

COMMENTS ON THE NATIONAL TAXPAYER ADVOCATE'S PREPARER LICENSING PROPOSAL

The following comments (the "Comments") constitute the individual views of the members of the Section of Taxation who prepared them and do not represent the position of the American Bar Association or the Section of Taxation.

These comments were prepared by individual members of a Task Force on the National Taxpayer Advocate's Preparer Licensing Proposal of the Committee on Standards of Tax Practice of the Section of Taxation. Principal responsibility was exercised by Sharyn M. Fisk. Substantive contributions were made by George Connelly, Jr. and Michael B. Lang, Chair of the Committee on Standards of Tax Practice. The Comments were reviewed by Karen Kole of the Section's Committee on Government Submissions and by Mark Yecies, Council Director for the Committee.

Although members of the Section of Taxation who participated in preparing these Comments have clients who would be affected by the federal tax principles addressed by these Comments or have advised clients on the application of such principles, no such member (or the firm or organization to which such member belongs) has been engaged by a client to make a government submission with respect to, or otherwise to influence the development or outcome of, the specific subject matter of these Comments.

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I. INTRODUCTION

The focus of the Internal Revenue Service (“IRS”) appears to be changing from compliance to enforcement. This new focus is evidenced by the recent issuance of new final regulations under I.R.C. §§ 6662 and 6664 and the proposed revisions to Treasury Department Circular No. 230 (“Circular 230”).¹

The IRS’ new focus is also directed toward tax professionals. In January 2003, the IRS announced the creation of the Office of Professional Responsibility (“OPR”).² The OPR, which replaced the office of the Director of Practice, was charged with enhancing the oversight of tax professionals.

II. ISSUE

Generally, the Internal Revenue Code (the “Code”) defines the term “income tax return preparer” as any person who, for compensation, prepares any tax return or claim for refund.³ This definition includes any person who prepares a substantial portion of a tax return or who furnishes a taxpayer with sufficient information and advice so that the completion of a return is largely a mechanical or clerical matter.⁴ However, neither the Code nor the applicable regulations prescribe any requisite skill, knowledge of tax rules or regulations, training or other criteria to set a minimum standard of competence for tax preparers. To the contrary, Treas. Reg. § 301.7701-15(a)(3) provides that a “person may be an income tax return preparer without regard to educational qualifications and professional status requirements.” While some “income tax preparers,” such as attorneys, certified public accountants (“CPAs”), and enrolled agents, are subject to strict Federal and/or state licensing requirements, continuing professional education, and ethical obligations, others who prepare returns (hereinafter “Tax Preparers”) are not.

The problems that stem from the fact that most Tax Preparers are not required to meet a minimum standard of competency are exacerbated by the fact that taxpayers, many of whom tend to have limited tax knowledge, are ill-equipped to assess the competency of a Tax Preparer’s expertise. Currently, there are no Federal standards that a Tax Preparer is required to satisfy prior to representing to the public that he or she is a Federal tax return preparer and selling tax preparation services. Taxpayers would be better served and compliance would likely be improved, if Tax Preparers were required to meet uniform minimum standards of competency in the field of tax law.

III. POSITION ON LICENSING TAX PREPARERS

¹ 31 CFR Part 10.

² IR-2003-3, Jan. 8, 2003.

³ I.R.C. § 7701(a)(36)(A).

⁴ Treas. Reg. §301.7701-15(a)(1).

We support programs that assist in ensuring the integrity of the tax system. A licensing program for Tax Preparers that is directed, implemented and monitored by the IRS, would benefit taxpayers, improve compliance and would further the IRS's commitment to ensuring the integrity of the tax system.

IV. PRACTICE BEFORE THE IRS

Today, for numerous reasons, taxpayers pay a third party to prepare their individual income tax returns more often than they prepare their own returns. Of these paid preparers, typically only attorneys, CPAs and enrolled agents are subject to some form of regulation or oversight by the IRS or state licensing agencies.⁵ IRS oversight for these preparers includes Circular 230, the OPR and applicable penalties under the Code.

A. Circular 230.

Circular 230 prescribes the regulations governing “practice” before the IRS, including who may practice, the minimum standards for that practice and a hierarchy of discipline for those who violate those standards.⁶ Section 10.3 of Circular 230 describes who may practice before the IRS. Generally, it lists the following “practitioners” who are in good standing: Attorneys, CPAs, enrolled agents and enrolled actuaries. Each category of practitioner is subject to strict Federal and/or state licensing requirements, continuing professional education, and ethical obligations. For example:

1. Attorneys. Attorneys must meet state licensing requirements, which typically include completion of a 3-year post graduate degree program and successful completion of a state bar exam prior to practicing law. In addition, in order to continue practicing law, attorneys typically must complete minimum continuing education requirements. Attorneys are subject to professional codes of conduct and disciplinary actions.
2. Certified Public Accountants. Like attorneys, CPAs also must meet state licensing requirements, which typically include a defined course of study and successful completion of a state examination. In addition, CPAs must work under the supervision of another CPA for a specified period of time.

⁵ See, e.g., Tax Preparers Act, Chapter 14, CAL. BUS. & PROF. CODE § 22255; Oregon State Board of Tax Practitioners, OR. REV. STAT. § 673.605 to 673.740 (2001).

⁶ “Practice before the IRS comprehends all matters connected with a presentation to the Internal Revenue Service or any of its officers or employees relating to a taxpayer’s rights, privileges, or liabilities under laws or regulations administered by the Internal Revenue Service. Such presentations include, but are not limited to, preparing and filing documents, corresponding and communicating with the Internal Revenue Service, and representing a client at conferences, hearings, and meetings.” Cir. 230, § 10.2(d).

Typically CPAs must complete minimum continuing education requirements. Like attorneys, CPAs are typically subject to professional codes of conduct and disciplinary actions.

3. Enrolled Agents and Enrolled Actuaries. Individuals who have either successfully passed an IRS written exam testing their knowledge of tax law and procedure or who have years of past service with the IRS, may represent taxpayers before the IRS as “enrolled agents” or “enrolled actuaries.”⁷ Enrolled agents are generally unrestricted in the types of tax matters they can represent and which IRS offices they can practice before. Enrolled agents must complete a specified number of hours of continuing education credit within a defined period.⁸

B. IRS Office of Professional Responsibility (“OPR”).

The OPR was created in January 2003 to enhance the oversight of tax professionals. The OPR enforces the standards of practice, as detailed in Circular 230, for those who are authorized to practice before the IRS and investigates allegations of misconduct or negligence against tax practitioners. The OPR also licenses enrolled agents. The OPR conducts disciplinary proceedings of practitioners and makes recommendations for discipline, where warranted. Practitioners who have violated one of the practice rules may be subject to censure, suspension, or disbarment from practicing before the IRS.⁹ Over the last year, OPR’s staff has been doubled and its newly appointed Director will sit on the IRS Enforcement Committee, a panel of senior agency executives who meet regularly to develop strategies on the top compliance problems facing the IRS.

C. Penalties Under the Code Applicable to Preparers.

In addition to the disciplinary proceedings conducted by the OPR, preparers may be subject to penalties imposed by the Code. Section 6694 imposes several penalties on preparers who understate a taxpayer’s tax liability. For example, a preparer is subject to a \$250 penalty for taking a position on a return or refund claim for which he or she knew or should have known that there was “not a

⁷ Cir. 230, §§ 10.3(c) and (d), § 10.6.

⁸ For renewed enrollment effective after March 31, 2004, a minimum of 16 hours of continuing education credit must be completed during each calendar year. For renewed enrollment effective after April 1, 2007, a minimum of 72 hours of continuing education credit must be completed during the three-year enrollment cycle. Cir. 230, §§ 10.6(e)(1) and (2). *See, also* IRS Publication, *Practice Before the IRS and Power of Attorney*, (Rev. April 2002), p. 5.

⁹ Cir. 230, § 10.50(a). “Censure” is a public reprimand and was introduced in the recently issued final regulations. 67 F.R. 48760, amending CFR part 10; 2002-33 I.R.B. (August 19, 2002).

realistic possibility of being sustained on its merits,” absent a showing of reasonable cause for the understatement.¹⁰ A preparer is also subject to a \$1,000 penalty per return or refund claim if the understatement is attributable to the preparer’s willful attempt to understate the tax liability or is due to the preparer’s reckless or intentional disregard of rules or regulations.¹¹ Moreover, a preparer may be subject to penalties for the failure to meet certain statutory requirements for each income tax return, including:

1. Providing the taxpayer with a copy of the tax return;¹²
2. Signing the tax return that he or she prepares;¹³
3. Providing an identifying number on the tax return that he or she prepares,¹⁴ and
4. Maintaining and preserving a copy or list of all such returns for three years after the close of the return period.¹⁵

In addition, a preparer who “endorses or otherwise negotiates” a federal tax refund check payable to another taxpayer is subject to a \$500 penalty for each check, unless the preparer is depositing the check into the taxpayer’s account for the taxpayer’s benefit.¹⁶

¹⁰ I.R.C. § 6694(a).

¹¹ I.R.C. § 6694(b).

¹² I.R.C. § 6695(a). The preparer is subject to a \$50 penalty for each failure, subject to an annual maximum penalty of \$25,000 and a reasonable cause exception. *See also* I.R.C. § 6107(a).

¹³ I.R.C. § 6695(b). The preparer is subject to a \$50 penalty for each failure, subject to an annual maximum penalty of \$25,000 and a reasonable cause exception.

¹⁴ I.R.C. § 6695(c). The preparer is subject to a \$50 penalty for each failure, subject to an annual maximum penalty of \$25,000 and a reasonable cause exception. *See also* I.R.C. § 6109(a)(4).

¹⁵ I.R.C. § 6695(d). The preparer is subject to a \$50 penalty for each failure, subject to an annual maximum penalty of \$25,000 and a reasonable cause exception. *See also* I.R.C. § 6107(b).

¹⁶ I.R.C. § 6695(f). The penalties under I.R.C. §§ 6694 and 6695 are in addition to any other penalties applicable to the situation and are assessed without regard to the deficiency procedures under I.R.C. § 6212.

A preparer who knowingly or recklessly discloses any information provided in connection with the preparation of a return, or who uses that information for any non preparation-related purposes, may be charged with a misdemeanor.¹⁷ A preparer is also subject to further criminal sanctions for willfully attempting to evade or defeat tax¹⁸; making of false statements under penalties of perjury¹⁹; and aiding, assisting, counseling, or advising in the preparation of any document in connection with the Internal Revenue laws that is false or fraudulent with respect to a material matter.²⁰

V. TAX PREPARERS.

For the purposes of these comments, any individual – other than an attorney, CPA, or enrolled agent – who prepares a return for compensation is a “Tax Preparer.”²¹ Unlike attorneys, CPAs and enrolled agents, currently Tax Preparers are not required to demonstrate a minimum competency in the field of tax law or satisfy any continuing education requirements in order to prepare federal tax returns.

A. Impact of Tax Preparers on the Federal Tax System

Statistics show that the majority of all individual taxpayers who file tax returns are paying a tax preparer to determine their tax obligation.²² For example, according to the National Taxpayer Advocate, the 1999 tax return filing season

¹⁷ I.R.C. § 7216(a). The preparer may be subject to a fine of up to \$1,000 and/or up to 1 year imprisonment. The preparer who discloses such information in response to a court order or as required by some other Code provision, however, is not subject to criminal sanctions. I.R.C. § 7216(b)(1).

¹⁸ I.R.C. § 7201.

¹⁹ I.R.C. § 7206(1).

²⁰ I.R.C. § 7206(2).

²¹ See, e.g., Treas. Reg. § 301.7701-15(a)(3). See also IRS Pub. 947, *Practice Before the IRS and Power of Attorney*, (Rev. April 2002), p. 3.

²² According to the *Statistics of Income*, Spring Bulletin, 2002, there were 130.1 million individual income tax returns filed in tax year 2000. Of those, 70,726,315 million or 54.3% were submitted by a tax preparer. This number reflects only tax preparers who sign the returns.

data through July 3, 1999, showed 1.2 million paid Tax Preparers.²³ Approximately 779,000 of these Tax Preparers filed between zero and nine returns. Tax Preparers far outnumber any other category of preparer. Such participation by Tax Preparers can have a major effect on taxpayers and the Federal tax system. Such effects include:

1. Taxpayers, out of necessity, rely on Tax Preparers to explain taxpayers' rights and responsibilities (e.g., filing, recordkeeping, etc.), as well as to advise on issues where guidance is unclear and assess the risks associated with a possible reporting position.
2. Errors on returns, however inadvertent and unintentional, can have serious consequences for taxpayers in terms of money owed, time spent resolving the problem, and related adjustments in future years.
3. The tax system is increasingly viewed as an efficient vehicle to deliver social benefits to targeted populations (e.g., the Earned Income Credit, the HOPE and Lifetime Learning Credits, Dependent Care Credit, and Low Income Housing Credit). Many of the taxpayers eligible for these benefits are unlikely to be knowledgeable about tax laws.²⁴
4. Each year, Congress enacts laws and the IRS develops procedures that hinge on specific documentation requirements. A well-educated preparer can prevent inadvertent errors that undermine the vitality of these programs and consume IRS compliance resources to a disproportionate degree.
5. Unscrupulous Tax Preparers may prey upon uneducated taxpayers in order to gain financial benefit through filing fraudulent tax returns and diverting a portion of the refunds for their own benefit, charging inflated fees for

²³ This number does not include preparers who were paid but did not sign the tax return they prepared.

²⁴ For every type of Form 1040 filed in 2000 (TY99), a larger portion of taxpayers claiming EITC used paid preparers than those who did not claim EITC. CRIS Model 2001 IMF TY99 data. (4/9/02). Since the EITC is targeted to low income taxpayers who frequently have limited literacy skills (both in terms of language and computers), this suggests that those who are least likely to possess the skills needed to determine the qualifications of a preparer, rely on preparers more than the general population. *See also* IRS News Release, *Return Preparer Fraud – Significant Cases*. FS-2003-10 (3/4/03) (announcing the guilty plea of defendants who conspired to file more than 3,100 false tax returns claiming refunds of \$8.7 million; defendants admitted to soliciting recipients of Aid to Families with Dependent Children and Supplemental Security Income by word of mouth and written flyers by falsely claiming that such recipients might be eligible for hundreds or thousands of dollars in refunds due to the EITC program).

return preparation services, or increasing their clientele by advertising guaranteed larger refunds.

B. Tax Preparer Error Rate.

There is no consistent data regarding the number and type of errors on returns in relation to the type of preparer. However, according to a 1999 tax year Earned Income Tax Credit (EITC) sample, the more education and training in tax law, and the more oversight, a preparer had, the lower the overclaim rate on the returns filed by the preparer. For example, based on a sample of EITC returns, the overclaim rate for CPAs and attorneys was 20.4 percent, for enrolled agents and supervised preparers 26.0 percent, and for Tax Preparers (other paid return preparers) 34.3 percent.²⁵ In addition, according to the National Taxpayer Advocate, nearly 26 percent of the returns filed with math errors in 2000 (1999TY) were computed and signed by Tax Preparers. Further, recent reports indicate that Tax Preparers contributed to the revenue loss of \$8.9 billion in erroneous EITC paid in 1999.²⁶

C. Circular 230.

A Tax Preparer may engage in limited practice before the IRS. This limited practice is defined in § 10.7 of Circular 230, which states:

An individual who prepares and signs a taxpayer's tax return as the preparer, or who prepares a tax return but is not required . . . to sign the tax return, may represent the taxpayer before revenue agents, customer service representatives or similar officers and employees of the Internal Revenue Service during an examination of the taxable year or period covered by that tax return, but . . . *this right does not permit such individual to represent the taxpayer, regardless of the circumstances requiring representation, before appeals officers, revenue officers, Counsel or similar officers or*

²⁵ Internal Revenue Service, *Compliance Estimates for Earned Income Tax Credit Claimed on 1999 Returns*. (2/28/02). This data was derived from taxpayer answers to the examiners' question about how the return was prepared.

²⁶ Internal Revenue Service, *Compliance Estimates for Earned Income Tax Credit Claimed on 1999 Returns*. (2/28/02).

*employees of the Internal Revenue Service or the Department of Treasury.*²⁷

A Tax Preparer is subject to the rules generally applicable regarding standards of conduct and other matters as the OPR prescribes.²⁸

D. Office of Professional Responsibility.

A Tax Preparer who is involved in disreputable conduct is subject to disciplinary action by the OPR.²⁹ The Director of the OPR, after notice and opportunity for conference, may deny eligibility to engage in limited practice before the IRS to a Tax Preparer who has engaged in conduct that would justify censuring, suspending, or disbaring a practitioner from practice before the IRS.³⁰ However, it is likely that, other than preparing a return, Tax Preparers, who tend to be seasonal workers, typically do not represent taxpayers before revenue agents or customer service representatives during an examination of the taxable year or period covered by that tax return. As a result, this disciplinary action is not an effective tool in dealing with Tax Preparers.

E. Current Enforcement Efforts Against Problem Tax Preparers.

In addition to the disciplinary action by the OPR, Tax Preparers are also subject to the penalties imposed by the Code and detailed above. The IRS Criminal Investigation Return Preparer Program (“RPP”) focuses on investigating and prosecuting abusive preparers. During the first quarter of 2003, of preparers in general, Tax Preparers had the highest number of cases referred for prosecution.³¹ Unfortunately, the RPP’s efforts are analogous to closing the barn door after the horses have gotten out. Only after an unqualified or unscrupulous Tax Preparer has filed inaccurate or plainly false tax returns – resulting in serious consequences (financial and otherwise) for taxpayers, consumption of IRS compliance resources, and loss of revenue – can efforts be made to remove that preparer from

²⁷ Cir. 230, § 10.7(c)(1)(viii) (emphasis added). *See also Rev. Proc.* 81-38 (1981), 1981-2 C.B. 592.

²⁸ *Id.* at § 10.7(c)(2)(iii).

²⁹ IRS Pub. 947, *Practice Before the IRS and Power of Attorney*, (Rev. April 2002), p. 3. “Disreputable conduct” is described on page 6.

³⁰ *Id.* at § 10.7(c)(2)(ii).

³¹ The number of criminal investigations referred to the Department of Justice for prosecution regarding individuals by occupations are as follows: Accountant, 28 cases; Electronic Return Originator, 11 cases; Tax Preparer, 40 cases. Internal Revenue Service, *Return Preparer Fraud Fact Sheet by Criminal Investigation (CI)*. (Jan. 03).

the tax system. For example, in October 2002, a defendant was sentenced for aiding and assisting in the preparation and filing of more than 1,100 fraudulent Federal tax returns seeking \$2.7 million in bogus refunds from the IRS. In December 2002, three defendants pled guilty to conspiring to file during a six-month period more than 3,100 false tax returns with the IRS claiming refunds of \$8.7 million.³² A more efficient system to address the effects Tax Preparers have on taxpayers and the Federal tax system should be implemented.

VI. NATIONAL TAXPAYER ADVOCATE POSITION³³

The National Taxpayer Advocate has recommended that Congress enact a program for registration, examination, and certification³⁴ for Federal Tax Return Preparers (“FTRPs”).

A. Definition of an FTRP.

Under the program recommended by the National Taxpayer Advocate, an FTRP would be defined as a person, other than an attorney, CPA or enrolled agent, who prepares more than five (5) federal tax returns in a calendar year for a fee and satisfies certain requirements (described below).

B. Requirements for an FTRP.

The National Taxpayer Advocate has outlined the following recommended registration, examination and certification requirements:

1. Registration. All persons who prepare more than five (5) federal tax returns for a fee must register with the IRS. The IRS would be authorized to impose a per return penalty for failure to register, absent reasonable cause for the failure.
2. Examination. All persons who prepare more than five (5) federal tax returns for a fee must pass, in their first year of preparing such returns, an initial IRS examination designed to test their technical knowledge and competency to prepare individual and/or business tax returns. The program would also require that each FTRP also pass an annual refresher examination (including tax law updates) in each succeeding year in which

³² IRS News Release, *Return Preparer Fraud – Significant Cases*. FS-2003-10 (3/4/03).

³³ All references to the National Taxpayer Advocate’s position in these comments refer to Nina Olson’s talk on the licensing of commercial return preparers to the American Bar Association’s Standards of Tax Practice Committee on September 13, 2003.

³⁴ The National Taxpayer Advocate has also recommended related penalties for the enforcement of a program for FTRPs.

the FTRP prepares returns. The IRS would be authorized to impose a per return penalty on unenrolled preparers who fail to take or pass the examination, absent reasonable cause.³⁵

3. Certification. The IRS would annually certify as FTRPs those unenrolled paid preparers who have successfully passed the required examinations and are authorized to prepare federal tax returns for a fee.

C. Authorization Provided to the IRS Under the National Taxpayer Advocate's FTRP Recommended Program.

The National Taxpayer Advocate's FTRP program would seek authorization for the IRS to:

1. Conduct a public information and consumer education campaign, utilizing paid advertising to inform the public of the requirements that paid preparers must (1) sign the return prepared for a fee and (2) display their Federal Tax Return Preparer registration card, which demonstrates current skill and competency in federal tax return preparation;
2. Maintain a public list (in print and electronic media, including internet-based) of FTRPs who are registered and certified, of FTRPs who are registered but not certified, and FTRPs whose registration has been revoked;
3. Notify any taxpayer about the fact that his or her return was prepared by an unenrolled return preparer who is not registered or by a Federal Tax Return Preparer who is registered but not certified.

VII. POINTS OF CONCERN AND RECOMMENDATIONS REGARDING THE NATIONAL TAXPAYER ADVOCATE'S RECOMMENDED FTRP PROGRAM.

After reviewing the National Taxpayer Advocate's recommended FTRP program, as well as state programs implemented by California³⁶ and Oregon,³⁷ we would support, in general, a

³⁵ The National Taxpayer Advocate has stated that this would require that the IRS develop a series of at least four examinations: 1) an examination testing knowledge of individual income tax return preparation, including the Earned Income Tax Credit and simple Sole Proprietorship schedule preparation; 2) an examination testing knowledge of business income tax return preparation, including more complex Sole Proprietorship schedule preparation and employment taxes; and 3) & 4) an annual refresher and update examination in both individual and business tax preparation.

³⁶ Tax Preparers Act, Chapter 14, CAL. BUS. & PROF. CODE § 22255. Beginning July 1, 1997, the California Tax Education Council (CTEC), a public and private entity, assumed the

program for licensing tax preparers. The following address points of concern and recommendations regarding the National Taxpayer Advocate's proposed licensing program:

A. Definition of Persons Covered by a Tax Preparer Licensing Program

The National Taxpayer Advocate defines Tax Preparers covered by the licensing program as "all persons who prepare more than five (5) federal tax returns for a fee." This definition should also include any person *who assists in the preparation of* more than five (5) federal tax returns in a calendar year for a fee. In addition, it should be clear that the term "person" is as defined in I.R.C. §7701(a)(1), which includes business entities.

B. Suggested Requirements for a Tax Preparer to be Licensed.

We would support the recommendations by the National Taxpayer Advocate, with the following suggested changes: 1) Two levels of licensing should be offered, one for "Registered Tax Preparers" and another for "Certified Tax Preparers"; and 2) annual continuing education rather than refresher examinations should be required.

1. Registration. All persons who assist in the preparation of or who prepare more than five (5) federal tax returns in a calendar year for a fee must register with the IRS. "Registered Tax Preparers" should be required to work under the supervision of a Certified Tax Preparer, enrolled agent, CPA or attorney. The IRS should provide Registered Tax Preparers with a registration number to facilitate compliance.

Allowing Registered Tax Preparers to practice before by the IRS by simply registering, addresses the concerns regarding the ability of taxpayers to obtain speedy and inexpensive tax assistance. Requiring supervision for Registered Tax Preparers addresses the issues of compliance and protection of the tax system's integrity. As noted in the discussion on Tax Preparer error rates, supervised Tax Preparers had lower overclaim rates than unsupervised Tax Preparers. Working under the supervision of a Certified Tax Preparer, enrolled agent, CPA or attorney (collectively "Supervisory Preparers") would provide the oversight and resources necessary to assist a Tax Preparer in filing complete and accurate returns with the IRS. Moreover, the requisite supervision would provide some form of self-policing in that Supervisory Preparers would want to ensure their good standing to practice before the

responsibility for administering the Tax Preparer Program, which was formerly administered by the California Department of Consumer Affairs.

³⁷ Oregon State Board of Tax Practitioners. OR. REV. STAT. § 673.605 to 673.740 (2001).

IRS. The requisite supervision should also be required for the Tax Preparer to represent a taxpayer before revenue agents or similar officers/employees of the IRS as detailed in § 10.7(c)(2)(iii) of Circular 230.

2. Examination. All persons who assist in the preparation of or who prepare more than five (5) federal tax returns in a calendar year for a fee, must register with the IRS and pass, in their first year of unsupervised preparation of such returns, an initial examination testing their technical knowledge, competency to prepare individual and/or business tax returns, and familiarity with the standards of tax practice required of preparers. The discussion on Tax Preparer error rates supports an examination requirement (i.e., enrolled agents who pass an IRS written exam have a lower overclaim rate than Tax Preparers, who are not required to pass an exam prior to preparing and filing returns with the IRS).
3. Certification. Upon registration and satisfactory completion of the examination, the person would be “certified” to prepare federal tax returns for a fee (i.e., a “Certified Tax Preparer”). The IRS should provide Certified Tax Preparers some form of credentials indicating that they are certified to practice (limited) before the IRS. Such credentials would assist taxpayers in assessing and identifying competent preparers. The certification process (i.e., current registration and compliance with the continuing education requirement) should be conducted annually by the OPR.
4. Continuing Education. All Certified Tax Preparers should be required to annually complete a specified number of hours of basic individual tax law education within the defined time period and provide evidence of such education to the IRS.³⁸ If a Certified Tax Preparer fails to complete the continuing education requirement, he or she should be required to re-register and retake the exam prior to filing returns unsupervised with the IRS.

³⁸ For example, California requires tax preparers to complete an initial requirement of 60 hours of basic individual tax law education within the previous 18 months, and a continuing education requirement of 20 hours per year, including 12 hours of federal taxation. Tax Preparers Act, Chapter 14, CAL. BUS. & PROF. CODE § 22255. Oregon requires that a tax preparer complete at least 30 hours of instruction or seminar relating to tax preparation. OR. REV. STAT. § 673.655 (2001); OR. ADMIN. R. 800-015-010 (1) (2002). Oregon requires that a tax preparer complete 780 hours of tax preparation work in two of the last five years, prior to taking the Tax Consultant exam. OR. REV. STAT. § 673.625 (2001); OR. ADMIN. R. 800-25-0020.

Requiring continuing education, rather than annual refresher examinations, would address concerns regarding a Certified Tax Preparer's technical knowledge and competency to prepare returns; concerns regarding examination availability – and consequently the livelihood of Certified Tax Preparers; and allow Certified Tax Preparers to focus their education on specific areas of tax.

Requiring continuing education would ensure a Certified Tax Preparer's technical knowledge and competency to prepare returns. This is evident in the overclaim rates discussed above, (i.e., the more education and training in tax law a preparer has, the lower the overclaim rate on the returns filed by the preparer). In addition, requiring continuing education has been a successful practice for enrolled agents, CPAs and attorneys. In addition, continuing education allows a Certified Tax Preparer to focus on areas of tax that he or she typically handles and facilitates the exposure to new changes in the tax laws. Requiring continuing education also allows the Certified Tax Preparer to attend training within his or her own schedule. Set examination dates, if missed for any reason, could affect the Certified Tax Preparer's ability to conduct business (i.e., if a Certified Tax Preparer missed an examination and had to wait until the next examination date, he or she could not continue to practice before the IRS until the refresher examination requirement was met).

C. Authorization Sought for the IRS Under the National Taxpayer Advocate's FTRP Recommended Program.

The authorization sought by the National Taxpayer Advocate's with respect to its recommend FTRP program is appropriate and necessary to facilitate the success of such a program. This authorization includes: 1) conducting public information and consumer education campaigns to inform the public of the requirements for Tax Preparers; 2) maintaining a public list (in print and electronic media) of registered Tax Preparers for the benefit of taxpayers; and 3) notifying taxpayers about the fact that his or her return was prepared by an unregistered Tax Preparer.

D. Enforcement.

First, the regulations defining an income tax return preparer, which states that a "person may be an income tax return preparer *without regard to educational qualifications and professional status requirements*," should be amended to support a Tax Preparer licensing program.³⁹ Congressional authorization and

³⁹ Treas. Reg. § 301.7701-15(a)(3) (emphasis added).

“blessing” for such a program will assist the IRS with enforcement and address judicial concerns. Second, in order for the IRS and the OPR to have authority to enforce a program for licensing Tax Preparers, Circular 230 should be amended to take into consideration the program’s requirements. Such authority should include disciplinary action by the OPR to address a Tax Preparer’s failure to register, work unsupervised or failure to meet the continuing education requirements. Lastly, any Tax Preparer licensing program should have “teeth” to ensure compliance. The National Taxpayer Advocate’s suggested per return penalties for Tax Preparers’ failure to comply with a licensing program’s requirements would be an appropriate first step. However, in order to ensure compliance with a licensing program, as well as to punish unscrupulous Tax Preparers, the suggested penalties should be enhanced and strictly enforced. An unenforced penalty, no matter how harsh, is useless. Penalties should have reasonable cause exceptions.

E. Implementation.

Suggestions on the implementation (i.e., funding, staffing, etc.) of a Tax Preparer licensing program were sought. The program for enrolling enrolled agents provides a starting block for any Tax Preparer licensing program (i.e., the registration, examination and oversight). For example, it is important that the IRS develop a competent test to determine the knowledge and competency of the Tax Preparer. We feel confident, based on the existing examination for enrolled agents, that the IRS will be able to develop a Tax Preparer exam that will test the requisite criteria (i.e., technical knowledge, competency to prepare individual and/or business tax returns, and familiarity with the standards of tax practice required of preparers). In addition, the OPR, which is already responsible for the enrollment of enrolled agents, is ideally suited to handle the licensing and monitoring of Tax Preparers. It should be noted that the doubling of the OPR staff would assist the OPR in handling this additional program, although additional staff will probably be necessary. Lastly, the IRS’ focus on electronic filing will assist in the regulation and enforcement of Tax Preparers.

F. Funding.

Suggestions on the funding of a Tax Preparer licensing program have been requested. In addition to other sources of funding, the National Taxpayer Advocate has suggested fees be charged for the application and examination to cover the administrative costs of a licensing program. We are in agreement. In addition, the reduction in revenue loss relating to erroneous filed returns and consumption of IRS compliance resources help offset the costs relating to implementing and maintain a licensing program. Moreover, enhanced penalties should also reduce revenue loss relating to false filed returns, as well as the consumption of IRS compliance resources.

G. Preemption.

The enactment of a Federal Tax Preparer program may cause preemption issues with corresponding state licensing programs. Accordingly, any legislation enacting a licensing program should explicitly address whether the program is intended to preempt state licensing programs. Our view is that, because Tax Preparers typically prepare state returns in addition to Federal returns, preemption is inappropriate.

VIII. CONCLUSION

A uniform licensing program for Tax Preparers that is directed, implemented and monitored by the IRS, would benefit taxpayers, improve compliance and fit within the IRS' new focus on enforcement. In addition, such a licensing program would further the IRS's commitment to ensuring the integrity of the tax system and recognition of tax professionals as an integral part of effective tax administration.