

**I NEED A LICENSE TO CUT YOUR HAIR
BUT NOT TO PREPARE YOUR TAXES: A
CALL FOR PAID TAX RETURN PREPARER
REGULATIONS**

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INTRODUCTION

March had come and gone, and Patricia Taft, a single mother living off of minimum wage, still needed to prepare her tax return. A co-worker recommended Robert Parsons. When Patricia spoke to Robert, he said all the things that a single mother living from paycheck to paycheck wanted to hear. Robert said, "I'll get you the biggest refund possible, and you don't have to pay me upfront." Patricia hired Robert to prepare her tax return and agreed to pay Robert a percentage of her tax refund amount.

A short while later, Patricia got her refund check, and it was the biggest one she had ever received. Robert had lived up to his guarantee. However, Patricia also got a letter from the IRS notifying her that her tax return was being audited. Patricia did not know what to do. All she knew was that the IRS was holding her responsible for the error-laden return that Robert had prepared. Why was she responsible for the return that Robert had prepared? Though it may seem unfair in Patricia's situation, taxpayers are legally responsible for their tax return, even when someone else prepares it.¹

Currently in the United States, Paid Tax Return Preparers (PTPs) file approximately ninety million tax returns each year.² Furthermore, about 60% of PTPs are not subject to regulation or oversight.³ While some PTPs are well educated and provide quality services, others are simply not qualified to be preparing tax returns for other taxpayers. As a result, the IRS recently began an effort "to achieve a minimum level of competency across the federal tax return preparer community."⁴

¹ I.R.S. Fact Sheet FS-2012-5 (Jan. 2012).

² Matthew R. Madara, *IRS Officials Call for Authority to Regulate Preparers*, 144 TAX NOTES 921, 921 (2014).

³ Press Release, I.R.S., Comm'r Koskinen on the Voluntary Return Preparer Education Program (June 26, 2014) [hereinafter Koskinen], <http://www.irs.gov/uac/Newsroom/Commissioner-Koskinen-on-the-Voluntary-Return-Preparer-Education-Program> [<http://perma.cc/94BG-JRD4>].

⁴ *Id.*

As part of this effort, the IRS reassessed its interpretation of 31 U.S.C. § 330 and determined that representatives who practice before the IRS also included PTPs.⁵ Because the IRS already had the statutory authority to regulate these representatives, the IRS then concluded that it had the statutory authority to regulate PTPs. As a result, the IRS issued new mandatory regulations in 2011 that required PTPs to take various steps, such as passing an initial examination and taking continuous learning courses, to become a certified tax return preparer.⁶ Similarly, various states, such as Oregon and Maryland, have also enacted legislation that regulates PTPs.⁷

However, not everyone agrees that PTPs should be subject to regulation or oversight. Sabina Loving and two other independent tax return preparers filed suit against the IRS alleging that the IRS had exceeded its statutory authority when it issued the mandatory PTP regulations. In January 2013, the district court, after interpreting 31 U.S.C. § 330, held that the IRS did not have the statutory authority to regulate PTPs.⁸ The IRS appealed the district court's ruling, but the D.C. Circuit Court of Appeals affirmed the ruling in February 2014.⁹

While affirming the district court's ruling, the circuit court noted that regulating PTPs was a good policy, but the IRS would need Congress or the President to enact legislation giving the IRS the requisite statutory authority.¹⁰ Since the unfavorable *Loving* decision, the IRS has not only lobbied for the requisite statutory authority, but it also implemented a Voluntary Return Preparer Program in June 2014.¹¹

While not mandatory like its 2011 counterpart, the voluntary program encourages PTPs to register with the IRS.¹² The registered PTPs then take courses on federal tax laws, ethics, and

⁵ See *infra* notes 16-19 and accompanying text; see also 31 U.S.C. § 330 (2012).

⁶ See *infra* note 20 and accompanying text.

⁷ See *infra* Part I.B.

⁸ *Loving v. IRS*, 917 F. Supp. 2d 67, 80-81 (D.D.C. 2013).

⁹ *Loving v. IRS*, 742 F.3d 1013, 1022 (D.C. Cir. 2014).

¹⁰ *Id.*

¹¹ See *infra* note 32 and accompanying text.

¹² See *infra* notes 32-37 and accompanying text.

filing tax returns.¹³ Unlike the 2011 mandatory regulations, the voluntary program does not require PTPs to pass a certification exam.¹⁴ Upon completing the coursework and fulfilling a few other requirements, the registered PTP would then receive a certificate of completion.¹⁵

However, since these drastic landscape changes, there has been very little discussion as to whether the IRS should have the statutory authority to regulate PTPs, and if so, how the IRS should regulate PTPs. At the same time, because of the recent *Loving* decision and the IRS implementing its new voluntary PTP program, the issue of PTP regulation has come to the forefront of tax law discussions with proponents on both sides of the issue. This Comment is the first to examine the PTP regulations implemented by the IRS, including both the current voluntary program and invalidated mandatory regulations, as well as the PTP regulations enacted by Oregon, New York, Maryland, and California. Based on the examination of these programs and regulations, this Comment offers a solution in the form of a model PTP regulatory framework.

Ultimately, Patricia Taft's unfortunate situation could have been prevented if the IRS had the statutory authority to regulate PTPs. The authority to regulate PTPs would have allowed the IRS to require that Robert Parsons take courses on federal tax laws and filing tax returns. Moreover, Robert would have been required to pass a certification exam before becoming a certified PTP. As a result, Robert would have been a competent PTP, and he would have been less likely to file an error-laden tax return for Patricia. All things considered, Patricia would not have been subject to a dreaded IRS audit.

Part I of this Comment will provide the relevant background on the IRS and its ongoing crusade to regulate PTPs. While the D.C. Circuit Court of Appeals' ruling in *Loving* will be discussed, it will not be analyzed with regard to whether the decision was correct. Additionally, this Part will discuss the PTP regulatory programs that have been proposed by the IRS. Such discussion

¹³ See *infra* note 36 and accompanying text.

¹⁴ See *infra* notes 36-37 and accompanying text.

¹⁵ See *infra* note 35 and accompanying text.

will describe both the mandatory program, which was invalidated by *Loving*, and the more recent voluntary program. PTP regulations that have been enacted in various states, such as California, Maryland, New York, and Oregon, will also be discussed.

Part II will explain why PTP regulations are needed in general. Part III will argue that the IRS should be given the statutory authority to regulate PTPs, but that the IRS should allow states to develop and enforce their own PTP regulations. Lastly, Part IV will provide a solution by proposing a regulatory framework that is mindful of costs and undue burden on PTPs while also providing the taxpayer with necessary consumer protection.

I. BACKGROUND

Currently, there are both federal and state regulations that apply to PTPs. The only PTP regulations on the federal level are in the form of the voluntary regulatory program that the IRS implemented to replace the mandatory federal regulations that were invalidated by the federal court system. On the state level, California, Maryland, Oregon, and New York are the only states that have implemented PTP regulations.

A. Federal PTP Regulations

After years of research and planning, the IRS decided to move forward with implementing regulations that set forth mandatory requirements for PTPs.¹⁶ In Treasury Department Circular 230, the IRS expanded the definition of practitioners¹⁷ in 31 C.F.R. § 10 to include registered tax return preparers.¹⁸

¹⁶ See I.R.S. Notice 2011-6, 2011-3 I.R.B. 315; I.R.S. Fact Sheet FS-2011-12 (Nov. 2011); Treas. Dep't Circular No. 230 (Rev. 8-2011), § 10 (June 3, 2011).

¹⁷ “*Practitioner* means any individual described in paragraphs (a), (b), (c), (d), (e), or (f) of § 10.3.” Treas. Dep't Circular No. 230, § 10.2, at 6. The aforementioned § 10.3(f) defines registered tax return preparer as “[a]ny individual who is designated as a registered tax return preparer pursuant to § 10.4(c)” and also sets forth the limitations and responsibilities of practicing before the IRS as a registered tax return preparer. *Id.* § 10.3, at 7.

¹⁸ I.R.S. Notice 2011-6, 2011-3 I.R.B. 315.

Because the IRS already had the statutory authority to regulate practitioners, the IRS believed the expanded practitioner definition now gave it the authority to regulate tax return preparers.¹⁹

As a result, the IRS proposed regulations that required individuals to “pass a registered tax return preparer minimum competency examination,” complete fifteen hours of continuous learning on an annual basis, and be subjected to the duties and restrictions contained in the ethics and conduct provisions of Circular 230.²⁰

However, Sabina Loving and other tax professionals believed that the IRS exceeded its statutory authority when it expanded the definition of “practitioner” and imposed registered tax return preparer regulations.²¹ Consequently, they brought suit against the IRS.²²

In *Loving*, the D.C. District Court had to determine whether 31 U.S.C. § 330 was “ambiguous as to whether tax-return preparers are ‘representatives’ who ‘practice’ before the IRS.”²³ After interpreting the statute for itself, the district court “conclude[d] that together the statutory text and context unambiguously foreclose[d] the IRS’s interpretation of 31 U.S.C. § 330” and also determined that none of the IRS’s other nontextual arguments could overcome the court’s conclusion that the statute was unambiguous.²⁴ In other words, “In the land of statutory interpretation, statutory text is king.”²⁵

Ultimately, the D.C. District Court granted a declaratory judgment stating that the IRS “lack[ed] statutory authority to promulgate or enforce the new regulatory scheme for ‘registered tax return preparers’ brought under Circular 230 by 76 Fed. Reg. 32,286”; additionally, the district court issued an injunction that

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Loving v. IRS*, 917 F. Supp. 2d 67, 69 (D.D.C. 2013).

²² *See id.* at 67.

²³ *Id.* at 73.

²⁴ *Id.* at 79.

²⁵ *Id.*

permanently enjoined the IRS “from enforcing this IRS registration scheme against tax-return preparers.”²⁶

After the district court’s unfavorable ruling, the IRS appealed to the D.C. Circuit Court of Appeals.²⁷ On appeal, the court of appeals had to determine “whether the IRS’s authority to ‘regulate the practice of representatives of persons before the Department of the Treasury’ encompasses authority to regulate tax-return preparers.”²⁸

After “employ[ing] all the tools of statutory interpretation, including text, structure, purpose, and legislative history,” the court of appeals determined that “at least six considerations foreclose[d] the IRS’s interpretation of the statute.”²⁹ Therefore, the D.C. Circuit Court of Appeals affirmed the D.C. District Court’s judgment, while “agree[ing] with the District Court that the IRS’s statutory authority under Section 330 cannot be stretched so broadly as to encompass authority to regulate tax-return preparers.”³⁰ Although the court of appeals ruled against the IRS, the court stated, “It might be that allowing the IRS to regulate tax-return preparers more stringently would be wise as a policy matter. But that is a decision for Congress and the President to make if they wish by enacting new legislation.”³¹

After the unfavorable court rulings, the IRS replaced its mandatory registered tax return preparer regulations with “a new, voluntary Annual Filing Season Program designed to encourage tax return preparers who are not attorneys, certified public accountants (CPAs), or enrolled agents (EAs) to complete continuing education courses for the purpose of increasing their knowledge of the law relevant to federal tax returns.”³² The new program “does not restrict any individual from preparing and signing tax returns and claims for refund nor does it change the requirement that paid tax return preparers must obtain a

²⁶ *Id.* at 80.

²⁷ *Loving v. IRS*, 742 F.3d 1013 (D.C. Cir. 2014).

²⁸ *Id.* at 1016 (quoting 31 U.S.C. § 330(a)(1) (2012)).

²⁹ *Id.* (quoting *Pharm. Research & Mfrs. of Am. v. Thompson*, 251 F.3d 219, 224 (D.C. Cir. 2001)).

³⁰ *Id.* at 1015.

³¹ *Id.* at 1022.

³² Rev. Proc. 2014-42, 2014-2 C.B. 192.

Preparer Tax Identification Number (PTIN).”³³ Furthermore, the new program does not affect enrolled actuaries or enrolled retirement plan agents.³⁴ To receive an Annual Filing Season Program Record of Completion, applicants must meet all requirements and submit an application.³⁵

To meet the requirements of the Annual Filing Season Program, the applicant must (1) “be eligible for and obtain a PTIN,” (2) “successfully complete” an IRS-approved annual federal tax filing refresher course for the application year, (3) have completed the required hours of IRS-approved continuous education during the year prior to the application year, and (4) not be classified as an “ineligible individual.”³⁶ The Annual Filing Season Program Record of Completion expires on December 31 of each year and is only effective for tax returns that are prepared and signed in the same calendar year.³⁷ Because the Annual Filing Season Program was implemented in June 2014, the necessary data to evaluate a full cycle of the program was not generated until the beginning of 2016.

B. State PTP Regulations

Currently, only four states—California, Maryland, New York, and Oregon—have PTP regulations. Oregon became the first state to enact PTP regulations when its 1973 Legislative Assembly created the Oregon State Board of Tax Practitioners “for the purpose of protecting the consumer by ensuring that Oregon tax professionals are competent and ethical in their professional activities.”³⁸

Later in the 1970s, California became the second state to enact PTP regulations. California adopted its regulations “to enable consumers to easily identify credible tax preparers who are

³³ *Id.*; see Treas. Reg. § 1.6109-2 (2012).

³⁴ Rev. Proc. 2014-42, 2014-42 C.B. 192.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Board of Tax Practitioners—About Us*, OREGON.GOV, http://www.oregon.gov/OBTP/Pages/about_us.aspx [<http://perma.cc/D5BP-SU2D>] (last visited Mar. 21, 2016).

bonded and registered, to ensure tax preparers receive adequate education . . . , to prohibit tax preparers from making fraudulent, untrue, or misleading representations, and . . . to register tax preparers and ensure” that they are compliant with all PTP requirements.³⁹

Maryland followed suit when it enacted the Maryland Individual Tax Preparers Act in 2008. The driving force behind Maryland’s act was “establish[ing] a registration program to ensure that qualified individuals provide individual tax preparation services.”⁴⁰

In 2013, New York became the most recent state to enact PTP regulations. Similar to the other states, New York’s Tax Return Preparer Requirements protect individuals by requiring PTPs to meet certain standards of eligibility.⁴¹ New York’s legislation also authorizes New York’s Commissioner of Taxation and Finance to deny a tax return preparer’s registration under certain circumstances⁴² and to discipline tax return preparers for incompetence, noncompliance, and fraud.⁴³

While all four states regulate PTPs, each state regulates PTP in its own distinct manner, all of which are different yet similar. To aid in the comparison of the state PTP regulations, this Part will compare and contrast them within the following categories: (1) Applicability and Exemptions, (2) Initial Registration Requirements, (3) Renewal Registration Requirements, and (4) Ethics and Conduct.

1. Applicability and Exemptions

Under the Oregon regulations, a PTP must be licensed as a tax consultant or a tax preparer.⁴⁴ A tax consultant license allows an individual to “prepare or advise or assist in the preparation of personal income tax returns for another” in exchange for “valuable

³⁹ CAL. BUS. & PROF. CODE § 22251.1 (West Supp. 2016).

⁴⁰ MD. CODE ANN., BUS. OCC. & PROF. § 21-102 (LexisNexis 2010).

⁴¹ N.Y. COMP. CODES R. & REGS. tit. 20, § 2600-2 (2013).

⁴² *Id.* § 2600-2.1.

⁴³ *Id.* § 2600-3.1.

⁴⁴ OR. REV. STAT. § 673.615 (2013).

consideration.”⁴⁵ A tax preparer license also allows an individual to “prepare or advise or assist in the preparation of tax returns only under the supervision of a tax consultant,” an attorney, or licensed CPA.⁴⁶

However, the following individuals are exempt from Oregon’s tax consultant and tax preparer licensing requirement: (1) a full-time, permanent employee that, as part of his job duties, prepares income tax returns for the employer’s business; (2) an attorney rendering legal services; (3) any fiduciary or regular employee working on behalf of the fiduciary estate and certain related parties; (4) a CPA with an active license from any state, a public accountant holding an Oregon permit, or a “public accounting firm registered in any state”; (5) an employee of the immediately aforementioned accountants or accounting firms; and (6) local, state, or federal government employees who are performing their official duties.⁴⁷

In California, a “tax preparer” is any individual or business entity who—in exchange “for a fee or for other consideration”—assists with the preparation of tax returns, directly prepares tax returns, or “assumes final responsibility” for all work pertaining to a completed tax return.⁴⁸ Furthermore, all tax preparers are required to register with the California Tax Education Council.⁴⁹

California exempts (1) individuals licensed by the California Board of Accountancy, (2) active members of the California Bar, (3) certain trust companies and businesses, (4) a financial institution whose tax preparation activities are regulated by the state or federal government, (5) individuals enrolled to practice before the IRS, (6) employees of an individual who is already exempt,⁵⁰ and (7) certain employees of business entities that are registered as tax preparers.⁵¹ Additionally, any employees who, as part of their normal job responsibilities, prepare their employer’s

⁴⁵ *Id.* § 673.615(1).

⁴⁶ *Id.* § 673.615(2).

⁴⁷ *Id.* § 673.610.

⁴⁸ CAL. BUS. & PROF. CODE § 22251(a)(1)(A) (West Supp. 2016).

⁴⁹ *Id.* § 22253(a)(1).

⁵⁰ *Id.* § 22258. This exemption applies so long as the employees are only preparing returns and not signing said returns. *Id.* §§ 22258(a)(6), 22258(b)(1).

⁵¹ *Id.* § 22258.

business-related tax returns are not considered tax preparers⁵² and are thus exempt from the tax preparer registration requirements.

The Maryland Individual Tax Preparers Act requires any person providing “individual tax preparation services” to register with the Maryland Board of Individual Tax Preparers before rendering any services.⁵³ Moreover, the act defines tax preparation services as “prepar[ing], advis[ing] or assist[ing] in the preparation of, or assum[ing] final responsibility for another person’s preparation” of a tax return in exchange for “valuable consideration.”⁵⁴

Like Oregon and California, Maryland also exempts certain individuals from its PTP regulations. Specifically, Maryland exempts (1) a CPA with a valid license from any state, (2) an attorney admitted to practice in any state, (3) a local, state, or federal government employee performing her official duties, (4) individuals who are enrolled to practice before the IRS, and (5) individuals who are performing their official duties as employees or assistants to a registered tax preparer or an exempt individual.⁵⁵

Finally, New York requires that a tax return preparer, or “an individual who prepares a substantial portion of any [tax] return for compensation,”⁵⁶ must register with the New York Department of Taxation and Finance.⁵⁷ New York excludes “attorneys, public accountants, enrolled agents,” CPAs, and employees working under the supervision of exempted individuals.⁵⁸ Additionally, New York excludes volunteer preparers, employees who prepare the income tax returns of their employer’s business, and employees who only perform clerical duties for their tax return preparer employer.⁵⁹

⁵² *Id.* §§ 22251(a)(2), 22258.

⁵³ MD. CODE ANN., BUS. OCC. & PROF. § 21-301 (LexisNexis 2010).

⁵⁴ *Id.* § 21-101.

⁵⁵ *Id.* § 21-102.

⁵⁶ N.Y. TAX LAW § 32(a)(14) (McKinney Supp. 2011).

⁵⁷ *Id.* § 32(b)(1).

⁵⁸ *Id.* § 32(a)(14).

⁵⁹ *Id.*

2. Initial Registration Requirements

In order to be eligible for a tax consultant or tax preparer license in Oregon, the PTP must be at least eighteen years old, have a high school diploma or its equivalent, and possess a valid PTIN issued by the IRS.⁶⁰ The PTP must also have “successfully completed at least 80 hours in basic personal income tax law, theory and practice” at an approved educational institution.⁶¹ Additionally, the PTP must pass an examination covering Oregon and federal tax laws to become a licensed tax preparer.⁶² While a tax consultant must also pass an examination, the tax consultant examination “must be of a more exacting nature and require higher standards of knowledge of personal income tax law, theory and practice than the examination for a tax preparer’s license.”⁶³ Furthermore, a licensed tax consultant also needs at least 1,100 hours of tax preparation working experience in two of the last five years; if the minimum hours are not met, the Oregon Board of Tax Practitioners may consider other factors, such as number of years employed and number of tax returns prepared, to satisfy this requirement.⁶⁴ Likewise, in certain situations, the Oregon Board of Tax Practitioners may allow a PTP to fulfill the tax education and tax preparation work experience requirements by substituting education for experience or vice versa.⁶⁵

Oregon also offers reciprocity to PTPs from other states. If the PTP is registered with another state and also is enrolled to practice before the IRS, the out-of-state PTP only has to pass Oregon’s competency exam to become licensed in the state.⁶⁶

To become a registered tax preparer in California, a PTP must be at least eighteen years old and maintain a \$5,000 surety bond.⁶⁷ A PTP must also complete sixty hours of instruction in

⁶⁰ OR. REV. STAT. § 673.625(1) (2013).

⁶¹ *Id.* § 673.625(1)(c).

⁶² *Id.* § 673.625(2).

⁶³ *Id.* § 673.625(3)(b).

⁶⁴ *Id.* § 673.625(3)(a).

⁶⁵ *Id.* § 673.625(4).

⁶⁶ *Id.* § 673.637.

⁶⁷ CAL. BUS. & PROF. CODE § 22250(a) (West Supp. 2016). The surety bond “shall be for the benefit of any person or persons damaged by any fraud, dishonesty,

“basic personal income tax law, theory, and practice” during the eighteen months prior to registration.⁶⁸ Of the sixty hours of tax instruction, forty-five hours must be focused on federal tax laws, while the remaining fifteen hours must be focused on California tax law.⁶⁹ In some cases, a PTP who has at least two years of recent tax preparation work experience may be allowed to fulfill the tax instruction requirement by using his or her work experience as a substitute for the hours of tax instruction.⁷⁰

To qualify for tax preparer registration in Maryland, a PTP must be at least eighteen years old with a high school diploma or its equivalent; additionally, the PTP must “be of good character and reputation.”⁷¹ Furthermore, the PTP must also pass a competency examination.⁷²

To become a registered tax preparer in New York, a PTP must be at least eighteen years old and possess a high school diploma or its equivalent.⁷³ In addition to complying with New York’s requirements, a PTP must also fulfill all applicable IRS tax return preparer requirements.⁷⁴ New York also requires that “commercial tax return preparer[s]” pass an IRS competency examination, if one is required, and pass the New York competency examination.⁷⁵ Currently, New York does not require tax return preparers who are not commercial tax return preparers to pass any of the competency examinations, but the statute

misstatement, misrepresentation, deceit, or any unlawful acts or omissions” by a PTP. *Id.* § 22250(b).

⁶⁸ *Id.* § 22255(a).

⁶⁹ *Id.*

⁷⁰ *Id.* § 22255(c).

⁷¹ MD. CODE ANN., BUS. OCC. & PROF. § 21-302(b) (LexisNexis 2010).

⁷² *Id.* § 21-302(e). Maryland’s competency examination is administered at least twice per year at a time and place deemed suitable by the Maryland Board of Individual Tax Preparers. *Id.* § 21-304(b).

⁷³ N.Y. COMP. CODES R. & REGS. tit. 20, § 2600-2.1(j) (2013).

⁷⁴ *Id.* § 2600-2.1(h).

⁷⁵ *Id.* § 2600-2.3(a). A “commercial tax return preparer” is any individual who “(A) prepared ten or more returns for compensation in the preceding calendar year and will prepare at least one return for compensation during the current calendar year; or (B) prepared fewer than ten returns in the preceding calendar year but will prepare ten or more returns for the current calendar year.” N.Y. TAX LAW § 32(a)(3) (McKinney Supp. 2011).

allows New York to impose the competency examination requirement on these other tax preparers at a later date.⁷⁶

3. Renewal Registration Requirements

Under the Oregon regulations, licensed tax consultants and tax preparers have to renew their licenses each year.⁷⁷ In order to renew a tax consultant or tax preparer license, one must complete thirty hours of continuing education on an annual basis.⁷⁸ However, this requirement can be waived if an individual can show he was unable to comply with the requirement “because of unusual or extenuating circumstances.”⁷⁹

California requires tax preparers to renew their registrations every year.⁸⁰ In order to renew registration, the tax preparer must demonstrate that he has completed at least twenty hours of continuing education within the past year, and the continuing education must include fifteen hours of instruction on federal taxation and five hours of instruction on California taxation.⁸¹ Additionally, the tax preparer must provide evidence that he has maintained the \$5,000 surety bond that was required as part of the initial registration.⁸²

On the other hand, a Maryland tax preparer registration “expires on the second December 31 that comes after the effective date of the registration.”⁸³ In order to renew a tax preparer registration, the tax preparer must complete at least sixteen hours of continuing education every two years.⁸⁴ The objective of Maryland’s continuing education requirement is to ensure that tax preparers are knowledgeable about changes to federal and Maryland tax laws.⁸⁵ Additionally, the Maryland Individual Tax

⁷⁶ N.Y. COMP. CODES R. & REGS. tit. 20, § 2600-2.3(b) (2013).

⁷⁷ OR. REV. STAT. § 673.645(1) (2013).

⁷⁸ *Id.* § 673.655(1).

⁷⁹ *Id.* § 673.655(2).

⁸⁰ CAL. BUS. & PROF. CODE § 22251.3(c) (West Supp. 2016).

⁸¹ *Id.* § 22255(b).

⁸² *Id.*

⁸³ MD. CODE ANN., BUS. OCC. & PROF. § 21-308(a) (LexisNexis 2010).

⁸⁴ *Id.* § 21-309(a)(2).

⁸⁵ *See id.* § 21-309(b)(1).

Preparer Act ensures that continuing education opportunities are provided at “reasonable intervals throughout” Maryland.⁸⁶

To maintain a New York registration, a PTP must complete annual continuous education.⁸⁷ Like the competency exam requirement, New York’s continuous education requirement currently applies to commercial tax return preparers only, but the New York Department of Taxation and Finance has the authority to impose continuous education on noncommercial tax return preparers if it desires to do so.⁸⁸ If the commercial tax return preparer has less than three years of tax preparation experience, he must complete sixteen hours of continuous education during his first year as a registered commercial tax return preparer.⁸⁹ After the first year, the commercial tax return preparer only has to complete four hours of continuous education each year.⁹⁰ If a commercial tax return preparer has three or more years of tax preparation experience, he simply has to complete four hours of continuous education each year.⁹¹

4. Ethics and Conduct

Of all the areas covered by PTP regulations on the state level, ethics and conduct are the areas that vary most from state to state. The differences range from New York being the only state to recommend best practices to Maryland’s procedure for complaints and ensuing investigations.⁹²

In Oregon, the PTP regulations list prohibited acts and provide grounds for discipline, while also outlining the consequences of improper conduct. First, an individual is prohibited from performing tax preparation services—preparing, advising, or assisting with another’s tax return—for compensation

⁸⁶ *Id.* § 21-309(b)(2). Maryland allows for tax preparers to satisfy the continuing education requirement through a variety of ways, including professional development programs, technical sessions, college courses, and seminars. *Id.* § 21-309(b)(3).

⁸⁷ N.Y. COMP. CODES R. & REGS. tit. 20, § 2600-2.2(a) (2013).

⁸⁸ *Id.* § 2600-2.2(b).

⁸⁹ *Id.* § 2600-2.2(a).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² See *infra* notes 127-29, 143-46 and accompanying text.

without being licensed as a tax consultant or a tax preparer.⁹³ Additionally, Oregon expressly lists ten conditions that authorize the Oregon Board of Tax Practitioners to take disciplinary action against a PTP. The Oregon board may take disciplinary action by (1) refusing to issue or renew a license, (2) suspending or revoking a current license, or (3) reprimanding an individual who is licensed as a tax consultant or tax preparer.⁹⁴ For example, a tax preparer or tax consultant can be subject to disciplinary action for being negligent or incompetent with regard to tax return preparation,⁹⁵ failing to pay taxes or file a tax return,⁹⁶ and violating the code of professional conduct.⁹⁷ Furthermore, Oregon prohibits anyone from fraudulently obtaining a tax consultant or tax preparer license,⁹⁸ using a license under false pretenses,⁹⁹ and using a “suspended, lapsed, or revoked license.”¹⁰⁰

In addition to the aforementioned disciplinary actions, any person who violates Oregon’s PTP regulation is also subject to a \$5,000 civil penalty for each violation,¹⁰¹ and the Oregon State Board of Tax Practitioners may also require these violators to successfully complete a specified educational program before being allowed to offer tax return preparation services.¹⁰² Oregon also stipulates that any PTP whose license is invalid—regardless of if it is invalidated due to suspension, revocation, voluntary surrender, or failure to renew—is still subject to the Oregon Board of Tax Practitioners’ authority in investigations and disciplinary actions.¹⁰³

California’s regulations outline a PTP’s actions in two ways: It prescribes both actions that a PTP must take and actions that PTPs are prohibited from taking. For example, a PTP must provide certain information, such as his name and bond number,

⁹³ OR. REV. STAT. § 673.615(1) (2013).

⁹⁴ *Id.* § 673.700.

⁹⁵ *Id.* § 673.700(3).

⁹⁶ *Id.* § 673.700(5).

⁹⁷ *Id.* § 673.700(7).

⁹⁸ *Id.* § 673.705(1).

⁹⁹ *Id.* § 673.705(3).

¹⁰⁰ *Id.* § 673.705(4).

¹⁰¹ *Id.* § 673.735(1).

¹⁰² *Id.* § 673.740.

¹⁰³ *Id.* § 673.697.

to a client before he can render any tax preparation services,¹⁰⁴ but at the same time, a PTP is prohibited from disclosing a client's confidential information unless an exception applies.¹⁰⁵ Furthermore, the California regulations expressly list eleven violations that can result in a tax preparer application being denied or a tax preparer being disciplined.¹⁰⁶ These violations include making misrepresentations,¹⁰⁷ instructing a client to sign an incomplete tax return,¹⁰⁸ and “[f]ail[ing] to sign a customer's tax return when payment for services rendered has been made.”¹⁰⁹

Additionally, California's regulations have another separate list of violations that include unprofessionalism,¹¹⁰ criminal convictions that are “substantially related to the qualifications, functions, or duties” of a tax preparer,¹¹¹ and impersonating a registered tax preparer.¹¹² Like the other list of violations, these violations can result in a registration being denied or a tax preparer being disciplined.¹¹³ If discipline is required, the tax preparer's registration may be placed on probation,¹¹⁴ suspended,¹¹⁵ or revoked.¹¹⁶ Moreover, suspensions and probations can be coupled with conditions and requirements that the tax preparer must satisfy.¹¹⁷

If a tax preparer is disciplined or denied registration, the disciplinary action will be “void and without effect” if it is not “done in good faith and in a fair and reasonable manner.”¹¹⁸ In addition to the aforementioned disciplinary actions, California superior courts can issue injunctions to prevent a tax preparer in

¹⁰⁴ CAL. BUS. & PROF. CODE § 22252 (West 2008).

¹⁰⁵ *Id.* § 22252.1(a).

¹⁰⁶ CAL. BUS. & PROF. CODE § 22253(a) (West Supp. 2016).

¹⁰⁷ *Id.* § 22253(a)(2).

¹⁰⁸ *Id.* § 22253(a)(3).

¹⁰⁹ *Id.* § 22253(a)(9).

¹¹⁰ *Id.* § 22253.1.5(a)(1).

¹¹¹ *Id.* § 22253.1.5(a)(4).

¹¹² *Id.* § 22253.1.5(a)(6).

¹¹³ *Id.* § 22253.1.5(a).

¹¹⁴ *Id.* § 22253.3(a)(1).

¹¹⁵ *Id.* § 22253.3(a)(2).

¹¹⁶ *Id.* § 22253.3(a)(3).

¹¹⁷ *Id.* § 22253.3(a)(4).

¹¹⁸ *Id.* § 22253.4(a)-(b).

violation of California's PTP regulations from offering tax preparation services.¹¹⁹

Like its counterparts, Maryland reserves the right to deny a registration, reprimand a PTP, or suspend or revoke a PTP's registration.¹²⁰ Furthermore, the Maryland Board can also impose a penalty "not exceeding \$5,000 for each violation" based on the severity of the violation.¹²¹ Maryland's violations include fraudulently using an individual tax preparer registration,¹²² a criminal conviction that "directly relate[s] to the fitness and qualification" needed to provide tax return preparation services,¹²³ or being negligent or incompetent when providing tax return preparation services.¹²⁴

As part of the disciplinary process, the Maryland Board must allow an individual an opportunity for a hearing regarding any disciplinary action¹²⁵ and the opportunity to appeal a final decision.¹²⁶ When the Maryland Board receives a complaint that alleges a violation, the board may seek an injunction against the conduct if it determines that the conduct will result in harm to a Maryland resident.¹²⁷ The board also has the right to investigate the complaint¹²⁸ and issue subpoenas.¹²⁹

With regard to New York, a tax return preparer will be subject to discipline if he is "incompetent or disreputable,"¹³⁰ fails to comply with New York's PTP regulations,¹³¹ or acts with the intent of defrauding a client.¹³² Other actions by a PTP that are

¹¹⁹ *Id.* § 22256(a).

¹²⁰ MD. CODE ANN., BUS. OCC. & PROF. § 21-311(a) (LexisNexis 2010).

¹²¹ *Id.* § 21-311(b)(1). When determining the amount of the civil penalty, the Maryland board considers factors such as seriousness, harm caused, intent, and prior violations. *Id.* § 21-311(b)(2)(i)-(iv).

¹²² *Id.* § 21-311(a)(1)-(2).

¹²³ *Id.* § 21-311(a)(3).

¹²⁴ *Id.* § 21-311(a)(4).

¹²⁵ *Id.* § 21-312(a).

¹²⁶ *Id.* § 21-313.

¹²⁷ *Id.* § 21-206(c).

¹²⁸ *Id.* § 21-206(a).

¹²⁹ *Id.* § 21-206(e).

¹³⁰ N.Y. COMP. CODES R. & REGS. tit. 20, § 2600-3.1(a) (2013).

¹³¹ *Id.* § 2600-3.1(b).

¹³² *Id.* § 2600-3.1(c).

sanctionable include criminal convictions,¹³³ failing to fulfill personal tax obligations,¹³⁴ assisting with noncompliance and tax evasion,¹³⁵ and aiding practice by non-registered preparers.¹³⁶ To aid with the enforcement of its PTP regulations, New York has also implemented procedures by which an individual may file a complaint against a registered tax return preparer.¹³⁷ In the event of a violation, the New York commissioner may refuse to issue a registration, revoke or cancel a current registration, or impose limitations or conditions on the PTP's capability to prepare or file returns.¹³⁸ For example, the New York commissioner could require a PTP to complete a remedial income tax course.¹³⁹ Additionally, if the New York commissioner decides to take disciplinary action, the PTP may request a hearing to review the action.¹⁴⁰

In addition to prohibited acts, the New York PTP regulations also list the duties of registered tax preparers. For instance, a registered tax preparer has the duty to act with due diligence,¹⁴¹ to refuse to prepare an individual's tax return when there is a conflict of interest,¹⁴² and to provide the highest quality services by adhering to best practices.¹⁴³ New York's best practices include communicating clearly,¹⁴⁴ making conclusions "supported by the law and the facts,"¹⁴⁵ and acting with fairness and integrity.¹⁴⁶

¹³³ *Id.* § 2600-5.1(a).

¹³⁴ *Id.* § 2600-5.1(d).

¹³⁵ *Id.* § 2600-5.1(e).

¹³⁶ *Id.* § 2600-5.1(h).

¹³⁷ *Id.* § 2600-6.3.

¹³⁸ *Id.* § 2600-3.3.

¹³⁹ *See id.* § 2600-3.3(b).

¹⁴⁰ *Id.* § 2600-6.1.

¹⁴¹ *Id.* § 2600-4.3(b).

¹⁴² *Id.* § 2600-4.3(g)(1).

¹⁴³ *Id.* § 2600-4.3(k).

¹⁴⁴ *Id.* § 2600-4.3(k)(1).

¹⁴⁵ *Id.* § 2600-4.3(k)(2).

¹⁴⁶ *Id.* § 2600-4.3(k)(4).

II. PTP REGULATIONS WILL PROTECT TAXPAYERS AND PROTECT THE IRS'S REVENUE

Benjamin Franklin once said, “[I]n this world nothing can be said to be certain, except death and taxes.”¹⁴⁷ Because taxes are certain, it is not surprising that, for the 2014 filing season, the IRS had received 136,887,000 individual income tax returns as of May 16, 2014; moreover, 102,139,000 refunds, totaling \$274.7 billion, were issued to taxpayers.¹⁴⁸ Furthermore, PTPs file approximately ninety million tax returns each year,¹⁴⁹ and about 60% of these PTPs are not subject to regulation or oversight.¹⁵⁰

Currently, there are only two ways in which a PTP can be subject to regulation and oversight. The PTP can voluntarily become subject to such regulation and oversight by registering with the IRS's Voluntary Return Preparer Program that was implemented in June 2014. On the other hand, a PTP can be subject to mandatory regulation and oversight if he or she prepares tax returns in certain states. Currently, only four states—California, Maryland, New York, and Oregon¹⁵¹—have legislation in place that requires PTPs to meet mandatory certification requirements.

While PTPs in the aforementioned states are subject to mandatory regulation and oversight, PTPs in the remaining forty-six states are not subjected to regulation and oversight unless they are registered with the IRS's Voluntary Return Preparer Program. As a result, the overwhelming majority of PTPs are not subject to “minimum educational, training, competency, or other standards” when preparing tax returns.¹⁵² Ironically, “[i]n 46

¹⁴⁷ Letter from Benjamin Franklin to Jean Baptiste Le Roy (Nov. 13, 1789), in 10 THE WRITINGS OF BENJAMIN FRANKLIN 68, 69 (Albert Henry Smyth ed., 1907).

¹⁴⁸ 2014 Filing Season Statistics, I.R.S. (May 16, 2014), <http://www.irs.gov/uac/Newsroom/Filing-Season-Statistics-for-Week-Ending-May-16,-2014> [https://perma.cc/WWD5-7SEX].

¹⁴⁹ Madara, *supra* note 2, at 921.

¹⁵⁰ Koskinen, *supra* note 3.

¹⁵¹ See generally CAL. BUS. & PROF. CODE §§ 22250-22259 (West 2008 & Supp. 2016); MD. CODE ANN., BUS. OCC. & PROF. §§ 21-102 to -402 (LexisNexis 2010); N.Y. COMP. CODES R. & REGS. tit. 20, § 2600 (2013); OR. REV. STAT. §§ 673.610-.685 (2013).

¹⁵² CHI CHI WU, NAT'L CONSUMER LAW CTR., RIDDLED RETURNS: HOW ERRORS AND FRAUD BY PAID TAX PREPARERS PUT CONSUMERS AT RISK AND WHAT STATES CAN DO 3

states, there are more regulatory requirements for hairdressers than tax preparers. Yet the impact of a bad haircut is far less damaging than an inaccurate tax return.”¹⁵³

A. PTP Regulations Are Needed to Protect Taxpayers

Due to the lack of regulation and minimum standards, the number of incompetent PTPs and instances of fraud committed by PTPs has risen sharply.¹⁵⁴ In 2008, mystery shopper tests conducted by an advocacy group revealed “instances of serious tax errors and fraud in 4 out of 17 tests—or nearly 25%.”¹⁵⁵ Likewise, in 2010, six out of nineteen mystery shoppers—nearly 32%—identified “incompetent tax preparation or outright fraud.”¹⁵⁶ Moreover, in 2011, nine mystery shopper tests were conducted by consumer groups, and four of the nine tests resulted in incompetent tax preparation or the encouragement of tax fraud.¹⁵⁷ In another 2011 mystery shopper testing, “10 of the 12 taxpayers encountered problems with inaccurate, illegal, or unprofessional behavior.”¹⁵⁸ A year later, the same group conducted another round of testing with nine out of ten taxpayers experiencing issues with their tax return.¹⁵⁹ In addition, Impact Alabama, the Treasury Inspector General for Tax Administration (TIGTA), and the Government Accountability Office (GAO) all conducted mystery shopper tests that found errors in at least 60% of the tax returns prepared by PTPs during the course of the study.¹⁶⁰

In order to protect individual taxpayers from these instances of fraud and abuse, basic fundamental standards that establish baseline considerations for PTPs are required.¹⁶¹ “It is only common sense to require commercial preparers to obtain basic

(2014), <http://www.nclc.org/images/pdf/pr-reports/report-riddled-returns.pdf>.
[<https://perma.cc/NW44-U5WZ>].

¹⁵³ *Id.* (footnote omitted).

¹⁵⁴ *Id.* at 5.

¹⁵⁵ *Id.* at 6.

¹⁵⁶ *Id.* at 7.

¹⁵⁷ *Id.* at 9.

¹⁵⁸ *Id.* at 10.

¹⁵⁹ *Id.* at 11.

¹⁶⁰ *See id.* at 12-13.

¹⁶¹ *Id.* at 19.

training, pass competency exams, and seek continuing education to stay current on ever-changing tax laws.”¹⁶² Accordingly, PTP regulations will provide taxpayers with assurance that their PTP has met certain qualifications and that their tax returns will be prepared in compliance with applicable tax laws.¹⁶³

At the same time, it has been shown that PTPs, who would not be exempt from the IRS’s PTP regulations,¹⁶⁴ “are on the lower end of compliance” when compared with other groups of tax return preparers.¹⁶⁵ Specifically, “[t]hese preparers file returns that more often indicate greater incidences and scope of adjustments after IRS audit and review.”¹⁶⁶ Moreover, in Leviner’s Total Tax analysis, the tax returns filed by non-exempt PTPs were “among the least compliant.”¹⁶⁷

If the results from the mystery shopper tests were not convincing enough, the need for PTP regulations can be further supported by the State of Oregon’s success with its own PTP regulations. Oregon developed its regulations over forty years ago because it felt that “[i]nitial training and registration is [sic] essential before anyone can even begin preparing your tax returns.”¹⁶⁸

According to the GAO, “tax returns from Oregon [are] 72 percent likelier to be accurate than returns from the rest of the country.”¹⁶⁹ Furthermore, Oregon has “suggested that their tax

¹⁶² *Id.*

¹⁶³ *Protecting Taxpayers from Incompetent and Unethical Return Preparers: Hearing Before the S. Comm. on Fin.*, 113th Cong. 45 (2014) [hereinafter *Protecting Taxpayers*] (statement of James R. McTigue Jr., Director, Tax Issues, Government Accountability Office).

¹⁶⁴ Generally, attorneys, CPAs, enrolled agents, and certain government employees are exempt from PTP regulations. *See generally* Koskinen, *supra* note 3; CAL. BUS. & PROF. CODE §§ 22250-22259 (West 2008 & Supp. 2016); MD. CODE ANN., BUS. OCC. & PROF. §§ 21-102 to -402 (LexisNexis 2010); N.Y. COMP. CODES R. & REGS. tit. 20, § 2600 (2013); OR. REV. STAT. §§ 673.610-.685 (2013).

¹⁶⁵ Sagit Leviner, *The Role Tax Preparers Play in Taxpayer Compliance: An Empirical Investigation with Policy Implications*, 60 BUFF. L. REV. 1079, 1120 (2012).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 1121.

¹⁶⁸ *Protecting Taxpayers*, *supra* note 163, at 36 (statement of Janis Salisbury, Chair, Oregon Board of Tax Practitioners).

¹⁶⁹ *Id.* at 2 (opening statement of Oregon Sen. Ron Wyden, Chairman, S. Comm. on Fin.). While the analysis of the Oregon regulations has provided encouraging results, it

return preparer regulations have [had] a positive impact on tax administration.”¹⁷⁰ For example, tax returns prepared by PTPs in Oregon had one or more math errors 1.07% of the time compared to a 1.58% math error rate for the rest of the United States.¹⁷¹ Furthermore, if the United States’ math error rate was reduced to that of Oregon’s, the number of math error cases would be reduced by 83,000, or 12.4%.¹⁷²

Additionally, “[i]n Oregon, the average per cent of tax agent clients with a \$10 or more potential interest income discrepancy is 1.99 per cent and 2.14 per cent in the rest of the US.”¹⁷³ Consequently, if the rest of the United States had the same discrepancy rates as Oregon, the number of potential interest income discrepancy cases would decline by 17%.¹⁷⁴ Overall, tax returns prepared by PTPs in Oregon “have a lower probability of experiencing math errors, are less likely to have underreported interest income in excess of \$10 and have, overall, higher voluntary reporting rates.”¹⁷⁵

Based on these studies, the IRS should be given the statutory authority to regulate PTPs for two reasons. First, PTP regulations would likely result in PTPs filing more accurate tax returns. Second, the group of PTPs who would not be exempt from the PTP regulations is one of the least compliant groups of PTPs in terms of filed tax returns. Because the PTP regulations would increase accuracy and also provide regulation and oversight in a much-needed area, the President and Congress should take the necessary steps to enact legislation giving the IRS the statutory authority to regulate PTPs.

is still undetermined exactly how much of the differences between individual tax returns in Oregon and the rest of the United States can be attributed to the Oregon PTP regulations.

¹⁷⁰ INTERNAL REVENUE SERV., U.S. DEP’T OF THE TREASURY, PUB. 4832, RETURN PREPARER REVIEW 28 (2009) [hereinafter PREPARER REVIEW], <https://www.irs.gov/pub/irs-utl/54419109.pdf> [<https://perma.cc/W38G-CLD7>].

¹⁷¹ Margaret McKerchar, Kim Bloomquist & Sagit Leviner, *Improving the Quality of Services Offered by Tax Agents: Can Regulation Assist?*, 23 AUSTL. TAX F. 399, 415 (2008).

¹⁷² *Id.*

¹⁷³ *Id.* at 416.

¹⁷⁴ *Id.* at 416-17.

¹⁷⁵ *Id.* at 418.

B. PTP Regulations Will Protect the IRS's Revenue

Not only will PTP regulations provide consumer protection to taxpayers, but they will also provide revenue protection.¹⁷⁶ In the President's Fiscal Year (FY) 2015 Budget, the Treasury Department proposed that the IRS be given the authority to regulate all PTPs.¹⁷⁷ The Treasury Department's reasoning behind the proposal involved "the harms caused by incompetent and dishonest preparers to the tax system, including increased collection costs, [and] reduced revenues."¹⁷⁸ Similarly, the Taxpayer Advocacy Panel argues that the IRS would benefit from PTP regulations "because the IRS . . . incurs costs because of fraudulent and inaccurate returns" and that the regulations would increase accuracy while decreasing fraud and costs incurred by the IRS.¹⁷⁹ Thus if the IRS enacted PTP regulations, it would reduce its costs incurred due to inaccurate returns while also increasing its revenues. As a result, PTP regulations would protect the IRS's revenue. For example, Oregon taxpayers underreport their tax liabilities by an average of \$329, while the rest of the United States averages \$561; if the rest of the United States underreported by the same amount as Oregon, the IRS would generate an additional \$11.5 billion in tax revenue each year.¹⁸⁰

C. The Benefits of PTP Regulations Outweigh Their Costs

It is undisputed that increased regulations would result in increased costs and that increased consumer protection would result in consumers paying higher costs. As a result, it is not surprising that the main argument against the IRS implementing mandatory PTP regulations is that the regulations would result in increased costs to PTPs, who would, in turn, pass the increased

¹⁷⁶ *Protecting Taxpayers*, *supra* note 163, at 39 (statement of Chi Chi Wu, Staff Attorney, National Consumer Law Center).

¹⁷⁷ *Id.* at 134 (statement of John A. Koskinen, Comm'r, I.R.S.).

¹⁷⁸ *Id.*

¹⁷⁹ PREPARER REVIEW, *supra* note 170, at 23-24.

¹⁸⁰ McKerchar et al., *supra* note 171, at 418. However, it is still undetermined exactly how much of these observed differences can be attributed to the PTP regulations in Oregon.

costs to the taxpayer.¹⁸¹ However, “the interest of consumers in obtaining competent, accurate, and ethical tax preparation far outweighs any increased marginal cost.”¹⁸² Moreover, the National Consumer Law Center believes that PTP regulations “will not actually even create significantly greater costs” because the cost of compliance for PTPs will be minimal.¹⁸³

Because of these increased costs, it is argued that the supply of PTPs will shrink due to a cost barrier preventing new PTPs from entering the industry and a cost burden forcing current PTPs to leave the industry.¹⁸⁴ Yet in Oregon, these compliance costs are seen as “very affordable” with the most expensive element being the education requirements.¹⁸⁵ However, Oregon is able to use its resources to “provide cost-effective education.”¹⁸⁶ Likewise, even the small tax preparation businesses in Oregon can easily afford the registration fees.¹⁸⁷ Given that the costs of complying are very affordable and cost effective, it is unlikely that the implementation of PTP regulations will cause a chain of events that ultimately lead to a decrease in the number of PTPs.

While the taxpayer may see increased costs at the front end of the tax return process, the taxpayer will recover these costs by the time the tax return process concludes.¹⁸⁸ For example, the GAO’s mystery shopper uncovered errors by PTPs that “caused some taxpayers to overpay their tax by thousands of dollars, and other taxpayers to underpay their tax by thousands of dollars and then likely face IRS enforcement action down the road.”¹⁸⁹

¹⁸¹ *Protecting Taxpayers*, *supra* note 163, at 8 (statement of Nina E. Olson, National Taxpayer Advocate, I.R.S.) (“The only credible argument I have heard against establishing preparer standards is that the cost will ultimately be passed on to the consumer.”).

¹⁸² *Id.* at 40 (statement of Chi Chi Wu, Staff Attorney, National Consumer Law Center).

¹⁸³ *Id.*

¹⁸⁴ *See id.* at 41 (statement of Dan Alban, Attorney, Institute for Justice).

¹⁸⁵ *Id.* at 43 (statement of Janis Salisbury, Chair, Oregon Board of Tax Practitioners).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *See* PREPARER REVIEW, *supra* note 170, at 23-24.

¹⁸⁹ *Protecting Taxpayers*, *supra* note 163, at 8 (statement of Nina E. Olson, National Taxpayer Advocate, I.R.S.).

Specifically, the taxpayer will incur slightly higher costs to have their tax returns prepared by a competent PTP; however, in return, the taxpayer will see significant cost savings when they avoid an IRS audit because their competent PTP prepared an accurate tax return.¹⁹⁰ Other cost savings would include avoiding interest on taxes owed and avoiding penalties.¹⁹¹

Overall, PTP regulations would increase the market burdens on PTPs and cause taxpayers to pay higher prices for tax return preparation services. While these are undoubtedly negative consequences of PTP regulations, the cost of these negative consequences are slim; the increased market burdens would not result in a significant decrease in the supply of PTPs, and the price increases incurred by taxpayers in the beginning of the tax return process would result in significant cost avoidance in the end. Furthermore, PTP regulations would result in the added benefits of increased consumer protection, decreased tax return errors, and increased cash flows for the IRS. Therefore, the benefits of PTP regulations clearly outweigh the costs of the regulations, and it only makes sense that PTPs should be regulated.

III. FIXING THE PROBLEM: A JOINT EFFORT BETWEEN THE IRS AND THE STATES

While the voluntary program implemented by the IRS during the summer of 2014 is a step in the right direction, the voluntary program will not fix the problem. Until PTP regulation and oversight becomes mandatory for all PTPs, the benefits of such

¹⁹⁰ *See id.* (“But the per-taxpayer cost of the program the IRS was implementing before the *Loving* decision seemed very reasonable as compared with the far more significant cost the GAO’s and other ‘shopping visits’ have found, where preparer errors caused some taxpayers to overpay their tax by thousands of dollars, and other taxpayers to underpay their tax by thousands of dollars and then likely face IRS enforcement action down the road.”); *Id.* at 2 (statement of Oregon Sen. Ron Wyden, Chairman, S. Comm. on Fin.) (noting that PTP regulations “put[] fewer [taxpayers] at the mercy of unscrupulous preparers and reduces the risk of a dreaded audit”); *Id.* at 40 (statement of Chi Chi Wu, Staff Attorney, National Consumer Law Center) (“After all, an erroneous return could put the taxpayer at risk of an IRS audit or even criminal sanctions.”).

¹⁹¹ *Id.* at 33 (statement of James R. McTigue Jr., Director, Strategic Issues, Government Accountability Office).

regulation and oversight, as discussed in Part II, will be extremely limited. This is because the PTPs, who are most in need of regulation and oversight, will likely not register for the voluntary program and will likely avoid preparing tax returns in the states that have mandatory certification requirements. Thus, it is paramount that the IRS be given the statutory authority to implement a mandatory return preparer program that would regulate all PTPs.

Once given the statutory authority to regulate PTPs, the IRS should then implement mandatory PTP regulations. Specifically, the IRS should use the model PTP regulations discussed in Part IV of this Comment. In doing so, the IRS will be able to accomplish its goal of establishing “a minimum level of competency” among PTPs.¹⁹² At the same time, the IRS should also encourage the forty-six states that have more requirements to be a hairdresser than a PTP to implement PTP regulations on the state level. Each state would then be able to tailor the model PTP regulations to be specific to its individual tax return preparation landscapes.

In the unfortunate event that the IRS is not given statutory authority to regulate PTPs, the quest for PTP regulations should not be abandoned. The states should take it upon themselves to move past the obstacles faced by the IRS and still implement PTP regulations. In this scenario, the IRS should do everything within its authority to regulate PTPs on the federal level and to assist the states with implementing PTP regulations.

IV. HOW SHOULD PTPS BE REGULATED?: A MODEL FOR PTP REGULATIONS

When given the statutory authority to regulate PTPs, the IRS should implement mandatory certification requirements for PTPs. While the IRS would ultimately have the statutory authority to regulate PTPs, the IRS should encourage and assist the individual states in developing and enforcing their own PTP regulations that would be tailored to the tax environment of each individual state. First, this would allow the IRS to obtain the PTP regulations that

¹⁹² Koskinen, *supra* note 3.

it desires, but at the same time, it would allow the states to have the independence that they desire. Second, it would allow for the PTP regulations to be tweaked so that they align with the taxation landscape of each state; this would allow the benefits of PTP regulations to be seen on both the federal and state levels. Third, because the states already have a system in place for regulating CPAs, the states could use the existing system as a starting point for regulating PTPs. The IRS should enact mandatory PTP regulations that will not only provide adequate regulation and oversight over PTPs preparing federal tax returns, but will also provide the states with a model for mandatory PTP regulations.

After carefully examining the IRS's attempts to regulate PTPs and the current PTP regulations on the state level, I have developed a model PTP regulation that will help "achieve a minimum level of competency across the . . . tax return preparer community,"¹⁹³ but, at the same time, it also keeps in mind what type of burdens, such as financial and time, that the requirements would put on PTPs. While regulating PTPs and protecting the taxpayer is the ultimate goal, PTP regulations should not unduly burden PTPs to accomplish this goal.

While developing my model for mandatory PTP regulations, I divided the regulations into four main sections. First, the applicability section addresses to whom the regulations are applicable and which PTPs are excluded. Second, the initial requirements section outlines how a PTP initially becomes certified. Third, the renewal section describes the requirements that PTPs must fulfill to in order to renew their certification. Fourth, the ethics and conduct section establishes an ethical framework that would help PTPs distinguish between ethical and unethical conduct, while also prohibiting certain acts and providing penalties for violating the code of ethics and/or committing a prohibited act.

¹⁹³ *Id.*

A. *Applicability and Exemptions*

In terms of applicability, PTP regulations should use the same provisions currently being used in the Voluntary Return Preparer Program but with some slight alterations. First, PTP regulations should follow the lead of Oregon, California, New York, and Maryland—the only states with PTP regulations—and be applicable to all PTPs and not just those who *voluntarily* subject themselves to the regulations.¹⁹⁴ Second, the model PTP regulations would closely mirror the exemptions of the IRS's Annual Filing Season Program. As a result, attorneys, CPAs, IRS Enrolled Agents, and PTPs already licensed by a state would be exempt from the federal PTP regulations.¹⁹⁵ However, the model PTP regulations would also include an exemption similar to New York's non-commercial preparer exemption.¹⁹⁶ Under this exemption, PTPs, who (1) prepared fewer than ten tax returns in the prior tax year and (2) reasonably anticipate preparing fewer than ten tax returns in the current tax year,¹⁹⁷ would not be subject to the vast majority of the model PTP regulations, such as examinations and continuous learning. However, these PTPs would still be required to register with the IRS and also disclose to their customers that they are not subject to the competency examination requirements and the continuous learning requirement. These variations would allow the IRS to regulate all PTPs but would not put undue burden on those PTPs who are already regulated by other means.

B. *Initial Registration Requirements*

As for the initial requirements for becoming a certified PTP, the IRS's voluntary program requirements should be combined with the initial requirements of the various states. First, the model PTP regulations should follow the examples set by all four states with PTP regulations and require that all PTPs be at least eighteen years old and have a high school diploma or its

¹⁹⁴ See *supra* notes 44-59 and accompanying text.

¹⁹⁵ See *supra* note 32 and accompanying text.

¹⁹⁶ See *supra* notes 75-76 and accompanying text.

¹⁹⁷ See *supra* notes 75-76 and accompanying text.

equivalent.¹⁹⁸ Second, like the Oregon PTP regulations, the model PTP regulations should require that all PTPs pass an initial certification exam on federal tax law;¹⁹⁹ the exam should primarily be offered online throughout the year. However, PTPs would still have the option of taking the initial certification exam on certain dates at an on-site facility. Finally, the model PTP regulations would borrow from Oregon and California by implementing a prior tax education requirement.²⁰⁰ Like California, all PTPs would be required to have forty-five hours of prior tax education on federal personal income tax law, theory, and practice.²⁰¹

However, as in California, PTPs would be allowed to waive, either in whole or in part, the prior tax education requirement.²⁰² To qualify for the waiver, a PTP would have to have at least two years of prior tax preparation work experience.²⁰³ Additionally, the PTP would have to demonstrate that his or her prior tax preparation work experience is an adequate substitute for the education and that the PTP's prior tax preparation sufficiently covered federal personal income tax law, theory, and practice.²⁰⁴ For example, a PTP with over ten years of tax preparation work experience would likely be able to waive all forty-five hours of prior tax education, while a PTP with the minimum two years of experience may only be able to waive fifteen hours of prior education.

C. Renewal Registration Requirements

To renew a certification, the model regulations would require PTPs to complete continuous learning courses on an annual basis,

¹⁹⁸ See *supra* notes 60-76 and accompanying text. See generally MD. CODE ANN., BUS. OCC. & PROF. § 21-302(c)-(d) (LexisNexis 2010); N.Y. COMP. CODES R. & REGS. tit. 20, § 2600-2.1(j) (2013); OR. REV. STAT. § 673.625(1)(a)-(b) (2013).

¹⁹⁹ See *supra* note 62 and accompanying text.

²⁰⁰ See *supra* notes 61, 69 and accompanying text; see also OR. REV. STAT. § 673.625(1)(c) (2013); CAL. BUS. & PROF. CODE § 22255(a) (West Supp. 2016).

²⁰¹ See *supra* note 69 and accompanying text.

²⁰² See *supra* note 70 and accompanying text; see also CAL. BUS. & PROF. CODE § 22255(c) (West Supp. 2016).

²⁰³ See *id.* § 22255(c).

²⁰⁴ *Id.*

which aligns with the IRS's PTP regulatory frameworks—both the currently enacted voluntary program and invalidated mandatory regulations—as well as the PTP regulations of all four states.²⁰⁵ PTPs would be required to complete fifteen hours of continuous learning on an annual basis; this fifteen-hour requirement is identical to the continuous learning requirement of the IRS's invalidated mandatory regulations.²⁰⁶ Similar to the continuous learning requirements for attorneys in a bar association and also for CPAs, a PTP would be able to fulfill the fifteen-hour requirement through a variety of methods including courses, conferences, and symposiums.

While the methods of fulfilling the required hours would vary in form, a specific method—in order to qualify as a continuous learning opportunity—would have to cover ethics, federal tax law topics, or federal tax law updates.²⁰⁷ To assist PTPs, the IRS would publish a list of approved continuous learning opportunities that would include both online and classroom courses as well as conferences and symposiums. Additionally, the list would include opportunities provided by both the IRS and third parties.

Unlike any of the PTP regulations previously discussed, the model PTP regulations would also require PTPs to pass a re-certification exam every three years. The re-certification exam would be on federal income tax topics and would be very similar to the initial certification exam.²⁰⁸ During the years that a PTP is required to take a re-certification exam, a PTP—who passes the re-certification exam—would be credited five hours of continuous learning for studying and taking the exam. Like the initial certification exam, the re-certification exam would be offered both online and at on-site facilities.

D. Ethics and Conduct

The Ethics and Conduct section of the model PTP regulations would provide PTPs with a strong ethical framework that aids the

²⁰⁵ See *supra* notes 20, 36, 77-91, and accompanying text.

²⁰⁶ See *supra* notes 20, 81, and accompanying text.

²⁰⁷ See *generally* Rev. Proc. 2014-42, 2014-2 C.B. 192.

²⁰⁸ See *supra* text accompanying note 199.

PTP in making the right choices and in conducting themselves in a professional manner. Specifically, PTPs would be subjected to the same duties and restrictions contained in the ethics and conduct provisions of Circular 230 regulations that already apply to IRS practitioners.²⁰⁹ Additionally, the model PTP regulations would borrow from New York and describe best practices such as clear communication, making conclusions “supported by the law and the facts,” and acting with fairness and integrity.²¹⁰

Furthermore, the Ethics and Conduct section should also expressly prohibit some acts, such as committing tax fraud, preparing tax returns as an unregistered PTP, fraudulently obtaining a PTP registration,²¹¹ and providing negligent or incompetent tax preparation services.²¹² However, the specific violations and prohibited acts that should be included in the PTP regulations are outside of the scope of this Comment and are better off being addressed by the legislators, who are enacting the PTP regulations. In addition to the expressly prohibited acts, the model PTP regulations should have general descriptions of prohibited acts to serve as a “catch-all.”

Lastly, the Ethics and Conduct section should also outline the punishments for violating the code of ethics and committing a prohibited act. At the very least, punishments for the aforementioned violations should include fines, suspension of a PTP’s registration, revocation of a PTP’s registration, and remedial tax education courses.²¹³ However, like the specific violations and prohibited acts, the punishments for violating a PTP regulation is outside of the scope of this Comment and should be thoroughly addressed by the group of individuals enacting the PTP regulations. In the event that disciplinary action is taken, the model PTP regulations should follow the lead of Maryland and New York by outlining an appeals process.²¹⁴

²⁰⁹ See *supra* notes 17, 20, and accompanying text.

²¹⁰ See *supra* notes 143–46 and accompanying text.

²¹¹ See *supra* notes 98–100, 122, and accompanying text.

²¹² See *supra* notes 95, 124 and accompanying text.

²¹³ See *supra* notes 94, 113–17, 119–21, 138, and accompanying text.

²¹⁴ See *supra* notes 126, 140, and accompanying text.

CONCLUSION

In recent years, the IRS has experienced both failure and success when trying to regulate PTPs. After seeing its mandatory PTP regulation struck down by the federal court system, the IRS successfully implemented a voluntary program to regulate PTPs. At the same time, four states—Oregon, California, Maryland, and New York—have successfully implemented PTP regulations; in 1973, Oregon became the first state to implement PTP regulations, with New York being the most recent state after implementing PTP regulations in December of 2013.

While PTP regulations are needed, the IRS's current solution in the form of the Annual Filing Season Program—a voluntary program—will not resolve the incompetent PTPs dilemma. The first step to resolving this dilemma is giving the IRS the statutory authority to regulate PTPs. After receiving the requisite statutory authority, the IRS should implement mandatory PTP regulations. These mandatory PTP regulations would not only protect taxpayers from incompetent PTPs on the federal level, but they would also serve as a model regulatory system off of which state legislatures could build PTP regulations tailored to the tax return environment in their state. Consequently, taxpayers could also be protected on the state level, too.

Moreover, these mandatory PTP regulations would also protect the revenue of the IRS. For example, the PTP regulation would increase the flow of revenue into the IRS by decreasing errors in tax returns. The decreased amount of errors would have a two-fold effect. First, the decreased error rate would result in fewer tax liabilities being understated, and consequently, IRS would receive more tax revenue. Second, more accurate tax returns would result in the IRS having to conduct fewer audits, which would reduce the IRS's operating costs. Basic accounting shows us that increased revenues coupled with decreased costs will result in a greater amount of revenue flowing into the IRS. Thus, PTP regulations would protect the IRS's revenue.

The significant benefits of taxpayer protection and revenue protection more than outweigh the costs of implementing PTP regulations. And while PTP regulations would result in taxpayers incurring higher costs to have their tax returns prepared, taxpayers would actually save money in the long run because PTP

regulations would help taxpayers avoid the high costs associated with underpaid tax liabilities, interest, IRS audits, and IRS penalties.

To realize all of the aforementioned benefits of PTP regulations, the IRS should be given the statutory authority to regulate PTPs. Once given the authority, the IRS should adopt mandatory PTP regulations in the form of the model PTP regulations that are recommended in Part IV of this Comment. In short, the IRS's PTP regulations should be a hybrid between its Voluntary Return Preparer Program and those regulations already enacted by California, Maryland, New York, and Oregon. The end product would be a set of regulations that would improve the quality of tax returns and provide the taxpayer with much needed consumer protection but, at the same time, not place undue burden on PTPs.

Needing a license to cut another's hair but not to prepare another's taxes does not make sense. Patricia Taft and other innocent victims of Robert Parsons and his fellow incompetent colleagues are calling for PTP regulations. Their calls should be answered, and Paid Tax Return Preparer Regulations should be implemented.

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