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1750 Pennsylvania Avenue, NW
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Re: Proposed Regulation 31 CFR part 10 (REG-138637-07) [75 FR 51713]

The American Society of Pension Professionals and Actuaries (ASPPA) appreciates the opportunity to comment on proposed modifications to regulations regarding practice before the Internal Revenue Service (IRS) contained in 31 CFR part 10, also known as “Circular 230” (REG-138637-07).

ASPPA is supportive of IRS initiatives in this area which will improve the training, professionalism, and competency of paid tax return preparers. However, the proposed modifications, as well as the proposed regulations on the furnishing of an identifying number by paid tax return preparers (see Proposed Regulation §1.6109-2 [75 FR14539]), focus primarily on persons who prepare individual or business income tax returns (e.g., Form 1040, Form 1120, etc.). ASPPA is concerned about the application of these rules in the context of preparers of IRS Form 5500 and its related schedules and reports which are primarily information returns required of the sponsor and/or plan administrator of an employee benefit plan. We believe that guidance is necessary to preclude the overbroad application of the new rules to persons who are only minimally involved, if at all, in the preparation of a tax return or a claim for refund of tax.

ASPPA is a national organization of more than 7,300 retirement plan professionals who provide consulting and administrative services for qualified retirement plans covering millions of American workers. ASPPA members are retirement professionals of all disciplines, including consultants, investment professionals, administrators, actuaries, accountants, and attorneys. Our large and broad-based membership gives ASPPA unique insight into current practical applications of ERISA and qualified retirement plans, with a practical focus on the issues faced by small- to medium-sized employers. ASPPA’s membership is diverse but united by a common dedication to the employer-sponsored retirement plan system.

Discussion

In March of this year, the IRS proposed new registration requirements for tax return preparers (see Prop. Reg. § 1.6109-2, [75 FR 14539]). More recently, modifications were proposed to the rules of practice before the IRS, commonly known as Circular 230 (see Prop. Reg. 31 CFR part 10, [75 FR 51713]). Both proposals are intended to work together to implement recommendations contained in IRS Publication 4832, “Return Preparer Review,” published on January 4, 2010. The stated goal of these proposals is to ensure that tax return preparers are knowledgeable, skilled and ethical. ASPPA fully supports these initiatives.

Both proposals generally require registration of tax return preparers (“TRPs”) who, for compensation, prepare all, or substantially all, of a tax return or claim for refund after December 31, 2010. Paid preparers of Form 5500 (and its related schedules) are potentially subject to the new rules even though Form 5500 is an “information return” and no tax liability is reported on that form. This is due to the fact that the information it reports may relate to a tax liability reported on an actual tax return or claim for refund and as a result, the proposals would require the preparer of Form 5500 to be a registered TRP. Application of the registration and Circular 230 rules in this context may impact a limited number of preparers of Form 5500. However there is little guidance on this aspect of the rule in the proposed regulations and clarification of how to apply the new rules in the context of Form 5500 is badly needed.

Generally, a Form 5500 must be filed annually for pension benefit plans, welfare benefit plans, and for certain “direct filing entities” (“DFEs”) pursuant to Code section 6058 and ERISA sections 104 and 4065. The content of the Form 5500 is set jointly by the Department of Labor, the IRS, and the Pension Benefit Guaranty Corporation, with separate portions of the filing representing information collected on behalf of each separate agency.

Much of the data collected via Form 5500 has no specific impact on a tax return or claim for refund filed by the plan sponsor or plan administrator. Examples of this type of data include, participant count information reported on Form 5500; insurance fees and commissions reported on Schedule A; direct and/or indirect compensation paid by the plan and reported on Schedule C; investments in DFEs reported on Schedule D; and plan balance sheet and income statement information reported on Schedules H and I. All of these items are not reported on any tax returns of the plan sponsor and generally represent a substantial portion of what is reported on Form 5500.

Electronically generated reports are often the source for the information described above. Such data is then entered into the Form 5500 software by clerical support staff or administrators who are not ultimately responsible for the filing of the form. In some instances, the information is electronically transferred directly into the Form 5500 software with no human intervention. ASPPA believes that such support staff or administrators should not be subject to the TRP registration requirements.

The focus for registration should be on the individual who has, either directly or as part of his or her supervisory role, primary responsibility for the accuracy of the information reported on Form 5500 rather than on those who input data but exercise no or independent judgment. This

“responsible individual” could be identified by adding an attachment to the Form 5500 on which the individual could provide her/his Preparer Tax Identification Number (“PTIN”). ASPPA believes that this approach would be appropriate, given that only a small portion of the information on Form 5500 potentially affects a tax return or claim for refund.

If the preparer is not limited to one individual as suggested above, then clarification of the schedules and entries that affect actual tax return information becomes critical. Since Form 5500 is an information return, registration should only be required for individuals responsible for preparing information that affects a substantial portion of an actual tax return or claim for refund filed by the plan sponsor.

In this regard, it is also imperative that the proposed regulations, or guidance published in the Internal Revenue Bulletin, specify which schedules or entries on Form 5500 may affect a tax return or claim for refund. This may include items such as:

- Amount of employer and participant contributions;
- Identification of prohibited transactions;
- Timeliness of the deposits of participant contributions made via payroll withholding;
- Whether individual account plans experienced so-called blackout periods and, if so, whether required notices were delivered; and
- Actuarial-related information.

The information illustrated above - other than contribution amounts - is not typically electronically generated from recordkeeping systems; rather, it involves input from the plan sponsor as well as other professionals providing services to the plan. Only individuals responsible for preparing those portions of Form 5500 should be subject to registration, and then only if the information constitutes a substantial portion of a tax return or claim for refund.

It is important to note the potential impact that overly broad application of the registration and Circular 230 requirements will have on employee benefit plans and their participants. Preparation of Form 5500, almost always done by a third party administrator on behalf of the plan sponsor, is typically a “team” effort where different employees play different roles. Many employees only gather data and perform ministerial acts, or work only with information reported on Form 5500 that has no effect on any tax shown on a return or claim for refund. It is paramount that these employees be clearly excluded from the registration and Circular 230 process to avoid the expense associated with these initiatives. Ultimately, overbroad and unnecessary registration of these employees will drive up the cost of plan administration which, in most cases, will simply be passed on to plans and their participants, to the detriment of the participants’ retirement savings.

Recommendations

1. **ASPPA recommends**, due to the primary role of Form 5500 as an information return, that both sets of proposed regulations provide that only one paid TRP is required to be registered with respect to a Form5500, i.e., the person who has primary responsibility for

the substantive accuracy of the schedule, entry or other portion of the form.

2. **ASPPA also recommends**, that if the above recommendation is not adopted, that both sets of proposed regulations clarify that registration and Circular 230 are applicable only to individuals who prepare information reported on a schedule, entry or other portion of Form 5500 that affects a tax liability and only if the specific information that is prepared constitutes a substantial portion of an actual tax return or claim for refund.
3. **ASPPA also recommends**, that the proposed regulations, or published guidance in the Internal Revenue Bulletin, specifically identify those schedules, items or entries associated with Form 5500 that may affect a tax return or claim for refund and which might therefore potentially constitute a substantial portion of such return or claim.¹

Thank you for your consideration of these comments. They were prepared by ASPPA's Reporting and Disclosure Sub-committee of the Government Affairs Committee, Peter Gould, CPC, Chair. Please contact Craig Hoffman, General Counsel and Director of Regulatory Affairs at (703) 516-9300 ext.128, if you have any questions regarding the matters discussed herein.

Sincerely,

/s/

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/s/

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¹ The likelihood that a Form 5500 filing for an employee welfare benefit plan that is unfunded or fully insured (or a combination) will have a significant impact on a tax return is more tenuous. Furthermore, there is no current or anticipated enrollment program or examination program that covers this narrow scope of form preparation. We therefore believe special consideration (i.e., an exemption or a narrow application of the rules) is warranted for those who prepare Form 5500 for unfunded or fully insured (or a combination) employee welfare benefit plans.

Courtesy copies:

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