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Attorney Exposure Under the Proposed Preparer Penalty Regulations

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On Tuesday, June 17, 2008, the IRS proposed regulations regarding preparer penalties. Attorneys who think these penalties will not be applied to them because they are attorneys, not tax return preparers have, in this author's view, but one option: think again!

Fully seven examples in the proposed preparer penalty regulations ("PPPRs") concern attorneys. In Part II of this article, which will appear in a future issue, we will consider and discuss all of these examples. Before we get to the examples themselves, however, consider some brief statutory background.

Part I. Significant Developments in the Proposed Preparer Penalty Regulations Generally

Because of the significant recent Congressional action in this area, the PPPRs represent "a comprehensive review and overhaul of all the tax return preparer penalties and related regulatory provisions." The PPPRs are generally effective for returns and claims for refund filed after the date that final regulations are published in the Federal Register, but no sooner than December 31, 2008.

A summary of the operation of these penalties is provided in Proposed Regulation §1.6694-1(a)(1) as follows:

"The §6694(a) penalty is imposed in an amount equal to the greater of $1,000, or 50 percent of the income derived (or to be derived) by the tax return preparer for an understatement of liability with respect to tax that is due to an undisclosed position for which the tax return preparer did not have a reasonable belief that the position would more likely than not be sustained on its merits (or due to a disclosed position for which there is no reasonable basis). The §6694(b) penalty is imposed in an amount equal to the greater of $5,000, or 50 percent of the income derived (or to be derived) by the tax return preparer for an understatement of liability with respect to tax that is due to a willful attempt to understate tax liability or that is due to reckless or intentional disregard of rules or regulations."

The PPPRs address various aspects of the above requirements, including explanations of the phrases "income derived (or to be derived) from the understatement," "reasonable belief," "more likely than not," "adequate disclosure," "reckless or intentional disregard of rules and regulations" and "reasonable basis." The PPPRs also address various details of compliance including burden of proof (generally, the return preparer has the burden with respect to knowing that the position was taken on the return, that there is reasonable cause or good faith and adequate disclosure of the position), the requirements to furnish a copy of the return to taxpayers as applied to electronic filings (generally, a "replica" of the official return "that provides all of the information" will do).

The Demise of "One Preparer Per Firm" Rule. A major development is the abandonment of the "one preparer per firm" rule. As one might paraphrase Caesar, all tax return preparers are divided into two types: signing return preparers, who are the individuals who either (i) have signed the return or (ii) are required to sign the return, and all other tax return preparers who are "nonsigning tax return preparers." Under current law, as set forth in the Preamble:

> "… if a signing tax return preparer is associated with a firm, that individual, and no other individual in the firm, is treated as a tax return preparer with respect to the return or claim for purposes of §6694. Under the current regulations, if two or more individuals associated with a firm are tax return preparers with respect to a return or claim for refund, and none of them is the signing tax return preparer, only one of the individuals is a nonsigning tax return preparer with respect to that return or claim for purposes of §6694. In such a case, ordinarily, the individual who is a tax return preparer for purposes of §6694 is the individual with overall supervisory responsibility for the advice given by the firm with respect to the return or claim. The 'one preparer per firm' rule and the corollary rule included in §1.6694–2(d)(5) of the current regulations precluding a tax return preparer from relying on the advice of an individual associated with the tax return preparer's same firm for purposes of penalty protection were intended to eliminate the administrative

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difficulty of attempting to apply the §6694 penalty on an intra-firm basis."

That rule is abandoned under the proposed regulations in favor of a rule assigning responsibility on a **position-by-position basis**, described as follows:

> "Specifically, the Treasury Department and the IRS believe this evolution requires the adoption of a framework that centers on the return or claim for refund on a position-by-position basis, with the focus of any penalty on the position(s) giving rise to the understatement on the return or claim for refund and any responsible parties with respect to such position(s). Thus the Treasury Department and the IRS believe that the "one preparer per firm" rule is no longer appropriate and have proposed to adopt a framework defining a preparer-per-position within a firm."

The proposed regulations then go on to set forth the general rule of these regulations: "Under both the current and the proposed regulations, an individual is a tax return preparer subject to §6694 if the individual is primarily responsible for the position on the return or claim for refund giving rise to the understatement."

The application of the proposed rules is then further expanded upon: "Under proposed §6694–1(b)(1), only one person within a firm will be considered primarily responsible **for each position** giving rise to an understatement and, accordingly, be subject to the penalty. (Emphasis supplied.)"

Thus, "the IRS may advise multiple individuals within the firm that it may be concluded that they are the individual within the firm who is primarily responsible."

If more than one firm is involved, "there may be more than one tax return preparer who is primarily responsible for the position(s) giving rise to an understatement …."

This position-by-position analysis is a major development in the exposure of attorneys to preparer penalties.

It is only fair to say, however, that assigning responsibility begins with the signing tax return preparer.

The rationale for this approach is recited as follows:

> "The Treasury Department and the IRS believe that amending the regulations to better target the person or persons responsible for the position(s) giving rise to the understatement will further compliance and result in more equitable administration of the tax return preparer penalty regime."

A similar rule is established for multiple **nonsigning** preparers. Acknowledging that under this "position-by-position" approach there may be greater uncertainty as to who the preparer to be penalized is, the preamble to the proposed regulations give some idea of the application of these rules in the following excerpt:

> "This rule in proposed §1.6694–1(b)(3) is intended to address the potential for uncertainty regarding the identification of the primarily responsible tax return preparer prior to the time of the expiration of the period of limitations on making an assessment under §6694(a). The proposed rule is distinguished from the current "one preparer per firm" rule in the current regulations because under the proposed rule the IRS may assess the penalty against either the signing tax return preparer or the nonsigning tax return preparer **with overall supervisory responsibility for the position(s) giving rise to an understatement depending on the facts and circumstances**. Specifically, when the facts indicate that the signing tax return preparer is the primarily responsible tax return preparer under proposed §1.6694–1(b)(1) and (b)(2), the IRS may assess the §6694 penalty against that individual when appropriate under the statute and regulations. In situations when the facts indicate that the nonsigning tax return preparer with overall supervisory responsibility is the primarily responsible tax return preparer under proposed §1.6694–1(b)(1) and (b)(3), the IRS may assess the §6694 penalty against that individual when appropriate. In situations when it is unclear which individual, as between the signer and other nonsigning tax return preparers at the firm, the IRS may assess the §6694 penalty against the nonsigning tax return preparer with overall supervisory responsibility with respect to the position giving rise to the understatement when appropriate. (Emphasis supplied.)"

Treasury and IRS "specifically request comments regarding the approach taken in these proposed regulations and any recommendations to improve this rule."

Section 1.6694–1(f) of the proposed regulations provides conforming rules in order to ensure that the penalty is not assessed twice with respect to the same matter in determining the amount of the §6694 penalty.

Firm Penalty Liability. When the firm's review procedures are disregarded "by the firm through willfulness, recklessness, or gross indifference (including ignoring facts that would lead a person of reasonable prudence and competence to investigate or ascertain) in the formulation of the advice, or the preparation of the return or claim for refund, that included the position for which the penalty is imposed," the penalty may be imposed on the firm.

Reliance on Information Provided by Others. A major issue has been the extent to which a defense that information was

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provided by others should be permitted under the preparer penalty rules. This is a matter of major concern since such a defense has been traditionally recognized, e.g., with respect to unverified information provided by taxpayers and the new rules' emphasis on a position-by-position analysis makes such a defense even more important.

Reliance on Taxpayer Provided Information. Regulation §1.6694–1(e) allows a tax return preparer generally to rely in good faith without verification upon factual information furnished by the taxpayer, and Proposed Regulation §1.6694–1(e) continues that rule, but provides that a tax return preparer may not rely on information provided by taxpayers with respect to legal conclusions on Federal tax issues.

Reliance on Information Provided by Those Not the Taxpayer. The proposed regulations expand this defense so that a tax return preparer may rely in good faith and without verification on information furnished by another advisor, another tax return preparer, or another party (even when the advisor or tax return preparer is within the tax return preparer's same firm). Similarly, "a tax return preparer may rely in good faith and without verification upon a tax return that has been previously prepared by a taxpayer or another tax return preparer and filed with the IRS." It seems that this should include information in a "replica" when the return is filed electronically, but there is no mention of that in the proposed regulations as written.

Cautionary and limiting rules are also provided in this regard. The first provides that tax return preparers "may not ignore the implications of information furnished to the tax return preparer or actually known by the tax return preparer," and the second provides that the preparer "must make reasonable inquiries if the information as furnished appears to be incorrect or incomplete." This "expansion of the current rules" regarding reliance seems "necessary given the heightened standards imposed on tax return preparers by the 2007 Act and the increased complexity of the tax law, which often requires signing and nonsigning tax return preparers to rely on the work of others in ensuring compliance."

Determination of the Penalty Amount. Numerous rules are provided with respect to determining the amount of the penalty to be imposed, many of which are quite complicated. This is due primarily to the linking of the penalty amount to the amount of income the preparer derives from the work done. Proposed Regulation §1.6694–1(f) defines "income derived (or to be derived)" with respect to a return or claim for refund as "all compensation the tax return preparer receives or expects to receive with respect to the engagement of preparing the return or claim for refund or providing tax advice (including research and consultation) with respect **to the position(s) taken on the return or claim for refund that gave rise to the understatement."**

Importantly, the proposed regulations provide that "only compensation for time spent on tax advice that is given with respect to events that have occurred at the time the advice is rendered **and that relates to the position(s) giving rise to the understatement will be taken into account for purposes of calculating the §6694 penalty."** Furthermore it is specifically recognized that allocable portion may well be less than the total amount of the compensation associated with the engagement:

> "The proposed regulations provide that it may be concluded, based upon information received from the tax return preparer, that an appropriate allocation of compensation attributable to the position(s) giving rise to the understatement on the return or claim for refund is less than the total amount of compensation associated with the engagement. For example, it may be concluded that the number of hours of the engagement spent on the position(s) giving rise to the understatement may be less than the total hours associated with the engagement. If this is concluded, **the amount of the penalty will be calculated based upon the compensation attributable to the position(s) giving rise to the understatement.** Otherwise, the total amount of compensation from the engagement will be the amount of income derived for purposes of calculating the penalty under §6694. (Emphasis supplied.)"

The rules also break out both the individual and firm penalty liability in this regard. Finally, an anti stacking rule with respect to monetary penalties under Circular 230 is expected so that penalties under 31 U.S.C. §330 are not imposed with respect to the same conduct.

The New Standard for Undisclosed Positions: Reasonable Belief of More Likely Than Not. Under the exact language of the statute, the penalty is to be imposed when "there was not a reasonable belief that the position would more likely than not be sustained on its merits. (Emphasis supplied.)", It therefore might be thought that imposition of the penalty depends on the subjective state of mind of the preparer at the time when the return or claim for refund is being prepared. And the Proposed Regulations provide that the "reasonable belief that the position would more likely than not be sustained on its merits" standard will be satisfied "if the tax return preparer analyzes the pertinent facts and authorities and, in reliance upon that analysis, reasonably concludes in good faith that the position has a greater than 50 percent likelihood of being sustained on its merits." In making that determination, the fact that the position may not be challenged is not considered.

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The Preamble describes the effect of the Proposed Regulations as follows:

> "Whether a tax return preparer meets this standard will be determined **based upon all facts and circumstances, including the tax return preparer's due diligence**. In determining the level of diligence in a particular case, the **IRS will take into account the tax return preparer's experience with the area of tax law and familiarity with the taxpayer's affairs**, as well as the complexity of the issues and facts in the case. The proposed regulations also provide that a tax return preparer may meet the 'reasonable belief that the position would more likely than not be sustained on its merits' standard **if a position is supported by a well-reasoned construction of the applicable statutory provision despite the absence of other types of authority**, or if the tax return preparer relies on information or advice furnished by a taxpayer, advisor, another tax return preparer, or other party (even when the advisor or tax return preparer is within the tax return preparer's same firm), as provided in proposed §1.6694–1(e). (Emphasis supplied.)"

This may seem to approach this matter subjectively, but other provisions make clear that these subjective points of view, to the extent they are subjective, are substantially limited. For example, Proposed Regulation §1.6694–2(b)(2) provides that a tax return preparer may not rely on unreasonable assumptions, and the reference is clearly a reference to objective, not subjective unreasonableness. Proposed Regulation §1.6694–2(b)(3) also states that the authorities contained in §1.6662–(d)(3)(iii) (or any successor provision) are to be considered in determining whether a position satisfies the "more likely than not" standard and Proposed Regulation §1.6694–2(b)(4) provides examples illustrating positions meeting the "reasonable belief that the position would more likely than not be sustained on its merits" standard.

Disclosed Positions and the Reasonable Basis Test. Proposed §§1.6694–2(c)(1) and (2) establish that the "reasonable basis" standard that must be met for disclosed positions is "the same standard as defined in current Regulation §1.6662–3(b)(3) (or any successor provision)." Under that provision, it is almost questionable whether "more likely than not" is a higher or lower standard than the "reasonable basis" test! Consider the following excerpt from Regulation §1.662-3(b)(3):

> "(3) *Reasonable basis*. Reasonable basis is a **relatively high standard** of tax reporting, that is, **significantly higher than not frivolous or not patently improper.** The reasonable basis standard is **not satisfied by a return position that is merely arguable or that is merely a colorable claim**. If a return position is **reasonably based on one or more of the authorities** set forth in §1.6662–4(d)(3)(iii) (taking into account the relevance and persuasiveness of the authorities, and subsequent developments), the return position **will generally satisfy the reasonable basis standard even though it may not satisfy the substantial authority standard** as defined in §1.6662–4(d)(2). (Emphasis supplied.)"

What is Adequate Disclosure? When a return preparer has a "reasonable basis" for a tax return position but does not have a "reasonable belief that the position would more likely than not be sustained on its merits," the penalty require "adequate disclosure" in order to avoid imposition of the penalty. Proposed Regulation §1.6694–2(c)(3) expands on the current regulations and on the interim guidance provided in Notice 2008–13.

For a signing tax return preparer within the meaning of §301.7701– 15(b)(1), the proposed regulations provide that a position may be "adequately disclosed" in one of five ways, the first of which is disclosure on a properly completed and filed Form 8275, Disclosure Statement, or Form 8275–R, Regulation Disclosure Statement (whichever is applicable) or on the tax return itself in accordance with the applicable annual revenue procedure. This method is applicable to all returns and claims for refunds whereas, three of the four remaining methods are only applicable to income tax returns, and the last method is only applicable where the penalties involved do not include the accuracy related penalty.

The first income-tax-returns-only method of adequate disclosure is only available when the tax return position also does not meet the "substantial authority" standard described in §1.6662–4(d). To satisfy this approach the tax return preparer must provide the taxpayer with a prepared tax return that includes the appropriate disclosure.

The second income-tax-returns-only method of disclosure is only available when the tax return position does meet the "substantial authority" standard. Disclosure of the position is considered adequate if the tax return preparer advises the taxpayer of all of the penalty standards applicable to the taxpayer under §6662. This author considers this option particularly useless since it only seems realistically applicable to the tax returns the preparer no longer wishes to prepare! Such a disclosure seems all but certain to lose the client, unless another preparer has previously given the same disclosure with respect to the same position, an event that seems extraordinarily unlikely.

The Proposed Regulation with respect to this method of making "adequate disclosure" provides that "the tax return preparer must also contemporaneously document the advice in the tax return preparer's files." The exact import

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of this requirement seems uncertain. For example, if the tax return preparer clearly made written disclosure to the client contemporaneously, but failed to contemporaneously put the document in his or her tax return work papers, would adequate disclosure then not have been provided because the advice, though given in writing contemporaneously, was kept in someone else's file? For that matter, what if the tax return preparer clearly and contemporaneously advised the client of the required matters but also put the letter in his or her tax return work papers after a substantial period of time had elapsed so that the pertinent document was not put in the tax return preparer's work papers "contemporaneously"—would that mean that adequate disclosure had not been made? This aspect of these rules seems overly formalistic and likely to give rise to abuse and controversy. If the disclosure was made contemporaneously in writing, where the writing was kept and when it was filed there seem altogether irrelevant to the merits of having made the required disclosure. A similar bit of non-sense infects the same requirement as applied to the next two methods of making adequate disclosure.

The third income-tax-returns-only method applies to positions taken with respect to tax shelters under IRC §6662(d)(2)(C) or a reportable transaction to which IRC §6662A applies. Disclosure of the position is considered adequate if the tax return preparer advises the taxpayer that there needs to be at a minimum "substantial authority" for the position, that the taxpayer must possess a "reasonable belief that the tax treatment was more likely than not" the proper treatment, and that disclosure will not protect the taxpayer from assessment of an accuracy-related penalty.

The last method applies to tax returns or claims for refund subject to penalties other than the accuracy-related penalty for substantial understatements under §§6662(b)(2) and (d). Disclosure under this method is considered adequate when the tax return preparer advises the taxpayer of the penalty standards applicable to the taxpayer under §6662. This rule is said to be "intended to address the situation when the penalty standard applicable to the taxpayer is based on compliance with requirements other than disclosure on the return (for example, §6662(e))."

This author considers this option almost as useless as the second method—and for the same reasons: a tax return preparer can only do this if he or she is willing to lose the client.

In summary, then, for signing preparers, there are the following options:

1. Use Form 8275 (or Form 8275-R if applicable).
2. Provide the taxpayer with a return disclosing the position.
3. Provide written descriptions of the applicable penalties to taxpayers.

In the case of a nonsigning tax return preparer within the meaning of §301.7701–15(b)(2), the preamble to the Proposed Regulations provides:

> "… the position may be disclosed in one of three ways. First, the position may be disclosed on a properly completed and filed Form 8275, "Disclosure Statement," or Form 8275– R, "Regulation Disclosure Statement," as appropriate, or on the tax return in accordance with the annual revenue procedure. Second, a nonsigning tax return preparer may meet the disclosure standards if the nonsigning tax return preparer advises the taxpayer of all opportunities to avoid penalties under §6662 that could apply to the position and advises the taxpayer of the standards for disclosure to the extent applicable. Third, disclosure of a position is adequate if a nonsigning tax return preparer advises another tax return preparer that disclosure under §6694(a) may be required. The nonsigning tax return preparer must document contemporaneously in the tax return preparer's files that this advice required by the proposed regulations was provided."

The Preamble to the Proposed Regulations contains the following warning to nonsigning tax return preparers attempting to comply with either the second or third methods:

> "In order to satisfy the disclosure standards when the position is not disclosed on or with the return, **each return position** for which there is a "reasonable basis" but for which the tax return preparer does not have a "reasonable belief that the position would more likely than not be sustained on the merits" **must be addressed by the tax return preparer**. Thus, **the advice to the taxpayer with respect to each position must be particular to the taxpayer and tailored to the taxpayer's facts and circumstances. No form of a general boilerplate disclaimer will satisfy these standards.** Proposed §1.6694–2(c)(iv) provides that disclosure **in the case of items attributable to a pass-through entity is adequate if made at the entity level in accordance with the rules in §1.6662–4(f)(5). For example, a tax return preparer of a partnership tax return need only advise the partnership in order to satisfy any of the above disclosure rules and does not need to advise each individual partner in the partnership of the applicable penalties**. (Emphasis supplied.)"

The Reasonable Cause Exception. Proposed Regulation §1.6694–2(d) provides, in accordance with current law:

> "The penalty under §6694(a) will not be imposed if, considering all the facts and circumstances, it is determined that the understatement was due to reasonable cause and that the tax return preparer acted in good faith."

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While this exception could have been used to make clear that some of the more feckless applications of the documentation rules are not intended —as surely they should not be, instead the Proposed Regulations seem to do their level best to make this exception as narrow as possible and perhaps even not applicable to circumstances in which the required disclosures were made and were contemporaneously made and in writing, but were not kept --or were not contemporaneously kept-- in the right file folder.

These proposals are intended to expand the scope of the reasonable cause exception in specific situations and otherwise the rule "maintains the rules in the current regulations regarding reasonable cause and good faith…" The "reasonable cause exception" is expanded in two ways. The first is a proposal to revise the rule "to provide that whether a position is supported by a generally accepted administrative or industry practice is an additional factor to consider in determining whether the tax return preparer acted with reasonable cause and good faith." This preamble to the Proposed Regulations explains that this "provision is intended to address situations in the absence of published guidance when administrative or industry practice has developed that would not reasonably be subject to challenge by the IRS." What sort of practice would "not reasonably …be subject to challenge by the IRS" seems uncertain, and no example illustrates the sort of thing Treasury has in mind.

Second, the reasonable cause factor regarding reliance on advice of another tax return preparer is also expanded to allow a tax return preparer to reasonably rely on information or advice furnished by a taxpayer, advisor, another tax return preparer, or other party (even when the advisor or tax return preparer is within the tax return preparer's same firm), as provided in proposed §1.6694–1(e).

Other factors taken into account in determining "reasonable cause" include the number of errors, the frequency of the errors, the materiality of the errors, the return preparer's normal office practice, as well any reliance on others or on generally accepted administrative or industry practice. It should be noted that the return preparer bears the burden of proof on this issue. Nonetheless, the Proposed Regulations warn preparers, perhaps ominously:

> "Notwithstanding these rules, the reasonable cause and good faith exception does not apply if there is a flagrant error on a return or claim for refund, a pattern of errors on a return or claim for refund, or a repetition of the same or similar errors on numerous returns or claims for refund."

In context, the implication is plain that general practices, no matter how laudable, will not save a "flagrant error." But what is a really "flagrant error"? Say a 1040 return has four major schedules (A, B, D, and E) and the Schedule E has three properties with approximately the same rents on each. Assume further that the preparer asked the taxpayer for the rents and received the rents for only two of the three properties, filing the return later in the rush of the filing season without realizing that the rents for the one property were omitted. Is that a "flagrant error" – stupid one concedes, but hardly nefarious-- so that office practices involving cross-referencing returns to work papers and peer reviews cannot be taken into account, even if in this case they failed? No example illustrates the new "flagrant error" rule. Perhaps examples should be added to illustrate this concept.

Definition of Tax Return Preparer. Although this matter was discussed above, we return to it because it is so central to the overall approach in the Proposed Regulations. The proposed regulations add two sub-sections (Proposed §§ 301.7701–15(b)(1) and (2)) to the Regulations under §7701, defining "signing tax return preparer" and "nonsigning tax return preparer." These terms are central to Regulation §1.6694– 1. Proposed Regulation §301.7701–15(b)(1) provides that a *signing tax return preparer* is "any tax return preparer who signs or **who is required to sign** a return or claim for refund as a tax return preparer…." Proposed Regulation §301.7701–15(b)(2) provides that a *nonsigning tax return preparer* is any tax return preparer who is not a signing tax return preparer but who prepares all or a substantial portion of a return or claim for refund within the meaning of §301.7701–15(b)(3) with respect to events that have occurred at the time the advice is rendered.

The proposed regulations provide that any time spent on advice that is given with respect to events that have occurred, and which is less than 5 percent of the aggregate time incurred by the person with respect to the position(s) giving rise to the understatement will not be taken into account in determining whether an individual is a nonsigning tax return preparer. The intent of this "less than 5 percent test" is to encourage tax professionals who principally rendered advice regarding events that had not yet occurred to provide follow-up advice requested by a taxpayer without the concern that, by providing such advice to a taxpayer, the advisor would become a tax return preparer.

Proposed Regulation §301.7701– 15(b)(3)(i) clarifies that whether a schedule, entry, or other portion of a return or claim for refund is a substantial portion is determined "based upon all facts and circumstances," and a single tax entry may constitute a substantial portion of the tax required to be shown on a return. The proposed regulations include additional factors to consider in determining whether a schedule, entry, or other portion of a return or claim for refund is a substantial portion, such as the size and complexity of the

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item relative to the taxpayer's gross income and the size of the understatement attributable to the item compared to the taxpayer's reported tax liability.

Finally, Proposed Regulation §301.7701–15(b)(3)(ii) increases the *de minimis* exception in determining what is and what is not "a substantial portion" of a return or claim for refund for nonsigning tax return preparers. Under the proposed regulations, the *de minimis* exception applies if the item giving rise to the understatement is (i) less than $10,000, or (ii) less than $400,000 if the item is also less than 20 percent of the taxpayer's gross income (or, for an individual, the individual's adjusted gross income). This *de minimis* rule does not apply for signing tax return preparers within the meaning of §301.7701–15(b)(1). This change to the regulations updates the current *de minimis* amounts to reflect the passage of time since those amounts were set in 1977. The Treasury Department and the IRS are considering whether other *de minimis* rules applicable to nonsigning tax return preparers of non-income tax returns are warranted.

Consistent with the interim guidance set forth in Notice 2008–13, §301.7701– 15(b)(4) is proposed to be amended by revising the definitions of "return" and "claim for refund" to only include preparers of returns and claims for refund that are specifically identified in published guidance in the Internal Revenue Bulletin. The Treasury Department and the IRS will publish this guidance simultaneously with the publication of final regulations and will likely maintain the three tiered approach used in the exhibits to Notice 2008–13, subject to any appropriate modifications. Under the substantial portion rule in §7701(a)(36)(A), preparation of a broad range of information returns, schedules, and other documents can subject a person to the §6694 penalties even though the documents may not themselves give rise to an understatement. Accordingly, the Treasury Department and the IRS believe that including a list of returns or other documents, the preparation of which may subject a tax return preparer to penalties, will further compliance by not unduly increasing the burden on persons preparing information returns and other documents.

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