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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 301

[TD 9518]

RIN 1545-BJ52

Specified Tax Return Preparers Required to File Individual Income Tax Returns Using Magnetic Media

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations on the requirement for “specified tax return preparers” to file individual income tax returns using magnetic media pursuant to section 6011(e)(3) of the Internal Revenue Code (Code). The final regulations reflect changes made to the law by the Worker, Homeownership, and Business Assistance Act of 2009. These regulations provide guidance to specified tax return preparers who prepare and file individual income tax returns. Unless an exception in these regulations applies, a tax return preparer who meets the definition of a “specified tax return preparer” must electronically file Federal income tax returns that the preparer prepares and files for individuals, trusts, and estates. These regulations provide a two-year transition period for certain specified tax return preparers.

DATES: Effective Date: These regulations are effective [insert date of publication in the Federal Register]..

Applicability Dates: In accordance with sections 7805(b)(1)(B) and (b)(2) and section 6011(e)(3), these regulations are applicable to individual income tax returns filed after December 31, 2010. See §301.6011-7(g).

FOR FURTHER INFORMATION CONTACT: Keith L. Brau, (202) 622-4940 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in these final regulations has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under control number 1545-2201. The collection of information in these final regulations is in §301.6011-7(a)(4)(ii). This taxpayer choice statement information will be used by tax return preparers and specified tax return preparers to demonstrate to the IRS that the related individual income tax returns filed in paper format were not required to be filed electronically pursuant to section 6011(e)(3), §1.6011-7, and §301.6011-7. The collection of information is voluntary to obtain a benefit.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it 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 final amendments to the Regulations on Income Taxes (26 CFR Part 1) and the Regulations on Procedure and Administration (26 CFR Part 301) under section 6011(e) of the Code relating to the requirement for specified tax return preparers to file individual income tax returns using magnetic media (electronically). Section 17 of the Worker, Homeownership, and Business Assistance Act of 2009 (Public Law 111-92 (123 Stat. 2984, 2996)) amended section 6011(e)(1) and added new section 6011(e)(3) as an exception to the restriction in section 6011(e)(1) that the Secretary may not require returns of any tax imposed by subtitle A on individuals, estates, and trusts to be filed in any format other than paper forms supplied by the Secretary. New section 6011(e)(3) provides that the Secretary shall require the filing on magnetic media of any individual income tax returns prepared and filed by a specified tax return preparer. Section 6011(e)(3)(B) defines a specified tax return preparer as, with respect to any calendar year, any tax return preparer unless such preparer reasonably expects to file 10 or fewer individual income tax returns during such calendar year. Section 6011(e)(3) does not define the term “filed.”

Under section 6011(e)(3)(C), an individual income tax return is any return of the tax imposed by subtitle A on individuals, estates, and trusts. This includes any return of income tax in the Form 1040 series and Form 1041 series. It also includes 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). At this time, certain individual income tax returns such as Form 990-T, Form 1040-NR (U.S. Nonresident Alien Income Tax Return), Form 1041-QFT (U.S. Income Tax Return for

Qualified Funeral Trusts), and all amended individual income tax returns, such as Form 1040X (Amended U.S. Individual Income Tax Return), cannot be filed electronically and, therefore, currently are exempt from the electronic filing requirement. See §301.6011-7(c)(2) and Notice 2011-26.

A notice of proposed rulemaking (REG-100194-10) was published in the **Federal Register** (75 FR 75439) on December 3, 2010. That document proposed to amend the regulations under section 6011(e) by adding new §§1.6011-6 and 301.6011-6. These sections would provide guidance on the electronic filing requirement contained in section 6011(e)(3), including, but not limited to, the following: (1) clarifying the definition of a specified tax return preparer as any person who is a tax return preparer, as defined in section 7701(a)(36) and §301.7701-15, unless the tax return preparer reasonably expects to file 10 or fewer individual income tax returns in a calendar year, and if a person who is a tax return preparer is a member of a firm, that person would be 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; (2) providing a definition of the term file based on whether the tax return preparer or specified tax return preparer submits the individual income tax return to the IRS; (3) recognizing a taxpayer's ability to choose to file an individual income tax return in paper format and providing that a tax return preparer or a specified tax return preparer is not considered to have filed an individual income tax return if the preparer obtains a signed writing from the taxpayer attesting that the taxpayer chooses to file the individual income tax return in paper format and the taxpayer, and not the preparer, will file (submit) the individual income tax return to the IRS; (4) providing exclusions from the

electronic filing requirement for individual income tax returns filed in paper format pursuant to an undue hardship waiver or administrative exemption; (5) giving examples of the application of the proposed rules; and (6) providing a two-year transition rule for the implementation of section 6011(e)(3). For calendar year 2011, the proposed regulations would define a specified tax return preparer as a tax return preparer who reasonably expects to file (or if the tax return preparer is a member of a firm, the firm's members in the aggregate reasonably expect to file) 100 or more individual income tax returns during the year, while beginning January 1, 2012, a specified tax return preparer would be a tax return preparer who reasonably expects to file (or if the tax return preparer is a member of a firm, the firm's members in the aggregate reasonably expect to file) 11 or more individual income tax returns in a calendar year.

Concurrently with publication of the proposed regulations, the IRS released Notice 2010-85, see IR-2010-116 (December 1, 2010) and 2010-51 IRB 877 (December 20, 2010), which contained a proposed revenue procedure that would provide guidance to tax return preparers regarding the format and content of undue hardship waiver requests and taxpayer choice statements.

Written comments were received by the Treasury Department and the IRS in response to the notice of proposed rulemaking and concurrent notice. A public hearing was held on January 7, 2011. Commentators appeared at the public hearing and commented on the notice of proposed rulemaking and Notice 2010-85. All comments were considered and are available for public inspection at www.regulations.gov or upon request. This preamble addresses all substantive comments received by the Treasury Department and the IRS. After consideration of the written comments and the

comments provided at the public hearing, the proposed regulations under section 6011(e)(3) are adopted as revised by this Treasury decision. The revisions are discussed in this preamble. In addition, although not discussed in the preamble, a few minor, non-substantive changes were made to the text of the final regulations to conform the language used throughout the regulations. Further, the “1.6011-6” and “301.6011-6” numbering used in the proposed regulations have been changed to “1.6011-7” and “301.6011-7” in these final regulations because “301.6011-6” was used in another proposed regulation, proposed §301.6011-6 (Statement of series and series organizations), which is unrelated to these regulations.

Concurrent with the publication of these regulations, the IRS is publishing a revenue procedure providing guidance to tax return preparers regarding the format and content of undue hardship waiver requests and taxpayer choice statements under §301.6011-7(c)(1) and §301.6011-7(a)(4)(ii), a notice containing administrative exemptions to the electronic filing requirement under §301.6011-7(c)(2), and a transition notice regarding the mailing of individual income tax returns by specified tax return preparers during the 2011 calendar year.

Summary of Comments

Fifty-three written comments were received in response to the notice of proposed rulemaking and Notice 2010-85, and two commentators spoke at the public hearing.

1. Definition of a Specified Tax Return Preparer

The proposed regulations do not apply to individuals described in section 7701(a)(36)(B)(i) through (iv) and §301.7701-15(f) who are not defined as tax return preparers under that Code section and regulation, such as an individual who provides

tax assistance under a Volunteer Income Tax Assistance (VITA) program or a person who prepares a return as a fiduciary. One commentator stated that section 6011(e)(3) made no distinction with respect to whether the tax return preparer is compensated and requested that the final regulations delete the phrase “as defined in section 7701(a)(36) and §301.7701-15” so that the rules would apply to any tax return preparer who prepares and files the requisite number of individual income tax returns. The final regulations do not adopt this recommendation. Section 7701(a) provides that “[w]hen used in this title, where not otherwise directly expressed or manifestly incompatible with the intent thereof,” the definition of “tax return preparer” is that which is provided by that Code section. Section 6011(e)(3) does not define “tax return preparer,” nor is the definition provided by section 7701(a)(36) “manifestly incompatible with the intent” of section 6011(e)(3). These final regulations therefore adopt the definition set forth in section 7701(a)(36) and its corresponding regulations. See §301.6011-7(a)(3).

One commentator suggested that the definition of specified tax return preparer should be applied solely on a firm basis, not on an individual basis, and the individual income tax returns a tax return preparer prepares independently for the preparer’s own business should not be aggregated with any individual income tax returns that the same person prepares as an employee for a firm. For example, if a tax return preparer prepares and files 60 individual income tax returns (that is, fewer than 100 in 2011) while working as an employee of a firm, and independently prepares and files 60 individual income tax returns as a sole proprietor, the commentator believes the tax return preparer should not be subject to the electronic filing requirement for the latter returns. The Treasury Department and the IRS do not adopt this approach in the final

regulations. The suggested approach would not be consistent with the statute. Congress placed the electronic filing responsibility of section 6011(e)(3) on each individual tax return preparer who reasonably expects to prepare and file more than 10 individual income tax returns in a calendar year.

Other commentators stated that the reasonable expectation for filing individual income tax returns in a calendar year should be determined solely at the individual tax return preparer level and not take into consideration the individual income tax returns prepared and filed by other tax return preparers in the firm. Under the proposed regulations, in the above example, the individual income tax returns that the other members of the firm expect to prepare and file would be aggregated with the 60 individual income tax returns that the above-mentioned person expects to prepare and file as an employee of the firm. Firm aggregation rules were included in the proposed regulations to limit avoidance of the statutory requirement, for example, by a firm purposely arranging its workload to prevent one or more of its tax return preparers from becoming a specified tax return preparer under section 6011(e)(3). As a result, the Treasury Department and the IRS do not adopt the commentators' recommendation and have maintained the proposed firm aggregation rules in the final regulations. See §301.6011-7(a)(3) and §301.6011-7(d).

Instead of determining the reasonable filing expectation based on the individual income tax returns reasonably expected to be filed in the calendar year, another commentator recommended that the reasonable filing expectation be determined based solely on the number of individual income tax returns filed in the immediately preceding year. This comment is not adopted. Section 6011(e)(3)(B), and not the regulations,

establishes the reasonable expectation standard. Further, the Treasury Department and the IRS have concluded that the number of individual income tax returns filed in the immediately preceding year may be a relevant factor but should not be the only factor in making a reasonable expectation determination for a calendar year.

2. Definition of File

a. Mailing paper returns for taxpayer-clients

Several commentators opposed the requirement that individual income tax returns prepared and filed by a specified tax return preparer be filed electronically. These commentators stated that they sometimes mail to the IRS the paper tax returns that they prepare for their clients as a service for their clients, often for those who are elderly, incapacitated, on travel, or in other situations in which it would not be practical or convenient to have the client mail the return to the IRS. For some of these clients, the individual income tax return may be unusually large in size or a filing due date may be imminent. For similar reasons, other commentators objected to the requirement in proposed §301.6011-6(a)(4)(ii) that a taxpayer, not the specified tax return preparer, must submit the paper individual income tax return to the IRS when the taxpayer chooses to file in paper format. They recommended that this requirement be eliminated, or, if the clients choose to have their individual income tax returns prepared in paper format and sign a statement documenting that choice, the specified tax return preparers should be able to mail those returns if the clients request this additional service from them.

Congress established the requirement that any individual income tax return prepared by a tax return preparer be filed on magnetic media (electronically) if such

individual income tax return is filed by the tax return preparer and the preparer is a specified tax return preparer for the calendar year during which the individual income tax return is filed. The language that Congress used in the statute, in particular section 6011(e)(3)(A)(i) and (B), specifically refers to the act of “filing” the individual income tax return by the tax return preparer or specified tax return preparer. The statute did not, however, define the term “file.” The Treasury Department and the IRS believe that, with respect to paper returns, a definition of the term file based on the act of the tax return preparer or specified tax return preparer (or a member of the preparer’s firm) submitting the individual income tax return is reasonable and necessary to give effect to the electronic filing requirement enacted by Congress. Otherwise, the requirement would have no meaning or consequence. As a result, the Treasury Department and the IRS do not adopt the commentators’ recommendations that the mailing restrictions be eliminated. Consistent with section 6011(e)(3), the final regulations provide that tax return preparers qualify as specified tax return preparers if they (or their firm) reasonably expect to file, that is, submit to the IRS, the specified number of individual income tax returns, and even if the tax return preparers file more than the specified number of individual income tax returns and therefore qualify as specified tax return preparers, these preparers need not electronically file an individual tax return if they (or their firm) do not file the return, that is, submit it to the IRS, as defined in the regulations. See §301.6011-7(a)(4).

The Treasury Department and the IRS recognize that the mailing restriction may create unforeseen or unavoidable difficulties for immediate compliance, particularly in situations in which specified tax return preparers have customarily mailed individual

income tax returns to the IRS as part of the specified tax return preparer's general business practice, or in which they mail a client's paper individual income tax return to the IRS on the client's behalf due to special circumstances, for example, the disability, incapacitation or infirmity of the client. Under these final regulations the IRS has the authority to issue additional guidance in the form of announcements, notices, or FAQs to address issues related to the filing of a taxpayer's individual income tax return under section 6011(e)(3) that will promote fair and efficient tax administration. In response to the public comments and concurrent with the publication of these regulations, the IRS is also publishing a transition notice regarding the mailing of individual income tax returns by specified tax return preparers during the 2011 calendar year. Solely for calendar year 2011, a specified tax return preparer who prepares individual income tax returns may mail any such return in paper format to the IRS, at the request of the taxpayer, subject to the conditions specified in Notice 2011-27. The specified tax return preparer must obtain a signed and dated statement from the taxpayer containing the taxpayer's choice to have the individual income tax return filed in paper format, and the taxpayer's unambiguous request to have the specified tax return preparer mail the individual income tax return to the IRS. See Notice 2011-27 for details.

b. Acts of assistance beyond providing filing or delivery instructions to taxpayers

The definition of file in the proposed regulations would include the submission by the tax return preparer or specified tax return preparer of an individual income tax return, either electronically (e-filed) or in paper format. Submission in non-electronic (paper) form would include "the direct or indirect transmission, sending, mailing or otherwise delivering of the paper tax return to the IRS by the preparer...and includes

any act or acts of assistance beyond providing filing or delivery instructions to the taxpayer.” Several commentators expressed confusion as to which acts of assistance would amount to filing by the tax return preparer. For example, if a tax return preparer provides the client with an addressed envelope or proper postage to make sure the postage is correct, but the client physically mails the individual income tax return, would that be considered filing by the tax return preparer? In response to these commentators’ concerns, the phrases “direct or indirect” and “and includes any act or acts of assistance beyond providing filing or delivery instructions to the taxpayer” were deleted from the final regulations. Acts such as providing filing or delivery instructions, an addressed envelope, postage estimates, stamps, or similar acts designed to assist the taxpayer in the taxpayer’s efforts to correctly mail or otherwise deliver an individual income tax return to the IRS do not constitute filing by the tax return preparer or specified tax return preparer as long as the taxpayer actually mails or otherwise delivers the paper individual income tax return to the IRS.

3. Taxpayer Choice Statements to File in Paper Format

The proposed regulations contain a provision that would provide taxpayers, who have their individual income tax returns prepared by a tax return preparer, the choice to have those returns filed in paper format. In particular, proposed §301.6011-6(a)(4)(ii) states that an individual income tax return would not be considered to be filed by a tax return preparer or specified tax return preparer if the preparer obtained, on or prior to the date the individual income tax return is filed, a signed and dated written statement from the taxpayer, stating the taxpayer chooses to file the individual income tax return in paper format, and that the taxpayer, and not the preparer, would submit the paper

individual income tax return to the IRS. Further, this statement would have to be signed by both spouses if it was a joint return.

a. Taxpayer choice statement form

The Treasury Department and the IRS received several comments supporting a taxpayer's choice to file an individual income tax return in paper format. Some commentators, however, questioned the need for the taxpayer choice statement, especially for tax return preparers who never mail individual income tax returns to the IRS on behalf of their clients, but instead give the returns to their clients to mail to the IRS. According to these comments, under the proposed regulations, the electronic filing requirement would apply only to specified tax return preparers, that is, those who file the requisite number of individual income tax returns. In their view, if the tax return preparer never files individual income tax returns on behalf of clients, or files ten or fewer (fewer than 100 in 2011), the tax return preparer would not meet the definition of a "specified tax return preparer," and should not have to obtain a taxpayer choice statement from these clients.

The burden of compliance with the electronic filing requirement is on the tax return preparer and specified tax return preparer. Neither the fact that the IRS receives a taxpayer's paper individual income tax return in the mail nor the fact that the tax return preparer's or specified tax return preparer's general business practice is to not mail paper individual income tax returns for clients necessarily establishes that the preparer did not file a particular individual income tax return with the IRS. See Revenue Procedure 2011-25. Based on the above, the Treasury Department and the IRS adopt proposed §301.6011-6(a)(4)(ii) in the final regulations, except for the modification

described in paragraph 3.b of this preamble. If the tax return preparer or specified tax return preparer obtains a signed statement in compliance with the requirements established in Revenue Procedure 2011-25, the signed statement will demonstrate compliance with the electronic filing requirement should the IRS question a preparer about the filing of a particular individual income tax return in paper format.

b. Only one spouse is required to sign the taxpayer choice statement for a joint return

Several commentators recommended that only one spouse, instead of both spouses, should be required to sign the taxpayer choice statement related to a joint individual income tax return. They expressed concerns that the two-signature requirement might not be practical in some cases, for example, when one spouse is unable to sign due to a health condition, or not available because of distance due to a temporary absence from the spouse's customary residence. Although the Treasury Department and the IRS continue to encourage tax return preparers to obtain both spouses' signatures on the taxpayer choice statement as a best practice, the commentators' recommendation that one spouse's signature will suffice for a joint return is adopted in the final regulations.

c. Suggested alternatives to signed taxpayer choice statement

The proposed regulations requested comments on how the burden of complying with the proposed taxpayer choice statement could be minimized. The comments received several suggested alternatives: (1) the IRS create a form similar to the "opt-out" forms used by some states that have an electronic filing requirement; (2) the IRS create a check-box on individual income tax returns in lieu of a separate writing obtained from the taxpayer; (3) the IRS accept IRS Form 8948 (Preparer Explanation

for Not Filing Electronically) if the check-box for taxpayer choice to file in paper format is checked; or (4) the IRS allow a contemporaneous email (unsigned) from the taxpayer to the preparer, containing the recommended language.

The Treasury Department and the IRS have considered these suggestions in finalizing the revenue procedure on taxpayer choice statements and do not adopt them at this time. See Revenue Procedure 2011-25. Regarding the recommendations that the IRS create a new form or add a check-box to the individual income tax return forms affected by section 6011(e)(3), it is unclear how the provision of an additional form would be any more beneficial, easier to implement, or time or cost effective than the taxpayer choice statement provided because that statement is short and easy and inexpensive to reproduce. Regarding use of the Form 8948, because this form is completed by a specified tax return preparer and is not signed by the taxpayer, checking a box on Form 8948 is insufficient proof of a taxpayer's choice to file in paper format. Finally, an email message from the taxpayer is insufficient proof of a taxpayer's choice to file an individual income tax return in paper format. If sent as a scanned attachment to an email, however, a copy of a hand-signed statement in compliance with the final regulations and related guidance will suffice. See Rev. Proc. 2011-25. The Treasury Department and the IRS have concluded that the taxpayer's hand-written signature is necessary to establish that the taxpayer chose to file in paper format and should be required on all taxpayer choice statements. See §301.6011-7(a)(4)(ii).

4. Undue Hardship Waivers

The proposed regulations contain a provision which would provide an exclusion from the electronic filing requirement in cases of undue hardship. The Treasury

Department and the IRS received several comments supporting this provision and the relief that it would provide. The final regulations adopt this exclusion, recognizing that there may be facts and circumstances in which the electronic filing requirement would create an undue hardship on the specified tax return preparer. Specified tax return preparers may request an undue hardship waiver from the IRS in the time and manner as set forth in the regulations and other published guidance.

One commentator recommended that taxpayers should be able to submit a hardship waiver request to the IRS. This recommendation was not adopted. The electronic filing requirement of section 6011(e)(3) and the final regulations is imposed on a specified tax return preparer, not on a preparer's taxpayer-client. Since the burden of compliance rests with the specified tax return preparer, the preparer should be the person responsible for submission of undue hardship waiver requests.

As mentioned above, the Treasury Department and the IRS published Notice 2010-85 and received comments on the proposed undue hardship waiver procedures. All comments were considered and some adopted in the revenue procedure published concurrently with these final regulations. See Rev. Proc. 2011-25.

5. Administrative Exemptions

The proposed regulations contain a provision that would provide an exclusion from the electronic filing requirement pursuant to administrative exemptions established by the IRS in additional guidance. The Treasury Department and the IRS received several comments in support of this provision, suggesting several possible administrative exemptions. The final regulations adopt this provision. The Treasury Department and the IRS considered the comments and included many of the suggested

administrative exemptions in Notice 2011-26, which provides administrative exemptions to the electronic filing requirement and is being issued contemporaneously with these final regulations.

Among the suggested administrative exemptions, Notice 2011-26 includes exemptions for (1) certain specified tax return preparers who are members of certain religious groups, certain foreign preparers without social security numbers, or specified tax return preparers who are currently ineligible for the IRS e-file program due to an IRS e-file sanction; (2) individual income tax returns that are not electronically filed due to technological difficulties, including a return that a specified tax return preparer was unable to e-file because the return was rejected, 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, or a return 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; and (3) individual income tax returns currently not accepted electronically (for example, Forms 1040-NR and 990-T) or any documentation or attachments not accepted electronically, such as documentation for section 6707A disclosures or required appraisals to support charitable contributions. Some individual income tax returns, however, 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 the instructions to Form 8453-F.

6. Transition Period

To enhance compliance and to promote effective and efficient administration of the electronic filing requirement of section 6011(e)(3), the proposed regulations would provide a transition rule that would phase in the new electronic filing requirement for specified tax return preparers over a two-year period -- 100 or more returns in 2011 and 11 or more returns starting in 2012. Solely for the 2011 calendar year, a tax return preparer would not be considered a specified tax return preparer if the tax return preparer reasonably expects, or the preparer's firm members in the aggregate reasonably expect, to file fewer than 100 individual income tax returns in the 2011 calendar year.

Several commentators supported the concept of a transition rule. For various reasons, primarily the issuance of these final regulations and other guidance at the beginning of the 2011 filing season, some commentators urged that the effective date of the electronic filing requirement be delayed until January 2012. Due to similar concerns, another commentator recommended that the transition period be expanded by lengthening the period to three years and increasing the filing threshold for calendar year 2011 from 100 to 200 individual income tax returns. This commentator pointed out that some states used 200 returns for their state return electronic filing requirement at least for the initial filing season. Either approach would allow tax return preparers more time to become familiar with these final regulations and to give those subject to the new

rules more time to make the necessary preparations and arrangements to comply with the rules.

The final regulations adopt the transition period proposed in the proposed regulations -- 100 or more individual income tax returns in 2011, and 11 or more individual income tax returns in 2012 and thereafter. This approach maintains the congressionally-mandated effective date applicable to all individual income tax returns filed after December 31, 2010, while providing both tax return preparers and the IRS with the ability to effectively and efficiently transition to the mandatory electronic filing of individual income tax returns. In addition, tax return preparers who have not already entered the IRS e-file system and who have always prepared their clients' individual income tax returns in paper format are unlikely to be adversely affected by the difference between 100 and 200 returns. Since the final regulations (like the proposed regulations) do not count the paper individual income tax returns filed by taxpayers who sign a taxpayer choice statement to file in paper format, these tax return preparers may not meet the definition of "specified tax return preparer" if the tax return preparers either reasonably expect their clients to continue to file their individual income tax returns in paper format or obtain this statement from their clients.

It is also noted that throughout 2010 the IRS performed extensive educational outreach across the country, informing the tax return preparer community of the anticipated 100-return transition rule for 2011. This educational outreach included, among other things, a discussion of the administrative exemptions that the IRS anticipated would be included in final guidance.

7. Electronic Filing Burden

Some commentators stated that the electronic filing requirement is burdensome, including imposing additional costs on tax return preparers and their clients, and questioned the accuracy of the hour burden estimates set forth in the Paperwork Reduction Act section of the proposed regulations. The proposed regulations, however, did not provide an estimate of the burden related to the electronic filing of individual income tax returns, but rather the burden, measured in hours, to obtain the recommended statements from taxpayer-clients to document their choice to file individual income tax returns in paper format and submit the returns to the IRS themselves. See §301.6011-7(a)(4)(ii). Any burden associated with the congressionally-mandated electronic filing requirement of section 6011(e)(3) was not at issue in or established by the proposed regulations, but is a direct result of that statutory requirement. One commentator remarked that there should not be an electronic filing mandate if the government does not reimburse the tax return preparer for any additional cost of electronic filing. The Congress, however, established the requirement, which does not include a reimbursement requirement.

In its comments, the Small Business Administration Office of Advocacy (SBA) stated that the proposed regulations, if finalized, would impact small business tax return preparers by “increasing the scope of specified tax return preparers.” Specifically, the SBA stated that, because the proposed regulations would require specified tax return preparers to electronically file individual income tax returns and would define a specified tax return preparer as a tax return preparer who reasonably expects to file more than 10 individual income tax returns in a calendar year, the proposed regulations would increase the scope of specified tax return preparers. For the same reasons, the SBA

stated that the proposed regulations contain a significant collection of information and have the potential to have a significant economic impact on a substantial number of small entities if the proposed regulations are adopted as final regulations. The SBA stated that the certification in the proposed regulations that a Regulatory Flexibility Analysis under the Regulatory Flexibility Act, 5. U.S.C. chapter 6 (RFA), was not required was not supported by a factual basis. The SBA recommended that the IRS publish for public comment either a supplemental RFA assessment or an Initial Regulatory Flexibility Analysis.

The Treasury Department and the IRS disagree with the SBA's conclusions and do not adopt its recommendation. As discussed in the preamble of the proposed regulations, the 10-return threshold for determining whether a tax return preparer is a specified tax return preparer is a statutory condition under section 6011(e)(3). The Congress by statute, and not the proposed regulations, established the electronic filing requirement, including the 10-return threshold for specified tax return preparers. As a result, a Regulatory Flexibility Analysis under the RFA is not required regarding the electronic filing requirement and its burden. The Treasury Department and the IRS have certified in the proposed regulations (and again in these final regulations) that the only collection of information contained in the regulations (the taxpayer choice statement) would not have a significant impact on a substantial number of small entities.

In its comments the SBA stated:

Prior to passage of the Worker, Homeownership, and Business Assistance Act of 2009 (the Act), the IRS was prohibited from requiring filers of individual income tax returns to file electronically unless the person was required to file at least 250 returns during the calendar year. The Act authorized the IRS to issue this NPRM to increase the scope of specified tax return preparers.

Page 2, SBA Office of Advocacy Letter of December 20, 2010.

Prior to the Act, the IRS was prohibited from requiring that income tax returns for individuals, estates, and trusts be other than on paper forms regardless of the number of returns filed, as specifically provided by the last sentence of section 6011(e)(1). The referenced 250-return rule, contained in section 6011(e)(2), is only applicable to non-individual taxpayer filers, for example, corporations and partnerships. Following passage of the Act, there are now two separate rules that can affect individual taxpayers. The first rule is still provided by section 6011(e)(1), which prohibits the IRS from requiring income tax returns of individuals, estates, and trusts be on anything other than paper forms if the individual taxpayer prepares and files the taxpayer's income tax return. The second rule is the newly enacted rule, contained in section 6011(e)(3), that applies when an individual taxpayer uses the services of a tax return preparer to prepare the taxpayer's income tax return. The 250-return rule similarly is not applicable to either of these rules.

In addition, the requirements and restrictions contained in section 6011(e)(2) only apply to "regulations [prescribed] under paragraph [6011(e)](1)," while the proposed and final regulations involved here are being prescribed pursuant to section 6011(e)(3) and the specific requirement detailed in section 6011(e)(3)(A) ("The Secretary shall require tha[t] any individual income tax return prepared by a tax return preparer be filed on magnetic media if..."). There is no "increase" in the scope of specified tax return preparers provided by the regulations. Prior to the Act and section 6011(e)(3), specified tax return preparers did not exist. The taxpayer choice statement provision, together with the provision for administrative exemptions, may work to reduce the

number of specified tax return preparers because individual income tax returns affected by these provisions are not counted in determining whether a tax return preparer files more than 10 (100 or more in 2011) individual income tax returns in a calendar year. Further, these provisions, as well as the undue hardship waiver provision, will benefit tax return preparers in their efforts to comply with the electronic filing requirement placed upon them by section 6011(e)(3). Furthermore, even if a tax return preparer is a specified tax return preparer, under both the proposed and final regulations a preparer would not have to electronically file an individual income tax return that a taxpayer chooses to have prepared in paper format and which the taxpayer will file with the IRS, providing a further compliance benefit to all tax return preparers subject to section 6011(e)(3).

The collection of information analysis in the proposed regulations was limited to the sole collection of information contained in the proposed regulations; that is, the taxpayer choice statements. The proposed regulations, in the preamble, stated:

This information [taxpayer choice statement] can be used by tax return preparers and specified tax return preparers, if necessary, to demonstrate to the IRS that the related individual income tax returns filed in paper format were not required to be filed electronically pursuant to section 6011(e)(3) and §301.6011-6. The collection of information is voluntary to obtain a benefit.

As discussed in this preamble, the electronic filing requirement applicable to specified tax return preparers is congressionally mandated and flows directly from the statute, that is, section 6011(e)(3); therefore, a Regulatory Flexibility Analysis under the RFA is not required. The Treasury Department and the IRS have adequately and appropriately certified in the proposed regulations that the taxpayer choice statement would not have

a significant impact on a substantial number of small entities. This collection of information has been reviewed and approved by OMB.

As previously mentioned, the certification in the proposed regulations was sufficient. This certification certified that the collection of information contained in the proposed regulations, the collection related to the taxpayer choice statement, would not have a significant economic impact on a substantial number of small entities and referred to the Paperwork Reduction Act section in the preamble to the proposed regulations for further information as to why economic impact on affected small entities was not significant. That section identified the small entities likely affected, estimated the number of affected firms, and discussed the time and nature of preparation and recordkeeping. Although the certification in the proposed regulations did not reduce the paperwork burden items to monetary costs, the proposed regulations solicited "Estimates of capital or start-up costs and costs of operation, maintenance, and purchases of service to provide information." No such estimates were received during the public comment period.

Section 605(b) of the RFA requires that the certification appear in either the proposed or final rule. Although not required, these final regulations include another certification that a Regulatory Flexibility Analysis under the RFA is not required. See the Special Analyses section.

8. Filing Perfection Period

One commentator recommended a 10-day perfection period for individual income tax returns. Because of issues that could arise with technology, the IRS e-file systems allow perfection of the e-file submission if the initial submission was made on or before

the return due date, the submitter received a “rejection” of the return from the IRS, and the submitter resolved the issue to successfully e-file the return to the IRS within a prescribed period. The current perfection period for individual returns is five days. The Treasury Department and the IRS do not adopt this recommendation in these final regulations because this type of provision is more appropriate for inclusion in administrative procedures.

Special Analyses

It has been determined that this Treasury decision 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.

When an Agency issues a rulemaking proposal, the Regulatory Flexibility Act, 5 U.S.C. chapter 6 (RFA), requires the Agency to “prepare and make available for public comment an initial regulatory flexibility analysis” which will “describe the impact of the proposed rule on small entities.” 5 U.S.C. 603(a). Section 605 of the RFA allows an Agency to certify a rule, in lieu of preparing an analysis, if the proposed rulemaking is not expected to have a significant economic impact on a substantial number of small entities.

The collection of information in these final regulations is in §301.6011-7(a)(4)(ii) (taxpayer choice statement). This information will be used by tax return preparers and specified tax return preparers to demonstrate to the IRS that the related individual income tax returns filed in paper format were not required to be filed electronically pursuant to section 6011(e)(3) and these final regulations, thus reducing the burden on

tax return preparers and specified tax return preparers. This collection of information is voluntary to obtain a benefit, that is, conclusive proof of a taxpayer's choice to file an individual income tax return in paper format, which will be used by tax return preparers and specified tax return preparers to demonstrate to the IRS that the individual income tax return filed in paper format was not required to be filed electronically.

The final regulations affect self-employed specified tax return preparers and small businesses that employ specified tax return preparers who prepare individual income tax returns in exchange for compensation. Section 601(3) of the RFA defines a small business as having the same meaning as "small business concern" under section 3 of the Small Business Act, 15 U.S.C. 632. The IRS estimates that 135,000 firms in 2011 and 312,000 in 2012 qualifying as small businesses will obtain taxpayer choice statements from taxpayers who choose to have their individual income tax returns prepared in paper format and will submit the paper returns to the IRS. (These estimates are based on Tax Year 2007 figures, including firms that filed all of their individual income tax returns on paper and those firms that electronically filed individual income tax returns for that tax year.) Therefore, the Treasury Department and the IRS have determined that this Treasury decision will have an impact on a substantial number of small businesses.

The IRS has also determined, however, that the impact on entities affected by these final regulations will not be significant. The recordkeeping burden associated with obtaining and keeping documentation of a taxpayer choice to file in paper format is minimal. It is estimated that five minutes of preparation time is needed for a preparer to explain the purpose of the information and obtain the taxpayer choice statement from

the taxpayer in the manner prescribed by the IRS, and six minutes for maintaining a copy in the preparer's records. A tax return preparer generally will not be submitting this documentation to the IRS. Based on the estimated numbers of firms (135,000 in 2011 and 312,000 in 2012) and estimates for the number of individual income tax returns that taxpayers chose to file (6,669,900 in 2011 and 9,217,800 in 2012), the estimated hours per firm is 9.06 in 2011 and 5.42 in 2012; with an average number of 1.2 preparers per firm, the estimated hours per preparer is 7.55 in 2011 and 4.51 in 2012.

Additionally, the Treasury Department and the IRS note that section 6011(e)(3) and these regulations only prescribe the method of filing individual income tax returns that are already required to be filed. Further, these regulations are implementing the electronic filing requirement imposed by statute on specified tax return preparers, as defined in section 6011(e)(3)(B). The taxpayer choice statement reduces any burden associated with the electronic filing requirement because paper individual income tax returns for which the tax return preparer obtains a taxpayer choice statement from the taxpayer are not counted in determining whether a tax return preparer files more than 10 (100 or more in 2011) individual income tax returns in a calendar year. There are no capital or start-up costs, such as the purchase of tax software, associated with the taxpayer choice statement; tax return preparers do not have to buy tax software to obtain a signed statement from their clients. Finally, the IRS has provided procedures for specified tax return preparers to request a waiver of the electronic filing requirement in cases of undue hardship. Therefore, specified tax return preparers who receive an

approved hardship waiver would not have to obtain taxpayer choice statements for any individual income tax returns that are covered under the waiver.

Accordingly, the Treasury Department and the IRS hereby certify that the collection of information contained in these regulations will not have a significant economic impact on a substantial number of small entities. Therefore, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act is not required. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking preceding these final regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small businesses.

Drafting Information

The principal author of these final regulations is Keith L. Brau, Office of the Associate Chief Counsel (Procedure and Administration).

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 301

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

Adoption of Amendments to the Regulations

Accordingly, 26 CFR parts 1 and 301 are amended as follows:

PART 1--INCOME TAXES

Paragraph 1. The authority citation for part 1 is amended by adding entries in numerical order to read, in part, as follows:

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

Section 1.6011-6 also issued under 26 U.S.C. 6011(a). * * *

Section 1.6011-7 also issued under 26 U.S.C. 6011(e). * * *

Par. 2. Section 1.6011-6 is added and reserved to read as follows:

§1.6011-6 **[Reserved]**

Par. 3. Section 1.6011-7 is added to read as follows:

§1.6011-7 Specified tax return preparers required to file individual income tax returns using magnetic media.

Individual income tax returns that are required to be filed on magnetic media by tax return preparers under section 6011(e)(3) and §301.6011-7 of this chapter must be filed in accordance with Internal Revenue Service regulations, revenue procedures, revenue rulings, publications, forms or instructions, including those posted electronically.

PART 301--PROCEDURE AND ADMINISTRATION

Par. 4. The authority citation for part 301 is amended by adding an entries in numerical order to read, in part, as follows:

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

Section 301.6011-6 also issued under 26 U.S.C. 6011(a). * * *

Section 301.6011-7 also issued under 26 U.S.C. 6011(e). * * *

Par. 5. Section 301.6011-6 is added and reserved to read as follows:

§ 301.6011-6 Statement of series and series organizations **[Reserved]**

Par. 6. Section 301.6011-7 is added to read as follows:

§301.6011-7 Specified tax return preparers required to file individual income tax returns using magnetic media.

(a) Definitions.

(1) Magnetic media. For purposes of this section, the term magnetic media has the same meaning as in §301.6011-2(a)(1).

(2) Individual income tax return. The term individual income tax return means any return of tax imposed by subtitle A on individuals, estates, and trusts.

(3) Specified tax return preparer. The term specified tax return preparer means any person who is a tax return preparer, as defined in section 7701(a)(36) and §301.7701-15, unless that person reasonably expects to file 10 or fewer individual income tax returns in a calendar year. 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 person will not be considered a specified tax return preparer if that person reasonably expects, or if the person 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. Solely for purposes of this section, a person is considered a member of a firm if the person is an employee, agent, member, partner, shareholder, or other equity holder of the firm.

(4) File or Filed. (i) For purposes of section 6011(e)(3) and these regulations only, an individual income tax return is considered to be "filed" by a tax return preparer or a specified tax return preparer if the preparer submits the individual income tax return to the IRS on the taxpayer's behalf, either electronically (by e-file or other magnetic

media) or in non-electronic (paper) form. Submission of an individual income tax return by a tax return preparer or a specified tax return preparer in non-electronic form includes the transmission, sending, mailing or otherwise delivering of the paper individual income tax return to the IRS by the preparer, any member, employee, or agent of the preparer, or any member, employee, or agent of the preparer's firm.

(ii) An individual income tax return will not be considered to be filed, as defined in paragraph (a)(4)(i) of this section, by a tax return preparer or specified tax return preparer if the tax return preparer or specified tax return preparer who prepared the return obtains, on or prior to the date the individual income tax return is filed, a hand-signed and dated statement from the taxpayer (by either spouse if a joint return) that states the taxpayer chooses to file the individual income tax return in paper format, and that the taxpayer, and not the preparer, will submit the paper individual income tax return to the IRS. The IRS may provide guidance through forms, instructions or other appropriate guidance regarding how tax return preparers and specified tax return preparers can document a taxpayer's choice to file an individual income tax return in paper format.

(iii) The rules contained in this section do not alter or affect a taxpayer's obligation to file returns under any other provision of law. The definition of file or filed by a tax return preparer or specified tax return preparer contained in paragraph (a)(4)(i) of this section applies only for the purposes of section 6011(e)(3) and these regulations and does not apply for any other purpose under any other provision of law.

(b) Magnetic media filing requirement. Except as provided in paragraphs (a)(4)(ii) and (c) of this section, any individual income tax return prepared by a specified

tax return preparer in a calendar year must be filed on magnetic media if the return is filed by the specified tax return preparer.

(c) Exclusions. The following exclusions apply to the magnetic media filing requirement in this section:

(1) Undue hardship waiver. The IRS may grant a waiver of the requirement of this section in cases of undue hardship. An undue hardship waiver may be granted upon application by a specified tax return preparer consistent with instructions provided in published guidance and as prescribed in relevant forms and instructions. A determination of undue hardship will be based upon all facts and circumstances. The undue hardship waiver provided to a specified tax return preparer may apply to a series or class of individual income tax returns or for a specified period of time, subject to the terms and conditions regarding the method of filing prescribed in such waiver.

(2) Administrative exemptions. The IRS may provide administrative exemptions from the requirement of this section for certain classes of specified tax return preparers, or regarding certain types of individual income tax returns, as the IRS determines necessary to promote effective and efficient tax administration. The IRS may provide administrative exemptions and any criteria or procedures necessary to claim an administrative exemption through forms, instructions, or other appropriate guidance.

(d) Reasonably expect to file--(1) In general. The determination of whether a tax return preparer reasonably expects, or if the preparer is a member of a firm, the firm's members in the aggregate reasonably expect, to file 10 or fewer individual income tax returns (or, in the case of the 2011 calendar year, fewer than 100 individual income tax returns) is made by adding together all of the individual income tax returns the tax

return preparer and, if the preparer is a member of a firm, the firm's members reasonably expect to prepare and file in the calendar year. In making this determination, individual income tax returns that the tax return preparer reasonably expects will not be subject to the magnetic media filing requirement under paragraph (a)(4)(ii) of this section or are excluded from the requirement under (c)(2) of this section are not to be counted. Individual income tax returns excluded from the magnetic media filing requirement under paragraph (c)(1) of this section are to be counted for purposes of making this determination.

(2) Time for making determination of reasonable expectations. The determination regarding reasonable expectations is made separately for each calendar year in order to ascertain whether the magnetic media filing requirement applies to a tax return preparer for that year. For each calendar year, the determination of whether a tax return preparer and the preparer's firm reasonably expect to file 10 or fewer individual income tax returns (or, in the case of the 2011 calendar year, fewer than 100 individual income tax returns) is made based on all relevant, objective, and demonstrable facts and circumstances prior to the time the tax return preparer and the preparer's firm first file an individual income tax return during the calendar year.

(e) Examples. The following examples illustrate the rules of paragraphs (a) through (d) of this section.

Example 1. Tax Return Preparer A is an accountant who recently graduated from college with an accounting degree and has opened his own practice. A has not prepared individual income tax returns for compensation in the past and does not plan to focus his practice on individual income tax return preparation. A intends instead to focus his practice on providing specialized accounting services to certain health care service providers. A has no plans to, and does not, employ or engage any other tax return preparers. A estimates that he may be asked by some clients to prepare and file their individual income tax returns for compensation, but A expects that the number of

people who do ask him to provide this service will be no more than seven in 2012. In fact, A actually prepares and files six paper Forms 1040 (U.S. Individual Income Tax Return) in 2012. Due to a growing client base, and based upon his experience in 2012, A expects that the number of individual income tax returns he will prepare and file in 2013 will at least double, estimating he will prepare and file 12 Form 1040 returns in 2013. A does not qualify as a specified tax return preparer for 2012 because A reasonably expects to file 10 or fewer returns (seven) in 2012. Consequently, A is not required to electronically file the individual income tax returns he prepares and files in 2012. A's expectation is reasonable based on his business projections, individual income tax return filing history, and staffing decisions. A is a specified tax return preparer in 2013, however, because based on those same factors A reasonably expects to file more than 10 individual income tax returns (12) during that calendar year. A, therefore, must electronically file all individual income tax returns that A prepares and files in 2013 that are not otherwise excluded from the electronic filing requirement.

Example 2. Same facts as in Example 1, except three of Tax Return Preparer A's clients specifically chose to have A prepare their individual income tax returns in paper format in 2012 with the clients mailing their respective returns to the IRS. A expects that these three clients will similarly choose to have him prepare their returns in paper format in 2013, with the clients being responsible for mailing their returns to the IRS. A is not required to electronically file these three returns in 2013 because the taxpayers chose to file their returns in paper format. A obtained a hand-signed and dated statement from each of those taxpayers, indicating that they chose to file their returns in paper format. These three individual income tax returns are not counted in determining how many individual income tax returns A reasonably expects to file in 2013. Because the total number of individual income tax returns A reasonably expects to file in 2013 (nine) does not exceed 10, A is not a specified tax return preparer for calendar year 2013, and A is not required to electronically file any individual income tax return that he prepares and files in 2013.

Example 3. Tax Return Preparer B is a solo general practice attorney in a small county. Her practice includes the preparation of wills and assisting executors in administering estates. As part of her practice, B infrequently prepares and files Forms 1041 (U.S. Income Tax Return for Estates and Trusts) for executors. In the past three years, she prepared and filed an average of five Forms 1041 each year and never exceeded more than seven Forms 1041 in any year. Based on B's prior experience and her estimate for 2012, made prior to the time she first files an individual income tax return in 2012, she reasonably expects to prepare and file no more than five Forms 1041 in 2012. Due to the unforeseen deaths of several of her clients in late 2011, B actually prepares and files 12 Forms 1041 in 2012. B does not find out about these deaths until after she has already filed the first Form 1041 in 2012 for another client. B is not required to electronically file these returns in 2012. She does not qualify as a specified tax return preparer for calendar year 2012 because prior to the time she filed the first Form 1041 in 2012, she reasonably expected to file 10 or fewer individual income tax returns in 2012.

Example 4. Same facts as Example 3, except, in addition to the five Forms 1041 that she expects to prepare and file in 2012, Tax Return Preparer B also expects to prepare and file 10 paper Forms 1040 (U.S. Individual Income Tax Return) in 2012, based upon the requests that she has received from some of her clients. Because the total number of individual income tax returns B reasonably expects to file in 2012 (fifteen) exceeds 10, B is a specified tax return preparer for calendar year 2012, and B must electronically file all individual income tax returns that B prepares and files in 2012 that are not otherwise excluded from the electronic filing requirement.

Example 5. Firm X consists of two tax return preparers, Tax Return Preparer C who owns Firm X, and Tax Return Preparer D who is employed by C in Firm X. Based upon the firm's experience over the past three years, C and D reasonably expect to file nine and ten individual income tax returns for compensation, respectively, in 2012. Both C and D must electronically file the individual income tax returns that they prepare in 2012, unless the returns are otherwise excluded from the electronic filing requirement, because they are members of the same firm and the aggregated total of individual income tax returns that they reasonably expect to file in 2012 (nineteen), exceeds 10 individual income tax returns.

(f) Additional guidance. The IRS may implement the requirements of this section through additional guidance, including by revenue procedures, notices, publications, forms and instructions, including those issued electronically.

(g) Effective /applicability date. This section is effective on March 30, 2011, and applicable to individual income tax returns filed after December 31, 2010.

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

Approved: March 25, 2011.

Michael Mundaca,
Assistant Secretary of the Treasury (Tax Policy).

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