COMMENTS OF STUART J. BASSIN

Submitted with respect to Notice of Proposed Rulemaking
Preparer Tax Identification Number (PTIN) User Fee Update
85 FED. Reg. 21126, REG-117138-17, April 16, 2020

The Notice of Proposed Rulemaking ("Notice") represents the latest effort by the Internal Revenue Service ("IRS") to fund a program of return preparer regulation, consumer protection, and public information managed by the agency's Return Preparer Office ("RPO"). The Notice proposes an annual user fee charged to an estimated 800,000 tax return preparers who request a preparer tax identification number (PTIN). The proposed PTIN fee violates the governing law which permits agencies to recover certain costs through a user fee (*e.g.,* the direct cost incurred by the agency to issue a PTIN), but prohibits agencies from recovering other costs through a user fee (*e.g.,* broader industry regulation and consumer protection). This Notice is remarkably vague in describing how IRS computed the costs it would recover through the PTIN fee and remarkably imprecise in describing how IRS segregated the RPO's recoverable costs associated with issuing PTINs from the non-recoverable costs associated with the RPO's other wide-ranging activities. This Notice does not satisfy the governing legal standards and should be withdrawn before it becomes the subject of another round in the decade-old litigation between IRS and return preparers over PTIN fees.

The Governing Law

The Independent Office Appropriations Act authorizes agencies to impose a "charge for a service or thing provided by the agency." 31 U.S.C. §9701(b). The Supreme Court has described the bounds of agency authority to impose user fees in a pair of companion decisions.

Federal Power Commission v. New England Power Co., 415 U.S. 345 (1974), and *National Cable Television Association v. United States*, 415 U.S. 336 (1974). Summarizing that authority, as applied to a challenge to an earlier PTIN fee imposed by IRS, the D.C. Circuit Court of Appeals recently explained that—

> [The Supreme Court has construed] the Act to cover only `fees' and not `taxes.'" That is because "[t]axation is a legislative function, and Congress ... is the sole organ for levying taxes." The Court explained that fees, as opposed to taxes, are imposed on identifiable recipients of particular government services. The Court thus understood the Act to give agencies authority to impose a "reasonable charge" on an "identifiable recipient for a measurable unit or amount of Government service or property from which [the recipient] derives a special benefit."

Montrois v. United States, 916 F.3d 1056, 1062 (D.C. Cir. 2019)(citations omitted). The *Montrois* court ruled that IRS could charge a PTIN fee to recover its direct cost of issuing a PTIN. At the same time, the court recognized that questions remained regarding whether the agency sought to recover the cost of other RPO activities through the user fee—*e.g.,* background checks and processing of taxpayer complaints. Noting in several places that the preparers could present those questions during a remand to the trial court, the Montrois court observed--

> *There may be force to the tax-return preparers' claim that the fee amount is excessive*, but no court has yet considered that claim, and the preparers can press the matter in the proceedings on remand.

Id. at 1067 (emphasis added). See also *Seafarers International Union of North America v. Coast Guard*, 81 F. 3d 179 (D.C. Cir. 1996)(" it should be clear that an agency is not free to add extra licensing procedures and then charge a user fee merely because the agency has general authority to regulate in a particular area.") In sum, following *Montrois*, a determination must be made regarding how much of the PTIN fee relates to agency costs and functions for which it may recover a user fee and how much relates to costs and functions for which it may not. Those issues are currently being litigated in federal district court.

The D.C. Circuit established the standard applicable to agency justifications for user fees in *Engine Manufacturers Association v. Environmental Protection Agency*, 20 F.3d 1177 (D.C. 1994). That case involved the user fee charged to applicants for a certificate of that their products satisfied the agency's testing program. The agency supported the fee with a 30-page cost analysis which the court "inspected without . . . enlightenment." *Id*. at 1181. After analyzing several of the issues raised by the cost analysis, the court rejected the user fee because the record compiled by the agency did not allow the court to—

> evaluate either the EMA's claim or the agency's conclusion to the contrary. Without any identified factual basis, the agency's belief provides little comfort; *the EPA can and must do better.*
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> . . . The agency should provide an explanation, in intelligible if not plain English, that at a minimum reveals how it determined which of its costs are recoverable, the justification(s) underlying its choice of cost allocation methods, and a reasoned basis for the agency's belief that it incurs the same costs for a carryover certification as it does for a new certification.

Id. at 1183 (emphasis added). Accordingly, the D.C. Circuit remanded the case to the agency for a new cost determination of recoverable costs. See also *District Hospital Partners L.P. v. Burwell*, 786 F.3d 46, 59-60 (D.C. Cir. 2015) (rejecting another agency cost determination).

<u>The IRS Role in Issuing a PTIN</u>

This Notice contains a statement that IRS incurs a direct cost of over $10 million each year (plus an overhead surcharge of 57%) for some vaguely described activities which it suggests relate to issuance of PTINs. It states that IRS made reference to some sort of cost-center allocation and made some sort of estimate regarding the number of full time employees required to conduct activities attributable to the cost of issuing PTINs in computing its "direct costs." None of the detailed information required for anyone to meaningfully review the

methodology, estimates, allocations, and computations employed by the agency to determine these costs or the computations it undertook is provided. For example, the Notice provides no information regarding the treatment of the costs associated with the RPO's consumer protection activities in determining the amount of its recoverable direct costs. Ultimately, the sketchy description of the methodology, estimates, allocations, and computations made by the agency is nebulous and does not satisfy the requirements of law, as enunciated by the D.C. Circuit.

The vagueness of IRS's computations is particularly concerning because most (if not all) of the effort and cost associated with issuing a PTIN is incurred by a third-party contractor, which recovers its costs through a separate fee of $14.95 it charges to each applicant. Under its agreement with IRS, that contractor is solely responsible for processing PTIN applications and operating a call center. In fact, return preparers seeking to obtain a PTIN complete a short online form on a website designed and maintained by that contractor and pay both the fees payable to the contractor and the IRS through the contractor-maintained website. Once the return preparer completes the form, they are assigned a PTIN through the website in a matter of seconds; IRS does not play any visible role in this process of issuing individual PTINs. Thus, it is difficult to imagine what costs IRS incurs in the process of issuing PTINs other than the cost of negotiating the contract with the contractor and supervising the contractor's performance of the contract. This Notice leaves one to wonder why the costs of a contractor which does virtually all of the work involved in issuing a PTIN are recovered through a fee of less than $15, while recovery of IRS's costs of supervising that contract justify a fee of $21.

Treatment of the RPO's Activities and Costs

The proposed fee apparently is based largely upon costs incurred through the RPO—a large IRS component engaged in a wide range of activities beyond managing the third-party contract for processing PTIN applications. The RPO's headcount includes more than 150 full-time employees, eleven of whom are identified as Directors, Deputy Directors, or Acting Directors of office components involved in diverse activities.[1] As of 2018, the RPO was organized into five major groups (including groups focused upon Suitability Checks, Continuing Education Management, Compliance and Complaint Referrals, and Enrolled Agent Policy). It also had offices devoted to enrollment of actuaries and communications.[2] A Facebook page maintained by the RPO does not mention any efforts the RPO undertook to administer the contract for registering PTINs.[3] Instead, it describes the many public information, consumer protection, and community outreach activities conducted by the RPO. The extent (if any) to which these other diverse activities relate to management of the PTIN contract or is included in the fee determination is not addressed in the Notice. Regardless of the merit of these other activities, the relevant inquiry here is how IRS has segregated the direct cost of issuing a PTIN (which are recoverable through a PTIN fee) from the cost of the RPO's other activities (which can only be recovered from Congressionally-appropriated funds).[4]

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[1] See www.irs.gov/tax-professionals/return-preparer-office-rpo-at-a-glance

[2] Treasury Inspector General for Tax Administration Report (Reference Number 2018-30-042, July 25, 2018) at 3 & n.14.

[3] www.facebook.com/pg/IRStax pros/notes

[4] TIGTA reported that the Suitability Office in the RPO was staffed with 28 employees. Yet, in 2016, PTINs were issued to 26,000 applicants who self-reported in their PTIN applications that they were not tax compliant. Similarly, over the life of the PTIN program, fewer than 1700 PTINs out of more than 1.3 million PTINs issued have been revoked. TIGTA

Unanswered Questions

These comments demonstrate that the description of the methodology IRS intends to employ in computing the costs it seeks to recover through the PTIN fee is wholly-inadequate and opaque. It will not withstand review by OMB's Office of Information and Regulatory Analysis or any reviewing court. Before going further, the agency must address the deficiencies in the cost justification employed in this Notice. To satisfy the legal governing standards, the agency needs to present a new notice for public comment which clearly describes its methodology and, for example, explains--

(1) specific identification and description of the cost centers included in the agency's computations of its costs;

(2) specific description of the methodology IRS employed in its computations to address "cost centers [which] work on different services across IRS and are not fully devoted to the services for which IRS charges user fees;"

(3) specific description of the methodology employed to "estimated […] the number of full-time employees required to conduct activities related to the costs of issuing . . . PTINs;"

(4) description of the duties of the individual employees employed in conducting activities related to the costs of issuing PTINs;

(5) description of the methodology employed to allocate the overall cost associated with employees with multiple duties between the costs of issuing PTINs and the costs of performing the employee's other duties;

(6) identification of the data and documents considered by the agency to make these estimates, allocations, and computations;

(7) identification of the worksheets and intermediate computations employed by the agency in the estimation, allocation, and computation process; and

(8) description of the methodology employed to segregate the recoverable costs of issuing PTINs from the other costs associated with the non-recoverable costs of the RPO.

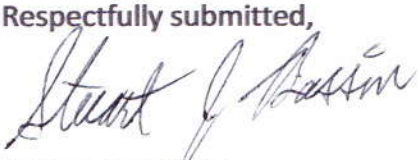
A robust disclosure of the information identified through answers to these questions is essential to providing the clear and credible information needed for a lawful evaluation of the proposed user fee.

Report at 20, 30. Those statistics raise questions regarding exactly what those 28 employees actually do.

In conclusion, I observe that the user fees charged to PTIN applicants has been the subject of litigation for nearly a decade. Issuance of a new rule which fails to provide a clear explanation of the allocations, estimates, and computations employed in computing the proposed user fee represents an open invitation for return preparers to continue litigation of these issues well into the next decade. That is bad public policy and is antithetical to the goal of sound tax administration. The IRS should withdraw the Notice.

May 13, 2020

Respectfully submitted,



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