



[4830-01-p]

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 300

[REG-117138-17]

RIN 1545-BP43

Preparer Tax Identification Number (PTIN) User Fee Update

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed amendments to the regulations relating to the imposition of certain user fees on tax return preparers. The proposed regulations reduce the amount of the user fee to apply for or renew a preparer tax identification number (PTIN) and affect individuals who apply for or renew a PTIN. The Independent Offices Appropriations Act of 1952 authorizes the charging of user fees.

DATES: Written or electronic comments and requests for a public hearing must be received by **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Requests for a public hearing must be submitted as prescribed in the “**Comments and Requests for a Public Hearing**” section.

ADDRESSES: Commenters are strongly encouraged to submit public comments electronically. Submit electronic submissions via the Federal eRulemaking Portal at www.regulations.gov (indicate IRS and REG-117138-17) by following the online instructions for submitting comments. Once submitted to the Federal eRulemaking Portal, comments cannot be edited or withdrawn. The IRS expects to have limited

personnel available to process public comments that are submitted on paper through mail. Until further notice, any comments submitted on paper will be considered to the extent practicable. The Department of the Treasury (Treasury Department) and the IRS will publish for public availability any comment submitted electronically, and to the extent practicable on paper, to its public docket.

Send paper submissions to: CC:PA:LPD:PR (REG-117138-17), room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, D.C. 20044.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Michael A. Franklin at (202) 317-6844; concerning cost methodology, Michael A. Weber at (202) 803-9738; concerning submissions of comments and/or requests for a public hearing, Regina Johnson, (202) 317-5177 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background and Explanation of Provisions

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

Regulations require a tax return preparer who prepares all or substantially all of a tax return or claim for refund to provide a PTIN as their identifying number on any tax return or claim for refund prepared for compensation. To account for its costs of providing PTIN application and renewal services, the IRS charges a user fee to apply for or renew a PTIN. This proposal would reduce the user fee from \$33 per application or renewal to \$21.

A. User Fee Authority

The Independent Offices Appropriations Act of 1952 (IOAA), which is codified at 31 U.S.C. 9701, authorizes agencies to prescribe regulations that establish user fees for services provided by the agency. The IOAA provides that regulations implementing user fees are subject to policies prescribed by the President; these policies are set forth in the Office of Management and Budget (OMB) Circular A-25, 58 FR 38142 (July 15, 1993) (OMB Circular A-25).

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

B. PTIN Requirement

Section 6109(a)(4) of the Internal Revenue Code authorizes the Secretary of the Treasury or his delegate to prescribe regulations for the inclusion of a tax return preparer's identifying number on a return, statement, or other document required to be filed with the IRS. On September 30, 2010, the Treasury Department and the IRS published final regulations under section 6109 (REG-134235-08) in the **Federal Register** (TD 9501) (75 FR 60315) (PTIN regulations) to provide that, for returns or claims for refund filed after December 31, 2010, the identifying number of a tax return

preparer is the individual's PTIN or such other number prescribed by the IRS in forms, instructions, or other appropriate guidance. The PTIN regulations require a tax return preparer who prepares or who assists in preparing all or substantially all of a tax return or claim for refund after December 31, 2010 to have a PTIN.

The PTIN regulations also state that the IRS will set forth in forms, instructions, or other appropriate guidance PTIN application and renewal procedures, including the requirement to pay a user fee to obtain or renew a PTIN. Pursuant to the authority granted in section 6109(c) and in accordance with §1.6109-2(d) of the PTIN regulations, the IRS has set forth application and renewal procedures in Form W-12, *IRS Paid Preparer Tax Identification Number (PTIN) Application and Renewal*, and the Form W-12 Instructions. Individuals may also apply for or renew a PTIN and pay the user fee online at irs.gov/ptin. The annual PTIN application and renewal period generally begins in the fall of the year preceding the filing season to which the PTIN relates.

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

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

C. PTIN User Fee

Final regulations (REG-139343-08) published in the **Federal Register** (TD 9503) (75 FR 60316) (initial PTIN user fee regulations) on September 30, 2010, established a \$50 user fee to apply for or renew a PTIN, in addition to a portion payable directly to the contractor, which was \$14.25 for new applications and \$13 for renewal applications. The \$50 user fee was based on an annual PTIN renewal period and an estimate that 1.2 million individuals would be applying for or renewing a PTIN each year.

The Treasury Department and the IRS determined that a \$50 user fee to apply for or renew a PTIN would recover the full direct and indirect costs that the government

would incur to administer the PTIN application and renewal process. As explained in the preamble to the initial PTIN user fee regulations, the projected costs included the development and maintenance of the IRS information technology system that would interface with a third-party contractor, the development and maintenance of internal applications that would have the capacity to process and administer the anticipated increase in PTIN applications, and customer service support activities, which included website development and maintenance and call center staffing to respond to questions regarding PTIN usage and renewal. The \$50 user fee was also determined to recover costs for personnel, administrative, and management support needed to evaluate and address tax compliance issues of individuals applying for and renewing a PTIN, to investigate and address conduct and suitability issues, and otherwise support and enforce the programs that required an individual to apply for and renew a PTIN.

Pursuant to the guidelines in OMB Circular A-25, the IRS re-calculated its costs associated with providing PTINs in 2015. The IRS determined that the full cost of administering the PTIN program going forward was reduced from \$50 to \$33 per application or renewal, plus a \$17 fee per application or renewal payable directly to a third-party contractor. Final regulations (REG-121496-15) published in the **Federal Register** (TD 9781) (81 FR 52766) (2016 PTIN user fee regulations) on August 10, 2016, superseded and adopted temporary regulations (TD 9742) (80 FR 66794) and established the \$33 annual user fee to apply for or renew a PTIN, plus \$17 per application or renewal payable directly to a third-party contractor. The reduction in the fee amount was attributable to several factors, which included the reduced number of PTIN holders (approximately 700,000) from the number originally projected (1.2 million)

in 2010, which reduced associated costs; the absorption of certain development costs in the early years of the program; and the fact that certain activities that would have been conducted in relation to registered tax return preparers would not be performed. In particular, the determination of the user fee no longer included expenses for personnel who performed functions primarily related to continuing education and testing for registered tax return preparers. Additionally, expenses related to personnel who performed continuing education and testing for enrolled agents and enrolled retirement plan agents were removed from the user fee.

In 2017, the IRS again conducted a biennial review of the PTIN user fee and determined that the amount of the fee going forward should be reduced to \$31 per application or renewal, plus an amount payable directly to a third-party contractor. The reduction was primarily attributable to reductions in contract support costs and salary and benefits. On June 1, 2017, before a notice of proposed rulemaking proposing to reduce the amount of the fee was issued, the IRS was enjoined from charging a PTIN user fee. In *Steele v. United States*, 260 F. Supp. 3d 52 (D.D.C. 2017), the United States District Court for the District of Columbia concluded that the Treasury Department and the IRS lacked the statutory authority to charge a PTIN user fee and enjoined the IRS from charging a PTIN user fee. The government filed an appeal and on March 1, 2019, the United States Court of Appeals for the District of Columbia Circuit reversed the district court's decision and lifted the injunction against charging the PTIN user fee. See *Montrois v. United States*, 916 F.3d 1056 (D.C. Cir. 2019) (holding that a PTIN provides tax return preparers a specific benefit by allowing them to provide an identifying number that is not a social security number on returns they prepare and

stating that the permissible amount of the fee would be the same regardless of whether the specific benefit was instead the ability to prepare tax returns for compensation).

The case is currently on remand in the United States District Court for the District of Columbia regarding the amount of the fee. *Id.* at 1068.

Pursuant to the guidelines in OMB Circular A-25, the IRS has re-calculated its cost of providing PTINs. The IRS has determined that the full cost of administering the PTIN program going forward has been reduced to \$21 per application or renewal, plus \$14.95 payable directly to a third-party contractor. The government is authorized to charge a PTIN user fee under the IOAA because, in exchange for the fee, it provides a service by issuing and maintaining PTINs, which provide tax return preparers a specific benefit by allowing them to provide an identifying number that is not a social security number on returns and to prepare returns for compensation.

D. Calculation of User Fees Generally

The IRS follows generally accepted accounting principles (GAAP) in calculating the full cost of administering PTIN applications and renewals. 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), available at https://files.fasab.gov/pdf/2019_fasab-handbook.pdf. 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 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 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. The costs charged to a cost center are the direct costs for the cost center's activities in addition to allocated overhead. Some cost centers work on different services across the IRS and are not fully devoted to the services for which the IRS charges user fees.

2. Cost Estimation of Direct Costs

The IRS uses various cost-measurement techniques to estimate the cost 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. To determine the labor and benefits cost incurred to provide the service of providing a PTIN, the IRS estimated the number of full-time employees required to conduct activities related to the costs of issuing and renewing PTINs. The number of full-time employees is based on both current employment numbers and future hiring estimates. Other direct costs associated with administering the PTIN program include contract costs and travel, training, supplies, printing, and other miscellaneous costs.

3. Overhead

When the indirect cost of a service or activity is not specifically identified from the cost-accounting system, an overhead rate is added to the identifiable direct cost to arrive at full cost. Overhead is an indirect cost of operating an organization that is not specifically identifiable with an activity. 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 an overhead rate by the estimated direct costs. The IRS calculates the overhead rate annually based on the Statement of Net Cost included in the IRS annual financial statements.

The financial statements are audited by the Government Accountability Office. The overhead rate is the ratio of the IRS's indirect costs divided by direct costs of its organizational units. Indirect costs are labor, benefits, and non-labor costs (excluding IT related to taxpayer services, enforcement, and business system modernization) from the supporting and sustaining organizational units. Direct costs are labor, benefits, and non-labor costs for the IRS's organizational units that interact directly with taxpayers.

For the PTIN user fee review, an overhead rate of 57.58 percent was used. The rate was calculated based on the FY 2019 Statement of Net Cost as follows:

Total Indirect Costs		\$4,006,706,430
Total Direct Costs	÷	<u>\$6,957,940,668</u>
Overhead Rate		<u>57.58%</u>

E. Calculation of PTIN User Fee

The IRS projected the direct costs associated with the PTIN program for fiscal years 2020 through 2022. Direct costs are incurred by the Return Preparer Office (RPO) and include staffing and other direct costs related to administering the PTIN program. Staffing costs relate to conducting certain suitability checks, foreign preparer processing, handling compliance and complaint activities, information technology and contract-related support, communications, budgeting and finance, and program oversight and support. The labor and benefits for the work performed related to the PTIN program is projected to be \$30,816,935 in total over fiscal years 2020 through 2022. Other direct costs associated with administering the PTIN program include contract costs and travel, training, supplies, printing, and other miscellaneous costs. The total amount of these other direct costs over fiscal years 2020 through 2022 is

projected to be \$463,750. Total direct costs for fiscal years 2020 through 2022 are therefore projected to be \$31,280,685. Adding overhead expenses to the total direct costs results in total costs of \$49,292,103 as shown below:

Total Direct Costs	\$ 31,280,685
Overhead (57.58%)	<u>\$ 18,011,418</u>
Total Direct Costs and Overhead	\$49,292,103

The number of users annually is estimated to be 800,000, based on numbers of PTIN holders in prior fiscal years. Dividing the total cost by the projected population of users for fiscal years 2020 through 2022 results in a cost per application of \$21 as shown below:

Total Costs	\$49,292,103
Number of Applications	÷ <u>2,400,000</u>
Cost Per Application	<u>\$ 21</u>

Taking into account the full amount of these costs, the amount of the PTIN user fee per application or renewal is \$21. The revised amount takes into account a reduction in contract support costs, a reduction in the cost of salary and benefits, and the current fiscal year overhead rate.

A third-party contractor performs certain functions, including processing applications to obtain or renew a PTIN and operating a call center, and charges a reasonable fee, which will be set at \$14.95 per application or renewal, in addition to the amount charged by the government. The third-party contractor was chosen through a competitive bidding process. The amount of the contractor portion may change in 2021 when the contract expires and will be re-computed.

Special Analyses

The OMB's Office of Information and Regulatory Analysis 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 these proposed regulations will not have a significant economic impact on a substantial number of small entities. The proposed regulations affect all individuals who prepare or assist in preparing all or substantially all of a tax return or claim for refund for compensation. Only individuals, not businesses, can have a PTIN. Thus, the economic impact of these regulations on any small entity generally will be a result of an individual tax return preparer who is required to have a PTIN owning a small business or a small business otherwise employing an individual tax return preparer who is required to have a PTIN. The Treasury Department and the IRS estimate that approximately 800,000 individuals will apply annually for an initial or renewal PTIN. Although the final regulations will likely affect a substantial number of small entities, the economic impact on those entities is not significant. The final regulations will establish a \$21 fee per application or renewal (plus \$14.95 payable directly to the contractor), which is a reduction from the previously established fee of \$33 (plus \$17 payable directly to the contractor) per application or renewal and will not have a significant economic impact on a small entity. Accordingly, the Secretary certifies that the rule will not have a significant economic impact on a substantial number of small entities.

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

Comments and Requests for a Public Hearing

Before these proposed amendments to the regulations are adopted as final regulations, consideration will be given to 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. Any electronic comments submitted, and to the extent practicable any paper comments submitted, will be made available at www.regulations.gov or upon request.

A public hearing will be scheduled if requested in writing by any person who timely submits electronic or written comments. Requests for a public hearing are also encouraged to be made electronically. If a public hearing is scheduled, notice of the date and time for the public hearing will be published in the **Federal Register**. Announcement 2020-4, 2020-17 IRB 1, provides that until further notice, public hearings conducted by the IRS will be held telephonically. Any telephonic hearing will be made accessible to people with disabilities.

Drafting Information

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

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.

Par. 2. Section 300.12 is amended by revising paragraphs (b) and (d) to read as follows:

§300.12 Fee for obtaining a preparer tax identification number.

* * * * *

(b) Fee. The fee to apply for or renew a preparer tax identification number is \$21 per year and is in addition to the fee charged by the contractor.

* * * * *

(d) Applicability date. This section applies to applications for or renewal of a preparer tax identification number filed on or after [date that is 30 days after these regulations are published as final regulations in the **Federal Register**].

Sunita Lough,

Deputy Commissioner for Services and Enforcement.

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