

Part III - Administrative, Procedural, and Miscellaneous

Undue Hardship Waiver of the Section 6011(e)(3) Electronic Filing Requirement and Taxpayer Choice Statements to File in Paper Format

Notice 2010-85

PURPOSE

This notice contains a proposed revenue procedure that provides guidance to specified tax return preparers regarding the format and content of requests for waiver of the magnetic media (electronic) filing requirement due to undue hardship, under section 6011(e)(3) of the Internal Revenue Code and proposed § 301.6011-6 of the Regulations on Procedure and Administration (26 CFR Part 301), which is being published contemporaneously with this notice. The proposed revenue procedure also provides guidance regarding the time and manner in which specified tax return preparers who seek an undue hardship waiver of the electronic filing requirement must submit their written requests for consideration by the IRS. Finally, the proposed revenue procedure provides guidance to tax return preparers, specified tax return preparers, and taxpayers regarding how to document a taxpayer's choice to file the taxpayer's individual income tax return in paper format when the return is prepared by a tax return preparer or specified tax return preparer but filed by the taxpayer.

Proposed § 301.6011-6 implements the requirement under newly enacted section 6011(e)(3) that all specified tax return preparers, generally tax return preparers who reasonably expect to file (if the preparer is a member of a firm, whose firm's

members in the aggregate reasonably expect to file) more than 10 individual income tax returns in a calendar year, electronically file all individual income tax returns they prepare and file. To promote the effective and efficient administration of the electronic filing requirement in section 6011(e)(3), proposed § 301.6011-6(a)(3) provides a transition rule for 2011, based upon the number of individual income tax returns a tax return preparer reasonably expects (if the preparer is a member of a firm, the preparer's firm members in the aggregate reasonably expect) to file, to permit the IRS and affected tax return preparers sufficient time to prepare for and implement the requirement of section 6011(e)(3) and proposed § 301.6011-6. Beginning January 1, 2011, tax return preparers who reasonably expect to file (if a preparer is a member of a firm, the firm's members in the aggregate reasonably expect to file) 100 or more individual income tax returns in calendar year 2011 are specified tax return preparers who are subject to these regulations in 2011. Beginning January 1, 2012, tax return preparers who reasonably expect to file (if a preparer is a member of a firm, the firm's members in the aggregate reasonably expect to file) 11 or more individual income tax returns in a calendar year are specified tax return preparers who are subject to these regulations for that calendar year.

Proposed § 301.6011-6(c)(1) authorizes the IRS to grant to a specified tax return preparer a waiver of this requirement in the case of undue hardship upon application by the specified tax return preparer consistent with instructions provided in additional published guidance and as prescribed in relevant forms and instructions. Proposed § 301.6011-6(a)(4)(ii) also provides that a specified tax return preparer is not required to

electronically file individual income tax returns that taxpayers choose to file in paper format and which the taxpayers file with the IRS themselves, and that the IRS may provide guidance through forms, instructions, or other appropriate guidance regarding how a preparer can document a taxpayer's choice to file in paper format. The proposed revenue procedure provides such additional guidance regarding undue hardship waiver requests and regarding how the preparer can document a taxpayer's choice to file individual income tax returns in paper format.

The IRS requests comments on this proposed revenue procedure. In particular, the IRS requests comments regarding the procedures and methods for how a specified tax return preparer can request and obtain an undue hardship waiver, the proposed time period for making an undue hardship waiver request, and the elements required to be provided in an undue hardship waiver request, as well as comments on the Paperwork Reduction Act burden estimates contained in Section 11 of the proposed revenue procedure. The IRS also requests comments on the proposed procedures for how a preparer can document a taxpayer's choice to file an individual income tax return in paper format. The comments should address procedures or mechanisms intended to make the proposed revenue procedure more efficient or functional.

Interested parties are invited to submit comments on this notice by January 3, 2011. Comments should be submitted to: Internal Revenue Service, CC:PA:LPD:PR (Notice 2010-85), Room 5205, P.O. Box 7604, Ben Franklin Station, Washington, DC 20224. Alternatively, comments may be hand-delivered Monday through Friday between the hours of 8:00 a.m. to 4:00 p.m. to: CC:PA:LPD:PR (Notice 2010-85),

Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC. Comments may also be submitted electronically via the following e-mail address: Notice.Comments@irsounsel.treas.gov. Please include "Notice 2010-85" in the subject line of any electronic submission.

For calendar year 2011 only, and only until such time that the proposed revenue procedure is published in final form or Form 8944 is finalized and approved, tax return preparers who meet the definition of a specified tax return preparer for calendar year 2011 and who believe they may qualify for an undue hardship waiver may voluntarily submit written waiver requests to the IRS, and will not be required to use Form 8944 if the form is not yet publically available, provided each hardship waiver request contains the information described in sections 6.02(1) – (12) and 6.03 of the proposed revenue procedure. The IRS will provide further information on processing these hardship waiver requests, including time, place and date information, in a later announcement or notice.

For further information regarding this notice, contact Keith Brau of the Office of Associate Chief Counsel (Procedure & Administration). Mr. Brau may be contacted at 202-622-4940 (not a toll-free call).

APPENDIX (PROPOSED REVENUE PROCEDURE)

SECTION 1. PURPOSE

This revenue procedure provides guidance to specified tax return preparers regarding the format and content of requests for waiver of the magnetic media (electronic) filing

requirement due to undue hardship, and regarding the time and manner in which specified tax return preparers who seek an undue hardship waiver of the electronic filing requirement must submit their written requests for consideration by the IRS, under section 6011(e)(3) and § 301.6011-6 of the Regulations on Procedure and Administration (26 CFR Part 301). This revenue procedure also provides guidance to tax return preparers, specified tax return preparers, and taxpayers regarding how to document a taxpayer's choice to file an individual income tax return in paper format when the return is prepared by a tax return preparer or specified tax return preparer but filed by the taxpayer.

SECTION 2. BACKGROUND

.01 Pursuant to section 6011(e)(3), § 301.6011-6 implements the requirement that specified tax return preparers file individual income tax returns electronically if they prepare and file the returns for taxpayers. Under section 6011(e)(3)(B) and as further defined in § 301.6011-6(a)(3), a specified tax return preparer means, with respect to any calendar year, any tax return preparer within the meaning of section 7701(a)(36) and § 301.7701-15 who prepares any individual income tax return unless such tax return preparer reasonably expects to file 10 or fewer individual income tax returns in the calendar year, and if a person who is a tax return preparer is a member of a firm, that person is a specified tax return preparer unless the person's firm members in the aggregate reasonably expect to file 10 or fewer individual income tax returns in a calendar year. Solely for the 2011 calendar year, a tax return preparer will not be considered a specified tax return preparer if the preparer reasonably expects, or if the

preparer is a member of a firm, the firm's members in the aggregate reasonably expect, to file fewer than 100 individual income tax returns in the 2011 calendar year. Solely for purposes of section 6011(e)(3) and § 301.6011-6, an individual is considered a member of a firm if the individual is an employee, agent, member, partner, shareholder, or other equity holder of the firm.

.02 Section 6011(e)(3)(C) and § 301.6011-6(a)(2) define an individual income tax return as any return of income tax imposed by subtitle A on individuals, estates, and trusts. This includes the Form 1040 series of income tax returns for individuals, the Form 1041 series of income tax returns for estates and trusts, and Form 990-T (Exempt Organization Business Income Tax Return) when the exempt organization is a trust subject to tax on unrelated business taxable income under section 511(b).

.03 Under § 301.6011-6(b) any individual income tax return prepared by a specified tax return preparer in a calendar year must be filed on magnetic media if the return is filed by the specified tax return preparer.

.04 Section 301.6011-6(a)(4)(i) provides that an individual income tax return is considered to be filed by a tax return preparer or a specified tax return preparer if the preparer or any member, employee or agent of the preparer or the preparer's firm submits the tax return to the IRS on the taxpayer's behalf, either electronically (by e-file or other magnetic media) or in non-electronic or non-magnetic media (paper) form. Submission of a tax return in paper form includes the direct or indirect transmission, sending, mailing, or otherwise delivering of the paper tax return to the IRS by the tax return preparer or the specified tax return preparer, or by any member, employee, or

agent of the tax return preparer or the preparer's firm, and includes any act or acts of assistance that go beyond providing filing or delivery instructions to the taxpayer.

.05 Section 301.6011-6(a)(4)(ii) also provides that a tax return preparer or specified tax return preparer, or the preparer's firm, is not required to electronically file an individual income tax return if the preparer who prepared the return obtains a signed statement from the taxpayer that states the taxpayer chooses to file the return in paper format and that the taxpayer, and not the preparer, is submitting the paper return to the IRS. Such statement must be signed by the taxpayer (by both spouses if a joint return) and dated on or before the date the taxpayer files the return. The IRS may provide guidance through forms, instructions or other appropriate guidance regarding how the preparer can document a taxpayer's choice to file a paper individual income tax return. This revenue procedure provides guidance to tax return preparers, specified tax return preparers, and taxpayers regarding how tax return preparers and specified tax return preparers can document a taxpayer's choice to file an individual income tax return in paper format.

.06 Section 301.6011-6(c)(1) authorizes the IRS to grant a waiver of the electronic filing requirement in cases of undue hardship to specified tax return preparers requesting an undue hardship waiver in the manner prescribed in IRS forms, instructions, or other appropriate guidance. This revenue procedure prescribes guidance on how to submit an undue hardship waiver request for consideration by the IRS.

SECTION 3. SCOPE

.01 Undue Hardship Waiver Requests. This revenue procedure applies to all specified tax return preparers, as defined in section 6011(e)(3)(B) and § 301.6011-6(a)(3), who seek a waiver of the electronic filing requirement in cases of undue hardship. This revenue procedure is intended to be applicable immediately to specified tax return preparers who reasonably expect to file, or if a member of a firm whose firm's members in the aggregate reasonably expect to file, 100 or more individual income tax returns in calendar year 2011. An undue hardship waiver, however, is not needed for, and waiver requests will not be accepted from, any tax return preparer who during calendar year 2011 is not required to file individual income tax returns electronically due to the transition rule set forth in § 301.6011-6(a)(3), *i.e.* tax return preparers who reasonably expect to file, or if a member of a firm whose firm's members in the aggregate reasonably expect to file, more than 10 but fewer than 100 individual income tax returns during calendar year 2011. For these tax return preparers, this revenue procedure will apply to undue hardship waiver requests for calendar year 2012 and thereafter.

.02 Documenting a Taxpayer's Choice to File Return in Paper Format. The provisions of this revenue procedure that explain how tax return preparers and specified tax return preparers can document a taxpayer's choice to file an individual income tax return in paper format are intended to be applicable immediately.

SECTION 4. OTHER EXCLUSIONS FROM THE ELECTRONIC FILING REQUIREMENT

.01 In General. Section 301.6011-6(c)(2) provides for a second category of exclusion or exemption from the electronic filing requirement of section 6011(e)(3) and

§ 301.6011-6, administrative exemptions.

.02 Administrative Exemptions. Under § 301.6011-6(c)(2), the IRS may provide administrative exemptions for certain classes of specified tax return preparers or types of individual income tax returns, as the IRS determines necessary to promote the effective and efficient administration of section 6011(e)(3) and § 301.6011-6. The IRS generally will provide an administrative exemption, and not an undue hardship waiver, when technology issues affecting a range of specified tax return preparers in a similar manner prevent specified tax return preparers from filing returns electronically. Undue hardship waiver requests should not be submitted by or for specified tax return preparers, or for the individual income tax returns they prepare and file, that meet the criteria for an administrative exemption for purposes of claiming the exemption. The IRS will provide the criteria and procedures for claiming an administrative exemption, if any, through forms, instructions, or other appropriate guidance.

.03 Further Information. Further information on the electronic filing requirement, undue hardship waiver requests, documentation for a taxpayer's choice to file in paper format, and administrative exemptions will be posted on www.irs.gov and may also be available in recorded messages on an IRS telephone help-line. The IRS also intends to post answers to Frequently Asked Questions on www.irs.gov.

SECTION 5. REQUESTS FOR WAIVER OF THE ELECTRONIC FILING REQUIREMENT DUE TO UNDUE HARDSHIP

.01 Under § 301.6011-6(c)(1), the IRS may grant waivers of the electronic filing requirement in cases of undue hardship. Undue hardship waivers generally are intended to be granted to specified tax return preparers for undue hardships that can be

identified in advance before the specified tax return preparers would otherwise be required to file individual income tax returns electronically for a particular calendar year.

.02 The IRS will ordinarily grant undue hardship waivers only in rare cases. An undue hardship waiver may be granted to a specified tax return preparer for a specified period of time or for a series or class of individual income tax returns, although undue hardship waivers will not ordinarily be granted for more than one calendar year period.

.03 A specified tax return preparer must request an undue hardship waiver in the manner prescribed in this revenue procedure. See section 6 below.

.04 The IRS will approve or deny requests for an undue hardship waiver of the electronic filing requirement based on each specified tax return preparer's particular facts and circumstances. In determining whether to approve or deny an undue hardship waiver request, the IRS may consider the specified tax return preparer's ability to file individual income tax returns electronically without incurring an undue financial hardship. The IRS will generally grant an undue hardship waiver only when the specified tax return preparer can demonstrate the undue hardship that would result by complying with the electronic filing requirement, including, but not limited to, any incremental costs to the specified tax return preparer.

.05 The fact that a specified tax return preparer does not have a computer or appropriate software or does not desire to obtain or use a computer or software does not, standing alone, constitute an undue hardship. An undue hardship waiver request based solely on this fact or personal desire, without any further explanation or justification, will be denied.

SECTION 6. WAIVER REQUEST FORM CLAIMING UNDUE HARDSHIP

.01 To request an undue hardship waiver the specified tax return preparer must complete a Form 8944, Preparer e-file Hardship Waiver Request, and submit the completed form and the documentation required by the instructions to the form to the IRS at the address provided in the instructions to the form. (Note Form 8944 and accompanying instructions have not been published by the IRS as of the date of the release of this notice. The IRS will publish a final Form 8944 when available.)

.02 In completing Form 8944, the specified tax return preparer seeking the waiver must provide all information requested by that form. This information may include:

- (1) The name, address, email address, telephone number and other contact information for the requesting specified tax return preparer;
- (2) The specified tax return preparer's preparer tax identification number (PTIN), and, if the specified tax return preparer is a member of a firm, the firm's employer identification number (EIN);
- (3) The reason for the waiver request, for example, financial hardship, personal hardship (personal or business casualty, bankruptcy, other), or other hardship (technical or systems-based, client-based);
- (4) The calendar year for which the waiver is being requested;
- (5) The type of individual income tax form or forms to which the waiver is to apply, or a statement that the specified tax return preparer is seeking a general undue hardship waiver applicable to the specified tax return preparer for all individual income

tax returns the specified tax return preparer may file in that calendar year;

(6) Information regarding the specified tax return preparer's history of filing individual income tax returns on behalf of clients, and the number of individual income tax returns the preparer reasonably expects to file in the year for which the waiver is being requested;

(7) An explanation of the process by which the specified tax return preparer prepares and files individual income tax returns, and of the systems and technologies the specified tax return preparer uses to prepare and file the returns;

(8) An explanation of the steps the specified tax return preparer has taken to meet the requirement to timely file the individual income tax returns electronically and why the steps were unsuccessful (if applicable), the undue hardship that would result by complying with the electronic filing requirement, including gross income earned from tax return preparation and any estimated incremental costs to the specified tax return preparer of complying with this requirement (with two vendor estimates or advertising material itemizing these costs), and whether adjustments to preparation fees can offset the estimated additional costs;

(9) If applicable, an explanation of the nature of any other personal (non-financial) hardship, how this personal hardship affects the specified tax return preparer's individual income tax return preparation ability and/or business, and what steps are still needed to overcome the claimed personal hardship or to become enabled to electronically file individual income tax returns;

(10) If applicable, an explanation of the basis for waiver requests not based on

hardship to the specified tax return preparer, the steps that have been taken by the specified tax return preparer to become an electronic filer of the affected individual income tax returns (and the results of those steps), and the steps that are still needed to be taken by the specified tax return preparer to become enabled to electronically file the affected individual income tax returns;

(11) A statement describing the steps the specified tax return preparer will take to ensure the preparer's ability to file future individual income tax returns electronically;

(12) A statement signed under penalty of perjury that, to the best of the specified tax return preparer's knowledge, the information provided is true, correct and complete; and

(13) Any other information the IRS determines necessary or helpful in considering whether to grant a waiver request as set forth in forms, instructions, or other guidance.

.03 The Form 8944 must be signed and dated.

.04 The Form 8944 and any notice from the IRS granting an undue hardship waiver should not be attached to a taxpayer's paper individual income tax return. This form and any notice should be retained by the tax return preparer.

SECTION 7. TIME FOR FILING A WAIVER REQUEST

.01 Because the electronic filing requirement under section 6011(e)(3) and § 301.6011-6 is based on a determination of how many individual income tax returns a tax return preparer reasonably expects, or if a member of a firm, the firm's members in the aggregate reasonably expect, to file during a calendar year, a specified tax return

preparer must make this reasonable expectation determination prior to the time the specified tax return preparer or the preparer's firm first files an individual income tax return during the calendar year.

.02 Tax return preparers who meet the definition of specified tax return preparer must therefore ordinarily submit their requests for undue hardship waivers between October 1 of the calendar year preceding the applicable calendar year and February 15 of the applicable calendar year. This will give the IRS time to process the undue hardship waiver request. Untimely requests for undue hardship waivers will not be considered absent the existence of unusual or unforeseen and unavoidable circumstances. It is important to submit requests for undue hardship waivers timely because if a waiver request is denied, it can take up to 45 days to obtain authorization from the IRS to electronically file individual income tax returns. See IRS Publication 3112 (IRS E-file Application and Participation).

SECTION 8. APPROVAL OF THE WAIVER REQUEST AND RECONSIDERATION OF DENIED WAIVER REQUESTS

.01 The IRS will review and process undue hardship waiver requests in a timely manner and will send the specified tax return preparer written notice of any approval or denial of the undue hardship waiver request. The IRS will not be considered to have waived the electronic filing requirement unless the specified tax return preparer receives written notice from the IRS that the undue hardship waiver request has been approved.

.02 If an undue hardship waiver request is denied, the specified tax return preparer may send a written request for reconsideration to the address listed on the written notice of denial by the date specified on that notice. The specified tax return

preparer must state in the request for reconsideration the grounds for reconsideration and may include additional information or documentation, if any, to support the request for reconsideration. The Electronic Products and Services Support e-help Operation Manager (or designee) will make a reconsideration determination in writing on whether to approve or deny the undue hardship waiver request, as supplemented by the request for reconsideration and will send the specified tax return preparer written notice of any approval or denial of the undue hardship waiver request. There is no further administrative review of this reconsideration determination, nor is there a right to judicial review of an adverse determination.

SECTION 9. DOCUMENTING A TAXPAYER'S CHOICE TO FILE IN PAPER FORMAT

.01 Section 301.6011-6(a)(4)(i) provides that an individual income tax return is considered to be filed by a tax return preparer or a specified tax return preparer if the preparer submits the tax return to the IRS on the taxpayer's behalf, either electronically (by e-file or other magnetic media) or in non-electronic (paper) form, and that submission of an individual income tax return by a tax return preparer or a specified tax return preparer in non-electronic form includes the direct or indirect transmission, sending, mailing or otherwise delivering of the paper tax return to the IRS by the preparer, any member, employee, or agent of the preparer, or any member, employee, or agent of the preparer's firm, and includes any act or acts of assistance beyond providing filing or delivery instructions to the taxpayer. Section 301.6011-6(a)(4)(ii), however, provides that an individual income tax return will not be considered to be filed, as defined in § 301.6011-6(a)(4)(i), by a tax return preparer or specified tax return

preparer if the tax return preparer or specified tax return preparer who prepared the return obtains, on or prior to the date the return is filed, a signed (by both spouses if a joint return) and dated written statement from the taxpayer that states the taxpayer chooses to file the return in paper format, and that the taxpayer, and not the preparer, is submitting the paper return to the IRS.

.02 A tax return preparer or specified tax return preparer should document a taxpayer's choice to file in paper format in the manner prescribed in this revenue procedure.

.03 A taxpayer's choice to file an individual income tax return in paper format must be in writing, must affirm that the taxpayer is choosing to file the return in paper format, and must affirm that the taxpayer, and not the preparer, is filing the return. This written statement must be signed by the taxpayer (by both spouses if a joint return) and dated on or before the date the taxpayer's return is filed with the IRS. The choice to file in paper format is the taxpayer's alone.

.04 If signed and dated by the taxpayer on or before the date the subject individual income tax return is filed with the IRS, the following statement contained in the signed writing will be sufficient to show that a taxpayer chooses to file the taxpayer's return in paper format and that the taxpayer, and not the tax return preparer or specified tax return preparer, will file the return:

My tax return preparer [INSERT PREPARER'S NAME] has informed me that [INSERT s/he] may be required to electronically file my [INSERT TAX YEAR] individual income tax return [INSERT TYPE OF RETURN: Form

1040, Form 1040A, Form 1040EZ, Form 1041, Form 990-T) if [INSERT s/he] files it with the IRS on my behalf. I do not want to file my return electronically and choose to file my return on paper forms. My preparer will not file my paper return with the IRS. I will file my paper return with the IRS myself. I was not influenced by [INSERT PREPARER'S NAME] or any member of [INSERT "his" or "her"] firm to sign this statement.

.05 The written statement containing the taxpayer's choice to file in paper format should not be attached to the taxpayer's individual income tax return. This statement should be retained by the tax return preparer.

SECTION 10. EFFECTIVE DATE

This revenue procedure is effective on [].

SECTION 11. PAPERWORK REDUCTION ACT

The collection of information contained in this revenue procedure relating to undue hardship waiver requests will be submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act (44 U.S.C. 3507(c)). The collection of information related to documenting a taxpayer's choice to file in paper format was previously submitted to the Office of Management and Budget for review. See FR [] for details.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

The collection of information in this revenue procedure is in Sections 5 and 6 of

this revenue procedure. This information is required for a tax return preparer who meets the definition of specified tax return preparer to obtain an undue hardship waiver of the electronic filing requirement contained in section 6011(e)(3) and § 301.6011-6. This information will be used in exercising the IRS's discretion to grant undue hardship waivers and approving or denying requests for such waivers based on the specified tax return preparer's particular facts and circumstances, or for purposes of reconsidering an undue hardship waiver request that has been denied. The likely respondents are individuals and small businesses who prepare and file individual income tax returns as paid tax return preparers and who meet the definition of specified tax return preparer contained in section 6011(e)(3)(B) and § 301.6011-6(a)(3).

The estimated total annual reporting and/or recordkeeping burden is 3,949 total hours for waiver requests for calendar year 2011, and 7,328 total hours for waiver requests for calendar year 2012.

The estimated annual burden per respondent/recordkeeper varies from 15 minutes to 2 hours, depending on individual circumstances, with an estimated average of 1 hour. We calculated 15 minutes of preparation for a basic waiver without attachments and minimal explanation (e.g. federal disaster declaration); 31 minutes for a bankruptcy waiver with attachments; 51 minutes for "other" waiver with attachments and detailed explanation; and 2 hours for an economic hardship waiver with attachments. We estimated 6 minutes for recordkeeping, consisting of maintaining a copy of the information submitted for the respondent's records.

The estimated number of respondents and/or recordkeepers is 3,949 for waiver

requests for calendar year 2011 and 7,328 for waiver requests for calendar year 2012.

The estimated annual frequency of responses (used for reporting requirements only) is no more than once per respondent.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law.

SECTION 12. DRAFTING INFORMATION

The principal author of this revenue procedure is Keith Brau of the Office of Associate Chief Counsel (Procedure & Administration). For further information regarding this proposed revenue procedure, contact Keith Brau at (202) 622-4940 (not a toll-free call).