

## New IRS Proposed Regulations Will Affect Form 5500 Preparers

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### Background

Both Congress and the IRS have embarked on a mission to increase oversight of Federal tax return preparers. This initiative represents the first concerted effort by the IRS to require registration for all preparers, as well as to institute competency testing and continuing education requirements for tax return preparers who are not Circular 230 practitioners (that is, "unenrolled preparers"). Treasury Department Circular 230 covered practitioners include CPAs, Attorneys, Enrolled Agents, Enrolled Actuaries ("EA") and Enrolled Retirement Plan Agents ("ERPA"). If you prepare Form 5500 filings for your clients, you are a tax return preparer - see ASPPA *asap* 08-24.

Additional guidance has been recently released by IRS, including an overview of the requirements and FAQs – see the links at <http://www.irs.gov/taxpros/article/0,,id=210909,00.html>. The new regulations and requirements are proposed to take effect January 1, 2011.

### Registration Requirement

All preparers (whether or not a Circular 230 practitioner) must obtain a Preparer Tax Identification Number (PTIN) if they prepare or file tax returns after December 31, 2010.

The IRS will be unveiling a new online system for preparers to obtain PTINs. An annual fee (estimated to be \$50 to \$100) will be charged for this registration. If you obtain (or previously obtained) a PTIN before the new system is available, you will have to re-apply under the new electronic system and pay the annual fee. Your PTIN, however, should not change. As part of the new PTIN process, the IRS will verify whether preparers are compliant with their personal and business tax obligations. Accordingly, any such outstanding issues should be resolved before registering for a PTIN under the new program.

The new online PTIN registration program is scheduled to open in September, 2010. You should determine who in your firm is a "preparer" and will need to register. If the preparers are Circular 230 practitioners, registration is all that will be needed. If your preparers are unenrolled preparers, they may want to apply for a PTIN as soon as the new online system is available in order to qualify for the extended deadline to complete the general tax competency test (described below) while continuing to prepare filings. Once the competency test is available (expected mid-2011) PTINs will only be available to unenrolled preparers who pass the test (as well as Circular 230 covered practitioners).

## Who is a Preparer?

In general terms, an individual who is compensated for preparing, or assisting in the preparation of, all or substantially all of a federal tax return or claim for refund (including the Form 5500) is considered to be a tax return preparer. An employee who prepares his or her employer's returns as part of his or her job duties is not considered a preparer for PTIN purposes, unless he or she also prepares other Federal tax returns for compensation.

Examples from the proposed regulation are helpful in understanding which individuals may be subject to these rules, although none of them specifically reference Form 5500. The proposed regulation is fairly broad in defining who is a preparer and suggests that anyone who gathers information or otherwise communicates with the client regarding data used to complete Form 5500 may be a preparer. That said, the examples illustrate that someone who answers the telephone, makes copies, inputs information into the data fields of preparation software on a computer, or uses the computer to file electronic returns prepared by someone else is **not** a preparer and does not need a PTIN to perform these clerical and incidental services. On the other hand, an individual who determines the amount and character of entries on the return and whether the information is sufficient for purposes of preparing the return **is** a tax return preparer subject to the new rules. A key factor in identifying who must become a registered tax return preparer is the extent to which an individual "exercises judgment" in the preparation of a filing. ASPPA will certainly be discussing this further with the IRS to gain more insight into the specific issues associated with determining who is considered a preparer for Form 5500.

While a PTIN is required to prepare a return after December 31, 2010, the 2009 and 2010 Form 5500 series reports do not provide for the inclusion of the preparer's PTIN. The IRS has confirmed that inclusion of the PTIN is expected to be a requirement of the Form 5500 in the near future. Forms 990, 990-T, 5330, and 945 already require the insertion of the preparer's PTIN (or social security number, which will be discontinued after 2010).

## Competency Testing

CPAs, Attorneys, and Enrolled Agents who are active and in good standing with their respective licensing agencies are exempt from the new competency testing requirements. Enrolled Actuaries and Enrolled Retirement Plan Agents in good standing are also exempt, provided they only prepare returns within the limited practice areas of these groups (e.g., Form 5500).

According to FAQs on the IRS website, unenrolled preparers will be required to pass a competency test on general income/business tax topics, with testing expected to begin in mid-2011. Unenrolled preparers who obtain PTIN's before competency testing is available will have three years, or until December 31, 2013, to pass the test. Failure to pass the test by the deadline will result in the deactivation of the preparer's PTIN. After testing becomes available, new preparers will have to pass the test before they can obtain a PTIN. The IRS has confirmed to ASPPA that there is no intent to create a competency test on retirement plan topics. Thus, the only way for an unenrolled preparer to get a PTIN as a Form 5500 preparer is to take the general tax competency test and be subject to the general tax continuing education requirements described below or to become a Circular 230 covered practitioner (such as an ERPA).

## **Continuing Education**

After completing the process to become an IRS registered tax return preparer, the individual also will be subject to a new continuing education requirement of 15 hours per year, including 3 hours of federal tax law updates, 2 hours of ethics, and 10 hours of other federal tax law programs. The starting date for the new continuing education requirements has not been established, but presumably it will go into effect before 2014, when all PTIN holders not otherwise exempt will have had to pass the general tax competency test. Circular 230 practitioners continue to be subject to existing continuing education requirements required therein and are exempt from these new requirements.

## **New IRS Designation/Standards of Conduct**

Unenrolled preparers who successfully complete the general tax competency test and PTIN registration will be awarded a new, and as yet unnamed, IRS designation which will permit them to represent taxpayers in IRS examinations when the return under examination was one they prepared.

Beginning January 1, 2011, all preparers will be required to comply with the standards of conduct as outlined in Circular 230 - see

[http://www.irs.gov/pub/irs-utl/circular\\_230.pdf](http://www.irs.gov/pub/irs-utl/circular_230.pdf).

ASPPA will continue to keep its members informed as additional information and guidance on these new requirements becomes available.