

[4830-01-p]

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 300

[TD 9503]

RIN 1545-BI71

User Fees Relating to Enrollment and Preparer Tax Identification Numbers

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains amendments to the regulations relating to the imposition of certain user fees on certain tax practitioners. The final regulations establish a new user fee for individuals who apply for or renew a preparer tax identification number (PTIN). The final regulations affect individuals who apply for or renew a PTIN.

DATES: Effective Date: These regulations are effective on September 30, 2010.

Applicability Date: For dates of applicability see §§300.1(d), 300.2(d), 300.3(d), 300.4(d), 300.5(d), 300.6(d), 300.7(d), 300.8(d), and 300.9(d).

FOR FURTHER INFORMATION CONTACT: Concerning the final regulations, Emily M. Lesniak at (202) 622-4570; concerning cost methodology Eva J. Williams at (202) 435-5514 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

This document contains final regulations relating to the imposition of a user fee to apply for or renew a PTIN and the reorganization of the effective date provisions under §§300.0 through 300.8. Section 300.9 establishes a \$50 user fee to apply for or renew a PTIN. The Independent Offices Appropriations Act of 1952 (IOAA), which is codified at 31 U.S.C. 9701, authorizes agencies to prescribe regulations establishing user fees for services provided by the agency. Regulations prescribing user fees are subject to the policies of the President, which are currently set forth in the Office of Management and Budget Circular A-25 (the OMB Circular), 58 FR 38142 (July 15, 1993). The OMB Circular requires agencies seeking to impose user fees for providing special benefits to identifiable recipients to calculate the full cost of providing those benefits.

On September 30, 2010, the Treasury Department and the IRS published in the **Federal Register** final regulations under section 6109 (TD 9501) that require tax return preparers who prepare all or substantially all of a tax return or claim for refund to use a PTIN as their identifying number. These regulations also provide that to be eligible to receive a PTIN, a tax return preparer must be an attorney, certified public accountant, enrolled agent, or registered tax return preparer.

On July 23, 2010, the Treasury Department and the IRS published in the **Federal Register** (75 FR 43110) a notice of proposed rulemaking (REG-139343-08) proposing amendments to part 300 of title 26 of the Code of Federal Regulations. New §300.9 of these regulations proposed to establish a \$50 user fee to apply for or renew a PTIN. These regulations do not include any fees charged by the vendor, which vendor fee is now calculated to be \$14.25. Additionally, these regulations proposed to reorganize the effective date provisions of §§300.0 through 300.8. A public hearing regarding the

proposed regulations was held on August 24, 2010. The IRS also received written public comments in response to the proposed regulations.

After careful consideration of all written public comments and statements made during the public hearing, the Treasury Department and the IRS have decided to adopt without modification the proposed regulations that establish a \$50 user fee to apply for or renew a PTIN, recovering the full cost to the IRS for administering the PTIN application and renewal program. The Treasury Department and the IRS also have decided to adopt without modification the proposed regulations reorganizing the effective date provisions under §§300.0 through 300.8.

Summary of Comments

Over 10,000 written comments were received in response to the notice of proposed rulemaking. The comments were considered and are available for public inspection upon request. The comments related to the \$50 user fee to apply for or renew a PTIN, the related PTIN regulations under section 6109, or the proposed amendments to regulations governing practice before the IRS under 31 CFR part 10 (Circular 230). No comments were received regarding the reorganization of the effective date provisions. Many of the comments are summarized in this preamble.

To the extent comments received with respect to the user fee regulation raise issues pertaining to the PTIN regulations under section 6109 or Circular 230, the Treasury Department and the IRS are considering and addressing those comments in connection with the relevant regulations. Accordingly, the summary of comments below addresses only those comments that seek modification or clarification of the user fee as set forth in the proposed regulations.

1. Tax Return Preparers Who Already Are Subject to Fees

The Treasury Department and the IRS received numerous comments stating that tax return preparers who are attorneys, certified public accountants, or enrolled agents already are required to maintain licenses and pay numerous fees associated with obtaining and maintaining their licenses. Some commentators also stated that regulation of currently unenrolled tax return preparers or imposing a user fee to apply for or renew a PTIN for currently unenrolled tax return preparers was acceptable, but individuals who are regulated currently should not be required to obtain a PTIN or pay a user fee. Other similar comments requested that licensed tax consultants in Oregon be grandfathered into the new regulatory scheme and that individuals who currently have a PTIN be exempt from the requirements to apply for and renew a PTIN.

Having a PTIN is a special benefit that allows specified tax return preparers to prepare all or substantially all of a tax return or claim for refund for compensation. The OMB Circular encourages user fees for government-provided services that confer special benefits on identifiable recipients over and above those benefits received by the general public. A user fee must be set at an amount that allows the agency to recover the full cost of providing the special services unless the Office of Management and Budget grants an exception.

The same special benefit is conferred on all persons who obtain a PTIN, and the cost to the government is the same for providing PTINs to attorneys, certified public accountants, and enrolled agents as it is for providing PTINs to formerly unenrolled tax return preparers. Under the OMB Circular, absent special approval, the IRS must recover the full costs for providing the special benefits associated with a PTIN. The IRS

cannot charge a user fee solely to tax return preparers who are not otherwise licensed as an attorney, certified public accountant, or enrolled agent. Although many comments sought exceptions to the user fee, one commentator encouraged the Treasury Department and the IRS to maintain a uniform user fee for obtaining a PTIN. Consequently, the Treasury Department and the IRS are adopting the proposed regulations and requiring all tax return preparers to pay a user fee to apply for or renew a PTIN.

2. Calculation of the User Fee

The Treasury Department and the IRS received a comment that the proposed regulations do not comply with the provisions of IOAA because a PTIN is not a service or thing of value to a tax return preparer. The commentator also stated that the proposed regulations do not comply with the general policies for implementing user fees, as provided in the OMB Circular, because providing a PTIN to a tax return preparer benefits the general public by tracking incompetent and unscrupulous tax return preparers and that the IRS already meets a goal of the OMB Circular because it is already self-sustaining, as the IRS collects more taxes than it costs to run the agency.

The IOAA authorizes agencies to prescribe regulations that establish charges for services provided by the agency. The charges must be fair and must be based on the costs to the government, the value of the service to the recipient, the public policy or interest served, and other relevant facts. The IOAA provides that regulations implementing user fees are subject to policies prescribed by the President; these policies are currently set forth in the OMB Circular. The OMB Circular encourages user fees for government-provided services that confer benefits on identifiable recipients

over and above those benefits received by the general public. Under the OMB Circular, an agency that seeks to impose a user fee for government-provided services must calculate the full cost of providing those services.

The user fee was determined to be consistent with the IOAA and the OMB Circular. A PTIN both confers a special benefit on an identifiable recipient and is a service or thing of value to a tax return preparer. A PTIN confers a special benefit because without a PTIN, a tax return preparer could not receive compensation for preparing all or substantially all of a federal tax return or claim for refund. Because only attorneys, certified public accountants, enrolled agents, and registered tax return preparers are eligible to obtain a PTIN, only a subset of the general public is entitled to a PTIN and the special benefit of receiving compensation for the preparation of a return that it confers. This analysis is consistent with the current practice of charging a user fee on individuals seeking to become enrolled agents. Being an enrolled agent confers special benefits; and, therefore, the IRS currently charges a user fee on applicants seeking those special benefits.

Further, while it is anticipated that requiring tax return preparers to obtain a PTIN will benefit tax administration generally, only the tax return preparer who receives the PTIN can take advantage of the special benefit associated with having a PTIN. The OMB Circular provides that a government agency should recover the full cost of providing a special benefit when the general public receives a benefit as a necessary consequence of the government providing a special benefit to an identifiable recipient.

The OMB Circular also provides that one of the objectives of establishing a user fee is to “ensure that each service, sale, or use of Government goods or resources

provided by an agency to specific recipients be self-sustaining.” As described above, the issuance of a PTIN provides a special benefit to the specific tax return preparer who receives the PTIN. The administration of the PTIN application and renewal program requires the use of IRS services, goods, and resources. For the PTIN application and renewal program to be self-sustaining, the IRS must charge a user fee to recover the costs of providing the special benefits associated with PTIN. The fact that the IRS collects tax revenue for use by the government as a whole does not affect the analysis of whether the PTIN application and renewal program is self-sustaining. Thus, the Treasury Department and the IRS are complying with the provisions of the IOAA and the OMB Circular by implementing a user fee to recover the costs associated with the issuance of PTINs.

3. Renewing a PTIN

Several commentators objected to renewing their PTIN on a yearly basis and requested longer renewal periods. At this time the Treasury Department and the IRS have determined that an annual renewal of a PTIN is the most effective procedure. The user fee to renew a PTIN is, however, part of the larger implementation of recommendations in Publication 4832, “Return Preparer Review,” which was published on January 4, 2010, to be effective for the 2011 Federal tax filing season (January-April 2011). These recommendations include revisions to Circular 230 implementing the registered tax return preparer program and revisions to the regulations under section 6109 requiring all tax return preparers to obtain and use a PTIN as their identifying number. As these programs are implemented, the IRS will continually monitor their administration and make appropriate adjustments to increase effectiveness. Thus, in

the future, the Treasury Department and the IRS will review the requirement to annually renew a PTIN and will make modifications, as appropriate.

4. The Amount of the User Fee

Many commentators objected to the amount of the user fee. Some stated that the user fee should be smaller or that tax return preparers who prepare a limited number of returns should pay a smaller user fee. Other commentators characterized the user fee as a tax or a revenue raiser.

As stated earlier in this preamble, under the OMB Circular, the IRS must recover the full cost of providing a PTIN. The full cost to the government to administer the PTIN application and renewal program was calculated to be \$50 per application or renewal. The user fee does not provide funds beyond the cost to process PTIN applications. Thus, the user fee to apply for or renew a PTIN does not provide additional revenue to the IRS that can be allocated to other programs. The PTIN user fee merely offsets costs the IRS incurs to provide the special benefits associated with having a PTIN.

The cost of processing PTIN applications is not affected by the number of tax returns that a tax return preparer prepares during a given tax season. For example, the cost to the IRS to process the PTIN applications of individuals who prepare over 500 tax returns per year, approximately 100 tax returns per year, or under 10 tax returns per year is the same. The IRS will perform the same tax compliance and suitability checks on these individuals and will provide these individuals with the same PTIN support services. The IRS must also maintain the same data in its PTIN database regarding these individuals and develop the same reconsideration process for these individuals in the event their PTIN applications are denied. Because the cost to the IRS is not

dependent on the quantity of returns that an individual tax return preparer prepares, the final regulations adopt the \$50 user fee for all tax return preparers to apply for or renew a PTIN.

5. Burden Imposed by the User Fee

Some commentators stated that the \$50 user fee will be a burden on their businesses or that the cost to apply for or renew a PTIN will be passed on to clients. The IRS recognizes that some individuals who prepare a small number of tax returns may stop preparing tax returns or that the PTIN user fee may be passed on to clients. The IRS, however, believes that the implementation of the registered tax return preparer program and the requirement to use a PTIN as provided in the section 6109 regulations will benefit taxpayers and tax administration as a whole. The registered tax return preparer program will ensure that tax return preparers meet and maintain a minimum level of competency. The requirement to use a PTIN will provide the IRS an effective way to monitor tax return preparers and enforce the regulation of tax return preparers. The Treasury Department and the IRS believe that a user fee to apply for or renew a PTIN is necessary to recover the cost that the IRS will incur to implement and administer the PTIN application and renewal program.

Other commentators suggested that the user fee to apply for or renew a PTIN would cause some tax return preparers to revert to using their social security number when preparing tax returns rather than a PTIN, which would contravene the identity protection currently provided by PTINs. The regulations under section 6109, however, require tax return preparers to use a PTIN as their sole identifying number when preparing tax returns or claims for refund for compensation. Thus, tax return preparers

are not allowed to use their social security numbers as an identifying number when preparing tax returns or claims for refund.

6. Use of a Third Party Vendor

Several commentators objected to providing identifying information to the third party vendor, and numerous commentators objected to paying a separate fee to the vendor.

The third party vendor is statutorily and contractually obligated to protect all personally identifiable information. The vendor is subject to the confidentiality and disclosure provisions of section 6103. The vendor also must comply with the provisions of the Federal Information Security Management Act; the E-Government Act of 2002; IRS Acquisitions Procedures; the Federal Acquisitions Regulations; the Taxpayer Browsing Protection Act of 1997; and the Privacy Act of 1974, which is codified at 5 U.S.C. 552a, regarding all non-tax information. The vendor must comply with numerous policies of the Office of Management and Budget, including OMB Circular No. A-130, Security and Federal Automated Information Resources Appendix III; OMB Circular policy M-06-16, Protection of Sensitive Agency Information; OMB Circular Policy M-06-15, Safeguarding Personally Identifiable Information; and OMB Circular Policy M-06-19, Reporting Incidents Involving Personally Identifiable Information.

The vendor faces significant consequences for the unauthorized inspection or disclosure of confidential tax information. These consequences include, among others, that an officer or employee of the vendor may be subject to civil damages; civil or criminal sanctions, such as sanctions imposed by 18 U.S.C. 641 and 3571; or penalties as prescribed in sections 7213, 7213A, and 7431.

The vendor's fee, currently set at \$14.25, covers the costs incurred by the vendor to administer the application and renewal process. These costs are separate from the costs to the IRS for administering the PTIN application and renewal program, which are recovered in the \$50 user fee. The respective fees pay for different aspects of administering the PTIN program, each of which is essential to providing PTINs to tax return preparers. Additionally, under the vendor's contract with the IRS, the vendor's fee is reviewed and approved by the IRS.

After consideration of all of the public comments and statements made during the public hearing, the Treasury Department and the IRS have adopted the proposed regulations in full.

Effective/Applicability Date

The Administrative Procedure Act provides that substantive rules generally will not be effective until thirty days after the final regulations are published in the **Federal Register** (5 U.S.C. 553(d)). Final regulations may be effective prior to thirty days after publication if the publishing agency finds that there is good cause for an earlier effective date.

This regulation is part of the IRS' effort to implement the recommendations in the "Return Preparer Review." The review concluded that obtaining more complete and accurate information on individual tax return preparers and improved IRS oversight of tax return preparers and their preparation of tax returns and claims for refund is necessary for effective tax administration. The PTIN is the mechanism that allows the IRS to obtain more complete and accurate information on tax return preparers. Thus,

the issuance of a PTIN is a threshold requirement to implementing the recommendations in the report.

This regulation must be effective significantly in advance of the beginning of the 2011 filing season to enable the IRS to charge a user fee to recover the cost of administering the program under which all individuals who prepare all or substantially all of a tax return or claim for refund of tax are required to obtain a PTIN for use during the 2011 Federal tax filing season. For all tax return preparers to receive a PTIN prior to the 2011 filing season, the IRS must begin registering preparers as quickly as possible. Thus, the Treasury Department and the IRS find that there is good cause for these regulations to be effective upon the publication of a Treasury decision adopting these rules as final regulations in the **Federal Register**.

Special Analyses

It has been determined that these final regulations are a significant regulatory action as defined in Executive Order 12866.

It has been determined that a final regulatory flexibility analysis under 5 U.S.C. 604 is required for this final rule. The analysis is set forth under the heading, "Final Regulatory Flexibility Analysis."

Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking preceding these final regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business. The Chief Counsel for Advocacy did not submit comments on the notice of proposed rulemaking.

Final Regulatory Flexibility Analysis

When an agency either promulgates a final rule that follows a required notice of proposed rulemaking or promulgates a final interpretative rule involving the internal revenue laws as described in 5 U.S.C. 603(a), the Regulatory Flexibility Act (5 U.S.C. chapter 6) requires the agency to “prepare a final regulatory flexibility analysis.” A final regulatory flexibility analysis must, pursuant to 5 U.S.C. 604(a), contain the five elements listed in this final regulatory flexibility analysis. For purposes of this final regulatory flexibility analysis, a small entity is defined as a small business, small nonprofit organization, or small governmental jurisdiction. 5 U.S.C. 601(3)-(6). The Treasury Department and the IRS conclude that the final regulations (together with other contemplated guidance provided for in these regulations) will impact a substantial number of small entities and the economic impact will be significant.

A statement of the need for, and the objectives of, the final rule.

The final regulations are necessary to recover the full cost to the IRS associated with administering the PTIN application and renewal program and providing the special benefits that are associated with obtaining a PTIN.

The Treasury Department and the IRS are implementing regulatory changes that increase the oversight of the tax return preparer industry. These regulatory changes are based upon findings and recommendations made by the IRS in the “Return Preparer Review.” Based upon findings in the review, all individuals who prepare all or substantially all of a tax return or claim for refund will be required to use a PTIN as their identifying number. Except as provided in any transitional period, only attorneys, certified public accountants, enrolled agents, or registered tax return preparers may apply for a PTIN. Thus, only attorneys, certified public accountants, enrolled agents,

and registered tax return preparers will be eligible to prepare all or substantially all of a tax return or claim for refund. By limiting the individuals who may prepare all or substantially all of a tax return or claim for refund to individuals who have a PTIN, the IRS is providing a special benefit to the individuals who obtain a PTIN.

The objective of the final regulations is to recover the costs to the government that are associated with providing this special benefit. The costs to the government include the development and maintenance of the IRS information technology system that interfaces with the vendor; the development and maintenance of internal applications; IRS customer service support activities, which include development and maintenance of an IRS website and call center staffing; and personnel, administrative, and management support needed to evaluate and address tax compliance issues, investigate and address conduct and suitability issues, and otherwise support and enforce the programs that require individuals to apply for or renew a PTIN.

Summaries of the significant issues raised in the public comments responding to the initial regulatory flexibility analysis and of the agency's assessment of the issues, and a statement of any changes made to the rule as a result of the comments.

A summary of the comments is set forth elsewhere in this preamble, along with the Treasury Department's and the IRS' assessment of the issues raised in the comments.

A description and an estimate of the number of small entities to which the rule will apply or an explanation of why an estimate is not available.

The final regulations affect all individuals who want to become a registered tax return preparer under the new oversight rules in Circular 230. Only individuals, not businesses, can practice before the IRS or become a registered tax return preparer. Thus, the economic impact of these regulations on any small entity generally will be a

result of applicants and registered tax return preparers owning a small business or a small entity employing applicants or registered tax return preparers.

The final regulations further affect all individual tax return preparers who are required to apply for or renew a PTIN. Only individuals, not businesses, can apply for or renew 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 owns a small business and who is required to apply for or renew a PTIN, or a small business otherwise employing an individual tax return preparer who is required to apply for or renew a PTIN, to prepare all or substantially all of a tax return or claim for refund.

The appropriate NAICS codes for the registered tax return preparer program and PTINs are those that relate to tax preparation services (NAICS code 541213), other accounting services (NAICS code 541219), offices of lawyers (NAICS code 541110), and offices of certified public accountants (NAICS code 541211). Entities identified as tax preparation services and offices of lawyers are considered small under the Small Business Administration size standards (13 CFR 121.201) if their annual revenue is less than \$7 million. Entities identified as other accounting services and offices of certified public accountants are considered small under the Small Business Administration size standards if their annual revenue is less than \$8.5 million. The IRS estimates that approximately 70 to 80 percent of the individuals subject to these proposed regulations are tax return preparers operating as or employed by small entities.

A description of the projected reporting, recordkeeping, and other compliance requirements of the rule, including an estimate of the classes of small entities subject to the requirements and the type of professional skills necessary for preparation of a report or record.

No reporting or recordkeeping requirements are projected to be associated with

the final regulation.

A description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting any alternative adopted in the final rule and why other significant alternatives affecting the impact on small entities that the agency considered were rejected.

The Treasury Department and the IRS are not aware of any steps that could be taken to minimize the economic impact on small entities that would also be consistent with the objectives of these final regulations. These regulations do not impose any more requirements on small entities than are necessary to effectively administer the internal revenue laws. Further, the regulations do not subject small entities to any requirements that are not also applicable to larger entities covered by the regulations.

The Treasury Department and the IRS have determined that there are no viable alternatives to the final regulations.

The IOAA authorizes the charging of user fees for agency services, subject to policies designated by the President. The OMB Circular implements presidential policies regarding user fees and encourages user fees when a government agency provides a special benefit to a member of the public. As Congress has not appropriated funds to the registered tax return preparer program or the PTIN application and renewal program, there are no viable alternatives to the imposition of user fees.

Drafting Information

The principal author of these final regulations is Emily M. Lesniak, Office of the Associate Chief Counsel (Procedure and Administration).

List of Subjects in 26 CFR Part 300

Reporting and recordkeeping requirements, User fees.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 300 is amended as follows:

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

Authority: 31 U.S.C. 9701.

Par. 2. Section 300.0 is amended by

1. Adding paragraph (b)(9).
2. Removing paragraph (c).

The addition reads as follows:

§300.0 User fees; in general.

* * * * *

(b) * * *

(9) Applying for a preparer tax identification number.

Par. 3. Section 300.1 is amended by adding paragraph (d) to read as follows:

§300.1 Installment agreement fee.

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(d) Effective/applicability date. This section is applicable beginning March 16, 1995, except that the user fee for entering into installment agreements on or after January 1, 2007, is applicable January 1, 2007.

Par. 4. Section 300.2 is amended by adding paragraph (d) to read as follows:

§300.2 Restructuring or reinstatement of installment agreement fee.

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(d) Effective/applicability date. This section is applicable beginning March 16, 1995, except that the user fee for restructuring or reinstatement of an installment agreement on or after January 1, 2007, is applicable January 1, 2007.

Par. 5. Section 300.3 is amended by adding paragraph (d) to read as follows:

§300.3 Offer to compromise fee.

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(d) Effective/applicability date. This section is applicable beginning November 1, 2003.

Par. 6. Section 300.4 is amended by adding paragraph (d) to read as follows:

§300.4 Special enrollment examination fee.

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(d) Effective/applicability date. This section is applicable beginning November 6, 2006.

Par. 7. Section 300.5 is amended by adding paragraph (d) to read as follows:

§300.5 Enrollment of enrolled agent fee.

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(d) Effective/applicability date. This section is applicable beginning November 6, 2006.

Par. 8. Section 300.6 is amended by adding paragraph (d) to read as follows:

§300.6 Renewal of enrollment of enrolled agent fee.

* * * * *

(d) Effective/applicability date. This section is applicable beginning November 6, 2006.

Par. 9. Section 300.7 is amended by adding paragraph (d) to read as follows:

§300.7 Enrollment of enrolled actuary fee.

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(d) Effective/applicability date. This section is applicable beginning January 22, 2008.

Par. 10. Section 300.8 is amended by adding paragraph (d) to read as follows:

§300.8 Renewal of enrollment of enrolled actuary fee.

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(d) Effective/applicability date. This section is applicable beginning January 22, 2008.

Par. 11. Section 300.9 is added to read as follows:

§300.9 Fee for obtaining a preparer tax identification number.

(a) Applicability. This section applies to the application for and renewal of a preparer tax identification number pursuant to 26 CFR 1.6109-2(d).

(b) Fee. The fee to apply for or renew a preparer tax identification number is \$50 per year, which is the cost to the government for processing the application for a preparer tax identification number and does not include any fees charged by the vendor.

(c) Person liable for the fee. The individual liable for the application or renewal fee is the individual applying for and renewing a preparer tax identification number from the IRS.

(d) Effective/applicability date. This section is applicable beginning September 30, 2010.

Steven T. Miller

Deputy Commissioner for Services and Enforcement.

Approved: August 24, 2010

Michael Mundaca

Assistant Secretary of the Treasury (Tax Policy).