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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 300

[TD 9820]

RIN 1545-BN09

Special Enrollment Examination User Fee for Enrolled Agents

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulation.

SUMMARY: This document contains a final regulation changing the amount of the user fee for the special enrollment examination to become an enrolled agent. The charging of user fees is authorized by the Independent Offices Appropriations Act of 1952. The final regulation affects individuals taking the enrolled agent special enrollment examination.

DATES: Effective date: This regulation is effective **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

Applicability date: For the date of applicability, see § 300.4(d).

FOR FURTHER INFORMATION CONTACT: Jonathan R. Black, (202) 317-6845 (not a toll-free number).

## SUPPLEMENTARY INFORMATION:

**Background and Explanation of Provisions**

This document contains amendments to 26 CFR part 300 regarding user fees. On January 26, 2016, a notice of proposed rulemaking (REG-134122-15) proposing to change the amount of the Enrolled Agent Special Enrollment Examination (EA-SEE) user fee was published in the **Federal Register** (81 FR 4221) (January 26, 2016 proposed rule). On October 25, 2016, a second notice of proposed rulemaking (REG-134122-15) withdrawing the January 26, 2016 proposed rule and proposing a smaller change to the EA-SEE user fee was published in the **Federal Register** (81 FR 73363) (October 25, 2016 proposed rule). Comments responding to each proposed rule were received, and a public hearing on the second proposed rule was held on December 29, 2016. After consideration of the comments, this Treasury decision adopts the regulations proposed by the October 25, 2016 proposed rule without change.

A. Enrolled Agents and the Special Enrollment Examination

Section 330 of title 31 of the United States Code authorizes the Secretary of the Treasury to regulate the practice of representatives before the Treasury Department. Pursuant to 31 U.S.C. 330, the Secretary has published regulations governing practice before the IRS in 31 CFR part 10 and reprinted the regulations as Treasury Department Circular No. 230 (Circular 230).

Section 10.4(a) of Circular 230 authorizes the IRS to grant status as enrolled agents to individuals who demonstrate special competence in tax matters by passing a written examination (the EA-SEE) administered by, or under the oversight of, the IRS

and who have not engaged in any conduct that would justify suspension or disbarment under Circular 230. There were a total of 51,755 active enrolled agents as of September 1, 2016.

Beginning in 2006, the IRS engaged the services of a third-party contractor to develop and administer the EA-SEE. The EA-SEE is composed of three parts, which are offered in a testing period that begins each May 1 and ends the last day of the following February. The EA-SEE is not available in March and April, during which period it is updated to reflect recent changes in the relevant law. More information on the EA-SEE, including content, scoring, and how to register, can be found on the IRS website at [www.irs.gov/tax-professionals/enrolled-agents](http://www.irs.gov/tax-professionals/enrolled-agents). The IRS Return Preparer Office (RPO) oversees the administration of the EA-SEE.

B. User Fee Authority

The Independent Offices Appropriations Act of 1952 (IOAA) (31 U.S.C. 9701) authorizes each agency to promulgate regulations establishing the charge for services provided by the agency (user fees). The IOAA provides that these user fee regulations are subject to policies prescribed by the President and shall be as uniform as practicable. Those policies are currently set forth in the Office of Management and Budget (OMB) Circular A-25 (OMB Circular), 58 FR 38142 (July 15, 1993).

The IOAA states that the services provided by an agency should be self-sustaining to the extent possible. 31 U.S.C. 9701(a). The OMB Circular states that agencies that provide services that confer special benefits on identifiable recipients beyond those accruing to the general public are to establish user fees that recover the

full cost of providing those services. The OMB Circular requires that agencies identify all services that confer special benefits and determine whether user fees should be assessed for those services.

Agencies are to review user fees biennially and update them as necessary to reflect changes in the cost of providing the underlying services. During this biennial review, an agency must calculate the full cost of providing each service, taking into account all direct and indirect costs to any part of the U.S. government. The full cost of providing a service includes, but is not limited to, salaries, retirement benefits, rents, utilities, travel, and management costs, as well as an appropriate allocation of overhead and other support costs associated with providing the service.

An agency should set the user fee at an amount that recovers the full cost of providing the service unless the agency requests, and OMB grants, an exception to the full-cost requirement. OMB may grant exceptions only where the cost of collecting the fees would represent an unduly large part of the fee for the activity, or where any other condition exists that, in the opinion of the agency head, justifies an exception. When OMB grants an exception, the agency does not collect the full cost of providing the service that confers a special benefit on identifiable recipients rather than the public at large, and the agency therefore must fund the remaining cost of providing the service from other available funding sources. When OMB grants an exception, the agency, and by extension all taxpayers, subsidizes the cost of the service to the recipients who should otherwise be required to pay the full cost of providing the service as the IOAA and the OMB Circular direct.

C. The EA-SEE User Fee

As discussed earlier, Circular 230 section 10.4(a) provides that the IRS will grant enrolled agent status to an applicant if the applicant, among other things, demonstrates special competence in tax matters by written examination. The EA-SEE is the written examination that tests special competence in tax matters for purposes of that provision, and an applicant must pass all three parts of the EA-SEE to be granted enrolled agent status through written examination. The IRS confers a benefit on individuals who take the EA-SEE beyond those that accrue to the general public by providing them with an opportunity to demonstrate special competence in tax matters by passing a written examination and therefore satisfying one of the requirements for becoming an enrolled agent under Circular 230 section 10.4(a). Because the opportunity to take the EA-SEE is a special benefit, the IRS charges a user fee to take the examination.

Pursuant to the guidelines in the OMB Circular, the IRS has calculated its cost of providing examination services under the enrolled agent program. The user fee is implemented under the authority of the IOAA and the OMB Circular and recovers the full cost of overseeing the program. The user fee was \$11 to take each part of the EA-SEE and was set in 2006. The IRS does not intend to subsidize any of the cost of making the EA-SEE available to examinees and is not applying for an exception to the full-cost requirement from OMB. As a result, this regulation increases the user fee to the full cost to the IRS for overseeing the EA-SEE program, \$81 per part, effective for examinees who register on or after March 1, 2018, to take the EA-SEE. The contractor who administers the EA-SEE also charges individuals taking the EA-SEE an additional

fee for its services. For the May 2016 to February 2017 testing period, the contractor's fee was \$98 for each part of the EA-SEE. For the May 2017 to February 2019 testing periods, the contractor's fee is \$100.94. For the May 2019 to February 2020 testing period, the contractor's fee will be \$103.97. The contract was subject to public procurement procedures, and there were no tenders that were more competitive.

### **Summary of Comments**

The comments submitted on the January 26, 2016 proposed rule and the October 25, 2016 proposed rule are available at [www.regulations.gov](http://www.regulations.gov) or upon request. Comments that were submitted on the January 26, 2016 proposed rule, which was withdrawn by the October 25, 2016 proposed rule, are addressed to the extent relevant to the October 25, 2016 proposed rule. Certain comments on the January 26, 2016 proposed rule, such as those comments requesting additional details on the cost of background investigations and costing methodology, were addressed in the preamble to the October 25, 2016 proposed rule.

All of the comments received opposed increasing the user fee for the EA-SEE. Specifically, comments expressed concern that the increased user fee would discourage individuals from becoming enrolled agents. The comments stated that discouraging individuals would be counter-productive considering that the IRS and taxpayers benefit from having more tax professionals who meet the standards required of an enrolled agent. Comments suggested that the IRS should work to increase the number of people taking the EA-SEE each year and focus its attention on encouraging unenrolled preparers, particularly those who participate in the Annual Filing Season

Program in Rev. Proc. 2014-42, to become enrolled agents, which would result in a reduced user fee on a per-part basis when the IRS redetermines the cost of the EA-SEE at the next biennial review of the user fee.

The Treasury Department and the IRS do not intend the user fee to discourage individuals from becoming enrolled agents and have considered the possible impact of increasing the user fee on the number of individuals taking the EA-SEE. Enrolled agents play a valuable role in the tax administration process, and the IRS uses the EA-SEE to ensure their qualifications. The IRS welcomes a continuing dialogue on how it can attract more individuals to take the EA-SEE and thereby lower the cost per part by spreading the fixed costs of administration over a larger population of examinees. The Treasury Department and the IRS have considered the potential impact on the number of individuals if the full cost of the EA-SEE program is collected and concluded not to seek an exemption to the full-cost requirement. Additionally, efforts to improve unenrolled preparers' knowledge of federal tax law, such as implementation of the Annual Filing Season Program, have not substantially affected the number of individuals taking the EA-SEE and have no direct relationship with the user fee.

Some comments alternatively recommended that the fee remain the same for taking the EA-SEE the first time, but that subsequent attempts to take and pass the EA-SEE should be subject to a higher fee. Comments suggested that the fee for subsequent attempts could be rebated if the individual passed the EA-SEE. The comments explained that this would discourage all but the most serious candidates from taking the EA-SEE. Comments also suggested that the IRS could increase the fee

gradually over a period of years, in order to encourage preparers to become enrolled agents sooner rather than later, and that the IRS should retain the \$11 per part user fee for a two-year window so that everyone who passed at least one part of the EA-SEE (presumably prior to the announcement of the fee increase) would have an opportunity to complete all parts of the EA-SEE without an unexpected fee increase.

The Treasury Department and the IRS considered these comments but have declined to implement them. The Treasury Department and the IRS do not have information to forecast how many examinees are likely to pass each part of the EA-SEE the first time versus on later attempts, and it therefore would not be able to adequately determine the cost allocation between first-time and repeat examinees. Additionally, the Treasury Department and the IRS think examinees should be charged the full cost to the IRS of overseeing the administration of the EA-SEE, regardless of whether they have already taken one or two parts, given the absolute amount of the user fee (\$81 per part). This final regulation increases the user fee to the full cost to the IRS, and the IRS has determined that it will not seek an exception to the full-cost requirement from OMB.

Comments recommended the IRS consider alternative means to reduce costs after the existing agreement with the contractor who administers the EA-SEE expires in 2020. Contractor costs are unrelated to this user fee regulation, and any concerns related to such costs should be directed to the RPO.

Comments also asked how it was possible that the IRS did not notice the increased costs over the course of the decade following the last user fee increase.

Although the OMB Circular directs the IRS to set its fees every two years, the IRS was



unable to obtain accurate estimates of its total costs until recently, because it had insufficient data to estimate the change in size of the testing population.

Comments suggested that the IRS should not charge a user fee to register for the EA-SEE, because the IRS and the general public benefit from the existence of enrolled agents. Whether a benefit accrues to the IRS and the general public, however, is not relevant to whether a user fee is appropriate under the OMB Circular. As discussed in the October 25, 2016 proposed rule, it is appropriate under the OMB Circular to charge a user fee for taking the EA-SEE because taking the EA-SEE provides a benefit to examinees. See Seafarers Int'l Union of N. Am. v. U.S. Coast Guard, 81 F.3d 179, 183 (D.C. Cir. 1996). The IOAA permits the IRS to charge a user fee for providing a “service or thing of value.” See 31 U.S.C. 9701(b). A government activity constitutes a “service or thing of value” when it provides “special benefits to an identifiable recipient beyond those that accrue to the general public.” See OMB Circular section 6(a)(1). Among other things, a “special benefit” exists when a government service is performed at the request of the recipient and is beyond the services regularly received by other members of the same group or the general public. See OMB Circular section 6(a)(1)(c). It is permissible for a service for which an agency charges a user fee to generate an “incidental public benefit,” and there is no requirement that the agency weigh this public benefit against the specific benefit to the identifiable recipient. See Seafarers, 81 F.3d at 183–84 (D.C. Cir. 1996). The IRS confers a benefit on individuals who take the EA-SEE beyond those that accrue to the general public by providing them

with an opportunity to satisfy one of the requirements for becoming an enrolled agent under Circular 230 section 10.4(a).

Comments observed that the IRS charges user fees inconsistently because, for example, the IRS does not charge user fees for toll-free telephone service, continuing-education webinars, walk-in service, notice letters, the annual filing season program record of completion, etc. This regulation deals only with the user fee for the EA-SEE, which, as discussed earlier, is compliant with the requirements of the OMB Circular, and the appropriateness of the EA-SEE user fee is not contingent on whether the IRS charges, or should charge, user fees for other activities.

Comments further questioned the determination of the amount of the EA-SEE user fee. One comment assumed that the increase in revenue was allocable to ten full-time equivalent employees and questioned how so much time was involved in oversight of the EA-SEE—the comment noted that, after accounting for the cost of background investigations, the salary of a GS-12 step 1 employee in Washington DC, when multiplied by the overhead rate and again multiplied by ten, equals approximately the expected increase in annual revenue to the IRS from the increased user fee.

Comments also questioned how much time staff spent reviewing surveys and setting the annual cut score, among other things. The preamble to the October 25, 2016 proposed rule addresses most questions about costing methodology. As stated in that preamble, eight individuals spend approximately seventy-five percent of their time on the EA-SEE, and two individuals spend approximately ten-percent of their time on the EA-SEE. That amounts to just over six people working full time. The calculation in the

comment on employee hours did not appear to account for the cost of benefits, which are calculated as 28.5 percent of salary, and the variance between the ten employee salaries, which range from GS-7 to GS-15, in calculating the number of employees involved. RPO employees do not track the time spent on each individual task associated with the EA-SEE, but—as stated in the preamble to the October 25, 2016 proposed rule—managers who are familiar with the employees' work provided estimates of the total time involved, based on their knowledge and experience.

Finally, comments asked the IRS to request an exception to the full-cost requirement from the OMB and questioned whether it is good public policy to charge a user fee when the public benefits from minimum competency standards for return preparers. The IRS has determined that an exception to the full-cost requirement is not justified, because subsidizing the cost of the EA-SEE program requires diverting resources from other activities that are in the public interest and that inure to the public generally, rather than to identifiable recipients requesting the specific benefit of taking the EA-SEE.

### **Special Analyses**

Certain IRS regulations, including this one, are exempt from the requirements of Executive Order 12866, as supplemented and reaffirmed by Executive Order 13563. Therefore, a regulatory assessment is not required. Pursuant to the Regulatory Flexibility Act (5 U.S.C. chapter 6), it is hereby certified that this regulation will not have a significant economic impact on a substantial number of small entities. The user fee primarily affects individuals who take the enrolled agent examination, many of whom

may not be classified as small entities under the Regulatory Flexibility Act. Therefore, a substantial number of small entities is not likely to be affected. Further, the economic impact on any small entities affected would be limited to paying the \$70 difference in cost per part between the \$81 user fee and the previous \$11 user fee, which is unlikely to present a significant economic impact. Moreover, the total economic impact of this regulation is approximately \$1.57 million, which is the product of the approximately 22,425 parts of the EA-SEE administered annually and the \$70 increase in the fee. Accordingly, the rule is not expected to have a significant economic impact on a substantial number of small entities, and a regulatory flexibility analysis is not required

#### **Drafting Information**

The principal author of this regulation is Jonathan R. Black of the Office of the Associate Chief Counsel (Procedure and Administration).

#### **Statement of Availability of IRS Documents**

Rev. Proc. 2014-42, Annual Filing Season Program, is published in the Internal Revenue Bulletin and is available from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402, or by visiting the IRS website at [www.irs.gov](http://www.irs.gov).

#### **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:

**PART 300—USER FEES**

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

Authority: 31 U.S.C. 9701.

Par. 2. Section 300.4 is amended by revising paragraphs (b) and (d) to read as follows:

§300.4 Enrolled agent special enrollment examination fee.

\* \* \* \* \*

(b) Fee. The fee for taking the enrolled agent special enrollment examination is \$81 per part, which is the cost to the government for overseeing the development and administration of the examination and does not include any fees charged by the administrator of the examination.

\* \* \* \* \*

(d) Applicability date. This section applies to registrations that occur on or after March 1, 2018, for the enrolled agent special enrollment examination. Section 300.4 (as contained in 26 CFR part 300, revised April 2017) applies to registrations that occur before March 1, 2018.

Kirsten Wielobob,  
Deputy Commissioner for Services and Enforcement.

Approved: June 27, 2017.

Tom West,  
Tax Legislative Counsel.