October 18, 2011

Hon. Douglas Shulman
Commissioner
Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington, DC 20224

Re: Comments on Proposed Regulations That Would Require Fingerprinting of Participants in the Preparer Tax Identification Number Program (Reg 116284-11)

Dear Commissioner Shulman:

Enclosed are comments on proposed regulations that would require the fingerprinting of participants in the preparer tax identification number program (Reg 116284-11). These comments represent the views of the American Bar Association Section of Taxation. They have not been approved by the Board of Governors or the House of Delegates of the American Bar Association, and should not be construed as representing the policy of the American Bar Association.

Sincerely,

William M. Paul
Chair, Section of Taxation

Enclosure

cc: Emily S. McMahon, Acting Assistant Secretary (Tax Policy), Department of the Treasury
    William J. Wilkins, Chief Counsel, Internal Revenue Service
    Steven T. Miller, Deputy Commissioner for Service and Enforcement, Internal Revenue Service
    Deborah A. Butler, Associate Chief Counsel, Internal Revenue Service
    Jeffrey Van Hove, Tax Legislative Counsel, Department of the Treasury
    Karen L. Hawkins, Director, Office of Professional Responsibility, Internal Revenue Service
    David Williams, Director, Return Preparer Office, Internal Revenue Service
These comments (“Comments”) are submitted on behalf of the American Bar Association Section of Taxation and have not been approved by the House of Delegates or Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the American Bar Association.

Principal responsibility for preparing these Comments was exercised by Armando Gomez on behalf of the Administrative Practice and Standards of Tax Practice Committees of the Section of Taxation. Substantive contributions were made by Michael J. Desmond. The Comments were reviewed by Sheri A. Dillon, Chair of the Administrative Practice Committee, and by Diana Erbsen, Chair of the Standards of Tax Practice Committee. The Comments were reviewed by Thomas J. Callahan of the Section’s Committee on Government Submissions and by Scott D. Michel, Council Director for the Administrative Practice and Standards of Tax Practice Committees.

Although the members of the Section of Taxation who participated in preparing these Comments have clients who might be affected by the federal income tax principles addressed by these Comments, no such member of the firm or organization to which such member belongs has been engaged by a client to make a government submission with respect to, or otherwise to influence the development or outcome of, the specific subject matter of these Comments.

Contact Person: Armando Gomez
Telephone: (202) 371-7868
Email: armando.gomez@skadden.com

Date: October 18, 2011
Comments

On September 26, 2011, the Department of the Treasury (the “Treasury”) and the Internal Revenue Service (the “Service”) published proposed regulations (the “Proposed Regulations”) that would establish a new user fee for individuals to take the registered tax return preparer competency examination and a new user fee for certain persons to be fingerprinted in conjunction with the preparer tax identification number, acceptance agent, and authorized e-file provider programs. These Comments respond to the request for comments on the Proposed Regulations.

1. General Comments. The Section of Taxation (the “Section”) continues to support the Service’s efforts to establish minimum qualifications for return preparers, registration of individuals who prepare and sign tax returns, and enforcement of the return preparer rules and standards of conduct prescribed under the Internal Revenue Code, Treasury Regulations and Circular 230. We believe that these efforts to improve the quality of tax return preparation will benefit all taxpayers, and commend the Service for the steps it has taken to address this issue. We are concerned, however, that if the qualification and registration requirements for preparers become too onerous, they could have a serious negative effect on compliance by driving preparers (and their clients) outside the regulatory regime.

When the Service first embarked on its return preparer review, we cautioned that registration should be limited to those paid preparers who actually prepare and sign returns. Insofar as the inclusion of the paid preparer’s registration number on a tax return facilitates the ability of the Service to associate the preparer with particular returns, the record-keeping and other burdens associated with a registration program would be fairly balanced. The December 2009 report on the Service’s return preparer review agreed, recommending that only signing preparers be included in the registration requirements. That report specifically reserved on expanding the registration requirements to non-signing preparers pending further study of the impact and necessity for such action, particularly as relates to “non-signing tax return preparers who are not attorneys, CPAs, enrolled agents, or otherwise licensed as tax professionals.”

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Only a few months later, Treasury and the Service issued proposed regulations under section 6109\(^5\) to implement the recommendations of the Service’s return preparer review.\(^6\) However, those regulations, which were finalized in September 2010,\(^7\) require all return preparers – both signing and non-signing – to register with the Service to obtain a preparer tax identification number (“PTIN”). As described in the preamble to the final regulations, the Chief Counsel for Advocacy of the Small Business Administration and others, submitted comments recommending that non-signing preparers be excluded from the registration requirement, particularly those who are supervised by a certified public accountant, attorney or enrolled agent, but the final regulations did not provide such an exclusion. We remain concerned that the burdens imposed, particularly on small businesses, may outweigh the benefits to the Service of requiring registration for non-signing preparers. In particular, we note that no “return” provides for disclosure of PTINs for non-signing preparers. We further note that any requirement to include a list of PTINs for a loosely defined group of non-signing preparers\(^8\) could be unduly burdensome, particularly in the case of large taxpayers who routinely obtain advice from numerous advisors who are not involved in the return preparation process.

We recognize that, by this point, a significant number of tax professionals likely have applied for and obtained PTINs, even if they rarely would be considered non-signing preparers. Nonetheless, we encourage Treasury and the Service to reconsider imposing registration on such a broad class of professionals. In particular, we encourage Treasury and the Service to consider narrowing the class of returns subject to these requirements. In our view, the scope of returns included in Rev. Proc. 2009-11\(^9\) sets the right target, unlike Notice 2011-6,\(^10\) which includes many documents submitted to the Service that have no bearing on the calculation or reporting of tax.

Regardless of whether Treasury and the Service narrow the class of individuals subject to PTIN registration requirements, we continue to be concerned that the burdens imposed by registration, including the user fees for registration and annual renewal, and the time required to complete registration and track registrations within firms, etc., can be significant. These concerns are exacerbated by the additional user fees and fingerprinting requirements contemplated by the Proposed Regulations.

\(^5\) References to a “section” are to a section of the Internal Revenue Code of 1986, as amended (the “Code”), unless otherwise indicated.


\(^7\) Reg. § 1.6109-2.

\(^8\) The regulations list several general “factors” to apply in determining whether a person qualifies as a non-signing preparer, but at least one of the examples that illustrates the inquiry reaches the conclusion that a person is not a non-signing preparer without any reference to or application of those factors. Reg. § 1.6109-2(g) and Ex. 4. Under this guidance, if there were a requirement to disclose a list of non-signing preparers, it would often be burdensome and difficult to determine who should be included on that list.


2. **User Fee for Registered Tax Return Preparer Competency Examination.** The Proposed Regulations would establish a $27 user fee to take the registered tax return preparer competency examination. This fee would be in addition to any reasonable fee charged by the third-party vendors who administer the examination. Only registered tax return preparers would be subject to the competency examination; attorneys, CPAs, enrolled agents, and specified individuals supervised by such persons are exempt from the examination requirement. The Proposed Regulations state that the Service estimates that some 350,000 individuals will become registered tax return preparers.

As discussed above, the Section supports the Service’s efforts to establish minimum qualifications for paid preparers. We agree that examinations to test technical knowledge, competency to prepare returns, and familiarity with the standards of tax practice required of preparers are appropriate. By limiting the competency examination to individuals who have not already demonstrated competence or who are not supervised by such persons, Treasury and the Service have attempted to balance the benefits of establishing minimum competence with the burdens attendant to the competency examination. We encourage Treasury and the Service to monitor the effectiveness of competency examinations in improving the quality of return preparation.

With respect to the specific user fee for the competency examination, we note that the $27 fee is in addition to the $64.25 fee to obtain a PTIN, and does not include the cost of preparing for or taking the competency examination. We encourage the Service to carefully monitor the fees sought to be charged by third-party vendors who will administer the competency examinations to ensure that the cost of the competency examination does not become a barrier that prices small businesses, including self-employed preparers, out of business.

3. **User Fee for Fingerprinting.** The Proposed Regulations would also establish a $33 user fee for applicants and participants in the PTIN program to be fingerprinted as prescribed by forms, instructions or other guidance. This fee would be in addition to any fees charged by the vendor that collects fingerprints from preparers subject to this requirement. The Proposed Regulations state that the Service “does not intend to fingerprint attorneys, certified public accountants, enrolled agents, enrolled retirement plan agents, and enrolled actuaries who apply for a PTIN at this time.” Accordingly, it appears that the fingerprinting requirement will be imposed on registered tax return preparers, and persons supervised by attorneys, CPAs or enrolled agents.\(^\text{11}\) The Proposed Regulations state that the Service estimates that some 450,000 individuals who receive a PTIN will be required to pay the fingerprinting user fee.

We recommend that Treasury and the Service reconsider imposing a fingerprinting requirement as a general condition to obtain a PTIN. We believe that there are sufficient safeguards in place already for the Service to verify the identity of PTIN applicants and conduct suitability checks without a fingerprinting requirement. It is not

\(^{11}\) The Proposed Regulations also indicate that PTIN applicants who reside and are employed outside of the United States will not be subject to the fingerprinting requirement.
clear to us that the Service will obtain any significant benefits from imposing this requirement, and the burdens – including the cost, the inconvenience and the invasion of privacy – are substantial in relation to any potential benefit.

For the approximately 350,000 registered tax return preparers who would be subject to both the competency examination and fingerprinting requirements, the user fees alone would add up to $124.25. Added to that cost would be the additional fees imposed by third-party vendors for taking the competency examination and collecting fingerprints. Many of the individuals subject to these requirements would also be required to incur costs – both time and money – to prepare for the competency examination and to travel to the locations where the tests are conducted or fingerprints are collected. It is not unreasonable to anticipate that these individuals will end up spending at least $250, just for the privilege of obtaining a PTIN. And while we recognize that the fingerprinting costs would not be recurring, the amounts are not trivial when viewed from the vantage point of the small businesses (which may employ multiple persons subject to the registration requirements) and self-employed individuals who will bear them.

To obtain a PTIN, an individual must provide the Service with their Social Security number, date of birth, and other personal identifying information. Those details, alone, should be sufficient for the Service to verify the identity of a PTIN applicant and confirm their tax compliance history. The PTIN application also requires applicants to disclose past felony convictions, and must be signed under penalties of perjury. It seems that the fingerprinting checks will serve primarily to identify those PTIN applicants who perjure themselves on the PTIN application. We recommend that other, less intrusive means, could (and should) be employed to conduct similar verification. For example, there are numerous commercial providers of background checks who can verify criminal histories from federal and state databases. Presumably the Service could arrange with the FBI and other law enforcement agencies to obtain similar information at a fraction of the cost. Such checks would not need to be performed in all cases; for example, the Service might limit the use of criminal history checks to (i) PTIN applicants who indicate on their PTIN application that they have a prior felony conviction, (ii) PTIN applicants whose applications, tax compliance checks, or other suitability reviews identify particular issues of concern to the Service, and (iii) a random sample of other PTIN applicants. By limiting the number and frequency of such criminal history checks, the costs would be reduced significantly. Accordingly, we respectfully submit that Treasury and the Service should reconsider the need for fingerprinting of PTIN applicants.

Moreover, if the fingerprinting requirement is retained, we recommend that it be limited to a narrower class of applicants. Specifically, we recommend exempting the supervised individuals from the fingerprinting requirement as those individuals are already subject to supervision by an attorney, CPA, or enrolled agent. Because they are supervised, it is not clear that fingerprinting will provide any significant benefits. It seems particularly incongruous that the Service would require such individuals to be fingerprinted, but that fingerprints will not be collected for PTIN applicants who reside and are employed outside of the United States.
Finally, we see no need to expand the fingerprinting requirement to attorneys, CPAs, or enrolled agents, all of whom already are subject to supervision by their bar examiners or other licensing authorities. If the Service is not already doing so as part of the suitability checks, it could confirm the licensing status of attorneys and CPAs with the states that license them. Obviously, the Service already has access to information on enrolled agents, so no further checks would seem necessary for that category of PTIN applicants.