



AMERICAN ACADEMY of ACTUARIES

June 13, 2011

Mr. Robert Choi

Director, Employee Plans
Internal Revenue Service
1750 Pennsylvania Avenue, NW
Washington, DC 20006

Ms. Lisa Mojiri-Azad

Office of Chief Counsel
Internal Revenue Service
1111 Constitution Ave NW
Washington, DC 20224-0001

Mr. Andrew Zuckerman

Director, EP Rulings & Agreements
Internal Revenue Service
1750 Pennsylvania Ave NW
Washington, DC 20006

Re: Proposed Regulation 31 CFR Part 10 (REG-138637-07) [75 FR 51713]

Dear Mr. Choi, Mr. Zuckerman, and Ms. Mojiri-Azad:

The American Academy of Actuaries¹ Pension Committee would like to express its concerns about the implications of the proposed modifications to regulations regarding practice before the Internal Revenue Service (IRS) that are contained in 31 CFR Part 10, also known as “Circular 230” (REG-138637-07), with respect to retirement plan professionals.

The Pension Committee appreciates the continuous efforts of the IRS to improve the training, certification, and competency of paid tax return preparers to ensure quality results and accurate tax return filings. We understand that the proposed modifications to Circular 230 and registration requirements for a Preparer Tax Identification Number (PTIN) are intended to ensure greater accuracy and clarity by requiring individual responsibility for the information contained in tax returns. We are, however, concerned about the application of these rules to various reporting requirements, including:

- IRS Form 5330, *Return of Excise Taxes Related to Employee Benefit Plans*;
- IRS Form 5310-A, *Notice of Plan Merger or Consolidation, Spinoff, or Transfer of Plan Assets or Liabilities; Notice of Qualified Separate Lines of Business*; and
- The determination of the deductibility of employer contributions to a defined benefit plan.

The committee also is concerned by the potential for the PTIN requirements to be reinstated with respect to Form 5500 series filings despite the relief granted in IRS Notice 2011-6. Finally, the committee believes the new rules may be applied to a broader group than is needed to achieve the regulatory objectives.

¹ The American Academy of Actuaries is a 17,000-member professional association whose mission is to serve the public and the U.S. actuarial profession. The Academy assists public policymakers on all levels by providing leadership, objective expertise, and actuarial advice on risk and financial security issues. The Academy also sets qualification, practice, and professionalism standards for actuaries in the United States.

Form 5330 Issues

Under regulation Section 1.6109-2, 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. The FAQs posted by the IRS on the PTIN web site clarify that preparation of all or substantially all of a tax return includes making determinations that affect tax liability. An individual who prepares a Form 5330 to report an excise tax that is owed often will rely upon determinations made by other parties in preparing that filing. Some examples include:

- Determining the excise tax on the late refund of excess contributions relies upon the parties completing the annual 401(k) plan ADP/ACP test;
- Determining the excise tax on the failure to satisfy minimum funding requirements relies upon the enrolled actuary who certifies the minimum funding requirements;
- Determining the excise tax on nondeductible employer contributions relies upon the enrolled actuary (for a defined benefit plan) or the parties preparing the annual compliance test (for a defined contribution plan) to determine the maximum annual deduction;
- Determining the excise tax on reversion of excess plan assets in a defined benefit plan termination relies on the parties that determine the plan's termination benefit liabilities.

In most cases, each of these activities leading to the determination that an excise tax is owed involves the work of multiple individuals. The enrolled actuary who determines the minimum funding requirements and maximum deduction limit for a defined benefit plan, for example, may be assisted by one or more analysts who review and reconcile data and asset information, update valuation software, and prepare the initial contribution computations. The enrolled actuary ultimately is responsible for the final determination and the work done by any supporting personnel. But in other situations, such as ADP/ACP testing or the determination of lump sum benefits payable upon plan termination, the work of support personnel is not clearly the responsibility of a Circular 230 practitioner². In each of these cases, it is unknown at the time that the work is being prepared whether it ultimately will lead to the determination that an excise tax is owed.

The FAQs available on the PTIN web site specifically address scenarios related to the preparation of Form 1040 and 94X. The potential implications of the PTIN requirement, however, are much more far-reaching for preparers of Form 5330 than for preparers of Form 1040 series returns. We believe it would be helpful to have the IRS provide further clarification regarding the application of the PTIN requirements to the work that ultimately might support the determination of excise taxes reportable on Form 5330. Note that similar issues may apply to other forms relating to the payment of excise taxes, such as Form 5329.

We recommend that the IRS either add Form 5330 to the exempt forms or provide clarification as to when the PTIN requirement may apply to individuals involved in calculations that may at some future date be used in an excise tax determination. It would seem appropriate that someone preparing a Form 5330 with respect to an excise tax should be able to rely upon documentation provided by other parties, that generally is produced for a purpose that is separate and distinct from the excise tax calculation (such as an ADP/ACP testing report or an ERISA funding valuation report), without those other parties being subject to the PTIN requirement as a result of the paid preparer's reliance on their work.

² For purposes of this letter, a Circular 230 practitioner is an attorney, CPA, enrolled actuary, enrolled agent or enrolled retirement plan agent.

Form 5310-A Issues

Form 5310 is included on the list of forms exempt from the PTIN requirement in Notice 2011-6. It is unclear if this exemption also covers Form 5310-A. We believe that it does not, since other forms having similar numbering (e.g., Forms 5500, 5500-SF and 5500-EZ) were cited as being collectively exempt by reference to a series of forms. It would be helpful to have clarification as to whether Form 5310-A is considered a part of the “Form 5310” listed in Notice 2011-6 or if it is viewed as a separate form that is subject to the PTIN requirements.

If Form 5310-A is not currently exempt from the PTIN requirements, we request that consideration be given to adding it to the list of exempt forms. Both Form 5310 and Form 5310-A require reporting of certain information related to the requirements to maintain qualification with respect to plan transactions (i.e., plan termination in the case of Form 5310 and plan restructuring in the case of Form 5310-A). If it is appropriate to exempt Form 5310, we believe it would be appropriate also to exempt Form 5310-A.

The filing requirements for Form 5310-A include an actuarial statement of valuation showing compliance with the requirements of Section 401(a)(12) and the regulations under Section 414(l) for a transaction involving a defined benefit plan. If Form 5310-A is not exempt from the PTIN requirement, we believe that the preparer of Form 5310-A should be able to rely upon the expertise of an enrolled actuary who prepares the actuarial statement of valuation for a Form 5310-A filing. It would appear redundant to require an enrolled actuary to obtain a PTIN to prepare the actuarial statement of valuation since the enrolled actuary is already subject to basic and continuing education requirements as well as the tax compliance and suitability background checks required of those maintaining a PTIN. (We note that the actuarial statement in Form 5310-A is not required to be signed by an enrolled actuary. If another party not subject to Circular 230 prepares the statement it may be appropriate to require a PTIN for that individual if Form 5310-A is not otherwise exempt in its entirety from the PTIN requirements.)

Deductibility of Employer Contributions

Although not reported on Schedules SB/MB, enrolled actuaries commonly report to a plan sponsor the maximum tax deductible contribution limit applicable to a defined benefit plan for each tax year. Using this information, the plan sponsor and its accountants determine the amount of the tax deduction that will be reported on the corporation’s tax return for each fiscal year. We believe that the determination of contribution amounts should not be considered an activity that involves the determination of a tax liability.

The determination of whether a contribution is claimed as a deduction on the employer’s tax return is the immediate driver of the tax liability determination—not the reporting by the enrolled actuary of the limitation on such deductions. This is the same reasoning applied with respect to the preparation of Form 5330. The preparer should be permitted to rely on information prepared by a third party for purposes other than just the determination of tax liability without obligating the third party to obtain a PTIN. Otherwise, the implication is that any work in determining contribution amounts (whether minimum required or maximum deductible) constitutes a determination of tax liability.

Form 5500 Issues

At the 2011 Enrolled Actuaries meeting, a representative from the IRS indicated that it is possible the exemption provided for preparation of Form 5500 series returns will be revoked at a future date despite efforts by individuals in the Employee Plans division to have an exemption provided in

Notice 2011-6. We believe that excluding Form 5500 series returns from the PTIN requirements was an appropriate action and are concerned that this position may be reversed.

With the exception of the Schedules SB/MB attachments required for defined benefit plans, much of the data reported via Form 5500 is merely informational and has no direct impact on a tax return or claim for refund filed by a plan administrator or sponsor. We believe, therefore, that Form 5500 (other than the Schedules SB/MB) falls outside the definition of a tax return or claim for refund to which the PTIN requirements should apply. The Schedules SB/MB must be signed by an enrolled actuary and as such all of the information reported on that portion of Form 5500 already is subject to attestation by a professional subject to Circular 230. The committee believes it would be appropriate that the IRS continue to specify that paid preparers of Form 5500 schedules (including the Schedules SB/MB) are exempt from the PTIN requirement.

If the IRS ultimately determines that Form 5500 constitutes a tax filing that is subject to PTIN requirements and repeals the Notice 2011-6 exemption, the committee believes it would be appropriate for Form 5500 filings to allow for the designation of *one* person to be responsible for a specific schedule. Individuals supporting and assisting that identified individual in any capacity to prepare the schedule should not be required to have a PTIN. For example, as noted previously, the enrolled actuary for a defined benefit plan is already responsible for the information included on the actuarial schedule (SB or MB) included with the Form 5500 filing. We believe it is unnecessary to require other individuals assisting with the drafting of the Schedules SB/MB to obtain a PTIN for that work. This type of assumption of responsibility could be permitted for other Form 5500 schedules (including those filed for defined contribution plans), allowing one individual to assume responsibility for an entire schedule (including the work of support personnel assisting with the preparation). If no one person takes responsibility for specific schedule(s) within Form 5500, then all individuals supporting or assisting in the preparation of the materials would need to obtain a PTIN.

We believe this achieves the goal of improving the quality and accuracy of the filing by ensuring that one or more certified person(s) are taking responsibility for the finished product. It also allows for increased flexibility for individual firms to allocate that responsibility appropriately to their staff without placing unnecessary, costly and burdensome requirements on all individuals involved in the preparation process.

Duplication of Fees for Enrolled Actuaries

Certain of the computations that support an excise tax determination reported on Form 5330 are the responsibility of an enrolled actuary. As discussed above, this is also true of certain information included with other filings, such as Form 5310-A, Form 5500 (in particular the Schedules SB/MB) and potentially all determinations of minimum required and maximum deductible contribution amounts for defined benefit plans.

If enrolled actuaries are required to obtain a PTIN as a matter of course due to any of the forms or responsibilities discussed above, it is appropriate to provide for a reduction in the renewal fee similar to that proposed for enrolled agents and enrolled retirement plan agents in 26 CFR Part 300 [REG-124018-10]. Enrolled actuaries already are subject to the tax compliance and suitability background checks, certification examinations and continuing education requirements as Circular 230 practitioners. This is the rationale provided by the IRS for reducing the renewal fees for enrolled agents and enrolled retirement plan agents. It should be applied uniformly to any individual licensed to practice before the IRS who also is required to also obtain a PTIN.

The Pension Committee appreciates your consideration of these comments and would be happy to discuss them with you at your convenience. Please contact Jessica M. Thomas, the Academy's senior pension policy analyst (202-785-7868; thomas@actuary.org) if you have any questions or would like to discuss these items further.

Sincerely,

A handwritten signature in black ink, appearing to read 'J. H. Moore', with a long horizontal flourish extending to the right.

John H. Moore, FSA, MAAA, EA, FCA
Chairperson, Pension Committee
American Academy of Actuaries