

The Kindler and Gentler IRS Is Targeting E-File Practitioners—Are you in compliance?

By David Lee Rice and Russell M. Ozawa

David Lee Rice and Russell M. Ozawa examine the compliance for both tax return preparers and authorized IRS e-file providers.

Introduction

In 2007 and 2008, more than 80 percent of all Federal individual income tax returns were prepared by paid tax return preparers or by taxpayers using consumer tax preparation software.¹ In 2007, the IRS estimated that there were between 900,000 and 1.2 million individuals preparing tax returns for a fee.² While some tax return preparers are licensed by their respective states (e.g., attorneys or CPAs) and others enrolled to practice by the IRS as enrolled agents, a large percentage of tax return preparers do not pass any government or professionally mandated competency requirements before they prepare a Federal tax return.

In 2011, the IRS received more than 100 million returns via e-file.³ E-file evolved from a pilot program launched by the IRS to test the costs and benefits of the Electronic Filing System (EFS). In 1986, roughly 25,000 Federal returns were filed electronically.⁴ Since the inception of e-file in 1986, more than 1 billion returns have been filed via e-file.⁵ The IRS authorizes providers to submit an e-file application.

Both tax return preparers and authorized IRS e-file providers must abide by certain rules and regulations, the violation of which may result in sanctions, suspension or expulsion. Practitioners, whether preparers and/or authorized IRS e-file providers, should practice due

diligence, as the IRS has begun auditing and examining preparers and providers to improve compliance.

Tax Return Preparers

Over the past 20 years, there has been an increased use of paid tax return preparers.⁶ Today, tax return preparers often do more than prepare tax returns—some educate taxpayers about tax laws and facilitate electronic filing. As a result of complex tax laws and growth in technology, a majority of U.S. taxpayers rely on tax return preparers to assist them in preparing their tax returns. Until recently, any person could have prepared a Federal tax return for any other person for a fee. Although some tax return preparers, such as attorneys and CPAs, were licensed by their states, and others were enrolled by the IRS as enrolled agents, many tax return preparers did not have to pass any competency requirements before they prepared a Federal tax return for a fee.

Tax Return Preparer Compliance Studies

In 2006, the Government Accountability Office (GAO) conducted a review of the quality of services offered by paid tax return preparers in chain commercial tax return preparation firms.⁷ Staff members from the GAO visited 19 chain commercial tax return preparation firms and asked preparers to prepare federal tax returns under one of two scenarios created by the GAO, Senate Committee on Finance and the Joint Committee on Taxation. Only two of the 19 preparers had calculated the correct tax liability and refund amounts. Worse, all 19 preparers made a mistake on the prepared returns. Three preparers incorrectly reported amounts of ordinary dividends or

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capital gain income, eight preparers reported the fictitious taxpayer's prior year's state tax refund incorrectly and several failed to ask about income from sources other than wages. One preparer even told the fictitious taxpayer that she did not have to report income from casual self-employment arrangements unless it was more than \$3,200, while others advised the fictitious taxpayer that she did not have to report this income because the IRS would not know about the income unless it was reported. The GAO also found that many of the tax return preparers made mistakes when it came to claiming the proper amounts of credits and deductions.

In 2008, the Treasury Inspector General for Tax Administration (TIGTA) conducted a similar review of unenrolled paid tax return preparers.⁸ Auditors from the TIGTA posed as taxpayers and visited 28 unenrolled tax return preparers in a large metropolitan area. Twelve of the 28 unenrolled preparers worked for chain commercial tax return preparation firms and 16 worked at or owned small, independent tax return preparation firms. Similar to the GAO study, the preparers were asked to prepare a federal tax return based on one of five scenarios developed by the TIGTA. Seventeen of the preparers did not calculate the correct amount of tax owed or refund due on the returns they prepared. None of the tax return preparers correctly calculated the expenses related to self-employment income. Seven preparers failed to exercise due diligence when determining whether the fictitious taxpayer was eligible to receive the earned income tax credit. Far worse, at least six preparers incorrectly acted willfully or recklessly during the preparation of the returns by adding or increasing deductions without permission. Several preparers failed to provide the required identifying information and five did not sign the fictitious taxpayer's tax return as required. Two preparers failed to provide their own identification numbers as required.

While each study only targeted a small sample of paid tax return preparers, the results were alarming enough for the IRS to increase oversight of paid tax return preparers with the ultimate goal of improving compliance with rules and regulations.

Preparer Duties

Today, under Treasury Department Circular No. 230 ("Circular 230"), the Commissioner may designate an individual 18 years or older as a registered tax return preparer if the individual demonstrates competence in Federal tax return preparation matters by written examination administered by, or administered under, the oversight of the IRS, or if the individual meets certain standards prescribed by the IRS. Only individuals

satisfying each condition to becoming a registered tax return preparer, including passing the competency examination and suitability checks, may represent that he or she is a registered tax return preparer. Registered tax return preparers must comply with the applicable rules in Circular 230.⁹

Tax return preparers, in general, must exercise due diligence in preparing or assisting in the preparation of tax returns and claims for refunds. This includes not only taking the necessary steps to prepare accurate Federal tax returns on behalf of clients, but also becoming knowledgeable in tax law and learning and understanding the underlying substantive law affecting an item of income or deduction. Furthermore, preparers must exercise due diligence in preparing or assisting in the preparation, approval and filing of returns, documents, affidavits or other papers relating to IRS matters. Paid tax return preparers must also exercise due diligence in determining the correctness of oral and written representations made by the preparer to the IRS, and the correctness of representations made by the preparer to the client with reference to any matter administered by the IRS.

New tax regulations require all paid tax return preparers, including attorneys, CPAs and enrolled agents, to apply for a preparer tax identification number (PTIN).¹⁰ According to the IRS, registration of paid tax return preparers will enable the IRS to provide better service to the tax return preparer community and taxpayers generally. The IRS will be able to track the number of persons preparing returns, the qualifications of those preparers and the number of returns each person prepares. The IRS plans to send targeted updates to those tax return preparers who have clients that are most likely to be impacted by significant or late changes in the tax laws or IRS procedures.¹¹ Moreover, registration will allow the IRS to more easily locate and review the returns prepared by a tax return preparer when instances of misconduct are detected.¹²

In addition to practicing due diligence and registering with the IRS for a PTIN, tax return preparers have additional responsibilities, which include but are not limited to:¹³

- signing the return or claim for refund and including their PTIN on the return or claim for refund;
- providing a copy of each return or claim for refund to the client;
- retaining a completed copy of the return or claim for refund, or retaining a record of all the taxpayers, their taxpayer identification numbers (TIN), the taxable years and the type of returns or claims for refund prepared; and

- providing a copy or list of the taxpayers, their TIN, taxable years and form type, for inspection upon request by the IRS for a three-year period following the close of the return period.

In an effort to increase oversight and compliance, the IRS sent letters to more than 10,000 paid tax return preparers in 2010 reminding them of their obligation to prepare accurate tax returns on behalf of their clients. In the letter, the IRS informed the paid tax return preparers that it would be visiting a small number of paid tax return preparers beginning in December 2010 to confirm that these preparers were complying with current return preparer requirements. In July 2011, the IRS announced that it would send letters to approximately 100,000 paid tax return preparers who prepared returns in 2011, but failed to follow the new PTIN requirements.

Preparers should be advised that the IRS does not have the right to review a specific client's files without notification to the client. Visitations to preparers' offices are not audits of taxpayers. Instead, they are a process of an oversight program implemented to improve compliance by preparers. The IRS is questioning and examining the tax return preparer and not the taxpayer. If an employee of the IRS requests to review confidential client information, the preparer should request the IRS employee to directly contact the client first. Preparers owe a duty to their clients to protect confidential information. The IRS, however, does have a right to ask about the preparer's office procedures, including how the preparer conducts interviews, what files the preparer maintains on clients, how the preparer transmits returns electronically and how and when the preparer signs returns. If the preparer is reviewed, the tax return preparer should have his compliance binders and office procedural manuals readily available. According to the IRS, taxpayer contacts resulting from reviews of tax return preparers will be able to confirm potential violations of the preparer that may result in penalties against the preparer—the rights of the taxpayers will not be jeopardized.¹⁴ In addition, because the preparer has client files, which contain confidential information, said files should not be open whereby it could be looked at by another client nor should the preparer have any of their client's papers or workpapers in plain view.

In the Fall of 2011, the IRS began implementing a new competency test. The IRS also began conducting background checks on certain paid tax return preparers. In 2012, the IRS is expected to require certain paid tax return preparers to complete 15 hours of continuing education annually. Attorneys, CPAs and enrolled agents will be exempt from competency testing and continuing

education requirements. However, these professionals are generally mandated by their state governing board or the IRS to complete so many hours of continuing education anyway.

Sanctions

Under Circular 230, the Secretary of Treasury, or his delegate, may censure, suspend or disbar any practitioner from practice before the IRS if the practitioner is shown to be incompetent or disreputable, fails to comply with any regulation, or acts with the intent to defraud or willfully and knowingly misleads or threatens a client or prospective client. Moreover, under Circular 230, the Secretary also has the discretion to impose monetary sanctions on such practitioners.

Penalties for filing an incorrect Federal tax return may extend to both the paid tax return preparer and the client. Thus, it is imperative that the paid tax return preparer exercise due diligence in preparing, or assisting in the preparation of, clients' tax returns. Taxpayers may be subject to accuracy-related or fraud penalties plus accrued interest on any underpayment. Paid tax return preparers may be subject to penalties if their client's Federal tax return understates tax liability due to an unreasonable position or due to the preparer's willful, reckless or intentional disregard of rules or regulations. If a paid tax return preparer understates tax liability on a client's Federal tax return due to an unreasonable position taken on the return, the preparer may be assessed a minimum penalty of \$1,000.¹⁵ However, if a paid tax return preparer understates tax liability on a client's Federal tax return due to the preparer's willful, reckless or intentional disregard of rules and regulations, the preparer may be assessed a minimum penalty of \$5,000.¹⁶

Moreover, paid tax return preparers may be subject to the following penalties as a result of an incorrect Federal tax return:¹⁷

- If the paid tax preparer's firm is an authorized IRS e-file provider, the firm may be suspended or expelled from participation in the IRS's e-file program.
- Preparers may be barred from preparing tax returns in the future.
- Depending on the severity of the violation, and whether there exists fraud or intentional disregard of rules and regulations, the preparer may be referred for criminal investigation.
- Preparers may be subject to disciplinary action by the IRS Office of Professional Responsibility.
- Preparers may be subject to other penalties under the Internal Revenue Code (the Code).¹⁸

In the first half of Fiscal Year 2010, the IRS conducted at least 5,000 field visits to tax return preparers. In addition, the IRS worked closely with the Department of Justice to pursue violations by tax return preparers. Their collective efforts resulted in 56 indictments, 25 convictions and 21 civil injunctions in the first three months of 2010.

Since 2010, numerous paid tax return preparers have been suspended by the Office of Professional Responsibility for various violations of rules or regulations. Numerous preparers have been permanently enjoined by the U.S. District Court from acting as Federal tax return preparers, preparing tax returns that include frivolous positions, promoting abusive tax shelters or from other tax-related activities. An enrolled agent in California was suspended for at least four years as a result of furnishing or causing another person to furnish false statements as to the substantiation of various types of deductions and other tax benefits that the enrolled agent knew or should have known were false. An attorney in Kansas was indefinitely suspended for failure to exercise due diligence in regard to a municipal finance bond transaction where purported Federal tax-exempt interest on the issued bonds was later determined by the IRS to be nonexempt from Federal taxation. That same attorney was also suspended for knowingly, recklessly or through gross negligence rendering false opinions. A CPA in Florida was suspended indefinitely for failure to exercise due diligence in preparing, approving and filing tax returns for clients, and failure to determine the correctness of oral or written representations made to the Department of Treasury. The same CPA was also suspended for failure to inform clients of penalties reasonably likely to apply, as well as the opportunities to avoid such penalties. A CPA in Texas was suspended indefinitely for, *inter alia*, failure to exercise due diligence in providing tax preparer identifying information on a client's Form 1040 and failure to file accurate Forms 1040. CPAs in Colorado and Oregon and an enrolled agent in Colorado were suspended indefinitely for failure to exercise due diligence in the determination of the validity of credits and deductions. Enrolled agents in California and New York were recently censured by the Office of Professional Responsibility for failure to exercise due diligence in the preparation of client tax returns filed with the IRS.

However, even OPR has certain safeguards in place and has published the methods by which it may discipline tax practitioners. The IRS, in its Internal Revenue

Manual (IRM), has listed the types of infractions that a practitioner can be charged with¹⁹ However, the IRS has not set forth the procedures by which the practitioner is disciplined, and indeed, if the IRS is imposing sanctions, at the very minimum they should set for the procedures as did OPR in Circular 230.²⁰

Because the consequences and penalties for filing an incorrect tax return can be severe to both the taxpayer and the paid tax return preparer, preparers should practice due diligence when preparing tax returns. In a time of increased oversight, it is imperative that paid tax return preparers keep informed about new tax laws and that any deductions taken by the taxpayer at the advice of the preparer be reasonable.

E-File Providers

In 2009, Congress passed a provision requiring all tax preparers who file more than 10 individual tax returns per year to file the tax returns electronically. The IRS is in the process of phasing in this requirement by setting the threshold at 100 or more tax returns for 2011 and 11 or more tax returns for 2012. A business or organization authorized by the IRS to participate in the IRS e-file program is known as an authorized IRS e-file provider. After a firm submits an e-file application and meets the eligibility criteria and passes a suitability check, the IRS assigns the firm an electronic filing identification number (EFIN). An authorized IRS e-file provider may be an electronic return originator (ERO), intermediate service provider, transmitter, software developer or reporting agent. These roles are not mutually exclusive.

Provider Roles and Responsibilities

Authorized IRS e-file providers must abide by certain e-file rules and requirements to continue participation in the IRS e-file program. Generally, an authorized IRS e-file provider must:²¹

- maintain an acceptable cumulative error or reject rate,
- adhere to the requirements for ensuring that tax returns are properly signed,
- properly use the standard/nonstandard Form W-2 indicator,
- properly use the refund anticipation loan (RAL) indicator,
- include the ERO's EFIN as the return EFIN for returns that the ERO submits to an Intermediate Service Provider or Transmitter,

- include the Intermediate Service Provider's EFIN in the designated Intermediate Service Provider field in the electronic return record, and
- submit an electronic return to the IRS with information that is identical to the information provided to the taxpayer on the copy of the return.

In addition to the foregoing responsibilities of authorized IRS e-file providers, authorized IRS e-file providers also must meet certain duties depending on the type of provider applied for.

Electronic Return Originator

An ERO originates the electronic submission of a return to the IRS. The ERO is often the first point of contact for most taxpayers filing a return using e-file. While an ERO may engage in tax return preparation (*i.e.*, as a tax return preparer), that activity is separate from the origination of the electronic submission of the return to the IRS. An ERO originates the electronic submission of returns that the ERO prepared or collected from the taxpayer by electronically sending the return to a transmitter that will transmit the return to the IRS, directly transmitting the return to the IRS or providing a return to an intermediate service provider for processing prior to transmission to the IRS. The ERO has various duties, including, but not limited to:

- timely originating the electronic submission of returns,
- submitting any required supporting paper documents to the IRS,
- providing copies to taxpayers,
- retaining records and making records available to the IRS, and
- accepting returns only from taxpayers and authorized IRS e-file providers.

Intermediate Service Provider

An intermediate service provider receives tax information from an ERO or from a taxpayer who files electronically using a personal computer or tax preparation software. The intermediate service provider processes the tax return information and forwards the information to a transmitter or sends the information back to the ERO (or taxpayer for online filing). The intermediate service provider's responsibilities include, but are not limited to:

- must include its EFIN and the ERO's EFIN on all return information forwarded to the transmitter;
- if requested, serves as a contact point between its client EROs and the IRS;
- if requested, must provide the IRS with a list of each client ERO; and

- must adhere to all applicable rules that apply to transmitters.

Transmitter

A transmitter transmits electronic tax return information directly to the IRS. Transmitters are equipped with proper computer hardware and software which allows them to transmit electronic return data directly to the IRS. Prior to transmitting return data, a potential transmitter must submit an application requesting the "transmitter" option and obtain an EFIN and an electronic transmitter identification number (ETIN) and a password for testing. Testing that ensures compatibility of the transmitter's transmission systems with the IRS's system must be completed to enable transmission of the electronic return to the IRS. A transmitter has various duties, including, but not limited to:

- must ensure that the EFINs of authorized IRS e-file providers are included in the electronic return record of returns it transmits;
- must timely transmit returns to the IRS, retrieve acknowledgment files and send the acknowledgment file information to the ERO, intermediate service provider or taxpayer (for online filing); and
- must promptly correct any transmission error that causes an electronic transmission to be rejected.

Software Developer

A software developer develops software allowing taxpayers and providers to format electronic return information according to e-file specifications and/or transmitting electronic return information directly to the IRS. Software developers must pass assurance testing. A software developer's duties include, but are not limited to:

- ensure correction of any software error causing returns to reject and distribute the correction;
- ensure that the software creates accurate returns,
- ensure that any software package for multiple providers to use to transmit returns has the capability of combining returns into one IRS transmission file and take into account sorting requirements of the declaration control number,
- ensure that an IRS assigned production password is not incorporated into its software,
- provide a copy of the software and accompanying documentation to the IRS if requested,
- ensure that its software contains appropriate language and version indicators for Consent to Disclose and Jurat Statements,

- ensure that the software contains IRS e-file signature authorization, and
- ensure that the software allows for input of different addresses on appropriate forms and schedules.

Compliance

Monitoring

The IRS has begun monitoring authorized IRS e-file providers for compliance with the rules governing the IRS e-file program. An e-file monitoring coordinator (EMC) receives external referrals from other authorized IRS e-file providers, tax professionals and taxpayers of potential violations of e-file rules. EMCs also receive internal referrals from IRS employees who believe an authorized IRS e-file provider is violating e-file rules. Visits are referral-based, follow-up, targeted or random.

Referral visits involve the receipt of a referral from providers, tax professionals, taxpayers or IRS employees. If the referral yields a valid complaint, a visit to the authorized IRS e-file provider is mandatory. Follow-up visits may be necessary based on violations identified in a previous year. Targeted visits are based on indicia of risks for noncompliance. Random visits are nondiscriminatory and utilized to determine general compliance with IRS e-file rules.

The monitor or EMC reviews the operations of the authorized IRS e-file provider, which may include satellite offices, temporary offices and seasonal offices. The monitor or EMC advises the authorized IRS e-file provider of any violations identified at those locations. Monitoring may include:²²

- reviewing IRS e-file submissions;
- investigating complaints;
- scrutinizing advertising material;
- visiting offices and observing office procedures;
- inspecting files;
- confirming the signature of personal identification number requirements for transmitting returns;
- confirming paid return preparer's signature, PTIN and employer identification number of the firm are correctly reported on all returns transmitted;
- verifying compliance with Code Sec. 6695, subdivision (g), relating to the due diligence requirements for returns claiming EITC if the provider is an income tax return preparer;
- scrutinizing refund procedures to ensure compliance with Code Sec. 6695, subdivision (f); and
- evaluating security requirements to ensure unauthorized disclosure of taxpayer information does not occur.

Authorized IRS e-file Providers should adhere to all e-file and statutory and regulatory rules and regulations to ensure that they won't be subject to sanctions or penalties. If an Authorized IRS e-file provider is monitored by a monitor or EMC, the provider should cooperate with the investigator and provide requested information and documents in a timely manner. Providers that are also preparers should follow preparer-client confidentiality rules if the IRS requests confidential client information, by requesting that the IRS contact the client directly first.

Sanctions

A violation of IRS e-file rules may result in a warning or a sanction of the authorized IRS e-file provider. For minor violations, a written warning may be issued to the authorized IRS e-file provider. However, for other violations for noncompliance, there are three levels of infractions.

Level one infractions consist of violations of IRS e-file rules that have little or no adverse impact on the quality of electronically filed returns or on e-file. They often result in a written reprimand. Level two infractions consist of violations of IRS e-file rules that have an adverse impact on the quality of electronically filed returns or on IRS e-file. Level two infractions also include continued level one infractions after the IRS has notified the authorized IRS e-file provider of the level one infraction. Level two infractions may result in limitations of participation in the e-file program or suspension from participation in the e-file program for a year. Level three infractions consist of violations of IRS e-file rules that have a significant impact on the quality of electronically filed returns or on the IRS e-file program. Level three infractions also include level two infractions after the IRS has notified the authorized IRS e-file provider of the level two infraction. Level three infractions may result in suspension from the IRS e-file program or, if the infraction involves fraud or criminal conduct, a level three infraction may even result in expulsion.

Reasonable cause is considered before the IRS levies sanctions for noncompliance. If an authorized IRS e-file provider is monitored, to avoid being sanctioned, the authorized IRS e-file provider may provide documentation that the circumstances leading to the infraction was beyond his or her control, and reasonable actions were taken to resolve the noncompliance as quickly as possible.

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avoid criminal prosecution by filing eight years of amended tax returns and paying accuracy related and/or delinquency penalties and a miscellaneous penalty equal to five percent or 12.5 percent or 27.5 percent of the highest balance in the account, depending on the circumstances.² Taxpayers who still have unreported off-shore accounts should consult with an experienced tax practitioner to fix the problem. However, it is no longer an option to just wait and continue to hide behind bank secrecy laws in Switzerland or any other country around the world. Those days are gone.

ENDNOTES

¹ Hiring Incentives to Restore Employment Act of 2010 (HIRE) (P.L. No. 111-147), Title V, §§ 501-41, 124 Stat. 71, 97-117.

² IR-2012-5, Jan. 9, 2012.

Practice

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Do not inadvertently exceed the scope of your license or experience. At a minimum, a nonlawyer representative should strongly recommend that a client consult counsel with admonition that discussions held between a client and a nonlawyer may have to be disclosed in the event of a criminal investigation or prosecution. Code Sec. 7525 does not protect information provided to the nonlawyer representative from disclosure in a criminal investigation or prosecution.

Throughout, treat all government representatives with respect and act like the professional that you want others to know and respect. Do not mislead, affirmatively or otherwise, anyone at anytime. Always maintain the appearance of reasonableness, even in times where the government may appear to be anything but reasonable. If

you have problems with an agent during the course of an examination, ask to speak to their manager. If you have problems, it is likely that other representatives have previously had similar discussions with the agent's manager. While the manager may appear to be supporting the agent when meeting with you, it is also likely that the manager will have a direct conversation with the agent outside your presence and that your future interactions with the agent will be significantly improved.

Be All You Can Be

A busy tax practice can be surrounded by minefields. Use your best efforts and remember that a tax return is not an offer to negotiate with the government. Document your advice in writing, limit the nature and scope of services to be provided in your engagement letter, establish a system of checklists (and follow the system) and use your best judgment. If the client is unwilling to accept and follow your advice, strongly consider terminating the engagement. Life is short and the headaches of trying to convince someone to do the right thing may simply not be worth your effort. If you encounter an undeserving or possibly disrespectful client, let them go and move on with your practice. Ninety-eight percent of the problems come from two percent of the clients.

You cannot be all things to all people, regardless of the effort and personal sacrifice. Lastly and perhaps most importantly, your client is not your friend. If you feel the need for friends, get a dog!

ENDNOTES

¹ Rev. Rul. 2010-15, IRB 2010-23, 730.

² Rev. Proc. 2008-35, IRB 2008-29, 132.

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Administrative Review

Authorized IRS e-file providers who are sanctioned as a result of violation of e-file rules or regulations may request administrative review by the office that sanctioned it. The provider may further appeal to the IRS Appeals Office if the sanctioning office upholds the sanction. Where is the "due process"?

Conclusion

As authorized IRS e-file providers, tax return preparers need to practice due diligence when preparing and filing returns via e-file. The IRS has begun reviewing and examining preparers and providers in order to increase compliance with rules and regulations. Violations of rules could result in costly punishment depending on the severity of the violation. Therefore, it is imperative the preparers stay abreast of changes in tax law and IRS procedures. More importantly, if sanctioned, it is imperative to get representation as soon as you have been contacted by the IRS as you may be unknowingly waiving certain rights. With the IRS acting as the sheriff, prosecutor, judge and jury, is the tax practitioner being afforded his or her due process rights?

ENDNOTES

¹ IRS Pub. 4832 (Rev. 12-2009), citing to IRS Office of Research.

² IRS Pub. 4832 (Rev. 12-2009), citing to IRS Office of Program Evaluation and Risk Analysis, *Paid Preparer Review for National Public Liaison* (Sept. 2007).

³ IRS FS-2011-10 (June 2011).

⁴ IRS FS-2011-10 (June 2011).

⁵ IRS FS-2011-10 (June 2011).

⁶ IRS Pub. 4832 (Rev. 12-2009).

⁷ IRS Pub. 4832 (Rev. 12-2009), citing to Government Accountability Office, *Paid Tax Return Preparers: In a Limited Study, Chain Preparers*

Made Serious Errors, GAO-06-563T (Apr. 4, 2006).

⁸ IRS Pub. 4832 (Rev. 12-2009), citing to Treasury Inspector General for Tax Administration, *Most Tax Return Prepared by a Limited Sample of Unenrolled Preparers Contained Significant Errors*, Rept. No. 2008-40-171 (Sept. 3, 2008).

⁹ Until the IRS finalizes the development of the suitability checks, no tax return preparers may represent that he or she is a registered tax return preparer. Moreover, a continuing education requirement will not begin until at least late 2011.

¹⁰ Reg. § 1.6109-2(a) requires that each filed Federal tax return or claim for refund prepared by one or more tax return preparers to include the identifying number of the tax return preparer. Beginning Jan. 1, 2011, paid tax return preparers must use a valid PTIN. Use of the PTIN is no longer optional. See <http://www.irs.gov/businesses/small/international/article/0,,id=96696,00.html>. In addition to attorneys, CPAs and enrolled agents, other individuals who may obtain a PTIN include: individuals who are supervised by the attorney, CPA or EA, and individuals who certify they do not prepare or assist in the preparation of all or substantially of any tax return or claim for refund covered by a competency examination.

¹¹ IRS Pub. 4832 (Rev. 12-2009).

¹² IRS Pub. 4832 (Rev. 12-2009).

¹³ Available online at <http://www.irs.gov/businesses/small/article/0,,id=231827,00.html>.

¹⁴ Available online at <http://www.irs.gov/businesses/small/article/0,,id=231916,00.html>.

¹⁵ Code Sec. 6694(a).

¹⁶ Code Sec. 6694(b).

¹⁷ The IRS has been working closely with the Justice Department to increase legal action against unscrupulous paid tax return preparers, obtaining 21 civil injunctions, 56 indictments and 25 convictions in the first few months of 2010. IR-2010-44 (April 7, 2010).

¹⁸ For example, preparers may be subject to penalties for failing to furnish a copy of the filed tax return to the client, failing to sign the tax return, failing to furnish the preparer's identifying number, failing to retain a copy of a completed tax return or claim for refund or a list with the taxpayer's name and taxpayer identification number for whom such return or claim was prepared, failing to file correct information returns, and failing to be diligent in determining eligibility for earned income credit. See Code Sec. 6695.

¹⁹ IRM 4.21.1.25; see discussion on Compliance, *infra*.

²⁰ IRM 4.23.17 et. seq. However, this section of the IRM deals solely with imposition of penalties under Code Secs. 6694 and 6695. What is even more disturbing, the GAO in October 2011 issued a report, GAO-12-33 *E Filing: Tax Returns and Digitizing More Paper Return Data Could Increase Benefits*, indicating that the IRS does not have authority to discipline practitioners for failing to e-file, and the GAO

recommended adding a penalty to the Code to enable the IRS to enforce the penalty. The report did note that OPR could discipline the practitioners through Circular 230, but that was an expensive process and the penalties might be much harsher under those provisions than they have to be. Clearly, there is some question as to whether the IRS actually has authority, sans Circular 230 and Code Secs. 6694 and 6695, to impose sanctions against e-file practitioners.

²¹ See IRS Pub. 1345, *Handbook for Authorized IRS e-file Providers of Individual Income Tax Returns*. See also other IRS Publications and Notices outlining rules and responsibilities for certain IRS forms (e.g., IRS Pub. 1347, *Procedures for the 1041 e-file Program, U.S. Income Tax Return for Estates and Trusts*; IRS Pub. 1524, *Procedures for 1065 e-file Program, U.S. Return of Partnership Income*).

²² IRS Pub. 3112, *IRS e-file Application and Participation*; IRS Pub. 1345, *Handbook for Authorized IRS e-file Providers of Individual Income Tax Returns*.

Whistleblower Office

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The Whistleblower Office is working with the Office of Chief Counsel, the Assistant Secretary for Tax Policy and other IRS offices, in drafting comprehensive proposed regulations that will revise the current regulations implementing Code Sec. 7623 to reflect the 2006 amendments to the statute.

The Treasury Department and the IRS recently finalized temporary regulations issued under Code Sec. 6103(n) in March 2008, which authorize contracts for services with Whistleblowers to be used in unusual circumstances when direct assistance of a Whistleblower is sought by the IRS, and described the parameters for disclosure of return information in connection with such contracts.

In the immediate future, the Whistleblower Office intends to address a number of issues. The definition of "collected proceeds" does not extend to all recoveries from taxpayers. Potential taxpayer liabilities are sometimes resolved in a manner that does not result

in collected proceeds from which an award may be paid. The dollar amount thresholds for "gross income" and "amounts in dispute" are undefined. Code Sec. 7623(b)(5) sets two thresholds for application of Code Sec. 7623(b), which also serve to define the jurisdiction of the Tax Court to review Whistleblower award determinations.

Those claims in which the "the tax, penalties, interest, additions to tax, and additional amounts in dispute exceed \$2,000,000" fall within the purview of the Whistleblower Office. In addition, the Whistleblower Office has authority "in the case of any individual [taxpayer], only if such individual's gross income exceeds \$200,000 for any tax year ... " for the matter to fall within Code Sec. 7623(b). Neither phrase "amounts in dispute" nor the phrase "gross income" is defined by statute. The Whistleblower Office intends to eliminate the uncertainties relating to purview and jurisdiction with regulations at the earliest possible date.

Code Sec. 7623 does not provide for the protection of the Whistleblower. Unlike other laws that encourage the reporting of information to the government, Code Sec. 7623 does not prohibit retaliation against a Whistleblower. As a matter of policy, and as an application of Code Sec. 6103, the IRS is committed to protect a Whistleblower's identity, and even the fact that the agency received information from a Whistleblower in a particular case.

Whistleblower Office—Opportunity? Risk? Another layer of complication?

A few taxpayer representatives will reap substantial financial