

Part IV. Items of General Interest

Notice of Proposed Rulemaking

Furnishing Identifying Number of Tax Return Preparer

REG-134235-08

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations under section 6109 of the Internal Revenue Code (Code) that provide guidance to tax return preparers on furnishing an identifying number on tax returns and claims for refund of tax that they prepare. These proposed regulations provide guidance on the identifying number of a tax return preparer for tax returns and claims for refund filed before and after the proposed effective date. The proposed regulations describe how the IRS will define the identifying number of tax return preparers. Additional provisions of the proposed regulations provide that tax return preparers must apply for and regularly renew their preparer identifying number as the IRS may prescribe in forms, instructions, or other guidance. This document also invites comments from the public regarding these proposed regulations.

DATES: Written or electronic comments and requests for a public hearing must be received by April 26, 2010.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG-134235-08), room 5205, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG-134235-08), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC 20224, or sent electronically via the Federal eRulemaking Portal at www.regulations.gov (IRS — REG-134235-08).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Stuart Murray at (202) 622-4940 (not a toll-free number); concerning submissions of comments and requests for a hearing, Richard Hurst at Richard.a.hurst@irs.counsel.treas.gov.

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in this notice of proposed rulemaking has been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collection of information should be sent to the **Office of Management and Budget**, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the **Internal Revenue Service**, Attn: IRS Reports Clearance Officer, SE:W:CAR:MP:T:T:SP, Washington, DC 20224. Comments on the collection of information should be received by April 26, 2010.

Comments are specifically requested concerning:

Whether the proposed collection of information is necessary for the proper performance of the functions of the IRS, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collection of information;

How the quality, utility, and clarity of the information to be collected may be enhanced;

How the burden of complying with the proposed collections of information may be minimized, including through the application of automated collection techniques or other forms of information technology; and

Estimates of capital or start-up costs of operation, maintenance, and purchase of service to provide information.

The collection of information in these proposed regulations is in §1.6109-2(d) and (e). This information is required in order for the IRS to issue identifying numbers to tax return preparers who are eligi-

ble to receive them. Tax return preparers will need to apply for an identifying number as prescribed in forms, instructions, or other guidance. The use of a prescribed identifying number by tax return preparers on tax returns and claims for refund of tax will enable the IRS to accurately identify tax return preparers, to match tax return preparers to tax returns and claims for refund that they prepare, and to generally administer the internal revenue laws. The collection of information is mandatory. The likely respondents are tax return preparers and employers of tax return preparers.

Estimated total annual reporting burden: 300,000 hours.

Estimated average annual burden hours (or fraction of an hour) per respondent: varies from 10 to 20 minutes, with an estimated average of 15 minutes.

Estimated number of respondents: 1.2 million.

Estimated annual frequency of responses: once every three years.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number assigned by the Office of Management and Budget.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background

This document contains proposed amendments to regulations under section 6109 of the Code relating to furnishing a tax return preparer's identifying number on tax returns and claims for refund of tax. Section 6109 was added to the Code in 1961 (Public Law 87-397, 75 Stat. 828) and authorizes the Secretary to prescribe regulations for the inclusion of identifying numbers on a return, statement, or other document required to be filed with the IRS. In addition, section 6109(c) authorizes the Secretary "to require such information as may be necessary to assign an identifying number to any person."

Section 6109(a)(4) as originally enacted by section 1203(d) of the Tax Reform Act of 1976 (Public Law 94-455, 90 Stat. 1520) required return preparers to furnish on income tax returns and claims for refund of income tax an identifying number, as prescribed, to identify the preparer, the preparer's employer, or both. Section 8246(a)(2)(D)(i) of the Small Business and Work Opportunity Tax Act of 2007 (Public Law 110-28, 121 Stat. 112), amended section 6109(a)(4) to allow the IRS to prescribe that tax return preparers furnish identifying numbers on any tax returns or claims for refund they prepare. As currently prescribed in regulations, the identifying number of a tax return preparer who is an individual is the preparer's social security number (SSN) or alternative number as prescribed by the IRS. The proposed regulations provide that the identifying number of a tax return preparer is exclusively the number prescribed by the IRS. The proposed regulations will implement some of the recommendations made in Publication 4832, *Return Preparer Review* (Rev. 12-2009), published at the end of last year (the Report). The IRS and the Treasury Department believe that the implementation of the Report's recommendations, including the recommendations implemented by these regulations, will increase tax compliance and allow taxpayers to be confident that the tax return preparers to whom they turn for assistance are knowledgeable, skilled, and ethical.

1. Identifying Numbers Generally

Because an identifying number is unique to the person to whom assigned, the IRS is able to use the number to correctly identify the taxpayer or the tax return preparer. The use of identifying numbers allows the IRS to accurately and timely process returns and issue refunds, centralize information, post information to the correct taxpayer's account, and effectively administer the rules relating to tax return preparers.

2. Requiring Identifying Numbers from Tax Return Preparers

Tax return preparers generally must provide an identifying number on the tax returns they prepare and sign. Specif-

ically, under §1.6695-1(b), a signing tax return preparer, as defined under §301.7701-15(b)(1), must sign a return of tax or claim for refund after it is completed and before it is presented to the taxpayer for signature. A signing tax return preparer under §301.7701-15(b)(1) is a tax return preparer who has primary responsibility for the overall substantive accuracy of the preparation of a return of tax or claim for refund.

Under §1.6109-2(a)(1), a tax return preparer who must sign a tax return or tax refund claim must also include an identifying number with the preparer's signature. A return of tax includes an information return described in §301.7701-15(b)(4). If a signing tax return preparer has an employment arrangement or association with another person, then that other person's employer identification number (EIN) must also be included on the tax return or refund claim.

The identifying number of a signing tax return preparer, and the identifying number of any person with whom the preparer has an employment arrangement or association, must be included on electronically filed tax returns, as well as paper returns. Further, because of recent statutory changes, tax return preparers who prepare and file individual income tax returns (Form Series 1040) for their clients will soon be required to electronically file the returns, unless the tax return preparer reasonably expects to file only 10 or fewer individual income tax returns for the calendar year. See Section 17 of the Worker, Homeownership, and Business Assistance Act of 2009, Public Law 111-92, 123 Stat. 2984, 2997 (adding Code section 6011(e)(3)).

Tax return preparers who are required but fail to include their identifying number on a tax return or refund claim, or fail to include the identifying number of any person with whom they have an employment arrangement or association, are subject to a penalty under section 6695(c). A tax return preparer is not liable for the penalty if the failure to include an identifying number is due to reasonable cause and not due to willful neglect.

3. Preparer Tax Identification Numbers

Section 6109(a) initially provided that the identifying number of a tax return pre-

parer was the individual's SSN. Section 3710(a) of the IRS Restructuring and Reform Act of 1998 (Public Law 105-206, 112 Stat. 685) (RRA '98), allowed the IRS to prescribe an identifying number for tax return preparers other than the preparer's SSN. In response to section 3710(a) of RRA '98, the IRS developed and began to issue preparer tax identification numbers (PTINs). Tax return preparers currently may apply online for a PTIN using the e-services PTIN process on the IRS website at www.irs.gov or by filing Form W-7P, "Application for Preparer Tax Identification Number." Applying online is faster, and return preparers are encouraged to apply online. In the future, the IRS will prescribe the method to apply for a PTIN consistent with these proposed regulations. Currently, under §1.6109-2(a)(2), a tax return preparer may use as an identifying number on a tax return or claim for refund either the preparer's SSN or an "alternative number" prescribed by the IRS, including a PTIN. But an EIN, an Electronic Filing Identification Number (EFIN) (which is an identification number assigned to IRS e-file providers), or an Electronic Transmitter Identification Number (ETIN) (which is an identification number assigned to IRS e-file providers who electronically transmit tax returns to the IRS) is not a valid preparer identifying number.

4. Regulation of Tax Return Preparers

In June 2009, the IRS initiated a comprehensive review of tax return preparers, and in December 2009 the IRS published the Report describing its findings from that review. The Report recommended, in part, that tax return preparers be required to obtain and use a PTIN as the exclusive preparer identifying number and undergo a tax-compliance check. As discussed below, the proposed regulations implement those recommendations.

Under current law, any individual may prepare a tax return or claim for refund. The Report recommended that the IRS establish new eligibility standards that an individual must meet in order to prepare tax returns — including testing, continuing education, and tax compliance checks. The Report contemplates that only attorneys, certified public accountants, enrolled agents, as well as tax return preparers who

pass a minimum competency exam and meet other requirements (referred to as “registered tax return preparers”) will be eligible to prepare and sign tax returns and claims for refund. These proposed regulations do not establish the requirements to become a registered tax return preparer, which primarily will be set forth in future guidance under Treasury Department Circular No. 230, 31 CFR Part 10. After a transition period, however, it is intended that only individuals who satisfy the eligibility standards may obtain and use a PTIN as a tax return preparer.

Explanation of Provisions

1. Requiring the Use of PTINs

The proposed regulations provide that for tax returns or refund claims filed after December 31, 2010, the identifying number that a tax return preparer must include with the preparer’s signature on tax returns and refund claims is that prescribed by the IRS in forms, instructions, or other guidance. Tax return preparers will not be able to use an SSN as a preparer identifying number unless specifically prescribed by the IRS in forms, instructions, or other guidance. Instead, to the extent provided in forms and instructions, a tax return preparer will be required to use a PTIN as the identifying number unless the IRS prescribes in the future a replacement to the PTIN. Forms and instructions will be revised accordingly. The use of PTINs as the identifying number for tax return preparers will improve tax administration and tax compliance, benefit taxpayers and tax return preparers, and help maintain the confidentiality of SSNs.

For tax returns or claims for refund filed before January 1, 2011, the identifying number of a tax return preparer will remain the preparer’s SSN or PTIN. In the case of tax returns for taxable periods ending before January 1, 2011, and made on the appropriate forms prescribed for the taxable periods, but which are filed on or after January 1, 2011, tax return preparers must furnish on the returns the identifying number prescribed on the forms to be filed and in associated instructions.

For tax return preparation businesses and other persons having an employment arrangement or association with a tax return preparer, the business’s or employer’s

EIN continues to be the identifying number that must be included on tax returns and refund claims along with the tax return preparer’s signature and preparer identifying number. An individual tax return preparer, however, may not use an EIN as a preparer identifying number on a return, even if the preparer has an EIN (for example, as a sole proprietor). Tax return preparers who use their SSN, or an EIN, EFIN, or ETIN, instead of a valid PTIN, on tax returns or claims for refund filed after the effective date may be subject to the penalty under section 6695(c) unless the failure to include a valid PTIN is due to reasonable cause and not due to willful neglect.

2. Eligibility to Receive a PTIN

The proposed regulations provide that all tax return preparers must apply for a PTIN or other prescribed identifying number at the time and in the manner as may be prescribed by the IRS in forms, instructions, or other appropriate guidance. The proposed regulations also authorize the IRS to prescribe a user fee in connection with applying for, and renewing, a PTIN (or successor number similar to a PTIN). Except as provided in any transitional period, beginning after December 31, 2010, to obtain a PTIN, an individual must be an attorney, certified public accountant, enrolled agent, or registered tax return preparer under future guidance to be provided in Circular 230.

Only for purposes of applying for and renewing a PTIN or other prescribed preparer identifying number, the term *tax return preparer* means any individual who is compensated for preparing, or assisting in the preparation of, all or substantially all, of a tax return or claim for refund of tax. A tax return preparer does not include an individual who is not otherwise a tax return preparer as that term is defined in §301.7701–15(b)(2), or who is an individual described in §301.7701–15(f). The proposed regulations provide several examples illustrating who is a tax return preparer required to apply for a PTIN.

As part of the process of applying for a PTIN, a tax return preparer may be subject to both an initial tax-compliance check and subsequent periodic checks, which could include a review of a preparer’s history of compliance with personal and business tax

filing and payment obligations. The tax-compliance check is intended to establish whether a tax return preparer has timely filed required personal and business tax returns and has paid taxes that are due or made other acceptable arrangements with the IRS, such as an approved installment agreement under section 6159. If a tax return preparer disregards any applicable requirements to obtain a prescribed identifying number and thereafter omits, when required to include, a valid identifying number on a tax return or claim for refund filed after the effective date, the preparer may be liable for the section 6695(c) penalty, unless the failure to include a valid identifying number was due to reasonable cause and not due to willful neglect.

The information a tax return preparer provides when the preparer initially applies for a PTIN or other prescribed identifying number will often become outdated or otherwise inaccurate. The IRS may require tax return preparers to regularly renew their identifying numbers and otherwise maintain updated information with the IRS. If a tax return preparer who is required to include an identifying number on a tax return or claim for refund filed after the effective date uses an expired identifying number, the tax return preparer may be liable for the section 6695(c) penalty, unless the use of the expired number was due to reasonable cause and not due to willful neglect.

The proposed regulations provide that if necessary for effective tax administration, the IRS may prescribe exceptions to any of the requirements, such as for an interim period while procedures are being implemented. For example, the IRS and the Treasury Department recognize that the procedures for becoming a registered tax return preparer may not be fully implemented when these regulations become effective. It is anticipated that transitional interim guidance will be provided to allow individuals who intend to become registered tax return preparers to obtain an interim PTIN or other interim identifying number that may be used as a preparer identifying number on tax returns and refund claims until the procedures are fully implemented. After the interim period, however, to obtain a PTIN, an individual will need to be an attorney, certified public accountant, enrolled agent, or registered

tax return preparer authorized to practice before the IRS under Circular 230.

Proposed Effective/Applicability Date

These regulations are effective after the date that final regulations are published in the **Federal Register**.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations.

It has been determined that an initial regulatory flexibility analysis under 5 U.S.C. 603 is required for this notice of proposed rulemaking. The analysis is set forth below under the heading, "Initial Regulatory Flexibility Analysis."

Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Initial Regulatory Flexibility Analysis

When an agency issues a rulemaking proposal, the Regulatory Flexibility Act (5 U.S.C. chapter 6) requires the agency to "prepare and make available for public comment an initial regulatory flexibility analysis" that "describe[s] the impact of the proposed rule on small entities." 5 U.S.C. 603(a). Section 605 of the Act provides an exception to this requirement if the agency certifies that the proposed rulemaking will not have a significant economic impact on a substantial number of small entities. A small entity is defined as a small business, small nonprofit organization, or small governmental jurisdiction. 5 U.S.C. 601(3)-(6). The IRS and the Treasury Department conclude that the proposed regulations, if promulgated (together with other contemplated guidance provided for in these regulations), will impact a substantial number of small entities and the economic impact will be significant. As a result, an initial regulatory flexibility analysis is required.

Description of the reasons why the agency action is being considered.

Taxpayers' reliance on paid tax return preparers has grown steadily in recent decades. Today, paid tax return preparers assist a majority of U.S. taxpayers in meeting their income tax filing obligations. Beyond preparing tax returns, tax return preparers also help educate taxpayers about the tax laws, and facilitate electronic filing. Tax return preparers provide advice to taxpayers, identify items or issues for which the law or guidance is unclear, and inform taxpayers of the benefits and risks of positions taken on a tax return, and the tax treatment or reporting of items and transactions. Competent tax return preparers who are well educated in the rules and subject matter of their field can prevent costly errors, potentially saving a taxpayer from unwanted problems later on and relieving the IRS from expending valuable examination and collection resources.

Given the important role that tax return preparers play in Federal tax administration, the IRS has a significant interest in being able to accurately identify tax return preparers and monitor their tax return preparation activities. The proposed regulations are intended to advance tax administration by requiring all individuals who are paid to prepare all or substantially all of a tax return or claim for refund of tax to obtain a preparer identifying number prescribed by the IRS. Pursuant to the proposed regulations, the IRS will require individuals who sign tax returns or claims for refund to report the preparer's identifying number on a tax return or claim for refund when the return or refund claim is signed. The proposed regulations also provide that the IRS may require tax return preparers to apply for, and regularly renew, their identifying numbers. Under the proposed regulations, the IRS may prescribe a user fee payable when applying for a number and for renewal.

Further, the IRS and the Treasury Department conclude that taxpayers, tax return preparers, and overall tax administration will be best served through increased oversight of the tax return preparer industry. Mandating a single prescribed identifying number for all tax return preparers and assigning a prescribed number to registered tax return preparers is critical to effective oversight.

Statement of the objectives of, and the legal basis for, the proposed rule.

The principal objective of the proposed regulations is to enable the IRS to more accurately identify tax return preparers and the tax returns and refund claims associated with each tax return preparer. The proposed regulations do this by providing that the IRS may prescribe the use of identifying numbers for tax return preparers and the qualifications or other requirements necessary to obtain a valid number. The legal basis for these provisions is section 6109 of the Code, which authorizes the Secretary to prescribe the "identifying number for securing proper identification of" a tax return preparer and "to require such information as may be necessary to assign an identifying number to any person."

Description and estimate (where feasible) of the number of small entities subject to the proposed rule.

The proposed regulations apply to individuals who prepare tax returns and claims for refund of tax. The estimated number of paid tax return preparers is as high as 1.2 million, which means the proposed regulations are likely to impact a large number of individuals. Most paid tax return preparers are employed by firms. A substantial number of paid tax return preparers are employed at small tax return preparation firms or are self-employed tax return preparers. Any economic impact of these regulations on small entities generally will be on self-employed tax return preparers who prepare and sign tax returns or on small businesses that employ one or more individuals who sign tax returns.

The appropriate NAICS codes for tax return preparers are those for tax return preparation services (NAICS code 541213) and other accounting services (NAICS code 541219). Entities identified under either of these two codes are considered small under the Small Business Administration's size standards (13 CFR 121.201), if their annual revenue is less than \$7 million or \$8.5 million, respectively. The IRS estimates that approximately 70 to 80 percent of the individuals subject to these proposed regulations are tax return preparers operating as or employed by small entities.