

IRS eases up on new-for-2011 tax return preparer requirements

Notice 2011-6, 2011-3 IRB

A new Notice provides guidance on the implementation of new regs requiring tax return preparers to obtain a preparer tax identification number (PTIN) for tax returns or refund claims filed after Dec. 31, 2010. It also identifies the forms treated as tax returns or claims for refund for purposes of the regs, and provides interim rules for certain PTIN holders during the new regs' implementation phase.

Background. In January, 2010, IRS released a study on the U.S. return preparer industry carrying detailed recommendations on new standards for preparers other than attorneys, certified public accountants (CPAs), and enrolled agents (EAs). Subsequently, IRS rolled out a new set of rules subjecting tax return preparers who are not attorneys, CPAs or EAs to new registration requirements, including mandatory use of Preparer Tax Identification Numbers (PTINs) for tax returns or refund claims filed after Dec. 31, 2010, competency testing, CE rules and ethical standards (i.e., Circular 230).

Tax practitioners had many complaints about the new requirements, particularly one that in certain circumstances would have applied the new rules to non-signing individuals who work on tax returns under the supervision of a professional such as a CPA. In an October 26 speech before the AICPA's Fall Tax Meeting in Washington, IRS Commissioner Doug Shulman revealed that IRS intended to ease up on such nonsigning individuals, and provide an interim waiver for the CE requirement.

Now IRS had made good on Commissioner Shulman's promise in a Notice that dials back the most controversial aspects of the new tax return preparer initiative.

Nonsigning preparers need a PTIN but won't be subject to competency exam or CE. Under Reg. § 1.6109-2(d), for returns or claims for refund filed after Dec. 31, 2010: (1) the identifying number of a tax return preparer is his PTIN or other number prescribed by IRS; (2) all individuals who are compensated for preparing, or assisting in the preparation of, all or substantially all of a tax return or claim for refund of tax must have a PTIN; and a tax return preparer must be an attorney, CPA, EA, or registered tax return preparer to obtain a PTIN (unless IRS provides exceptions).

Notice 2011-6 provides that under the following circumstances, individuals 18 years or older who are not attorneys, certified public accountants, enrolled agents, or registered tax return preparers, may pay the applicable user fee, obtain a PTIN, and prepare, or assist in the preparation of, all or substantially all of a tax return (or claim for refund for compensation), *without* being subject to a competency examination or CE requirements:

(1) the individual is supervised by an attorney, CPA, EA, enrolled retirement plan agent, or enrolled actuary authorized to practice before IRS under Circular 230 §10.3(a) through (e);

- (2) the supervising attorney, CPA, EA, enrolled retirement plan agent, or enrolled actuary signs the tax returns or claims for refund prepared by the individual;
- (3) the individual is employed at the law firm, certified public accounting firm, or other recognized firm of the tax return preparer who signs the tax return or claim for refund; and
- (4) the individual passes the requisite tax compliance check and suitability check (when available).

A recognized firm is a partnership, professional corporation, sole proprietorship, or any other association, other than a law firm or certified public accounting firm, that has one or more employees lawfully engaged in practice before IRS and that is 80% or more owned by one or more attorneys, certified public accountants, EAs, enrolled actuaries, or enrolled retirement plan agents authorized to practice before IRS under sections 10.3(a) through (e) of Circular 230, respectively.

Individuals applying for a PTIN under the liberalized rule must (a) certify that they are supervised by an attorney, CPA, EA, enrolled retirement plan agent, or enrolled actuary who signs the tax return or claim for refund prepared by the individual and (b) provide a supervising individual's PTIN or other number if prescribed by IRS. Such individuals may not sign any tax return they prepare or assist in preparing for compensation, represent taxpayers before IRS in any capacity, or represent to IRS, their clients, or the general public that they are a registered tax return preparer or a Circular 230 practitioner.

Although not practitioners under Circular 230, individuals qualifying for the liberalized PTIN rule are subject to the duties and restrictions relating to practice in subpart B of Circular 230.

Competency exam waived for some. IRS has determined that individuals should not be required, as a condition to obtaining a PTIN, to pass a competency exam covering tax returns and claims for refunds not prepared by them. Thus, until further guidance is issued, any individual 18 or older may pay the applicable user fee and obtain a PTIN if he: (a) certifies that he does not prepare, or assist in the preparation of, all or substantially all of any tax return or claim for refund covered by the competency examination(s) for registered tax return preparers administered under IRS oversight (1040 series until further notice); and (b) passes the requisite tax compliance check and suitability check (when available).

Such individuals who obtain or renew a PTIN may sign the tax returns or claims for refunds that they prepare for compensation as the paid preparer, and represent taxpayers before revenue agents, customer service representatives, or similar IRS officers and employees during an exam if the individual signed the tax return or claim for refund for the tax year under examination. They may not, however, represent to IRS, their clients, or the general public that they are a registered tax return preparer or a Circular 230

practitioner. Enrolled retirement plan agents and enrolled actuaries who obtain a PTIN under this provision may continue to practice and represent as provided in Circular 230.

Forms that are and aren't required to be prepared by a PTIN holder. Under Notice 2011-6, all tax returns, claims for refund, or other tax forms submitted to IRS are considered tax returns or claims for refund for purposes of Reg. § 1.6109-2, and therefore an individual must obtain a PTIN to prepare for compensation all or substantially all of any form, unless otherwise provided by IRS. Notice 2011-6 carries a list of many forms or forms series, that are not subject to Reg. § 1.6109-2, including: Form SS-4, Application for Employer Identification Number; Form SS-8, Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding; Form SS-16, Certificate of Election of Coverage under FICA; the Form W-2 series and the Form 1098 and Form 1099 series.

Transitional relief. Notice 2011-6 carries the following transitional relief provisions:

□ Individuals who are not attorneys, CPAs, or EAs may obtain a provisional PTIN before the date that the competency examination is first offered (the “initial test offering date,” not anticipated to be before mid-2011). But after the initial test offering date, only attorneys, CPAs, EAs, and registered tax return preparers, or individuals defined in Notice 2011-6 Sec. 1.02(a) (qualifying individuals preparing returns under the proper supervision) or (b) (those for whom the competency exam is waived), will be eligible to obtain a PTIN in accordance with Reg. § 1.6109-2, subject to any future IRS guidance identifying additional individuals who may obtain a PTIN.

□ Until Dec. 31, 2013, a provisional PTIN may be renewed upon proper application and payment of the applicable user fee, even if the provisional PTIN holder is not an attorney, CPA, EA, or registered tax return preparer. After Dec. 31, 2013, provisional PTINs generally will not be renewed, and the holder of a provisional PTIN may keep the PTIN only if he is eligible to get a PTIN in accordance with Reg. § 1.6109-2, Notice 2011-6 Sec. 1.02(a) or (b), or future guidance.

□ Until Dec. 31, 2013, those tax return preparers holding a provisional PTIN before the initial test offering date may, subject to the requisite federal tax compliance check and suitability check (when available), prepare for compensation all or substantially all of any tax return or claim for refund. During the transition period from the initial test offering date through Dec. 31, 2013, tax return preparers who hold a provisional PTIN may, subject to the payment of the applicable user fee, take the competency exam as often as it is offered.

□ Before Jan. 1, 2011, any individual generally may prepare a tax return or claim for refund for compensation, and if he prepares and signs a taxpayer's return or claim for refund as the preparer, generally may represent that taxpayer during an examination of the tax period covered by that return or claim for refund. The proposed Circular 230 regs do not extend this right of representation to individuals who are not practitioners after Dec. 31, 2010. To ensure that tax return preparers have sufficient time to become

registered tax return preparers, Notice 2011-6 allows an individual to represent a taxpayer during an examination provided he prepared and signed the taxpayer's return or claim for refund as the preparer for the tax period under examination, and he was permitted under the regs or other published guidance to prepare the taxpayer's return or claim for refund for compensation. But an individual who isn't an attorney, CPA, EA, enrolled retirement plan agent, or enrolled actuary may not represent the taxpayer before appeals officers, revenue officers, Counsel, or similar IRS or Treasury officers or employees.

□ There is no CE requirement for registered tax return preparers or tax return preparers who obtain a provisional PTIN during the first year of registration, which commenced on Sept. 30, 2010.

□ Practice before IRS by a tax return preparer who obtains a provisional PTIN or any individual who for compensation prepares, or assists in the preparation of, all or a substantial portion of a document pertaining to any taxpayer's tax liability for submission to IRS also is subject to applicable duties and restrictions relating to practice before IRS under Circular 230.