



[4830-01-p]

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 301

[REG-132434-17]

RIN 1545-B012

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

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations to amend regulations under section 7602(a) of the Internal Revenue Code relating to administrative proceedings.

Current regulations permit any person authorized to receive returns and return information under section 6103(n) and the regulations thereunder to receive and review summoned books, papers, and other data, and, in the presence and under the guidance of an IRS officer or employee, participate fully in the interview of a witness in a summons interview. These proposed regulations significantly narrow the scope of the current regulations by excluding non-government attorneys from receiving summoned books, papers, records, or other data or from participating in the interview of a witness summoned by the IRS to provide testimony under oath, with a limited exception. These proposed regulations affect taxpayers involved in a federal tax examination and other persons whose books and records or testimony are sought to be examined by the IRS under section 7602(a).

DATES: Written or electronic comments and requests for a public hearing must be

received by **[INSERT DATE 90 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG-132434-17), room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, D.C. 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG-132434-17), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington D.C., or sent electronically via the Federal eRulemaking Portal at [www.regulations.gov](http://www.regulations.gov) (IRS-REG-132434-17).

FOR FURTHER INFORMATION CONTACT: Concerning submission of comments, Regina Johnson, (202) 317-6901; concerning the proposed regulations, William V. Spatz at (202) 317-5461 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

### **Background**

These proposed regulations amend Procedure and Administration Regulations (26 CFR part 301) under section 7602(a) of the Internal Revenue Code relating to participation by persons described in section 6103(n) and Treas. Reg. §301.6103(n)-1(a) in receiving and reviewing summoned books, papers, records, or other data and in interviewing a summoned witness under oath. These proposed regulations narrow the scope of the current regulations by providing that certain non-government attorneys hired by the IRS are not authorized to participate in an examination.

On June 18, 2014, temporary regulations (TD 9669) regarding participation in a summons interview of a person described in section 6103(n) were published in the

**Federal Register** (79 FR 34625). A notice of proposed rulemaking (REG-121542-14) cross-referencing the temporary regulations was published in the **Federal Register** (79 FR 34668) the same day. No public hearing was requested or held. The Internal Revenue Service received two comments on the proposed regulations. One comment recommended that the regulations be revised to remove the provision permitting a contractor to question a witness under oath or to ask a witness's representative to clarify an objection or assertion of privilege. The other comment recommended that the proposed and temporary regulations be withdrawn. After consideration of these comments, the proposed regulations were adopted in final regulations (TD 9778) published in the **Federal Register** (81 FR 45409) on July 14, 2016 ("Summons Interview Regulations"). The only change from the temporary regulations in the final regulations was to replace the word "examine" with "review" in the phrase describing what contractors may do with books, papers, records, or other data received by the IRS under a summons. The preamble to the final regulations explains that this was intended to clarify that the regulations do not authorize contractors to direct audits of a taxpayer's return. See 81 FR 45410.

#### Description of Summons Interview Regulations

The United States tax system relies upon taxpayers' self-assessment and reporting of their tax liability. The expansive information-gathering authority that Congress granted to the IRS under the Code includes the IRS's broad examination and summons authority, which allows the IRS to determine the accuracy of that self-assessment. See *United States v. Arthur Young & Co.*, 65 U.S. 805, 816 (1984). Section 7602(a) provides that, for the purpose of ascertaining the correctness of any

return, making a return where none has been made, or determining the liability of any person for any internal revenue tax, the IRS is authorized to examine books and records, issue summonses seeking documents and testimony, and take testimony from witnesses under oath. These provisions have been part of the revenue laws since 1864.

Use of outside specialists is appropriate to assist the IRS in determining the correctness of the taxpayer's self-assessed tax liability. The assistance of persons from outside the IRS, such as economists, engineers, appraisers, industry specialists, and actuaries, promotes fair and efficient administration and enforcement of the laws administered by the IRS by providing specialized knowledge, skills, or abilities that the IRS officers or employees assigned to the examination may not possess. Section 6103(n) and Treas. Reg. § 301.6103(n)-1(a) authorize the IRS to disclose returns and return information to these contractors. The regulations under §301.7602-1(b)(3) were issued to clarify that persons described in section 6103(n) and Treas. Reg. §301.6103(n)-1(a) may receive and review books, papers, records, or other data summoned by the IRS and, in the presence and under the guidance of an IRS officer or employee, participate fully in the interview of a person who the IRS has summoned as a witness to provide testimony under oath. See 81 FR 45410.

Executive Order 13789, Notice 2017-38, and the Reports to the President

Executive Order 13789, issued on April 21, 2017 (E.O. 13789, 82 FR 19317), instructs the Secretary of the Treasury (the Secretary) to review all significant tax regulations issued on or after January 1, 2016, and to take appropriate action to alleviate the burdens of regulations that (i) impose an undue financial burden on U.S.

taxpayers; (ii) add undue complexity to the Federal tax laws; or (iii) exceed the statutory authority of the IRS.

E.O. 13789 further instructs the Secretary to submit to the President within 60 days a report (First Report) that identifies regulations that meet these criteria. Notice 2017-38 (2017-30 I.R.B. 147 (July 24, 2017)) included the Summons Interview Regulations in a list of eight regulations identified by the Secretary in the First Report as meeting at least one of the first two criteria specified in E.O. 13789. E.O. 13789 further instructs the Secretary to submit to the President a second report (Second Report) that recommends specific actions to mitigate the burden imposed by regulations identified in the First Report.

In response to Notice 2017-38, the Treasury Department and the IRS received seven comments from professional and business associations addressing the Summons Interview Regulations. All but one of these comments recommended removal of the regulations based primarily on the commentators' perception that the regulations create longer and less efficient examinations by improperly delegating authority to outside law firms to conduct examinations. The one commenter that did not recommend removal of the regulations in their entirety requested removal of the provisions permitting a contractor to directly question a witness during a summons interview.

As explained in the preamble to the final Summons Interview Regulations, the regulations do not delegate authority to conduct examinations or summons interviews. Rather, the regulations permit contractors authorized under section 6103(n) to review

books and records and be present and ask questions during summons interviews, all under the supervision of IRS officers and employees. See 81 FR 45410-45412.

Comments in response to Notice 2017-38 also raised concerns that the regulations permit the IRS to hire law firms to receive and review summoned information and fully participate in a summons interview on behalf of the government.

On October 16, 2017, the Secretary published the Second Report in the **Federal Register** (82 FR 48013) stating that the Treasury Department and the IRS are considering proposing a prospectively effective amendment to the Summons Interview Regulations to narrow their scope to prohibit non-government attorneys from questioning witnesses on behalf of the IRS, reviewing summoned records, or playing a behind-the-scenes role in an examination, such as consulting on IRS legal strategy, with a limited exception.

The Code provides IRS officers and employees with significant and broad powers under its summons authority to question witnesses under oath and to require the production of books and records. The Summons Interview Regulations require the IRS to retain authority over important decisions when section 6103(n) contractors question witnesses, but there is a perceived risk that the IRS may not be able to maintain full control over the actions of a non-government attorney hired by the IRS when such an attorney, with the limited exception described below, questions witnesses. The actions of the non-governmental attorney while questioning witnesses could foreclose IRS officials from independently exercising their judgment. Managing an examination or summons interview is therefore best exercised solely by government employees, including government attorneys, whose only duty is to serve the public

interest. These concerns outweigh the countervailing need for the IRS to use non-government attorneys, except in the limited circumstances set forth in proposed paragraph (b)(3)(ii). Treasury and the IRS remain confident that the core functions of questioning witnesses and conducting examinations are well within the expertise and ability of government attorneys and examination agents.

### **Explanation of Provisions**

Proposed §301.7602-1(b)(3)(i) retains the rule from the Summons Interview Regulations authorizing section 6103(n) contractors to receive and review summoned information and fully participate in the summons interview, including questioning witnesses. However, proposed §301.7602-1(b)(3)(ii) is added to prohibit contractors who are attorneys, with the limited exception described below, from participating in the administrative process contemplated by section 7602(a). Under this prohibition, a non-government attorney, with the limited exception described below, may not review summoned books, papers, records or other data or question summoned witnesses on behalf of the IRS unless the attorney is hired by the IRS for a permitted purpose.

As a limited exception to that prohibition, proposed §301.7602-1(b)(3)(ii) permits the IRS to hire a non-government attorney if the attorney is being hired for specialized substantive subject matter expertise in an area other than federal tax law. Specifically, proposed §301.7602-1(b)(3)(ii) permits the IRS to hire an attorney who has specialized knowledge of foreign, state, or local law, including tax law, or who is a specialist in non-tax substantive law such as patent law, property law, or environmental law. It would not permit IRS to hire an attorney for non-substantive specialized knowledge, such as civil litigation skills. Proposed §301.7602-1(b)(3)(ii) also permits the IRS to hire a contractor

who may happen to be an attorney, but who is hired for knowledge, skills, or abilities other than providing legal services as an attorney. Further, proposed §301.7602-1(b)(3)(ii) permits the IRS to hire an entity that employs or is owned by attorneys so long as the expertise they are providing is not prohibited by proposed §301.7602-1(b)(3)(ii).

These changes are proposed to be effective for examinations begun and summonses served by the IRS on or after the date that these proposed regulations are published in the **Federal Register**.

### **Special Analyses**

Certain IRS regulations, including these, are exempt from the requirements of Executive Order 12866, as supplemented and affirmed by Executive Order 13563. Therefore, a regulatory assessment is not required. Because the proposed regulations would not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Therefore, a regulatory flexibility analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, the IRS will submit the proposed regulations to the Chief Counsel for Advocacy of the Small Business Administration for comments about the regulations' impact on small businesses.

### **Comments and Request for a Public Hearing**

Before these proposed regulations are adopted as final, the IRS will consider any written (signed original and 8 copies) or electronic comments timely submitted. The IRS requests comments on all aspects of these proposed regulations. All comments will be available for public inspection and copying. The IRS will schedule a public meeting if one is requested, in writing, by a person who submits written comments. If the IRS



does schedule a public hearing, the IRS will publish notice of the date, time, and place for the public hearing in the **Federal Register**.

### **Drafting Information**

The principal author of these regulations is William V. Spatz of the Office of Associate Chief Counsel (Procedure and Administration).

### **List of Subjects in 26 CFR Part 301**

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

### **Proposed Amendments to the Regulations**

Accordingly, 26 CFR part 301 is proposed to be amended as follows:

#### **PART 301--PROCEDURE AND ADMINISTRATION**

Paragraph 1. The 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 by revising paragraphs(b)(3) and (d) to read as follows:

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

\* \* \* \* \*

(b) \* \* \*

(3) Participation of a person described in section 6103(n). (i) In general. Except as provided in paragraph (b)(3)(ii) of this section, for purposes of this paragraph (b), a person authorized to receive returns or return information under section 6103(n) and §301.6103(n)-1(a) of the regulations may receive and review books, papers, records, or

other data produced in compliance with a summons, and, in the presence and under the guidance of an IRS officer or employee, participate fully in the interview of a witness summoned by the IRS to provide testimony under oath. Fully participating in an interview includes, but is not limited to, receipt, review, and use of summoned books, papers, records, or other data; being present during summons interviews; and questioning the person providing testimony under oath.

(ii) Exception for certain non-governmental attorneys. An attorney who is not an officer or employee of the United States may not be hired by the IRS to perform the activities described in paragraph (b)(3)(i) of this section unless the attorney is hired by the IRS as a specialist in foreign, state, or local law, including 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.

\* \* \* \* \*

(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 **[INSERT DATE THIS DOCUMENT IS FILED FOR PUBLIC INSPECTION BY THE FEDERAL REGISTER]**.

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 **[INSERT DATE THIS DOCUMENT IS FILED  
FOR PUBLIC INSPECTION BY THE FEDERAL REGISTER]**, see 26 CFR 301.7602-1

(revised as of April 1, 2017).

Kirsten Wielobob  
Deputy Commissioner for Services and Enforcement  
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