



National Association of Tax Professionals

Comments on Proposed Regulations Under §6109

April 26, 2010

Background

The National Association of Tax Professionals (NATP) is a nonprofit professional association that is committed to the accurate administration and application of tax laws and regulations by providing education, research, and information to all tax professionals. For over 30 years, NATP has existed to serve professionals who work in all areas of tax practice.

NATP is a unique association among others in the industry. It is the only organization that represents all tax professionals whether CPAs, attorneys, EAs, accountants, financial planners, franchisees or other participants in the industry. NATP has over 19,500 members and 35 Chapters. These members own or work in firms that prepare more than 11 million tax returns annually on behalf of individuals and other entities. NATP serves these members by providing over 200 education offerings in more than 95 cities throughout the United States, a service unmatched by any other national tax association.

Purpose

NATP is providing comments specifically regarding the implications of the proposed regulations under §6109 as they relate to the manner in which the regulations may affect tax preparers in their day-to-day business operations, the burden of compliance, and whether the proposed regulations will have practical utility. NATP supports the implementation and assignment of a unique number to tax preparers as a necessary first step towards the registration process. The specific areas NATP is addressing include:

- The need for the regulations to specifically address who should be signing the return.

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- The practicality of coordinating the definitions of signing and nonsigning preparers as currently defined under §§6109, 6694, 6695, and 7701.
- The need for additional guidance on how foreign individuals who prepare tax returns for U.S. taxpayers will obtain a PTIN, if required.
- The potential recordkeeping and financial burden on tax professionals for complying with the proposed regulations.
- The value of having one uniform number for identifying paid tax professionals.
- Additional items that require clarification.

Signing and Nonsigning Preparers

In the current marketplace, there are many different methods employed for preparing and filing tax returns. The traditional tax preparation firm employs seasonal full-time and/or part-time preparers with some tax firms maintaining a year-round staff. Typically, these preparers will meet with the clients, input their information into the tax preparation software, complete the return, submit the return for e-filing, and present the completed return to the taxpayer. In this scenario, it is clear who is the signing, paid preparer, and thus, required to obtain a Preparer Identification Number (PTIN).

In other cases, the rules are not quite as straight forward. Some firms will employ an individual to gather the information necessary to prepare the return, possibly input the information into the software from an organizer prepared by a tax professional, then present the return for review and signature to a principal of the firm. It can easily be argued that these individuals are not “signing” or “paid” preparers because they are not making “determinations with respect to the proper application of the tax laws...in order to determine the client’s tax liability.” In fact, these can easily be described as clerical functions in a common sense. These employees are keypunching data and assembling returns. When is the line crossed and they become preparers? When does the information they provide to the client or represent on the return become an application of tax law or a material determination of tax liability?

There are clearly clerical functions that fall outside the definition of “preparer,” but the line needs more definition. Example #3 in Prop. Reg. §1.6109-2(g) needs to be expanded. If the scenario presented in Example #3 is “typical” more than one individual should be required to sign the return. What happens when one of the steps indicated is not in the mix? For example, what if the preparer never “meets” the client and never has the opportunity to explain the determination of tax to the client. Are they then still a preparer? Or merely performing clerical functions?

Uniform Definition of Paid Preparer

Current Reg. §301.7701-15 defines a tax return preparer as anyone who prepares or employs others to prepare any tax return or refund claim for compensation. A signing preparer is the individual who has the primary responsibility for the overall substantive accuracy of the return or claim for refund. Furthermore, the final regulations also refer to nonsigning preparers,

which is in line with the expansion of the preparer penalties to anyone who provides advice on a substantial portion of a tax return. This should be the uniform definition of a tax return preparer.

All tax return preparers who have the potential to be assessed penalties under §§6694 and 6695 should fall under the requirement to obtain a PTIN. This requirement will better enable the IRS to oversee just who is preparing returns or providing advice and in what capacity. In addition, this requirement will close a potential loophole whereas some individuals who currently do not come within the definition of a signing preparer are not required to obtain a PTIN. For example, under §6694, an individual who provides pre-transactional advice is not a preparer and thus not subject to penalties. Consequently, would an individual who provides advice on a post-transactional event therefore be considered a return preparer?

Foreign Tax Return Preparers

There is no guidance in the proposed regulation addressing foreign individuals who prepare U.S. tax returns. Will foreign tax preparers have to comply with the new regulations and obtain a PTIN? If so, will these preparers be subject to the same rules as U.S. return preparers? The standard for compliance for non U.S. tax preparers needs to be equal to or greater than the standard for compliance for U.S. preparers. It can only be assumed that there are a fair number of cross-border and other foreign preparers who are completing and filing returns for overseas U.S. taxpayers. These preparers must also become part of the registration process.

There are other firms that outsource tax work to other countries. Often, these overseas preparers are completing a significant portion of the tax return. The regulations should clearly define what is meant by “compensated preparer.” Currently, the IRS has this statement posted on its website:

“All individuals who are compensated for preparing, or assisting in the preparation of, all or substantially all of a federal tax return or claim for refund or who sign, or are required to sign, a federal tax return or claim for refund as paid tax return preparer must obtain a PTIN and, if applicable, successfully pass an examination.”

The proposed regulations in its current form, is not this specific. The preamble states that under §1.6109-2(a)(1), a tax return preparer “who must sign” a tax return must include an identifying number. Are foreign preparers exempt because they do not sign the return even though they prepare substantially all the return? They are compensated, yet they do not sign the return. These preparers appear to be covered by the regulations and subject to the PTIN requirement but the regulations do not state this. This needs to be clearly set forth in the final regulations. Consistency and clarity are musts.

Recordkeeping and Financial Burden

In their current form, the proposed regulations do not specifically outline the requirements for recordkeeping, the impending user fee, or potential reporting requirements. It seems clear that there will be the need for some sort of recordkeeping on the part of the tax

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preparer similar to the recordkeeping currently required by preparers subject to Circular 230. The regulations, once final, should clearly outline these requirements and include the applicable user fees. The preamble to the proposed regulations appears contradictory, or at the very least confusing. In one paragraph it states:

“The proposed regulations do not directly impose any reporting, recordkeeping, or similar requirements on any small entities.”

Yet a few paragraphs later the same preamble states the following:

“Under other guidance that the IRS may issue, tax return preparers who apply to be registered tax return preparers and who regularly renew their status may be subject to recordkeeping requirements because they may be required to maintain specified records, such as documentation and educational materials relating to completion of continuing education courses.”

With regard to user fees, enrolled agents, CPAs, and attorneys are required to pay user fees and other fees to maintain their respective designations. If these preparers are also required to pay an additional user fee to become a registered or authorized return preparer, the IRS may see a decline in the number of individuals who wish to become an enrolled agent. A decline in the number of enrolled agents and others that are authorized to represent taxpayers could have a detrimental effect on tax administration. These preparers are an essential element in assisting taxpayers with compliance and advocating on their behalf.

The Value of a Uniform Identification Number

As stated in the preamble, “the principal objective of the proposed regulations is to enable the IRS to more accurately identify tax return preparers and the tax returns and refund claims associated with each tax return preparer.” NATP agrees that this is a necessary first step toward identifying who is preparing tax returns and to ensure the competency of all tax return preparers. The use of one uniform number for all preparers will make the task of identifying return preparers and the subsequent monitoring of their activities a much simpler process on the part of the IRS.

Additional Items Requiring Clarification

Consider having a system in place that matches EIN of tax preparation firms to the social security numbers of employees receiving a Form W-2 from that employer to track whether these employees are complying with any registration and PTIN requirements. The IRS can use this information to send correspondence informing those employees and employers of who is required to obtain a PTIN.

The regulations should specifically indicate that after the 3-year initial phase-in, a tax compliance check will take place before issuing a PTIN to the preparer.

The regulations should address whether the employee, for example, of a corporation who prepares the Form 1120 is required to sign the return as a paid preparer and/or whether or not he or she needs a PTIN. What about other individuals in that department of the corporation who assist in the preparation of that return?

NATP appreciates the opportunity to comment on these regulations. We trust that the remarks made herein will be helpful and used in the further revision and clarification of how §6109 and the regulations thereunder will be equitably administered.