



[4830-01-p]

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 300

[REG-122898-17]

RIN 1545-BO38

User Fees Relating to Enrolled Agents and Enrolled Retirement Plan Agents

AGENCY: Internal Revenue Service (IRS), Treasury.

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

SUMMARY: This document contains proposed amendments to the regulations relating to imposing user fees for enrolled agents and enrolled retirement plan agents. The proposed regulations remove the initial enrollment user fee for enrolled retirement plan agents because the IRS no longer offers initial enrollment as an enrolled retirement plan agent. The proposed regulations also increase the amount of the renewal user fee for enrolled retirement plan agents from \$30 to \$67. In addition, the proposed regulations increase the amount of both the enrollment and renewal user fee for enrolled agents from \$30 to \$67. The proposed regulations affect individuals who are or apply to become enrolled agents and individuals who are enrolled retirement plan agents. The Independent Offices Appropriations Act of 1952 authorizes charging user fees.

DATES: Written or electronic comments must be received by **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Requests to speak and outlines of topics to be discussed at the public hearing scheduled for January 24,

2019, at 10 a.m. must be received by **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG-122898-17), room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, D.C.

20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG-122898-17), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, D.C. 20224 or sent electronically via the Federal eRulemaking Portal at <http://www.regulations.gov> (IRS REG-122898-17). The public hearing will be held in the Main Auditorium of the Internal Revenue Service Building, 1111 Constitution Avenue, NW, Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Mark Shurtliff at (202) 317-6845; concerning cost methodology, Michael A. Weber at (202) 803-9738; concerning submission of comments, the public hearing, or to be placed on the building access list to attend the public hearing, Regina Johnson at (202) 317-6901 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background and Explanation of Provisions

This document contains proposed amendments to 26 CFR part 300 regarding user fees.

A. Enrolled Agents and Enrolled Retirement Plan Agents

Section 330(a)(1) of title 31 of the United States Code authorizes the Secretary of the Treasury to regulate the practice of representatives before the Treasury Department. Before admitting a representative to practice, the Secretary is authorized

to “require that the representative demonstrate – (A) good character; (B) good reputation; (C) necessary qualifications to enable the representative to provide to persons valuable service; and (D) competency to advise and assist persons in presenting their cases.” 31 U.S.C. 330(a)(2). Pursuant to section 330 of title 31, the Secretary has published regulations governing practice before the IRS in 31 CFR part 10 and reprinted the regulations as Treasury Department Circular No. 230 (Circular 230).

Section 10.4(a) of Circular 230 authorizes the IRS to grant enrollment as enrolled agents to individuals who demonstrate special competence in tax matters by passing a written examination administered by, or under the oversight of, the IRS and who have not engaged in any conduct that would justify suspension or disbarment under Circular 230. Every year, the IRS develops and administers an Enrolled Agent Special Enrollment Examination (EA-SEE) that individuals must pass to become an enrolled agent.

Section 10.4(b) of Circular 230 currently authorizes the IRS to grant enrollment as enrolled retirement plan agents to individuals who demonstrate special competence in qualified retirement plan matters by passing a written examination administered by, or under the oversight of, the IRS and who have not engaged in any conduct that would justify suspension or disbarment under Circular 230. Until February 12, 2016, the IRS annually developed and administered an Enrolled Retirement Plan Agent Special Enrollment Examination (ERPA-SEE) that individuals were required to take and pass to become an enrolled retirement plan agent. After February 12, 2016, however, the IRS stopped offering the ERPA-SEE. Individuals who have already passed the ERPA-SEE

may maintain their enrollment as enrolled retirement plan agents, but the IRS is not accepting applications to become new Enrolled Retirement Plan Agents. Accordingly, the proposed regulations propose to remove the user fee for the initial enrollment of an enrolled retirement plan agent currently in Treasury Regulation §300.10.

Section 10.4(d) also authorizes the IRS to grant enrollment as an enrolled agent or an enrolled retirement plan agent to a qualifying former IRS employee by virtue of past IRS service and technical experience if the former employee has not engaged in any conduct that would justify suspension or disbarment under the provisions of Circular 230 and meets certain other requirements. Application for enrollment as an enrolled agent based on former employment with the IRS must be made within three years from the date of separation from that employment and does not require passing the EA-SEE. When the IRS discontinued offering the ERPA-SEE necessary for enrollment as an enrolled retirement plan agent for individuals without IRS work experience, effective February 12, 2016, the IRS stopped granting individuals enrollment as enrolled retirement plan agents by virtue of past service and technical experience in the IRS.

Once eligible for enrollment as an enrolled agent, whether by examination or former employment with the IRS, an individual must file an application for enrollment with the IRS and currently pay a \$30 nonrefundable user fee. To maintain active enrollment and practice before the IRS, an individual who has been enrolled as an enrolled agent or enrolled retirement plan agent must file an application to renew enrollment every three years and currently pay a \$30 nonrefundable user fee. 31 CFR 10.6(d).

The IRS Return Preparer Office (RPO) is responsible for certain matters related to authority to practice before the IRS, including acting on applications for enrollment and renewal of enrolled agents and for renewal of enrolled retirement plan agents. 31 CFR 10.1. As a condition for enrollment as an enrolled agent, the RPO may conduct a federal tax-compliance check to determine whether an applicant has filed all required tax returns and has no outstanding federal tax debts and a suitability check to determine whether an applicant has engaged in any conduct that would justify suspending or disbarring any practitioner under Circular 230. 31 CFR 10.5(d). As a condition for renewal, enrolled agents and enrolled retirement plan agents must certify completion of the continuing education requirements. 31 CFR 10.6(e).

As part of its responsibility for administering the enrollment program, RPO determines whether applicants have met the above requirements. 31 CFR 10.6(j)(1). An applicant who is denied enrollment as an enrolled agent for failure to pass a tax-compliance check may reapply if the applicant becomes current with respect to the applicant's tax liabilities. 31 CFR 10.5(d)(2). Applicants who fail to meet the continuing education and fee payment requirements receive from RPO a notice that states the basis for RPO's determination of noncompliance and provides an opportunity to cure the failure. 31 CFR 10.6(j)(1).

B. User Fee Authority

The Independent Offices Appropriations Act of 1952 (IOAA) (31 U.S.C. 9701) authorizes each agency to promulgate regulations establishing the charge for services the agency provides (user fees). Under the IOAA, these user-fee regulations are subject to policies prescribed by the President and shall be as uniform as practicable.

Those policies are currently set forth in the Office of Management and Budget (OMB) Circular A-25 (OMB Circular), 58 FR 38142 (July 15, 1993).

The IOAA states that the services provided by an agency should be self-sustaining to the extent possible (31 U.S.C. 9701(a)). The OMB Circular states that agencies providing services that confer special benefits on identifiable recipients beyond those accruing to the general public must identify those services, determine whether user fees should be assessed for those services, and, if so, establish user fees that recover the full cost of providing those services. As required by the IOAA and the OMB Circular, agencies are to review user fees biennially and update them as necessary to reflect changes in the cost of providing the underlying services. During these biennial reviews, an agency must calculate the full cost of providing each service, taking into account all direct and indirect costs to any part of the U.S. government. The full cost of providing a service includes, but is not limited to, salaries, retirement benefits, rents, utilities, travel, and management costs, as well as an appropriate allocation of overhead and other support costs associated with providing the service.

An agency should set the user fee at an amount that recovers the full cost of providing the service unless the agency requests, and the OMB grants, an exception to the full-cost requirement. The OMB may grant exceptions only where the cost of collecting the fees would represent an unduly large part of the fee for the activity, or where any other condition exists that, in the opinion of the agency head, justifies an exception. When the OMB grants an exception, the agency does not collect the full cost of providing the service that confers a special benefit on identifiable recipients rather than the public at large, and the agency therefore must fund the remaining cost of

providing the service from other available funding sources. When the OMB grants an exception, the agency, and by extension all taxpayers, subsidize the cost of the service to the recipients who would otherwise be required to pay the full cost of providing the service, as the IOAA and the OMB Circular direct.

C. Enrollment and Renewal User Fees for the Enrolled Agent and Renewal User Fee for the Enrolled Retirement Plan Agent

As discussed in section A of this preamble, an individual who has been granted enrollment as an enrolled agent or an enrolled retirement plan agent may practice before the IRS. The IRS confers benefits on individuals who are enrolled agents or enrolled retirement plan agents beyond those that accrue to the general public by allowing them to practice before the IRS. Because the ability to practice before the IRS is a special benefit, the IRS charges a user fee to recover the full cost associated with administering the program for enrollment and renewal of enrolled agents and renewal of enrolled retirement plan agents.

On September 30, 2010, the Treasury Department and the IRS published two final regulations in the Federal Register: final regulations (TD 9501, 75 FR 60309) that required tax return preparers who prepare all or substantially all of a tax return or claim for refund for compensation to obtain a preparer tax identification number (PTIN) and final regulations (TD 9503, 75 FR 60316) that required a user fee to apply for or renew a PTIN. Individuals applying for or renewing a PTIN were to be subject to federal tax-compliance and suitability checks and were required to pay a \$50 user fee to obtain or renew a PTIN. All enrolled agents and certain enrolled retirement plan agents were

required to obtain a PTIN as a condition of enrollment and renewal of enrollment. TD 9527, 76 FR 32286; Notice 2011-91, 2011-47 I.R.B. 792.

On April 19, 2011, the Treasury Department and the IRS published in the Federal Register (76 FR 21805) a final regulation (TD 9523) that reduced the amount of the user fees for the initial enrollment and renewal enrollment for enrolled agents and enrolled retirement plan agents from \$125 to \$30. Because individuals applying to enroll as an enrolled agent or enrolled retirement plan agent also had to obtain a PTIN, the user fee to enroll or renew enrollment was reduced to reflect that certain review procedures (including federal tax-compliance and suitability checks) would be performed as part of the process to obtain a PTIN. On June 1, 2017, the IRS ceased collecting any user fees related to the PTIN. See Steele v. United States, 260 F.Supp.3d 52 (D. D.C. 2017) (holding that the IRS was authorized to require tax return preparers to obtain PTINs, but was not authorized to charge fees for PTINs).

As required by the IOAA and the OMB Circular, the RPO completed its 2017 biennial review of the enrollment and renewal user fees associated with enrolled agents and enrolled retirement plan agents. As discussed in section D of this preamble, during its review the RPO took into account the increase in labor, benefits, and overhead costs incurred in connection with providing services to individuals who enroll or renew enrollment as enrolled agents and enrolled retirement plan agents since the user fee was last changed in 2011. In addition, RPO determined that costs associated with federal tax-compliance checks and suitability checks on enrolled individuals should be recovered as part of the user fee for administering the enrollment and renewal programs. The 2017 biennial review also took into account new costs associated with

administering the program for enrolled agents and enrolled retirement plan agents, including the costs of operating a dedicated toll-free helpline in the RPO for enrollment and renewal matters. The RPO determined that the full cost of administering the program for enrolled agents and enrolled retirement plan agents has increased from \$30 to \$67 per application for enrollment or renewal. The proposed fee complies with the directive in the OMB Circular to recover the full cost of providing a service that confers special benefits on identifiable recipients beyond those accruing to the general public.

D. Calculation of User Fees Generally

The IRS follows generally accepted accounting principles (GAAP) in calculating the full cost of processing an application for enrollment or renewal. The Federal Accounting Standards Advisory Board (FASAB) is the body that establishes GAAP that apply for federal reporting entities, such as the IRS. FASAB publishes the FASAB Handbook of Accounting Standards and Other Pronouncements, as Amended (Current Handbook), which is available at

http://files.fasab.gov/pdf/2017_fasab_handbook.pdf. The Current Handbook

includes the *Statement of Federal Financial Accounting Standards (SFFAS) No. 4:*

Managerial Cost Accounting Concepts and Standards for the Federal Government.

SFFAS No. 4 establishes internal costing standards under GAAP to accurately measure

and manage the full cost of federal programs, and the methodology below is in

accordance with *SFFAS No. 4*.

1. Cost Center Allocation

The IRS determines the cost of its services and the activities involved in producing them through a cost-accounting system that tracks costs to organizational units. The lowest organizational unit in the IRS's cost-accounting system is called a cost center. Cost centers are usually separate offices that are distinguished by subject-matter area of responsibility or geographic region. All costs of operating a cost center are recorded in the IRS's cost-accounting system and allocated to that cost center. The costs allocated to a cost center are the direct costs for the cost center's activities as well as all indirect costs, including overhead, associated with that cost center. Each cost is recorded in only one cost center.

2. Determining the Per Unit Cost

To establish the per-unit cost, the total cost of providing the service is divided by the volume of services provided.

3. Cost Estimation of Direct Labor

Not all cost centers are fully devoted to one service for which the IRS charges user fees. Some cost centers work on a number of different services across the IRS. In these cases, the IRS uses various cost-measurement techniques to estimate the cost incurred in those cost centers attributable to the program. These techniques include using various timekeeping systems to measure the time required to accomplish activities, or using information provided by subject-matter experts on the time devoted to a program. Once the IRS has estimated the average time required to accomplish an activity, it multiplies that time estimate by the relevant organizational unit's average labor and benefits cost per unit of time to determine the labor and benefits cost incurred

to provide the service. To determine the full cost, IRS then adds overhead as discussed below.

4. Overhead

Overhead is an indirect cost of operating an organization that cannot be immediately associated with an activity that the organization performs. Overhead includes costs of resources that are jointly or commonly consumed by one or more organizational unit's activities but are not specifically identifiable to a single activity.

These costs can include:

- General management and administrative services of sustaining and supporting organizations.
- Facilities management and ground maintenance services (security, rent, utilities, and building maintenance).
- Procurement and contracting services.
- Financial management and accounting services.
- Information technology services.
- Services to acquire and operate property, plants and equipment.
- Publication, reproduction, and graphics and video services.
- Research, analytical, and statistical services.
- Human resources/personnel services.
- Library and legal services.

To calculate the overhead allocable to a service, the IRS multiplies a Corporate Overhead rate by the labor and benefits costs determined as discussed previously. The IRS calculates the Corporate Overhead rate annually based on cost elements

underlying the Statement of Net Cost included in the IRS Annual Financial Statements, which are audited by the Government Accountability Office. The Corporate Overhead rate is the ratio of the sum of the IRS’s indirect labor and benefits costs from the supporting and sustaining organizational units—those that do not interact directly with taxpayers—and all non-labor costs to the IRS’s labor and benefits costs of its organizational units that interact directly with taxpayers.

The Corporate Overhead rate of 68.00 percent for costs reviewed during FY 2017 was calculated based on FY 2016 costs (which are assumed to be fixed and reoccurring) as follows:

| | | |
|-----------------------------------|---|------------------------|
| Indirect Labor and Benefits Costs | | \$1,681,373,747 |
| Non-Labor Costs | + | <u>\$2,879,907,032</u> |
| Total Indirect Costs | | \$4,561,280,779 |
| Direct Labor and Benefits Costs | ÷ | <u>\$6,708,063,559</u> |
| Corporate Overhead Rate | | <u>68.00%</u> |

E. Calculation of User Fee for Enrolled Agent Enrollment and Renewal and Enrolled Retirement Plan Agent Renewal

The IRS used projections for fiscal years 2018 through 2020 to determine the direct costs associated with enrolled agent enrollment and renewal and enrolled retirement plan agent renewal. Direct costs are incurred by the RPO and include labor costs for enrollment and renewal submission processing; tax compliance and background checks; continuing education and testing-related activities; and communications, which include the new toll-free helpline.

The labor and benefits for the work performed related to applications for enrolled agent enrollment and renewal and enrolled retirement plan agent renewal is projected to be \$2,708,603 in total over fiscal years 2018 through 2020. The labor and benefits costs include the cost to perform background checks and tax compliance checks, which are services that were not included in the previous \$30 user fee. The number of enrollment and renewal applications is based on the FY2016 numbers adjusted by the anticipated increase in enrollment. Adding Corporate Overhead expenses to the total labor and benefits results in total costs of \$4,550,453 as shown below:

| | |
|-------------------------------|--------------------|
| Labor and Benefits | \$2,708,603 |
| Corporate Overhead (68%) | <u>\$1,841,850</u> |
| Labor, Benefits, and Overhead | \$4,550,453 |

Dividing this total cost by the projected population of initial enrollment and renewal applications for fiscal years 2018 through 2020 results in a cost per application of \$67 as shown below:

| | |
|------------------------------|---------------------|
| Labor, Benefits and Overhead | \$4,550,453 |
| Number of Applications | ÷ <u>68,343</u> |
| Cost Per Application | <u>\$ <u>67</u></u> |

Taking into account the full amount of these costs, the user fee for enrolled agent enrollment or renewal and enrolled retirement plan agent renewal is proposed to be \$67 per application. The IRS does not intend to seek an exception from OMB to the full cost requirement.

Special Analyses

OIRA has determined that this regulation is significant and subject to review under section 6(b) of Executive Order 12866.

Pursuant to the Regulatory Flexibility Act (5 U.S.C. chapter 6), it is hereby certified that this regulation will not have a significant economic impact on a substantial number of small entities. The user fee primarily affects individuals who are enrolled agents, apply to become enrolled agents, or are enrolled retirement plan agents. Only individuals, not businesses, can be enrolled agents or enrolled retirement plan agents. Thus, any economic impact of the user fee on small entities generally will occur only when an enrolled agent or enrolled retirement plan agent owns a small business or when a small business employs enrolled agents or enrolled retirement plan agents and reimburses them for their renewal fees. The Treasury Department and IRS estimate that approximately 22,781 individuals will apply annually for enrollment as an enrolled agent, renewal as an enrolled agent, or renewal as an enrolled retirement plan agent. Due to the relatively small number of small businesses that employ enrolled agents or enrolled retirement plan agents, a substantial number of small entities are not likely to be affected. Further, the economic impact on any small entities affected would be limited to paying the \$37 difference in cost between the \$67 user fee and the previous \$30 user fee (for each enrolled agent or enrolled retirement plan agent that a small entity employs and pays for), which is unlikely to present a significant economic impact. The total economic impact of this regulation is thus approximately \$842,897 annually, which is the product of the approximately 22,781 individuals and the \$37 increase in the fee. Accordingly, the rule is not expected to have a significant economic impact on a substantial number of small entities, and a regulatory flexibility analysis is not required.

It is not anticipated that the increase in user fee that is paid every three years and averages to \$12.33 per year will negatively affect enrollment, which has historically remained steady as user fee amounts have changed. Pursuant to section 7805(f), this notice of proposed rulemaking has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Public Hearing

Before these proposed amendments to the regulations are adopted as final regulations, consideration will be given to any comments that are submitted timely to the IRS as prescribed in the preamble under the “**ADDRESSES**” section. The Treasury Department and the IRS request comments on all aspects of the proposed regulations. All comments submitted will be made available at www.regulations.gov or upon request.

A public hearing has been scheduled for January 24, 2019, beginning at 10:00 am in the Main Auditorium of the Internal Revenue Service Building, 1111 Constitution Avenue N.W., Washington, D.C. 20224. Due to building-security procedures, visitors must enter at the Constitution Avenue entrance. All visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the “**FOR FURTHER INFORMATION CONTACT**” section of this preamble.

The rules of §601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit written or electronic comments and an outline of the topics to be discussed and the time to be devoted to each topic by

[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. A period of 10 minutes will be allocated to each person for making

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

Drafting Information

The principal author of these regulations is Mark Shurtliff, Office of the Associate Chief Counsel (Procedure and Administration). Other personnel from the Treasury Department and the IRS participated in their development.

List of Subjects in 26 CFR Part 300

Reporting and recordkeeping requirements, User fees.

Proposed Amendments to the Regulations

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

PART 300--USER FEES

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

Authority: 31 U.S.C. 9701.

§300.0 [Amended]

Par. 2. Section 300.0 is amended by removing paragraph (b)(10) and redesignating paragraphs (b)(11) through (13) as paragraphs (b)(10) through (12).

Par. 3. Section 300.5 is amended by revising paragraphs (b) and (d) to read as follows:

§300.5 Enrollment of enrolled agent fee.

* * * * *

(b) Fee. The fee for initially enrolling as an enrolled agent with the IRS is \$67.

* * * * *

(d) Applicability date. This section applies 30 days after the date of publication of a Treasury Decision adopting this rule as a final regulation in the Federal Register.

Par. 4. Section 300.6 is amended by revising paragraphs (b) and (d) to read as follows:

§300.6 Renewal of enrollment of enrolled agent fee.

* * * * *

(b) Fee. The fee for renewal of enrollment as an enrolled agent with the IRS is \$67.

* * * * *

(d) Applicability date. This section applies 30 days after the date of publication of a Treasury Decision adopting this rule as a final regulation in the Federal Register.

§300.10 [Removed]

Par. 5. Section 300.10 is removed.

§300.11 [Redesignated as §300.10 and Amended]

Par. 6. Redesignate §300.11 as §300.10 and amend newly redesignated §300.10 by revising paragraphs (b) and (d) to read as follows:

§300.10 Renewal of enrollment of enrolled retirement plan agent fee.

* * * * *

(b) Fee. The fee for renewal of enrollment as an enrolled retirement plan agent with the IRS is \$67.

* * * * *

(d) Applicability date. This section applies 30 days after the date of publication of a Treasury Decision adopting this rule as a final regulation in the Federal Register.

§§300.12 and 300.13 [Redesignated as §§300.11 and 300.12]

Par. 7. Redesignate §§300.12 and 300.13 as §§300.11 and 300.12.

Kirsten Wielobob,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 2018-25210 Filed: 11/15/2018 4:15 pm; Publication Date: 11/19/2018]