ORAL ARGUMENT SCHEDULED FOR MAY 10, 2018
No. 17-5204

In the United States Court of Appeals for the District of Columbia Circuit

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BRITTANY MONTROIS, ET AL.
Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, CASE NO. 1:14-CV-01523-RCL (HON. ROYCE C. LAMBERTH)

BRIEF OF PLAINTIFFS-APPELLEES

WILLIAM H. NARWOLD
MOTLEY RICE LLC
One Corporate Center
20 Church Street, 17th Floor
Hartford, CT 06103
(860) 882-1676
bnarwold@motleyrice.com

ALLEN BUCKLEY
LAW OFFICE OF ALLEN BUCKLEY LLC
2727 Paces Ferry Road, Suite 750
Atlanta, GA 30339
Telephone: (678) 981-4689
ab@allenbuckleylaw.com

DEEPAK GUPTA
JONATHAN E. TAYLOR
DANIEL TOWNSEND
GUPTA WESSLER PLLC
1900 L Street, NW, Suite 312
Washington, DC 20036
(202) 888-1741
(202) 888-7792 (fax)
deepak@guptawessler.com

(Additional counsel on the next page)

March 30, 2018

Counsel for Plaintiffs-Appellees

MEGHAN S.B. OLIVER
MOTLEY RICE LLC
28 Bridgeside Boulevard
Mount Pleasant, SC 29464
(843) 216-9000
moliver@motleyrice.com

LOUIS BOGRAD
MOTLEY RICE LLC
401 9th Street, N.W., Suite 1001
Washington, DC 20004
(202) 386-9623
lbograd@motleyrice.com

CHRISTOPHER S. RIZEK
CAPLIN & DRYSDALE, CHARTERED
One Thomas Circle, NW, Suite 1100
Washington, DC 20005
(202) 862-8852
crizek@capdale.com

Counsel for Plaintiffs-Appellees

COMBINED CERTIFICATES

Certificate as to Parties, Rulings, and Related Cases

As required by Circuit Rules 27(a)(4) and 28(a)(1), undersigned counsel for Appellees Brittany Montrois et al. provides the following information:

I. Parties appearing in the district court and in this Court

1. Joseph Henchman, Brittany Montrois, Adam Steele, *Plaintiffs-Appellees.*
2. United States of America, *Defendant-Appellant.*

II. Rulings under review

The rulings under review are (1) United States District Court Judge Royce C. Lamberth June 1, 2017 order granting the plaintiffs' motion for summary judgment, and (2) the court's July 10, 2017 entry of judgment and a permanent injunction.

III. Related cases

This case has not previously been filed with this Court or any other court. Counsel is not aware of any case qualifying as related under Circuit Rule 28(a)(1)(C).

Respectfully submitted,

/s/ Deepak Gupta

DEEPAK GUPTA
JONATHAN E. TAYLOR
GUPTA WESSLER PLLC
1900 L Street, NW, Suite 312
Washington, DC 20036
(202) 888-1741
(202) 888-7792 (fax)
deepak@guptawessler.com

Counsel for Plaintiffs-Appellees

March 30, 2018

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Independent Offices Appropriations Act	IOAA
Internal Revenue Service	IRS
Office of Management and Budget	OMB
Preparer Tax Identification Number	PTIN

INTRODUCTION

For decades, the IRS acknowledged that it lacked authority to regulate people who prepare tax returns on behalf of others. Then, in 2010, after many failed attempts to secure specific authority from Congress, the IRS issued regulations to do just that. Never before had the IRS assumed such authority.

As part of this unprecedented regulatory effort, the IRS began requiring paid tax-return preparers to pass a qualifying exam and take annual continuing-education courses. The IRS also mandated—for the first time—that all preparers pay an annual fee for an agency-issued "preparer tax identification number" (or PTIN), an initial $64.25 to obtain the PTIN and $63 each year for renewal. The idea was to have the PTIN application process incorporate the new eligibility criteria—meaning that only people who met those criteria would receive a PTIN—and to use the fees to cover the costs of implementing the new licensing regime.

But in 2014 this Court struck down the eligibility criteria—the backbone of the licensing regime—as a "vast expansion" of the IRS's authority, unauthorized by Congress. *Loving v. IRS*, 742 F.3d 1014, 1021 (D.C. Cir. 2014). This Court held that the agency's asserted authority, a 125-year-old statute governing the "practice of representatives" before the Treasury, "cannot be stretched so broadly as to encompass authority to regulate tax-return preparers." *Id.* at 1015. Without such

authority, the IRS could not impose any eligibility requirements on preparers, thus reinstating the rule that anyone may prepare tax returns for compensation.

After *Loving*, only one vestige of the 2010 regulations remains in effect: the requirement that return preparers pay annually for a PTIN. But *Loving* removed the IRS's stated rationale for that requirement, declaring it outside the bounds of what Congress has authorized.

At this point, the IRS faced a choice: It could have (and should have) abandoned the last remnant of its unsuccessful regulatory bid, refunded the unlawful PTIN fees, and restored the status quo ante. Instead, the agency pressed forward. Despite *Loving*, the IRS continued to charge the annual PTIN fees that were intended to fund its failed regulatory scheme. Yet it has not offered any legitimate reason for doing so, nor any independent justification for the fee that can withstand *Loving*. The plaintiff tax preparers accordingly brought this case to declare the PTIN fees unlawful, enjoin their collection, and obtain a refund.

For two independent reasons, the district court's ruling that the fees are unlawful should be upheld. *First*, the district court correctly held that the IRS lacked statutory authority to charge the fees. The sole statute on which the IRS relied, the Independent Offices Appropriations Act (or IOAA), authorizes agencies to charge user fees only for providing a "service or thing of value." 31 U.S.C. § 9701. In its brief to this Court, the IRS claims (at 35) that a PTIN is a "service or thing of

value" because it allows people "to lawfully earn a living" by preparing tax returns, akin to an occupational license. But the IRS has no licensing authority after *Loving*. And, as the district court noted, the "cases finding that a fee was permissible under the IOAA generally concern valid regulatory schemes, as opposed to the situation here where the regulatory scheme was struck down." J.A. 194–95. There is no case, by contrast, "in which an agency has been allowed to charge fees under the IOAA for issuing some sort of identifier when that agency is not allowed to regulate those to whom the identifier is issued." J.A.197. The IRS gives no persuasive reason why this case should become the first.

Second, even if the IRS possessed statutory authority to charge the fees, the district court's ruling should nevertheless be affirmed on an independent and narrower ground under the Administrative Procedure Act: The *sole* reason that the IRS gave for requiring preparers to pay for a PTIN—after allowing them for decades to use their social security numbers, and to obtain an optional PTIN for free—was to facilitate and fund the now-invalidated licensing requirements. Because the IRS gave no other justification for the PTIN fees, the fees are arbitrary and capricious and hence unlawful under the APA.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331. The court entered a final judgment and permanent injunction on July 10, 2017. J.A.202. On September

6, the government filed a timely notice of appeal under Federal Rule of Appellate Procedure 4(a)(1)(B). J.A.207. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

This case presents two questions concerning the lawfulness of the IRS's collection of certain fees from tax-return preparers—both of which must be resolved in the IRS's favor to sustain those fees:

1. The Independent Offices Appropriations Act requires that an agency confer a "special benefit" on someone before it may charge that person a user fee. *Nat'l Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336, 343 (1974) (*NCTA*). When an agency lacks licensing power over members of a particular occupation—and has only the limited authority to change those members' identifying numbers from their social security numbers to something else—has the agency conferred a "special benefit" on those members by exercising that authority and assigning them a new number?

2. Even assuming that the IRS had statutory authority, are the fees impermissible under the APA because the agency did not offer a "good reason" for them, *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016), but instead justified them based entirely on its unauthorized attempt to regulate tax-return preparers?

STATUTES AND REGULATIONS

The relevant IRS regulations are attached as an addendum to this brief.

STATEMENT OF THE CASE

I. Regulatory background

A. In 2010, after multiple failed efforts to obtain authorization from Congress, the IRS attempts for the first time to regulate tax-return preparers.

Before 2011, anyone could file a tax return on behalf of someone else for compensation. J.A.38; J.A.68. Although the Justice Department could criminally prosecute tax-return preparers who committed fraud or other misconduct, and federal district courts could enjoin repeat offenders from preparing returns, *see* 26 U.S.C. § 7407, the IRS had no authority of its own to license or regulate who may prepare tax returns for others. J.A.39; *see also* Jay A. Soled & Kathleen Delaney Thomas, *Regulating Tax Return Preparation*, 57 B.C. L. Rev. 151, 163 (2017) ("[W]hen it comes to congressional oversight of tax return preparers, there is none.").

This was not for lack of trying. In the preceding decade, the IRS had supported nearly a dozen attempts in Congress to secure the regulatory authority to create eligibility criteria and "require the registration" of tax-return preparers. J.A.41–42. All failed. *Id.* Stymied in Congress, the IRS took it upon itself to regulate return preparers in 2010—the first attempt to do so in American history. An internal study declared that, despite the repeated rejection of "bills requiring the registration and regulation of tax return preparers," the agency did not actually need any "additional legislation" to exercise licensing authority over preparers,

because (in its view) the IRS had such licensing authority all along. J.A.92; J.A.100. Based on this view, the agency claimed existing statutory authority and announced its intention to issue regulations imposing mandatory registration and other requirements "to increase the oversight of paid tax return preparers," thereby achieving the "twin goals of increasing taxpayer compliance and ensuring uniform and high ethical standards of conduct for tax return preparers." J.A.69; J.A.73; *see* J.A.99–100 (citing 26 U.S.C. § 6109 and 31 U.S.C. § 330).

The new regulations consisted of three interrelated parts. The first part, finalized in June 2011, formed the core of the regulatory scheme: It imposed eligibility requirements on preparers, including competency testing and continuing education. *See Regulations Governing Practice Before the Internal Revenue Service*, 76 Fed. Reg. 32,286 (June 3, 2011); 31 C.F.R. §§ 10.4(c), 10.5(b), 10.6. Specifically, this regulation mandated that certain preparers—those who were not licensed attorneys, certified public accountants, or authorized tax practitioners known as enrolled agents—pass a qualifying exam and take 15 hours of continuing-education courses per year to be able to prepare tax returns on behalf of others for compensation. 76 Fed. Reg. at 32,287. As authority for these novel eligibility requirements, the IRS invoked a 125-year-old statute, 31 U.S.C. § 330, that predated the creation of the federal income tax and that the IRS had "never interpreted . . . to give it authority to regulate tax-return preparers." *Loving*, 742 F.3d at 1021.

The other two regulations were complementary. Together, they would require tax-return preparers to obtain and pay for an IRS-issued number (a PTIN), and to pay for the annual renewal of that number, instead of using their social security numbers to identify themselves on returns, while making the new preparer eligibility requirements part of the PTIN application and renewal process to ensure continued compliance. These two regulations are the central focus of this case.

1. The regulation requiring preparers to obtain a PTIN

The first of these regulations established the requirement that preparers obtain and annually renew a PTIN (which typically does not change once issued). 26 C.F.R. § 1.6109-2.

Until this regulation took effect, preparers had long been allowed to use their social security numbers as the required "identifying number" on the returns they prepared for others, as permitted by 26 U.S.C. § 6109(d). J.A.39–41. That statute provides that the social security number shall "be used as the identifying number," unless "otherwise . . . specified under regulations" issued by the IRS. 26 U.S.C. § 6109(d). The PTIN, introduced in 1998 as an optional alternative identification number, was provided at no charge and with no annual-renewal requirement. *User Fees Relating to Enrollment and Preparer Tax Identification Numbers*, 75 Fed. Reg. 43,110 (July 23, 2010). And, beginning in 2009, preparers could omit their identifying number—social security or PTIN—from the taxpayer's copy of the return, thus

fully protecting the preparer's privacy. *Tax Return Preparer Penalties Under Sections 6694 and 6695*, 73 Fed. Reg. 78,430, 78,432 (Dec. 22, 2008).

This regime changed in 2010. For the first time, the IRS disallowed use of a return preparer's social security number as the identifying number and mandated that each preparer obtain (and regularly renew) a PTIN.

Relying on its authority under 26 U.S.C. § 6109, the IRS explained that it changed its longstanding policy "to address two overarching objectives." *Furnishing Identifying Number of Tax Return Preparer*, 75 Fed. Reg. 60,309, 60,310 (Sept. 30, 2010). The "first overarching objective" was "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." *Id.* The second was "to further the interests of tax administration by improving the accuracy of tax returns and claims for refund and by increasing overall tax compliance." *Id.*; *see also Furnishing Identifying Number of Tax Return Preparer*, 75 Fed. Reg. 14,539, 14,540 (Mar. 26, 2010) ("[The PTIN requirement] will 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."). These are the same "twin goals" first identified by the IRS in its 2009 study, *see* J.A.73, out of

which the three final regulations were "an outgrowth," 75 Fed. Reg. at 60,314; *see also* J.A.44 (2009 study: "Increased oversight begins with mandatory registration.").

According to the IRS, the regulation would help achieve these twin goals by using the PTIN as a new "threshold requirement" that would enable the agency to "enforce the regulation of tax return preparers." *User Fees Relating to Enrollment and Preparer Tax Identification Numbers*, 75 Fed. Reg. 60,316, 60,318–19 (Sept. 30, 2010); *see* J.A.130 ("As the regulation is currently written, [people will] not qualify for a PTIN unless they become registered tax return preparers authorized to practice under section 330"—the statute at issue in *Loving*.). Put differently, the PTIN would now take on a "revised purpose" as an occupational license, 75 Fed. Reg. at 43,113—a way "to administer requirements intended to ensure that tax return preparers are competent, trained, and conform to rules of practice," and therefore "to aid the IRS's oversight of tax return preparers," 75 Fed. Reg. at 60,313.

Unlike in the past, when anyone could obtain a PTIN or use their social security number, the agency would now create a host of "qualifications [and] other requirements necessary to obtain a valid number," and these requirements would be imposed "[a]s part of the process of applying for a PTIN." 75 Fed. Reg. at 14,541–42; *see also id.* at 14,544 ("The [new regulations] will ensure that qualified, competent, and ethical tax return preparers will be assigned prescribed preparer identifying numbers."). Thus, "to obtain a PTIN," the regulation stated, the

"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." 75 Fed. Reg. at 60,312. And to ensure continued compliance with the new requirements, the IRS mandated that each preparer annually renew the PTIN, something even enrolled agents are not required to do. *Compare* 75 Fed. Reg. at 60,310 ("[B]y requiring regular renewal of a PTIN, tax return preparers will confirm their continuing competence and suitability to be tax return preparers."); *with* IRS, *Enrolled Agent Information*, https://perma.cc/FX4T-BQX8 (Enrolled agents must pay $30 and "complete 72 hours of continuing education courses every three years.").

The IRS explained how this new licensing scheme would work: "[T]he IRS will establish a process intended to assign PTINs only to qualified, competent, and ethical tax return preparers. The testing requirements [imposed by parallel regulations] 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." 75 Fed. Reg. at 60,314–15. In this way, the PTIN requirement was "critical to effective oversight" of tax-return preparers. 75 Fed. Reg. at 60,313.

2. The regulation requiring preparers to pay for a PTIN

The second regulation established the requirement that preparers annually pay a fee to obtain and renew their PTINs. 26 C.F.R. § 300.13. These fees were originally set at $64.25 to obtain a PTIN, and $63 annually to renew. J.A.52.

This policy, too, was a sharp departure from what the IRS had done in the past. Since creating PTINs in 1998, the IRS had issued them "without charging a user fee," 75 Fed. Reg. at 43,111—just like it issues other identifying numbers without a fee (much less annual renewal fees). *See* IRS, *Taxpayer Identification Numbers (TIN)*, https://perma.cc/K69M-X2FN (listing four IRS-issued identification numbers in addition to social security numbers: EIN, ITIN, ATIN, and PTIN).[1]

But now, "[t]he PTIN application, issuance, and renewal process" were set to "become significantly more expansive and intricate with the implementation of the registered tax return preparer program." 75 Fed. Reg. at 43,111. Thanks to that new regulatory regime, the IRS estimated that there would be "as many as 1.2 million [PTIN] applications," and this "increase in demand" would "require the IRS to expend more resources." 75 Fed. Reg. at 43,111, 43,113.[2] More importantly,

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[1] Indeed, the IRS had never attempted to charge a fee for *any* of these numbers, despite having issued millions of them.

[2] By comparison, the IRS has issued about 4.6 million ITINs to taxpayers without charging a fee. *See* National Taxpayer Advocate, *Annual Report to Congress FY2015, Vol. 1*, at 196, https://goo.gl/wmHynf ("Without ITINs, approximately 4.6 million taxpayers would not be able to comply with their annual tax filing and payment obligations, or receive tax benefits to which they are legally entitled.").

because of the new registered-preparer program, processing these applications would entail far more work than before: "Federal tax compliance checks [would] be performed on all individuals who apply for or renew a PTIN. Suitability checks [would] be performed. The IRS [would] further investigate individuals when the compliance or suitability check suggest[ed] that the individual may be unfit to practice before the IRS. These checks were not previously performed as a prerequisite to obtaining a PTIN." *Id.* at 43,111. Given "the increased costs to the government to process the application for a PTIN," as well as "the anticipated increase in PTIN applications"—and the fact that "Congress has not appropriated funds to the registered tax return preparer program or PTIN application process"—the IRS determined that there was "no viable alternative to imposing a user fee." 75 Fed. Reg. at 43,113. The IRS charged this fee even to those who had already obtained a PTIN.

The IRS justified the fee under the IOAA, which authorizes agencies to impose user fees for providing a "service or thing of value" to an identifiable person, not to exceed the costs incurred by the agency in providing that service. 31 U.S.C. § 9701. The IRS explained why it thought the statute applied: "By limiting the individuals who may prepare all or substantially all of a tax return or claim for refund to individuals who have a PTIN, the IRS is providing a special benefit to the individuals who obtain a PTIN"—the ability "to prepare all or substantially all

of a tax return or claim for refund." 75 Fed. Reg. at 60,319–20. "Because only attorneys, certified public accountants, enrolled agents, and registered tax return preparers are eligible to obtain a PTIN, only a subset of the general public is entitled to a PTIN and the special benefit of receiving compensation for the preparation of a return that it confers." 75 Fed. Reg. at 60,317.

At the same time, the IRS explained why requiring a PTIN would "provide important benefits to the IRS." 75 Fed. Reg. at 43,113. These would include "allowing the IRS to track the number of persons who prepare returns, track the qualifications of those persons who prepare returns, track the number of returns each person prepares, and, when instances of misconduct are detected, locate and review returns prepared by a specific tax return preparer." *Id.*

To justify the amount of the fee—a flat $50 to the government, plus a separate payment to a third-party vendor—the IRS listed all the compliance work it would now have to perform in implementing the licensing program: "The $50 annual fee is expected to recover the $59,427,633 annual costs the government will face in its administration of the PTIN registration program. This fee includes: (1) costs the government faces in administering registration cards or certificates for each registered tax preparer, (2) costs associated with prescribing by forms, instructions, or other guidance which forms and schedules registered tax preparers can sign for, and (3) tax compliance and suitability checks conducted by the

government." 76 Fed. Reg. at 32,296. Of these three categories, the IRS previously determined that the last category (compliance and suitability checks) would account for 74% of the estimated costs, while the second category (forms)—for which the agency already receives appropriations from Congress—would account for only 0.25%. J.A.50–51; J.A.53–54. The first category (registration cards) has never been implemented.

B. In early 2014, this Court invalidates the new eligibility requirements as a "vast expansion of the IRS's authority," unauthorized by Congress.

Four years ago, this Court invalidated the heart of the return-preparer regulations: the IRS's attempt to impose competency-testing and continuing-education requirements. The Court held that the asserted statutory basis for imposing these requirements—the 125-year-old statute permitting the IRS to "regulate the practice of representatives of persons before the Department of the Treasury," 31 U.S.C. § 330—"cannot be stretched so broadly as to encompass authority to regulate tax-return preparers." *Loving*, 742 F.3d at 1015.

"If we were to accept the IRS's interpretation of Section 330," the Court reasoned, "the IRS would be empowered for the first time to regulate hundreds of thousands of individuals in the multi-billion dollar tax-preparation industry. Yet nothing in the statute's text or the legislative record contemplates that vast expansion of the IRS's authority." *Id.* at 1021. And, indeed, for more than a century

"the IRS never interpreted the statute to give it authority to regulate tax-return preparers. Nor did the IRS ever suggest that it possessed this authority." *Id.* To the contrary, as recently as 2005, "the National Taxpayer Advocate—the government official who acts as a kind of IRS ombudsperson—stated to Congress that 'the IRS currently has no authority to license preparers or require basic knowledge about how to prepare returns.'" *Id.* This Court agreed and affirmed the judgment "permanently enjoin[ing] the tax-return preparer regulations." *Id.* at 1016. (The plaintiffs had not sought monetary relief.) As a result, anyone may once again prepare tax returns on behalf of others for compensation.

Despite the fact that this Court invalidated the core of its regulatory program, the IRS has continued to charge PTIN fees that it had previously justified as necessary to fund the failed licensing regime.[3]

C. In late 2015, the IRS reduces the amount of the PTIN fee.

In October 2015—nearly two years after *Loving* (and about a year after this case was filed)—the IRS issued a temporary regulation reducing the total PTIN fee to $50. *Preparer Tax Identification Number (PTIN) User Fee Update*, 80 Fed. Reg. 66,792, 66,794 (Oct. 30, 2015). The IRS said that it had "re-calculated its cost of providing services under the PTIN application and renewal process" and "determined that

[3] The IRS used some of these fees to fund a now-voluntary testing and IRS-approved program similar to the one struck down in *Loving*. J.A.57–58. By contrast, the IRS has issued refunds for all competency-testing fees that it had collected. *See* IRS, *Registered Tax Return Preparer Test Fee Refunds*, https://perma.cc/6VUJ-2YCB.

the full cost of administering the PTIN program going forward has been reduced from $50 to $33 per application or renewal." *Id.* The IRS also explained that the "vendor fee is increasing from $14.25 for original applications and $13 for renewal applications to $17 for [either]." *Id.* The IRS issued a final regulation to the same effect ten months later, in August 2016. *Preparer Tax Identification Number (PTIN) User Fee Update*, 81 Fed. Reg. 52,766 (Aug. 10, 2016).

Among the reasons why the fee had been set too high, the IRS explained, was "the fact that certain activities that would have been required to regulate registered tax return preparers will not be performed. In particular, the determination of the user fee no longer includes expenses for personnel who perform functions primarily related to continuing education and testing for registered tax return preparers. Additionally, expenses related to personnel who perform continuing education and testing for enrolled agents and enrolled retirement plan agents were also removed from the user fee." 80 Fed. Reg. at 66,794. The IRS did not, however, provide a refund of the fees that it had already collected to reimburse these expenses. Nor did the IRS attempt to square its modest fee reduction with its earlier determination that compliance and suitability checks, plus registration cards, would be responsible for all but 0.25% of the costs.[4]

[4] The IRS has also continued to use the fees to fund activities related to tax compliance, background checks, the voluntary certification program established after *Loving*, and many other things unrelated to issuing a number. J.A.57–58.

II. Procedural background

A. Tax-return preparers file this lawsuit to challenge the lawfulness of the PTIN fee and get their money back.

Because the IRS refused to stop charging PTIN fees and did not refund any PTIN fees after *Loving*, tax-return preparers brought this class-action lawsuit in late 2014. The complaint asserts two claims. The first claim—and the only one before this Court on appeal—is purely legal: that the IRS lacks authority to charge the fee because doing so "constitutes unlawful agency action under the Administrative Procedure Act, 5 U.S.C. § 706(2)," and because "preparers receive no specific or special benefit or thing of value in registering for and obtaining a PTIN," as required by the IOAA, 31 U.S.C. § 9701. J.A.24. The second claim, by contrast, is fact-intensive: even if the IRS has legal authority, "the fees charged exceed the amount that can be charged under 31 U.S.C. § 9701, as they include costs attributable to the public benefit and do not reasonably reflect the value of the specific service for which they are charged." J.A.25. Because the first claim, if successful, would render the second claim moot, the court bifurcated the proceedings and considered dispositive motions addressing the first count alone. Dist. Ct. ECF Nos. 51 & 52.

B. The district court holds that the PTIN fees are unlawful and grants summary judgment to the plaintiffs.

The district court granted the plaintiffs' motion for summary judgment and invalidated the fees. The court rooted its holding in the IOAA, "find[ing] that

PTINs do not pass muster as a 'service or thing of value' under the government's rationale." J.A.192.

In support of this conclusion, the court easily disposed of the IRS's claim that the PTIN regulations are "completely separate and distinct" from the regulation struck down in *Loving*, calling this argument "a stretch at best." J.A.189; J.A.192. The court then rejected the IRS's contention that the "service or thing of value" provided by the PTIN is the ability to prepare returns for compensation: "Granting the ability to prepare tax returns for others for compensation—the IRS's proposed special benefit—is functionally equivalent to granting the ability to practice before the IRS. The D.C. Circuit has already held, however, that the IRS does not have the authority to regulate the practice of tax return preparers." J.A.193–94.

Canvassing the case law, the court explained that "the D.C. Circuit cases finding that a fee was permissible under the IOAA generally concern valid regulatory schemes, as opposed to the situation here where the regulatory scheme was struck down." J.A. 194–95. The court could not find any precedential opinion "in which an agency has been allowed to charge fees under the IOAA for issuing some sort of identifier when that agency is not allowed to regulate those to whom the identifier is issued." J.A.197. Further, the court remarked, "it is no longer the case that only a subset of the general public may obtain a PTIN and prepare tax returns for others for compensation"—the special benefit originally identified by

the IRS. *Id.* Anyone can now do so. If a benefit exists after *Loving*, the court concluded, "it inures to the IRS." *Id.* Because the court found that the fee is unauthorized under the IOAA, it did not reach the plaintiffs' alternative argument that the fee is arbitrary and capricious because there is no "valid justification" for it after *Loving*. J.A.191.[5]

STANDARD OF REVIEW

This Court gives fresh review to a grant of summary judgment. *District Hosp. Partners, L.P. v. Burwell*, 786 F.3d 46, 54 (D.C. Cir. 2015). Further, "[u]nder the APA, judicial review of an agency decision is typically limited to the administrative record." *Kappos v. Hyatt*, 566 U.S. 431, 438 (2012).

SUMMARY OF ARGUMENT

The IRS's imposition of PTIN fees is unlawful for two independent reasons: (1) the agency lacks statutory authority to charge the fees under the IOAA, and (2) even if it had the bare statutory authority, the reasons the IRS gave for charging the fee are impermissible in light of *Loving*, and thus inadequate under the APA.

[5] The court did, however, discuss the IRS's justifications for the PTIN requirement (as opposed to the fee requirement). The court noted that the IRS "offered several justifications" but mentioned only one: "the need to identify tax return preparers in order to maintain oversight." J.A.190. Although the court thought that this justification might sustain the PTIN requirement, *id.*, it was unable to identify any reason why the requirement would be necessary to further this purpose, or what "oversight" the number would help maintain.

I.A. The IOAA allows agencies to charge user fees for services that they provide, but only if the services confer "special benefits" on those who pay the fee. *NCTA*, 415 U.S. at 343. Were it otherwise, people "would be paying not only for benefits they received but for the protective services rendered [by the agency] to the public." *Id.* at 341. That would convert the fee into a tax, and "under our constitutional regime" Congress is "the sole organ for levying taxes." *Id.* at 340–41. Unlike a tax, a fee "is incident to a voluntary act, *e.g.*, a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcast station." *Id.*

In that paradigmatic context—the licensing context—an agency "may exact a fee for administering any procedures reasonably necessary to ensure that [the statutory licensing] eligibility criteria have been met." *Seafarers Int'l Union N. Am. v. U.S. Coast Guard*, 81 F.3d 179, 185 (D.C. Cir. 1996). But the agency may not "add [unauthorized] licensing procedures and then charge a user fee." *Id.* at 186.

B. That is what happened here. When the IRS imposed the PTIN fee, it claimed the authority to add substantive licensing criteria to the PTIN application process, for which it could charge a fee. But *Loving* held that the IRS lacks licensing authority over tax-return preparers. The only authority the agency has over them is to require that they include an identifying number on the returns they prepare,

and to change this number from the preparer's social security number (the statutory default) to something else. 26 U.S.C. § 6109(a)(4) & (d).

As the district court correctly held, the IRS did not confer a special benefit on preparers by exercising this limited authority and switching the identifying number to a PTIN. Only "if the new system was indeed beneficial to the members of the industry" may the IRS charge a fee for it. *Fed. Power Comm'n v. New England Power Co.*, 415 U.S. 345, 351 (1974). But here, the "new system" was intended to be a regulated industry with an occupational-licensing requirement. And the intended benefit was all the privileges that come with having access to that regulated industry, as this Court has repeatedly recognized. Divorced from this licensing scheme, however, the decision to go from using one number to another is not "beneficial to the members of the industry," *id.*, and no case holds that it is.

It is true that, generally speaking, an agency may charge to "assist a person in complying with his statutory duties." *Elec. Indus. Ass'n, Consumer Elecs. Grp. v. FCC*, 554 F.2d 1109, 115 (D.C. Cir. 1976). But this Court made that general statement in a case involving occupational-licensing fees imposed by an agency with unquestioned licensing authority, as a charge for administering procedures necessary to ensure compliance with substantive licensing criteria. The only requirement in this case, by contrast, was imposed by the agency, under a statute that exists for the benefit of the agency.

The IRS points to two examples outside the occupational-licensing context: filing fees in immigration proceedings and passport fees. Neither is helpful. The first covers the service of adjudicating one's case under the immigration laws; the person who pays receives an opportunity to avoid deportation, an "obvious, substantial, and direct benefit" to that person. *Ayuda, Inc. v. Att'y Gen.*, 848 F.2d 1297, 1301 (D.C. Cir. 1988). And passport fees are set by a specific statute—not by the IOAA. In any event, they too are part of a comprehensive regulatory regime with strict eligibility criteria. The benefit one receives is not just getting over the hurdle of paying the fee—it's that the State Department has determined that she is authorized to travel internationally, under the protection of the United States.

II.A. Under the APA, an agency "must give adequate reasons" whenever it acts, but especially when it changes its policy. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). In such cases, the agency must "show that there are good reasons for the new policy," *id.* at 2126, and that they fall within the scope of the agency's authority. If the agency failed to identify a good reason or relied on impermissible considerations, its action was unlawful under the APA—even if the agency could have conceivably identified a permissible justification.

B. The IRS did not provide a permissible justification. When it changed its policy to begin requiring preparers to obtain and pay for a PTIN, the IRS justified the requirements as necessary only to support its unauthorized licensing attempt.

The IRS expressly relied on the fact that the process for obtaining a PTIN would "become significantly more expansive and intricate with the implementation of the registered tax return preparer program"—requiring the agency to perform "checks [that] were not previously performed as a prerequisite to obtaining a PTIN"—which would "significantly increase" the cost. 75 Fed. Reg. at 43,111–13. But Congress did not condone "that vast expansion of the IRS's authority." *Loving*, 742 F.3d at 1021. So reliance on this factor is improper.

The IRS's "special benefit" analysis was also based on an incorrect view of its authority. The IRS said that, because only some people could "obtain a PTIN, only a subset of the general public is entitled to a PTIN and the special benefit of receiving compensation for the preparation of a return that it confers." 75 Fed. Reg. at 60,317. But, again, the IRS may not confer this benefit in light of *Loving*.

Finally, the IRS mentioned the new PTIN requirement as justification for the fee. But that requirement was intended to serve "two overarching objectives." 75 Fed. Reg. at 60,310. The first was to provide assurance to taxpayers that their preparers are qualified; the second was to improve the accuracy of tax returns. Both are rooted in the unauthorized licensing program, and thus impermissible.

In sum, because the fee was "solely grounded in" impermissible justifications, and the IRS did not "articulate some valid reason" for it, the fee is unlawful. *Haw. Longline Ass'n v. Nat'l Marine Fisheries Serv.*, 281 F. Supp. 2d 1, 28–29 (D.D.C. 2003).

ARGUMENT

THE IRS HAS UNLAWFULLY COLLECTED PTIN FEES.

This Court held in *Loving* that the IRS lacks statutory authority "to regulate tax-return preparers" and invalidated its substantive licensing requirements. 742 F.3d at 1015. As the Court put it: Congress did not "contemplate[] that vast expansion of the IRS's authority," nor had the agency itself "ever suggest[ed] that it possessed this authority" in the 125 years before. *Id.* at 1021. The question in this appeal is whether a vestige of this failed integrated licensing scheme—the annual PTIN fee intended to fund it—may live on and exist independently of that scheme.

For two reasons, it may not. *First*, as the district court correctly held, the sole statute on which the IRS relied to authorize the fee, the IOAA, does not apply here because Congress did not grant the IRS any licensing authority over tax-return preparers, so the fee does not confer a "special benefit" under the IOAA.

Second, even if the IRS had statutory authority to impose a fee as a general matter, the reasons it gave for exercising that authority and requiring tax-return preparers to pay for a PTIN were based entirely on the IRS's unauthorized attempt to regulate preparers more broadly, making the fee unlawful under the APA.

I. The fee is unlawful because a PTIN is merely an identifying number, and thus does not confer a "special benefit" under the IOAA, as the district court correctly held.

A. The IOAA's user-fee framework

We begin with the question of statutory authority. The IOAA permits an agency to charge a user fee for "each service or thing of value" that it provides. 31 U.S.C. § 9701(a). In interpreting this statute, the Supreme Court has "read the Act narrowly to avoid constitutional problems." *NCTA*, 415 U.S. at 342; *see New England Power*, 415 U.S. 345; *Nat'l Ass'n of Broadcasters v. FCC*, 554 F.2d 1118, 1129 n.28 (D.C. Cir. 1976). Because agencies may not constitutionally impose taxes on their own—that is the job of Congress, and Congress alone, *see* U.S. Const. art. I, § 8, cl. 1—any user fee that an agency charges under the IOAA must be "for a service that confers a specific benefit upon an identifiable beneficiary," as opposed to the public at large, and must be limited to the costs of providing that service. *Engine Mfrs. Ass'n v. EPA*, 20 F.3d 1177, 1180 (D.C. Cir. 1994).

As the Supreme Court long ago explained, a fee (unlike a tax) "connotes a 'benefit,'" and "is incident to a voluntary act"—the paradigmatic example being "a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcast station." *NCTA*, 415 U.S. at 340–41. Under the IOAA, the agency that provides those services "normally may exact a fee" because it "bestows a benefit on the applicant, not shared by other members of society." *Id.*

But an agency may not impose fees "for an independent public interest served," *Nat'l Ass'n of Broadcasters*, 554 F.2d at 1128, for that would take the agency "far from its customary orbit and put[] it in search of revenue in the manner of an Appropriations Committee." *NCTA*, 415 U.S. at 341. The IOAA's goal is to make agency programs conferring benefits on recipients "self-sustaining to the extent possible." 31 U.S.C. § 9701(a). It is not to turn them into profit centers to fund agency activities more broadly.

In the context of occupational licensing, this Court has laid down the framework to apply when "deciding whether an agency may exact a fee" under the IOAA. *Seafarers*, 81 F.3d at 185. The Court should first "turn to the relevant statute to determine the substantive requirements underlying the license. Then, the proper inquiry is whether the actual licensing procedures adopted by the agency are sufficiently related to the statutory criteria to justify assessing a fee." *Id.* If so, the agency may charge "a user fee for license applicants." *Id.* at 186. Otherwise, it may not. *Id.*

Under this framework, an agency "charged with ensuring that all those receiving licenses meet certain job-related eligibility criteria . . . may exact a fee for administering any procedures reasonably necessary to ensure that those particular eligibility criteria have been met." *Id.* at 185; *see also Engine Mfrs. Ass'n*, 20 F.3d at 1180 ("In a regulated industry, a certificate of approval is deemed a benefit specific to the

recipient."). But "it should be clear that an agency is not free to add [unauthorized] licensing procedures and then charge a user fee merely because the agency has general authority to regulate in a particular area." *Seafarers*, 81 F.3d at 186. Nor may an agency charge a fee for something that serves "principally to benefit the public generally." *Ayuda*, 848 F.2d at 1301.

B. The PTIN fee has no basis in existing IOAA jurisprudence.

1. When the IRS began imposing PTIN fees, it took the position that it had authority to mandate licensing criteria for return preparers under 31 U.S.C. § 330. But this Court held in *Loving* that "Section 330 does not encompass tax-return preparers," thus eliminating that statute as a basis for agency oversight. 742 F.3d at 1021. The only other statute that gives the IRS any authority over return preparers, then, is 26 U.S.C. § 6109, entitled "Identifying numbers." This statute does two relevant things: Subsection (a)(4) says that "[a]ny return or claim for refund prepared by a tax return preparer shall bear such identifying number for securing proper identification of such preparer" as "may be prescribed." Subsection (d), in turn, provides that the preparer's social security number "shall . . . be used as the identifying number" unless "otherwise . . . specified" by regulation.

Congress created these provisions for the benefit of the IRS, not return preparers. When Congress first enacted subsection (a)(4), preparers were required to disclose their social security numbers "to enable the IRS to identify all returns

prepared by a specific individual in cases where the IRS has discovered some returns improperly prepared by that individual." J.A.40. Congress provided for this "[d]isclosure requirement[]," in other words, "to aid the Internal Revenue Service in detecting incorrect returns prepared by tax return preparers"—not to bestow a benefit on those preparers. H.R. Rep. No. 94–658, at 275, 277 (1975), *reprinted in* U.S.C.C.A.N. 3171, 3173. When Congress later amended subsection (d) to give the IRS the limited authority to change the identification number from the social security number to something else, it did so out of concern "that inappropriate use might be made of a preparer's social security number," S. Rep. No. 105-174, at 106 (1998)—a concern the IRS later addressed by allowing preparers to omit their identifying numbers from the taxpayer's copy of the return, 73 Fed. Reg. at 78,432.

The IOAA question in this case, therefore, is one that this Court has never confronted: When an agency lacks licensing authority over members of a particular occupation—and has only the limited authority to change the members' identifying numbers from their social security numbers to something else—has the agency conferred a "special benefit" on those members by exercising that authority and assigning them a new number?

2. The IRS says that the answer is yes, but no authority supports this position. As the district court noted, there is no case "in which an agency has been allowed to charge fees under the IOAA for issuing some sort of identifier when that

agency is not allowed to regulate those to whom the identifier is issued, and the government has not pointed to any." J.A.197. Most of this Court's cases upholding a user fee under the IOAA involved a licensing scheme created by Congress, with substantive requirements that the agency had authority to implement, "as opposed to the situation here where the regulatory scheme was struck down." J.A.195.

One case, for example, upheld fees imposed by the FCC on telecommunications companies for obtaining "operating license[s]," "station construction permit[s]," "equipment testing and approval," and "tariff filings." *Elec. Indus. Ass'n*, 554 F.2d at 1115–16. These fees conferred "an independent private benefit" because they allowed the companies, by complying with substantive statutory requirements, to gain access to a regulated market and the benefits that come along with that, including "marketing a quality product," "credibility in the market place," and "a means for [each company] to obtain its revenues and to regulate subscriber use of its facilities." *Id.* at 1115–16.

Another case upheld fees charged by the EPA to automobile manufacturers for obtaining a statutorily required certificate of compliance showing that their vehicles satisfied emissions standards set by Congress. *Engine Mfrs. Ass'n*, 20 F.3d at 1179–80. This Court explained that the certificate provided a special benefit because it was "necessary in order [for the manufacturer] to keep its product certified for sale" in the regulated market. *Id.* at 1180.

Other cases authorizing user fees in the licensing context likewise hold that what makes a license "valuable," in IOAA terms, is that an agency "has undertaken to regulate [an] industry" and thereby created a set of eligibility criteria and licensing requirements as part of a broader regulatory scheme. *Nat'l Cable Television Ass'n v. FCC*, 554 F.2d 1094, 1101–02 (D.C. Cir. 1976); *see also, e.g.*, *Seafarers*, 81 F.3d at 181, 185–86 (allowing fees to recoup those costs "reasonably necessary to fulfill the substantive demands underlying the licensing procedures authorized by [Congress]").

This is in keeping with the Supreme Court's recognition that a permit or occupational license is the paradigmatic example of a permissible user fee. *See NCTA*, 415 U.S. at 340–41 (explaining that a user fee may be charged to "permit an applicant to practice law or medicine or construct a house or run a broadcast station"). And it is in keeping with federal user-fee policy, as set forth in OMB Circular A–25, which states that special benefits are those that enable beneficiaries to obtain "immediate or substantial gains or values," like "a license to carry on a specific activity or business." 58 Fed. Reg. 38,142, 38,144 (July 15, 1993). Regulated professions like law or medicine, with requirements such as specialized training and continuing education that support the need for licensing, are fields in which not everyone can participate. Hence the black-letter rule that, "[i]n a regulated industry," a license or "certificate of approval is deemed a benefit specific to the

recipient," because it gives them "the right to sell their products" in the regulated market. *Engine Mfrs. Ass'n*, 20 F.3d at 1180.

But tax-return preparation is not a regulated industry. Congress never "authorized a license requirement," *Seafarers*, 81 F.3d at 186, nor placed any substantive conditions on who may prepare tax returns on behalf of others for compensation, *see Loving*, 742 F.3d at 1021 ("[T]he IRS currently has no authority to license preparers[.]"). "These acts can be performed by anyone." *Id.* (quotation marks omitted). Thus, as the IRS conceded below, there are now no "requirements or restrictions" on who may obtain a PTIN. *See* Dist. Ct. ECF No. 50, at 10. As a result, it is no longer true that "only a subset of the general public is entitled to a PTIN and the special benefit of receiving compensation for the preparation of a return that it confers." 75 Fed. Reg. at 60,317. Anyone may do so.[6]

If Congress had wanted to confer licensing authority, it knew how. It expressly authorized the IRS, for example, to regulate what are known as "enrolled agents"—tax practitioners who represent taxpayers in adversarial proceedings—to ensure that they are "properly licensed to practice" before the agency. 31 U.S.C. § 330(b). Congress even specified the licensing criteria. *See id.* § 330(a). Enrolled agents thus pay a $30 fee every three years to maintain what the IRS calls its "highest credential." IRS, *Enrolled Agent Information*, https://perma.cc/FX4T-

[6] Although the IRS now says (at 13 n.9) that it does not issue PTINs to minors, it does not say where it gets the authority to impose such a requirement.

BQX8. In a similar vein, Congress expressly granted the IRS licensing power over people in the business of collecting "foreign payments of interest or dividends by means of coupons, checks, or bills of exchange," specifically requiring them to "obtain a license" from the IRS. 26 U.S.C. § 7001(a). Congress did nothing remotely similar for tax-return preparers.

So even if an agency, as a general matter, "is entitled to charge for services which assist a person in complying with his statutory duties" in a regulated industry, that is not what's going on here. *Elec. Indus. Ass'n*, 554 F.2d at 1115. For one thing, the requirement that preparers obtain a PTIN is not a statutory requirement with substantive standards that is "*designed for their benefit*," *Cent. & S. Motor Freight Tariff Ass'n v. United States*, 777 F.2d 722, 735 (D.C. Cir. 1985); it is an agency-created requirement with no standards, designed to benefit the IRS (if it benefits anyone at all). Again, the sole statute that gives the IRS authority to impose that very limited identification requirement, section 6109, was enacted for the benefit of the IRS; it was not "passed in large measure for the benefit of the individuals, firms, or industry upon which the agency [now] seeks to impose a fee." *Id.* at 734. Indeed, when the IRS exercised its authority under that statute, and moved from a regime in which "PTINs were previously issued solely for the convenience of tax return preparers" to one in which they were required, the IRS said that "PTINs will now be used to collect and track data on tax return preparers," which "will provide

important benefits *to the IRS*," 75 Fed. Reg. at 43,113 (emphasis added), and "benefit taxpayers and tax administration *as a whole*," 75 Fed. Reg. at 60,318 (emphasis added). But an agency may not charge a fee for a requirement that serves "principally to benefit the public generally." *Ayuda*, 848 F.2d at 1301.

For another thing, *Loving* makes clear that tax-return preparation is not a regulated industry because the IRS has no licensing authority. And "it should be clear that an agency is not free to add [unauthorized] licensing procedures and then charge a user fee" for carrying out those procedures. *Seafarers*, 81 F.3d at 186.

It is this feature—the IRS's utter lack of any licensing authority—that makes this case fundamentally different from the precedent cited by the agency. That includes the Eleventh Circuit's decision in *Brannen v. United States*, 682 F.3d 1316 (11th Cir. 2012). That case came well before this Court's decision in *Loving*, and was thus decided against the backdrop of a licensing regime that was still in effect, and whose lawfulness had not been challenged before the Eleventh Circuit. That alone distinguishes that case from this one. And *Brannen* had no occasion to examine the permissibility of the IRS's asserted rationale for the PTIN regulations, which turns on the illegality of the larger scheme, and which is squarely presented here.

3. To support its view that it has authority to charge money for a PTIN, the IRS relies on two examples of fees imposed outside the licensing context altogether: fees for immigration appeals and passport fees. Neither example helps the IRS.

First, the IRS points to the filing fees for immigrants to appeal or apply "for a stay of a final deportation order," which this Court upheld in *Ayuda*, 848 F.2d at 1298. But these are user fees, like those routinely charged by the courts, that enable the government to provide a service directly to the person who pays—in this example, the service of processing and adjudicating that person's case under a comprehensive regulatory regime governing immigration. Any appeal or request for stay of a deportation order is, in effect, a request for action on an application for permission to remain in the country. *See* 8 U.S.C. § 1225(a)(1) (providing that any alien who "arrives in the United States," or "is present" in this country but "has not been admitted," is treated as "an applicant for admission"). The fee covers the costs of following procedures that give the applicant an opportunity to appeal a negative decision with respect to his or her own case, and thereby avoid deportation, thus "redound[ing] to the obvious, substantial, and direct benefit" of the person who "invoked [them]." *Ayuda*, 848 F.2d at 1301. As a result, the fees cannot "be characterized as an [agency] effort to charge for activities that are carried on principally to benefit the public generally." *Id.*

But PTIN fees are different. As discussed above, section 6109's disclosure requirement was created for the benefit of the IRS, not the preparer. And the IRS admitted that its PTIN requirement was designed "to provide important benefits to the IRS." 75 Fed. Reg. at 43,113. Moreover, the IRS provides no service to a

preparer that is remotely analogous to when an agency conducts an appeal for a specific individual. Instead, the IRS (or rather, a third-party vendor) just assigns the preparer a nine-digit number to be used on tax filings, and then reissues that number (for another fee) every year thereafter. In some other contexts, the assignment of such a standardized number might be the way that an agency confers a license or permit. But here, the number is not a special benefit under the IOAA because the IRS has no authority to regulate the return-preparer industry.

The IRS's second example is even less applicable. The IRS cites a footnote from *New England Power* that in turn quotes a 1959 White House Circular, in which OMB listed a passport as something that would, in OMB's view, provide a special benefit under the IOAA. *See* 415 U.S. at 349 n.3. The Supreme Court, however, did not express its own view on this specific example. And passport fees, in any event, are not subject to the IOAA's requirements because they are authorized by a different statute, 22 U.S.C. § 214, just like national-park fees, which the district court addressed, *see* J.A.197–98.

Even if passport fees were not separately authorized by statute, the example would still just illustrate the flaws in the IRS's reasoning. A passport functions as a "permit to enter" this country; a citizen may not legally "depart from or enter" the United States without one. 8 U.S.C. §§ 1185(b) & (f). Passport fees are user fees charged as part of a comprehensive regulatory regime, developed and administered

by the State Department, to oversee the process of deciding who gets a passport. *See generally* 22 C.F.R. § 51.60. Passports may not be issued to those who are in default on a loan from the federal government, 22 U.S.C. § 2671(d)(3), to those who are in arrears on child support, 42 U.S.C. § 652(k), or to certain covered sex offenders, 22 U.S.C. § 212b. *See* 22 C.F.R. § 51.60(a). And the State Department has substantial discretion to refuse passports to persons who, for instance, have outstanding warrants, are committed to a mental institution, are the subject of extradition requests, or are a threat to national security. 22 C.F.R. § 51.60(b)–(f). The benefit that accrues to an individual when she pays the passport fee is not simply that she gets over the hurdle of paying the fee—it's that the State Department has administered this regulatory regime and determined that she is authorized to travel internationally without hindrance, and with the protection of the U.S. Government and its consular services.

A PTIN, by contrast, is completely unattached to any broader regulatory or licensing scheme and confers no special benefit. The only benefit that a person gets by paying for a PTIN is satisfying the IRS's requirement to have a PTIN. That is not the kind of service or special benefit conferred in response to a "voluntary act" that Congress had in mind when it authorized user fees under the IOAA. *NCTA*, 415 U.S. at 340. The satisfaction of an agency-imposed payment requirement cannot be the sole benefit for which the agency may justify that very same

payment. As the district court observed, J.A.197, the IRS cites no precedent where a court has found that charging a user fee solely for the issuance of an identifying number—without any valid licensing or regulatory scheme with eligibility requirements—passes muster under the IOAA, much less that this is "precisely" what Congress envisioned in enacting that statute, as the IRS now claims (at 35). Indeed, the IRS does not cite another example of any agency even attempting to impose a user fee simply for issuing an identification number. And the IRS itself issues several other numbers for free, including Electronic Filing Identification Numbers (or EFINs), which allow the holder to electronically file tax returns.[7]

On the IRS's argument, moreover, the Social Security Administration could have charged a fee for the issuance of a social security number before 2010, on the theory that it conferred the ability "to lawfully earn a living" preparing tax returns. IRS Br. 35. A PTIN, after all, is just an identifying number that has now taken the place of the social security number under section 6109(d); it cannot confer on someone the ability to prepare returns any more than a social security number did.

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[7] It is unclear that preparing returns for others without including a PTIN is even unlawful, or that the IRS has authority to prevent anyone from doing so. Granted, a preparer may have to pay a $50 penalty to the IRS for each return that omits a PTIN. 26 U.S.C. § 6695(c). But that penalty would be for failing to disclose the number—not for the unauthorized filing of a return. *Cf. NFIB v. Sebelius*, 567 U.S. 519, 574 (2012) (explaining that the "imposition of a tax"—a payment required by the tax code, enforced by the IRS, and deposited into the Treasury—"leaves an individual with a *lawful choice* to do or not do a certain act, so long as he is willing to pay a tax levied on that choice" (emphasis added)). And the avoidance of a *penalty* imposed by the IRS can't be the sole benefit authorizing a *fee* imposed by the IRS.

The central flaw in the IRS's argument can be illustrated by a single question: If anyone may prepare tax returns for others—as has been the general rule in this country since the federal income tax was established—then what special benefit does a PTIN confer? If the IRS's PTIN fee requirement were all that was needed to justify itself, then agencies across the federal government would feel free to raise revenue by attaching fees to freestanding requirements that are not part of any broader regulatory or licensing regime, and so provide no real, discernible benefit. That would thwart the purposes of the IOAA, marking "a sharp break with our traditions" and encouraging agencies to stray "far from [their] customary orbit" and seek out "revenue in the manner of an Appropriations Committee of the House." *NCTA*, 415 U.S. at 341. As generous as this Court's interpretation of the IOAA has been, the statute must stop somewhere. *See Ayuda*, 848 F.2d at 1301 (Silberman, J., concurring) (expressing "doubt that an opportunity to appeal a deportation order is a 'service or thing of value'"). If this case is not that stopping point, it is hard to imagine what would be. [8]

[8] The IRS also briefly argues (at 43–44) that a PTIN confers "a 'special benefit' because it protects preparers' social security numbers." But, as the district court recognized, this "confidentiality" concern "is not discussed in the regulation specifically addressing user fees." J.A.198. Nor does the IRS explain why, if this were the real reason for the PTIN regulations, the old regime—allowing preparers to use *either* their social security number *or* a PTIN, and to omit this number from the taxpayer's copy—failed to protect the confidentiality of social security numbers. The IRS's cannot excuse its failure by invoking (at 44) "concerns that Congress

II. The fee is unlawful because the IRS justified the PTIN program based entirely on its unauthorized attempt to license tax-return preparers—an impermissible reason.

Even if the IRS had the bare statutory authority to impose a PTIN fee under the IOAA (or if this Court simply wishes to avoid deciding that question), there is a narrower ground for affirmance: The fee is unlawful because the reasons the IRS gave for requiring preparers to obtain and pay for a PTIN—after years of requiring neither—are improper under *Loving*, and thus inadequate under the APA.

A. The IRS was required to show that there were good reasons for imposing the fee, consistent with its statutory authority.

A bedrock principle of "administrative rulemaking is that an agency must give adequate reasons for its decisions." *Encino Motorcars*, 136 S. Ct. at 2125. If those reasons "are inadequate or improper, the court is powerless to affirm the administrative action." *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

So when an agency changes an existing policy and adopts a new one—as the IRS did when it began requiring tax-return preparers to obtain and pay for a PTIN after doing neither for decades—it "must . . . show that there are good reasons for the new policy." *Encino Motorcars*, 136 S. Ct. at 2126; *see also Williams Gas Processing–Gulf Coast Co. v. FERC*, 475 F.3d 319, 326 (D.C. Cir. 2006). And those reasons must be "in accord with the agency's proper understanding of its

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expressed when it amended § 6109" in 1998, because preparers didn't then *have* the option of omitting their identification numbers from the taxpayers' copy.

authority." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 536 (2009) (Kennedy, J., concurring). If they are not—"if the agency has relied on factors which Congress has not intended it to consider"—then its action must be invalidated as "arbitrary and capricious," *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), or as "not in accordance with law" under the APA. 5 U.S.C. § 706.

That is true even if the agency could conceivably have offered some permissible justification for its action. "It is not the role of the courts to speculate on reasons that might have supported an agency's decision." *Encino Motorcars*, 136 S. Ct. at 2127. Quite the opposite: "an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *State Farm*, 463 U.S. at 50. If a court finds that the agency's "stated rationale for its decision is erroneous, [it] cannot sustain [the agency's] action on some other basis the agency did not mention." *PDK Labs. Inc. v. U.S. DEA*, 362 F.3d 786, 798 (D.C. Cir. 2004); *see also MCI Telecomms. Corp. v. FCC,* 10 F.3d 842, 846 (D.C. Cir. 1993) ("A decision resting solely on a ground that does not justify the result reached is arbitrary and capricious."). Thus, a court must "set aside agency regulations"—even those that are "within the agencies' scope of authority"—if they "are not supported by the reasons that the agencies adduce," or if those reasons are impermissible. *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998).

In the user-fee context, moreover, "[i]t is essential that an agency make clear the basis for a fee it assesses under the IOAA, so that a reviewing court can determine" its legality—that is, whether the agency is truly providing a "special benefit" to the recipient. *NCTA*, 554 F.2d at 1097; *see also id.* OMB Circular A–25, 58 Fed. Reg. at 38,146 (agencies must "[d]etermine the extent of the special benefits provided" to impose a user fee).

B. The IRS did not identify any justification for the fee that can withstand *Loving*.

1. Applying these principles here, the requirements that preparers pay for a PTIN may be sustained only if the IRS clearly identified in its rulemaking a good reason for that fee that is consistent with its delegated authority. It did not come close to doing so. The IRS justified the PTIN fee as necessary only to support its broader effort to regulate return preparers by imposing eligibility criteria, which Congress did not authorize. *See Loving*, 742 F.3d at 1021–22. Because the fee was "solely grounded in" the cost of implementing an invalid regulatory scheme—and the IRS did not "articulate some valid reason for the continued application" of the requirement apart from the larger scheme itself—the fees are "arbitrary and capricious under the APA." *Haw. Longline Ass'n*, 281 F. Supp. 2d at 28–29.

To see why the fee requirement is inextricably tied to the IRS's failed regulatory scheme, just look at the notice of proposed rulemaking. Here, the IRS

explained why it was changing its policy of issuing PTINs "without charging a user fee." 75 Fed. Reg. at 43,111. It is worth quoting the IRS's explanation in full:

> The IRS currently issues PTINs to tax return preparers without charging a user fee. The PTIN application, issuance, and renewal process, however, will become significantly more expansive and intricate with the implementation of the registered tax return preparer program. Federal tax compliance checks will be performed on all individuals who apply for or renew a PTIN. Suitability checks will be performed. The IRS will further investigate individuals when the compliance or suitability check suggests that the individual may be unfit to practice before the IRS. These checks were not previously performed as a prerequisite to obtaining a PTIN.
>
> Additionally, the IRS will establish and implement a reconsideration process for individuals who apply to become a registered tax return preparer and are denied a PTIN upon initial application or renewal. The IRS will incur costs to apply existing Circular 230 procedures when those individuals who are certified public accountants, attorneys, enrolled agents, or registered tax return preparers are denied renewal of a PTIN.

75 Fed. Reg. at 43,111. Not one sentence of this explanation is permissible under *Loving*. There is simply nothing in it to suggest that the IRS would have imposed a fee had it been operating under a proper conception of its authority. That is fatal under the APA.

But that is not all. On the next page, the IRS provided its "description of the reasons why action by the agency is being considered." 75 Fed. Reg. at 43,112 (initial capitalization removed). The key part is as follows:

> Except as provided in any transitional period, only attorneys, certified public accountants, enrolled agents, or registered tax return preparers may apply for a PTIN. Thus, only attorneys, certified public

> accountants, enrolled agents, and registered tax return preparers will be eligible to prepare all or substantially all of a tax return or claim for refund. By limiting the individuals who may prepare all or substantially all of a tax return or claim for refund to individuals who have a PTIN, the IRS is providing a special benefit to the individuals who obtain a PTIN. There are costs to the IRS that are associated with processing a PTIN application and providing the special benefits associated with the PTIN.

Id. The IRS said the same thing in the preamble to the final rule. *See* 75 Fed. Reg. at 60,319. It was clear on this score: "Because only attorneys, certified public accountants, enrolled agents, and registered tax return preparers are eligible to obtain a PTIN, only a subset of the general public is entitled to a PTIN and the special benefit of receiving compensation for the preparation of a return that it confers." 75 Fed. Reg. at 60,317. In other words, by creating eligibility criteria, the IRS would use the PTIN to bestow on certain people "the ability to prepare all or substantially all of a tax return." 75 Fed. Reg. at 43,112. But, again, the IRS does not have this licensing authority. So here, too, the agency was acting under a mistaken understanding of its statutory authority.[9]

[9] This is the only asserted special benefit. The rulemaking does not mention protecting the confidentiality of preparers' social security numbers, which was the sole reason that Congress gave for granting the IRS authority to assign a new identifying number. If anything, the IRS made clear that it was *not* addressing confidentiality concerns. It explicitly contrasted the old regime, where PTINs were "issued solely for the convenience of tax return preparers," 75 Fed. Reg. at 43,113, with the new regime, where PTINs would allow the IRS to "enforce the regulation of tax return preparers," 75 Fed. Reg. at 60,318.

Then there's the final page of the notice of proposed rulemaking. On this page, the IRS reiterated that it was changing its policy and charging a fee primarily because of the (now-invalidated) "registered tax return preparer program." 75 Fed. Reg. at 43,113. Because of that program, the agency said, "the IRS will now perform Federal tax compliance checks and perform suitability checks prior to the issuance of a PTIN," which would "significantly increase the intricacy of the application process," and thus the cost. *Id.* "Previously, neither of these checks was performed before a PTIN was issued." The IRS added: "When the initial compliance and suitability checks suggest that the individual applying for a PTIN may not be fit to practice before the IRS, the IRS will conduct an investigation. For individuals who are found unfit to receive a PTIN, the IRS will develop and implement a reconsideration process." *Id.*

Again, none of these justifications can withstand *Loving*. They are all based on the agency's unfounded belief that it had authority to use the PTIN as an occupational license, with substantive criteria. It did not.

The IRS also briefly noted in two places that the new PTIN requirement "will increase the number of PTIN applications to as many as 1.2 million applications," *id.*, and this "increase in demand for PTINs will require the IRS to expend more resources," 75 Fed. Reg. at 43,111. But these "resources" would be attributable almost entirely to "the registered tax return program," which would

"significantly increase the intricacy of the application process. 75 Fed. Reg. at 43,113; *see* 76 Fed. Reg. at 32,296 (breaking down costs the IRS sought to recover with the fee); J.A.50–51 (showing that nearly all the estimated costs would cover procedures now recognized to be unauthorized). There is no hint that the IRS would have reached the same conclusion had it known how hollow the application process would turn out to be.

Moreover, the reference to the PTIN requirement just underscores the impermissibility of the IRS's justifications. In imposing that parallel requirement, the IRS departed from its longstanding policy of allowing preparers to use their social security number and to obtain an optional PTIN for free. The reason it did so is no mystery. The creation of eligibility criteria triggered a need for a number that "only individuals who satisfy the eligibility standards may obtain and use." 75 Fed. Reg. at 14,541. By disallowing social security numbers, the IRS could "assign PTINs only to qualified, competent, and ethical tax return preparers," 75 Fed. Reg. at 60,314–15, converting it into a new "threshold requirement" to "enforce the regulation of tax return preparers," 75 Fed. Reg. at 60,318–19. [10]

[10] The IRS suggests (at 2) that, by not filing a cross-appeal, we have waived any argument that the fee is unlawful based on the inadequacy of the reasons given for the PTIN requirement. Not so. Although the district court denied the plaintiffs' summary-judgment motion "insofar as it argues that the IRS may not require the use of [PTINs]," J.A.200, the plaintiffs have never sought to invalidate the PTIN requirement itself. Rather, they seek invalidation and a refund of the *fees*—relief the court granted in full. J.A.202. Because the plaintiffs obtained all their requested

That was the sole impetus for the PTIN requirement, and the sole justification offered by the IRS in creating it. Indeed, the IRS identified "two overarching objectives" for the requirement—neither one of which is legitimate under *Loving*. 75 Fed. Reg. at 60,310. The first was "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." *Id.* The second was "to further the interests of tax administration by improving the accuracy of tax returns and claims for refund and by increasing overall tax compliance." 75 Fed. Reg. at 60,310. As *Loving* makes clear, Congress did not authorize either objective because it did not grant the IRS licensing authority. And replacing one identifying number with another, by itself, cannot accomplish either objective. So these factors, however desirable they might be, lie well outside the bounds of what the IRS could permissibly rely upon in its rulemaking.[11]

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relief, a cross-appeal "for the sole purpose of making an argument in support of the judgment" is not only unnecessary but "worse than unnecessary," *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 741 (D.C. Cir. 1995). Hence, this Court "encourage[s] such parties not to cross-appeal." *Jones v. Bernanke*, 557 F.3d 670, 676 (D.C. 2009).

[11] The district court noted the IRS's asserted "need to identify tax return preparers in order to maintain oversight," and its statement that "the use of a single identifying number was critical to such oversight." J.A.190–91. But the IRS thought that the PTIN was critical to "oversight" because it would enforce the unauthorized licensing scheme. And if the pure desire for a "single identifying number" were the real motivation, J.A.190, there was a tried-and-true solution to

The PTIN requirement, then, cannot provide the missing justification for the fee when it is apparent that the IRS was not operating under a proper conception of its authority. The IRS cannot use an unauthorized regulatory scheme to bootstrap a registration requirement, and then use that registration requirement to bootstrap a fee. No, the fee must rest on its own bottom. The IRS did not provide any good reason, in its original rulemaking, for how the fee hits that mark.

2. Nor did the IRS provide a permissible justification when it recalculated the fee after this suit was filed. Although it tried to downplay the original rationale for the PTIN regulations—a means to an unlawful end (occupational licensing)—the IRS did not submit a satisfactory reason for why it required preparers "to provide an identifying number on the return that is not an SSN" and then started charging for it. 80 Fed. Reg. at 66,793. In the final updated regulation, it said simply: "The ability to prepare tax returns and claims for refund for compensation is a special benefit, for which the IRS may charge a user fee to recover the full costs of providing the special benefit," 81 Fed. Reg. at 52,766—even though *Loving* held that the IRS has no power to confer this "ability" because it lacks licensing authority. And the agency's attempt to justify the fee is a model of bureaucratic obfuscation. Here it is in its entirety:

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the problem, and it would have cost nothing: The IRS could have just gone back to requiring preparers to use their social security numbers, as envisioned by Congress.

> The PTIN user fee is based on direct costs of the PTIN program, which include staffing and contract-related costs for activities, processes, and procedures related to the electronic and paper registration and renewal submissions; tax compliance and background checks; professional designation checks; foreign preparer processing; compliance and IRS complaint activities; information technology and contract-related expenses; and communications. The PTIN user fee also takes into account various indirect program costs, including management and support costs.

80 Fed. Reg. at 66,794.

What exactly this means is anyone's guess. Is the IRS continuing to conduct suitability testing even after *Loving*? If so, what gives it the statutory authority to do so? If not, and the vast majority of PTIN fees previously went to professional certification and suitability checks, then what is the IRS now doing with the money? And if the third-party vendor does everything necessary to issue a PTIN, then what benefit is the IRS providing to preparers? Regardless, courts may not accept "*post hoc* rationalizations for agency action"—particularly those offered once litigation is underway. *State Farm*, 463 U.S. at 50. And because the fee was clearly created to effectuate an unlawful licensing scheme, that justification is improper.

The IRS itself has previously acknowledged the interdependency of the PTIN fees and its failed return-preparer licensing scheme. Indeed, the IRS thought that the natural consequence of invalidating the licensing scheme in *Loving* was to invalidate the PTIN program created to facilitate and finance that scheme. As the IRS emphasized in *Loving*, "[t]he PTIN program and the registered tax-return-

preparer program are closely linked," J.A.161, in that they were created by "overlapping regulations" and share a common origin, purpose, computer system, and operating budget, J.A.130–31. Although the injunction in *Loving* did not formally cover the PTIN program, that was because the plaintiffs there disavowed any challenge to the requirement that preparers obtain and pay for a PTIN. *Loving v. IRS*, 920 F. Supp. 2d 108, 109 (D.D.C. 2013). Even with that disavowal, however, the IRS told this Court that affirming the district court's injunction would require the agency to "shut[] down the PTIN application system" and rebuild it. J.A.169. A sworn declaration from the director of the Return Preparer Office went further, saying that "[t]he combined PTIN and competency testing user fees" could "only be spent on *the registered tax return preparer program*." J.A.171 (emphasis added).

That mandatory licensing program no longer exists; the fees shouldn't either. Just as the IRS refunded the competency-testing fees after *Loving*, it should now be made to do the same for the PTIN fees.

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted,

/s/ Deepak Gupta

DEEPAK GUPTA
JONATHAN E. TAYLOR
DANIEL TOWNSEND
GUPTA WESSLER PLLC
1900 L Street, NW, Suite 312
Washington, DC 20036
(202) 888-1741
(202) 888-7792 (fax)
deepak@guptawessler.com

ALLEN BUCKLEY
LAW OFFICE OF ALLEN BUCKLEY LLC
2727 Paces Ferry Road, Suite 750
Atlanta, GA 30339
(678) 981-4689
ab@allenbuckleylaw.com

CHRISTOPHER S. RIZEK
CAPLIN & DRYSDALE, CHARTERED
One Thomas Circle, NW, Suite 1100
Washington, DC 20005
(202) 862-8852
crizek@capdale.com

Counsel for Plaintiffs-Appellees

WILLIAM H. NARWOLD
MOTLEY RICE LLC
One Corporate Center
20 Church Street, 17th Floor
Hartford, CT 06103
(860) 882-1676
bnarwold@motleyrice.com

MEGHAN S.B. OLIVER
MOTLEY RICE LLC
28 Bridgeside Boulevard
Mount Pleasant, SC 29464
(843) 216-9000
moliver@motleyrice.com

LOUIS BOGRAD
MOTLEY RICE LLC
401 9th Street, N.W., Suite 1001
Washington, DC 20004
(202) 386-9623
lbograd@motleyrice.com

March 30, 2018

CERTIFICATE OF COMPLIANCE WITH RULE 32(g)(1)

I hereby certify that my word processing program, Microsoft Word, counted 12,693 words in the foregoing brief, exclusive of the portions excluded by Rule 32(g)(1).

/s/ Deepak Gupta
Deepak Gupta

CERTIFICATE OF SERVICE

I hereby certify that on March 30, 2018, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. All participants are registered CM/ECF users, and will be served by the appellate CM/ECF system.

/s/ Deepak Gupta
Deepak Gupta

Addendum

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Register on November 17, 2009 [74 FR 59108].

DATES: Interested persons desiring to participate in this hearing must provide written notice of desired participation as set out below, on or before April 26, 2010.

The hearing will commence on May 4, 2010 at 10 a.m. at 600 Army Navy Drive, Arlington, VA 22202.

ADDRESSES: To ensure proper handling of notification, please reference "Docket No. DEA–333" on all correspondence. Written notification sent via regular or express mail should be sent to Hearing Clerk, Office of the Administrative Law Judge, Drug Enforcement Administration, 8701 Morrissette Drive, Springfield, VA 22152.

FOR FURTHER INFORMATION CONTACT: Hearing Clerk, Office of the Administrative Law Judge, Drug Enforcement Administration, 8701 Morrissette Drive, Springfield, VA 22152, Telephone (202) 307–8188.

SUPPLEMENTARY INFORMATION:

Background

On November 17, 2009, the Drug Enforcement Administration (DEA) published a Notice of Proposed Rulemaking (NPRM) in the **Federal Register** (74 FR 59108) to place the substance carisoprodol into schedule IV of the Controlled Substances Act (CSA) (21 U.S.C. 801, *et seq.*). The NPRM stated that, if this scheduling action were finalized, carisoprodol would be subject to the regulatory controls and criminal sanctions of schedule IV, as are applicable to the manufacture, distribution, dispensing, importation, and exportation of carisoprodol and products containing carisoprodol.

The NPRM invited interested parties to submit comments, objections, and requests for hearing on or before December 17, 2009. The DEA received 18 comments in response to the NPRM. Seventeen commenters strongly supported the control of carisoprodol. These commenters included health care providers, an organization representing pharmaceutical manufacturers and distributors, State regulatory agencies and State Departments of Health officials, law enforcement entities and one pain management association.

According to these commenters, carisoprodol products are being diverted, abused, misused, and sold on the street and from Internet sites without legitimate prescriptions. Commenters indicated carisoprodol is being abused with other controlled drugs such as opioids. There are incidences of pain patients addicted to carisoprodol.

While 17 comments were supportive of control, one commenter requested a hearing on the issue. This commenter stated that it believes "that the NPRM and the associated documentation do not provide substantial evidence to support the proposed scheduling of carisoprodol." Additionally, the petitioner stated that "the proposal gives inadequate weight to the negative impact on patient care of scheduling carisoprodol." In requesting a hearing, the commenter stated its intention to present factual information concerning the relative potential for abuse of carisoprodol, and expert opinion concerning the significance and reliability of data cited in the NPRM and associated materials.

All comments received in response to the NPRM are part of the administrative record and will be considered by DEA in determining whether to finalize the rule placing carisoprodol into schedule IV.

Hearing Notification

In response to this request, DEA is convening a hearing on the NPRM. Accordingly, notice is hereby given that a hearing in connection with this proposed scheduling action will commence on May 4, 2010, at 10 a.m. at the Drug Enforcement Administration, 600 Army Navy Drive, Arlington, VA 22202 and will continue until all interested persons, as that term is defined in 21 CFR 1300.01(b)(19), desiring to participate, who have given notice of such desire as prescribed below, have been heard. The hearing will be conducted pursuant to the provisions of 5 U.S.C. 556 and 557, and 21 CFR 1308.41–1308.45, and 1316.41–1316.68.

Every interested person desiring to participate in the hearing shall file a written notice of intention to participate, in duplicate, with the Hearing Clerk, Office of the Administrative Law Judge, Drug Enforcement Administration, 8701 Morrissette Drive, Springfield, VA 22152, on or before April 26, 2010. Each notice of intention to participate must be in the form prescribed in 21 CFR 1316.48. The commenter who requested the hearing is hereby directed to file with the Administrative Law Judge a notice of its continued intention to participate in the hearing and to state with particularity its interest in the proceeding.

Dated: March 21, 2010.

Michele M. Leonhart,

Deputy Administrator.

[FR Doc. 2010–6763 Filed 3–25–10; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–134235–08]

RIN 1545–BI28

Furnishing Identifying Number of Tax Return Preparer

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations under section 6109 of the Internal Revenue Code (Code) that provide guidance to tax return preparers on furnishing an identifying number on tax returns and claims for refund of tax that they prepare. These proposed regulations provide guidance on the identifying number of a tax return preparer for tax returns and claims for refund filed before and after the proposed effective date. The proposed regulations describe how the IRS will define the identifying number of tax return preparers. Additional provisions of the proposed 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. This document also invites comments from the public regarding these proposed regulations.

DATES: Written or electronic comments and requests for a public hearing must be received by April 26, 2010.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–134235–08), Room 5205, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–134235–08), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC 20224, or sent electronically via the Federal eRulemaking Portal at *http://www.regulations.gov* (IRS–REG–134235–08).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Stuart Murray at (202) 622–4940 (not a toll-free number); concerning submissions of comments and requests for a hearing, Richard Hurst at *richard.a.hurst@irscounsel.treas.gov.*

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in this notice of proposed rulemaking has been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collection of information should be sent to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, SE:W:CAR:MP:T:T:SP, Washington, DC 20224. Comments on the collection of information should be received by April 26, 2010.

Comments are specifically requested concerning:

Whether the proposed collection of information is necessary for the proper performance of the functions of the IRS, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collection of information (see below);

How the quality, utility, and clarity of the information to be collected may be enhanced;

How the burden of complying with the proposed collections of information may be minimized, including through the application of automated collection techniques or other forms of information technology; and

Estimates of capital or start-up costs of operation, maintenance, and purchase of service to provide information.

The collection of information in these proposed 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. Tax return preparers will need to apply for an identifying number as prescribed in forms, instructions, or other guidance. The use of a prescribed identifying number by tax return preparers on tax returns and claims for refund of tax will enable the IRS to accurately identify tax return preparers, to match tax return preparers to tax returns and claims for refund that they prepare, and to generally administer the internal revenue laws. The collection of information is mandatory. The likely respondents are tax return preparers and employers of tax return preparers.

Estimated total annual reporting burden: 300,000 hours.

Estimated average annual burden hours (or fraction of an hour) per respondent: varies from 10 to 20 minutes, with an estimated average of 15 minutes.

Estimated number of respondents: 1.2 million.

Estimated annual frequency of responses: once every three years.

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 assigned by the Office of Management and Budget.

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 proposed 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 was added to the Code in 1961 (Pub. L. 87–397, 75 Stat. 828) and authorizes the Secretary to prescribe regulations for the inclusion of identifying numbers on a return, statement, or other document required to be filed with the IRS. In addition, section 6109(c) authorizes the Secretary "to require such information as may be necessary to assign an identifying number to any person." Section 6109(a)(4) as originally enacted by section 1203(d) of the Tax Reform Act of 1976 (Pub. L. 94–455, 90 Stat. 1520) required return preparers to furnish on income tax returns and claims for refund of income tax an identifying number, as prescribed, to identify the preparer, the preparer's employer, or both. Section 8246(a)(2)(D)(i) of the Small Business and Work Opportunity Tax Act of 2007 (Pub. L. 110–28, 121 Stat. 112), amended section 6109(a)(4) to allow the IRS to prescribe that tax return preparers furnish identifying numbers on any tax returns or claims for refund they prepare. As currently prescribed in regulations, the identifying number of a tax return preparer who is an individual is the preparer's Social Security number (SSN) or alternative number as prescribed by the IRS. The proposed regulations provide that the identifying number of a tax return preparer is exclusively the number prescribed by the IRS. The proposed regulations will implement some of the recommendations made in Publication 4832, *Return Preparer Review* (Rev. 12–2009), published at the end of last year (the Report). The IRS and the Treasury Department believe that the implementation of the Report's recommendations, including the recommendations implemented by these regulations, will 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.

1. Identifying Numbers Generally

Because an identifying number is unique to the person to whom assigned, the IRS is able to use the number to correctly identify the taxpayer or the tax return preparer. The use of identifying numbers allows the IRS to accurately and timely process returns and issue refunds, centralize information, post information to the correct taxpayer's account, and effectively administer the rules relating to tax return preparers.

2. Requiring Identifying Numbers From Tax Return Preparers

Tax return preparers generally must provide an identifying number on the tax returns they prepare and sign. Specifically, under § 1.6695–1(b), a signing tax return preparer, as defined under § 301.7701–15(b)(1), must sign a return of tax or claim for refund after it is completed and before it is presented to the taxpayer for signature. A signing tax return preparer under § 301.7701–15(b)(1) is a tax return preparer who has primary responsibility for the overall substantive accuracy of the preparation of a return of tax or claim for refund.

Under § 1.6109–2(a)(1), a tax return preparer who must sign a tax return or tax refund claim must also include an identifying number with the preparer's signature. A return of tax includes an information return described in § 301.7701–15(b)(4). 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.

The identifying number of a signing tax return preparer, and the identifying number of any person with whom the preparer has an employment arrangement or association, must be included on electronically filed tax returns, as well as paper returns. Further, because of recent statutory changes, tax return preparers who prepare and file individual income tax returns (Form Series 1040) for their clients will soon be required to electronically file the returns, unless the tax return preparer reasonably expects to file only 10 or fewer individual

income tax returns for the calendar year. *See* Section 17 of the Worker, Homeownership, and Business Assistance Act of 2009, Public Law 111–92, 123 Stat. 2984, 2997 (adding Code section 6011(e)(3)).

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

3. Preparer Tax Identification Numbers

Section 6109(a) initially provided that the identifying number of a tax return preparer was the individual's SSN. Section 3710(a) of the IRS Restructuring and Reform Act of 1998 (Pub. L. 105–206, 112 Stat. 685) (RRA '98), allowed the IRS to prescribe an identifying number for tax return preparers other than the preparer's SSN. In response to section 3710(a) of RRA '98, the IRS developed and began to issue preparer tax identification numbers (PTINs). Tax return preparers currently may apply online for a PTIN using the e-services PTIN process on the IRS Web site at *http://www.irs.gov* or by filing Form W–7P, "Application for Preparer Tax Identification Number." Applying online is faster, and return preparers are encouraged to apply online. In the future, the IRS will prescribe the method to apply for a PTIN consistent with these proposed regulations. Currently, under § 1.6109–2(a)(2), a tax return preparer may use as an identifying number on a tax return or claim for refund either the preparer's SSN or an "alternative number" prescribed by the IRS, including a PTIN. But an EIN, an Electronic Filing Identification Number (EFIN) (which is an identification number assigned to IRS e-file providers), or an Electronic Transmitter Identification Number (ETIN) (which is an identification number assigned to IRS e-file providers who electronically transmit tax returns to the IRS) is not a valid preparer identifying number.

4. Regulation of Tax Return Preparers

In June 2009, the IRS initiated a comprehensive review of tax return preparers, and in December 2009 the IRS published the Report describing its findings from that review. The Report recommended, in part, that tax return preparers be required to obtain and use a PTIN as the exclusive preparer identifying number and undergo a tax-compliance check. As discussed below, the proposed regulations implement those recommendations.

Under current law, any individual may prepare a tax return or claim for refund. The Report recommended that the IRS establish new eligibility standards that an individual must meet in order to prepare tax returns—including testing, continuing education, and tax compliance checks. The Report contemplates that only attorneys, certified public accountants, enrolled agents, as well as tax return preparers who pass a minimum competency exam and meet other requirements (referred to as "registered tax return preparers") will be eligible to prepare and sign tax returns and claims for refund. These proposed regulations do not establish the requirements to become a registered tax return preparer, which primarily will be set forth in future guidance under Treasury Department Circular No. 230, 31 CFR part 10. After a transition period, however, it is intended that only individuals who satisfy the eligibility standards may obtain and use a PTIN as a tax return preparer.

Explanation of Provisions

1. Requiring the Use of PTINs

The proposed regulations provide that for tax returns or refund claims filed after December 31, 2010, the identifying number that a tax return preparer must include with the preparer's signature on tax returns and refund claims is that prescribed by the IRS in forms, instructions, or other guidance. Tax return preparers will not be able to use an SSN as a preparer identifying number unless specifically prescribed by the IRS in forms, instructions, or other guidance. Instead, to the extent provided in forms and instructions, a tax return preparer will be required to use a PTIN as the identifying number unless the IRS prescribes in the future a replacement to the PTIN. Forms and instructions will be revised accordingly. The use of PTINs as the identifying number for tax return preparers will improve tax administration and tax compliance, benefit taxpayers and tax return preparers, and help maintain the confidentiality of SSNs.

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. In the case of tax returns for taxable periods ending before January 1, 2011, and made on the appropriate forms prescribed for the taxable periods, but which are filed on or after January 1, 2011, tax return preparers must furnish on the returns the identifying number prescribed on the forms to be filed and in associated instructions.

For tax return preparation businesses and other persons having an employment arrangement or association with a tax return preparer, the business's or employer's EIN continues to be the identifying number that must be included on tax returns and refund claims along with the tax return preparer's signature and preparer identifying number. An individual tax return preparer, however, may not use an EIN as a preparer identifying number on a return, even if the preparer has an EIN (for example, as a sole proprietor). Tax return preparers who use their SSN, or an EIN, EFIN, or ETIN, instead of a valid PTIN, on tax returns or claims for refund filed after the effective date may be subject to the penalty under section 6695(c) unless the failure to include a valid PTIN is due to reasonable cause and not due to willful neglect.

2. Eligibility To Receive a PTIN

The proposed regulations provide that all tax return preparers must apply for a PTIN or other prescribed identifying number at the time and in the manner as may be prescribed by the IRS in forms, instructions, or other appropriate guidance. The proposed regulations also authorize the IRS to prescribe a user fee in connection with applying for, and renewing, a PTIN (or successor number similar to a PTIN). Except as provided in any transitional period, beginning after December 31, 2010, to obtain a PTIN, an individual must be an attorney, certified public accountant, enrolled agent, or registered tax return preparer under future guidance to be provided in Circular 230.

Only for purposes of applying for and renewing a PTIN or other prescribed preparer identifying number, 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. 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 proposed regulations provide several examples illustrating who is a tax return preparer required to apply for a PTIN.

As part of the process of applying for a PTIN, a tax return preparer may be subject to both an initial tax-compliance check and subsequent periodic checks, which could include a review of a preparer's history of compliance with personal and business tax filing and

payment obligations. The tax-compliance check is intended to establish whether a tax return preparer has timely filed required personal and business tax returns and has paid taxes that are due or made other acceptable arrangements with the IRS, such as an approved installment agreement under section 6159. If a tax return preparer disregards any applicable requirements to obtain a prescribed identifying number and thereafter omits, when required to include, a valid identifying number on a tax return or claim for refund filed after the effective date, the preparer may be liable for the section 6695(c) penalty, unless the failure to include a valid identifying number was due to reasonable cause and not due to willful neglect.

The information a tax return preparer provides when the preparer initially applies for a PTIN or other prescribed identifying number will often become outdated or otherwise inaccurate. The IRS may require tax return preparers to regularly renew their identifying numbers and otherwise maintain updated information with the IRS. If a tax return preparer who is required to include an identifying number on a tax return or claim for refund filed after the effective date uses an expired identifying number, the tax return preparer may be liable for the section 6695(c) penalty, unless the use of the expired number was due to reasonable cause and not due to willful neglect.

The proposed regulations provide that if necessary for effective tax administration, the IRS may prescribe exceptions to any of the requirements, such as for an interim period while procedures are being implemented. For example, the IRS and the Treasury Department recognize that the procedures for becoming a registered tax return preparer may not be fully implemented when these regulations become effective. It is anticipated that transitional interim guidance will be provided to allow individuals who intend to become registered tax return preparers to obtain an interim PTIN or other interim identifying number that may be used as a preparer identifying number on tax returns and refund claims until the procedures are fully implemented. After the interim period, however, to obtain a PTIN, an individual will need to be an attorney, certified public accountant, enrolled agent, or registered tax return preparer authorized to practice before the IRS under Circular 230.

Proposed Effective/Applicability Date

These regulations are effective after the date that final regulations are published in the **Federal Register**.

Special Analyses

It has been determined that this notice of proposed rulemaking is 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 an initial regulatory flexibility analysis under 5 U.S.C. 603 is required for this notice of proposed rulemaking. The analysis is set forth below under the heading, "Initial Regulatory Flexibility Analysis."

Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Initial Regulatory Flexibility Analysis

When an agency issues a rulemaking proposal, the Regulatory Flexibility Act (5 U.S.C. chapter 6) requires the agency to "prepare and make available for public comment an initial regulatory flexibility analysis" that "describe[s] the impact of the proposed rule on small entities." 5 U.S.C. 603(a). Section 605 of the Act provides an exception to this requirement if the agency certifies that the proposed rulemaking will not have a significant economic impact on a substantial number of small entities. A small entity is defined as a small business, small nonprofit organization, or small governmental jurisdiction. 5 U.S.C. 601(3)–(6). The IRS and the Treasury Department conclude that the proposed regulations, if promulgated (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. As a result, an initial regulatory flexibility analysis is required.

Description of the reasons why the agency action is being considered.

Taxpayers' reliance on paid tax return preparers has grown steadily in recent decades. Today, paid tax return preparers assist a majority of U.S. taxpayers in meeting their 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 proposed regulations are intended to 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 proposed regulations, the IRS will require individuals who sign tax returns or claims for refund to report the preparer's identifying number on a tax return or claim for refund when the return or refund claim is signed. The proposed regulations also provide that the IRS may require tax return preparers to apply for, and regularly renew, their identifying numbers. Under the proposed regulations, the IRS may prescribe a user fee payable when applying for a number and for renewal.

Further, the IRS and the Treasury Department conclude that taxpayers, tax return preparers, and overall tax administration will be best served through increased oversight of the tax return preparer industry. Mandating a single prescribed identifying number for all tax return preparers and assigning a prescribed number to registered tax return preparers is critical to effective oversight.

Statement of the objectives of, and the legal basis for, the proposed rule.

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. The proposed regulations do this by providing that the IRS may prescribe the use of identifying numbers for tax return preparers and the qualifications or other requirements necessary to obtain a valid number. The legal basis for these provisions is section 6109 of the Code, which authorizes the Secretary to prescribe the "identifying number for securing proper identification of" a tax return preparer and "to require such information as may

be necessary to assign an identifying number to any person."

Description and estimate (where feasible) of the number of small entities subject to the proposed rule.

The proposed 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 proposed 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 sign tax returns.

The appropriate NAICS codes for tax return preparers are those for tax return preparation services (NAICS code 541213) and other accounting services (NAICS code 541219). Entities identified under either of these two codes are considered small under the Small Business Administration's size standards (13 CFR 121.201), if their annual revenue is less than $7 million or $8.5 million, respectively. The IRS estimates that approximately 70 to 80 percent of the individuals subject to these proposed regulations are tax return preparers operating as or employed by small entities.

Description of the projected reporting, recordkeeping, and related requirements of the proposed rule, including an estimate of the classes of small entities that will be subject to the requirements and the type of professional skills necessary for preparation of the report or record.

The proposed regulations do not directly impose any reporting, recordkeeping, or similar requirements on any small entities. Rather, the proposed regulations provide that the IRS may prescribe in forms, instructions, or other guidance (including regulations) requirements for identifying numbers for tax return preparers, regular renewal of identifying numbers, and payment of a user fee when applying for or renewing an identifying number. 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 an identifying number and subsequent renewal will require reporting of certain information, but are not expected to require recordkeeping. 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 replaces 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 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. 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 will be proposed in the near future. 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 regulations to be issued in the future, 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 IRS and the Treasury Department 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 proposed regulations.

Although each of the reporting and recordkeeping requirements and the costs identified above (in connection with the proposed regulations and the other anticipated guidance necessary to implement the Return Preparer Review) 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.

Identification, to the extent practicable, of all relevant Federal rules that may duplicate, overlap, or conflict with the proposed rule.

The proposed regulations do not duplicate, overlap, or conflict with any Federal statutes or other rules.

Description of any significant alternatives to the proposed rule that accomplish the stated objectives of applicable statutes and minimize any significant economic impact on small entities.

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

More broadly, the IRS received a large volume of comments as part of the Return Preparer Review on the issue of increased oversight of tax return preparers generally and on the Report's proposed recommendations, including 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.

As to the proposed requirements recommended in the Report, the IRS and the Treasury Department considered various alternatives in determining the best ways to effectuate proposed changes with respect to tax return preparers, including:

(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.

After consideration of these and other alternatives and the responses received in the public comment process, the IRS and the Treasury Department conclude that the provisions of the proposed regulations will most effectively promote sound tax administration. The provisions in the proposed regulations for 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. The provisions, in combination with anticipated guidance described above, also will ensure that qualified, competent, and ethical tax return preparers will be assigned prescribed preparer identifying numbers. 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 continuing education requirements are intended to ensure that tax return preparers 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.

Comments and Requests for Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. The IRS and the Treasury Department request comments on the clarity of the proposed rules and how they can be made easier to understand. All comments that are submitted by the public will be available for public inspection and copying. A public hearing will be scheduled if requested in writing by any person who timely submits comments. If a public hearing is scheduled, notice of the date, time, and place for the public hearing will be published in the **Federal Register**.

Drafting Information

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

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be 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 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. 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 completing the 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, 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.

(i) *Effective/applicability date.* Paragraph (a)(2) of this section is effective for returns and claims for refund filed after the date that final regulations are published in the **Federal Register.** Paragraphs (d) through (h) of this section are effective after the date that final regulations are published in the **Federal Register.**

Steven T. Miller,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 2010–6867 Filed 3–24–10; 11:15 am]

BILLING CODE 4830–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2009–0958; FRL–9131–3]

Revisions to the California State Implementation Plan

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve revisions to the San Joaquin Valley Unified Air Pollution Control District (SJVUAPCD) portion of the California State Implementation Plan (SIP). These revisions concern volatile organic compound (VOC) emissions from refinery vacuum producing systems and process unit turnaround. We are approving local rules that regulate these emission sources under the Clean Air Act as amended in 1990 (CAA or the Act). We are taking comments on this proposal and plan to follow with a final action.

DATES: Any comments must arrive by April 26, 2010.

ADDRESSES: Submit comments, identified by docket number [EPA–R09–OAR–2009–0958], by one of the following methods:

1. *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions.

2. *E-mail: steckel.andrew@epa.gov.*

3. *Mail or deliver:* Andrew Steckel (Air–4), U.S. Environmental Protection Agency Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901.

Instructions: All comments will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Information that you consider CBI or otherwise protected should be clearly identified as such and should not be submitted through *http://www.regulations.gov* or e-mail. *Http://www.regulations.gov* is an "anonymous access" system, and EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send e-mail directly to EPA, your e-mail address will be automatically captured and included as part of the public comment. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

List of Subjects in 26 CFR Part 54

Excise taxes, Health care, Health insurance, Pensions, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 54 is proposed to be amended as follows:

PART 54—PENSION EXCISE TAXES

Paragraph 1. The authority citation for part 54 is amended by adding an entry in numerical order to read in part as follows:

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

Section 54.9815–2719 also issued under 26 U.S.C. 9833. * * *

Par. 2. Section 54.9815–2719 is added to read as follows:

§ 54.9815–2719 Internal claims and appeals and external review processes.

[The text of proposed § 54.9815–2719 is the same as the text of paragraphs (a) through (f) of § 54.9815–2719T published elsewhere in this issue of the **Federal Register**].

Steven Miller,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 2010–18050 Filed 7–22–10; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 300

[REG–139343–08]

RIN 1545–B171

User Fees Relating to Enrollment and Preparer Tax Identification Numbers

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains proposed amendments to the regulations relating to the imposition of certain user fees on certain tax practitioners. The proposed regulations establish a new user fee for individuals who apply for or renew a preparer tax identification number (PTIN). The proposed regulations affect individuals who apply for or renew a PTIN. The charging of user fees is authorized by the Independent Offices Appropriations Act of 1952.

DATES: Written or electronic comments must be received by August 23, 2010. Outlines of topics to be discussed at the public hearing scheduled for Tuesday, August 24, 2010, at 10 a.m. must be received by Monday, August 23, 2010.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–139343–08), Room 5205, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–139343–08), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC, or sent electronically via the Federal eRulemaking Portal at *http://www.regulations.gov* (IRS REG–139343–08). The public hearing will be held in the Auditorium of the Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Emily M. Lesniak at (202) 622–4940; concerning cost methodology, Eva J. Williams at (202) 435–5514; concerning submission of comments, the public hearing, or to be placed on the building access list to attend the public hearing, Richard A. Hurst at *Richard.A.Hurst@irscounsel.treas.gov* or (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

Section 330 of title 31 of the United States Code authorizes the Secretary of the Treasury to regulate the practice of representatives before the Treasury Department. Pursuant to section 330 of title 31, the Secretary has published regulations governing practice before the IRS in 31 CFR part 10 and reprinted the regulations as Treasury Department Circular No. 230 (Circular 230). Circular 230 is administered by the IRS Office of Professional Responsibility (OPR).

User Fee for PTINs

Section 6109 of the Internal Revenue Code (Code) authorizes the Secretary to prescribe regulations for the inclusion of a tax return preparer's identifying number on a return, statement, or other document required to be filed with the IRS. Section 6109(c) further authorizes the Secretary "to require such information as may be necessary to assign an identifying number to any person." As currently prescribed in regulations, the identifying number of a tax return preparer who is an individual is the tax return preparer's social security number (SSN) or alternative number as prescribed by the IRS.

Proposed regulations under section 6109 (REG–134235–08) were published in the **Federal Register** (75 FR 14539) on March 26, 2010, and provide that, for returns or claims for refund filed after December 31, 2010, the identifying number of a tax return preparer is the individual's PTIN or such other number prescribed by the IRS in forms, instructions, or other appropriate guidance. The proposed regulations under section 6109 require a tax return preparer who prepares all or substantially all of a return or claim for refund of tax after December 31, 2010 to have a PTIN. The proposed regulations also state that the IRS will provide through other guidance (including forms and instructions) guidance regarding how to apply for a PTIN or other prescribed preparer identifying number, for the regular renewal of a PTIN or other prescribed preparer identifying number, and for the payment of a user fee. Only attorneys, certified public accountants, enrolled agents, and registered tax return preparers will be eligible to apply for a PTIN. The requirements to become a registered tax return preparer will be provided in future Circular 230 guidance.

A third party vendor will administer the PTIN application and renewal process and will charge a reasonable fee that is independent of the user fee charged by the government. The vendor will develop a web-based database that individuals will use to apply for or renew a PTIN and will process paper PTIN applications. The database also will be used for applications to become registered tax return preparers, to renew the registered tax return preparers' status, to self-certify continuing professional education credits for registered tax return preparers, and to pay applicable user fees.

Proposed § 300.9 establishes a $50 user fee to apply for or renew a PTIN. The $50 user fee is based on an annual PTIN renewal period, and the procedures for renewing a PTIN will be provided in other guidance, including forms and instructions. The user fee is nonrefundable regardless of whether the applicant receives a PTIN.

PTINs were previously issued to tax return preparers solely for the convenience of the tax return preparers, providing an alternative to using the tax return preparers' social security numbers. Requiring registration through the use of PTINs will enable the IRS to better collect and track data on tax return preparers. This data will allow the IRS to track the number of persons who prepare returns, track the qualifications of those who prepare returns, track the number of returns each person prepares, and more easily locate and review returns prepared by a

tax return preparer when instances of misconduct are detected.

The user fee to apply for or renew a PTIN recovers the costs that the government incurs to administer the PTIN application process. These costs include the development and maintenance of the IRS information technology system that interfaces with the vendor and the development and maintenance of internal applications that will have the capacity to process and administer the anticipated increase in applications for a PTIN. It is anticipated that the number of individuals requesting PTINs will increase to as many as 1.2 million individuals, and all individuals who receive PTINs will be required to renew their PTINs. The anticipated increase in demand for PTINs will require the IRS to expend more resources. The user fee will recover the cost of IRS customer service support activities, which include Web site development and maintenance and call center staffing to respond to questions regarding PTIN usage and renewal. The user fee also will recover costs for personnel, administrative, and management support needed to evaluate and address tax compliance issues of individuals applying for and renewing a PTIN, to investigate and address conduct and suitability issues, and otherwise support and enforce the programs that require an individual to apply for and renew a PTIN.

The IRS currently issues PTINs to tax return preparers without charging a user fee. The PTIN application, issuance, and renewal process, however, will become significantly more expansive and intricate with the implementation of the registered tax return preparer program. Federal tax compliance checks will be performed on all individuals who apply for or renew a PTIN. Suitability checks will be performed. The IRS will further investigate individuals when the compliance or suitability check suggests that the individual may be unfit to practice before the IRS. These checks were not previously performed as a prerequisite to obtaining a PTIN.

Additionally, the IRS will establish and implement a reconsideration process for individuals who apply to become a registered tax return preparer and are denied a PTIN upon initial application or renewal. The IRS will incur costs to apply existing Circular 230 procedures when those individuals who are certified public accountants, attorneys, enrolled agents, or registered tax return preparers are denied renewal of a PTIN.

Coordination With Other User Fees

Additional user fees related to the programs for regulating enrolled agents, enrolled retirement plan agents, and registered tax return preparers will be established in future regulations as those programs are implemented. These future regulations will address user fees associated with taking the registered tax return preparer examination and providing continuing education programs. The user fee for taking a registered tax return preparer examination will recover the costs to the government for creating, administering, and reviewing the examination. The user fee for providing continuing education programs will recover the costs to the government for the review, approval, and oversight of continuing education providers to ensure their compliance with program requirements for continuing education programs. The vendor also will charge a reasonable fee to take the registered tax return preparer examination.

Future regulations also will coordinate the enrollment and renewal user fees imposed on enrolled agents and enrolled retirement plan agents with the PTIN user fees because the costs to the government to process an enrollment application are substantially the same as the costs to the government to process a PTIN application. For example, the IRS generally may conduct only a single background check and compliance check for an individual who applies to become an enrolled agent and applies to obtain a PTIN, and therefore the enrollment application fee and the PTIN application fee must be coordinated to prevent the collection of excessive fees. It is currently anticipated that future regulations will require enrolled agents to obtain a PTIN and pay the associated application or renewal fee, in which case the enrollment and renewal fees for enrolled agents will be substantially reduced.

Effective/Applicability Dates

These regulations reorganize the effective dates for the user fees found in Treasury Regulations part 300. Currently, all of the user fee effective dates are contained in § 300.0 paragraph (c). This reorganization relocates the effective date sections to the appropriate regulation implementing each user fee. This relocation will simplify the process for updating the effective dates as the user fee regulations are revised.

Authority

The charging of user fees is authorized by the Independent Offices Appropriations Act (IOAA) of 1952, which is codified at 31 U.S.C. 9701. The IOAA authorizes agencies to prescribe regulations that establish charges for services provided by the agency. The charges must be fair and must be based on the costs to the government, the value of the service to the recipient, the public policy or interest served, and other relevant facts. The IOAA provides that regulations implementing user fees are subject to policies prescribed by the President; these policies are currently set forth in the Office of Management and Budget Circular A–25, 58 FR 38142 (July 15, 1993) (the OMB Circular).

The OMB Circular encourages user fees for government-provided services that confer benefits on identifiable recipients over and above those benefits received by the general public. Under the OMB Circular, an agency that seeks to impose a user fee for government-provided services must calculate the full cost of providing those services. In general, a user fee should be set at an amount that allows the agency to recover the full cost of providing the special service, unless the Office of Management and Budget grants an exception.

Pursuant to the guidelines in the OMB Circular, the IRS has calculated its cost of providing services under the PTIN application and renewal process. The government will charge the full cost of administering these programs and will implement the proposed user fees under the authority of the IOAA and the OMB Circular.

Proposed Effective/Applicability Date

The Administrative Procedure Act provides that substantive rules will not be effective until thirty days after the final regulations are published in the **Federal Register** (5 U.S.C. 553(d)). Final regulations may be effective prior to thirty days after publication if the publishing agency finds that there is good cause for an earlier effective date.

The IRS is implementing the recommendations in Publication 4832, "Return Preparer Review", which was published on January 4, 2010, to be effective for the 2011 Federal tax filing season (January–April 2011). The IRS and the Treasury Department find that there is good cause for these regulations to be effective upon the publication of a Treasury decision adopting these rules as final regulations in the **Federal Register**.

Special Analyses

It has been determined that this notice of proposed rulemaking is a significant regulatory action as defined in Executive Order 12866.

It has been determined that an initial regulatory flexibility analysis is required for this notice of proposed rulemaking under 5 U.S.C. 603. This analysis is set forth under the heading "Initial Regulatory Flexibility Analysis."

Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Initial Regulatory Flexibility Analysis

When an agency issues a rulemaking proposal, the Regulatory Flexibility Act (5 U.S.C. chapter 6) (RFA) requires the agency "to prepare and make available for public comment an initial regulatory flexibility analysis" that will "describe the impact of the proposed rule on small entities." *See* 5 U.S.C. 603(a). Section 605 of the RFA provides an exception to this requirement if the agency certifies that the proposed rulemaking will not have a significant economic impact on a substantial number of small entities. A small entity is defined as a small business, small nonprofit organization, or small governmental jurisdiction. *See* 5 U.S.C. 601(3) through (6). The IRS and the Treasury Department conclude that the proposed rule, if promulgated, will have a significant economic impact on a substantial number of small entities. As a result, an initial regulatory flexibility analysis is required.

Description of the Reasons Why Action by the Agency Is Being Considered

The IRS and the Treasury Department are implementing regulatory changes that increase the oversight of the tax return preparer industry based upon findings and recommendations made by the IRS in Publication 4832, "Return Preparer Review," which was published on January 4, 2010. These regulatory changes include implementing a registered tax return preparer program and requiring all individuals who prepare all or substantially all of a tax return or claim for refund to use a PTIN as an identifying number. Except as provided in any transitional period, only attorneys, certified public accountants, enrolled agents, or registered tax return preparers may apply for a PTIN. Thus, only attorneys, certified public accountants, enrolled agents, and registered tax return preparers will be eligible to prepare all or substantially all of a tax return or claim for refund. By limiting the individuals who may prepare all or substantially all of a tax return or claim for refund to individuals who have a PTIN, the IRS is providing a special benefit to the individuals who obtain a PTIN. There are costs to the IRS that are associated with processing a PTIN application and providing the special benefits associated with the PTIN.

Future regulations will establish additional user fees related to the enrolled agent and enrolled retirement plan agent program, and registered tax return preparer program. The additional user fees will recover the costs to the government that result from providing the special benefits associated with taking the registered tax return preparer examination and providing continuing education programs. The cost to the government for administering and reviewing the registered tax return preparer examination will be recovered in a user fee for taking the registered tax return preparer examination. The cost to the government to verify compliance with requirements for continuing education programs will be recovered in a user fee for qualifying continuing education programs. Each continuing education provider may charge a fee to attend a qualified continuing education program. The third party vendor also will charge a reasonable fee to take a registered tax return preparer examination.

A Succinct Statement of the Objectives of, and Legal Basis for, the Proposed Rule

The objective of the proposed regulations is to recover the costs to the government associated with providing the special benefits that an individual receives upon applying for or renewing a PTIN. These costs include the development and maintenance of the IRS information technology system that interfaces with the vendor; the development and maintenance of internal applications; IRS customer service support activities, which include development and maintenance of an IRS Web site and call center staffing; and personnel, administrative, and management support needed to evaluate and address tax compliance issues, investigate and address conduct and suitability issues, and otherwise support and enforce the programs that require individuals to apply for or renew a PTIN. The OMB Circular encourages user fees when special benefits are conferred on identifiable recipients. Individuals who obtain a PTIN receive the ability to prepare all or substantially all of a tax return or claim for refund. The ability to prepare all or substantially all of a tax return or claim for refund is a special benefit.

The legal basis for these requirements is contained in section 9701 of title 31.

A Description of and, Where Feasible, an Estimate of the Number of Small Entities To Which the Proposed Rule Will Apply

The proposed regulations affect all individuals who want to become a registered tax return preparer under the new oversight rules in Circular 230. Only individuals, not businesses, can practice before the IRS or become a registered tax return preparer. Thus, the economic impact of these regulations on any small entity generally will be a result of applicants and registered tax return preparers owning a small business or a small entity employing applicants or registered tax return preparers.

The proposed regulations further affect all individual tax return preparers who are required to apply for or renew a PTIN. Only individuals, not businesses, can apply for or renew a PTIN. Thus, the economic impact of these regulations on any small entity generally will be a result of an individual tax return preparer who is required to apply for or renew a PTIN owning a small business or a small business otherwise employing an individual tax return preparer who is required to apply for or renew a PTIN to prepare all or substantially all of a tax return or claim for refund.

The appropriate NAICS codes for the registered tax return preparer program and 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 Small Business Administration 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 Small Business Administration 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 proposed 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 Proposed Rule, Including an Estimate of the Classes of Small Entities Which Will Be Subject to the Requirement and the Type of Professional Skills Necessary for Preparation of the Report or Record

No reporting or recordkeeping requirements are projected to be associated with this proposed regulation.

An Identification, to the Extent Practicable, of All Relevant Federal Rules Which May Duplicate, Overlap, or Conflict With the Proposed Rule

The IRS is not aware of any Federal rules that duplicate, overlap, or conflict with the proposed rule.

A Description of Any Significant Alternatives to the Proposed Rule Which Accomplish the Stated Objectives of Applicable Statutes and Which Minimize Any Significant Economic Impact of the Proposed Rule on Small Entities

The IOAA authorizes the charging of user fees for agency services, subject to policies designated by the President. The OMB Circular implements presidential policies regarding user fees and encourages user fees when a government agency provides a special benefit to a member of the public. As Congress has not appropriated funds to the registered tax return preparer program or PTIN application process, there are no viable alternatives to the imposition of user fees.

While the IRS previously issued PTINs to tax return preparers without charging a user fee, the registered tax return preparer program and the issuance of the new regulations under section 6109 will increase the number of PTIN applications to as many as 1.2 million applications and significantly increase the intricacy of the application process. Additionally, PTINs were previously issued solely for the convenience of tax return preparers to provide an alternative to using the tax return preparers' social security numbers as an identifying number on prepared returns. PTINs will now be used to collect and track data on tax return preparers. This data will provide important benefits to the IRS, such as allowing the IRS to track the number of persons who prepare returns, track the qualifications of those persons who prepare returns, track the number of returns each person prepares, and, when instances of misconduct are detected, locate and review returns prepared by a specific tax return preparer.

This anticipated increase in PTIN applications and the revised purpose of a PTIN will require the IRS to develop and maintain a Web site and train call center staff to respond to PTIN-related questions. Further, the IRS will now perform Federal tax compliance checks and perform suitability checks prior to the issuance of a PTIN. Previously, neither of these checks was performed before a PTIN was issued. When the initial compliance and suitability checks suggest that the individual applying for a PTIN may not be fit to practice before the IRS, the IRS will conduct an investigation. For individuals who are found unfit to receive a PTIN, the IRS will develop and implement a reconsideration process. Similarly, the IRS will provide due process procedures for those individuals who are certified public accountants, attorneys, enrolled agents, or registered tax return preparers and are denied renewal of their PTIN.

Thus, due to the increased costs to the government to process the application for a PTIN, the anticipated increase in PTIN applications, and the lack of appropriated funds, there is no viable alternative to imposing a user fee.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. The IRS and Treasury Department request comments on the clarity of the proposed regulations and how they can be made easier to understand. All comments that are submitted by the public will be made available for public inspection and copying.

A public hearing has been scheduled for Tuesday, August 24, 2010, beginning at 10 a.m. in the Auditorium of the Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. All visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the **FOR FURTHER INFORMATION CONTACT** section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit written or electronic comments and an outline of the topics to be discussed and the time to be devoted to each topic by Monday, August 23, 2010. A period of 10 minutes will be allocated to each person for making comments.

An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal author of these regulations is Emily M. Lesniak, Office of the Associate Chief Counsel (Procedure and Administration).

List of Subjects in 26 CFR Part 300

Reporting and recordkeeping requirements, User fees.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 300 is proposed to be amended as follows:

PART 300—USER FEES

Paragraph 1. The authority citation for part 300 continues to read in part as follows:

Authority: 31 U.S.C. 9701.

Par. 2. Section 300.0 is amended by
1. Adding paragraph (b)(9).
2. Removing paragraph (c).
The addition reads as follows:

§ 300.0 User fees; in general.

* * * * *

(b) * * *

(9) Applying for a preparer tax identification number.

Par. 3. Section 300.1 is amended by adding paragraph (d) to read as follows:

§ 300.1 Installment agreement fee.

* * * * *

(d) *Effective/applicability date.* This section is applicable beginning March 16, 1995, except that the user fee for entering into installment agreements on or after January 1, 2007, is applicable beginning January 1, 2007.

Par. 4. Section 300.2 is amended by adding paragraph (d) to read as follows:

§ 300.2 Restructuring or reinstatement of installment agreement fee.

* * * * *

(d) *Effective/applicability date.* This section is applicable beginning March 16, 1995, except that the user fee for restructuring or reinstatement of an installment agreement on or after January 1, 2007, is applicable beginning January 1, 2007.

Par. 5. Section 300.3 is amended by adding paragraph (d) to read as follows:

§ 300.3 Offer to compromise fee.

* * * * *

(d) *Effective/applicability date.* This section is applicable beginning November 1, 2003.

Par. 6. Section 300.4 is amended by adding paragraph (d) to read as follows:

§ 300.4 Special enrollment examination fee.

* * * * *

(d) *Effective/applicability date.* This section is applicable beginning November 6, 2006.

Par. 7. Section 300.5 is amended by adding paragraph (d) to read as follows:

§ 300.5 Enrollment of enrolled agent fee.

* * * * *

(d) *Effective/applicability date.* This section is applicable beginning November 6, 2006.

Par. 8. Section 300.6 is amended by adding paragraph (d) to read as follows:

§ 300.6 Renewal of enrollment of enrolled agent fee.

* * * * *

(d) *Effective/applicability date.* This section is applicable beginning November 6, 2006.

Par. 9. Section 300.7 is amended by adding paragraph (d) to read as follows:

§ 300.7 Enrollment of enrolled actuary fee.

* * * * *

(d) *Effective/applicability date.* This section is applicable beginning January 22, 2008.

Par. 10. Section 300.8 is amended by adding paragraph (d) to read as follows:

§ 300.8 Renewal of enrollment of enrolled actuary fee.

* * * * *

(d) *Effective/applicability date.* This section is applicable beginning January 22, 2008.

Par. 11. Section 300.9 is added to read as follows:

§ 300.9 Fee for obtaining a preparer tax identification number.

(a) *Applicability.* This section applies to the application for and renewal of a preparer tax identification number pursuant to 26 CFR 1.6109–2(d).

(b) *Fee.* The fee to apply for or renew a preparer tax identification number is $50 per year, which is the cost to the government for processing the application for a preparer tax identification number and does not include any fees charged by the vendor.

(c) *Person liable for the fee.* The individual liable for the application or renewal fee is the individual applying for and renewing a preparer tax identification number from the IRS.

(d) *Effective/applicability date.* This section will be applicable on the date of publication of a Treasury decision adopting these rules as final regulations in the **Federal Register**.

Steven T. Miller,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 2010–18198 Filed 7–21–10; 4:15 pm]

BILLING CODE 4830–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R06–OAR–2007–0210; FRL–9177–5]

Approval and Promulgation of Air Quality Implementation Plans; Texas; Revisions to Emissions Inventory Reporting Requirements and Conformity of General Federal Actions, Including Revisions Allowing Electronic Reporting Consistent With the Cross Media Electronic Reporting Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve revisions to the Texas State Implementation Plan (SIP) submitted by the Governor of Texas and by the Texas Commission on Environmental Quality (TCEQ) respectively on December 17, 1999 and February 26, 2007. The revisions pertain to regulations on reporting air pollution emissions (emission inventories), and conformity of general Federal actions to SIPs. EPA is proposing to approve the revision pursuant to section 110 of the CAA.

DATES: Written comments should be received on or before August 23, 2010.

ADDRESSES: Comments may be mailed to Mr. Guy Donaldson, Chief, Air Planning Section (6PD–L), Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202–2733. Comments may also be submitted electronically or through hand deliver/courier by following the detailed instructions in the **ADDRESSES** section of the direct final rule located in the rules section of this **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Emad Shahin, Air Planning Section (6PD–L), Environmental Protection Agency, Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733, telephone 214–665–6717; fax number 214–665–7263; e-mail address *shahin.emad@epa.gov.*

SUPPLEMENTARY INFORMATION: In the rules section of this **Federal Register**, EPA is approving the State's SIP submittal as a direct rule without prior proposal because the Agency views this as non-controversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this action no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time.

For additional information see the direct final rule, located in the rules section of this **Federal Register**.

Dated: July 12, 2010.

Al Armendariz,

Regional Administrator, Region 6.

[FR Doc. 2010–17976 Filed 7–22–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 81

[EPA–R03–OAR–2010–0431; FRL–9178–9]

Approval of One-Year Extension for Attaining the 1997 8-Hour Ozone Standard in the Baltimore Moderate Nonattainment Area

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to extend the attainment date from June 15, 2010 to June 15, 2011 for the Baltimore nonattainment area, which is classified as moderate for the 1997 8-hour ozone national ambient air quality standard (NAAQS). This extension is based in part on air quality data for the 4th highest daily 8-hour monitored value during the 2009 ozone season. In the final rules section of this **Federal Register**, EPA is approving the State's request as a direct final rule without prior proposal because the Agency views this as a noncontroversial request and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this action, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this

■ 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.

[FR Doc. 2010–24480 Filed 9–29–10; 8:45 am]

BILLING CODE 4160–01–S

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.

* * * * *

(b) * * *

CFR part or section where identified and described	Current OMB control No.
* * * * *	
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–BI71

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

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

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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.

* * * * *

(b) * * *

CFR part or section where identified and described	Current OMB control No.
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1.6109–2	1545–2176
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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]

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 300

[TD 9503]

RIN 1545–BI71

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

require tax return preparers who prepare all or substantially all of a tax return or claim for refund to use a PTIN as their identifying number. These regulations also provide that to be eligible to receive a PTIN, a tax return preparer must be an attorney, certified public accountant, enrolled agent, or registered tax return preparer.

On July 23, 2010, the Treasury Department and the IRS published in the **Federal Register** (75 FR 43110) a notice of proposed rulemaking (REG–139343–08) proposing amendments to part 300 of title 26 of the Code of Federal Regulations. New § 300.9 of these regulations proposed to establish a $50 user fee to apply for or renew a PTIN. These regulations do not include any fees charged by the vendor, which vendor fee is now calculated to be $14.25. Additionally, these regulations proposed to reorganize the effective date provisions of §§ 300.0 through 300.8. A public hearing regarding the proposed regulations was held on August 24, 2010. The IRS also received written public comments in response to the proposed regulations.

After careful consideration of all written public comments and statements made during the public hearing, the Treasury Department and the IRS have decided to adopt without modification the proposed regulations that establish a $50 user fee to apply for or renew a PTIN, recovering the full cost to the IRS for administering the PTIN application and renewal program. The Treasury Department and the IRS also have decided to adopt without modification the proposed regulations reorganizing the effective date provisions under §§ 300.0 through 300.8.

Summary of Comments

Over 10,000 written comments were received in response to the notice of proposed rulemaking. The comments were considered and are available for public inspection upon request. The comments related to the $50 user fee to apply for or renew a PTIN, the related PTIN regulations under section 6109, or the proposed amendments to regulations governing practice before the IRS under 31 CFR part 10 (Circular 230). No comments were received regarding the reorganization of the effective date provisions. Many of the comments are summarized in this preamble.

To the extent comments received with respect to the user fee regulation raise issues pertaining to the PTIN regulations under section 6109 or Circular 230, the Treasury Department and the IRS are considering and addressing those comments in connection with the relevant regulations. Accordingly, the summary of comments below addresses only those comments that seek modification or clarification of the user fee as set forth in the proposed regulations.

1. Tax Return Preparers Who Already Are Subject to Fees

The Treasury Department and the IRS received numerous comments stating that tax return preparers who are attorneys, certified public accountants, or enrolled agents already are required to maintain licenses and pay numerous fees associated with obtaining and maintaining their licenses. Some commentators also stated that regulation of currently unenrolled tax return preparers or imposing a user fee to apply for or renew a PTIN for currently unenrolled tax return preparers was acceptable, but individuals who are regulated currently should not be required to obtain a PTIN or pay a user fee. Other similar comments requested that licensed tax consultants in Oregon be grandfathered into the new regulatory scheme and that individuals who currently have a PTIN be exempt from the requirements to apply for and renew a PTIN.

Having a PTIN is a special benefit that allows specified tax return preparers to prepare all or substantially all of a tax return or claim for refund for compensation. The OMB Circular encourages user fees for government-provided services that confer special benefits on identifiable recipients over and above those benefits received by the general public. A user fee must be set at an amount that allows the agency to recover the full cost of providing the special services unless the Office of Management and Budget grants an exception.

The same special benefit is conferred on all persons who obtain a PTIN, and the cost to the government is the same for providing PTINs to attorneys, certified public accountants, and enrolled agents as it is for providing PTINs to formerly unenrolled tax return preparers. Under the OMB Circular, absent special approval, the IRS must recover the full costs for providing the special benefits associated with a PTIN. The IRS cannot charge a user fee solely to tax return preparers who are not otherwise licensed as an attorney, certified public accountant, or enrolled agent. Although many comments sought exceptions to the user fee, one commentator encouraged the Treasury Department and the IRS to maintain a uniform user fee for obtaining a PTIN. Consequently, the Treasury Department and the IRS are adopting the proposed regulations and requiring all tax return preparers to pay a user fee to apply for or renew a PTIN.

2. Calculation of the User Fee

The Treasury Department and the IRS received a comment that the proposed regulations do not comply with the provisions of IOAA because a PTIN is not a service or thing of value to a tax return preparer. The commentator also stated that the proposed regulations do not comply with the general policies for implementing user fees, as provided in the OMB Circular, because providing a PTIN to a tax return preparer benefits the general public by tracking incompetent and unscrupulous tax return preparers and that the IRS already meets a goal of the OMB Circular because it is already self-sustaining, as the IRS collects more taxes than it costs to run the agency.

The IOAA authorizes agencies to prescribe regulations that establish charges for services provided by the agency. The charges must be fair and must be based on the costs to the government, the value of the service to the recipient, the public policy or interest served, and other relevant facts. The IOAA provides that regulations implementing user fees are subject to policies prescribed by the President; these policies are currently set forth in the OMB Circular. The OMB Circular encourages user fees for government-provided services that confer benefits on identifiable recipients over and above those benefits received by the general public. Under the OMB Circular, an agency that seeks to impose a user fee for government-provided services must calculate the full cost of providing those services.

The user fee was determined to be consistent with the IOAA and the OMB Circular. A PTIN both confers a special benefit on an identifiable recipient and is a service or thing of value to a tax return preparer. A PTIN confers a special benefit because without a PTIN, a tax return preparer could not receive compensation for preparing all or substantially all of a federal tax return or claim for refund. Because only attorneys, certified public accountants, enrolled agents, and registered tax return preparers are eligible to obtain a PTIN, only a subset of the general public is entitled to a PTIN and the special benefit of receiving compensation for the preparation of a return that it confers. This analysis is consistent with the current practice of charging a user fee on individuals seeking to become enrolled agents. Being an enrolled agent confers special benefits; and, therefore,

the IRS currently charges a user fee on applicants seeking those special benefits.

Further, while it is anticipated that requiring tax return preparers to obtain a PTIN will benefit tax administration generally, only the tax return preparer who receives the PTIN can take advantage of the special benefit associated with having a PTIN. The OMB Circular provides that a government agency should recover the full cost of providing a special benefit when the general public receives a benefit as a necessary consequence of the government providing a special benefit to an identifiable recipient.

The OMB Circular also provides that one of the objectives of establishing a user fee is to "ensure that each service, sale, or use of Government goods or resources provided by an agency to specific recipients be self-sustaining." As described above, the issuance of a PTIN provides a special benefit to the specific tax return preparer who receives the PTIN. The administration of the PTIN application and renewal program requires the use of IRS services, goods, and resources. For the PTIN application and renewal program to be self-sustaining, the IRS must charge a user fee to recover the costs of providing the special benefits associated with PTIN. The fact that the IRS collects tax revenue for use by the government as a whole does not affect the analysis of whether the PTIN application and renewal program is self-sustaining. Thus, the Treasury Department and the IRS are complying with the provisions of the IOAA and the OMB Circular by implementing a user fee to recover the costs associated with the issuance of PTINs.

3. Renewing a PTIN

Several commentators objected to renewing their PTIN on a yearly basis and requested longer renewal periods. At this time the Treasury Department and the IRS have determined that an annual renewal of a PTIN is the most effective procedure. The user fee to renew a PTIN is, however, part of the larger implementation of recommendations in Publication 4832, "Return Preparer Review," which was published on January 4, 2010, to be effective for the 2011 Federal tax filing season (January–April 2011). These recommendations include revisions to Circular 230 implementing the registered tax return preparer program and revisions to the regulations under section 6109 requiring all tax return preparers to obtain and use a PTIN as their identifying number. As these programs are implemented, the IRS will continually monitor their administration and make appropriate adjustments to increase effectiveness. Thus, in the future, the Treasury Department and the IRS will review the requirement to annually renew a PTIN and will make modifications, as appropriate.

4. The Amount of the User Fee

Many commentators objected to the amount of the user fee. Some stated that the user fee should be smaller or that tax return preparers who prepare a limited number of returns should pay a smaller user fee. Other commentators characterized the user fee as a tax or a revenue raiser.

As stated earlier in this preamble, under the OMB Circular, the IRS must recover the full cost of providing a PTIN. The full cost to the government to administer the PTIN application and renewal program was calculated to be $50 per application or renewal. The user fee does not provide funds beyond the cost to process PTIN applications. Thus, the user fee to apply for or renew a PTIN does not provide additional revenue to the IRS that can be allocated to other programs. The PTIN user fee merely offsets costs the IRS incurs to provide the special benefits associated with having a PTIN.

The cost of processing PTIN applications is not affected by the number of tax returns that a tax return preparer prepares during a given tax season. For example, the cost to the IRS to process the PTIN applications of individuals who prepare over 500 tax returns per year, approximately 100 tax returns per year, or under 10 tax returns per year is the same. The IRS will perform the same tax compliance and suitability checks on these individuals and will provide these individuals with the same PTIN support services. The IRS must also maintain the same data in its PTIN database regarding these individuals and develop the same reconsideration process for these individuals in the event their PTIN applications are denied. Because the cost to the IRS is not dependent on the quantity of returns that an individual tax return preparer prepares, the final regulations adopt the $50 user fee for all tax return preparers to apply for or renew a PTIN.

5. Burden Imposed by the User Fee

Some commentators stated that the $50 user fee will be a burden on their businesses or that the cost to apply for or renew a PTIN will be passed on to clients. The IRS recognizes that some individuals who prepare a small number of tax returns may stop preparing tax returns or that the PTIN user fee may be passed on to clients. The IRS, however, believes that the implementation of the registered tax return preparer program and the requirement to use a PTIN as provided in the section 6109 regulations will benefit taxpayers and tax administration as a whole. The registered tax return preparer program will ensure that tax return preparers meet and maintain a minimum level of competency. The requirement to use a PTIN will provide the IRS an effective way to monitor tax return preparers and enforce the regulation of tax return preparers. The Treasury Department and the IRS believe that a user fee to apply for or renew a PTIN is necessary to recover the cost that the IRS will incur to implement and administer the PTIN application and renewal program.

Other commentators suggested that the user fee to apply for or renew a PTIN would cause some tax return preparers to revert to using their social security number when preparing tax returns rather than a PTIN, which would contravene the identity protection currently provided by PTINs. The regulations under section 6109, however, require tax return preparers to use a PTIN as their sole identifying number when preparing tax returns or claims for refund for compensation. Thus, tax return preparers are not allowed to use their social security numbers as an identifying number when preparing tax returns or claims for refund.

6. Use of a Third Party Vendor

Several commentators objected to providing identifying information to the third party vendor, and numerous commentators objected to paying a separate fee to the vendor.

The third party vendor is statutorily and contractually obligated to protect all personally identifiable information. The vendor is subject to the confidentiality and disclosure provisions of section 6103. The vendor also must comply with the provisions of the Federal Information Security Management Act; the E–Government Act of 2002; IRS Acquisitions Procedures; the Federal Acquisitions Regulations; the Taxpayer Browsing Protection Act of 1997; and the Privacy Act of 1974, which is codified at 5 U.S.C. 552a, regarding all non-tax information. The vendor must comply with numerous policies of the Office of Management and Budget, including OMB Circular No. A–130, Security and Federal Automated Information Resources Appendix III; OMB Circular policy M–06–16, Protection of Sensitive Agency

Information; OMB Circular Policy M–06–15, Safeguarding Personally Identifiable Information; and OMB Circular Policy M–06–19, Reporting Incidents Involving Personally Identifiable Information.

The vendor faces significant consequences for the unauthorized inspection or disclosure of confidential tax information. These consequences include, among others, that an officer or employee of the vendor may be subject to civil damages; civil or criminal sanctions, such as sanctions imposed by 18 U.S.C. 641 and 3571; or penalties as prescribed in sections 7213, 7213A, and 7431.

The vendor's fee, currently set at $14.25, covers the costs incurred by the vendor to administer the application and renewal process. These costs are separate from the costs to the IRS for administering the PTIN application and renewal program, which are recovered in the $50 user fee. The respective fees pay for different aspects of administering the PTIN program, each of which is essential to providing PTINs to tax return preparers. Additionally, under the vendor's contract with the IRS, the vendor's fee is reviewed and approved by the IRS.

After consideration of all of the public comments and statements made during the public hearing, the Treasury Department and the IRS have adopted the proposed regulations in full.

Effective/Applicability Date

The Administrative Procedure Act provides that substantive rules generally will not be effective until thirty days after the final regulations are published in the **Federal Register** (5 U.S.C. 553(d)). Final regulations may be effective prior to thirty days after publication if the publishing agency finds that there is good cause for an earlier effective date.

This regulation is part of the IRS' effort to implement the recommendations in the "Return Preparer Review." The review concluded that obtaining more complete and accurate information on individual tax return preparers and improved IRS oversight of tax return preparers and their preparation of tax returns and claims for refund is necessary for effective tax administration. The PTIN is the mechanism that allows the IRS to obtain more complete and accurate information on tax return preparers. Thus, the issuance of a PTIN is a threshold requirement to implementing the recommendations in the report.

This regulation must be effective significantly in advance of the beginning of the 2011 filing season to enable the IRS to charge a user fee to recover the cost of administering the program under which all individuals who prepare all or substantially all of a tax return or claim for refund of tax are required to obtain a PTIN for use during the 2011 Federal tax filing season. For all tax return preparers to receive a PTIN prior to the 2011 filing season, the IRS must begin registering preparers as quickly as possible. Thus, the Treasury Department and the IRS find that there is good cause for these regulations to be effective upon the publication of a Treasury decision adopting these rules as final regulations in the **Federal Register**.

Special Analyses

It has been determined that these final regulations are a significant regulatory action as defined in Executive Order 12866.

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 did not submit comments on the notice of proposed rulemaking.

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 to recover the full cost to the IRS associated with administering the PTIN application and renewal program and providing the special benefits that are associated with obtaining a PTIN.

The Treasury Department and the IRS are implementing regulatory changes that increase the oversight of the tax return preparer industry. These regulatory changes are based upon findings and recommendations made by the IRS in the "Return Preparer Review." Based upon findings in the review, all individuals who prepare all or substantially all of a tax return or claim for refund will be required to use a PTIN as their identifying number. Except as provided in any transitional period, only attorneys, certified public accountants, enrolled agents, or registered tax return preparers may apply for a PTIN. Thus, only attorneys, certified public accountants, enrolled agents, and registered tax return preparers will be eligible to prepare all or substantially all of a tax return or claim for refund. By limiting the individuals who may prepare all or substantially all of a tax return or claim for refund to individuals who have a PTIN, the IRS is providing a special benefit to the individuals who obtain a PTIN.

The objective of the final regulations is to recover the costs to the government that are associated with providing this special benefit. The costs to the government include the development and maintenance of the IRS information technology system that interfaces with the vendor; the development and maintenance of internal applications; IRS customer service support activities, which include development and maintenance of an IRS Web site and call center staffing; and personnel, administrative, and management support needed to evaluate and address tax compliance issues, investigate and address conduct and suitability issues, and otherwise support and enforce the programs that require individuals to apply for or renew a PTIN.

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

A summary of the comments is set forth elsewhere in this preamble, along with the Treasury Department's and the

IRS' assessment of the issues raised in 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 affect all individuals who want to become a registered tax return preparer under the new oversight rules in Circular 230. Only individuals, not businesses, can practice before the IRS or become a registered tax return preparer. Thus, the economic impact of these regulations on any small entity generally will be a result of applicants and registered tax return preparers owning a small business or a small entity employing applicants or registered tax return preparers.

The final regulations further affect all individual tax return preparers who are required to apply for or renew a PTIN. Only individuals, not businesses, can apply for or renew a PTIN. Thus, the economic impact of these regulations on any small entity generally will be a result of an individual tax return preparer who owns a small business and who is required to apply for or renew a PTIN, or a small business otherwise employing an individual tax return preparer who is required to apply for or renew a PTIN, to prepare all or substantially all of a tax return or claim for refund.

The appropriate NAICS codes for the registered tax return preparer program and 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 Small Business Administration 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 Small Business Administration 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 proposed 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

No reporting or recordkeeping requirements are projected to be associated with the final regulation.

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.

The IOAA authorizes the charging of user fees for agency services, subject to policies designated by the President. The OMB Circular implements presidential policies regarding user fees and encourages user fees when a government agency provides a special benefit to a member of the public. As Congress has not appropriated funds to the registered tax return preparer program or the PTIN application and renewal program, there are no viable alternatives to the imposition of user fees.

Drafting Information

The principal author of these final regulations is Emily M. Lesniak, Office of the Associate Chief Counsel (Procedure and Administration).

List of Subjects in 26 CFR Part 300

Reporting and recordkeeping requirements, User fees.

Adoption of Amendments to the Regulations

■ Accordingly, 26 CFR part 300 is amended as follows:

PART 300—USER FEES

■ **Paragraph 1.** The authority citation for part 300 continues to read in part as follows:

Authority: 31 U.S.C. 9701.

■ **Par. 2.** Section 300.0 is amended by
■ 1. Adding paragraph (b)(9).
■ 2. Removing paragraph (c).
■ The addition reads as follows:

§ 300.0 User fees; in general.

* * * * *

(b) * * *

(9) Applying for a preparer tax identification number.

■ **Par. 3.** Section 300.1 is amended by adding paragraph (d) to read as follows:

§ 300.1 Installment agreement fee.

* * * * *

(d) *Effective/applicability date.* This section is applicable beginning March 16, 1995, except that the user fee for entering into installment agreements on or after January 1, 2007, is applicable January 1, 2007.

■ **Par. 4.** Section 300.2 is amended by adding paragraph (d) to read as follows:

§ 300.2 Restructuring or reinstatement of installment agreement fee.

* * * * *

(d) *Effective/applicability date.* This section is applicable beginning March 16, 1995, except that the user fee for restructuring or reinstatement of an installment agreement on or after January 1, 2007, is applicable January 1, 2007.

■ **Par. 5.** Section 300.3 is amended by adding paragraph (d) to read as follows:

§ 300.3 Offer to compromise fee.

* * * * *

(d) *Effective/applicability date.* This section is applicable beginning November 1, 2003.

■ **Par. 6.** Section 300.4 is amended by adding paragraph (d) to read as follows:

§ 300.4 Special enrollment examination fee.

* * * * *

(d) *Effective/applicability date.* This section is applicable beginning November 6, 2006.

■ **Par. 7.** Section 300.5 is amended by adding paragraph (d) to read as follows:

§ 300.5 Enrollment of enrolled agent fee.

* * * * *

(d) *Effective/applicability date.* This section is applicable beginning November 6, 2006.

■ **Par. 8.** Section 300.6 is amended by adding paragraph (d) to read as follows:

§ 300.6 Renewal of enrollment of enrolled agent fee.

* * * * *

(d) *Effective/applicability date.* This section is applicable beginning November 6, 2006.

■ **Par. 9.** Section 300.7 is amended by adding paragraph (d) to read as follows:

§ 300.7 Enrollment of enrolled actuary fee.

* * * * *

(d) *Effective/applicability date.* This section is applicable beginning January 22, 2008.

■ **Par. 10.** Section 300.8 is amended by adding paragraph (d) to read as follows:

§ 300.8 Renewal of enrollment of enrolled actuary fee.

* * * * *

(d) *Effective/applicability date.* This section is applicable beginning January 22, 2008.

■ **Par. 11.** Section 300.9 is added to read as follows:

§ 300.9 Fee for obtaining a preparer tax identification number.

(a) *Applicability.* This section applies to the application for and renewal of a preparer tax identification number pursuant to 26 CFR 1.6109–2(d).

(b) *Fee.* The fee to apply for or renew a preparer tax identification number is $50 per year, which is the cost to the government for processing the application for a preparer tax identification number and does not include any fees charged by the vendor.

(c) *Person liable for the fee.* The individual liable for the application or renewal fee is the individual applying for and renewing a preparer tax identification number from the IRS.

(d) *Effective/applicability date.* This section is applicable beginning September 30, 2010.

Steven T. Miller,

Deputy Commissioner for Services and Enforcement.

Approved: August 24, 2010.

Michael Mundaca,

Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 2010–24652 Filed 9–28–10; 11:15 am]

BILLING CODE 4830–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2009–0616; FRL–8844–1]

Spinosad; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation revises tolerances for residues of spinosad in or on hog, fat; hog, meat; hog, meat byproducts; poultry meat byproducts. Elanco Animal Health (A Division of Eli Lilly & Company) requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective September 30, 2010. Objections and requests for hearings must be received on or before November 29, 2010, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2009–0616. All documents in the docket are listed in the docket index available at *http://www.regulations.gov*. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Samantha Hulkower, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 603–0683; e-mail address: *hulkower.samantha@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to those engaged in the following activities:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

This listing is not intended to be exhaustive, but rather to provide a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Get Electronic Access to Other Related Information?

You may access a frequently updated electronic version of EPA's tolerance regulations at 40 CFR part 180 through the Government Printing Office's e-CFR site at *http://www.gpoaccess.gov/ecfr*.

C. How Can I File an Objection or Hearing Request?

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2009–0616 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before November 29, 2010. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2

2015–22–04 Fiberglas-Technik Rudolf Lindner GmbH & Co. KG: Amendment 38–18309; Docket No. FAA–2015–3300; Directorate Identifier 2015–CE–024–AD.

(a) Effective Date

This airworthiness directive (AD) becomes effective December 4, 2015.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Fiberglas-Technik Rudolf Lindner GmbH & Co. KG Models G103 TWIN ASTIR, G103 TWIN II, and G103A TWIN II ACRO gliders, all manufacturer serial numbers, certificated in any category.

(d) Subject

Air Transport Association of America (ATA) Code 27: Flight Controls.

(e) Reason

This AD was prompted by mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as a broken bell-crank installed in the air brake control system. We are issuing this AD to detect and correct a broken bell-crank which could lead to failure of the air brake system, possibly resulting in reduced control.

(f) Actions and Compliance

Unless already done, do the following actions:

(1) Within 30 days after December 4, 2015 (the effective date of this AD) and repetitively thereafter at intervals not to exceed 12 months, inspect the locking forces of the air brake control unit, and, if any discrepancy is found, before further flight, correct the locking forces. Do the inspection and correction of any discrepancy following the instructions of Fiberglas-Technik Rudolf Lindner Service Bulletin (SB–G08), Edition April 24, 2015; and Fiberglas-Technik Rudolf Lindner Anweisung (English translation: Instructions), (A/I–G08), Ausgabe (English translation: Edition) April 24, 2015.

Note 1 to paragraph (f)(1) of this AD: This service information contains German to English translation. The European Aviation Safety Agency (EASA) used the English translation in referencing the document. For enforceability purposes, we will refer to the Fiberglas-Technik Rudolf Lindner service information as it appears on the document.

(2) Within 60 days after December 4, 2015 (the effective date of this AD), inspect the bell-crank installed in the air brake control system, and, if any cracks are found, before further flight, replace the bell-crank with a serviceable part. Do the inspection and replacement following the instructions of Fiberglas-Technik Rudolf Lindner Service Bulletin (SB–G08), Edition April 24, 2015; and Fiberglas-Technik Rudolf Lindner Anweisung (English translation: Instructions), (A/I–G08), Ausgabe (English translation: Edition) April 24, 2015.

Note 2 to paragraph (f)(2) of this AD: In the lower wing surface inspection, openings near the bell-crank may be installed to simplify the inspection and make a possible replacement of the bell-crank possible. This optional installation is described in GROB Luft Und Raumfahrt Service Bulletin 315–45/2, dated December 21, 1995; and Fiberglas-Technik Rudolf Lindner Service Bulletin (SB–G07), Edition April 24, 2015.

(3) Within 30 days after replacing a bell-crank as required by paragraph (f)(2) of this AD or within the next 30 days after December 4, 2015 (the effective date of this AD), whichever occurs later, report the inspection results of the removed bell-crank to Fiberglas-Technik Rudolf Lindner GmbH & Co. KG. You may find contact information for Fiberglas-Technik Rudolf Lindner GmbH & Co. KG in paragraph (h) of this AD.

(g) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, Standards Office, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Jim Rutherford, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4165; fax: (816) 329–4090; email: *jim.rutherford@faa.gov*. Before using any approved AMOC on any glider to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(3) *Reporting Requirements:* For any reporting requirement in this AD, a federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB Control Number. The OMB Control Number for this information collection is 2120–0056. Public reporting for this collection of information is estimated to be approximately 5 minutes per response, including the time for reviewing instructions, completing and reviewing the collection of information. All responses to this collection of information are mandatory. Comments concerning the accuracy of this burden and suggestions for reducing the burden should be directed to the FAA at: 800 Independence Ave. SW., Washington, DC 20591, Attn: Information Collection Clearance Officer, AES–200.

(h) Related Information

Refer to MCAI European Aviation Safety Agency (EASA) AD No.: 2015–0116, dated June 24, 2015; GROB Luft Und Raumfahrt Service Bulletin 315–45/2, dated December 21, 1995; and Fiberglas-Technik Rudolf Lindner Service Bulletin (SB–G07), Edition April 24, 2015, for related information. You may examine the MCAI on the Internet at *http://www.regulations.gov/#!documentDetail;D=FAA-2015-3300-0003*.

(i) Material Incorporated by Reference

(1) The Director of the Federal Register approved the incorporation by reference (IBR) of the service information listed in this paragraph under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) You must use this service information as applicable to do the actions required by this AD, unless the AD specifies otherwise.

(i) Fiberglas-Technik Rudolf Lindner Service Bulletin (SB–G08), Edition April 24, 2015; and

(ii) Fiberglas-Technik Rudolf Lindner Anweisung (English translation: Instructions), (A/I–G08), Ausgabe (English translation: Edition) April 24, 2015.

(3) For Fiberglas-Technik Rudolf Lindner GmbH & Co. KG service information identified in this AD, contact Fiberglas-Technik Rudolf Lindner GmbH & Co. KG, Steige 3, D–88487 Walpertshofen, Germany; phone: ++49 (0) 7353/22 43; fax: ++49 (0) 7353/30 96; email: *info@LTB-Lindner.com;* Internet: *http://www.ltb-lindner.com*.

(4) You may view this service information at the FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call (816) 329–4148. In addition, you can access this service information on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2015–3300.

(5) You may view this service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html*.

Issued in Kansas City, Missouri on October 22, 2015.

Melvin Johnson,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2015–27440 Filed 10–29–15; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 300

[T.D. 9742]

RIN 1545–BN03

Preparer Tax Identification Number (PTIN) User Fee Update

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Temporary regulations.

SUMMARY: This document contains temporary regulations relating to the imposition of certain user fees on tax return preparers. The temporary regulations reduce the user fee to apply for or renew a preparer tax identification number (PTIN) and affect individuals who apply for or renew a PTIN. The Independent Offices Appropriations Act of 1952 authorizes the charging of user fees. The text of the temporary regulations also serves as the text of the proposed regulations (REG–121496–15) set forth in the notice of proposed rulemaking on this subject in the Proposed Rules section of this issue of the **Federal Register**.

DATES: *Effective Date:* These regulations are effective on October 30, 2015.

Applicability Date: For date of applicability, see paragraph (d) of these temporary regulations.

FOR FURTHER INFORMATION CONTACT: Concerning the temporary regulations, Hollie M. Marx at (202) 317–6844; concerning cost methodology, Eva J. Williams at (202) 803–9728.

SUPPLEMENTARY INFORMATION:

Background

The Independent Offices Appropriations Act of 1952 (IOAA), which is codified at 31 U.S.C. 9701, authorizes agencies to prescribe regulations that establish user fees for services provided by the agency. The charges must be fair and must be based on the costs to the government, the value of the service to the recipient, the public policy or interest served, and other relevant facts. The IOAA provides that regulations implementing user fees are subject to policies prescribed by the President; these policies are set forth in the Office of Management and Budget Circular A–25, 58 FR 38142 (July 15, 1993) (OMB Circular A–25).

Under OMB Circular A–25, federal agencies that provide services that confer benefits on identifiable recipients are to establish user fees that recover the full cost of providing the special benefit. An agency that seeks to impose a user fee for government-provided services must calculate the full cost of providing those services. In general, a user fee should be set at an amount that allows the agency to recover the direct and indirect costs of providing the service, unless the Office of Management and Budget grants an exception. OMB Circular A–25 provides that agencies are to review user fees biennially and update them as necessary.

PTIN Requirement

Section 6109(a)(4) of the Internal Revenue Code authorizes the Secretary to prescribe regulations for the inclusion of a tax return preparer's identifying number on a return, statement, or other document required to be filed with the IRS. On September 30, 2010, the Treasury Department and IRS published final regulations under section 6109 (REG–134235–08) in the **Federal Register** (TD 9501) (75 FR 60315) (PTIN regulations) to provide that, for returns or claims for refund filed after December 31, 2010, the identifying number of a tax return preparer is the individual's PTIN or such other number prescribed by the IRS in forms, instructions, or other appropriate guidance. The PTIN regulations require a tax return preparer who prepares or who assists in preparing all or substantially all of a tax return or claim for refund after December 31, 2010 to have a PTIN. The PTIN regulations also state that the IRS will set forth in forms, instructions or other appropriate guidance PTIN application and renewal procedures, including the payment of a user fee. The PTIN regulations further state that the IRS may conduct a Federal tax compliance check on an individual who applies for or renews a PTIN.

In accordance with section 1.6109–2(d) of the PTIN regulations, the IRS has set forth application and renewal procedures in Form W–12, *IRS Paid Preparer Tax Identification Number (PTIN) Application and Renewal,* and the Form W–12 Instructions. Individuals may also apply for or renew a PTIN and pay the user fee online at *irs.gov/ptin.* The annual PTIN application and renewal period generally begins in the fall (on October 15 in previous years) of the year preceding the filing season to which the PTIN relates. A third-party vendor processes applications to obtain or renew a PTIN and charges a reasonable fee that is separate from the user fee charged by the government.

Requiring the use of PTINs improves tax administration and tax compliance and benefits tax return preparers by allowing them to provide an identifying number on the return that is not an SSN. Requiring the use of PTINs enables the IRS to better collect and track data on tax return preparers, including the number of persons who prepare returns, the qualifications of those who prepare returns, and the number of returns each person prepares. PTIN use allows the IRS to more easily identify and communicate with tax return preparers who make errors on returns, which benefits tax return preparers by improving compliance and therefore reducing the number of client returns that are examined. The PTIN also enables the IRS to more easily locate and review returns prepared by a tax return preparer when instances of misconduct or potential misconduct are detected, which aids tax administration and compliance. These aids to tax administration and compliance in turn benefit taxpayers and tax return preparers by working to reduce preparer error and misconduct.

Section 1.6109–2(d) states that only individuals authorized to practice before the IRS under 31 U.S.C. 330 are eligible to obtain a PTIN. Under section 1.6109–2(h), the IRS may prescribe in forms, instructions, or other appropriate guidance exceptions to the requirements of the PTIN regulations, including the requirement that an individual must be authorized to practice before the IRS to be eligible to receive a PTIN. On December 30, 2010, the IRS released Notice 2011–6 (2011–3 IRB 315 (Jan. 17, 2011)), which stated that, until December 31, 2013, a provisional PTIN could be renewed upon proper application and payment of the applicable user fee, even if the individual holding the provisional PTIN was not authorized to practice before the IRS.

On June 3, 2011, the Treasury Department and the IRS published in the **Federal Register** (76 FR 32286) amendments to Treasury Department Circular No. 230 (31 CFR part 10), to regulate all tax return preparers under 31 U.S.C. 330. In *Loving* v. *IRS,* 917 F.Supp.2d 67 (D.D.C. 2013), the district court concluded that the IRS and Treasury Department lacked statutory authority to regulate tax return preparation as practice before the IRS under 31 U.S.C. 330 and enjoined the IRS and Treasury from enforcing the regulation of registered tax return preparers. The district court subsequently modified its order to clarify that the IRS's authority to require that tax return preparers obtain a PTIN is unaffected by the injunction. *Loving* v. *IRS,* 920 F.Supp.2d 108, 109 (D.D.C. 2013) (stating ''Congress has specifically authorized the PTIN scheme by statute . . . [and that] scheme, therefore, does not fall within the scope of the injunction and may proceed as promulgated.''). The United States Court of Appeals for the District of Columbia Circuit affirmed the district court's decision and order for injunction. *Loving* v. *IRS,* 742 F.3d 1013 (D.C. Cir. 2014).

PTIN User Fee

Final regulations (REG–139343–08) published in the **Federal Register** (TD 9503) (75 FR 60316) (PTIN user fee regulations) on September 30, 2010, established a $50 user fee to apply for

or renew a PTIN. The $50 user fee was based on an annual PTIN renewal period and an estimate that 1.2 million individuals would be applying for or renewing a PTIN each year.

The IRS and Treasury Department determined that a $50 user fee to apply for or renew a PTIN would recover the full direct and indirect costs that the government incurs to administer the PTIN application and renewal process. The initial determination of a $50 annual fee took into account certain costs that the IRS ascertained it would incur to provide the special benefit associated with the provision of PTINs. As explained in the PTIN user fee regulations, the initial projected costs included the development and maintenance of the IRS information technology system that would interface with a third-party vendor, the development and maintenance of internal applications that would have the capacity to process and administer the anticipated increase in PTIN applications, customer service support activities, which included Web site development and maintenance and call center staffing to respond to questions regarding PTIN usage and renewal. The $50 user fee was also determined to recover costs for personnel, administrative, and management support needed to evaluate and address tax compliance issues of individuals applying for and renewing a PTIN, to investigate and address conduct and suitability issues, and otherwise support and enforce the programs that required an individual to apply for and renew a PTIN.

The vendor's fee, currently set at $14.25 for new applications and $13 for renewal applications, is paid directly to the vendor and covers the costs incurred by the vendor to process applications and renewals. The agency user fee and the vendor fee pay for different aspects of the PTIN program, each of which is essential to the program.

Explanation of Provisions

Pursuant to the guidelines in OMB Circular A–25, the IRS has re-calculated its cost of providing services under the PTIN application and renewal process. The IRS has determined that the full cost of administering the PTIN program going forward has been reduced from $50 to $33 per application or renewal. Individuals who prepare or assist in preparing all or substantially all of a tax return or claim for refund for compensation are required to have a PTIN. The ability to prepare tax returns and claims for refund for compensation is a special benefit, for which the IRS may charge a user fee to recover the full costs of providing the special benefit.

The amount of the user fee is $33 for both initial PTIN applications and renewals because the activities the IRS is required to perform to issue a new PTIN or renew an existing PTIN are the same. Pursuant to the authority granted in section 6109(c), the IRS has determined that it requires certain information to assign (or, in the case of a renewal, re-assign) a PTIN to an individual. The required information is set forth in the Form W–12 and Form W–12 Instructions.

The PTIN user fee is based on direct costs of the PTIN program, which include staffing and contract-related costs for activities, processes, and procedures related to the electronic and paper registration and renewal submissions; tax compliance and background checks; professional designation checks; foreign preparer processing; compliance and IRS complaint activities; information technology and contract-related expenses; and communications. The PTIN user fee also takes into account various indirect program costs, including management and support costs.

The reduction in the fee amount is attributable to several factors, which include the reduced number of PTIN holders (approximately 700,000) from the number originally projected (1.2 million) in 2010, which reduced associated costs; the absorption of certain development costs in the early years of the program; and the fact that certain activities that would have been required to regulate registered tax return preparers will not be performed. In particular, the determination of the user fee no longer includes expenses for personnel who perform functions primarily related to continuing education and testing for registered tax return preparers. Additionally, expenses related to personnel who perform continuing education and testing for enrolled agents and enrolled retirement plan agents were also removed from the user fee.

Individuals who apply for or renew a PTIN will continue to pay a fee directly to a third-party vendor, which is separate from the user fee described in this Treasury decision. The vendor fee is increasing from $14.25 for original applications and $13 for renewal applications to $17 for original applications and $17 for renewal applications.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866, as supplemented by Executive Order 13563.

Historically, the annual PTIN application and renewal period has begun on October 15. For 2015, the date has been postponed to November 1. There is insufficient time before November 1 to provide an opportunity for notice and public comment and issue a final regulation prior to that date. To enable the reduced fee amount to be in effect for PTINs issued or renewed by tax return preparers preparing returns in 2016, the IRS and Treasury find that there is good cause to dispense with (1) notice and public comment pursuant to 5 U.S.C. 553(b) and (c) and (2) a delayed effective date pursuant to 5 U.S.C. 553(d). It would be impracticable, unnecessary, and contrary to the public interest to continue to charge the current fee when the IRS has determined pursuant to the biennial review conducted under OMB Circular A–25 that the fee should be reduced going forward. The IRS and Treasury Department will consider public comments submitted in response to the cross-referenced notice of proposed rulemaking published elsewhere in this issue of the **Federal Register** and will promulgate a final rule after considering those comments.

For applicability of the Regulatory Flexibility Act, please refer to the cross-referenced notice of proposed rulemaking published elsewhere in this issue of the **Federal Register**. Pursuant to section 7805(f), this Treasury decision has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal author of these regulations is Hollie M. Marx, Office of the Associate Chief Counsel (Procedure and Administration).

List of Subjects in 26 CFR Part 300

Reporting and recordkeeping requirements, User fees.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 300 is amended as follows:

■ **Paragraph 1.** The authority citation for part 300 continues to read as follows:

Authority: 31 U.S.C. 9701.

■ **Par. 2.** Section 300.13 is amended by removing and reserving paragraph (b) to read as follows:

§ 300.13 Fee for obtaining a preparer tax identification number.

* * * * *

(b) *Fee.* [Reserved]

* * * * *

■ **Par. 3.** Section 300.13T is added to read as follows:

§ 300.13T Fee for obtaining a preparer tax identification number.

(a) [Reserved]

(b) *Fee.* The fee to apply for or renew a preparer tax identification number is $33 per year, which is the cost to the government for processing the application for a preparer tax identification number and does not include any fees charged by the vendor.

(c) [Reserved]

(d) *Effective/applicability date.* This section will be applicable for all PTIN applications filed on or after November 1, 2015.

Karen M. Schiller,

Acting Deputy Commissioner for Services and Enforcement.

Approved: October 16, 2015.

Mark J. Mazur,

Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 2015–27789 Filed 10–29–15; 8:45 am]

BILLING CODE 4830–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2014–0607; FRL–9934–88]

Metaflumizone; Pesticide Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes a tolerance for the combined residues of the insecticide metaflumizone in or on the raw agricultural commodities citrus (crop group 10–10) at 0.04 parts per million (ppm); pome fruit (crop group 11–10) at 0.04 ppm; stone fruit (crop group 12–12) at 0.04 ppm; and tree nut (crop group 14–12) at 0.04 ppm. BASF Corporation requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective October 30, 2015. Objections and requests for hearings must be received on or before December 29, 2015, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**.

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2014–0607, is available at *http://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW., Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets*.

FOR FURTHER INFORMATION CONTACT: Susan Lewis, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; main telephone number: (703) 305–7090; email address: *RDFRNotices@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Crop production (NAICS code 111), *e.g.,* agricultural workers; greenhouse, nursery, and floriculture workers; farmers.
- Animal production (NAICS code 112), *e.g.,* cattle ranchers and farmers, dairy cattle farmers, livestock farmers.
- Food manufacturing (NAICS code 311), *e.g.,* agricultural workers; farmers; greenhouse, nursery, and floriculture workers; ranchers; pesticide applicators.
- Pesticide manufacturing (NAICS code 32532), *e.g.,* agricultural workers; commercial applicators; farmers; greenhouse, nursery, and floriculture workers; residential users.

B. How can I get electronic access to other related information?

You may access a frequently updated electronic version of 40 CFR part 180 through the Government Printing Office's e-CFR cite at *http://www.ecfr.gov/cgi-bin/text-idx?&c=ecfr&tpl=/ecfrbrowse/Title40/40tab_02.tpl*.

C. How can I file an objection or hearing request?

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2014–0607 in the subject line on the first page of your submission. All requests must be in writing, and must be received by the Hearing Clerk on or before December 29, 2015. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing (excluding any Confidential Business Information (CBI)) for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit the non-CBI copy of your objection or hearing request, identified by docket ID number EPA–HQ–OPP–2014–0607, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be CBI or other information whose disclosure is restricted by statute.
- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001.
- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *http://www.epa.gov/dockets/contacts.html*. Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *http://www.epa.gov/dockets*.

II. Background and Statutory Findings

In the **Federal Register** of December 17, 2014 (79 FR 75107) (FRL–9918–90), EPA issued a document pursuant to FFDCA section 408(d)(3), 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP #4F8286) by BASF Corporation, P.O. Box 13528, Research Triangle Park, NC 27709. The petition requested that 40 CFR 180.657 be amended by establishing a tolerance for the combined residues of the

§ 383.1 Purpose and periodic adjustment.

(a) *Purpose.* This part adjusts the civil penalty liability amounts prescribed in 49 U.S.C. 46301(a) for inflation in accordance with the Act cited in paragraph (b) of this section.

(b) *Periodic Adjustment.* DOT will periodically adjust the maximum civil penalties set forth in 49 U.S.C. 46301 and this part as required by the Federal Civil Penalties Inflation Adjustment Act of 1990 as amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015.

■ 3. Section 383.2 is revised to read as follows:

§ 383.2 Amount of penalty.

Civil penalties payable to the U.S. Government for violations of Title 49, Chapters 401 through 421, pursuant to 49 U.S.C. 46301(a), are as follows:

(a) A general civil penalty of not more than $32,140 (or $1,414 for individuals or small businesses) applies to violations of statutory provisions and rules or orders issued under those provisions, other than those listed in paragraph (b) of this section, (*see* 49 U.S.C. 46301(a)(1));

(b) With respect to small businesses and individuals, notwithstanding the general $1,414 civil penalty, the following civil penalty limits apply:

(1) A maximum civil penalty of $12,856 applies for violations of most provisions of Chapter 401, including the anti-discrimination provisions of sections 40127 (general provision), and 41705 (discrimination against the disabled) and rules and orders issued pursuant to those provisions (*see* 49 U.S.C. 46301(a)(5)(A));

(2) A maximum civil penalty of $6,428 applies for violations of section 41719 and rules and orders issued pursuant to that provision (*see* 49 U.S.C. 46301(a)(5)(C)); and

(3) A maximum civil penalty of $3,214 applies for violations of section 41712 or consumer protection rules or orders (*see* 49 U.S.C. 46301(a)(5)(D)).

Issued in Washington, DC, under authority delegated at 49 CFR 1.27(n), on: August 5, 2016.

Molly J. Moran,

Acting General Counsel.

[FR Doc. 2016–19003 Filed 8–9–16; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 300

[TD 9781]

RIN 1545–BN02

Preparer Tax Identification Number (PTIN) User Fee Update

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations and removal of temporary regulations.

SUMMARY: This document contains final regulations relating to the imposition of certain user fees on tax return preparers. The final regulations supersede and adopt the text of temporary regulations that reduced the user fee to apply for or renew a preparer tax identification number (PTIN) from $50 to $33. The final regulations affect individuals who apply for or renew a PTIN. The Independent Offices Appropriations Act of 1952 authorizes the charging of user fees.

DATES: *Effective Date:* These regulations are effective on September 9, 2016. *Applicability Date:* For date of applicability, see § 300.13(d).

FOR FURTHER INFORMATION CONTACT: Concerning the final regulations, Hollie M. Marx at (202) 317–6844; concerning cost methodology, Eva J. Williams at (202) 803–9728 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background and Summary of Comments

This document contains final regulations relating to the imposition of a 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 that establish user fees for services provided by the agency. The charges must be fair and must be based on the costs to the government, the value of the service to the recipient, the public policy or interest served, and other relevant facts. The IOAA provides that regulations implementing user fees are subject to policies prescribed by the President; these policies are set forth in the Office of Management and Budget Circular A–25, 58 FR 38142 (July 15, 1993) (OMB Circular A–25).

Under OMB Circular A–25, federal agencies that provide services that confer special benefits on identifiable recipients beyond those accruing to the general public are to establish user fees that recover the full cost of providing the special benefit. An agency that seeks to impose a user fee for government-provided services must calculate the full cost of providing those services, review user fees biennially, and update them as necessary.

Section 6109(a)(4) of the Internal Revenue Code (Code) authorizes the Secretary to prescribe regulations for the inclusion of a tax return preparer's identifying number on a return, statement, or other document required to be filed with the IRS. On September 30, 2010, the Treasury Department and the IRS published final regulations under section 6109 (REG–134235–08) in the **Federal Register** (TD 9501) (75 FR 60315) (PTIN regulations) to provide that, for returns or claims for refund filed after December 31, 2010, the identifying number of a tax return preparer is the individual's PTIN or such other number prescribed by the IRS in forms, instructions, or other appropriate guidance. The PTIN regulations require a tax return preparer who prepares or who assists in preparing all or substantially all of a tax return or claim for refund after December 31, 2010 to have a PTIN. Final regulations (REG–139343–08) published in the **Federal Register** (TD 9503) (75 FR 60316) on September 30, 2010, established a $50 user fee to apply for or renew a PTIN. The ability to prepare tax returns and claims for refund for compensation is a special benefit, for which the IRS may charge a user fee to recover the full costs of providing the special benefit.

Pursuant to the guidelines in OMB Circular A–25, the IRS recalculated its cost of providing services under the PTIN application and renewal process and determined that the full cost of administering the PTIN program going forward is reduced from $50 to $33 per application or renewal. On October 30, 2015, the Treasury Department and the IRS published in the **Federal Register** (80 FR 66851–01) a notice of proposed rulemaking by cross-reference to temporary regulations (REG–121496–15) proposing amendments to regulations under 26 CFR part 300. On the same date, the Treasury Department and the IRS published in the **Federal Register** (80 FR 66792–01) temporary regulations (TD 9742) that reduced the amount of the user fee to obtain or renew a PTIN from $50 to $33 per original or renewal application. Five electronic public comments were submitted under the regulation number for the proposed regulations, but their contents related to issues other than a user fee for applying for or renewing a PTIN and are not relevant to these regulations. The comments are available for public

inspection at *http://www.regulations.gov* or upon request. The IRS received no requests for a public hearing, and none was held. The final regulations adopt the proposed regulations without change. The temporary regulations are hereby made obsolete and removed.

Effect on Other Documents

Temporary regulations § 300.13T are obsolete as of September 9, 2016.

Special Analyses

Certain IRS regulations, including this one, are exempt from the requirements of Executive Order 12866, as supplemented and reaffirmed by Executive Order 13563. Therefore, a regulatory impact assessment is not required.

The Administrative Procedure Act provides that substantive rules generally will not be effective until thirty days after the final regulations are published in the **Federal Register** (5 U.S.C. 553(d)). The Treasury Department and the IRS have determined that section 5 U.S.C. 553(d) of the Administrative Procedure Act applies to these final regulations.

The notice of proposed rulemaking (REG–121496–15) included an initial regulatory flexibility analysis. The Treasury Department and the IRS concluded in the initial regulatory flexibility analysis that the proposed regulations, if promulgated, may have a significant economic impact on a substantial number of small entities. None of the public comments submitted under the regulation number for the proposed regulation addressed the initial regulatory flexibility analysis. After further consideration, the Treasury Department and the IRS conclude that no final regulatory flexibility analysis is required. The Treasury Department and the IRS certify that the final regulations will not have a significant economic impact on a substantial number of small entities. Although the final regulations will likely affect a substantial number of small entities, the economic impact on those entities is not significant. The final regulations establish a $33 fee to apply for or renew a PTIN per original or renewal application, which is a reduction from the previously established fee of $50 per original or renewal application, and the $33 fee will not have a significant economic impact on a small entity.

Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking that preceded these final regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business. No comments were received on the proposed regulations.

Drafting Information

The principal author of these final regulations is Hollie M. Marx, Office of the Associate Chief Counsel (Procedure and Administration). However, other personnel from the Treasury Department and the IRS participated in their development.

List of Subjects in 26 CFR Part 300

Reporting and recordkeeping requirements, User fees.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 300 is amended as follows:

PART 300—USER FEES

■ **Paragraph 1.** The authority citation for part 300 continues to read as follows:

Authority: 31 U.S.C. 9701.

■ **Par. 2.** Section 300.13 is amended by adding paragraph (b) and revising paragraph (d) to read as follows:

§ 300.13 Fee for obtaining a preparer tax identification number.

* * * * *

(b) *Fee.* The fee to apply for or renew a preparer tax identification number is $33 per year, which is the cost to the government for processing the application for a preparer tax identification number and does not include any fees charged by the vendor.

* * * * *

(d) *Applicability date.* This section will be applicable for applications for and renewal of a preparer tax identification number filed on or after September 9, 2016.

§ 300.13T [Removed]

■ **Par. 3.** Section 300.13T is removed.

John Dalrymple,

Deputy Commissioner for Services and Enforcement.

Approved: July 14, 2016.

Mark J. Mazur,

Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 2016–18925 Filed 8–9–16; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF DEFENSE

Department of the Army

32 CFR Part 505

[USA–2016–HQ–0030]

Army Privacy Program

AGENCY: Department of the Army, DoD.

ACTION: Direct final rule.

SUMMARY: The Department of the Army is amending the Army Privacy Program Regulation. Specifically, Army is adding exemption rules for Army system of records ''A0600–20 SAMR, Soldiers Equal Opportunity Investigative Files''. This rule provides policies and procedures for the Army's implementation of the Privacy Act of 1974, as amended. This direct final rule makes changes to the Department of the Army's Privacy Program rule. These changes will allow the Department to exempt records from certain portions of the Privacy Act. This will improve the efficiency and effectiveness of the Department of Defense's (DoD's) program by preserving the exempt status of the records when the purposes underlying the exemption are valid and necessary to protect the contents of the records.

DATES: The rule will be effective October 19, 2016 unless comments are received that would result in a contrary determination. Comments will be accepted on or before October 11, 2016.

ADDRESSES: You may submit comments, identified by docket number and/or RIN number and title, by any of the following methods:

- *Federal Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Department of Defense, Office of the Deputy Chief Management Officer, Directorate for Oversight and Compliance, 4800 Mark Center Drive, Mailbox #24, Alexandria, VA 22350–1700.

Instructions: All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Ms. Tracy C. Rogers, Chief, FOIA/PA, telephone: 703–428–7499.