

DEPARTMENT



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Internal Revenue Service

26 CFR Part 301

[TD 9952]

RIN 1545-B012

Certain Non-Government Persons Not Authorized to Participate in Examinations of Books and Witnesses as a Section 6103(n) Contractor

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTIONS: Final regulations.

SUMMARY: This document contains final regulations modifying regulations relating to IRS administrative proceedings to reflect limitations that are required by the enactment of the Taxpayer First Act of 2019. These final regulations implement new rules regarding the persons who may be provided books, papers, records, or other data obtained pursuant to section 7602 of the Internal Revenue Code (Code) for the sole purpose of providing expert evaluation and assistance to the IRS, and adopt further limitations on the types of non-governmental attorneys to whom, under the authority of section 6103(n) of the Code, any books, papers, records, or other data obtained pursuant to section 7602 may be provided. These final regulations also prohibit any IRS contractors from asking substantive questions of a summoned witness under oath or asking a summoned person's representative to clarify an objection or assertion of privilege. The regulations affect persons who are examined by the IRS and any persons who are questioned by the IRS under oath pursuant to section 7602.

DATES: Effective date: These regulations are effective on [INSERT DATE OF PUBLICATION OF THIS DOCUMENT IN THE FEDERAL REGISTER].

Applicability date: For date of applicability, see §301.7602-1(d), which provides that the regulations promulgated by this Treasury decision are applicable to examinations begun or administrative summonses served by the IRS on or after August

6, 2020.

FOR FURTHER INFORMATION CONTACT: William V. Spatz at (202) 317-5461 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

## **Background**

These final regulations amend Procedure and Administration Regulations (26 CFR part 301) under section 7602(a) of the Code relating to participation by persons described in section 6103(n) of the Code and 26 CFR §301.6103(n)-1(a) of the Procedure and Administration Regulations in receiving and reviewing summoned books, papers, records, or other data and in interviewing a summoned witness under oath. These final regulations narrow the scope of the final regulations (TD 9778) published in the **Federal Register** (81 FR 45409) on July 14, 2016 (Summons Interview Regulations) by providing that certain non-government attorneys whom the IRS could previously have hired are no longer authorized to participate in an examination and by interpreting the requirements of section 7602(f), which was added to the Code by the Taxpayer First Act of 2019. A notice of proposed rulemaking (REG-132434-17) proposing these changes was published in the **Federal Register** (85 FR 47931) on August 7, 2020 (proposed regulations).

## **Summary of Comments**

No public hearing was requested or held regarding the proposed regulations. Two responsive comments were received, both of which concerned only one portion of the proposed regulations – proposed §301.7602-1(b)(3)(C), titled “Hiring of certain non-government attorneys.”

The first commenter recommended modifying the proposed rules to allow any outside contractors working for the IRS to examine, interview, and determine whether a taxpayer was a “tax cheat.” The Department of the Treasury (Treasury Department)

and the IRS decline to adopt this comment. While the IRS may hire a contractor to assist the IRS in these processes, examining a taxpayer and determining whether that taxpayer is in compliance with Federal tax laws are core IRS functions that the IRS has never allowed a contractor to perform. In addition, section 7602(f) now prohibits the IRS from allowing an IRS contractor to ask substantive questions of a witness whose testimony is being taken under oath pursuant to section 7602.

The second commenter noted that the non-exclusive nature of the proposed regulations left open the possibility that the IRS could hire as a contractor in an IRS examination a certified public accountant (CPA), enrolled agent, or another non-attorney to provide the IRS with assistance in the application of Federal tax laws. This commenter asserted that the proposed regulations should be revised so as to prohibit the IRS from hiring as a contractor in an examination any person, whether or not an attorney, for that person's expertise with the Federal tax laws. The Treasury Department and the IRS decline to adopt this comment. The limitation on hiring attorneys as contractors in examinations for their expertise in applying the Federal tax laws is a measure that goes beyond what is required by section 7602(f). This hiring limitation was introduced as a matter of sound tax administration to address concerns expressed by a range of professional and business associations over the IRS's prior use of attorneys as contractors. While the previous commenters addressing the Summons Interview Regulations and Notice 2017-38, 2017-30 I.R.B. 147, noted the potential hazards that could arise from the IRS hiring attorney contractors for their expertise with Federal tax laws, the hiring of a CPA or other accountant by the IRS as a contractor has not been established as a widely held concern. Accordingly, the Treasury Department and the IRS have determined (1) that hiring outside CPAs and accountants as contractors in an examination does not pose the same potential risk to tax administration that prior commenters had identified for the IRS hiring of outside

attorneys, who are trained at developing facts and taking testimony, and (2) that the IRS is justified in contracting for the resources and expertise of CPAs and accountants from outside of the IRS in certain large or complex cases.

### **Explanation of the Final Regulations**

The preamble to proposed regulations explained the various provisions of the proposed regulations in detail. Because these final regulations adopt the proposed regulations without any modifications, any persons interested in understanding the provisions of these final regulations should consult the preamble discussion of these provisions in the proposed regulations.

### **Special Analyses**

These regulations are not subject to review under section 6(b) of Executive Order 12866 pursuant to the Memorandum of Agreement (April 11, 2018) between the Treasury Department and the Office of Management and Budget regarding review of tax regulations. Therefore, a regulatory impact assessment is not required.

Pursuant to the Regulatory Flexibility Act (5 U.S.C. chapter 6), it is hereby certified that these regulations do not impose a significant economic impact on a substantial number of small entities. The final regulations mainly affect the IRS and do not impose requirements on small entities. Thus, no economic impact will result from these regulations on any small entity. Accordingly, the Secretary of the Treasury's delegate certifies that the rule will not have a significant economic impact on a substantial number of small entities.

Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking preceding these final regulations was submitted to the Chief Counsel for the Office of Advocacy of the Small Business Administration for comments on its impact on small business. No comments were received from the Chief Counsel for the Office of Advocacy of the Small Business Administration.

## Drafting Information

The principal author of these final regulations is William V. Spatz of the Office of Associate Chief Counsel (Procedure and Administration). However, other personnel from the Treasury Department and the IRS participated in their development.

## List of Subjects in 26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

## Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 301 is amended as follows:

### PART 301--PROCEDURE AND ADMINISTRATION

Paragraph 1. The general authority citation for part 301 continues to read in part as follows:

Authority: 26 U.S.C. 7805 \* \* \*

Par. 2. Section 301.7602-1 is amended:

1. In paragraph (b)(2), by adding “(Secretary)” at the end of the first sentence.
2. By revising paragraphs (b)(3) and (d).

The revisions read as follows:

#### § 301.7602-1 Examination of books and witnesses.

\* \* \* \* \*

(b)\* \* \*

(3) Participation of a person described in section 6103(n)--(i) IRS contractor access to books and records obtained by the IRS administratively--(A) In general. The Secretary may not, under the authority of section 6103(n), provide any books, papers, records, or other data obtained pursuant to section 7602 to any person authorized under section 6103(n), except when such person requires such information for the sole purpose of providing expert evaluation and assistance to the IRS.

(B) Persons providing expert evaluation and assistance. For the purposes of paragraph (b)(3)(i)(A) of this section, persons providing expert evaluation and assistance may include, but are not limited to, the following:

(1) Persons with specialized expertise in certain substantive areas, including, but not limited to, economists, engineers, attorneys specializing in an area relevant to an issue in the examination (such as patent law, property law, environmental law, or foreign, state, or local law (including foreign, state, or local tax law)), industry experts, or other subject-matter experts;

(2) Persons providing support as ancillary service contractors including, but not limited to, court reporters, translators or interpreters, photocopy services, providers of data processing programs or equipment, litigation support services, or other similar contractors; and

(3) Whistleblower-related contractors described in § 301.6103(n)-2.

(C) Hiring of certain non-government attorneys. The IRS may not hire an attorney as a contractor to assist in an examination under section 7602 unless the attorney is hired by the IRS as a specialist in foreign, state, or local law (including foreign, state, or local tax law), or in non-tax substantive law that is relevant to an issue in the examination, such as patent law, property law, or environmental law, or is hired for knowledge, skills, or abilities other than providing legal services as an attorney.

(ii) IRS contractor participation in an IRS summons interview--(A) In general. No person other than an officer or employee of the IRS or its Office of Chief Counsel may, on behalf of the Secretary, question a witness under oath whose testimony was obtained pursuant to section 7602. Persons authorized by section 6103(n) and with whom the Secretary may provide books, papers, records, or other data obtained pursuant to section 7602 may also attend a summons interview and provide assistance to the IRS or Office of Chief Counsel employees in attendance, but may not question

the summoned witness under oath or ask a summoned person's representative to clarify an objection or assertion of privilege.

(B) Court reporters, translators, and interpreters are not barred from asking questions. Court reporters who are hired as contractors by the IRS to make a record of an IRS summons interview are permitted to ask typical housekeeping questions of a summoned witness. Examples of such questions include, but are not limited to, asking whether the witness swears to tell the truth, asking the witness to spell a word or phrase, and asking whether the witness can speak up or speak rather than gesture an answer. Translators and interpreters who are hired as contractors by the IRS to assist in the interview of a summoned witness are permitted to translate any of the questions that are asked of the witness by an IRS or Office of Chief Counsel officer or employee and to ask questions which may be necessary to clarify the translation.

\* \* \* \* \*

(d) Applicability date. This section is applicable after September 3, 1982, except for paragraphs (b)(1) and (2) of this section, which are applicable on and after April 1, 2005, and paragraph (b)(3) of this section, which applies to examinations begun or administrative summonses served by the IRS on or after August 6, 2020. For rules under paragraphs (b)(1) and (2) of this section that are applicable to summonses issued on or after September 10, 2002 or under paragraph (b)(3) of this section that are applicable to summons interviews conducted on or after June 18, 2014 and before July 14, 2016, see 26 CFR 301.7602-1T (revised as of April 1, 2016). For rules under paragraph (b)(3) of this section that are applicable to administrative

summonses served by the IRS before August 6, 2020, see 26 CFR 301.7602-1 (revised as of April 1, 2020).

Douglas W. O'Donnell,  
Deputy Commissioner for Services and Enforcement.

Approved: August 20, 2021

Mark J. Mazur,  
Acting Assistant Secretary of the Treasury (Tax Policy).

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