Preparer Due Diligence Requirements for Determining Earned Income Credit Eligibility

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Temporary regulations.

SUMMARY: This document contains amendments to the Income Tax Regulations (26 CFR parts 1 and 602) under section 6695(g) relating to the penalty for failure of a preparer to be diligent in determining a taxpayer's eligibility for the earned income credit (EIC). Section 6695(g) was added by section 1085(a)(2) of the Taxpayer Relief Act of 1997, Public Law 105-34 (11 Stat. 788, 955 (1997)) (the Act), effective for taxable years beginning after December 31, 1996. Section 6695(g) imposes a $100 penalty for each failure by an income tax return preparer to meet the due diligence requirements set forth in this regulation. The IRS may impose the section 6695(g) penalty in addition to any other applicable penalty provided by law.

In Notice 97–65 (1997–51 I.R.B. 14 (December 22, 1997)), the IRS set forth the preparer due diligence requirements for 1997 returns and claims for refund involving the EIC. To avoid the imposition of the section 6695(g) penalty for 1997 returns and claims for refund, Notice 97–65 requires preparers to meet four requirements: (1) Complete the Earned Income Credit Eligibility Checklist attached to Notice 97–65 (Eligibility Checklist), or otherwise record the information necessary to complete the Eligibility Checklist; (2) complete the Earned Income Credit Worksheet (Computation Worksheet), as contained in the 1997 Form 1040 instructions, or otherwise record the computation and information necessary to complete the Computation Worksheet; (3) have no knowledge that any information used by the preparer in determining eligibility for, and amount of, the EIC is incorrect; and (4) retain for three years the Eligibility Checklist and Computation Worksheet (or alternative records), and a record of how and when the information used to determine eligibility for, and amount of, the EIC was obtained by the preparer. This information may be retained either as a paper record or in magnetic media format consistent with Rev. Proc. 81–46 (1981–2 C.B. 621).

Notice 97–65 also requested comments on preparer due diligence requirements for tax years after 1997. Two comments were received. The commentators did not suggest alternative due diligence requirements. One commentator suggested, however, increased education for the public. The IRS and Treasury Department adhere to the principle that education is an integral part of good tax administration. Therefore, as part of its overall EIC strategy, the IRS has established various educational tools and outreach programs for taxpayers and preparers. These efforts are intended to provide the public with the tools necessary to receive the full amount of the EIC allowed by law.

The second commentator suggested that preparers should be able to meet the due diligence requirements by using software reviewed and approved by the IRS. The IRS does not approve commercial software. The IRS is currently exploring, however, new opportunities for partnership with outside stakeholders to reduce burden, enhance customer service, and increase compliance. As part of this effort, the IRS will continue to review this comment and evaluate options.

Explanation of Provisions

The temporary and proposed regulations impose due diligence standards on persons who are income tax return preparers with respect to determining eligibility for, or the amount of, the EIC. Consistent with existing regulations under section 6695, these temporary regulations apply a modified definition of income tax return preparer. Section 7701(a)(36) provides that, in general, the term income tax return preparer means any person who prepares for compensation, or who employs one or more persons to prepare for compensation, any return or claim for refund of tax imposed by subtitle A. The preparation of a substantial portion of a return or claim for refund is treated as if it were the preparation of such return or claim for refund. Persons are considered preparers if they give legal advice concerning a return or claim for refund or if they prepare another return or claim for refund (§ 301.7701–15(a)(2) and (b) and § 301.7701–15(b)(3), respectively). The
regulations retain this definition of an income tax return preparer, except that preparers who merely give advice or prepare another return that affects the EIC return or claim for refund are not preparers for purposes of the section 6695(g) penalty. Rather, the due diligence standards are imposed only on paid preparers who prepare the return claiming the EIC.

The temporary regulations essentially adopt the four due diligence requirements in Notice 97-65. Thus, to avoid the penalty under section 6695(g), a preparer must: (1) Complete the Eligibility Checklist (Form 8867, Paid Preparer’s Earned Income Credit Checklist, or such other form as may be prescribed by the IRS), or otherwise record in the preparer’s files the information necessary to complete the Eligibility Checklist; (2) complete the Computation Worksheet (Earned Income Credit Worksheet contained in the Form 1040 Instructions), or otherwise record in the preparer’s files the computation and information necessary to complete the Computation Worksheet; (3) have no knowledge, and have no reason to know, that any information used by the preparer in determining eligibility for, and amount of, the EIC is incorrect; and (4) retain for three years the Eligibility Checklist and the Computation Worksheet (or alternative records), and a record of how and when the information used to determine eligibility for, and the amount of, the EIC was obtained by the preparer.

The temporary regulations also provide that the income tax return preparer may avoid the section 6695(g) penalty with respect to a particular income tax return or claim for refund if the preparer can demonstrate to the satisfaction of the IRS that, considering all the facts and circumstances, the preparer’s normal office procedures are reasonably designed and routinely followed to ensure compliance with the due diligence requirements of the regulations, and that the particular failure was isolated and inadvertent.

The temporary regulations will be effective for taxable years beginning after December 31, 1996. However, the Eligibility Checklist contained in Notice 97-65 has been expanded in Form 8867. Therefore, for taxable year 1997, the applicable Eligibility Checklist is the Eligibility Checklist contained in Notice 97-65. For taxable year 1998, a preparer may choose as the applicable Eligibility Checklist either the Eligibility Checklist published in Notice 97-65 modified however, by replacing $9,770, $25,760, $29,290, and $2,250 each time these figures appear on the 1997 Eligibility Checklist with $10,030, $26,473, $30,095, and $2,300, respectively, or Form 8867. For taxable years beginning after December 31, 1998, the applicable Eligibility Checklist will be the Form 8867.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in EO 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. Further, it is hereby certified, pursuant to sections 603(a) and 605(b) of the Regulatory Flexibility Act, that the collection of information in these regulations will not have a significant economic impact on a substantial number of small entities. This certification is based upon the fact that the amount of time necessary to record and retain the required information will be nominal for those income tax return preparers that choose to use the Alternative Eligibility Record and Alternative Computation Record. Therefore, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Internal Revenue Code, these temporary regulations will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact.

Drafting Information

The principal author of these regulations is Marc C. Porter, Office of Assistant Chief Counsel (Income Tax & Accounting). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects

26 CFR Part 1
Income taxes, Reporting and recordkeeping requirements.
26 CFR Part 602
Reporting and recordkeeping requirements.

Amendments to the Regulations

Accordingly, 26 CFR parts 1 and 602 are amended as follows:

PART 1–INCOME TAXES

Paragraph 1. The authority citation for part 1 is amended by adding an entry in numerical order to read as follows:

Authority: 26 U.S.C. 7805 * * * Section 1.6695–2T also issued under 26 U.S.C. 6695(g). * * *
documents containing the required information.

(ii) The preparer's completion of the Computation Worksheet or Alternative Computation Record must be based on information provided by the taxpayer to the preparer or otherwise reasonably obtained by the preparer.

(3) Knowledge. The preparer must not know, or have reason to know, that any information used by the preparer in determining the taxpayer's eligibility for, or the amount of, the EIC is incorrect. The preparer may not ignore the implications of information furnished to, or known by, the preparer appears to be incorrect, inconsistent, or incomplete.

(4) Retention of records. (i) The preparer must retain—

(A) A copy of the completed Eligibility Checklist or Alternative Eligibility Record;

(B) A copy of the Computation Worksheet or Alternative Computation Record; and

(C) A record of how and when the information used to complete the Eligibility Checklist or Alternative Eligibility Record and the Computation Worksheet or Alternative Computation Record was obtained by the preparer, including the identity of any person furnishing the information.

(ii) These items must be retained for three years after the date the return or claim for refund was presented to the taxpayer for signature, and may be retained on paper or electronically in the manner prescribed in applicable regulations, revenue rulings, revenue procedures, or other appropriate guidance.

(c) Exception to penalty. The section 6695(g) penalty will not be applied with respect to a particular income tax return or claim for refund if the preparer can demonstrate to the satisfaction of the IRS that, considering all the facts and circumstances, the preparer's normal office procedures are reasonably designed and routinely followed to ensure compliance with the due diligence requirements of paragraph (b) of this section, and the failure to meet the due diligence requirements of paragraph (b) of this section with respect to the particular return or claim for refund was isolated and inadvertent.

(d) Effective date. (1) In general. This section applies to income tax returns and claims for refund for taxable years beginning after December 31, 1996. This section expires on December 21, 2001. For the applicable Eligibility Checklist, see paragraph (d)(2) of this section.


(ii) For the 1998 taxable year. For taxable year 1998 the applicable Checklist is either—

(A) The Checklist published in Notice 97–65 (1997–51 I.R.B. 14) December 22, 1997, modified however, by applying the figures $10,030, $26,473, $30,095, and $2,300 in place of $9,770, $25,760, $29,290, and $2,250, respectively, each time these figures appear on the 1997 Checklist; or

(B) Form 8867, Paid Preparer's Earned Income Credit Checklist.

(iii) For taxable years after 1998. For taxable years beginning after December 31, 1998, the applicable Eligibility Checklist is the Eligibility Checklist contained in Form 8867, Paid Preparer's Earned Income Credit Checklist, or such other form as may be prescribed by the IRS.

PART 602—OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT

Par. 3. The authority citation for part 602 continues to read as follows:


Par. 4. In §602.101, paragraph (c) is amended by adding the following entry in numerical order to the table to read as follows:

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<th>§602.101 OMB Control numbers.</th>
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<td>*(c) ** ** ** ** ** ** ** **</td>
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<th>Current OMB control No.</th>
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<td>1.6695–2T</td>
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David S. Mader,
Acting Deputy Commissioner of Internal Revenue.

Approved: December 9, 1998.

Donald C. Lubick,
Assistant Secretary of the Treasury.

[FR Doc. 98–33343 Filed 12–18–98; 8:45 am]

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ARCHITECTURAL AND TRANSPORTATION BARRIERS COMPLIANCE BOARD

36 CFR Part 1152

Employee Responsibilities and Conduct

AGENCY: Architectural and Transportation Barriers Compliance Board.

ACTION: Final rule.

SUMMARY: The Architectural and Transportation Barriers Compliance Board (Access Board) is removing its regulations on the ethical conduct of employees and financial disclosure requirements as unnecessary and obsolete. The regulations have been superseded by government-wide standards of ethical conduct and financial disclosure requirements for executive branch employees.

DATES: This final rule is effective January 20, 1999.

FOR FURTHER INFORMATION CONTACT: James Raggio, Office of General Counsel, Architectural and Transportation Barriers Compliance Board, 1331 F Street, NW., suite 1000, Washington, DC, 20004–1111. Telephone number (202) 272–5434 (Voice); (202) 272–5449 (TTY).

SUPPLEMENTARY INFORMATION: Pursuant to section 201 of Executive Order 12674 (April 12, 1989), as modified by Executive Order 12731 (October 17, 1990), the Office of Government Ethics (OGE) issued government-wide standards of ethical conduct for employees of the executive branch (5 CFR part 2635). These standards, which became effective on February 3, 1993, superseded the Access Board's regulations on ethical conduct in 36 CFR part 1152, subparts A, B, and C. OGE also issued regulations on financial disclosure requirements for employees of the executive branch. These regulations, which became effective on October 5, 1992, superseded the Access Board's regulations on financial disclosure requirements in 36 CFR part 1152, subpart D. The regulations in 36 CFR part 1152 are unnecessary and obsolete, and therefore are being removed.

This rule relates to agency management and personnel and the provisions of the Administrative Procedures Act regarding notice of proposed rulemaking do not apply. See 5 U.S.C. 553(a)(2).

List of Subjects in 36 CFR Part 1152

Conflict of interests.