

**Office of Chief Counsel
Internal Revenue Service
*memorandum***

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subject: Processing of Form 8809, Application for Extension of Time to File Information Returns

This Chief Counsel Advice responds to your request for assistance. This advice may not be used or cited as precedent.

BACKGROUND

A Form 8809, *Application for Extension of Time to File Information Returns*, is used to request an initial or additional extension of time to file Forms W-2, W-2G, 1042-S, 1097, 1098, 1099, 3921, 3922, 5948 or 8027 with the Internal Revenue Service. Although the current Form 8809 Instructions (Rev. May 2011) authorize filing on paper "if the request is for one filer," the Form instructions provide, "Requests for more than one filer must be filed through the Filing Information Returns Electronically (FIRE) System." Filing through the FIRE System is accomplished either:

1. Online by completing a fill-in Form 8809 through the FIRE system at <http://fire.irs.gov> for an automatic 30-day extension; or
2. Electronically through the FIRE system in a file formatted according to the specifications in Publication 1220, Part D.

ISSUES

ISSUE 1. What regulation or authorities allow the Internal Revenue Service (Service) to mandate the electronic filing of Form 8809?

I.R.C. § 6011(e)(1) provides, in part, that the Service “shall prescribe regulations providing standards for determining which returns must be filed on magnetic media or in other machine-readable form.” Pursuant to this Code provision, the Service has issued regulations mandating, by name, the electronic filing of Forms 1042-S, 1098, 1098-E, 1098-T, 5498, 8027, W-2, W-2G, 49R-2/W-2PR, W-2VI, W-2GU, W-2AS, and the Forms in the 1099 series.¹ The Form 8809 is not listed in these regulations. Rev. Proc. 2012-30 § 3.02 allows Form 8809 to be mailed to the Service, and Rev. Proc. 2012-30 § 3.05 allows Form 8809 to be faxed to the Service. Treas. Reg. § 301.6011-2(b)(3) allows the Service to add forms that must be electronically filed by revenue procedure. We have not identified any existing regulation or revenue procedure, however, that presently mandates that Form 8809 requests for more than one filer must be filed electronically.

Under the authority of section 6011(e)(1), the Service and the Department of Treasury may issue regulations or revenue procedures mandating the electronic filing of the Form 8809, subject to the 250 return requirement further discussed below.

ISSUE 2. What regulation and/or authority allows the Service to mandate the electronic filing of Form 8809 if a filer/payer or transmitter will file more than 250 information returns with the IRS?

I.R.C. § 6011(e)(1) authorizes the Service to issue regulations to mandate the electronic filing of returns, and I.R.C. § 6011(e)(2) provides that, with certain exceptions, the

¹ Treas. Reg. § 301.6011-2(b), entitled “Returns required on magnetic media,” provides, in part:

- (1) If the use of Form 1042-S, 1098, 1098-E, 1098-T, 1099 series, 5498, 8027, W-2G, or other form treated as a form specified in this paragraph (b)(1) is required by the applicable regulations or revenue procedures for the purpose of making an information return, the information required by the form must be submitted on magnetic media, except as otherwise provided in paragraph (c) of this section. ...
- (2) If the use of Form W-2 (Wage and Tax Statement), Form 499R-2/W-2PR (Withholding Statement (Puerto Rico)), Form W-2VI (U.S. Virgin Islands Wage and Tax Statement), Form W-2GU (Guam Wage and Tax Statement), Form W-2AS (American Samoa Wage and Tax Statement), or other form treated as a form specified in this paragraph (b)(2) is required for the purpose of making an information return, the information required by the form must be submitted on magnetic media, except as otherwise provided in paragraph (c) of this section. Returns described in this paragraph (b)(2) must be made in accordance with applicable Social Security Administration procedures or publications (which may be obtained from the local office of the Social Security Administration).

Service may not require any person that is required to file less than 250 returns to file those returns electronically.² Moreover, under current regulation section 301.6011-2(c)(1)(iii), the 250 or more requirement applies separately for each type of return.³ The Service and the Department of Treasury could, in the future, revise regulation section 301.6011-2(c)(1)(iii) to clarify that the “no aggregation” provision would not apply to the Form 8809, and similar to Treas. Reg. § 301.6011-5(a)(5), provide that the Form 8809 must be filed electronically if the person “required to file” the information returns must file at least 250 returns during the calendar year.

ISSUE 3. What regulation or authorities allows the Service to mandate Transmitters filing an extension for more than one payer/filer to file Form 8809 electronically?

I.R.C. § 6011(e)(1) authorizes the Service to issue regulations to mandate the electronic filing of returns, and I.R.C. § 6011(e)(2) provides that, with certain exceptions, the Service shall not require *any person* that is required to file less than 250 returns to file those returns on magnetic media. We have not identified any existing regulation or revenue procedure authorizing the Service to mandate Transmitters filing an extension for more than one payer/filer to file Form 8809 electronically.

ISSUE 4. What regulation allows the Service to accept one Form 8809 from a Transmitter requesting an initial 30-day extension for more than one payer/filer? (Note: Currently Transmitters filing Form 8809 are instructed to attach a list with the name and TIN of each payer/filer they are requesting an extension for.)

Treas. Reg. § 1.6081-8(a) and (b) provide that a person required to file an information return on the Form W-2 series, W-2G, 1042-S, 1098 series, 1099 series, 5498 series, or 8027 is allowed one automatic 30-day extension of time to file the return after the date prescribed for filing the return if the filer or the person transmitting the return for the filer files an application on a Form 8809, Request for Extension of Time to File Information Returns, *or in any other manner as may be prescribed* by the Service, filed with the Service office designated in the application’s instructions by the date prescribed for filing the information return.

² IRC § 6011(e)(2), entitled “Requirements of regulations”, provides, in part:

In prescribing regulations under paragraph (1), the Secretary—

- (A) shall not require any person to file returns on magnetic media unless such person is required to file at least 250 returns during the calendar year.

³ Treas. Reg. § 301.6011-2(c)(iii), entitled “No aggregation,” provides:

Each type of information return described in paragraphs (b)(1) and (2) of this section is considered a separate return for purposes of this paragraph (c)(1). Therefore, the 250–threshold applies separately to each type of form required to be filed.

Pursuant to the broad authority to prescribe “in any other manner” the method of applying for an automatic extension under Treas. Reg. § 1.6081-8(b), it is our view that the Service, by form instructions, may prescribe procedures to accept one Form 8809 from a Transmitter requesting an initial 30-day extension for more than one payer/filer.

ISSUE 5. What regulation allows the Service to accept one Form 8809 from a Transmitter requesting an additional extension of time for more than one payer/filer?

Treas. Reg. § 1.6081-8(d) provides that a person required to file an information return on the Form W-2 series, W-2G, 1042-S, 1098 series, 1099 series, 5498 series, or 8027 may submit a request for an additional 30-day extension of time to file the information return if the filer or the person transmitting the return for the filer files an application on a Form 8809, Request for Extension of Time to File Information Returns, *or in any other manner as may be prescribed by the Service.*

Pursuant to the broad authority to prescribe “in any other manner” the method of applying for an extension under Treas. Reg. 1.6081-8(d), it is our view that the Service, by form instructions, may prescribe procedures to accept one Form 8809 from a Transmitter requesting an additional 30-day extension for more than one payer/filer.

ISSUE 6. What regulation requires the Service to provide an extension of time to file information returns with the IRS?

Treas. Reg. § 1.6081-8 provides for an automatic 30-day extension of time and does not require a showing of good cause. We note, however, that obtaining an extension under section 1.6081-8 does not extend the due date for providing a statement to the person with respect to whom the information is required to be reported. Treas. Reg. § 1.6081-8(e).

ISSUE 7. Can I.R.C. § 6011 be amended to include a requirement to file Form 8809 electronically?

Congress has the ability to amend I.R.C. § 6011 to include a requirement to file Form 8809 electronically. The Administration and the Department of Treasury have annually requested that the Internal Revenue Code be amended to expand the Service’s regulatory authority to mandate the electronic filing of returns.

ISSUE 8. What are the required steps to amend the current regulation or create new regulations?

The following is a very brief overview of the regulatory process and the Guidance Priority Plan. Please look to IRM 32.1, Chief Counsel Regulation Handbook, for more details.

The Treasury Department's Office of Tax Policy and Service has procedures to establish an Annual Guidance Priority List and uses this List each year to identify and prioritize the tax issues that should be addressed through regulations, revenue rulings, revenue procedures, notices, and other published administrative guidance. Divided by subject area, the Guidance Priority Plan lists projects that the IRS plans to work on in the coming year. The plan is released, in recent years, in the fall, jointly by the Assistant Secretary for Tax Policy at the Treasury Department, the Commissioner and the Chief Counsel.

The plan is created based on input from several sources. Internally, the Operating Divisions, the IRS Chief Counsel's Office and the Treasury Department's Office of Tax Policy propose projects to be included on the plan. Since at least 2000, the IRS has also solicited input from the public. This year, for example, Notice 2013-22, 2013-15 I.R.B. 904, requested public comment on recommendations for items that should be included on the 2013-14 Guidance Priority List. After input from the Operating Divisions, the Chief Counsel's Office, Treasury officials, and the public, the final composition of the Guidance Priority Plan is negotiated.

The regulation project is then assigned to one of the Associate Chief Counsel's offices. A proposed regulation is then drafted, and approved at the Branch level, Associate Chief Counsel level and the Office of Tax Policy for circulation for comments by the internal stakeholders. Once all of the comments have been addressed, the proposed regulation is approved at the Branch, Associate Chief Counsel, Chief Counsel and the Commissioner's Office for transmittal to the Treasury Department. At Treasury, the proposed regulation is reviewed by the Office of Tax Policy, and the General Counsel's Office for approval by the Treasury Secretary for publication in the Federal Register.

Once the proposed regulation is published, the proposed regulation is scheduled for public comment at a public hearing, generally 60 to 90 days after publication. Public comments are carefully considered as part of the process of promulgating final regulations. Once public comments are received and considered, a final regulation is drafted, and the approval process described above is repeated for publication in the Federal Register.

ISSUE 9. Whether the Service must continue to issue Revenue Procedures covering electronic filing specifications and republish them as publications or whether the Service may issue electronic filing guidance specifications directly as publications?

A revenue procedure is an official statement of a procedure that affects the rights or duties of taxpayers or other members of the public under the Internal Revenue Code, related statutes, tax treaties, and regulations that should be a matter of public knowledge.⁴ Revenue Procedures do not have the force and the effect of Treasury

⁴ Statement of Procedural Rules § 601.601(d)(2)(i)(b).

Department Regulations, but they do advise the public of internal management and procedural matters.⁵

The issue of migrating electronic filing specification revenue procedures to solely a publication has been an issue for the past several years. Electronic filing specification guidance started out as revenue procedures in the late 1980's, see, e.g., Rev. Proc. 88-39, 1988-2 C.B. 562, and Rev. Proc. 88-40, 1988-2 C.B. 574. These types of guidance are now drafted by the operating divisions, authorized by Delegation Order 1-55, Delegation of Approval Authority for Revenue Procedures (04-03-1991) (formerly DO-234).⁶ This practice, however, causes a duplication of effort to publish these sets of guidance twice, first as a revenue procedure, then as a publication.

Since revenue procedures are not given the same level of deference by courts as Treasury Regulations, it appears at first blush that issuing guidance as both a revenue procedure and as a publication is a waste of time and resources. A basic principle of administrative law is that, generally, courts will tend to defer to an agency's interpretation of the statute that it administers, see *Chevron U.S.A. Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837 (1984). Not all agency actions, however, are entitled to the highly deferential standard of *Chevron* deference. While *Chevron* deference applies to agency interpretations contained within properly promulgated regulations, interpretations such as those in revenue procedures do not warrant *Chevron* deference. Instead, they are "entitled to respect," but only to the extent that they are persuasive. See *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).⁷

⁵ Mitchell Rogovin and Donald L. Korb, *The Four R's Revisited: Regulations, Rulings, Reliance and Retroactivity in the 21st Century: A View from Within*, 46 DUQ. L. REV. 323 336-37 (2008).

⁶ The relevant Revenue Procedures and Publications include:

Rev. Proc. 2012-30, 2012-33 I.R.B. 166 – published as Publication 1220, *Specifications for Filing Forms 1097, 1098, 1099, 3921, 3922, 5498, 8935, and W-2G Electronically*;

Rev. Proc. 2012-34, 2012-34 I.R.B. 280 – published as Publication 4810 *Specifications for Filing Form 8955-SSA, Annual Registration Statement of Identifying Separated Participants With Deferred Vested Benefits, Electronically*;

Rev. Proc. 2012-36, 2012-39 I.R.B. 374 - published as Publication 1187 *Specifications for Filing Form 1042-S, Foreign Person's U.S. Source Income Subject to Withholding, Electronically*;

Rev. Proc. 2012-37, 2012-41 I.R.B. 449 - published as Publication 1239, *Specifications for Filing Form 8027, Employer's Annual Information Return of Tip Income and Allocated Tips, Electronically*; and

Rev. Proc. 2012-49, 2012-50 I.R.B. 681– published as Publication 1516 *Specifications for Filing Forms 8596, Information Returns for Federal Contracts, Electronically*.

⁷ On May 7, 2011, the Department of Justice announced it will no longer argue for *Chevron* deference to apply to revenue rulings and revenue procedures. The announcement comes in the wake of the Supreme Court's recent decision in *Mayo Found. for Med. Educ. & Research v. United States.*, 131 S. Ct. 704 (2011) in which the Court held all regulations should be analyzed using *Chevron* deference regardless of the agency which promulgated them.

Despite the duplication of effort, however, there may be a benefit to issuing some types of procedural guidance in revenue procedure form. Although revenue procedures are not entitled to *Chevron* deference, they generally receive more deference than a publication, which normally would receive no deference.⁸ Thus, revenue procedures carry more weight although they may not be controlling. Consequently, if the Service wants taxpayers to follow certain requirements or procedures, a revenue procedure is a better vehicle to set forth those rules than a publication.

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

Please call (202) 622-4910 if you have any further questions.

⁸ In this regard, publications are not included in the list of authorities considered in determining whether a taxpayer had substantial authority for his or her return reporting position whereas revenue procedures are included.