



June 23, 2016

VIA ELECTRONIC SUBMISSION

The Honorable William J. Wilkins
Chief Counsel
Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington, DC 20224
Notice.Comments@irs.counsel.treas.gov

Re: IRS Proposed Rulemaking Excise Tax; Tractors, Trailers, Trucks, and Tires; Definition of Highway Vehicle, REG-103380-05

Dear Mr. Wilkins:

The Office of Advocacy (Advocacy) offers the following comment to the Internal Revenue Service (IRS) in response to the above-referenced proposed rules issued on April 18, 2016.¹ The proposed regulations would update the IRS requirements related to the Highway Revenue Act of 1982. Because the IRS certified that the collection of information in the proposed regulations will not have a significant economic impact on a substantial number of small entities, and because the statement in support of the certification lacks a factual basis, Advocacy recommends that the IRS publish for public comment either a supplemental Regulatory Flexibility Act (RFA) assessment with a valid factual basis or an Initial Regulatory Flexibility Analysis (IRFA). Advocacy also encourages the IRS to extend the comment period for the proposed regulations by 60 days.

The Office of Advocacy

Congress established Advocacy under Pub. L. 94-305 to represent the views of small entities before Federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA); as such the views expressed by Advocacy do not necessarily

¹ 81 Fed. Reg. 18544.



reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),² as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),³ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives. In addition, section 241 of SBREFA specifically applies the RFA to all IRS interpretative rules that impose on small entities a collection of information requirement.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.⁴ The agency must include, in any explanation or discussion accompanying the final rule's publication in the Federal Register, the agency's response to these written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.⁵

Background

On April 18, 2016, the IRS issued proposed regulations relating to the excise taxes imposed on the sale of highway tractors, trailers, trucks, and tires, the use of heavy vehicles on the highway, and the definition of "highway vehicle."⁶ The proposed regulations would update the IRS rules implementing the Highway Revenue Act of 1982.⁷ The Highway Revenue Act imposes a 12 percent tax on the first retail sale of some highway-type tractors and chassis and bodies for highway-type trucks and trailers.⁸ The proposed rules would revise the definition of "highway vehicle" and establish recordkeeping requirements for gross vehicle weight (GVW) and gross combined weight (GCW).⁹ The proposed regulations also provide model certificates to be used to establish tax-free status with respect to certain sales of taxable vehicles and taxable tires.¹⁰

Some noteworthy requirements that the proposal would add or revise include the following:

- The requirement that a retail exemption certificate must be completed on an order-by-order basis.¹¹ To qualify for the nontaxable treatment on the resale or long-term leasing of a highway vehicle, the IRS requires sellers to complete a retail exemption certificate. Currently, the IRS permits a single certificate to cover multiple orders occurring over time between the same seller and purchaser (a blanket certificate). The proposed regulations would delete the option of using a blanket certificate.

² 5 U.S.C. §601 et seq.

³ Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. §601 et seq.).

⁴ Small Business Jobs Act of 2010 (PL 111-240) § 1601.

⁵ Id.

⁶ 81 Fed. Reg. 18544.

⁷ 5 U.S.C. §4481.

⁸ Id.

⁹ 81 Fed. Reg. 18544.

¹⁰ Id.

¹¹ Id. at 18549.

- The requirement that all retail exemption certificates related to the sale or lease of a body would need a body identification number.¹²
- The requirement that a retailer keep the GVW records for all chassis, bodies, and vehicles it sells, and the GCW records for all tractors it sells, without regard to whether the retailer is paying the excise tax on those.¹³ Under the current rules, a seller is required to maintain only a record of a vehicle's GVW only with respect to those vehicles excluded from the excise tax.
- The requirement for a new form exemption certificate for the completion of an incomplete chassis cab as a truck.¹⁴ Under the current rules, an incomplete chassis cab that is not equipped with certain specified features will be treated as a truck if the purchaser certifies in writing that the vehicle will not be equipped for use as a tractor. The rules currently do not require written certification to be in a specific form. The proposed regulations would mandate a form certificate that the purchaser must provide to the seller.

The IRS states that the proposal's new and revised requirements reflect legislative changes and court decisions.¹⁵ However, the proposed regulations do not specify what legislative changes and court decisions prompted the IRS to contemplate the changes, and the IRS does not describe why it is proposing those changes.

In addition, in the Special Analysis portion of the proposed rule, the IRS certifies that the collection of information in the proposed regulations will not have a significant economic impact on a substantial number of small entities. The IRS bases this certification on the observation that "the time required to secure and maintain the required information is minimal (estimated at an average of 15 minutes) and taxpayers would ordinarily already collect and retain much of this information for other business purposes such as accounting, insurance, and marketing."¹⁶

Small Business are Concerned that the Proposed Rules Establish an Unattainable Standard, Underestimate the Burden Imposed by the Proposal, and Are Unclear about the Purposes of the Proposal

Small business owners and representatives from the highway vehicle retail and manufacturing industries have been in contact with Advocacy to express concern about the proposed rules. These small business owners report that the IRS underestimates the collection of information and increased paperwork burden that the proposed regulations would impose.

As described above, the proposed rules would mandate a number of new paperwork and record keeping requirements which small business owners contend would far exceed the average of fifteen minutes that the IRS estimates in the Special Analysis portion of the proposed rules. For

¹² Id.

¹³ Id. at 18551.

¹⁴ Id. at 18550.

¹⁵ Id. at 18545.

¹⁶ Id. at 18547.

example, the proposed regulations would require body identification numbers for retail exemption certificates related to the sale or lease of a body. However, the proposed regulations do not define what constitutes body identification numbers, and there is currently no industry standard for assigning body identification numbers. Thus, the proposed regulations would create a new standard that does not currently exist. According to small business stakeholders, this one new requirement would create a paperwork burden that exceeds the paperwork burden estimated by the IRS.

As another example, the proposed rules would eliminate the option of using blanket retail exemption certificates. One trade association with small business members submitted a public comment that this change would “dramatically increase the cost and time burden on everyone involved: the buyer, the manufacturer, and the IRS.”¹⁷ The comment letter provides the following illustration: “One manufacturer currently uses 37 resale certificates to cover a 3-year period – one for each purchasing entity; if the proposed rule was in effect, the manufacturer would need to prepare over 111,000 resale certificates, approximately a 300,000 percent increase.”¹⁸

Small business owners and their representatives informed Advocacy that due to the costs associated with the increased burdens of the proposal, the proposed rule could ultimately impact the ability to hire and retain employees. However, the IRS does not consider and describe this in the proposal.

In addition, small business owners stated to Advocacy that the purpose for the new and revised requirements is unclear because the proposed regulations do not discuss why the IRS is contemplating the changes. As the underlying rationale for the new requirements is unstated, small business stakeholders reported that they are unable to consider and potentially recommend less burdensome alternatives that would accomplish the same regulatory purpose of the IRS proposal. For this reason, small business owners and representatives expressed hope to Advocacy that the IRS would extend the period to comment on the proposal so that they may have more time to weigh the changes proposed in this rulemaking, and to propose alternatives.

The Proposed Rules Do Not Provide a Factual Basis for Certification under the RFA

In this case, the IRS has certified that the proposed regulations will not have a significant economic impact on a substantial number of small entities. Under section 605(b) of the RFA an agency must provide a factual basis in support of the certification. At a minimum the factual basis should include: (1) identification of the regulated small entities based on the North American Industry Classification System; (2) the estimated number of regulated small entities; (3) a description of the economic impact of the rule on small entities; and (4) an explanation of why either the number of small entities is not substantial and/or the economic impact is not significant under the RFA.¹⁹

¹⁷ Comments of the Truck Trailer Manufacturers Association, Docket ID: IRS-2016-0013 (May 20, 2016), [available at www.regulations.gov](http://www.regulations.gov).

¹⁸ *Id.*

¹⁹ 5 USC § 605(b).

In the proposed regulations, the IRS provides a one-sentence factual basis to support its certification by stating that “the time required to secure and maintain the required information is minimal (estimated at an average of 15 minutes) and taxpayers would ordinarily already collect and retain much of this information for other business purposes such as accounting, insurance, and marketing.”²⁰ This statement does not identify or estimate the number of regulated small entities. Moreover, based on input to Advocacy from small businesses, the IRS explanation regarding the proposed rule’s burden is inaccurate. Instead, small business owners and representatives reported to Advocacy that the proposed rules, if finalized, would impose a significant paperwork and economic burden which far exceeds the IRS estimate. For these reasons, the factual basis contained in the proposal appears to be invalid.

If an agency cannot properly certify the proposed rule, then an IRFA must be developed and published in the Federal Register with a period for notice and comment. An IRFA must contain: (1) a description of the reasons why the regulatory action is being taken; (2) the objectives and legal basis for the proposed regulation; (3) a description and estimated number of regulated small entities; (4) a description and estimate of compliance requirements, including any differential for different categories of small entities; (5) identification of duplication, overlap, and conflict with other rules and regulations; and (6) a description of significant alternatives to the rule.²¹

Recommendation

Advocacy recommends that the IRS publish for public comment either a supplemental RFA assessment with a valid factual basis in support of a certification or an IRFA before proceeding with this rulemaking. By publishing for comment either a supplemental RFA assessment or an IRFA, small businesses will have adequate data to assess the amount of paperwork burden that may be generated by the proposed rules. Moreover, the IRS will gain valuable insight into the effects of the proposal.

In addition, in its supplemental RFA assessment or IRFA, the IRS should lay out a clear explanation regarding its underlying rationale for proposing new or revised requirements. This will provide the small business stakeholders with an opportunity to better evaluate the proposal and consider less burdensome regulatory alternatives to recommend to the IRS. Finally, Advocacy encourages extending the comment period by an additional 60 days to allow small businesses more time to consider the impact of the proposed regulations.

²⁰ 81 Fed. Reg. 18544.

²¹ 5 USC § 603.

Advocacy recommends that the IRS adopt these recommendations. If you have any questions or require additional information please contact me or Assistant Chief Counsel Dillon Taylor at (202) 401-9787 or by email at Dillon.Taylor@sba.gov.

Sincerely,



The Honorable Darryl L. DePriest
Chief Counsel
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U.S. Small Business Administration



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Copy to: The Honorable Howard Shelanski
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