

Part III - Administrative, Procedural, and Miscellaneous

Administrative Exemptions to the Specified Tax Return Preparer Electronic Filing Requirement Under Internal Revenue Code § 6011(e)(3) and Regulations Under § 6011(e)(3)

Notice 2011-26

PURPOSE

This notice applies to tax return preparers who are required by law to electronically file certain income tax returns for individuals, estates, and trusts. This notice provides administrative exemptions to the electronic filing requirement under section 6011(e)(3) of the Internal Revenue Code and corresponding regulations.

BACKGROUND

Contemporaneously with the publication of this notice, final regulations have been published in the Federal Register **[INSERT FR CITATION]** on **[INSERT DATE]** implementing the requirement under section 6011(e)(3) that specified tax return preparers file individual income tax returns electronically if they prepare and file the returns for taxpayers. Under section 6011(e)(3)(B) and as further defined in § 301.6011-7(a)(3), a specified tax return preparer means, with respect to any calendar year, any tax return preparer within the meaning of section 7701(a)(36) and § 301.7701-15 who prepares any individual income tax return unless such tax return preparer

reasonably expects to file 10 or fewer individual income tax returns in the calendar year, and if a person who is a tax return preparer is a member of a firm, that person is a specified tax return preparer unless the person's firm members in the aggregate reasonably expect to file 10 or fewer individual income tax returns in a calendar year. Solely for the 2011 calendar year, a tax return preparer will not be considered a specified tax return preparer if the preparer reasonably expects, or if the preparer is a member of a firm, the firm's members in the aggregate reasonably expect, to file fewer than 100 individual income tax returns in the 2011 calendar year.

Section 6011(e)(3)(C) and § 301.6011-7(a)(2) define an individual income tax return as any return of tax imposed by subtitle A on individuals, estates, and trusts. This includes the Form 1040 series of income tax returns for individuals, the Form 1041 series of income tax returns for estates and trusts, and Form 990-T (Exempt Organization Business Income Tax Return) when the exempt organization is a trust subject to tax on unrelated business taxable income under section 511(b).

Under section 6011(e)(3)(A) and § 301.6011-7(b), any individual income tax return prepared by a specified tax return preparer in a calendar year must be filed electronically if the return is filed by the specified tax return preparer. Section 301.6011-7(c)(1) authorizes the IRS to grant to a specified tax return preparer a waiver of this requirement in the case of undue hardship. Revenue Procedure 2011-25, published in the Internal Revenue Bulletin (IRB 2011-17) on April 25, 2011, provides additional guidance regarding undue hardship waiver requests. Announcement 2010-96, published in the Internal Revenue Bulletin (IRB 2010-52) on December 27, 2010,

provided further guidance on electronic filing hardship waiver request procedures for calendar year 2011.

Section 301.6011-7(c)(2) provides for another category of exclusion from the electronic filing requirement, administrative exemptions. Under § 301.6011-7(c)(2), the IRS may provide administrative exemptions for certain classes of specified tax return preparers or types of individual income tax returns, as the IRS determines necessary to promote the effective and efficient administration of section 6011(e)(3) of the Internal Revenue Code and § 301.6011-7, and the IRS may provide the criteria and procedures, if any are necessary, for administrative exemptions through forms, instructions, or other appropriate guidance. This notice sets forth the administrative exemptions to the electronic filing requirement contained in those sections, and these administrative exemptions are to remain in effect until modified or superseded.

DISCUSSION

Scope of Administrative Exemptions. The administrative exemptions set forth in this notice for certain classes of specified tax return preparers apply to all tax return preparers who fall within one of those classes. These exemptions are intended to be applicable retroactively as of January 1, 2011, to tax return preparers who reasonably expect to file, or if a member of a firm whose firm's members in the aggregate reasonably expect to file, 100 or more individual income tax returns in calendar year 2011. They will be applicable starting in 2012 to tax return preparers who reasonably expect to file, or if a member of a firm whose firm's members in the aggregate reasonably expect to file, 11 or more individual income tax returns in 2012 and

subsequent calendar years. An exemption, however, is not needed for any tax return preparer who is not required to file individual income tax returns electronically, i.e., tax return preparers who reasonably expect to file, or if a member of a firm whose firm's members in the aggregate reasonably expect to file, fewer than 100 individual income tax returns during calendar year 2011 (10 or fewer in calendar year 2012 and thereafter).

The administrative exemptions set forth in this notice for certain types of individual income tax returns are applicable to tax return preparers, specified tax return preparers, or both, depending on the circumstances discussed in this notice. These administrative exemptions are intended to be applicable retroactively as of January 1, 2011. Tax return preparers are affected by the administrative exemptions because a tax return preparer's classification as a specified tax return preparer is based upon the number of non-exempt individual income tax returns the tax return preparer reasonably expects to file in a given calendar year, and exempt returns do not count towards the more than 10 (100 or more in 2011) individual income tax return filing threshold. Specified tax return preparers are affected by administrative exemptions because these preparers are not required to electronically file any individual income tax return that qualifies for an administrative exemption.

Administrative Exemptions.

A. Exempt Preparers. The following categories of tax return preparers and specified tax return preparers are exempt from the electronic filing requirement under section 6011(e)(3) and the corresponding regulations:

1. Preparer Members of Certain Religious Groups. A tax return preparer who is a member of a recognized religious group that is conscientiously opposed to its members using electronic technology, including for the filing of income tax returns electronically, and that has existed continuously since December 31, 1950.

2. Foreign Preparers Without Social Security Numbers. A specified tax return preparer who is a foreign person without a social security number and is therefore ineligible to file electronically because the IRS e-file program currently does not accept foreign tax return preparers without social security numbers who live and work abroad. To qualify for this exemption, the specified tax return preparer (1) must not be a member of a firm that is eligible to e-file, and (2) must have applied for a PTIN and either submitted Form 8946, PTIN Supplemental Application For Foreign Persons Without a Social Security Number or qualify for the relief provided by Section 5 of Revenue Procedure 2010-41, 2010-48 I.R.B. 781.

3. Certain Preparers Ineligible for IRS e-file. A tax return preparer who is currently ineligible for the IRS e-file program due to an IRS e-file sanction. To qualify for this exemption, the tax return preparer must have received a letter from the IRS enforcing the sanction and the sanction must be in effect for some or all of the calendar year in which the individual income tax return or returns are being filed. This exemption ends on the date the sanction period ends or the date the IRS accepts the tax return preparer into the IRS e-file program, whichever date occurs first. If, however, the tax return preparer has a pending application for the IRS e-file program filed with the IRS at the time the sanction period ends, the exemption will continue until the date the IRS renders

a decision on the tax return preparer's application.

B. Exempt Individual Income Tax Returns Due to Preparer's Technological Difficulties.

The following individual income tax returns are exempt from the electronic filing requirement under section 6011(e)(3) and the corresponding regulations, due to technological difficulties experienced by a tax return preparer or specified tax return preparer, as applicable, who meets the identified criteria for an exemption:

1. Rejected Returns. A return that a specified tax return preparer attempted to e-file but was unable to e-file because the return was rejected and the specified tax return preparer attempted but could not resolve the reject condition or code.

2. Forms or Schedules Not Supported by Preparer's Software Package. A return prepared by a tax return preparer or specified tax return preparer whose e-file software package does not support one or more forms or schedules that are part of the return.

3. Other Technological Difficulties. A return or returns prepared by a tax return preparer or specified tax return preparer who experiences a short-term inability to electronically file the return or returns due to some other verifiable and documented technological problem.

C. Exempt Individual Income Tax Returns Due to IRS e-file Limitations. For all tax return preparers and specified tax return preparers, the following individual income tax returns and attachments to returns are exempt from the electronic filing requirement under section 6011(e)(3) and the corresponding regulations, due to IRS barriers or other systemic limitations that currently prevent the returns and attachments from being filed electronically:

1. Returns Currently Not Accepted Electronically. Any individual income tax return that is not currently accepted electronically by IRS e-file or that the IRS has instructed taxpayers not to file electronically. This includes Form 1040-NR (U.S. Nonresident Alien Income Tax Return), Form 1041-QFT (U.S. Income Tax Return for Qualified Funeral Trusts), Form 990-T (Exempt Organization Business Income Tax Return), and all amended individual income tax returns, such as Form 1040X (Amended U.S. Individual Income Tax Return). This also includes a fiscal year return for Form 1040 (U.S. Individual Income Tax Return) and a fiscal year return for Form 1041 (U.S. Income Tax Return for Estates & Trusts) for certain periods (fiscal year Form 1041 returns ending during any month after June 30 of the current processing year); Form 1041 claiming a refund amount equal to or greater than \$10,000,000; Form 1041 with a dollar amount over \$99,999,999,999; and other Forms 1041 not accepted by IRS e-file for any other limitation listed in IRS Publication 1437 (Procedures for the Form 1041 e-file Program U.S. Income Tax Returns for Estates and Trusts). See IRS Publication 1346 (Electronic Return File Specifications and Record Layouts for Individual Income Tax Returns) for forms in the Form 1040-series that the IRS currently accepts electronically. For information on IRS.Gov, see www.irs.gov/efile/.

2. Required Documentation or Attachments Not Accepted Electronically. Any required documentation or attachments that the IRS does not yet provide the capability to file electronically such as documentation for section 6707A disclosures or required appraisals to support charitable contributions are exempt. Some returns can be filed electronically and the attachments mailed to the IRS using a transmittal Form 8453

(U.S. Individual Income Tax Transmittal for an IRS e-file Return) or Form 8453-F (U.S. Estate or Trust Income Tax Declaration and Signature for Electronic Filing). The associated return must be filed electronically if prepared and filed by a specified tax return preparer and otherwise capable of being e-filed, and the attachments mailed to the IRS using a transmittal Form 8453. See the instructions to Form 8453 and instructions to Form 8453-F.

Exemptions are Automatic. A tax return preparer or specified tax return preparer who qualifies for an exemption described in this notice does not have to request an exemption from the IRS or otherwise obtain the IRS' approval. These exemptions are automatic for those who meet the criteria provided in this notice. Although there is no need to apply for an administrative exemption or to maintain any specific information, the burden is on the tax return preparer or specified tax return preparer to show entitlement to an administrative exemption, and the preparer will be required to demonstrate the applicability of an administrative exemption or exemptions upon request by the IRS. Note that undue hardship waiver requests are unnecessary for purposes of claiming an administrative exemption and should not be submitted by or for an exempt specified tax return preparer, or for an exempt individual income tax return.

The IRS has created Form 8948, Preparer Explanation for Not Filing Electronically, for specified tax return preparers to explain why an individual income tax return that is able to be filed electronically was prepared and filed in paper format. Among the reasons listed, Form 8948 includes the exemptions listed in paragraphs A. and B. of this notice. For further information, see the instructions to Form 8948, which,

among other things, provide that Form 8948 is to be attached to the paper copy of the tax return that a specified tax return preparer prepares and furnishes to the taxpayer. Further note that returns currently not acceptable by IRS electronically as specified in paragraph C.1. of this notice do not require the use of Form 8948.

Further Information. Further information, including Frequently Asked Questions, on the electronic filing requirement, administrative exemptions, and undue hardship waiver requests, is posted on www.irs.gov.

EFFECTIVE DATE

The administrative exemptions set forth in the notice are effective for and apply to individual income tax returns filed after December 31, 2010.

DRAFTING INFORMATION

The principal author of this notice is Keith Brau of the Office of Associate Chief Counsel (Procedure & Administration). For specific questions regarding the electronic filing requirement, undue hardship waiver requests, and administrative exemptions, call the IRS at 1-866-255-0654 (a toll-free number); callers who are outside of the 50 U.S. States and/or U.S. Territories should use the International phone number: 1-512-416-7750 (not a toll-free number). For further information regarding this notice, contact Keith Brau at (202) 622-4940 (not a toll-free number).