

**A Preliminary Analysis:  
Tax Return Preparer/PTIN Regulations**  
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A few preliminary observations:

1. Over the past few months, Treasury has acted swiftly to issue multiple and successive sets of regulations affecting tax return preparers:
  - Proposed amendments to 31 CFR, Subtitle A, Part 10 (Circular 230), RIN 1545-BH01 [REG-138637-07], governing practice before the IRS, published in the Federal Register on 8/23/10.
  - Final regulations regarding user fees, TD 9503, released 9/28/10. These final regulations adopt in full the proposed regulations (REG-139343-08) published in the Federal Register on 7/23/10.
  - Final regulations regarding furnishing preparer tax identification number (“PTIN”), TD 9501, published in the Federal Register on 9/30/10. These final regulations adopt proposed regulations (REG-134235-08) amending Treasury Regulations Section 6109-2 and published in the Federal Register on 3/26/10.
2. As explained below, the new rules will not affect practitioners or banks who are fiduciaries of a trust or estate and who prepare returns in that fiduciary capacity. The new rules, however, will affect practitioners and banks in other situations, e.g. as tax return preparer for a corporate foundation; as tax return preparer for a third-party executor; as tax return preparer for third-party trustees.
3. The final regulations require that attorneys, CPAs and enrolled agents who are tax return preparers obtain and renew a PTIN. Tax return preparers who are not attorneys, CPAs or enrolled agents are also required to obtain and renew a PTIN—and, in addition, are subject to a new testing and continuing education regime.
4. As drafted, the proposed amendments to Circular 230 do not adequately deal with the question of when a tax return preparer has prepared “substantially all” of a return. This is a major flaw—because the proposed rules apply by their terms only to those who prepare, or assist in preparing, all or “substantially all” of certain documents.
5. Although the proposed amendments to the Circular 230 regulations (REG-138637-07) define “tax return preparer,” they do not consistently use that term. To make matters worse, a separate (and different) definition of “tax return preparer” appears in Treasury Regulations Section 1.6109-2(g).

6. A set of “Frequently Asked Questions” posted at [www.irs.gov/taxpros](http://www.irs.gov/taxpros) explains that although competence testing is expected to begin in mid-2011, “tax return preparers who have PTINs before testing becomes available will have until 12/31/13 to pass the competency test.” [Note: the FAQs also indicate that initial testing will be for Form 1040 series returns—but that the IRS “will issue additional guidance or instructions for other tax returns.”]

## EXECUTIVE SUMMARY

1. Proposed tax return preparer regulations, RIN 1545-BH01 [REG-138637-07], published 8/23/10. Proposed amendments to 31 CFR, Subtitle A, Part 10 (Circular 230), governing practice before the IRS. Proposed to be effective 60 days after publication of final regulations in the Federal Register. [Note: it is expected that final regulations will be issued before year-end.]

a. Would expand application of Circular 230 to all compensated tax return preparers, Under 31 CFR Section 10.8(b), as proposed,

“Any individual who for compensation prepares, or assists in the preparation of, all or substantially all of a document pertaining to any taxpayer’s tax liability for submission to the Internal Revenue Service is subject to the duties and restrictions relating to practice in subpart B [of Circular 230], as well as subject to the sanctions for violation of the regulations in subpart C [of Circular 230].” [Note: for consistency, former 31 CFR Section 10.7(e), which allowed “any individual” to prepare a tax return, is also deleted.]

(1) There is no definition of “substantially all” in Circular 230, either in its current form or as proposed to be amended.

(2) Treasury Regulations Section 6109-2(g) defines “tax return preparer” to mean “any individual who is compensated for preparing or assisting in the preparation of, all or substantially all of a tax return or claim for refund of tax.” It also includes a list of factors relevant in determining whether a given individual is a “tax return preparer,” as well as four examples, the last of which is somewhat relevant to the “substantially all” issue. It does not, however, directly address that issue. Moreover, there is no cross-reference in Treasury Regulations Section 6109-2(g) to the proposed Circular 230 regulations; to the contrary, its definition and

examples expressly apply “only for purposes of paragraphs (d), (e), and (f)” [of Treasury Regulations Section 6109-2].

*[Note: The lack of guidance on this point in the proposed Circular 230 regulations is in contrast to the detailed explanation of “substantial portion” in Treasury Regulations Section 301.7701-15(b)(3).]*

b. Would modify tax return preparation standards. 31 CFR Section 10.34(a), as proposed, would require “a reasonable basis” for all return positions. *[Note: this is a more relaxed standard than the “substantial authority” standard under the general civil penalty provisions of IRC Section 6694(a)(2).]*

c. Would create a new class of individual authorized to practice before the IRS, the “registered tax return preparer.” 31 CFR Section 10.3(f), as amended, lists six categories of individuals who may practice before the IRS: attorneys, certified public accountants, enrolled agents, enrolled actuaries, enrolled retirement plan agents and “registered tax return preparers.” *[Note: the scope of a registered tax return preparer’s practice is limited under 31 CFR Section 10.3(f)(2), as proposed.]*

d. Would establish requirements for registered tax return preparers, including testing and continuing legal education. 31 CFR Sections 10.4, 10.5 and 10.6, as proposed, outline the application and renewal process, including:

- (1) Completing an application and paying an initial registration fee.
- (2) Filing required individual and business tax returns and payment of Federal tax debts (passing a “Federal tax compliance check”).
- (3) Passing a written competency exam administered by, or on behalf of, the Internal Revenue Service. The Preamble to REG-138637-07 clarifies that:
  - (a) Initially, there will be two competency examinations:
    - (i) one covering wage and non-business income Form 1040 series returns; and
    - (ii) one covering wage and small business income Form 1040 series returns.

(b) Individuals passing the wage and small business income Form 1040 series exam will be able to prepare any Form 1040 series return.

(c) Individuals passing the wage and non-business income Form 1040 series exam will only be authorized to prepare certain (as-yet-to-be-determined) returns and claims for refund.

(d) The IRS will provide transition rules covering the period beginning on the effective date of the regulations and ending on the date the “registered tax return preparer” examinations become available.

- (4) Possessing a valid preparer tax identification number (“PTIN”).
- (5) Not engaging in conduct that would justify suspension or disbarment (“passing a suitability check”).
- (6) Renewing the registration as required.
- (7) Completing, as a condition for renewal, 16 hours of continuing education each year.

*[Note: Although there are no “grandfather” provisions, the IRS has announced, in IR-2010-99, issued 9/28/10, that it is considering exempting certain individuals from the testing and continuing education requirements, i.e. “a discrete category of people who engage in return preparation under the supervision of someone else—for example, some employees who prepare all or substantially all of the return and work in certain professional firms under. . . supervision. . .”]*

e. Would expand the definition of “incompetence and disreputable conduct” (subject to sanction under Circular 230) to include:

- (1) Willfully failing to file by electronic media when so required, with a reasonable cause exception. 31 CFR Section 10.51(a)(16), as proposed.
- (2) Willfully preparing all or substantially all of, or signing a tax return without a valid PTIN. 31 CFR Section 10.51(a)(17), as proposed.
- (3) Willfully representing a taxpayer before the IRS unless authorized to do so. 31 CFR Section 10.51(a)(18), as proposed.

f. Would require those responsible “for overseeing a firm’s practice of preparing tax returns” to “take reasonable steps to ensure that the firm has adequate procedures in effect for all members, associates and employees for

purposes of complying with Circular 230.” 31 CFR Section 10.36(b), as proposed.

g. Would define “tax return preparer” to mean “any individual within the meaning of section 7701(a)(36) and 26 CFR 301.7701-15.” 31 CFR Section 10.2(a)(8), as added by REG-138637-07.

*[Note: (1) IRC Section 7701(a)(36)(B)(iv) provides that those preparing returns or claims for refund “as a fiduciary” are not “tax return preparers.” Treasury Regulations Section 301.7701-15(d)(2) clarifies that this exception applies to “preparation of a return or claim for refund for a trust or estate of which the person either is a fiduciary or is an officer, general partner, or employee of the fiduciary.” (2) REG-138637-07 generally does not use the term “tax return preparer.”]*

2. Final PTIN user fee regulations, REG-139343-08, TD 9503, released 9/28/10. **To be effective 9/30/10.** Amends Treasury Regulations Section 300.9 to establish a \$50 fee for individuals who apply for or renew a PTIN; annual renewal is required.

*[Note: \$50 represents only the government’s costs for processing; on 8/19/10, the IRS announced the total fee is \$64.25, with \$50 allocated to the IRS and \$14.25 allocated to the third-party vendor that operates the online PTIN registration system. IR-2010-91.]*

3. Final PTIN regulations, TD 9501, published 9/30/10. Generally applicable to tax return preparers after 12/31/10.

a. Background. Existing IRC Section 6109(a) requires individuals making any “return, statement, or other document” required under the Internal Revenue Code to include “such identifying number as may be prescribed.” Currently, preparers generally may use either their social security numbers or PTINs issued by the IRS. Under IRC Section 6695(c), a maximum penalty of \$25,000 (\$50 per failure) is currently imposed on those who fail to furnish a required PTIN.

b. Would require PTIN after 12/31/10. Would require that:

(1) after 12/31/10, every tax return preparer have a PTIN; and

(2) for tax returns and claims for refund filed after 12/31/10, the identifying number of a tax return preparer is the PTIN.

Treasury Regulations Section 1.6109-2(d) and 1.6109-2(a)(ii)).

*[Note: The online PTIN application system became available on 9/28/10.]*

c. Eligibility to obtain a PTIN. Treasury Regulations Section 1.6109(d) is amended to provide that, after 12/31/10, only attorneys, certified public accountants, enrolled agents or registered tax return preparers who are “authorized to practice before the IRS under Circular 230” are eligible to obtain a PTIN.

d. Expiration and renewal. Treasury Regulations Section 1.6109-2(e) authorizes the IRS to provide for the expiration and renewal of PTINs, including requiring that any PTIN issued on or before 9/30/10 will expire on 12/31/10.

e. Tax compliance check. Effective 9/30/10, Treasury Regulations Section 1.6109(f) authorizes the IRS to conduct a “tax compliance check” on those applying for, or renewing, a PTIN.

*[Note: the preamble to the proposed amendments to Circular 230 (REG-138637-07) explains that the tax compliance check will cover both personal and business tax filings, including employment tax returns.]*

f. Definition of “tax return preparer.” “Only for purposes of [Treasury Regulations Section 6109-2] (d), (e) and (f), the term ‘tax return preparer’ is defined to include both:

- (1) individuals compensated for preparing substantially all of a tax return or claim for refund; and
- (2) individuals compensated for assisting in the preparation of all or substantially all of a tax return or claim for refund.

Treasury Regulations Section 1.6109-2(g).

*[Note: there is currently no exception for non-signing preparers who are supervised by attorneys, CPAs, or enrolled agents; there is also no exception for state-licensed tax return preparers, such as Licensed Tax Preparers in Oregon. There is also no definition of “substantially all.”]*

In an attempt to be helpful, TD 9501 (see 3. “Terminology”) points out that [Treasury Regulations] Section 1.6109-2(g) includes a non-exclusive list of factors that can be used “to determine whether an individual prepared or assisted in preparing all or substantially all of a tax return or claim for refund.” The three enumerated factors are: (i) the complexity of the work performed relative to the overall complexity of the return or refund claim; (ii) the dollar amount of the items attributable to the work performed relative to the total dollar amounts required to be reported; and (iii) the amount of tax or credit attributable to the work performed relative to the

total tax liability required to be reported. Under the regulations, an individual who prepares a single schedule may be a “tax return preparer.” However, individuals are not tax return preparers if they are not described in Treasury Regulations Section 301.7701-15(b)(2) [relating to “non-signing tax return preparers”] or if they are described in Treasury Regulations Section 301.7701-15(f) [relating to persons who are not tax return preparers].

The examples provided in Treasury Regulations Section 1.6109-2(g) clarify that:

(1) An individual who does not exercise any discretion or independent judgment as to the clients’ underlying tax positions is not a tax return preparer. Example 1.

(2) If one individual (C) completes a tax return that is then reviewed by a second individual (D), both (C) and (D) are required to have PTINS. Example 2.

*[Note: This example has raised a storm of protest. It would require both an estate tax attorney and his paralegal, for example, to obtain a PTIN; likewise for a CPA and her non-CPA associate. And although the IRS may be considering relief from the testing requirements for such subordinates, it is not considering relief from the PTIN requirement itself.]*

g. Potential exceptions. In Treasury Regulations Section 6109-2(h), the Internal Revenue Service is authorized to “prescribe exceptions” to the general requirements of Treasury Regulations Section 6109-2.

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