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Subject: New Tax Return Preparer Registration Requirement May Include Form 5500 Preparers

Major References: [*Final Regulations, Furnishing Identifying Number of Tax Return Preparer, 75 Fed. Reg. 60309 \(published September 30, 2010\) \(to be codified in 26 C.F.R. pt. 1\); Final Regulations, User Fees Relating to Enrollment and Preparer Tax Identification Numbers, 75 Fed. Reg. 60316 \(published September 30, 2010\) \(to be codified in 26 C.F.R. pt. 300\); and Proposed Regulations Governing Practice Before the Internal Revenue Service, 75 Fed. Reg. 51713 \(proposed Aug. 23, 2010\) \(to be codified in 31 C.F.R. pt. 10\).*](#)

MDRT Information Retrieval Index Nos.: 2400; 3250 ; 3700

SEE THE CIRCULAR 230 DISCLAIMERS APPENDED TO THE CONCLUSION OF THIS WASHINGTON REPORT.

On September 28, 2010, the Internal Revenue Service issued final regulations requiring paid tax return preparers to register with the IRS to obtain a Prepared Tax Identification Number ("PTIN"), which may implicate preparers of Form 5500, the Annual Returns/Reports of Employee Benefit Plans. The final regulations established a new online system for registering with the IRS. In August, the IRS also issued proposed regulations that would amend Treasury Circular 230. Registration would be mandatory for current Circular 230 covered individuals (attorneys, certified public accountants, enrolled agents, enrolled actuaries, and enrolled retirement plan agents) and a new proposed Circular 230 group - registered tax return preparers. As Form 5500 preparers may be considered "tax return preparers", they may be subject to these new requirements.

All paid tax return preparers must apply for and obtain a PTIN, even if they already have one, before preparing any federal tax returns in 2011.

New Registration Requirement for “Tax Return Preparers”

Under the current rules, anyone may prepare a tax return or claim for refund without registering or meeting any eligibility requirements. After December 31, 2010, all tax return preparers (i.e., those persons who receive compensation for preparing all or substantially all of a federal tax return, claim for refund, or other documents to submit to the IRS) must register with the IRS and obtain a PTIN. This PTIN requirement applies to all “tax return preparers.” It is not necessary that a person file a tax return, claim for refund or other document to be a “tax return preparer” subject to the requirement.

Tax return preparers subject to this requirement include Circular 230 preparers and unenrolled agents alike. Under the current rules, Circular 230 persons include: attorneys and certified public accountants (CPAs), enrolled agents, enrolled actuaries, and enrolled retirement plan agents. The proposed 230 regulations seek to add a new group of persons to Circular 230 covered persons -- the “Registered Tax Return Preparers.”

Registered tax return preparers would be authorized to practice before the IRS with certain limitations. They may sign, prepare, or assist in preparing all or substantially all of a federal tax return, claim for refund, or other documents to submit to the IRS. Likewise, registered tax return preparers may represent the taxpayer before revenue agents, customer service representatives, or similar IRS officials during an examination if the preparer signed the tax return or claim for refund for the year or period under examination. But, the registered tax return preparers may not represent the taxpayer before appeals officers, revenue officers, counsel, or similar offices or IRS or Treasury employees unless they otherwise qualify for such activity. Authorized practice for the registered tax return preparer is conditioned, however, on the person having passed the requisite written competency exam, described below.

The proposed 230 regulations also intend to clarify what it means to “practice before the IRS.” Some have argued that, under the current rules, a person does not “practice before the IRS” unless that person *both* prepares and files a federal tax return, claim for refund, or other documents to submit to the IRS. This argument is defunct under the proposed 230 regulations, which clarify that the person need not both prepare and file. Either activity is sufficient to constitute “practice before the IRS.”

Without further clarifying guidance from the IRS, it would seem that paid preparers of the Form 5500 may be considered “tax return preparers” for purposes of the PTIN requirement if they prepare substantially all of the Form 5500 and its schedules which may include information utilized by the tax return or claim for refund.

All paid tax return preparers can obtain a PTIN in one of two ways. First, the IRS has created an online application system that can be accessed through the Tax Professionals page of IRS.gov. Second, a paper application may be submitted on a new Form W-12, IRS Paid Preparer Tax Identification Number Application. Receipt of a PTIN will be immediate after successful online registration, while response time with respect to a paper application on Form W-12 is estimated to be between four to six weeks. Individuals who currently possess a PTIN will need to reapply under the new system, but generally will be reassigned the same number. Note that

individuals without a Social Security number will also need to provide one of the following: new Form 8945, PTIN Supplemental Application for U.S. Citizens Without a Social Security Number Due to Conscientious Religious Objection, or new Form 8946, PTIN Supplemental Application for Foreign Persons Without a Social Security Number. The IRS has set up a special toll-free telephone number, 1-877-613-PTIN (7846), that tax professionals can call for technical support related to the new online registration system.

Competency Testing and Continuing Education

The IRS has also indicated that persons required to obtain a PTIN will be subject to two additional requirements in the future: (1) they must pass a proficiency exam, and (2) they must satisfy annual continuing education requirements - generally 15 hours per year.

As part of the registration process in the future, individuals, other than attorneys, certified public accountants (CPAs), and enrolled agents, must pass a competency exam. Enrolled actuaries and enrolled retirement plan agents may also be exempt from the competency exam requirement if they restrict their prepared filings to the limited areas of these groups. All other individuals will have to pass a competency exam in the future.

The competency exam is not expected to be available until mid-2011. So, preparers who apply for a PTIN prior to mid-2011 will be granted a PTIN without having first passed the exam. These preparers will also be granted an extension, until December 31, 2013, to pass the exam.

Attorneys, CPAs, enrolled agents, enrolled actuaries, and enrolled retirement plan agents are exempt from the continuing education requirement given their existing education requirements. For all others, the 15 hours for continuing education is to comprise 3 hours of federal tax law updates, 2 hours of ethics, and 10 hours of federal tax law. The continuing education requirement is expected to go into effect in 2014.

In this regard, note that, in the press release accompanying the publication of the final PTIN regulations, the IRS indicated that it has under serious consideration exempting certain other tax return preparers from the testing and continuing education requirements - namely, a discrete category of people who engage in return preparation under the supervision of someone else. As an example, the press release referenced employees who prepare all or substantially all of a return and work in certain professional firms under the supervision of another individual who signs the return, is registered and satisfies the testing and continuing education requirements.

Annual Fee

The annual fee for a PTIN is \$64.25: a \$50 fee for the IRS's outreach, technology, and compliance efforts and a \$14.25 fee for a third-party vendor to operate the online system and provide customer support. The fee must be paid to obtain a PTIN and to renew the PTIN annually.

Tax Compliance and Suitability Check

Part of the process to obtain a PTIN will include the person passing a tax compliance and suitability check. The IRS will consider whether the PTIN applicant has filed all required business or tax returns, and paid, or made proper arrangements to pay, all Federal taxes. The IRS will also consider whether the applicant has engaged in any conduct justifying suspension or disbarment from

the practice before the IRS. If the results show that the applicant engaged in conduct subject to sanctions under Circular 230, the IRS may deny the applicant's request for a PTIN.

Mandatory E-filing

Depending on the number of Federal returns the preparer files, he or she may be required to file the returns electronically after December 31, 2010. Tax return preparers who prepare 100+ individual or trust returns in 2011 or 11+ individual or trust returns in 2012 must e-file. Note that all 5500s, beginning with the 2009 plan year, have been required to be filed electronically under the EFAST system.

Circular 230 Changes

The IRS also released proposed regulations that would amend Treasury Circular 230, the rules governing practices before the IRS. The proposed regulations generally would extend current regulations that apply to attorneys, certified public accountants, enrolled agents and other specified tax professionals to all tax return preparers, including registered tax return preparers. The regulations would also repropose standards with respect to the preparation of tax returns, review rule, regarding continuing education providers and amend multiple sections of Circular 230.

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The apparent inclusion of Form 5500 preparers within the tax return preparer class may subject those preparers to a myriad of rules and obligations which did not previously apply to them. A firm that engages in a qualified retirement plan practice and does, in fact, participate in Form 5500 preparation should pay close attention to these new regulatory mandates and seek legal guidance in determining how they specifically relate to him or her.

Any AALU member who wishes to obtain a copy of the final PTIN regulations or the proposed 230 regulations may do so through the following means: (1) use hyperlink above next to "Major References," (2) log onto the AALU website at www.aalu.org and enter the *Member Portal* with your last name and birth date and select *Current Washington Report* for linkage to source material or (3) email Anthony Raglani at raglani@aalu.org and include a reference to this *Washington Report*.

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