Taxpayer Bill of Rights Controls Over the ICAA

Wall Argues that the Idaho Taxpayers' Bill of Rights [Idaho Code §§ 63-4001 *et. seq*.] guarantee a right of representation by "anyone" and that it controls over the Act because "a specific right controls over a general prohibition."[120] There is no dispute that the Taxpayer Bill of Rights allows anyone to provide representation. Wall argues "the Director's interpretation of the Act would effectively outlaw professional tax representation."[121] This Court disagrees. Requiring a license does not "outlaw" professional tax representation.

Still, this Court will address whether the Idaho Taxpayer Bill of Rights controls over the ICAA on the issue of representation before the Idaho Tax Commission which is raised in this case. "[W]here two statutes appear to apply to the same case or subject matter, the specific statute will control over the more general statute." *State v. Barnes*, 133 Idaho 378, 382, 987 P.2d 290, 294 (1999). "[W]here two statutes conflict, courts should apply the more recent and more specifically applicable statute." *Eller v. Idaho State Police*, 165 Idaho 147, 154, 443 P.3d 161, 168 (2019).

Wall cites *City of Sandpoint v. Sandpoint Indep. Highway Dist.*, 879 P.2d 1078, 1083 (Id. 1994), to support its argument that because the Taxpayers Bill of Rights is an earlier-adopted statute more specific in its application, the ICAA as a later-enacted (updated in 2008) statute does not apply because it renders the right to representation

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120 Petitioner's Brief, pp. 38-40.

121 Petitioner's Brief, p. 38.

Wall also argues as part of this section that the Act precludes professional tax debt advisors from charging fees associated with tax liens that are secured, as most are by the time taxpayers seek professional services. *Petitioner's Br*. pp. 39-40. The Court has extensively addressed the issue of whether Idaho Code § 2229 precludes Wall from charging fees for either secured or unsecured tax debts and has determined that the Director's interpretation does not prohibit licensed debt counselors form being paid. The Court adopts its previous analysis related to fees and does not consider this argument separately here.

by anyone in the Taxpayers Bill of Rights as a "nullity."[122] Wall argues that the ICAA applies when helping consumers settle general debts but the Taxpayer Bill of Rights is more specific and addresses representation before the Idaho Tax Commission. Wall then argues that the Idaho Tax Commission, under its legislative authority, developed "power of attorney forms on which the Idaho Tax commission did not require a license under the Act in order to represent a taxpayer." In short, Wall argues because there is no requirement for a license under the Taxpayer Bill of Rights as the more specific statute that anyone can be a representative so the ICAA that relates only to general debts cannot proscribe additional requirements for representation in Idaho.[123] Again, this Court finds that interpreting the ICAA to include tax debt advisors, which then requires tax debt advisors operating in Idaho to be licensed by Idaho's Department of Finance, does not "nullify" an Idahoan's right to choose their representation before the Idaho Tax Commission.

Further, the Director addressed the Idaho Taxpayer Bill of Rights, stating:

> 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.[124]

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122 Petitioner's Brief, p. 39.

123 Id.

124 R. p. 03234.

The Hearing Officer's decision was substantially the same and states:

> 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 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.

This is a well-reasoned analysis that the Idaho Taxpayer Bill of Rights does not preclude the application of the ICAA to tax debt advisors. Because the ICAA does not nullify the right to choose representation in the Idaho Taxpayer Bill of Rights, the District Court finds as a matter of law that The Idaho Taxpayer Bill of Rights does not preclude the Idaho Collection Agency Act from also applying to tax debt counselors/advisors.

e. Whether the ICAA is Unconstitutional

Wall argues for the first time before this Court that the Idaho Collection Agency Act is unconstitutional under the First Amendment of the United States Constitution to the extent it regulates advice or advocacy since this is protected free speech.[125] This Court considers this new argument raised on appeal because the constitutionality of a statute cannot be raised in front of an agency. *See Alcohol Beverage Control v. Boyd*, 148 Idaho 944, 946, 231 P.3d 1041, 1043 (2010) (the agency was unable to consider the constitutionality of the statute in question, because "[p]assing on the constitutionality of statutory enactments, even enactments with political overtones, is a fundamental responsibility of the judiciary…").

Wall argues this Court should apply a strict scrutiny standard because the ICAA as interpreted regulates "content-based speech" because it is "related to the topic discussed or the idea or message expressed;"[126] specifically, tax counseling/advising. The Department argues that this Court should apply the more lenient rational basis test because the ICAA regulates "commercial speech" which is afforded less protections.[127]

> 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 Idaho State Tax Commission does not automatically entail matters which would require licensing under the Act. It cannot be concluded that the 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.

R. pp. 01685-1686.

125 Petitioner's Brief, pp. 41-42.

126 Petitioner's Brief, p. 41.

127 Response, p. 38.

However, the Department argues that both Idaho Code §§ 26-2223 and 26-2229(3) would satisfy the constitutionality test under either standard because the ICAA provides "an appropriate balance between permitting consumers access to services to assist them in resolving debts while also protect consumers from harm."[128]

"The constitutionality of a statute is a question of law. The party challenging a statute on constitutional grounds bears the burden of establishing the statute is unconstitutional and 'must overcome a strong presumption of validity.'" *Id.* (quoting *Olsen v. J.A. Freeman Co.,* 117 Idaho 706, 709, 791 P.2d 1285, 1288 (1990)).

> As a general matter, the First Amendment means that government has no power to restrict expression because of its message, ideas, subject matter, or content. [*United States v. Alvarez*, 567 U.S. 709, 132 S. Ct. 2537, 2543, 183 L. Ed. 2d 574, 585-86 (2012)]; *Ashcroft v. American Civil Liberties Union,* 535 U.S. 564, 573, 122 S.Ct. 1700, 1706–07, 152 L.Ed.2d 771, 779–81 (2002). As a result, the Constitution demands that content-based restrictions on speech be presumed invalid and that the government bear the burden of showing their constitutionality. *[Id.]* The Supreme Court has repeatedly recognized, however, that certain categories of speech do not enjoy the benefit of full First Amendment protection.

State v. Ruggiero, 156 Idaho 662, 665, 330 P.3d 408, 411 (Ct. App. 2014).

In Minnesota, Wall raised a similar argument before the Minnesota District Court in *State v. Wall & Associates, Inc.*, No. 27-CV-18-19874, 2019 WL 3803681, at *1 (Minn.Dist.Ct. Aug. 01, 2019). The Minnesota Court reasoned in relevant part:

> States have long been able to use their Police Powers to Enforce Licensure Schemes without infringing on the First Amendment
>
> **...**
>
> state's police power "to provide for the general welfare of its people authorizes it to prescribe all such regulations as in its judgement as will secure or tend to secure [its people] against the consequences of ignorance and incapacity, as well as of deception and fraud." *Dent v. West Virginia*, 129 U.S. 114, 122 (1889). In fact, the Court has gone so far as to say "[i]t is too well settled to require discussion at this day that the police power of the states extends to the regulation of certain trades and callings." *Watson v. Maryland*, 218 U.S. 173, 176 (1910). More recently, the Court has affirmed this settled law stating, "States have a compelling interest in the practice of professions within their boundaries, and…as part

[128] Response, p. 40.

> of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions." *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975). Justice Jackson eloquently summarized the law of licensing professionals:
>
> > The modern state owes and attempts to perform a duty to protect the public from those who seek for one purpose or another to obtain its money. When one does so through the practice of a calling, the state may have an interest in shielding the public from the untrustworthy, the incompetent, or the irresponsible, or against unauthorized representation of agency. A usual method of performing this function is through a licensing system.
>
> *Thomas v. Collins*, 323 U.S. 516, 544 (1945) (Jackson, J. concurring).

Id. 2019 WL 3803681, at *2–3. This Court finds the Minnesota court's analysis persuasive.

This Court finds that the State of Idaho has a rational interest in the licensing requirements for debt relief services. At its most basic, "commercial speech" is a "Communication (such as advertising and marketing) that involves only the commercial interests of the speaker and the audience, and is therefore afforded lesser First Amendment protection than social, political, or religious speech." BLACK'S LAW DICTIONARY, Speech (11th ed. 2019). Commercial Speech is further described as:

> [S]peech that does no more than propose a commercial transaction which is related solely to the economic interests of the speaker and his or her audience or which is likely to influence consumers in their commercial decisions. It usually involves advertising products for sale but is not restricted to advertising; for instance, communication directed solely to the collection of a debt is purely commercial.

Considering this definition, this Court finds that the regulation of the debt collection industry and tax "advice or advocacy" when marketed to potential client and clients for this purpose is a business and that "commercial speech" is not content-based speech that demands a strict scrutiny test by applied when determining constitutionality. The Court finds the ICAA is a content neutral statute because it does not place a restraint on the substance of a particular type of speech and "serves purposes unrelated to the content of expression." *See State v. Medel*, 139 Idaho 498, 501, 80 P.3d 1099, 1102 (Ct. App. 2003). This court acknowledges that debt settlement service providers use

speech while providing their services, including debt counseling. However, the ICAA's purpose is to protect Idaho citizens while seeking debt relief and counseling and this statute is not an attempt to regulate speech. This Court finds that the ICAA regulates all persons who choose to provide debt relief services but the Act does not restrict based on the content or message provided as part of these services. Therefore, the Act places only an incidental burden on speech.

> Commercial speech is not protected to the same extent as noncommercial speech, and not all regulation of commercial speech is unconstitutional because commercial speech has a great potential to mislead and because the State has an interest in protecting the public from those seeking to obtain the public's money.

16B C.J.S. *Constitutional Law* § 941(Aug. 2023 Update). Generally, "Restrictions on commercial speech are reviewed under the standard of intermediate scrutiny." *Id.* However, the more lenient rational basis test applies where a commercial speaker is required to make "certain disclosures in the context of potentially misleading speech." *Zauderer v. Officer of Disciplinary counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985).

This Court finds that it is a well-recognized state interest to prevent consumer deception, including as part of a state licensing requirement. *See Wall & Associates, Inc.*, 2019 WL 3803681, at *6 (citing *1-800-411-Pain Referral Serv., LLC*, 744 F.3d at 1054; *Am. Meat Inst. V. U.S. Dep't of Agric.*, 760 F.3d 18, 23 (D.C. Cir. 2014); *Milavetz, Gallop & Milavetz, P.A. v. U.S.*, 559 U.S. 229, 250 (2010)). This Court determined above that there are identifiable and acknowledged concerns for consumer protection, even with tax debt negotiators/counselors.[129] Therefore, the question is whether the Act's requirements and regulations are "are reasonably related to the purpose of protecting the consumer." *See Zauderer v. Officer of Disciplinary counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985).

This Court finds that the State of Idaho's interest in preventing deception of consumers is reasonably related to the licensing requirement enacted in the ICAA that

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[129] *See Supra* § III.1.a.ii "Whether the Director's Interpretation of the Act is Entitled to Deference."

includes certain restrictions on counselors and advisors and also mandates certain obligations to consumers by those falling within the scope of that statute. In the first half of this decision, the District Court affirmed the Director's decision that from 2011 until 2022 Wall was engaging in conduct as a debt counselor without a license in violation of Idaho Code Section 26-2223(1) and (7). The Director also addressed how the ICAA "is an important consumer protection statutory regime as it relates to debt counselor business and their dealings with potentially vulnerable debtors," stating:

> 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.[130]

This Court agrees with the Director that the ICAA is a statutory consumer protection regime and this Court also finds as a matter of law that the ICAA is not an unconstitutional limitation of the U.S. Constitution's First Amendment right to free speech.

2. Did The Director Abuse Her Discretion in Imposing Penalties and Restoration Fees to Clients

Idaho Code § 26-2244(2) provides:

> Whenever, after notice and the opportunity for a hearing, the director finds that any person has engaged in any act, practice, or omission constituting a violation of any provision of this act or a rule adopted or an order issued

[130] R. pp. 03192-3193.

under 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 or a rule adopted or an order issued under 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 or a rule adopted or an order issued under 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.

"The selection of administrative sanctions is vested in the agency's discretion." *Knight v. Idaho Dep't of Ins.,* 124 Idaho 645, 650, 862 P.2d 337, 342 (Ct.App.1993). The Director acknowledged that the decision to impose sanctions under Idaho Code § 26-2244(2)(a) was discretionary.[131]

On reviewing a department's discretionary decisions, "an appellate court reviewing agency actions under the [IDAPA] must determine whether the agency perceived the issue in question as discretionary, acted within the outer limits of its discretion and consistently with the legal standards applicable to the available choices, and reached its own decision through an exercise of reason." *Williams v. Idaho State Bd. of Real Est. Appraisers*, 157 Idaho 496, 502, 337 P.3d 655, 661 (2014).

The Director imposed the following penalties and sanctions:

8. 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).

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

10. Respondent is ordered to pay the Idaho Department of Finance fees and costs in the total amount of $42, 016.60, pursuant to Idaho Code Section 26-244(2)(c).

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131 R. p. 03200.

Neither party raised any specific argument related to the $42,016.60 of fees and costs awarded by the Director pursuant to Idaho Code § 26-244(2)(c). So, this Court finds the fees and costs awarded to the Department and against Wall are not an issue on appeal before this so this Court will not further address the award of $42,016.60 of fees and costs against Wall.

The Petitioner argues that the Director imposed "Draconian" penalties and restitution which was an abuse of discretion and also unconstitutional. The Department responded that the Director did not abuse her discretion and that she applied appropriate sanctions under the ICAA.

For clarity, the Court notes that Wall received a total of $661,339.00 in payments from Wall's fifty-four clients where Wall was found to be in violation of the Act.[132] Because the Director awarded $162,000.00 to the Department in penalties and $271,987.50 in restoration fees to Wall's clients, the evidence in the record shows that Wall still had a net gain of $263,351.50 from its tax counseling/advising services in Idaho from these fifty-four clients from 2011 to 2020. Even considering the Department's $42,016.60 in costs and fees that Wall must pay for its unsuccessful agency appeal, the Department still did not penalize Wall in an amount to exceed the amounts that Wall made with its contracts with Idaho citizens during the relevant timeframe.[133]

a. Whether the Department is Estopped from Imposing Penalties

Wall argues that the Director should be "estopped from seeking to impose penalties or restitution against Wall under the doctrine of quasi-estoppel."[134] Wall

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132 R. p. 02960.

133 Further, the Court notes from the Agency Record that "[i]t is not known how many more Idaho clients Wall has contracted with since June of 2020," but the evidence in the Record is that Wall has not stopped contracting with clients since the agency's final decision. R. p. 03180. ("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.").

134 Petitioner's Brief, p. 43.

argues that the Department had the authority pursuant to Idaho Code § 26-2244(1) to, without notice or hearing, "order any person to cease and desist from acts, practices, or omissions which constitute a violation of this act or a rule adopted or an order issued under this act." Wall argues that the Department did not use this power but instead "allowed Wall to continue to operate for the next seven years."[135]

"Quasi-estoppel is properly applied when one party unconscionably asserts a position inconsistent with a previously taken position to the detriment of other party." *Naranjo v. Idaho Dep't of Correction*, 151 Idaho 916, 920, 265 P.3d 529, 533 (Ct. App. 2011). "When the government is not acting in a proprietary function, estoppel must be invoked with caution and only in exceptional cases with recognition that its application is the exception and not the rule." *Id.* (quoting in part *Boise City v. Sinsel,* 72 Idaho 329, 338, 241 P.2d 173, 179 (1952)). When a department does not take an inconsistent position, the Court need not consider whether extraordinary circumstances exist. *Id.*

The Director addressed the communications that occurred from 2011 and 2012 between Wall and the Department as well as Wall's knowledge of the Department's stance on the requirement for licensing, providing in part:

> Wall points out that after the Department's counsel gave it clear instruction in 2012, get licensed or stop its unlicensed debt counseling business, Wall sent an additional letter again claiming that it did not need to get licensed. The record indicates that the Department's counsel did not provide further response. Wall claims this meant that it rightfully assumed that the Department was conceding the issue. The facts do not support that assumption.
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> The Department's counsel stated in his last correspondence: "At this point there is no reason for a continued dialogue." (Final Order, p. 6.) Despite that clear statement, Wall tried to continue the dialogue, repeating its arguments that the Department's counsel had already rejected. Wall knew the Department's clear position: "Wall and Associates needs to either obtain a license or quit doing business as a debt counselor in Idaho." (*Id.*) Wall knew that the Department did not send any communication changing that position, regardless of how many times Wall asked the Department to reconsider. (*Id.*) Therefore, Wall was on notice that it was risking liability under the ICAA if it ignored the Department and its counsel's clear instruction. Yet, Wall continued its unlicensed debt counselor business in Idaho, suggesting that it was not deterred by the risk of liability and was

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135 Id.

> factoring that liability as merely a cost of doing business. Those facts are an aggravating factor in this matter.[136]

Here, the Director found that Wall was on notice of the Department's position that Wall was required to be licensed, the Department's position remained unchanged throughout the communications with Wall, and that Wall was clearly informed that it could be subject to penalties and/or sanctions under the ICAA.

The Department argues that this is a factual determination by the Director that is supported by substantial and competent evidence. This Court agrees. "Substantial evidence is relevant evidence that a reasonable mind might accept to support a conclusion. *In re Idaho Dep't of Water,* 148 Idaho at 212, 220, P.3d at 330 (*citing Pearl v. Bd. of Prof'l Discipline of Idaho State Bd. of Med.,* 137 Idaho 107, 112, 44 P.3d 1162, 1167 (2002)) (internal quotations omitted). "Substantial evidence is more than a scintilla of proof, but less than a preponderance." *Id.* The Court finds that although the Department had the option to order any person to cease and desist under the Act, these communications from the Department to Wall were provided for the purpose of informing Wall to cease and desist in Idaho if it would not get licensed in Idaho. The Court finds there is substantial and competent evidence to find that Wall was properly informed of the Department's position and, despite that notice, Wall continued to act in contravention to the Department's requirements for Wall to be licensed or discontinue operations in Idaho that Wall knew was potentially violating the ICAA. Because the Department did not take or communicate inconsistent positions, the doctrine of quasi-estoppel does not apply to preclude penalties in this case.

b. Ordered Penalties

Wall argues that the penalties imposed are unjust and that an appropriate penalty would "eliminate penalties for any violation after the tacit acceptance of Wall's position in 2012" which would then only leave six customers and "that a penalty of $1,000.00 would be the maximum appropriate penalty for each of these alleged violations, for a penalty of $6,000.00, which is in line with the penalties assessed on other companies."[137]

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136 R. pp. 3200-01 & 3308-09.

137 Petitioner's Brief, p. 55.

The Director found, based upon the stipulation between the parties and Wall's list of clients from 2011 onward, that Wall had committed fifty-four violations by entering into contracts with fifty-four clients for services related to tax debts.[138] The Director ordered $3,000 per violation, which is less than the $5,000 per violation allowed under Idaho Code § 26-2244(2)(a). So, this Court finds the $162,000.00 penalty imposed was authorized by the statute.

In deciding to impose $3,000 for each violation, the Director stated that she considered the following aggravating circumstances:

> 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 claims judgment owed to an Idaho resident.

Further, the Director indicated that important factors for her consideration were "deterrence and enforcement of the statutory regulatory program."[139] Finally, in reaching the decision to impose a $3,000 penalty per violation, the Director stated:

> 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

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138 R. p. 03199 ("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.").

139 R. p. 03202.

> 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.

On Reconsideration, the Director provided that "[a] lessor penalty would have suggested that Wall's violations were merely the price of doing business and would have reduced deterrent impact."[140] The Director indicated that Wall's request for a penalty of less than $10,000 for its ten years of violations, "would clearly not act as deterrent to statutory violations that earned as least $661,339 in fees."[141] Finally, the Director noted that, despite the Final Order to cease and desist acts and practices constituting unlicensed debt counselor or credit counselor activity in Idaho or to become licensed pursuant to the ICCA,[142] Wall provided no indication that it had taken any steps to comply with the Final Order and noted that Wall did not apply for a license as a debt collector.[143]

Wall argues there is no history of the Director imposing "such heavy penalties" and that the record shows that penalties assessed against other violators were less than $15,000.00.[144] The referenced $15,000 penalty (and $5,000 in fees) was determined as part of a consent order, which was an agreement between the Department and the alleged violator, to imposed a penalty of $15,000 for forty-three violations resulting in excess of $46,000.00 in fees.[145] In that example, the violator agreed to immediately comply with the ICAA requirements. Additionally, the Director required that violator to pay the entire amount of the fees collected as part of the

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140 R. p. 03308.

141 Id.

142 R. p. 03209.

143 R. p. 03308 (FN 1).

144 Petitioner's Brief, p. 53.

145 R. pp. 00563-570 (Kinney Dec, Exhibit Q).

violations in restitution.[146] The Court finds the facts of this other case differ from the proceedings and the financial concerns in this case.

Further, Wall argues Instant Tax Solutions has been the only other tax company that the Director of Finance has challenged under Idaho Code § 26-2223 and that Instant Tax Solutions only paid a $1,500.00 under its consent decree.[147] The Department contacted Instant Tax Solutions after it received a complaint in 2019 and addressed only those alleged violations for the 2019 calendar year.[148] Upon information from the Department, that respondent immediately complied with the Department's licensing requirements.[149] Further, the Consent Decree does not indicate any financial gains obtained during times of noncompliance with the ICAA. The Court finds this immediate compliance based on one complaint differs from the facts and proceedings in this case related to Wall.

Wall argues that the imposition of "such high penalties" was because Wall refused to settle this matter which is impermissible because Wall is entitled to exercise its right to adjudicate the issue.[150] However, Wall does not cite to any decision or any part of the Agency Record or transcripts to support Wall's argument that Wall's decision not to settle or enter into a consent order was a factor when the Department determined the penalties. Instead, Wall cites to the Complainant's Memorandum of Restitution and Penalties[151] to support its argument that the penalties were determined after incorrectly considering Wall's decision not to enter into consent orders with the Department. This Court will not equate a party's briefed argument with the Director's Decision that is part of the Agency Record. The Complainant's Memorandum states in relevant part:

> The record contains past examples of penalties imposed, upon the entry of a Consent Order, i.e., a stipulated and agreed order. In order to

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146 R. p. 00568.

147 R. pp. 00547-552 (Kinney Dec, Exhibit O).

148 Id.

149 R. p. 00550 ("Respondent represents that it has cured its deficiency by obtaining a license to engage in debt counseling activities in Idaho, and agrees to maintain its license in order to continue providing debt settlement services or otherwise conduct activity described in the Act.")

150 Petitioner's Brief, p. 53.

151 R. pp. 01746-1759, specifically p. 01755.

> achieve a quicker and easier definite resolution, the Department has been willing to forgo imposition of higher penalties in exchange for consensual orders where violations are admitted and relief is obtained.[152]

Every case is different. The referenced agency actions in other cases are dissimilar from the facts related to Wall's actions and communications with the Department. This Court determines this case from the record before it and this Court finds that the Court cannot equate agreed-upon terms with other alleged violators are the same facts or circumstances described in the Agency Record or transcripts that record the lengthy proceedings in this action. So, this Court will not substitute its own judgment of negotiated settlements in other cases as being a reasonable determination of penalties in this case. While Wall had…and still has…rights to adjudicate this case to conclusion. This right has not be infringed upon. But Wall does not have a right to now have this Court require the Department to adhere to settlement penalty amounts for negotiated resolutions in a case where there has been no settlement.

The standard that this Court applies in this proceeding is whether the determination by the Director is supported by substantial and competent evidence. Again, "Substantial evidence is relevant evidence that a reasonable mind might accept to support a conclusion. *In re Idaho Dep't of Water,* 148 Idaho at 220, P.3d at 330 (internal citation and quotations omitted). Overall, in reviewing the Director's decision and her stated basis for imposing the $3,000 penalty per violation, this Court finds that there is substantial evidence in the record that a reasonable might accept to support the Director's conclusion and that the Director did not abuse her discretion in imposing the $3,000-per-volation penalty which was well within the outer limits of her discretion and consistent with legal standards applicable. The Director reached her own decision through an exercise of reason that is based upon evidence in the record. So, this Court affirms the Director's decision to impose $162,000.00 in penalties against Wall pursuant to Idaho Code § 26-2244(2)(a).

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[152] R. p. 01755.

c. Ordered That Fees Be Restored to Clients

Wall argues the Director abused her discretion in awarding certain restitution to clients. Further, the Petitioner argues that a statute of limitations applies to preclude any award of restoration fees paid prior to 2016.

i. Whether the Amount Awarded to Clients Was an Abuse of Discretion

The Director ordered Wall to "restore fees totaling $271,987.50 for the eleven harmed Idaho clients."[153] No prejudgment interest was awarded and this is not an issue on appeal.[154] Wall argues the Director's decision was based on the finding that "Wall did not provide a benefit to those clients solely because the IRS did not grant those client's requests for an OIC or other relief [and t]he fact that the IRS does not grant the relief Wall's client seeks does not mean that Wall did not provide a benefit to that client through Wall's representation."[155] Therefore, the Court will address the Director's reasoning and discussion of each client below.

Under Idaho Code § 26-2244(2)(b), the Director has authority to return all fees that were "acquired … in violation of [the] act." The amount of full restitution for all fifty-four of Walls clients during the relevant timeframe would total $661,339.00. The Director made a discretionary decision to not order the return of all these fees collected by Wall. Instead, the Director stated she would "limit the restoration of fees pursuant to principles of restitution and/or disgorgement."[156] In addressing the appropriate restoration amount, the Director provided in part:

> 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.*
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> …

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153 R. p. 03206.

154 Id. ("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.').

155 Petitioner's Brief, p. 44.

156 R. p. 03203.

> [T]he 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.

Wall argues "that the purpose of a restitutionary award is to place the consumer in the position the consumer would have been in if the transaction had not happened" and the Director's award of restitution did not comply with this rule because Wall completed work which left many clients in a better position.[157] The Director recognized the rule related to restitution but also discussed the rule for disgorgement and its purpose, stating:

> "[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)).[158]

It is clear in the Director's decision that the Director did not order the restoration of fees solely for deterrence purposes. Instead, the Decision demonstrates that she used the limited record before her to determine where restitution was needed to make each client whole and considered whether Wall's gains from each client were improper based on the fees charged, work completed, and results obtained that she had within the record. This Court finds that the Petitioner has failed to show the Director erred by considering both purposes of restitution and disgorgement when she made her discretionary determination of the amount of fees and charges acquired or transferred in violation of the Act from each client or that that award was an abuse of her discretion.

The basis of the Director's Decision is articulated in the record. She ordered restoration of fees for the "[f]our Idaho clients [that] submitted complaints to the Department explaining how they had been harmed both in fees paid and in stress caused by Wall's business practices"[159] and more particularly explained this reasoning and order for these clients as follows: AM and VM-- $7,800 (all fees); MP--$9,000 of

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157 Petitioner's Brief, p. 50.

158 R. p. 03203.

159 R. p. 03204.

total $10,800 paid; MG--$6,300 (all fees), and MM--$6,300 of $10,375 total.[160] Wall did not specifically address the circumstances of any particular client in this list. The Court finds the Director did not abuse her discretion in awarding full restitution of these fees under Idaho Code § 26-2244(2)(b).

The Director also addressed the "seven Outlier Clients" and decided as follows:

> 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.[161]

As referenced in the Final Decision, Part I.E of the Final Order addressed "Wall's Disclosed Results for Idaho Clients Since 2011", in part:

> 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. …
>
> 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

160 R. p. 03205.

161 Id.

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.*[162]

Wall argues the Director's review and finding that "Wall did not provide a benefit … is simply not accurate."[163] Specifically, Wall states her findings for restoration as to Clients J, CT and MT are "absurd" because there was a recognized benefit to these clients. Related to Client J, Wall asserts Client J owed $440,000 in taxes and Wall argues that its negotiation resulted in Client J paying "the IRS **nothing** [from 2012-2020] because of Wall's efforts to resolve the matter" and then in 2020 resulted in "an installment plan of $2,500 per month."[164] Wall argues there was a benefit to Client J with a resolution that allowed Client J to keep its businesses and other property while

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162 R. pp. 03185-3188.

163 Petitioner's Brief, p. 45.

164 Id.

ultimately only paying a fraction of the taxes and interest owed. Wall argues there is "no taxpayer [in client J's position] who would not agree to this resolution."[165] Related to Clients CT and MT, Wall makes similar arguments that the clients kept their business and personal assets even though they were in the process of being seized, and the client's did not pay money to the IRS between 2018 and 2021. Wall argues it only received "5% of the $650,000 tax obligation" and the Clients received a substantial benefit.[166] This evidence was in the record at the time of the Director's review and there is no evidence or argument that the Director did not actually consider this evidence when she reached her decision. Wall also made similar arguments on reconsideration of the Final Order. The Director provided in relevant part on Reconsideration:

> In its Motion to Reconsider Final Order, Wall challenges the interpretation of the facts relevant to the two highest paying of the Outlier Clients: J (paid $98,000 in fees, Wall ordered to return $73,500) and CT and MT (paid $60,800 in fees, Wall ordered to return $45,600). Wall points out that it helped J to avoid a levy on business and personal assets and to work out a payment plan of $30,000 a year to the IRS, which hopefully will end in ten years if the remaining tax debt is extinguished by the statute of limitation. Wall offers no evidence of how much time, effort, or expertise it took to achieve that result for the client. The IRS tells the public that most resolutions obtained through a third party could be obtained directly by the taxpayer. (See Final Order, pp. 17-18.) Wall provides nothing to suggest that it provided $98,000 in value to J in order to achieve the straightforward result of an agreement not to execute against assets during negotiations and then a payment plan. For example, Wall provides no evidence to suggest whether that result was achieved through: ten hours of work or 10,000 hours; through submitting basic paperwork or through detailed negotiation by highly qualified negotiators; through typical disclosures of assets and liabilities or through some exceptional and unique fact finding or briefing. Wall provides no explanation for why this result was different than what J would have achieved for himself by following the IRS's public guidelines and tools.
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> Wall is unable to provide such evidence of its efforts, at least in part, because it apparently keeps few records of its efforts and apparently declines to internally itemize its agents' efforts and work product or track their time. As pointed out by the Department, Wall risks significant

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165 Petitioner's Brief, p. 46.

166 Id.

> overpayment by clients because of Wall's business model of requiring monthly payments that are not tied to the actual time, effort, or expertise expended by Wall. Instead, Wall's business model incentivizes long, drawn-out resolutions and capitalizes on the under-resourced and ofttimes slow-moving IRS. Certainly, a taxpayer can and should pay a reasonable fee for assistance with tax debts. But Wall's fee is tied to the essentially arbitrary factor of time, with no showing at all that it should have taken eight or more years for Wall to achieve this resolution for J.
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> Similarly, for clients CT and MT, Wall points out that it worked out a good resolution: the IRS stopped its levy while the taxpayer submits information about its ability to pay and the parties negotiate an appropriate payment plan. Wall provides nothing to suggest that it gave $60,800 in value in order to achieve this straightforward result. Wall provides no evidence of how much time, effort, or expertise it took to achieve that result for the client. Wall provides no evidence of how this result has been exceptional or otherwise different than what the IRS offers to any unrepresented taxpayer under similar facts.
>
> In sum, Wall's arguments regarding J and CT and MT further confirm why the Director exercised her discretion to require the restoration of certain fees. Based on the current record, the Director suspects that many more clients of Wall were similarly charged excessive and unsupportable fees. However, in the exercise of discretion and based on the current record, the Director limits her order to restoring fees of $271,987.50 to eleven harmed Idaho clients.[167]

While the Court appreciates facts alleged by Wall as to each client related to some benefit being provided, this Court finds that the Director properly acted within the outer boundaries of her discretion consistently with the legal standards applicable to the available choices and she reached her own decision through an exercise of reason when she ordered the partial restoration of the fees for these seven Outlier Clients.

Therefore, the District Court affirms the Director's decision to impose pursuant to Idaho Code § 26-2244(2)(b) a total of $271,987.50 in restoration fees to the identified clients.

ii. Statute of Limitations on Restitution/Restoration of Client Fees

Wall argues that Idaho Code §§ 5-218 and 5-225 prevent reimbursement as restitution to Wall's clients "for payments made prior to December 3, 2016."[168] The Department argues that the statute of limitations that Wall cites does not limit the

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167 R. pp. 03306-3308.

168 Petitioner's Brief, p. 49.

restoration of fees and the Department argues that the Final Order correctly outlines why the cited statute of limitation does not apply in this case.[169] Wall did not address the applicability of the statute of limitations on restoration/restitution in its Reply.[170]

Idaho Code § 5-218 provides that "[a]n action upon a liability created by statute, other than a penalty or forfeiture" must be commenced within three year and Idaho Code §5-225 provides that the statute of limitation applies to those actions brought by the state or for the benefit of the state.

The Hearing Officer's Decision states in relevant part:

> 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).[171]

In addition to the Hearing Officer's Decision, the Director also provided in the Final Order that:

> 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

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169 Response, p. 35.

170 *See generally* Reply.

171 R. p. 01686.

> investigation and after failed attempts to resolve the matter consensually.[172]

The Court in *Young* determined that state department actions "consistent with the exercise of its police powers, as authorized by the legislature, and [are] not barred by the statute of limitations." *Young,* 135 Idaho at 808, 25 P.3d at 121. There is no dispute that the Respondent is charged under Idaho law with enforcing the provisions of the Act. So, the Court finds the Department was acting within its police powers. Further, the ICAA itself does not impose any statute of limitations limiting the ability of the Director to order restitution for violations it investigates or discovers. Therefore, this Court does not find the Director erred as a matter of law when she determined that the Idaho Code § 5-218 statute of limitations does not apply to limit the ordered restitution in these proceedings to only those fees collected in 2016 or later.

3. Whether the Department Erred in Excluding Evidence

P. Mark Yates is the Chief Executive Officer of Wall. Wall argues that Hearing Officer Nielsen erred when he struck paragraphs 26, 27, 29, 30, 31, 36 and 37 of the Yates Response Declaration and that the Director never addressed or considered the this decision in spite of Wall briefing this issue prior to the Final Order.[173] The Petitioner's Memorandum argues the Yates Declaration established "his experience in business and his interpretations of the Act" which was relevant.[174] In the additional briefing on the Petition for Judicial Review, neither Wall or the Department addressed the Hearing Officer's decision to strike these portions of the Yates Declaration.[175]

There is no dispute that the "Idaho Rules of Civil Procedure and the Idaho Rules of Evidence do not apply to contested case proceedings conducted before the agency." Idaho Admin. Code R. 04.11.01.052. Still, that does not mean all evidence presented must be considered by the agency when reaching a decision. Idaho Administrative Code Rule 04.11.01.600 provides:

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172 R. p. 03206.

173 Petitioner's Brief, p. 49.

174 Id.pp. 49-50.

175 *See generally* Reply.

> Evidence should be taken by the agency to assist the parties' development of the record, not excluded to frustrate that development. The presiding officer at hearing is not bound by the Idaho Rules of Evidence. No informality in any proceeding or in the manner of taking testimony invalidates any order. The presiding officer, with or without objection, may exclude evidence that is irrelevant, unduly repetitious, inadmissible on constitutional or statutory grounds, or on the basis of any evidentiary privilege provided by statute or recognized in the courts of Idaho. All other evidence may be admitted if it is of a type commonly relied upon by prudent persons in the conduct of their affairs. The agency's experience, technical competence and specialized knowledge may be used in evaluation of evidence.

The record demonstrates that the Hearing Officer reasoned when striking portions of the Yates Declaration:

> The basis for this ruling is that pursuant to Idaho Rules of Administrative Procedure 04.11.01.000, Rule 600 the Hearing Officer has broad discretion on the admissibility of evidence and may reject evidence which is determined to be among other grounds irrelevant. The identified paragraphs are as comprised of various opinions and conclusions of a witness and were advanced without sufficient showing of the foundational basis for such matters. Absent such foundation these matters are irrelevant and subject to exclusion.[176]

Since the Director's Final Order does not expressly address the relevance of the excluded portions of the Yates Declaration, that the Director adopted the Hearing Officer's findings.

The paragraphs were not removed from the record. So, this Court has reviewed paragraphs 26, 27, 29, 30, 31, 36 and 37 of the Yates Declaration. While recognizing that Yates has some experience and training, the Court agrees these paragraphs contain legal conclusions and that it was within the discretion of the Hearing Officer to rule on such objections and exclude irrelevant evidence. It was also within the discretion of the Director to adopt such rulings or to reconsider such rulings. Finally, it is also within this Court's discretion to consider such excluded paragraphs. The Yates Declaration does not include any evidence that Yates is an attorney or that he has any expertise in reaching legal conclusions. This Court finds that legal conclusions related to statutory interpretation any statute's plain language meaning are conclusory and are

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176 R. p. 01692.

irrelevant to the proceedings before this Court on appeal. Such arguments and issues are more appropriately raised and determined for consideration before the agency. In its review of the Agency Record and transcripts, this Court finds that neither the Hearing Officer or the Director abused their discretion by striking or deciding not to consider the specified paragraphs of the Yates Declaration when the Hearing Officer and the Director reached their decisions in this matter. Therefore, this Court will not find error related to these evidentiary arguments by Wall.

4. **Attorney Fees**

Both parties request costs and attorney fees.[177]

The Petitioner is not the prevailing party and is, therefore, not entitled to fees.

The Respondent requests fee pursuant to Idaho Code § 12-117(1) and Idaho Appellate Rule 41.[178] Idaho Code § 12-117(1) provides: "in any proceeding involving as adverse parties a state agency … and a person,… the court hearing the proceeding, including on appeal, shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if it finds that the nonprevailing party acted without a reasonable basis in fact or law."

The Court finds the Department is entitled to attorney fees under Idaho Code § 12-117. Wall did not identify any new arguments or emphasize any new facts that were not considered by the Hearing Officer and/or the Director when the agency reached its decisions. Based upon its review of the entire agency record, transcripts, and briefing filed in support of the appeal, this Court finds that Wall acted without a reasonable basis in fact or law in bringing this appeal. Therefore, this Court awards attorney fees to be paid by Petitioner for defending against the Petition for Judicial Review.

Costs are awarded to the Respondent, Department of Finance, as the prevailing party pursuant to Idaho Appellate Rule 40(a) ("costs shall be allowed as a matter of course to the prevailing party unless otherwise provided by law or order of the Court."). The Department must file memoranda of costs and fees within fourteen days of this Order or will waive their right to fees and costs. IDAHO APP. R. 40(c).

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177 Petition, p. 15 ("Petitioner prays for relief … For costs of suit"); Response, pp. 5, 40-41.

178 Response, pp. 5, 40-41.

CONCLUSION

Idaho Department of Finance's Final Order Adopting and Amending Hearing Officer Preliminary Order in Agency Case No. 2019-9-10[179] captioned as *State of Idaho, Department of Finance, Consumer Finance Bureau, Complainant v. Wall & Associates, Inc Respondent*, issued on April 30, 2022 by Director of Finance Patricia R. Perkins is hereby AFFIRMED in its entirety.

All relief requested by Petitioner Wall & Associates, Inc. in its Petition for Judicial Review is DENIED.

IT IS ORDERED:

Attorney fees on appeal for the Petitioner are DENIED.

Attorney fees on appeal and costs on appeal are GRANTED for the Respondent pursuant to Idaho Rule of Civil Procedure 84(r), and Idaho Appellate Rules 35, 40, and 41, and a memorandum of costs must be filed within fourteen days of service of this Order.

Dated: 9/22/2023 4:13:52 PM

Lynn Norton
District Judge

[179] R. pp. 03174-3274.

CERTIFICATE OF SERVICE

I certify that on this day I served a copy of the attached to:

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Trent Tripple
Clerk of the Court

Dated: 09/22/2023

By: *Janine Korsen*
Deputy Clerk