

■ Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR part 558 is amended as follows:

PART 558—NEW ANIMAL DRUGS FOR USE IN ANIMAL FEEDS

■ 1. The authority citation for 21 CFR part 558 continues to read as follows:

Authority: 21 U.S.C. 360b, 371.

§ 558.342 [Amended]

■ 2. In § 558.342, in the table in paragraphs (e)(1)(v), (e)(1)(vi), and (e)(1)(vii), in the “Sponsor” column, remove “000009.”

Dated: September 24, 2010.

Steven D. Vaughn,

Director, Office of New Animal Drug Evaluation, Center for Veterinary Medicine.

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 602

[TD 9501]

RIN 1545-BI28

Furnishing Identifying Number of Tax Return Preparer

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final rule.

SUMMARY: This document contains final regulations under section 6109 of the Internal Revenue Code (Code) that provide guidance on how the IRS will define the identifying number of tax return preparers and set forth requirements on tax return preparers to furnish an identifying number on tax returns and claims for refund of tax they prepare. Additional provisions of the regulations provide that tax return preparers must apply for and regularly renew their preparer identifying number as the IRS may prescribe in forms, instructions, or other guidance.

DATES: *Effective Date:* These regulations are effective on September 30, 2010.

Applicability Date: For dates of applicability, see § 1.6109-2(i).

FOR FURTHER INFORMATION CONTACT: Stuart Murray at (202) 622-4940 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in these final regulations has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under control number 1545-2176. The collection of information in these final regulations is in § 1.6109-2(d) and (e). This information is required in order for the IRS to issue identifying numbers to tax return preparers who are eligible to receive them.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background

This document contains final amendments to regulations under section 6109 of the Code relating to furnishing a tax return preparer's identifying number on tax returns and claims for refund of tax. Section 6109(a)(4) requires tax return preparers to furnish on tax returns and claims for refund of tax an identifying number, as prescribed, to ensure proper identification of the preparer, the preparer's employer, or both. In addition, section 6109(c) authorizes the Secretary “to require such information as may be necessary to assign an identifying number to any person.” The requirement to furnish an identifying number on tax returns and claims for refund of tax applies to information returns described in § 301.7701-15(b)(4) and to electronically filed tax returns.

In 2009 the IRS conducted a comprehensive review of tax return preparers, culminating in Publication 4832, *Return Preparer Review* (Rev. 12-2009) (the Report). The Report recommended that tax return preparers be required to obtain and use a preparer tax identification number (PTIN) as the exclusive preparer identifying number. The Report also recommended that the IRS establish new eligibility standards to prepare tax returns—including testing, continuing education, and Federal tax compliance checks. The proposed regulations adopted several of the recommendations made in the Report. The Treasury Department and

the IRS conclude that adopting these provisions in the final regulations will increase tax compliance and help to ensure that tax return preparers are knowledgeable, skilled, and ethical.

To implement recommendations made in the Report, on March 26, 2010, the Treasury Department and the IRS published in the **Federal Register** (75 FR 14539) a notice of proposed rulemaking (REG-134235-08) proposing amendments to § 1.6109-2 regarding the identifying number that a tax return preparer must furnish on tax returns and claims for refund of tax. A public hearing was held on the proposed regulations on May 6, 2010. The IRS received written public comments responding to the proposed regulations.

Summary of Comments and Explanation of Revisions

Over 200 written comments were received in response to the notice of proposed rulemaking. All comments were considered and are available for public inspection. Most of the comments are summarized in this preamble.

1. Requiring the Use of PTINs

The final regulations adopt the proposed amendments to § 1.6109-2, which provide that for tax returns or refund claims filed after December 31, 2010, tax return preparers must obtain and exclusively use the identifying number prescribed by the IRS in forms, instructions, or other guidance, rather than a social security number (SSN), as the identifying number to be included with the tax return preparer's signature on a tax return or claim for refund. Prior to these final regulations, the identifying number of a tax return preparer was the tax return preparer's SSN or an alternative number as prescribed by the IRS. The alternative number that the IRS has prescribed is a PTIN. After December 31, 2010, tax return preparers can only use a PTIN (or other number that the IRS prescribes in the future as a replacement to the PTIN) and may not use an SSN as a preparer identifying number unless the IRS directs otherwise. For tax returns or claims for refund filed before January 1, 2011, the identifying number of a tax return preparer will remain the preparer's SSN or PTIN.

The requirement to use a PTIN will allow the IRS to better identify tax return preparers, centralize information, and effectively administer the rules relating to tax return preparers. The final regulations will also benefit taxpayers and tax return preparers and help maintain the confidentiality of SSNs. Most of the comments received

on the notice of proposed rulemaking support the requirement to use a PTIN as the exclusive identifying number for tax return preparers beginning next year.

Under the final regulations, a tax return preparer must sign and furnish a PTIN on a tax return or claim for refund if the tax return preparer has primary responsibility for the overall substantive accuracy of the preparation of the tax return or claim for refund. If a signing tax return preparer has an employment arrangement or association with another person, then that other person's employer identification number (EIN) must also be included on the tax return or refund claim.

Tax return preparers who are required but fail to include a PTIN on a tax return or refund claim, or fail to include the EIN of any person with whom they have an employment arrangement or association, are subject to a penalty under section 6695(c), unless the failure to include an identifying number is due to reasonable cause and not due to willful neglect.

a. Supervised Tax Return Preparers Who Do Not Sign Tax Returns

The proposed regulations provided that for purposes of the provisions of § 1.6109-2 that would be applicable after December 31, 2010, the term *tax return preparer* means 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. The proposed regulations further provided that a tax return preparer for purposes of these provisions excludes an individual who is not defined as a nonsigning tax return preparer in § 301.7701-15(b)(2). A nonsigning tax return preparer is defined in § 301.7701-15(b)(2) as any tax return preparer who, while not a signing tax return preparer (the individual who has the primary responsibility for the overall substantive accuracy of the preparation of a tax return or claim for refund of tax), prepares all or a substantial portion of a tax return or claim for refund.

Some commentators recommended that individuals who prepare or assist in preparing all or substantially all of a tax return or claim for refund should not be required to obtain a PTIN if they do not sign the tax return or claim for refund and if they act under the supervision of another tax return preparer who substantively reviews the tax return or claim for refund and signs it. Commentators explained, for example, that in some accounting firms, employees who have passed the Uniform Certified Public Accountant

Examination and are working toward their license as a certified public accountant are often involved in, or assist with, the preparation of tax returns. Although these employees do not sign tax returns or claims for refund as a tax return preparer, under the regulations as proposed, they are tax return preparers who must have a PTIN after December 31, 2010, if they prepare all or substantially all of a tax return or claim for refund. The commentators proposed an exemption for these individuals.

The Chief Counsel for Advocacy of the Small Business Administration (SBA) submitted similar comments, on behalf of small businesses, on the proposed amendments to § 1.6109-2 as applied to tax return preparers who do not sign tax returns or claims for refund, in particular the provisions requiring tax return preparers to obtain and renew a PTIN as the IRS may prescribe. The SBA heard from small accounting firms that those firms would incur a substantial financial burden if the regulations include certified public accountant candidates and other paraprofessional employees who are involved in tax return preparation under the supervision of a certified public accountant who is a signing tax return preparer. The SBA also observed that requiring these individuals to register with the IRS as tax return preparers would not improve the accuracy of tax returns prepared in small accounting firms because the firms and certified public accountants within these firms are already subject to ethical and competency rules administered by state boards of accountancy, as well as Treasury Department Circular No. 230, 31 CFR Part 10. The SBA recommended that the regulations either exclude outright employees of firms engaged in certified public accountancy who are nonsigning tax return preparers or exclude these employees if they are supervised by a certified public accountant, attorney, or enrolled agent.

These final regulations are intended to address two overarching objectives. The first overarching objective is to provide some assurance to taxpayers that a tax return was prepared by an individual who has passed a minimum competency examination to practice before the IRS as a tax return preparer, has undergone certain suitability checks, and is subject to enforceable rules of practice. The second overarching objective is to further the interests of tax administration by improving the accuracy of tax returns and claims for refund and by increasing overall tax compliance.

The final regulations define a *tax return preparer* in § 1.6109-2(g) as an individual who prepares for compensation, or assists in preparing, all or substantially all of a tax return or claim for refund of tax. The final regulations retain this definition from the proposed regulations without including the requested exemption. It is critical to the IRS's tax administration efforts that, in the first instance, the IRS is readily able to identify all individuals who are involved in preparing all or substantially all of a tax return or claim for refund. Additionally, by requiring regular renewal of a PTIN, tax return preparers will confirm their continuing competence and suitability to be tax return preparers. Accordingly, were the Treasury Department and the IRS to provide an exemption in these regulations for a sizeable segment of tax return preparers, it would undercut effective oversight by the IRS of the tax return preparer community. An exemption for some tax return preparers, as requested in the comments, would allow the exempt individuals to prepare tax returns and claims for refund without identifying themselves to the IRS as tax return preparers and without undergoing competency examinations and suitability checks and being subject to enforceable rules of practice.

b. Licensed Tax Return Preparers, Tax Return Preparers of Longstanding, and Those Who Prepare a Small Number of Tax Returns

In the proposed regulations, no distinction was made between tax return preparers licensed by a state authority as tax return preparers and unlicensed tax return preparers. A number of comments were received from state-licensed tax return preparers, particularly from those who are Licensed Tax Preparers or Licensed Tax Consultants in Oregon. These comments almost uniformly requested that state-licensed tax return preparers be "grandfathered" into the regulations and not be required to apply for a PTIN, renew an existing PTIN, or comply with requirements that the IRS may prescribe to obtain or renew a PTIN after December 31, 2010. Other commentators asked that the IRS consider an exemption from the regulations for tax return preparers who have been preparers for a certain period of years or who prepare annually a volume of tax returns below a certain (relatively small) number. Some commentators, however, were opposed to exemptions or grandfather provisions.

The Report discussed at some length state licensing and regulation of tax

return preparers, including state-by-state descriptions, but in the Report's recommendations, exemptions were not made for tax return preparers licensed or otherwise regulated under a state program. The Report also concluded that the IRS would not provide "grandfather" exemptions based on experience in preparing tax returns. The proposed regulations, consistent with the Report's recommendations, did not include any exemption for state-based licensure, length of experience, or number of tax returns prepared.

After careful consideration of the comments received on this issue, the final regulations do not include any exemption for state-based licensure, length of experience, or number of tax returns prepared. The Treasury Department and the IRS conclude that tax return preparers who prepare tax returns and claims for refund for compensation should be subject to uniform standards of qualification and practice. When obtaining the services of a tax return preparation business, taxpayers should be assisted by tax return preparers subject to the same Federal regulations, regardless of a taxpayer's state of residence or variable circumstances such as the size of the business or the number of years a tax return preparer has been in the industry.

c. Volunteers and Other Unpaid Tax Return Preparers

The proposed regulations did not include volunteers and other unpaid tax return preparers as tax return preparers required to obtain a PTIN. Consistent with the definition of a tax return preparer under section 7701(a)(36), which requires a compensation element for an individual to be a tax return preparer, the definition of *tax return preparer* in the proposed regulations excluded an individual described in § 301.7701-15(f), which lists, among others, any individual who provides assistance in the preparation of tax returns as part of a Volunteer Income Tax Assistance (VITA), Tax Counseling for the Elderly (TCE), or Low-Income Taxpayer Clinic (LITC) program. Section 301.7701-15(f)(1)(xii) also excludes from the definition of a tax return preparer anyone who prepares a tax return or claim for refund without an explicit or implicit agreement for compensation. An insubstantial gift, favor, or service received for the preparation of a tax return or refund claim is not considered compensation.

Several commentators recommended that the final regulations require volunteer tax return preparers to obtain a PTIN. According to the commentators, putting volunteers under the regulations

would provide several benefits, including increased tax compliance and improvement of the volunteer programs. Although commentators suggested that the PTIN and other requirements applicable to paid tax return preparers also apply to volunteers, it was noted that associated fees could be waived for volunteers. The comments also noted that extending the regulations to all tax return preparers who hold themselves out to the public as tax return preparers would unambiguously include individuals who prepare tax returns for customers purportedly for "free" but incident to a customer's purchase of a product or other service.

The final regulations adopt the same definition of tax return preparer as in the proposed regulations. The Treasury Department and the IRS conclude that the final regulations are properly limited to paid tax return preparers. The focus on paid tax return preparation in the Report and in these regulations is consistent with both the current reality of tax return preparation and applicable legal provisions, including § 301.7701-15(f). As noted by the figures in the Report, volunteer tax return preparers are a small fraction of all tax return preparers and the tax returns prepared by volunteers are a small fraction of all prepared tax returns.

Only volunteers or other truly unpaid tax return preparers, however, are not tax return preparers for purposes of these regulations. As an example, individuals who prepare tax returns without compensation for relatives or friends as a personal favor are not within the definition of the term *tax return preparer*.

The Treasury Department and the IRS conclude that arrangements for tax return preparation as part of a sales transaction are inherently agreements to prepare tax returns for compensation under these regulations, notwithstanding any claim by tax return preparers that the tax return or refund claim preparation is not separately compensated. No change in these regulations is necessary to reflect this result. As a result, an individual who, in connection with a sale of goods or services, prepares all or substantially all of a tax return or claim for refund filed after December 31, 2010, and who does not furnish a valid PTIN on the tax return or claim for refund may be liable for the section 6695(c) penalty, unless the failure to furnish a valid PTIN was due to reasonable cause and not due to willful neglect.

d. Tax Return Preparation Software

The proposed regulations did not specifically include any provisions on

commercially available tax return preparation software or software developers. Several commentators expressed the concern that some tax return preparers use tax return preparation software to prepare multiple "self-prepared" tax returns for clients in order to hide the tax return preparers' involvement and avoid identifying themselves on the tax returns. The commentators proposed that the final regulations include limits on the purchase or use of software, such as a requirement built into the software to enter a PTIN to use the software to prepare more than one tax return.

The final regulations do not include any provisions with respect to software. Software developers are not tax return preparers for purposes of these final regulations, and the regulation of software is beyond the scope of these amendments to § 1.6109-2.

e. Requiring the Use of a PTIN After December 31, 2010

Under the proposed regulations, the amendments to § 1.6109-2 would apply to tax returns and claims for refund filed after December 31, 2010. For tax returns and claims for refund filed before then, the existing provisions of § 1.6109-2 apply. Some commentators questioned whether, as a matter of implementation, January 1, 2011, is a realistic date for the requirements of these regulations. The final regulations maintain the distinction between tax returns and claims for refund filed on or before December 31, 2010, and those filed after that date. To the extent a transitional period may be necessary, the Treasury Department and the IRS may, under § 1.6109-2(h) of the final regulations, prescribe in other guidance interim procedures for tax return preparers to apply for a PTIN or register with the IRS.

2. Eligibility To Receive a PTIN

a. Foreign Tax Return Preparers

The proposed regulations did not specifically address foreign tax return preparers who prepare tax returns or refund claims. A frequent question in the public comments was whether the regulations as proposed would apply to foreign tax return preparers. These commentators also asked whether foreign tax return preparers who do not have an SSN will be eligible for a PTIN. Currently, both Form W-7P, "Application for Preparer Tax Identification Number," and the existing online process at <http://www.irs.gov> that can be used to apply for a PTIN require an applicant to provide the applicant's SSN. Many foreign tax return preparers

are uncertain as to how they will obtain a PTIN, if they are required to have a PTIN.

The final regulations apply to tax return preparers regardless of United States or foreign citizenship or residency. The IRS will establish a process to obtain a PTIN for tax return preparers who do not have SSNs. The Treasury Department and the IRS intend to issue transitional guidance before December 31, 2010, which describes the process to obtain a PTIN for foreign and other tax return preparers who do not have SSNs.

b. User Fees

The proposed regulations provided that, in applying for a PTIN, tax return preparers must pay a user fee that the IRS prescribes in forms, instructions, or other guidance. The proposed regulations also provided for the IRS to prescribe the manner for renewing a PTIN, including the payment of a user fee. Some commentators objected to the proposed requirement of a user fee to obtain or renew a PTIN. Sole proprietors and small preparation firms commented that a user fee, combined with the potential costs of minimum competency testing and for continuing education, would materially increase their business expenses.

The final regulations adopt the proposed provisions under which the IRS may prescribe requirements to apply for or renew a PTIN, including the payment of a user fee. By statute (31 U.S.C. 9701), Congress authorized Federal agencies to establish user fees. The Treasury Department and the IRS will prescribe in regulations the requirement to pay a user fee, the amount of any fee, and the time and manner of payment. A user fee to obtain or renew a PTIN will be necessary to recover the costs that the IRS will incur to implement and administer the processes to apply for and renew a PTIN. The amount of a user fee will be reasonable and based on accepted methods of calculation that reflect the costs to the government, the value of the service to the recipient, the public policy or interest served, and other relevant factors.

3. Terminology

a. Preparation of All or Substantially All of a Tax Return or Claim for Refund

The requirement to obtain a PTIN applies to individuals who for compensation prepare, or assist in preparing, all or substantially all of a tax return or claim for refund. Section 1.6109-2(g) of the proposed regulations identified the following non-exclusive

list of factors to determine whether an individual prepared or assisted in preparing all or substantially all of a tax return or claim for refund:

The complexity of the work performed by the individual relative to the overall complexity of the tax return or claim for refund of tax;

The amount of the items of income, deductions, or losses attributable to the work performed by the individual relative to the total amount of income, deductions, or losses required to be correctly reported on the tax return or claim for refund of tax; and

The amount of tax or credit attributable to the work performed by the individual relative to the total tax liability required to be correctly reported on the tax return or claim for refund of tax.

Examples are included in the proposed regulations to illustrate the provisions of paragraph (g). The final regulations retain these provisions, including the examples, consistent with the definition of a tax return preparer adopted in paragraph (g) of the final regulations. As explained, this definition of tax return preparer for purposes of these regulations is necessary for meaningful oversight of tax return preparation. The factors in paragraph (g) provide guidance for applying the test of whether an individual has prepared or assisted with preparing all or substantially all of a tax return or claim for refund. Paragraph (g) of the final regulations, however, also adds a sentence not in the proposed regulations to clarify that the preparation of a form, statement, or schedule, such as Schedule EIC (Form 1040), "Earned Income Credit," may constitute the preparation of all or substantially all of a tax return or claim for refund based on the application of the factors in paragraph (g).

Paragraph (h) of the final regulations clarifies that the IRS may specify in other appropriate guidance the returns, schedules, and other forms to which these regulations will apply.

b. Registered Tax Return Preparers

As provided in the proposed regulations, to obtain a PTIN or other prescribed identifying number, a tax return preparer must be an attorney, certified public accountant, enrolled agent, or registered tax return preparer authorized to practice before the IRS under 31 U.S.C. 330 and Circular 230. This requirement will apply after December 31, 2010, unless the IRS prescribes exceptions, such as for a transitional period, as necessary for effective tax administration. A number of the comments noted a concern that

the term *registered tax return preparer* is likely to cause confusion in the marketplace for tax return preparation. The commentators are concerned that this designation for a certain group of tax return preparers, when listed with attorneys, certified public accountants, and enrolled agents, may lead the public to mistakenly infer that registered tax return preparers have credentials and qualifications similar to those of attorneys, certified public accountants, and enrolled agents. Several commentators observed that some registered tax return preparers might even attempt to exploit this confusion to their commercial advantage. To avoid the potential for misperception, the commentators advocate that the IRS explain the distinctions between registered tax return preparers and other practitioners authorized to practice before the IRS under Circular 230. At least one commentator also recommended changing the term to "authorized tax return preparers."

The final regulations adopt the term *registered tax return preparer*. The Treasury Department and the IRS conclude that the term does not reasonably imply that registered tax return preparers are authorized to practice law or certified public accountancy or act as enrolled agents or that the term will cause material confusion or misunderstanding by the public.

The role of registered tax return preparers and their authority to practice before the IRS will be addressed in amendments to Circular 230. The requirements and process to become a registered tax return preparer will be set forth in forms, instructions, and other appropriate guidance. In that regard, some commentators that employ tax return preparers requested that the IRS allow the employers to mass register their employees (with a means for employers to subsequently validate through the IRS an employee's standing as a registered tax return preparer with a current PTIN). The purpose of these final regulations, however, is not to provide guidance on the specific process for registration.

Special Analyses

It has been determined that these final regulations are not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations.

It has been determined that a final regulatory flexibility analysis under 5

U.S.C. 604 is required for this final rule. The analysis is set forth under the heading, "Final Regulatory Flexibility Analysis."

Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking preceding these final regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business. The Chief Counsel for Advocacy submitted comments on the notice of proposed rulemaking, which are discussed elsewhere in this preamble.

Final Regulatory Flexibility Analysis

When an agency either promulgates a final rule that follows a required notice of proposed rulemaking or promulgates a final interpretative rule involving the internal revenue laws as described in 5 U.S.C. 603(a), the Regulatory Flexibility Act (5 U.S.C. chapter 6) requires the agency to "prepare a final regulatory flexibility analysis." A final regulatory flexibility analysis must, pursuant to 5 U.S.C. 604(a), contain the five elements listed in this final regulatory flexibility analysis. For purposes of this final regulatory flexibility analysis, a small entity is defined as a small business, small nonprofit organization, or small governmental jurisdiction. 5 U.S.C. 601(3)–(6). The Treasury Department and the IRS conclude that the final regulations (together with other contemplated guidance provided for in these regulations) will impact a substantial number of small entities and the economic impact will be significant.

A Statement of the Need for, and the Objectives of, the Final Rule

The final regulations are necessary for tax administration. The final regulations are needed to identify tax return preparers and the tax returns and claims for refund that they prepare, to aid the IRS's oversight of tax return preparers, and to administer requirements intended to ensure that tax return preparers are competent, trained, and conform to rules of practice. Mandating a single type of identifying number for all tax return preparers and assigning a prescribed identifying number to registered tax return preparers is critical to effective oversight.

Taxpayers' reliance on paid tax return preparers has grown steadily in recent decades, and a large number of U.S. taxpayers rely on paid tax return preparers for assistance in meeting the taxpayers' income tax filing obligations. Beyond preparing tax returns, tax return preparers also help educate taxpayers about the tax laws and facilitate electronic filing. Tax return preparers

provide advice to taxpayers, identify items or issues for which the law or guidance is unclear, and inform taxpayers of the benefits and risks of positions taken on a tax return, and the tax treatment or reporting of items and transactions. Competent tax return preparers who are well educated in the rules and subject matter of their field can prevent costly errors, potentially saving a taxpayer from unwanted problems later on and relieving the IRS from expending valuable examination and collection resources.

Given the important role that tax return preparers play in Federal tax administration, the IRS has a significant interest in being able to accurately identify tax return preparers and monitor their tax return preparation activities. The final regulations, therefore, enable the IRS to more accurately identify tax return preparers and improve the IRS's ability to associate filed tax returns and refund claims with the responsible tax return preparer. The final regulations are intended to accomplish this result, and thereby advance tax administration, by requiring all individuals who are paid to prepare all or substantially all of a tax return or claim for refund of tax to obtain a preparer identifying number prescribed by the IRS. Pursuant to the final regulations, the IRS will require individuals who sign tax returns or claims for refund to furnish the tax return preparer's PTIN on a tax return or claim for refund when the return or refund claim is signed. The final regulations also provide that the IRS may require tax return preparers to apply for, and regularly renew, their PTINs. Under the final regulations, the IRS may prescribe a user fee payable when applying for a number and for renewal.

Summaries of the Significant Issues Raised in the Public Comments Responding to the Initial Regulatory Flexibility Analysis and of the Agency's Assessment of the Issues, and a Statement of Any Changes Made to the Rule as a Result of the Comments

The IRS did not receive specific comments from the public responding to the initial regulatory flexibility analysis in the proposed regulations that preceded these final regulations. The IRS did receive comments from the public on the proposed amendments to § 1.6109–2. A summary of the comments is set forth elsewhere in this preamble, along with the Treasury Department's and the IRS's assessment of the issues raised in the comments and descriptions of any revisions resulting from the comments.

A Description and an Estimate of the Number of Small Entities to Which the Rule Will Apply or an Explanation of Why an Estimate Is Not Available

The final regulations apply to individuals who prepare tax returns and claims for refund of tax. The estimated number of paid tax return preparers is as high as 1.2 million, which means the final regulations are likely to impact a large number of individuals. Most paid tax return preparers are employed by firms. A substantial number of paid tax return preparers are employed at small tax return preparation firms or are self-employed tax return preparers. Any economic impact of these regulations on small entities generally will be on self-employed tax return preparers who prepare and sign tax returns or on small businesses that employ one or more individuals who prepare tax returns.

The appropriate NAICS codes for PTINs are those that relate to tax preparation services (NAICS code 541213), other accounting services (NAICS code 541219), offices of lawyers (NAICS code 541110), and offices of certified public accountants (NAICS code 541211). Entities identified as tax preparation services and offices of lawyers are considered small under the SBA's size standards (13 CFR 121.201) if their annual revenue is less than \$7 million. Entities identified as other accounting services and offices of certified public accountants are considered small under the SBA's size standards if their annual revenue is less than \$8.5 million. The IRS estimates that approximately 70 to 80 percent of the individuals subject to these final regulations are tax return preparers operating as, or employed by, small entities.

A Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Rule, Including an Estimate of the Classes of Small Entities Subject to the Requirements and the Type of Professional Skills Necessary for Preparation of a Report or Record

The final regulations do not directly impose any reporting, recordkeeping, or similar requirements on any small entities. Rather, the final regulations provide that the IRS may prescribe in forms, instructions, or other guidance (including regulations) requirements for PTINs issued to tax return preparers, regular renewal of PTINs, and payment of a user fee when applying for or renewing a PTIN. In addition, other guidance may require certain tax return preparers to complete competency testing, complete continuing education

courses, and adhere to established rules of practice governing attorneys, certified public accountants, enrolled agents, enrolled actuaries, and enrolled retirement plan agents.

Applying for a PTIN and subsequent renewal will require reporting of certain information, but they are not expected to require recordkeeping. No particular or special professional skills will be necessary. These activities also will not require the purchase or use of any special business equipment or software. To the extent it will be necessary to apply for a PTIN (or similar identifying number that may subsequently replace a PTIN) online at <http://www.irs.gov>, most if not all tax return preparation businesses have computers and Internet access. The IRS estimates that applying for a PTIN will take 10 to 20 minutes per individual, with an average of 15 minutes per individual.

Under amendments to Circular 230 that the IRS will issue to implement recommendations in the Report, 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. These requirements do not involve any specific professional skills other than general recordkeeping abilities already needed to own and operate a small business or to competently act as a tax return preparer. It is estimated that tax return preparers will annually spend approximately 30 minutes to 1 hour in maintaining records relating to the continuing education requirements, depending on individual circumstances.

A separate regulation addressing reasonable user fees has been proposed. Tax return preparers may be required to pay a user fee when first applying for a PTIN and at every renewal. Small entities may be affected by these costs if the entities choose to pay some or all of these fees for their employees.

Under the amendments to Circular 230, tax return preparers may also incur costs for commercial continuing education courses and minimum competency examinations, plus incidental costs, such as for travel and accommodations, in order to maintain their status as registered tax return preparers under Circular 230. Course prices can vary greatly, from free to hundreds of dollars. Many small tax return preparation firms may choose, as with the user fee, to bear these costs for their employees. In some cases, small entities may lose sales and profits while

their employed tax return preparers attend training or educational classes or are studying and sitting for examinations. Some small entities that employ tax return preparers may even need to alter their business operations if a significant number of their employees cannot satisfy the necessary registration and competency requirements. The Treasury Department and the IRS conclude, however, that only a small percentage of small entities, if any, may need to cease doing business or radically change their business model due to the final regulations.

Although each of the reporting and recordkeeping requirements and the costs identified above (in connection with the final regulations and the other anticipated guidance necessary to implement the Report) is not expected to singly result in a significant economic impact, taken together it is anticipated that they may have a significant economic impact on a substantial number of small entities.

A Description of the Steps the Agency Has Taken To Minimize the Significant Economic Impact on Small Entities Consistent With the Stated Objectives of Applicable Statutes, Including a Statement of the Factual, Policy, and Legal Reasons for Selecting Any Alternative Adopted in the Final Rule and Why Other Significant Alternatives Affecting the Impact on Small Entities That the Agency Considered Were Rejected

The Treasury Department and the IRS are not aware of any steps that could be taken to minimize the economic impact on small entities that would also be consistent with the objectives of these final regulations. These regulations do not impose any more requirements on small entities than are necessary to effectively administer the internal revenue laws. Further, the regulations do not subject small entities to any requirements that are not also applicable to larger entities covered by the regulations.

The Treasury Department and the IRS have determined that there are no viable alternatives to the final regulations that would enable the IRS to accurately identify tax return preparers, other than through the use of a PTIN, as provided in the regulations.

The Treasury Department and the IRS considered alternatives at multiple points. These final regulations are, in large measure, an outgrowth of, and in part carry out, the Report, which extensively reviewed different approaches to improving how the IRS oversees and interacts with tax return preparers. As part of the Report, the IRS

received a large volume of comments on the issue of increased oversight of tax return preparers generally and on the proposed recommendation requiring tax return preparers to use a uniform prescribed identifying number. The comments were received from all categories of interested stakeholders, including tax professional groups representing large and small entities, IRS advisory groups, tax return preparers, and the public. The input received from this large and diverse community overwhelmingly expressed support for the proposed requirements.

Among the alternatives contemplated at the time were:

(1) Requiring all paid tax return preparers to comply with the ethical standards in Circular 230 or an ethics code similar to Circular 230, but not requiring any paid preparers to demonstrate their qualification and competency;

(2) Requiring tax return preparers who are not currently authorized to practice before the IRS to register with the IRS, complete annual continuing education requirements, and meet certain ethical standards, but not to pass a minimum competency examination;

(3) Requiring all paid tax return preparers to pass a minimum competency examination and meet other registration requirements; and

(4) Requiring all paid tax return preparers who are not currently authorized to practice before the IRS to pass a minimum competency examination and meet other registration requirements, but "grandfather in" tax return preparers who have accurately and competently prepared tax returns for a certain period of years.

These and other issues were raised in the public comments to the proposed regulations and were carefully considered in developing the final regulations. After consideration of all of the various alternatives and the responses received in the public comment process, the Treasury Department and the IRS conclude that the provisions of the final regulations will most effectively promote sound tax administration. Establishing a single, prescribed identifying number for tax return preparers will enable the IRS to accurately identify tax return preparers, match preparers with the tax returns and claims for refund they prepare, and better administer the tax laws with respect to tax return preparers and their clients.

Under the final regulations and the additional guidance described, the IRS will establish a process intended to assign PTINs only to qualified, competent, and ethical tax return

preparers. The testing requirements that may be set forth in other guidance will establish a benchmark of minimum competency necessary for tax return preparers to obtain their professional credentials, while the purpose of the continuing education provisions is to require tax return preparers to remain current on the Federal tax laws and continue to develop their tax knowledge. The extension in other, prospective guidance of the rules in Circular 230 to any paid tax return preparer will require all practitioners to meet certain ethical standards and allow the IRS to suspend or otherwise appropriately discipline tax return preparers who engage in unethical or disreputable conduct. Accordingly, the implementation of qualification and competency standards is expected to increase tax compliance and allow taxpayers to be confident that the tax return preparers to whom they turn for assistance are knowledgeable, skilled, and ethical.

Drafting Information

The principal author of these final regulations is Stuart Murray of the Office of the Associate Chief Counsel, Procedure and Administration.

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 602

Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

■ Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Section 1.6109–2 also issued under 26 U.S.C. 6109(a). * * *

■ **Par. 2.** Section 1.6109–2 is amended by revising the section heading, revising paragraphs (a)(2) and (d), and adding paragraphs (e), (f), (g), (h), and (i) to read as follows:

§ 1.6109–2 Tax return preparers furnishing identifying numbers for returns or claims for refund and related requirements.

(a) * * *

(2)(i) For tax returns or claims for refund filed on or before December 31, 2010, the identifying number of an

individual tax return preparer is that individual's social security number or such alternative number as may be prescribed by the Internal Revenue Service in forms, instructions, or other appropriate guidance.

(ii) For tax returns or claims for refund filed after December 31, 2010, the identifying number of a tax return preparer is the individual's preparer tax identification number or such other number prescribed by the Internal Revenue Service in forms, instructions, or other appropriate guidance.

* * * * *

(d) Beginning after December 31, 2010, all tax return preparers must have a preparer tax identification number or other prescribed identifying number that was applied for and received at the time and in the manner, including the payment of a user fee, as may be prescribed by the Internal Revenue Service in forms, instructions, or other appropriate guidance. Except as provided in paragraph (h) of this section, beginning after December 31, 2010, to obtain a preparer tax identification number or other prescribed identifying number, a tax return preparer must be an attorney, certified public accountant, enrolled agent, or registered tax return preparer authorized to practice before the Internal Revenue Service under 31 U.S.C. 330 and the regulations thereunder.

(e) The Internal Revenue Service may designate an expiration date for any preparer tax identification number or other prescribed identifying number and may further prescribe the time and manner for renewing a preparer tax identification number or other prescribed identifying number, including the payment of a user fee, as set forth in forms, instructions, or other appropriate guidance. The Internal Revenue Service may provide that any identifying number issued by the Internal Revenue Service prior to the effective date of this regulation will expire on December 31, 2010, unless properly renewed as set forth in forms, instructions, or other appropriate guidance, including these regulations.

(f) As may be prescribed in forms, instructions, or other appropriate guidance, the IRS may conduct a Federal tax compliance check on a tax return preparer who applies for or renews a preparer tax identification number or other prescribed identifying number.

(g) Only for purposes of paragraphs (d), (e), and (f) of this section, the term *tax return preparer* means 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. Factors to consider in determining whether an individual is a tax return preparer under this paragraph (g) include, but are not limited to, the complexity of the work performed by the individual relative to the overall complexity of the tax return or claim for refund of tax; the amount of the items of income, deductions, or losses attributable to the work performed by the individual relative to the total amount of income, deductions, or losses required to be correctly reported on the tax return or claim for refund of tax; and the amount of tax or credit attributable to the work performed by the individual relative to the total tax liability required to be correctly reported on the tax return or claim for refund of tax. The preparation of a form, statement, or schedule, such as Schedule EIC (Form 1040), "Earned Income Credit," may constitute the preparation of all or substantially all of a tax return or claim for refund based on the application of the foregoing factors. A tax return preparer does not include an individual who is not otherwise a tax return preparer as that term is defined in § 301.7701–15(b)(2), or who is an individual described in § 301.7701–15(f). The provisions of this paragraph (g) are illustrated by the following examples:

Example 1. Employee A, an individual employed by Tax Return Preparer B, assists Tax Return Preparer B in answering telephone calls, making copies, inputting client tax information gathered by B into the data fields of tax preparation software on a computer, and using the computer to file electronic returns of tax prepared by B. Although Employee A must exercise judgment regarding which data fields in the tax preparation software to use, A does not exercise any discretion or independent judgment as to the clients' underlying tax positions. Employee A, therefore, merely provides clerical assistance or incidental services and is not a tax return preparer required to apply for a PTIN or other identifying number as the Internal Revenue Service may prescribe in forms, instructions, or other appropriate guidance.

Example 2. The facts are the same as in *Example 1*, except that Employee A also interviews B's clients and obtains from them information needed for the preparation of tax returns. Employee A determines the amount and character of entries on the returns and whether the information provided is sufficient for purposes of preparing the returns. For at least some of B's clients, A obtains information and makes determinations that constitute all or substantially all of the tax return. Employee A is a tax return preparer required to apply for a PTIN or other identifying number as the Internal Revenue Service may prescribe in

forms, instructions, or other appropriate guidance. Employee A is a tax return preparer even if Employee A relies on tax preparation software to prepare the return.

Example 3. C is an employee of a firm that prepares tax returns and claims for refund of tax for compensation. C is responsible for preparing a Form 1040, "U.S. Individual Income Tax Return," for a client. C obtains the information necessary for the preparation of the tax return during a meeting with the client, and makes determinations with respect to the proper application of the tax laws to the information in order to determine the client's tax liability. C completes the tax return and sends the completed return to employee D, who reviews the return for accuracy before signing it. Both C and D are tax return preparers required to apply for a PTIN or other identifying number as the Internal Revenue Service may prescribe in forms, instructions, or other appropriate guidance.

Example 4. E is an employee at a firm which prepares tax returns and claims for refund of tax for compensation. The firm is engaged by a corporation to prepare its Federal income tax return on Form 1120, "U.S. Corporation Income Tax Return." Among the documentation that the corporation provides to E in connection with the preparation of the tax return is documentation relating to the corporation's potential eligibility to claim a recently enacted tax credit for the taxable year. In preparing the return, and specifically for purposes of the new tax credit, E (with the corporation's consent) obtains advice from F, a subject matter expert on this and similar credits. F advises E as to the corporation's entitlement to the credit and provides his calculation of the amount of the credit. Based on this advice from F, E prepares the corporation's Form 1120 claiming the tax credit in the amount recommended by F. The additional credit is one of many tax credits and deductions claimed on the tax return, and determining the credit amount does not constitute preparation of all or substantially all of the corporation's tax return under this paragraph (g). F will not be considered to have prepared all or substantially all of the corporation's tax return, and F is not a tax return preparer required to apply for a PTIN or other identifying number as the Internal Revenue Service may prescribe in forms, instructions, or other appropriate guidance. The analysis is the same whether or not the tax credit is a substantial portion of the return under § 301.7701-15 of this chapter (as opposed to substantially all of the return), and whether or not F is in the same firm with E. E is a tax return preparer required to apply for a PTIN or other identifying number as the Internal Revenue Service may prescribe in forms, instructions, or other appropriate guidance.

(h) The Internal Revenue Service, through forms, instructions, or other appropriate guidance, may prescribe exceptions to the requirements of this section, including the requirement that an individual be authorized to practice before the Internal Revenue Service before receiving a preparer tax

identification number or other prescribed identifying number, as necessary in the interest of effective tax administration. The Internal Revenue Service, through other appropriate guidance, may also specify specific returns, schedules, and other forms that qualify as tax returns or claims for refund for purposes of these regulations.

(i) *Effective/applicability date.*

Paragraph (a)(1) of this section is applicable to tax returns and claims for refund filed after December 31, 2008. Paragraph (a)(2)(i) of this section is applicable to tax returns and claims for refund filed on or before December 31, 2010. Paragraph (a)(2)(ii) of this section is applicable to tax returns and claims for refund filed after December 31, 2010. Paragraph (d) of this section is applicable to tax return preparers after December 31, 2010. Paragraphs (e) through (h) of this section are effective after September 30, 2010.

PART 602—OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT

■ **Par. 3.** The authority citation for part 602 continues to read as follows:

Authority: 26 U.S.C. 7805.

■ **Par. 4.** In § 602.101, paragraph (b) is amended by revising the entry for "1.6109-2" in the table to read as follows:

§ 602.101 OMB Control numbers.

CFR part or section where identified and described	Current OMB control No.
* * * * *	
(b) * * *	
* * * * *	
1.6109-2	1545-2176
* * * * *	

Steven T. Miller,
Deputy Commissioner for Services and Enforcement.

Approved: August 11, 2010.

Michael Mundaca,
Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 2010-24653 Filed 9-28-10; 11:15 am]

BILLING CODE 4830-01-P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 300

[TD 9503]

RIN 1545-B171

User Fees Relating to Enrollment and Preparer Tax Identification Numbers

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final rule.

SUMMARY: This document contains amendments to the regulations relating to the imposition of certain user fees on certain tax practitioners. The final regulations establish a new user fee for individuals who apply for or renew a preparer tax identification number (PTIN). The final regulations affect individuals who apply for or renew a PTIN.

DATES: *Effective Date:* These regulations are effective on September 30, 2010.

Applicability Date: For dates of applicability see §§ 300.1(d), 300.2(d), 300.3(d), 300.4(d), 300.5(d), 300.6(d), 300.7(d), 300.8(d), and 300.9(d).

FOR FURTHER INFORMATION CONTACT: Concerning the final regulations, Emily M. Lesniak at (202) 622-4570; concerning cost methodology Eva J. Williams at (202) 435-5514 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

This document contains final regulations relating to the imposition of a user fee to apply for or renew a PTIN and the reorganization of the effective date provisions under §§ 300.0 through 300.8. Section 300.9 establishes a \$50 user fee to apply for or renew a PTIN. The Independent Offices Appropriations Act of 1952 (IOAA), which is codified at 31 U.S.C. 9701, authorizes agencies to prescribe regulations establishing user fees for services provided by the agency. Regulations prescribing user fees are subject to the policies of the President, which are currently set forth in the Office of Management and Budget Circular A-25 (the OMB Circular), 58 FR 38142 (July 15, 1993). The OMB Circular requires agencies seeking to impose user fees for providing special benefits to identifiable recipients to calculate the full cost of providing those benefits.

On September 30, 2010, the Treasury Department and the IRS published in the **Federal Register** final regulations under section 6109 (TD 9501) that