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presents

Form 5500: Tackling Compliance Risks, Understanding Applicability of IRS Paid Preparer Rules Proactive Steps to Meet the Most Complex Requirements and Avoid IRS Penalties

A Live 110-Minute Teleconference/Webinar with Interactive Q&A

Today's panel features:

Jewell Lim Esposito, Shareholder, **Chamberlain Hrdlicka White Williams & Martin**, West Conshohocken, Pa.

Alex Brucker, Partner, **Brucker & Morra**, Los Angeles

Becky Miller, Director, National Professional Standards Group, **McGladrey & Pullen**, Bloomington, Minn.

Thursday, March 18, 2010

The conference begins at:

1 pm Eastern

12 pm Central

11 am Mountain

10 am Pacific

You can access the audio portion of the conference on the telephone or by using your computer's speakers.

Please refer to the dial in/ log in instructions emailed to registrations.

Part III – Administrative, Procedural, and Miscellaneous

GUIDANCE UNDER THE PREPARER PENALTY PROVISIONS OF THE SMALL BUSINESS AND WORK OPPORTUNITY TAX ACT OF 2007

NOTICE 2008-13

This notice provides guidance regarding implementation of the tax return preparer penalty provisions under section 6694 and the related definitional provisions under section 7701(a)(36) of the Internal Revenue Code (Code), as amended by the Small Business and Work Opportunity Tax Act of 2007 (the Act), Pub. L. No. 110-28, 121 Stat. 190.

In 2008, the Treasury Department and the IRS intend to revise the regulatory scheme governing tax return preparer penalties, which has remained substantially unchanged since the late 1970's. Until then, this notice provides interim guidance on the application of the tax return preparer penalties as amended by the Act. This notice also solicits public comments regarding the revision of the regulatory scheme governing tax return preparer penalties in order to enable the Treasury Department and the IRS to complete their work on the overhaul of these rules by the end of 2008.

BACKGROUND

Section 8246 of the Act amended several provisions of the Code to extend the application of the income tax return preparer penalties to all tax return preparers, alter

the standards of conduct that must be met to avoid imposition of the section 6694(a) penalty for preparing a return which reflects an understatement of liability, and increase applicable penalties under section 6694(a) and (b). The amendments made by the Act to section 6694 are effective for tax returns and claims for refund prepared after May 25, 2007. The Treasury Department and the IRS issued Notice 2007-54, 2007-27 I.R.B. 12, on June 11, 2007, which provided transitional relief under section 6694(a). Concurrent with the issuance of this notice, the Treasury Department and the IRS are issuing additional guidance clarifying Notice 2007-54. See Notice 2008-11.

Prior to amendment by the Act, section 7701(a)(36) defined *income tax return preparer* as any person who prepared for compensation an income tax return or claim for refund, or a substantial portion of an income tax return or claim for refund. As amended by the Act, section 7701(a)(36) now defines *tax return preparer* as any person that prepares for compensation a tax return or claim for refund, or a substantial portion of a tax return or claim for refund, and is no longer limited to persons who prepare income tax returns.

Section 301.7701-15 of the current Procedure and Administration Regulations defines the term *income tax return preparer* to include any person who prepares for compensation all or a substantial portion of a tax return or claim for refund under Subtitle A of the Code. Operation of the current regulations brings into the preparer penalty regime a wide range of activities performed by persons who do not sign the tax return or claim for refund, who may have no knowledge of how their work is ultimately reported on the tax return or claim for refund, or who may have no knowledge of the size or complexity of the schedule, entry, or other portion of a tax return or claim for

refund relative to the entire tax return. For example, current regulations broadly define the term *substantial portion* using a facts and circumstances test that compares the relative length, complexity, and tax liability of a particular schedule, entry, or other portion of a tax return or claim for refund to the length, complexity, and tax liability of the tax return or claim for refund as a whole. Case law, including *Goulding v. United States*, 717 F. Supp. 545 (N.D. Ill. 1989), *aff'd*, 957 F.2d 1420 (7th Cir. 1992), supports the current regulations which deem the preparer of a Schedule K-1 for a partnership to be the preparer of a partner's income tax return on which the partnership items were reported, if the Schedule K-1 constitutes a substantial portion of the partner's tax return.

The Act also amended section 6694(a) by raising the standards of conduct for tax return preparers. For *undisclosed positions*, the Act replaced the realistic possibility standard with a requirement that there be a reasonable belief that the tax treatment of the position would more likely than not be sustained on its merits. For *disclosed positions*, the Act replaced the nonfrivolous standard with the requirement that there be a reasonable basis for the tax treatment of the position.

The amendments made by the Act did not modify the exception to liability under section 6694 that is applicable when it is shown, considering all the facts and circumstances, that the tax return preparer has acted in good faith and there is reasonable cause for the understatement.

As part of the regulatory rulemaking process, the Treasury Department and IRS will determine the appropriate modifications to the existing regulatory framework, given the complexities and anomalies created by the inter-relationship of the amendments to section 6694 applicable to tax return preparers and the various accuracy-related penalty

provisions applicable to taxpayers, as well as the inter-relationship of the amendments to section 6694 and the regulations governing the practice before the IRS in Circular 230 (31 CFR part 10). In advance of publication of regulations in 2008, this notice provides interim guidance to tax return preparers regarding the definitions and standards of conduct that must be met by a tax return preparer to avoid a penalty under section 6694(a). Tax return preparers may rely on the interim guidance in this notice until further guidance is issued. It is important to note that the regulations expected to be finalized in 2008 may be substantially different from the rules described in this notice, and in some cases more stringent.

Section 7805(a) provides the Treasury Department and the IRS with authority to issue regulations and other published guidance interpreting the Code, including sections 6694 and 7701(a)(36). Consistent with the legislative history of section 6694, the Treasury Department and the IRS promulgated regulations dating back to 1977 that interpreted the statutory term *disclosed* in section 6694(a)(3), as applied to *nonsigning preparers*, to include making statements, either orally or in writing. See Treas. Reg. § 1.6694-2(c)(3)(ii)(A) and (B). Section 6694(a)(3) provides the Treasury Department and the IRS with authority to grant relief from penalty liability if a tax return preparer has acted in good faith and there is reasonable cause for any understatement of tax that may result from a position taken on a return. In addition, in the past, reasonable cause relief (such as in section 6694(a)) has been provided to implement appropriate transitional rules for a new or revised statutory provision.

This interim guidance discusses the following issues: (1) relevant categories of tax returns or claims for refund for purposes of section 6694; (2) the definition of *tax return preparer* under sections 6694 and 7701(a)(36); (3) standards of conduct applicable to tax return preparers for disclosed and undisclosed positions taken on tax returns; and (4) interim penalty compliance obligations applicable to tax return preparers. It is the IRS's intent to administer these provisions in a fair and equitable manner that will promote compliance with the requirements of the Code and effective tax administration.

INTERIM GUIDANCE UNDER SECTION 6694

Except to the extent modified by the interim guidance in this notice, and until further guidance is issued, existing regulations and guidance under sections 6694 and 7701(a)(36) will remain in effect.

A. Returns and Claims for Refund Subject to 6694 Penalty

Interim guidance discussed below describes categories of returns to which section 6694 could apply and includes associated exhibits to this notice. The Treasury Department and the IRS may choose to add or remove documents from any of the categories or exhibits to this notice in future guidance as they gain experience in implementing the provisions of the Act and receive public comments.

1. Tax Returns Reporting Tax Liability

Until further guidance is issued, solely for purposes of section 6694, a *return* or *claim for refund* includes the tax returns listed on Exhibit 1 or a claim for refund with respect to any such return. A claim for refund of tax includes a claim for credit against any tax. A person who for compensation prepares all or a substantial portion of a tax

return listed on Exhibit 1, or a claim for refund with respect to any such tax return, is a tax return preparer who is subject to section 6694.

2. Information Returns and Other Documents

Under current regulations, a person who for compensation prepares information returns or other documents that include information that is or may be reported on a taxpayer's tax return is subject to section 6694 if the information reported on the information return or other document constitutes a *substantial portion* of the taxpayer's tax return, notwithstanding the fact that the information return or other document may not be reporting the liability of the taxpayer. The current regulatory definitions of *substantial portion* and *substantial preparation* require a facts and circumstances analysis of each document prepared and a comparison of the items included on that document with the tax return that actually reports a tax liability. Section 301.7701-15(b). Thus, for example, under current regulations, the preparer of a Form 1065, U.S. Return of Partnership Income, may be deemed to be the preparer of any of the partners' individual income tax return (e.g., Form 1040, U.S. Individual Income Tax Return), if the items on the partnership return constitute a substantial portion of that partner's income tax return. Section 301.7701-15(b)(3).

(a) Information Returns Constituting a Substantial Portion of a Taxpayer's Tax Return

Until further guidance is issued, solely for purposes of section 6694, an information return listed on Exhibit 2 that includes information that is or may be reported on a taxpayer's tax return or claim for refund is a return to which section 6694 could apply if the information reported constitutes a *substantial portion* of that taxpayer's tax

return or claim for refund. A person who for compensation prepares any of the forms listed on Exhibit 2, which form does not report a tax liability but affects an entry or entries on a tax return and constitutes a substantial portion of the tax return or claim for refund that does report a tax liability, is a tax return preparer who is subject to section 6694.

(b) Other Documents Constituting a Substantial Portion of a Taxpayer's Tax Return

Until further guidance is issued, solely for purposes of section 6694, a document that includes information that is or may be reported on a taxpayer's tax return or claim for refund is treated as a return to which section 6694 could apply if the information reported constitutes a *substantial portion* of that taxpayer's tax return or claim for refund. For example, a person who for compensation prepares documents, such as depreciation schedules or cost, expense or income allocation studies, that do not report a tax liability but which will affect an entry or entries on a tax return that does report a tax liability, and that constitute a substantial portion of such tax return, is a tax return preparer who is subject to section 6694.

(c) Other Documents Not Constituting a Substantial Portion of a Taxpayer's Tax Return Unless Prepared Willfully to Understate Tax or in Reckless or Intentional Disregard of the Rules or Regulations

Until further guidance is issued, solely for purposes of section 6694, a document listed on Exhibit 3 that includes information that is or may be reported on a taxpayer's tax return or claim for refund (and that constitutes a substantial portion of such tax return or claim for refund) will not subject the preparer to a penalty under section

6694(a). A document listed on Exhibit 3, however, may subject the preparer to a willful or reckless conduct penalty under section 6694(b) if the information reported on the document constitutes a substantial portion of the tax return or claim for refund and is prepared willfully in any manner to understate the liability of tax on a tax return or claim for refund, or in reckless or intentional disregard of rules or regulations. For example, preparation of a Form W-2, Wage and Tax Statement, reporting certain executive compensation may constitute preparation of a substantial portion of the Form 1040 return on which the compensation is reported if it is prepared willfully in a manner to understate the liability of tax. A person who for compensation prepares all or a substantial portion of any of the forms or other documents listed on Exhibit 3 is not a tax return preparer subject to section 6694(a) unless the form or document was prepared willfully in any manner to understate the liability of tax on a tax return or claim for refund or in reckless or intentional disregard of rules or regulations.

B. Definition of Tax Return Preparer

Until further guidance is issued, solely for purposes of section 6694, the term *tax return preparer* in section 7701(a)(36) is defined by using the definitions in §§ 1.6694-1, 1.6694-3 and 301.7701-15, with the following modifications:

1. Eliminating the word *income* as a modifier to *tax return preparer* throughout §§ 1.6694-1, 1.6694-3, and 301.7701-15. This modification conforms the current regulations to amendments made by the Act.
2. Expanding the definition of returns and claims for refund from *returns of tax under subtitle A, claims for refund under subtitle A, or similar language*, to include returns of tax and claims for refund under subtitles A

through E of the Code throughout §§ 1.6694-1, 1.6694-3, and 301.7701-15. This modification conforms the current regulations to amendments made by the Act.

3. Interpreting the term *substantial portion* in § 301.7701-15(b)(1) to mean a schedule, entry, or other portion of a tax return or claim for refund that, if adjusted or disallowed, could result in a deficiency determination (or disallowance of refund claim) that the preparer knows or reasonably should know is a significant portion of the tax liability reported on the tax return (or, in the case of a claim for refund, a significant portion of the tax originally reported or previously adjusted). This clarifies that any determination as to whether a person has prepared a substantial portion of a tax return and thus is considered a tax return preparer will depend on the relative size of the deficiency attributable to the schedule, entry, or other portion.

For examples illustrating the provisions of this section B, see section H below.

C. Date Return is Prepared

Until further guidance is issued, solely for purposes of section 6694, a return or claim for refund is deemed prepared on the date reflected by the tax return preparer's signature. If a signing preparer fails to sign the tax return, the tax return is deemed prepared on the date the tax return is filed. In the case of a nonsigning preparer, the relevant date is the date the person provides the advice, which date will be determined based on all the facts and circumstances. For purposes of this interim guidance, the rules described in this section will apply instead of § 1.6694-2(b)(5).

D. Reasonable Belief that the Tax Treatment of the Position Would More Likely Than Not Be Sustained on the Merits

Until further guidance is issued, solely for purposes of section 6694, a tax return preparer is considered reasonable to believe that the tax treatment of an item is more likely than not the proper tax treatment (without taking into account the possibility that the tax return will not be audited, that an issue will not be raised on audit, or that an issue will be settled) if the tax return preparer analyzes the pertinent facts and authorities in the manner described in § 1.6662-4(d)(3)(ii) and, in reliance upon that analysis, reasonably concludes in good faith that there is a greater than fifty percent likelihood that the tax treatment of the item will be upheld if challenged by the IRS. For purposes of interim guidance, the standard described in this section will apply instead of § 1.6694-2(b).

For purposes of determining whether the tax return preparer has a reasonable belief that the position would more likely than not to be sustained on the merits, a tax return preparer may rely in good faith without verification upon information furnished by the taxpayer, as provided in § 1.6694-1(e). In addition, a tax return preparer may rely in good faith and without verification upon information furnished by another advisor, tax return preparer or other third party. Thus, a tax return preparer is not required to independently verify or review the items reported on tax returns, schedules or other third party documents to determine if the items meet the standard requiring a reasonable belief that the position would more likely than not be sustained on the merits. The tax return preparer, however, may not ignore the implications of information furnished to the tax return preparer or actually known to the tax return preparer. The tax return preparer

also must make reasonable inquiries if the information furnished by another tax return preparer or a third party appears to be incorrect or incomplete.

For examples illustrating the provisions of this section D, see section H below.

E. Reasonable Basis

Until further guidance is issued, solely for purposes of section 6694, reasonable basis will be interpreted in accordance with § 1.6662-3(b)(3). For purposes of this interim guidance, the standards described in this section will apply instead of § 1.6694-2(c). The *reasonable basis* standard will also apply for purposes of § 1.6694-3(c)(2).

For purposes of determining whether the tax return preparer has a reasonable basis for a position, a tax return preparer may rely in good faith without verification upon information furnished by the taxpayer, as provided in § 1.6694-1(e). In addition, a tax return preparer may rely in good faith and without verification upon information furnished by another tax return preparer or other third party. Thus, a tax return preparer is not required to independently verify or review the items reported on tax returns, schedules or other third party documents to determine if the items meet the standard requiring a reasonable basis for a position. The tax return preparer, however, may not ignore the implications of information furnished to the tax return preparer or actually known to the tax return preparer. The tax return preparer also must make reasonable inquiries if the information furnished by another tax return preparer or a third party appears to be incorrect or incomplete.

For examples illustrating the provisions of this section E, see section H below.

F. Reasonable Cause and Good Faith

Until further guidance is issued, solely for purposes of section 6694, the IRS will continue to consider the factors described in §§ 1.6694-2(d)(1) to -2(d)(4), but the factor regarding reliance on advice found in § 1.6694-2(d)(5) is replaced by the rules described in this section F. For purposes of this interim guidance, a tax return preparer will be found to have acted in good faith when the tax return preparer relied on the advice of a third party who is not in the same firm as the tax return preparer and who the tax return preparer had reason to believe was competent to render the advice. The advice may be written or oral, but in either case the burden of establishing that the advice was received is on the tax return preparer. A tax return preparer is not considered to have relied in good faith if--

(i) The advice is unreasonable on its face;

(ii) The tax return preparer knew or should have known that the third party advisor was not aware of all relevant facts; or

(iii) The tax return preparer knew or should have known (given the nature of the tax return preparer's practice), at the time the tax return or claim for refund was prepared, that the advice was no longer reliable due to developments in the law since the time the advice was given.

For examples illustrating the provisions of this section F, see section H below.

G. Interim Penalty Compliance Rules

Until further guidance is issued, solely for purposes of section 6694, a *signing tax return preparer* shall be deemed to meet the requirements of section 6694 with respect to a position for which there is a reasonable basis but for which the tax return preparer does not have a reasonable belief that the position would more likely than not be

sustained on the merits, if the tax return preparer meets any of the following requirements:

1. The position is disclosed in accordance with § 1.6662-4(f) (which permits disclosure on a properly completed and filed Form 8275, Disclosure Statement, or 8275-R, Regulation Disclosure Statement, as appropriate, or on the tax return in accordance with the annual revenue procedure described in § 1.6662-4(f)(2));
2. If the position would not meet the standard for the taxpayer to avoid a penalty under section 6662(d)(2)(B) without disclosure, the tax return preparer provides the taxpayer with the prepared tax return that includes the disclosure in accordance with § 1.6662-4(f);
3. If the position would otherwise meet the requirement for nondisclosure under section 6662(d)(2)(B)(i), the tax return preparer advises the taxpayer of the difference between the penalty standards applicable to the taxpayer under section 6662 and the penalty standards applicable to the tax return preparer under section 6694, and contemporaneously documents in the tax return preparer's files that this advice was provided;
or
4. If section 6662(d)(2)(B) does not apply because the position may be described in section 6662(d)(2)(C), the tax return preparer advises the taxpayer of the penalty standards applicable to the taxpayer under section 6662(d)(2)(C) and the difference, if any, between these standards and the

standards under section 6694, and contemporaneously documents in the tax return preparer's files that this advice was provided.

For purposes of this interim guidance, the rules applicable to signing tax return preparers described in this section will apply instead of § 1.6694-2(c)(3)(i).

Until further guidance is issued, solely for purposes of section 6694, a *nonsigning tax return preparer* shall be deemed to meet the requirements of section 6694 with respect to a position for which there is a reasonable basis but for which the nonsigning tax return preparer does not have a reasonable belief that the position would more likely than not be sustained on the merits, if the advice to the taxpayer includes a statement informing the taxpayer of any opportunity to avoid penalties under section 6662 that could apply to the position as a result of disclosure, if relevant, and of the requirements for disclosure. If a nonsigning tax return preparer provides advice to another tax return preparer, a nonsigning tax return preparer shall be deemed to meet the requirements of section 6694 with respect to a position for which there is a reasonable basis but for which the nonsigning tax return preparer does not have a reasonable belief that the position would more likely than not be sustained on the merits, if the advice to the tax return preparer includes a statement that disclosure under section 6694(a) may be required. If the advice with respect to a position is in writing, the statement must be in writing. If the advice with respect to a position is oral, the statement also may be oral. Contemporaneously prepared documentation in the nonsigning tax return preparer's files is sufficient to establish that the statement was given to the taxpayer or other tax return preparer. For purposes of this interim guidance, the rules applicable to

nonsigning tax return preparers described in this section will apply instead of § 1.6694-2(c)(3)(ii).

For examples illustrating the provisions of this section G, see section H below.

H. Examples

Examples illustrating the provisions of this notice and existing rules under current regulations:

Example 1. Accountant A prepares a Form 8886, Reportable Transaction Disclosure Statement, that is used to disclose reportable transactions. Accountant A does not prepare the tax return or advise the taxpayer regarding the tax return reporting position of the transaction to which the Form 8886 relates. The preparation of the Form 8886 is not directly relevant to the determination of the existence, characterization, or the amount of an entry on a tax return or claim for refund. Rather, the Form 8886 is prepared by Accountant A to disclose a reportable transaction. Accountant A has not prepared a substantial portion of the tax return and is not considered a tax return preparer under section 6694.

Example 2. Accountant B prepares a partnership's Form 1065 (including Schedules K-1) allocating the partnership's losses among its partners in proportion to their original investment. Accountant B is not an employee of either the partnership or the general partner. Accountant B knows that the loss deduction calculated by Accountant B and claimed by one of the partners on that partner's tax return, if disallowed, is the most significant portion of the liability on that partner's tax return. Accountant B has prepared a substantial portion of that partner's tax return and is considered a tax return preparer under section 6694.

Example 3. Attorney C, an attorney in a law firm, advises a large corporate taxpayer on specific issues of law regarding the tax consequences of a proposed corporate transaction. Based upon this advice, the corporate taxpayer enters into the transaction. Once the transaction is completed, the corporate taxpayer does not receive any additional advice from Attorney C or anyone in Attorney C's firm with respect to the proposed corporate transaction. Six months later, the corporate taxpayer hires Preparer D, who is not associated with the same firm as Attorney C, to prepare its entire tax return. Attorney C has not prepared a substantial portion of the corporation's tax return and is not considered a tax return preparer under section 6694.

Example 4. Attorney D, an attorney in a law firm, advises a large corporate taxpayer concerning the proper treatment and amount of a single entry on the corporate taxpayer's tax return. The tax liability involved in this entry is an

insignificant portion of the tax liability for the corporate tax return as a whole. Neither Attorney D nor any other attorney associated with Attorney D's firm signs the corporate taxpayer's tax return as a tax return preparer. Attorney D has not prepared a substantial portion of the corporation's tax return and is not considered a tax return preparer under section 6694.

Example 5. Attorney E specializes in tax planning at a law firm and develops Strategy Y, a plan with a significant purpose of tax avoidance. Attorney E provides advice with respect to Strategy Y to 50 taxpayers. The 50 taxpayers implement Strategy Y in a manner that significantly reduces the Federal tax liability that would otherwise be reported on their tax returns. After Strategy Y is entered into, Attorney E advises each of the 50 taxpayers on the reporting of specific amounts that Attorney E knows will be placed on the tax return of each of the 50 taxpayers. Attorney E knows that the tax liability involved in this entry, if disallowed, is a significant portion of the tax liability for each of the tax returns. Neither Attorney E nor any other person associated with Attorney E's firm signs the taxpayers' tax returns as a tax return preparer. The advice relating to Strategy Y constitutes preparation of a substantial portion of each of the 50 taxpayers' tax returns. Thus, Attorney E is a tax return preparer under section 6694.

Example 6. During an interview conducted by Preparer F, the taxpayer provided a schedule prepared by another advisor in Preparer F's firm for use in preparing the taxpayer's tax return. The schedule did not appear to be incorrect or incomplete. On the basis of this information, Preparer F completed the tax return. It is later determined that there is an understatement of liability for tax that resulted from incorrect information on the schedule. Preparer F is not required to audit, examine or review the schedule in order to verify independently that the information on the schedule met the standard requiring a reasonable belief that the position would more likely than not be sustained on the merits. Preparer F is not subject to a penalty under section 6694.

Example 7. In preparing a tax return, Accountant G relies on the advice of an actuary concerning the limit on deductibility under section 404(a)(1)(A) of a contribution by an employer to a qualified pension trust. The actuary providing the advice was not associated with Accountant G's firm. On the basis of this advice, Accountant G completed the tax return. It is later determined that there is an understatement of liability for tax that resulted from incorrect advice provided by the actuary. Accountant G had no reason to believe that the advice was incorrect or incomplete, and the advice appeared reasonable on its face. Accountant G was also not aware of any reason why the actuary did not know all of the relevant facts or that the advice was no longer reliable due to developments in the law since the time the advice was given. Accountant G is not subject to a penalty under section 6694.

Example 8. During an interview conducted by Preparer H, a taxpayer stated that he had made a charitable contribution of real estate in the amount of \$50,000 during the tax year, when in fact he had not made this charitable contribution. Preparer H did not inquire about the existence of a qualified appraisal or complete a Form 8283 in accordance with the reporting and substantiation requirements under section 170(f)(11). Preparer H reported deductions on the tax return for the charitable contribution which resulted in an understatement of liability for tax. Preparer H is subject to a penalty under section 6694.

Example 9. Preparer I prepared the tax returns of a taxpayer for each of the past three years. While preparing this year's tax return, Preparer I realizes that the taxpayer did not provide a Form 1099 for a bank account that produced significant taxable income in each of the previous three years. When Preparer I asked the taxpayer about any other existing income and the lack of this Form 1099, the taxpayer furnishes the Form 1099 to Preparer I for use in preparation of the tax return. Preparer I did not know that the taxpayer owned an additional bank account this past year that generated taxable income and the taxpayer did not reveal this information to the tax return preparer. Preparer I is not subject to a penalty under section 6694.

Example 10. A corporate taxpayer hires Accountant J to prepare its tax return. Accountant J encounters an issue regarding various small asset expenditures. Accountant J researches the issue and concludes that there is a reasonable basis for a particular treatment of the issue. Accountant J cannot, however, reach a reasonable belief whether the position would more likely than not be sustained on the merits because it was impossible to make a precise quantification regarding whether the position would more likely than not be sustained on the merits. The position is not disclosed on the tax return. Accountant J signs the tax return as the tax return preparer. The IRS later disagrees with this position taken on the tax return. Accountant J is not subject to a penalty under section 6694.

Example 11. A corporate taxpayer hires Accountant K to prepare its income tax return. Accountant K does not reasonably believe that a particular position taken on the tax return would more likely than not be sustained on its merits although there is substantial authority for the position. Accountant K prepares and signs the tax return without disclosing the position taken on the tax return, but advises the corporate taxpayer of the difference between the penalty standards applicable to the taxpayer under section 6662 and to the tax return preparer under section 6694, and contemporaneously documents in the tax return preparer's files that this advice was provided. The corporate taxpayer signs and files the tax return without disclosing the position because the position meets the requirements for nondisclosure under section 6662(d)(2)(B)(i). The IRS later disagrees with the position taken on the tax return, resulting in an understatement of liability reported on the tax return. Accountant K is not subject to a penalty under section 6694.

Example 12. Attorney L advises a large corporate taxpayer in writing concerning the proper treatment of complex entries on the corporate taxpayer's tax return. Attorney L has reason to know that the tax liability involved in these entries, if disallowed, is a significant portion of the tax liability for the tax return. When providing the advice, Attorney L concludes that one position with respect to these entries does not meet the reasonable belief that the position would more likely than not be sustained on the merits standard and also does not have substantial authority, although the position meets the reasonable basis standard. Attorney L, in good faith, advises the corporate taxpayer in writing that the position lacks substantial authority and the taxpayer will be subject to an accuracy-related penalty under section 6662 unless the position is disclosed in a disclosure statement included in the return. Attorney L also documents the fact that this advice was contemporaneously provided to the corporate taxpayer in writing at the time the advice was provided. The corporate taxpayer decides not to include a disclosure statement in the return. Neither Attorney L nor any other attorney associated with Attorney L's firm signs the corporate taxpayer's return as a tax return preparer, but the advice by Attorney L constitutes preparation of a substantial portion of the tax return. Thus, Attorney L is a tax return preparer for purposes of section 6694. Attorney L, however, will not be subject to a penalty under section 6694.

REQUESTS FOR COMMENTS

Interested parties are invited to submit comments on this notice by March 24, 2008. Comments should be submitted to: Internal Revenue Service, CC:PA:LPD:PR (Notice 2008-13), Room 5203, P.O. Box 7604, Ben Franklin Station, Washington, DC 20224. Alternatively, comments may be hand delivered Monday through Friday between the hours of 8:00 a.m. to 4:00 p.m. to: CC:PA:LPD:PR (Notice 2008-13), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, N.W., Washington, DC. Comments may also be submitted electronically via the following e-mail address: Notice.Comments@irs.counsel.treas.gov. Please include *Notice 2008-13* in the subject line of any electronic submissions.

Specifically, this notice requests comments with respect to the definition of a *tax return preparer*. The Treasury Department and the IRS are considering various

modifications to the regulations defining *tax return preparer* for purposes of sections 6694 and 7701(a)(36). These modifications may include limiting the definition or keeping a broader definition in order to clarify the definition of nonsigning tax return preparers in such a manner that nonsigning tax return preparers can more easily identify the circumstances under which they would be subject to section 6694. This may involve the addition of examples or changes to the current de minimis safe harbor in § 301.7701-15(b)(2).

This notice also requests comments with respect to providing additional guidance on defining both the *reasonable belief* and *more likely than not* concepts included in section 6694, as amended by the Act. Comments are requested whether the Treasury Department and the IRS should promulgate rules specifically tailored to common situations when reaching a *more likely than not* level of certainty on a position is not possible or practical as either a legal or factual matter and, specifically, whether disclosure should be necessary to avoid penalties under section 6694(a) and how disclosure should be made in those situations.

EFFECTIVE DATE

This notice is effective as of: (1) January 1, 2008, for all tax returns, amended tax returns, and claims for refund (other than 2007 employment and excise tax returns) filed on after that date with respect to advice provided on or after that date; and (2) February 1, 2008, for all 2007 employment and excise tax returns filed on after that date with respect to advice provided on or after that date.

CONTACT INFORMATION

The principal authors of this notice are Matthew S. Cooper and Michael E. Hara of the Office of Associate Chief Counsel (Procedure and Administration). For further information regarding this notice, contact Mr. Cooper at (202) 622-4940 or Mr. Hara at (202) 622-4910 (not toll-free calls).

EXHIBIT 1 – Tax Returns Reporting Tax Liability

Income Tax Returns – Subtitle A

Form 926, Return by a U.S. Transferor of Property to a Foreign Corporation;

Form 990T, Exempt Organization Business Income Tax Return;

Form 1040, U.S. Individual Income Tax Return;

Form 1040A, U.S. Individual Income Tax Return;

Form 1040-EZ, Income Tax Return for Single Filers and Joint Filers With No Dependents;

Form 1040-EZT, Claim for Refund of Federal Telephone Excise Tax;

Form 1040X, Amended U.S. Individual Income Tax Return;

Form 1040-PR (Anexo H-PR), Contribuciones sobre el Empleo de Empleados Domesticos;

Form 1041, U.S. Income Tax Return for Estates and Trusts;

Form 1042, Annual Withholding Tax Return for U.S. Source Income of Foreign Persons;

Form 1066, U.S. Real Estate Mortgage Investment Conduit (REMIC) Income Tax Return;

Form 1120, U.S. Corporation Income Tax Return;

Form 1120-C, U.S. Income Tax Return for Cooperative Associations;

Form 1120-IC DISC, Interest Charge Domestic International Sales – Corporation Return;

Form 1120-F, U.S. Income Tax Return of a Foreign Corporation;

Form 1120S, U.S. Income Tax Return for an S Corporation;

Form 1120X, Amended U.S. Corporation Income Tax Return;
Form 8831, Excise Taxes on Excess Inclusions of REMIC Residual Interests
(I.R.C. § 860E); and
Form 8924, Excise Tax on Certain Transfers of Qualifying Geothermal or Mineral
Interests (New Form, Exclusion from Capital Gains).

Estate and Gift Tax Returns - Subtitle B

Form 706, U.S. Estate Tax Return;
Form 706-A, United States Additional Estate Tax Return;
Form 706-D, United States Additional Estate Tax Return Under Code Section
2057;
Form 706-GS(D) Generation-Skipping Transfer Tax Return for Distributions;
Form 706-GS(T) Generation-Skipping Transfer Tax Return for Terminations;
Form 706-NA, United States Estate (and Generation-Skipping Transfer) Tax
Return - Estate of nonresident not a citizen of the United States ;
Form 706-QDT, United States Estate Tax Return for Qualified Domestic Trusts;
Form 709, United States Gift (and Generation-Skipping Transfer) Tax Return;
and
Form 843, Claim For Refund and Request for Abatement (also used to claim
refunds for employment and certain excise tax returns).

Employment Tax Returns - Subtitle C

Form CT-1, Employer's Annual Railroad Retirement Tax Return;
Form CT-2, Employee Representative's Quarterly Railroad Tax Return;
Form 940, Employer's Annual Federal Unemployment Tax Return;

Form 940-PR, Planilla para la Declaración Federal ANUAL del Patrono de la Contribución Federal para el Desempleo (FUTA);

Form 941, Employer's QUARTERLY Federal Tax Return;

Form 941-PR, Planilla para la Declaración Federal TRIMESTRAL del Patrono;

Form 941-SS, Employer's QUARTERLY Federal Tax Return;

Form 941-M, Employer's MONTHLY Federal Tax Return;

Form 943, Employer's Annual Federal Tax Return for Agricultural Employees;

Form 943-PR, Planilla Para la Declaración ANUAL de la Contribución Federal del Patrono De Empleados Agrícolas;

Form 944, Employer's ANNUAL Federal Tax Return;

Form 944-PR, Planilla para la Declaración ANUAL de la Contribución Federal del Patrono;

Form 944(SP), Declaración Federal ANUAL de Impuestos del Patrono o Empleador;

Form 944-SS, Employer's ANNUAL Federal Tax Return;

Form 945, Annual Return of Withheld Federal Income Tax;

Form 1040-SS, U.S. Self-Employment Tax Return.

Miscellaneous Excise Tax Returns – Subtitle D

Form 11-C, Occupational Tax and Registration Return for Wagering;

Form 720, Quarterly Federal Excise Tax Return;

Form 720X, Amended Quarterly Federal Excise Tax Return;

Form 730, Monthly Tax Return for Wagers;

Form 990-PF, Return of Private Foundation or Section 4947(a)(1) Nonexempt Charitable Trust Treated as a Private Foundation (with respect to the excise tax based on investment income);

Form 2290, Heavy Highway Vehicle Use Tax Return;

Form 2290(FR), Declaration d'Impot sur L'utilisation des Vehicules Lourds sur les Routes;

Form 2290(SP), Declaración del Impuesto sobre el Uso de Vehículos Pesados en las Carreteras;

Form 4720, Return of Certain Excise Taxes on Charities and Other Persons Under Chapters 41 and 42 of the Internal Revenue Code;

Form 5330, Return of Excise Taxes Related to Employee Benefit Plans;

Form 8612, Return of Excise Tax on Undistributed Income of Real Estate Investment Trusts;

Form 8613, Return of Excise Tax on Undistributed Income of Regulated Investment Companies; and

Form 8849, Claim for Refund of Excise Taxes.

Alcohol, Tobacco, and Certain Other Excise Taxes – Subtitle E

Form 8725, Excise Tax on Greenmail; and

Form 8876, Excise Tax on Structured Settlement Factoring Transactions.

Exhibit 2 – Information Returns That Report Information That is or May be Reported on Another Tax Return That May Subject a Tax Return Preparer to the Section 6694(a) Penalty if the Information Reported Constitutes a Substantial Portion of the Other Tax Return

Form 1042-S, Foreign Person's U.S. Source Income Subject to Withholding;
Form 1065, U.S. Return of Partnership Income (including Schedules K-1);
Form 1120S, U.S. Income Tax Return for an S Corporation (including Schedules K-1);
Form 5500, Annual Return/Report of Employee Benefit Plan;
Form 8038, Information Return for Tax-Exempt Private Activity Bond Issues;
Form 8038-G, Information Return for Government Purpose Tax-Exempt Bond Issues; and
Form 8038-GC, Consolidated Information Return for Small Tax-Exempt Government Bond Issues.

Exhibit 3 - Forms That Would Not Subject a Tax Return Preparer to the Section 6694(a) Penalty Unless Prepared Willfully in any Manner to Understate the Liability of Tax on a Return or Claim for Refund or in Reckless or Intentional Disregard of Rules or Regulations

Form 1099 series of returns;

Form W-2 series of returns;

Form W-8BEN, Beneficial Owner's Certificate of Foreign Status for U.S. Tax Withholding;

Form SS-8, Determination of Worker Status;

Form 990, Return of Organization Exempt from Income Tax;

Form 990-EZ, Short Form Return of Organization Exempt From Income Tax;

Form 990-N, Electronic Notice (e-Postcard) for Tax-Exempt Organizations not Required To File Form 990 or 990-EZ;

Form 1040-ES, Estimated Tax for Individuals;

Form 1120-W, Estimated Tax for Corporations;

Form 2350, Application for Extension of Time to File U.S. Income Tax Return;

Form 2350 (SP), Application for Extension of Time to File U.S. Income tax Return (Spanish Version);

Form 4137, Social Security and Medicare Tax on Unreported Tip Income;

Form 4768, Application for Extension of Time to File a Return and/or Pay U.S. Estate (and Generation-Skipping Transfer) Taxes;

Form 4868, Application for Automatic Extension of Time to File U.S. Individual Income Tax Return;

Form 4868 (SP), Application for Automatic Extension of Time to File U.S.

Individual Income Tax Return (Spanish Version);

Form 5558, Application for Extension of Time to File Certain Employee Plan

Returns;

Form 7004, Application for Automatic 6-Month Extension of Time To File Certain

Business Income Tax, Information, and Other Returns;

Form 8109, Federal Tax Deposit Coupon;

Form 8027, Employer's Annual Information Return of Tip Income and Allocated

Tips;

Form 8809, Application for Extension of Time to File Information Returns;

Form 8868, Application for Extension of Time To File an Exempt Organization

Return;

Form 8892, Application for Automatic Extension of Time to File Form 709 and/or

Payment of Gift/Generation-Skipping Transfer Tax; and

Form 8919, Uncollected Social Security and Medicare Tax on Wages.