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### Alternative Methods to Regulating Paid Uncredentialed Tax-Return Preparers Post Loving

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## **Alternative Methods to Regulating Paid Uncredentialed Tax-Return Preparers Post Loving**

### **I. Introduction**

With an increasing number of inconveniences with filing taxes and constant changes to the already complex Internal Revenue Code, many taxpayers rely on paid tax-return preparers to assist in filing their taxes.<sup>1</sup> In 2018, the Internal Revenue Service (hereinafter “IRS”) conducted a study that found approximately 83 million taxpayers paid to have their federal tax return prepared for the 2017 tax year.<sup>2</sup> The majority of these returns were filed by preparers who were neither licensed nor regulated.<sup>3</sup> This statistic is concerning because many taxpayers blindly rely upon the assistance of paid preparers, despite preparers not being federally regulated, nor

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<sup>1</sup> Loving v. IRS, 742 F.3d 1013, 1014 (D.C. Cir. 2014), aff’d 917 F. Supp. 2d 67, 80 (D.D.C. 2013).

<sup>2</sup> Internal Revenue Service, <https://www.irs.gov/newsroom/choosing-a-paid-tax-return-preparer> (last visited Nov. 25, 2019).

<sup>3</sup> Nina E. Olson, *More Than a ‘Mere’ Preparer: Loving and Return Preparation*, 139 Tax Notes 767, 769 (2012).

[https://taxpayeradvocate.irs.gov/Media/Default/Documents/NTA\\_TaxNotes\\_LovingCase.pdf](https://taxpayeradvocate.irs.gov/Media/Default/Documents/NTA_TaxNotes_LovingCase.pdf)

required to demonstrate a certain level of competency in federal tax law.<sup>4</sup> John Koskinen the IRS Commissioner in 2015, stated “about sixty percent of all tax-return preparers operate without any type of oversight or education requirement.”<sup>5</sup> As a result of the lack of oversight, tax preparers incorrectly file returns which have devastating consequences for taxpayers, taxpayers fall subject to fraud and other predatory practices, and the IRS is unable to collect the full amount of taxes which they are owed.

Paid preparers are broken into two major categories, uncredentialed and credentialed preparers. Uncredentialed preparers make up approximately sixty percent of all preparers and lack any professional licensure or certification. Additionally, they are not regulated nor required to demonstrate any competency in tax law before charging for services.<sup>6</sup> On the other hand, credentialed preparers are regulated and do have professional licensures. They include certified public accountants, attorneys, enrolled agents, and enrolled retirement plan agents.<sup>7</sup> Currently,

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<sup>4</sup> Elaine Povich, *The Scary Truth About Your Independent Tax Preparer*, HUFFINGTON POST (Feb. 25, 2014, 10:43 AM), [http://www.huffingtonpost.com/2014/02/25/tax-preparations-n\\_4853792.html](http://www.huffingtonpost.com/2014/02/25/tax-preparations-n_4853792.html).

<sup>5</sup> Internal Revenue Service News Release (2014), *New IRS Filing Season Program Unveiled for Tax Return Preparers: Voluntary Program to Focus on Continuing Education for Unenrolled Preparers*, <https://www.irs.gov/pub/irs-news/IR-14-075.pdf>.

<sup>6</sup> Taxpayer Advocate Service, *Return Preparer Oversight: The IRS Lacks a Coordinated Approach to Its Oversight of Return Preparers and Does Not Analyze the Impact of Penalties Imposed on Preparers* (2018), [https://taxpayeradvocate.irs.gov/Media/Default/Documents/2018-ARC/ARC18\\_Volume1\\_MSP\\_07\\_RETURNPREPARER.pdf](https://taxpayeradvocate.irs.gov/Media/Default/Documents/2018-ARC/ARC18_Volume1_MSP_07_RETURNPREPARER.pdf).

<sup>7</sup> Rev. Proc. 2014-42, 2014-2 C.B. 192.

there is not a nationwide regulation program for uncredentialed paid tax-return preparers, but New York, Oregon, Maryland, and California have implemented state level regulations.<sup>8</sup> With so many taxpayers relying on the assistance of paid preparers, majority of whom are uncredentialed, it is imperative to have government oversight in the form of regulations. Regulations will increase compliance within our tax system by ensuring uncredentialed paid tax-return preparers are competent and properly claiming legal positions for taxpayers which they are entitled to. Furthermore, regulations will assist in protecting taxpayers, especially those who are low-income because they “are often the least educated and least financially sophisticated in the United States.”<sup>9</sup>

The IRS has made several attempts throughout history to regulate uncredentialed paid tax-return preparers, the most recent being 2011. In efforts to respond to concerns surrounding taxpayers “being poorly served due to [tax] preparers’ inadequate education and training,” the IRS promulgated regulations which required uncredentialed tax-return preparers to: 1) pass a competency test related to Form 1040 and related schedules, 2) pay annual fees, and 3) complete continuing education courses.<sup>10</sup> These regulations were rejected before issuance in the landmark case *Loving v. Commissioner*. This decision was a major setback for the IRS because it permanently enjoined the IRS from enforcing a “registration scheme against tax-return

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<sup>8</sup> Povich, *supra* note 4.

<sup>9</sup> Olson, *supra* note 3, at 769.

<sup>10</sup> Loving, 742 F. 3d at 1014.

preparers,” and held that the IRS does not possess the statutory authority to regulate uncredentialed tax-return preparers.<sup>11</sup>

This paper argues a nationwide regulation program for uncredentialed tax-return preparers is needed and the current regulation regime is insufficient. Regulation helps to ensure effective tax administration, ensure ethical standards of preparers, and to protect low-income taxpayers from incompetent and unscrupulous preparers. This paper reviews historical attempts by the IRS to regulate uncredentialed tax-return preparers and proposes two viable alternatives to regulation which will achieve some of the same goals. It provides insight into the landmark case *Loving v. Commissioner* which set precedent for regulating uncredentialed tax-return preparers. And it examines current literature both for and against regulating uncredentialed tax-return preparers.

Part II, A begins by providing background information of how the IRS exercised their regulation authority pre- *Loving*. Part II, B will discuss the promulgated regulations set forth by the IRS in 2011, which were rejected in *Loving*. Part II, C lay outs the current regulatory scheme of uncredentialed tax-return preparers post- *Loving*. Part III, examines recent literature in favor and against regulation of uncredentialed tax-return preparers. Part IV, offers a proposal in accordance with recent literature, asking for a legislative fix by Congress to provide the IRS the authority to regulate uncredentialed tax-return preparers. Additionally, it offers unique alternatives to regulation, that achieve some of the same goals as regulation, if a legislative fix by Congress is not adopted.

## **II. Background**

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<sup>11</sup> *Id.* at 1022.

## A) 1884 - 2011

Originally enacted in 1884, 31 U.S.C. §330 provides the Treasury Secretary with the authority to “regulate the practice of representatives of persons before the Treasury Department.”<sup>12</sup> Since the IRS is a bureau of the Treasury Department, 31 U.S.C. §330 includes practice before the IRS.<sup>13</sup> The regulations set forth by the Treasury Secretary are reprinted under the name Treasury Department Circular 230 (hereinafter “Circular 230”).<sup>14</sup> Circular 230 was created in 1921 and “govern[s] the recognition of attorneys, certified public accountants, enrolled agents . . . and other persons representing taxpayers before the Internal Revenue Service.”<sup>15</sup> It provides the standards of compliance for tax-return preparers who “practice before the IRS” and offers methods and procedures of discipline for those who fail to comply with those standards.<sup>16</sup>

Before the IRS promulgated regulations in 2011, the IRS never maintained the position that 31 U.S.C. §330 or Circular 230 gave them the authority to regulate tax-return preparers.<sup>17</sup>

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<sup>12</sup> 31 U.S.C. §330 (2020).

<sup>13</sup> 26 C.F.R. §601.101(a) (2020).

<sup>14</sup> Loving, 917 F. Supp. 2d 67, 71.

<sup>15</sup> Id. §330.

<sup>16</sup> Pippa Browde, *A Consumer Protection Rationale for Regulation of Tax Return Preparers*, 101 Marq. L. Rev. 527, 552 (2017).

<sup>17</sup> Loving, 742 F. 3d 1013, 1021. (holding, in the first 125 years after the statute's enactment, the Executive Branch never interpreted the statute to authorize regulation of tax-return preparers. But in 2011, the IRS decided that the statute in fact did authorize regulation of tax-return preparers).

Rather, they maintained the position that 31 U.S.C. §330 gave them the authority to regulate credentialed paid tax-return preparers such as attorneys, accountants, and other tax professionals “appearing in adversarial proceedings before them through competency standards.”<sup>18</sup>

## **B) 2011 - 2014**

In 2011, the IRS in response to public concerns of the tax preparation industry, promulgated regulations which attempted to expand its regulatory authority to uncredentialed tax-return preparers.<sup>19</sup> The regulations required uncredentialed tax-return preparers to register as a new category of preparers called Registered Tax-Return Preparers (RTRP).<sup>20</sup> The primary goal of the RTRP program was to “increase the quality of the tax preparation industry and to improve services to taxpayers.”<sup>21</sup> Furthermore, the program was believed to “increase tax compliance and help to ensure that tax-return preparers are knowledgeable, skilled, and ethical.”<sup>22</sup> The regulations required tax-return preparers to: 1) pass a competency test related to Form 1040 and related schedules, 2) pay annual fees, and 3) complete continuing education courses.<sup>23</sup> In the

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<sup>18</sup> *Id.* at 1015.

<sup>19</sup> Regulations Governing Practice Before the Internal Revenue Service, 76 Fed. Reg. 32, 286-87 (Jun. 3, 2011) (to be codified at 31 C.F.R. pt. 10).

<sup>20</sup> Elaine Smith, *Regulating Tax Preparers: Transforming Loving from a Stumbling Block to A Stepping Stone*, 83 UMKC L. Rev 1079, 1090 (2015).

<sup>21</sup> Internal Revenue Service *Registered Tax Return Preparer Test Explained* (2012), <http://irs.gov/pub/irs-news/fs-11-12.pdf>.

<sup>22</sup> T.D. 9501, 2010-46, I.R.B. 652.

<sup>23</sup> *Loving*, 742 F. 3d 1013, 1014.

promulgation of the regulations, the IRS relied on 31 U.S.C. §330,<sup>24</sup> which provides the IRS the authority to “regulate the practice of representatives of persons before the Department of the Treasury.”<sup>25</sup> The IRS estimated the promulgated regulations would apply to approximately 600,000 to 700,000 tax-return preparers.<sup>26</sup>

Three independent tax-return preparers who would be subject to the regulations, brought suit against the IRS “seeking declaratory and injunctive relief to prevent enforcement of the new regulations.”<sup>27</sup> The individuals argued the regulations were beyond the scope of authority given to the IRS by 31 U.S.C. §330.<sup>28</sup> The District Court for the District of Columbia held in favor of plaintiffs and the D.C. Court of Appeals affirmed. The Court of Appeals opined that the IRS’s interpretation of the statute was “unreasonable in light of the statute's text, history, structure, and context.”<sup>29</sup> This case established that the IRS does not possess the authority to regulate uncredentialed tax-return preparers because merely preparing a tax-return does not constitute practice before the IRS.

### **C) 2014 - Present**

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<sup>24</sup> Id.

<sup>25</sup> Id. § 330(a)(1).

<sup>26</sup> Loving, 742 F. 3d 1013, 1014.

<sup>27</sup> Id. at 1016.

<sup>28</sup> Id. at 1014.

<sup>29</sup> Id.



Despite the D.C. Court of Appeals decision to reject the proposed regulations in *Loving*, some regulations still exist. However, the category of RTRP does not.<sup>30</sup> The most important remaining regulation is the Preparer Tax Identification Number (“PTIN”). The PTIN, which derives its statutory authority from Section 6109 (a)(4) of the Internal Revenue Code, began in 1999 as an “alternative for tax-return preparers furnishing their social security numbers on tax returns which they prepared.”<sup>31</sup> The PTIN was required to help protect the identity of tax-return preparers and to “help maintain the confidentiality of SSNs.”<sup>32</sup> The PTIN is a number assigned to any individual who for compensation “prepares all, or substantially all, of any federal tax return or refund claim.”<sup>33</sup> It serves as a mechanism by which the IRS can regulate tax-return preparers by collecting data and easily identifying any preparer misconduct.<sup>34</sup> Furthermore, it allows the IRS to better identify tax-return preparers, centralize information, and effectively administer the rules relating to tax-return preparers.<sup>35</sup>

The requirements attached to obtaining a PTIN, renewing a PTIN, and failure of having a PTIN are so de minimis that the need of greater regulations on tax-return preparers is apparent.

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<sup>30</sup> Rev. Proc. 2014-42, 2014-2 C.B. 192.

<sup>31</sup> *Steele v. United States*, 159 F. Supp. 3d 73, 77 (D.D.C. 2016).

<sup>32</sup> Furnishing Identifying Number of Tax Return Preparer, 75 Fed. Reg. 60, 309 (Sept. 30, 2010).

<sup>33</sup> Internal Revenue Service, <https://www.irs.gov/tax-professionals/ptin-requirements-for-tax-return-preparers> (last visited Apr. 30, 2020).

<sup>34</sup> Internal Revenue Service, Return Preparer Review Pub. No. 4832, Return Preparer Review (2009), <http://www.irs.gov/pub/irs-pdf/p4832.pdf>.

<sup>35</sup> See Furnishing Identifying Number of Tax Return Preparer, 75 Fed. Reg. 60, 309 (Sept. 30, 2010). See also; *Montrois v. United States*, 916 F. 3d 1056, 1059 (D.C. Cir 2019).

To obtain a PTIN, a return preparer can do so by filling an application online called the W-12.<sup>36</sup> There are no prerequisites or filing requirements and the process to complete the W-12 is not extensive. So much so, that the IRS boasts that the application “only takes about 15 minutes.”<sup>37</sup> Similarly, the renewal process is just as simple. To renew a PTIN, a preparer must pay a nominal fee of \$63 and complete another W-12, which takes the same amount of time. The need of greater regulations attached to the PTIN is reinforced with the inconsequential fee of \$50, a preparer must pay per return for failure to furnish a PTIN.<sup>38</sup> Therefore, any paid tax-return preparer can easily obtain a PTIN and renew a PTIN, without any legitimate risk associated.

Another form of regulation is the Annual Filing Season Program, an IRS program which provides paid tax-return preparers who voluntarily enroll into the program continuing education of tax law. Created in 2015, the program serves as an interim measure to regulate tax-return preparers by providing them with current updates of federal tax law.<sup>39</sup> Furthermore, the program is designed as an incentive for tax-return preparers to voluntarily join. To complete the program, an uncredentialed tax-return preparer must complete 18 hours of continuing education, which consists of a six-hour federal tax law refresher course with a test, ten hours of other federal law topics, and two hours of ethics.<sup>40</sup> The preparer must also renew their PTIN and “consent to

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<sup>36</sup> Internal Revenue Service, *supra* note 35.

<sup>37</sup> Id.

<sup>38</sup> 26 U.S.C.S. § 6695 (2020).

<sup>39</sup> Internal Revenue Service, <https://www.irs.gov/tax-professionals/annual-filing-season-program> (last visited Mar. 24, 2020).

<sup>40</sup> Id.

adhere to the obligations in Circular 230, Subpart B and section 10.51.”<sup>41</sup> After the preparer has completed the program, they are awarded a record of completion from the IRS and will have their name recognized in a public database of return preparers called the Record of Completion Directory on the IRS website.<sup>42</sup> Additionally, the preparer is given limited representation rights before Revenue Agents, Taxpayer Advocate Service, customer service representatives, and the IRS for the returns which they prepared.<sup>43</sup>

The Annual Filing Season Program is a strong attempt by the IRS to regulate uncredentialed tax-return preparers and provide taxpayers with assurance that their tax-return preparer’s competency. However, it is insufficient because the comprehension test’s structure allows preparers to “game the system.” If a preparer fails the test on their first attempt, the provider administering the test can provide the preparer with the exact test for their second attempt.<sup>44</sup> Similarly, on a preparer’s third attempt, the test provider can administer a test with as much as half of the same questions as the second test.<sup>45</sup> The current structure of the test does not ensure tax preparers are competent in tax law and dampens the IRS’s ability to regulate tax-return preparers and ensure a certain level of competency. A preparer who fails the test on their first attempt can simply memorize the answers for their second attempt. Similarly, a preparer who

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<sup>41</sup> Id.

<sup>42</sup> Id.

<sup>43</sup> Id.

<sup>44</sup> Internal Revenue Service, <https://www.irs.gov/tax-professionals/ce-provider-faqs-annual-federal-tax-refresher-aftr-course#act> (last visited Mar. 24, 2020).

<sup>45</sup> Id. (explaining, a minimum of fifty percent of the test questions for the third attempt must be different than the questions in the prior test).

fails on their second attempt, can memorize the answers for their third attempt where they may come across as much as fifty percent of the same questions. This practice takes away from the IRS's ability to ensure preparer possess a certain level of competency because preparers can study the test and not learn the material.

The awareness of the Annual Filing Season Program needs to be increased. There are no statistics or empirical evidence at the moment that provides insight into the number of taxpayers who utilize the RPO Directory when making their selection to hire a preparer. However, it is my assumption that many taxpayers do not use the directory because they are unaware of it. If taxpayers were aware of the directory, they would utilize it to make informed decisions while selecting a tax-return preparer because they would be aware of the amount of tax law knowledge the preparer possesses. This informed decision will assist in decreasing levels of concern regarding tax-return preparers incompetency and improve confidence of the tax preparation industry.

### **III. Review of Existing Proposals**

A large portion of current literature concerning regulation of the tax preparation industry calls for government regulation over uncredentialed tax-return preparers. This regulation is usually in the form of an amendment to 31 U.S.C. §330, which will grant the IRS the ability to regulate uncredentialed paid tax-return preparers.<sup>46</sup> However, some have made the argument that

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<sup>46</sup> See Soled and Thomas, *Regulating Tax Return Preparation*, 58 B.C. L. Rev. 151, 193 (2017).; See also; (Alex H. Levy, *Believing In Life After Loving: IRS Regulation of Tax Preparers*, 17 Fla. Tax Rev. 437, 467 (2015)).

regulation of uncredentialed tax-return preparers would do more harm than good.<sup>47</sup> This section reviews current literature and discusses existing proposals.

### A. Levy

In 2014, the year *Loving* was decided in the District of Columbia Court of Appeals, Alex Levy wrote an article examining *Loving* and discussing its aftermath. The article painted a picture of the Government's previous attempts to regulate uncredentialed tax-return preparers. Levy, at the time a recent graduate of New York University School of Law, agrees with other commentators discussed below that mandatory regulations of uncredentialed tax-return preparers is beneficial, and that a legislative fix by Congress may be necessary to achieve it. In fact, Levy contends that a legislative fix by Congress is the only pathway left for regulation to be achieved because of the Solicitor General failed to petition the Supreme Court after *Loving*.<sup>48</sup>

Levy contends government oversight is needed to assist in properly allocating public monies, to decrease incompetence, and to protect low-income taxpayers against fraud and predatory practices from uncredentialed tax-return preparers.<sup>49</sup> Levy emphasizes the consequences of these practices do apply to all taxpayers, but are particularly devastating for low-income taxpayers because they lack the resources to detect fraud by their preparer and are left "to reimburse the government, plus interest, and may also be barred from claiming a vital tax

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<sup>47</sup> Bob Ewing, *IRS Tax Preparers: A Successful Challenge to the IRS's Authority To License Tax Preparers*, <https://ij.org/case/irs-tax-preparers/#backgrounder> (last visited Apr. 24, 2020).

<sup>48</sup> *Id.* at 441.

<sup>49</sup> Levy, *supra* note 46, at 448-50.

benefit in the future.”<sup>50</sup> Levy acknowledges a legislative fix will be difficult to achieve due to the *Loving* court’s decision and the current political climate.<sup>51</sup> Nonetheless, Levy encourages the IRS to not let this dissuade them.<sup>52</sup>

In coming to this proposal, Levy recounts the IRS’s six-month public review on the tax-return preparer industry in 2009, in response to concerns about the industry.<sup>53</sup> During this review, the IRS solicited comments from individuals, groups, and organizations on how to “1) increase taxpayer compliance and 2) ensure uniform and high ethical standards of conduct for tax preparers” known as Notice 2009-60.<sup>54</sup> Levy bolstered his claim for government oversight by revealing that Notice 2009-60 received more than 500 comments, some which rejected the idea of testing tax-return preparers. But, most which “favored some level of increased regulation.”<sup>55</sup> As a result of these solicitations, the IRS in 2011 promulgated regulations requiring tax-return preparers to 1) pass a competency test, 2) pass a background check, and 3) obtain a PTIN, which were struck down in *Loving*.<sup>56</sup>

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<sup>50</sup> *Id.* at 448.

<sup>51</sup> *Id.* at 469.

<sup>52</sup> *Id.* at 441.

<sup>53</sup> *Id.*

<sup>54</sup> Levy, *supra* note 46, at 442.

<sup>55</sup> IRS Return Preparer Review, *supra* note 34.

<sup>56</sup> Levy, *supra* note 46, at 443.

Levy also emphasizes his dissatisfaction with the *Loving* case. Levy argues that the IRS was outmaneuvered because the IRS’s litigation strategy was “bumbling and ill-considered.”<sup>57</sup> Sarcastically, he questions whether the IRS actually anticipated their regulations to be challenged.<sup>58</sup> He argues that the IRS should have been more proactive and rejected the court’s characterization of a tax preparer as a mere scrivener because taxpayers rely on unregulated tax-return preparers due to the complexity of the Internal Revenue Code.<sup>59</sup> Furthermore, they rely on unregulated tax-return preparers because they are “often low income and vulnerable.”<sup>60</sup> As a result of the *Loving* failure, Levy argues a simple one sentence inclusion to 31 U.S.C. §330, that explicitly gives the government the authority to regulate tax- return preparers is necessary.<sup>61</sup>

Levy proposes to change the language of the statute from “the Secretary of the Treasury may—regulate the practice of representatives of persons before the Department of the Treasury,”<sup>62</sup> to the “Secretary of Treasury may—regulate the practice of representatives of persons before the Department of Treasury—including compensated preparers of tax returns, documents, and other submissions.”<sup>63</sup> Levy highlights that this legislative fix is not foreign, having received Congressional support in 2013 when Senator Max Baucus of Montana, included

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<sup>57</sup> *Id.* at 440.

<sup>58</sup> *Id.* at 444.

<sup>59</sup> *Id.* at 445.

<sup>60</sup> *Id.*

<sup>61</sup> Levy, *supra* note 46, at 467.

<sup>62</sup> *Id.* § 330(a)(1).

<sup>63</sup> Levy, *supra* note 46, at 468.

a clause in his tax reform discussion draft on tax administration which granted the IRS explicit authority to regulate tax-return preparers.<sup>64</sup>

## **B. Olson**

In 2013, when *Loving* was pending appeal to the United States Court of Appeals for the District of Columbia, Nina Olson the National Taxpayer Advocate (NTA), wrote a Special Report to Tax Notes regarding the need for regulating uncredentialed tax-return preparers. Olson, who was appointed by the Secretary of Treasury in 2001, dedicated her professional career to serving taxpayers as an advocate. Before serving as the NTA, Olson was the Executive Director and founder of the Community Tax Law Project, an organization which provides free tax assistance to low-income families.<sup>65</sup> Furthermore, Olson testified before the House Ways and Means Oversight Subcommittee and the Senate Finance Committee in 1997 and 1998, regarding problems facing low-income taxpayers.<sup>66</sup>

Olson advocates for the regulation of unenrolled (“uncredentialed”) tax- return preparers.<sup>67</sup> Olson highlights the preparation industry has become a very lucrative market and low-income taxpayers have become easy targets of predatory practices.<sup>68</sup> Olson argues regulation is needed to protect low-income uneducated taxpayers and ensure preparers are accurately preparing returns and upholding ethical standards. Olson recommends that Congress

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<sup>64</sup> Id. at 458.

<sup>65</sup> The Community Tax Law Project, <http://ctlp.org/> (last visited May 2, 2020).

<sup>66</sup> Olson, *supra* note 3, n.4 at 768.

<sup>67</sup> Id. at 769.

<sup>68</sup> Id.



adopts her recommendations set forth in her 2002 NTA report, and require uncredentialed tax-return preparers to register, be tested, and complete continuing legal education.”<sup>69</sup> Olson argues continuing education and testing are prophylactic because it ensures preparers possess a minimum level of competency and professionalism to minimize future negligence.<sup>70</sup> Furthermore, Olson stresses regulations would benefit taxpayers and increase the level of public trust for the tax-preparation industry.<sup>71</sup>

Olson maintains this argument, despite the *Loving* court’s holding that the IRS does not possess the authority to regulate tax-return preparers. Olson argues that the IRS does in fact possess the authority to regulate tax-return preparers because the court incorrectly characterized the roles and responsibilities of a tax preparer.<sup>72</sup> Olson describes the uniqueness of tax-return preparation, explaining that preparing a return “is not merely a ministerial act.”<sup>73</sup> Rather, it signifies that a tax-return preparer is “in the business of advising and assisting [their] client . . . . on the treatment of her items.”<sup>74</sup> Therefore, preparing a tax return is “almost always, presenting a case” before the IRS because a tax-return preparer “acts as a representative before the IRS when they advise and assist a taxpayer in making their claim to the IRS and Treasury.”<sup>75</sup> Olson continues her argument to say for the above-reasoning, the District Court’s opinion in *Loving*

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<sup>69</sup> *Id.* at 768.

<sup>70</sup> *Id.* at 777.

<sup>71</sup> Olson, *supra* note 3, at 778.

<sup>72</sup> *Id.* at 769-72.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 767.

was incorrect because it was based on a “fundamental misrepresentation [of] what occurs in 21<sup>st</sup> century tax administration.”<sup>76</sup>

Olson does not explicitly call upon a legislative fix by Congress to provide the IRS with the authority to regulate uncredentialed tax-return preparers. Rather, she highlights that Congress in 1884 placed regulations on tax-return preparers in response to concerns of the tax return industry where are identical to current circumstances. Therefore, Congress’s regulation would be “permissible and [a] reasonable approach to solving a serious problem in tax administration.”<sup>77</sup>

### **C. Browde**

In 2017, Pippa Browde an Associate Professor of Law at the University of Montana wrote an article discussing regulation for uncredentialed tax-return preparers. Browde calls for regulation of the return preparation industry, but offers a new outlook on how the issue of regulation ought to be framed. Browde frames the issue of necessity for regulation as a “consumer protection” issue. One where low-income taxpayers ought to be considered consumers and the need of regulation is to prevent uncredentialed tax-return preparers from preparing returns with errors and prevent abusive practices against low-income taxpayers. In framing the need of regulations as a “consumer protection” matter, Browde focuses on low-income taxpayer and fails to address the need of regulation to further compliance with the United States’ tax system and decrease the tax gap.<sup>78</sup> Furthermore, Browde challenges the concept that regulations on tax-return preparers would invite compliance.

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<sup>76</sup> Olson, *supra* note 3, at 772.

<sup>77</sup> *Id.* at 777.

<sup>78</sup> Browde, *supra* note 16, at 556.

Browde explains how the role of a tax-return preparer from the perspective of a low-income taxpayer creates a strong level of dependency because low-income taxpayers primarily rely on paid preparers to assist in the preparation and filing of their tax returns.<sup>79</sup> She offers multiple rationales for this dependency including, that low-income taxpayers believe they lack the ability to prepare their return themselves and believe that “using a paid preparer may increase the amount of refund they will receive or accelerate their refund.”<sup>80</sup> With the existence of this relationship, Browde explains taxpayers trust that their preparers are competent.”<sup>81</sup>

Browde continues to discuss the dependency between taxpayers and paid tax-return preparers by illustrating how paid tax-return preparers have a “unique role in the tax administration system . . . to help low-income taxpayers access social welfare benefits administered through the tax system.”<sup>82</sup> In this assertion, Browde focuses on the history and the importance of the Earned Income Tax Credit (hereinafter “EITC”) to low-income taxpayers. She explains that the EITC represents “the nation’s largest anti-poverty program and the private industry acts as intermediary to assist taxpayers (low-income) claim their eligibility.”<sup>83</sup> Due to the financial importance the EITC has on low-income taxpayers, Browde argues that “the majority of taxpayers claiming EITC benefits rely on the services of tax return preparers.”<sup>84</sup> As a

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<sup>79</sup> Id. at 533.

<sup>80</sup> Id.

<sup>81</sup> Id.

<sup>82</sup> Id. at 538.

<sup>83</sup> Browde, *supra* note 16, at 538.

<sup>84</sup> Id. at 539.

result, Browde alleges this invites fraud.<sup>85</sup> Furthermore, Browde argues this reliance from low-income taxpayers on paid tax-return preparers creates a high error rate.

#### **D. Jay Soled and Kathleen Delaney Thomas**

Jay Soled and Kathleen Delaney Thomas, tax professors at prominent U.S. law schools, desire Congress's intervention within the tax-return preparation industry just like Olson, Levy, and Browde. They argue Congress should regulate the actions of uncredentialed tax-return preparers because they "lack expertise in tax law and target low-income taxpayers."<sup>86</sup>

Furthermore, uncredentialed tax-return preparers, "often charge exorbitant and hidden fees while frequently making errors, which, if detected by the IRS, leave[s] the taxpayer responsible for repayment of taxes and interest."<sup>87</sup> Soled and Thomas emphasizes the importance of regulation to protect all taxpayers, especially low-income taxpayers.

Soled and Thomas begin their proposals by articulating the importance of the tax-preparation industry and the taxation process within the United States. They argue for the private sector, the goal of the tax-preparation industry is to generate profit.<sup>88</sup> While, the goal of the IRS is to collect money which will be used to reduce poverty and redistribute wealth.<sup>89</sup> They acknowledge that these two goals are at odds with one another, but the IRS's goal should prevail.

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<sup>85</sup> Id. (arguing, tax returns claiming the EITC are perhaps the single biggest source of fraudulent refund claims).

<sup>86</sup> Soled and Thomas *supra* note 46, at 154.

<sup>87</sup> Id. at 154.

<sup>88</sup> Id.

<sup>89</sup> Id.

Additionally, they argue by regulating uncredentialed tax-return preparers with competency standards, the government can ensure a decrease in the tax gap, promote social welfare programs, and minimize tax-return errors.<sup>90</sup>

To achieve these goals, Soled and Thomas propose a legislative fix by Congress which would extend Circular 230's regulations to apply to all tax return preparers.<sup>91</sup> Soled and Thomas argue Congress can easily achieve this goal by merely adding two sentences to 31 U.S.C. §330.<sup>92</sup> Soled and Thomas do not provide the specific language change for the proposed legislative fix. However, they do offer that one sentence would declare that practice before the Treasury Department includes tax-return preparation and the other sentence would “declare that in the process of tax-return preparation, tax return preparers act as taxpayers’ de facto representatives.”<sup>93</sup> This in effect, “will allow the Treasury Department to require all tax-return preparers, credentialed or uncredentialed to 1) pass a competency exam, 2) undertake continuing tax education courses, and 3) submit a separate, signed statement acknowledging their involvement in the process.”<sup>94</sup> Furthermore, it will allow the Treasury Department to sanction those tax-return preparers who fail to uphold certain moral decency standards.<sup>95</sup>

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<sup>90</sup> Id. at 173.

<sup>91</sup> Soled and Thomas *supra* note 46, at 185.

<sup>92</sup> Id.

<sup>93</sup> Id.

<sup>94</sup> Id. at 186.

<sup>95</sup> Id. at 154.

Soled and Thomas's article does not address the current regulation through the PTIN. Additionally, as a regulatory alternative the article uniquely proposes that the Treasury Department could redesign the Form 1040 in a manner that would potentially help ensure better tax compliance.<sup>96</sup> However, they do not provide guidance of how this will be accomplished, but they do admit that this alternative is not feasible without properly addressing the competency standard of tax-return preparers.<sup>97</sup>

Soled and Thomas add that an expansion of Circular 230 to encompass all tax return preparers, will allow the IRS to secure injunctions against a tax-return preparer's ability to practice more easily, enhance financial liability exposure against a preparer who commits errors, and strengthen criminal tax sanctions."<sup>98</sup> Soled and Thomas explain that proposing regulations has two perspectives, one of the taxpayer and the other from the tax-return preparer. Soled and Thomas argue from the taxpayer's perspective, there should be a decrease or limit on penalties for taxpayers who owe the IRS due to an error made by a tax-return preparer.<sup>99</sup> Furthermore, they recommend that taxpayers be further involved in the tax-return preparation process by mandating all taxpayers to "supply their tax-return preparers with a signed-one-page declaration consisting of four parts.<sup>100</sup> The parts "affirming: i) the importance of taxpayer honesty; ii) the advantages associated with the submission of a correct return, iii) the disadvantages associated

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<sup>96</sup> Soled and Thomas *supra* note 46, at 163.

<sup>97</sup> Id.

<sup>98</sup> Id. at 190.

<sup>99</sup> Id.

<sup>100</sup> Id. at 191-92.

with the submission of an incorrect return, and iv) gratitude expressed by the government for taxpayers fulfilling their civic duties.<sup>101</sup>

### **E. Arguments Against Regulation**

Some literature argues that government oversight in the form of regulations is not necessary because regulation only benefits large tax-return preparation companies such as H & R Block and Jackson Hewitt.<sup>102</sup> The Institute for Justice (hereinafter “Institute”), the organization who represented Sabina Loving in the landmark *Loving* case, has adopted this viewpoint. The Institute argues that the powerful industry insiders would be the main beneficiaries of regulating uncredentialed tax-return preparers, at the expense of independent preparers, because they lobbied for the regulations and it would help them to “limit competition and drive more business their way.”<sup>103</sup> This argument follows the idea that mandatory regulations would drive small business tax-return preparers who are unable to afford the expenses associated with mandatory regulations out of business, and benefit the larger tax-return preparation companies who are able to afford the regulation expenses. Additionally, The Institute argues mandatory regulations are not sincere, rather a “power grab” attempt by the Obama IRS.<sup>104</sup>

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<sup>101</sup> Soled & Thomas *supra* note 46, at 191, 92.

<sup>102</sup> Levy, *supra* note 46, at 463.

<sup>103</sup> See *id.*, see also Examiner Editorial, *Institute for Justice lawsuit challenges IRS Power Grab*, (March 14, 2012, 12:00AM), <https://www.washingtonexaminer.com/institute-for-justice-lawsuit-challenges-irs-power-grab>.

<sup>104</sup> Levy, *supra* note 46, at 462.

Another argument against regulation is that even if the IRS was provided with the statutory authority to regulate uncredentialed tax-return preparers by Congress, the IRS would be unable to effectively do so because they lack sufficient resources and competency.<sup>105</sup> The IRS similar to other government agencies have a limited budget. The budget varies from year to year and results in various cancellations of agency initiatives and even hiring freezes. In the current regulation regime, the IRS's limited budget has resulted in them only being "able to audit a tiny percentage of returns each year."<sup>106</sup> Thus, IRS resources are scarce. Mandatory regulations to be effective would require an increase of IRS resources which the IRS does not possess. For example, for the IRS to achieve the regulations set forth in *Loving*, they would need an increase in budget to hire personnel to review background checks and ensure all preparers have completed their continuing education requirements. Therefore, regulation is not necessary because the IRS does not have sufficient resources to effectively regulate uncredentialed tax-return preparers.

#### **IV. Proposal**

In accordance with the above literature, a legislative fix by Congress is needed to regulate uncredentialed tax-return preparers. Regulation is needed as a mechanism to ensure compliance within the U.S. tax system and efficient tax administration. Furthermore, regulation is needed to protect low-income taxpayers from predatory practices of incompetent uncredentialed preparers. The proposals set forth within this section echo current literature requesting Congress to make a legislative fix which will give the IRS the authority to regulate uncredentialed paid tax-return preparers. In addition, this section offers two viable alternatives of regulation which will be

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<sup>105</sup>Taxpayer Advocate Service, *supra*, note 6.

<sup>106</sup> Soled and Thomas *supra* note 46, at 175.



beneficial if Congress refuses to make a legislative fix. It is important to draw a distinction between the terms regulation and alternatives. Regulations are mandatory and will be forced upon all tax-return preparers who for compensation prepare tax returns. However, this concept was rejected in *Loving*, therefore, the alternatives that I speak of will be voluntary and will only apply to those uncredentialed preparers who choose to opt into the program.

The preferable proposal to achieve regulation for uncredentialed tax-return preparers is a legislative fix by Congress to 31 U.S.C. §330. A legislative fix is simple and can be achieved in a sentence or two. The sentence will provide clear language which explicitly grants Congress the authority to regulate uncredentialed tax-return preparers. The language can be changed from “the Secretary of the Treasury may regulate the practice of representatives of persons before the Department of the Treasury” to, the Secretary of Treasury may—regulate the practice of representatives of persons before the Department of Treasury “including any individual who is compensated for preparing tax returns, documents, and other submissions.”

### **1. Possible alternatives outside of the *Loving* regulations**

Even if an amendment to 31 U.S.C. §330 is rejected by Congress or Congress fails to act, viable alternatives to regulation exists that will achieve the same goals. These alternatives are cost-effective and will provide incentives to uncredentialed tax-return preparers who chose to opt in.

The Annual Filing Season Program discussed in section II, can serve as an alternative to regulating uncredentialed tax-return preparers if the critiques discussed are resolved. The program currently is voluntary and provides uncredentialed tax-return preparers who choose to opt into the program, public recognition of competency through a directory which they can show

their clients. However, many taxpayers are unaware of the program and the program's testing structure needs to be changed. If taxpayers were aware of the program and knew that the preparers listed on the directory contained a certain level of competency in federal tax law, taxpayers would feel more confident in hiring preparers because they would be able to view their credentials. Additionally, if the competency test administered was structured in a way that a preparer could not simply memorize the test, both taxpayers and the IRS can be assured that the returns prepared by uncredentialed tax-return preparers were accurate and contained minimal errors, if any.

These critiques can be easily remedied to serve as an alternative. To change the structure of the comprehension test, the Annual Filing Seasons Program can simply adopt the same testing curriculum as volunteer programs, such as VITA or TCE which will be discussed in the next section. The new testing curriculum will allow uncredentialed preparers to demonstrate competency in tax law and ensure competency depending on the type of tax law they desire to pursue. To raise awareness of the program, the IRS can simply advertise the program and its benefits on their website, billboards, and other relatively cheap platforms. The benefits received by any uncredentialed tax-return preparer who voluntarily opts in the Annual Filing Season Program would be that they are provided with clients who need to have their returns prepared but are outside the eligibility scope of volunteer programs. Furthermore, they will be provided with taxpayers who have contacted the IRS for assistance or whom the IRS have previously issued deficiencies, as a result of an incorrectly filed return or a preparer's error.

Another viable alternative to regulation is connecting taxpayers with preparers who complete the Volunteer Income Tax Assistance Program (VITA), Tax Counseling for the Elderly (TCE), or a similar volunteer program with training and a competency test. VITA is a federally

funded program by the Treasury Department and provides free tax-return preparation services to all individuals including those with disabilities, whose income is \$56,000 or less.<sup>107</sup> Similarly, TCE is a federally funded program and offers “free tax help to individuals sixty or older.”<sup>108</sup> For both programs, a potential taxpayer who is outside the scope of eligibility is declined assistance and left to locate a tax-return preparer who is able to file their return. I propose that these turned-away taxpayers are provided with the names of the tax-return preparers who have successfully completed the program. Furthermore, these taxpayers names should be placed on a list which any tax preparer who has successfully completed the program could access and contact the taxpayer.

To become a VITA volunteer, identical to become a TCE volunteer, an individual must complete a series of in-person course trainings on federal tax law and pass a competency test. The test varies in difficulty depending on the level of preparation an individual desires (i.e. basic, advanced, military, health savings, international, foreign student and scholars)<sup>109</sup> and the individual must receive a minimum score of eighty percent to pass.<sup>110</sup> After completion of the trainings and the competency test, the individual is certified as a preparer and permitted to prepare returns. They are assumed to possess sufficient knowledge to accurately prepare tax-returns based upon the level of which they pursued.

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<sup>107</sup> Internal Revenue Service, <https://www.irs.gov/individuals/free-tax-return-preparation-for-you-by-volunteers> (last visited Apr. 26, 2020).

<sup>108</sup> Id.

<sup>109</sup> Id.

<sup>110</sup> Id.

The alternatives will achieve some of the same goals that regulation would, but without mandating that all uncredentialed tax-return preparers opt into the program. Additionally, the alternatives will benefit individual or small business uncredentialed tax-return preparers. Small shop tax preparers (“mom and pop shops”) who opt into these programs would not fear losing money or being beat out of competition by the bigger tax preparation industries as a result of opting into these programs. In fact, they may be able to compete with the larger corporate preparation competition because they would receive referrals of clients who are outside of the eligibility scope of the VITA program and would have their name published in the Record of Completion Directory. These incentives will serve as a sufficient incentive for uncredentialed tax-return preparers to pay the expenses associated with the alternative program.

## **V. Conclusion**

Uncredentialed tax-return preparers are the majority of tax-return preparers and are not required to demonstrate any level of competency in tax law nor any knowledge at all. They are simply required to fill out a form online and obtain a PTIN which takes merely a few minutes. But, if they make a mistake on a taxpayer’s return, those consequences to the taxpayer can be devastating. This seems highly inequitable. Additionally, volunteers in programs such as VITA or TCE are required to take trainings on tax law and competency tests, but paid preparers are not. It seems illogical to have trainings for volunteer preparers, but not paid preparers.

The Internal Revenue Code is complex and changes periodically which causes taxpayers to blindly rely upon paid tax-return preparers. Taxpayers assume their hired preparer is competent and will prepare their return honestly and without errors. But, this is not always the case and there is not a sufficient regulation regime that currently exists to enforce this. Statutory penalties are insufficient to induce fear and to prevent preparers from committing fraud and other

predatory practices. Therefore oversight is needed. It can be in the form of a simple legislative fix within 31 U.S.C. §330 by Congress. But, if Congress fails to act or rejects such a fix, alternatives in the form of the Annual Filing Season Program or the VITA/TCE program is viable. These programs will meet the two major goals of the RTRP program which was to “increase the quality of the tax preparation industry and to improve services to taxpayers.”<sup>111</sup> Uncredentialed tax-return preparers who are now competent in tax law will increase the quality of the tax preparation industry by preparing tax-returns with less errors which will help the IRS with their collection efforts. Additionally, competence will assist uncredentialed tax-return preparers in demonstrating to both their referred and non-referred clients that they contain a sufficient amount of knowledge which will improve services to taxpayers.

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<sup>111</sup> Internal Revenue Service, *Registered Tax Return Preparer Test Explained* (2011), <http://irs.gov/pub/irs-news/fs-11-12.pdf>.