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A Market for Tax Compliance

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I. INTRODUCTION

In 2011, the IRS took regulatory steps to correct a longstanding problem: inconsistent quality from tax preparers who are permitted to prepare tax returns but who are not part of any licensed class of professionals that would impose quality standards.[1] Although tax commentators generally praised such steps, the IRS's authority to increase the standards on this class of tax preparers was immediately

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[1] *See* Treasury Inspector Gen. for Tax Admin., Ref. No. 2009-40-098, Inadequate Data on Paid Preparers Impedes Effective Oversight (2009) [hereinafter TIGTA Report] (for a discussion of the pre-2011 difficulties the IRS had in monitoring paid preparers); Patrick E. Tolan, Jr., *It's About Time: Registration and Regulation Will Boost Competence and Accountability of Paid Tax Preparers*, 31 Va. Tax Rev. 471, 485-86, 503 (2012).

challenged, resulting in an initial loss for the government, which has recently been affirmed on appeal.[2]

The IRS's action to enhance the standards applicable to paid tax return preparers was one of a series of steps that the IRS has taken to combat what is known as the tax gap. The tax gap, simply put, is the difference between the amount of taxes that should be collected by the government if all taxpayers complied with their obligations and the amount that is actually collected.[3] The most recent estimate from tax year 2006 shows a gross tax gap of $450 billion (indicating a compliance rate of 83.1%).[4]

Although the United States arguably has more of a culture of compliance than the rest of the world,[5] the United States' overall high compliance rate is deceptive because noncompliance does not exist evenly across all types of tax reporting and willingness to comply tends to correlate with whether the government is receiving third-party information related to a taxpayer's tax liability.[6] Illustrating the extremes in compliance rate differentials, there is only a 1% noncompliance rate for wage income (which is almost entirely reported by third parties), but there is an approximately 50% noncompliance rate for cash income, which is not subject to third-party reporting.[7]

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[2] See Bryan T. Camp, "Loving" Return Preparer Regulation, 140 TAX NOTES 457 (2013); Richard M. Lipton, "Tough Loving": District Court Invalidates IRS Regulation of Return Preparers, 188 J. TAX'N 200 (2013) (discussing the IRS' loss in Loving v. IRS, 917 F. Supp. 2d 67 (D.D.C. 2013), and the status of the subsequent history of the litigation). On February 11, 2014, the D.C. Circuit panel unanimously affirmed the district court. Loving v. IRS, 742 F.3d 1013 (D.C. Cir. 2014).

[3] I.R.S. News Release IR-2012-4 (Jan. 6, 2012) ("The tax gap is defined as the amount of tax liability faced by taxpayers that is not paid on time.").

[4] *Id.*

[5] Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*, 102 MICH. L. REV. 71, 86 (2003) [hereinafter Kahan, *The Logic of Reciprocity*]; Richard Lavoie, *Flying Above the Law and Below the Radar: Instilling a Taxpaying Ethos in those Playing by their Own Rules*, 29 PACE L. REV. 637, 638 n.6 (2009) [hereinafter Lavoie, *Flying Above the Law*].

[6] *See* Leandra Lederman, *Tax Compliance and the Reformed IRS*, 51 U. KAN. L. REV. 971, 974-75 (2003) (noting that reliance upon statistics establishing a high compliance rate despite a low audit rate to support the view of a compliant culture is flawed because this comparison does not consider the effect of information reporting); *see also* Leandra Lederman, *The Interplay Between Norms and Enforcement in Tax Compliance*, 64 OHIO ST. L.J. 1453, 1460 (2003); Sagit Leviner, *A New Era of Tax Enforcement: From "Big Stick" to Responsive Regulation*, 42 U. MICH. J.L. REFORM 381, 400-01 (2009) [hereinafter Leviner, *New Era*]; Susan Cleary Morse, Stewart Karlinsky & Joseph Bankman, *Cash Businesses and Tax Evasion*, 20 STAN. L. & POL'Y REV. 37, 39–40 (2009) (citing JOEL SLEMROD & JON BAKIJA, TAXING OURSELVES: A CITIZEN'S GUIDE TO THE GREAT DEBATE OVER TAXES 178 (3d ed. 2004) and INTERNAL REVENUE SERV. & U.S. DEP'T OF TREASURY, REDUCING THE FEDERAL TAX GAP: A REPORT ON IMPROVING VOLUNTARY COMPLIANCE (2007), *available at* http://www.irs.gov/pub/irs-news/tax_gap_report_final_080207_linked.pdf); Jay A. Soled, *Homage to Information Returns*, 27 VA. TAX REV. 371 (2007) [hereinafter Soled, *Homage*]; Richard Winchester, *The Gap in the Employment Tax Gap*, 20 STAN. L. & POL'Y REV. 127, 127 (2009); Dave Rifkin, *An Overview of the "Tax Gap"*, TAXES, Oct. 2008.

[7] Morse, Karlinsky & Bankman, *supra* note 6, at 39. Susan Morse, Stewart Karlinsky, and Joseph Bankman conclude from this data that "[t]he strong relationship between evasion

Commentators have spilled considerable amounts of ink proposing solutions to reduce the tax gap and to improve tax compliance.[8] These proposals tend to reflect what is perceived to be causing the tax gap, a complex analysis involving numerous economic, psychological, and cultural factors.[9] No one has yet proposed a perfect grand unifying theory of tax compliance,[10] and, as a result, proposals to remedy the tax gap often "pull policymakers in different directions."[11]

While most of the proposals to remedy the tax gap have merit, the government could not implement all of them, even if it wished to, given the considerable

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and income source suggests that the primary causal factor that explains evasion is opportunity." *Id.* at 40.

[8] *See, e.g.*, U.S. DEP'T OF THE TREASURY, OFFICE OF TAX POLICY, UPDATE ON REDUCING THE FEDERAL TAX GAP AND IMPROVING VOLUNTARY COMPLIANCE 2 (2009) (for a good overview of what the proposed solutions from government are); *see also* Rifkin, *supra* note 6 (for a good overview of various proposals to reduce the tax gap).

[9] Dan M. Kahan, *Reciprocity, Collective Action, and Community Policing*, 90 CALIF. L. REV. 1513, 1520 (2002) [hereinafter Kahan, *Community Policing*] ("[M]ost taxpayers behave like moral and emotional reciprocators: in deciding whether to pay their taxes in full, they are more influenced by their perception that others are or are not complying than they are by the material costs and benefits of evasion."); Marjorie E. Kornhauser, *A Tax Morale Approach to Compliance: Recommendations for the IRS*, 8 FLA. TAX REV. 599, 609-12, 616 (2007) [hereinafter Kornhauser, *Morale Approach*] (discussing how framing compliance issues for the taxpayer; cultural, religious, and psychological attitudes towards taxation; and taxpayers' perceptions of whether their fellow taxpayers are compliant can influence whether a taxpayer will be compliant); Lavoie, *Flying Above the Law*, *supra* note 5, at 115, 120 (discussing many of these factors as well as how taxpayers' perception regarding the fairness of the tax system, the value received from tax dollars, and the level of compliance exhibited by other taxpayers can influence compliance decisions); Leviner, *New Era*, *supra* note 6, at 407 (discussing how religious, moral, and ethical attitudes as well as taxpayers' inherent trust in government and in each other motivate compliance decisions); Kyle D. Logue & Gustavo G. Vettori, *Narrowing the Tax Gap Through Presumptive Taxation*, 2 COLUM. J. TAX L. 120, 121-26 (2011) (discussing that, while classic deterrence theory at first blush seems to describe tax compliance by small and medium-sized businesses, this theoretical model is too simplistic to describe accurately why taxpayers choose to comply or choose not to comply with the tax laws); Morse, Karlinsky & Bankman, *supra* note 6, at 38 (summarizing the seminal description of the classical rational actor economic theory of tax noncompliance found in Michael G. Allingham & Agnar Sandmo, *Income Tax Evasion: A Theoretical Analysis*, 1 J. PUB. ECON. 323, 326 (1972)); Alex Raskolnikov, *Revealing Choices: Using Taxpayer Choice to Target Tax Enforcement*, 109 COLUM. L. REV. 689 (2009) (discussing how taxpayers' religious, moral, and ethical attitudes can influence compliance decisions); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 945 (1996) ("agents are willing to cooperate, and hence to solve collective action problems without coercion, if most people are seen as cooperators."); Dennis J. Ventry, Jr., *Cooperative Tax Regulation*, 41 CONN. L. REV. 431 (2008). *But see* Michael Doran, *Tax Penalties and Tax Compliance*, 46 HARV. J. ON LEGIS. 111 (2009) (criticizing the social norms approach, although providing a nice summary of both the traditional and norms-based models).

[10] Doran, *supra* note 9, at 138 ("The questions of why taxpayers comply and how penalties should be structured to promote compliance remain unsettled and controversial . . . .").

[11] *Id.* at 113.

limitations on resources available for tax enforcement.[12] Because increasing resources for IRS enforcement of the tax laws is not politically viable,[13] the government inevitably must look to proposals that can reduce the tax gap but that do not require more funding for the IRS. The most readily apparent solution, increasing potential penalties to compensate for the low risk of detection created by the limited enforcement budget,[14] also is a practical non-starter on account that such an approach would require increasing penalties to such a high level that they would become draconian.[15] In other words, the IRS has no choice but to do more with less.

One way for the IRS to accomplish this goal is to attempt to increase the likelihood that taxpayers will accurately report their tax liabilities in the first place, which would create fewer problems to detect. Conceivably there are multiple ways the government could attempt to do this, ranging from adopting policies designed to incentivize taxpayers to be more likely to comply voluntarily with the tax laws to increasing the transactions that would be subject to third party reporting to the IRS, which increases the likelihood that taxpayers will report such transactions accurately.[16] Because paid tax preparers are playing an increasingly important role in the administration of the tax laws,[17] such proposals logically should (and, as seen by

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[12] David Cay Johnston, *Change and the IRS*, 121 TAX NOTES 1067 (2008) (quoting Charles Rossotti, former Commissioner of the IRS, who stated, "The tax system continues to grow in complexity . . . while the resource base of the IRS is not growing and in real terms is shrinking. Basically, demands and resources are going in the opposite direction. This is systematically undermining one of the most important foundations of the American economy.").

[13] Kahan, *The Logic of Reciprocity*, *supra* note 5, at 84-85. A main task of any I.R.S. commissioner . . . is to beg Congress and the White House for resources. For all the obvious appeal of having the I.R.S. collect every dollar owed to the government, it is just as obviously unappealing for most politicians to advocate a more vigorous I.R.S. Michael Dukakis tried this during his 1988 presidential campaign, and—well, it didn't work. Stephen J. Dubner & Steven D. Levitt, *Filling in the Tax Gap*, N.Y. TIMES, Apr. 2, 2006.

[14] Leviner, *New Era*, *supra* note 6, at 401.

[15] *Id.* at 402.

[16] *See* W. Edward Afield, *Dining with Tax Collectors: Reducing the Tax Gap through Church-Government Partnerships*, 7 RUTGERS BUS. L.J. 53 (2010) (for a summary of the various proposals that are designed to encourage more voluntary compliance); Soled, *Homage*, *supra* note 6, at 377; *see also supra* note 6 and accompanying text.

[17] Leslie Book, *The Need to Increase Preparer Responsibility, Visibility and Competence*, *in* NAT'L TAXPAYER ADVOCATE, 2008 Annual Report to Congress Vol. II [hereinafter Book, *Increase Preparer Responsibility*]; Sagit Leviner, *The Role of Tax Preparers Play in Taxpayer Compliance: An Empirical Investigation with Policy Implications*, 60 BUFF. L. REV. 1079, 1090 (2012) [hereinafter Leviner, *Empirical Investigation*] ("With the growing number of taxpayers who turn to third party preparation assistance, tax preparers have become critical gatekeepers for the tax system and its administration."); Richard Lavoie, *Am I My Brother's Keeper? A Tax Law Perspective on the Challenge of Balancing Gatekeeping Obligations and Zealous Advocacy in the Legal Profession*, 44 LOY. U. CHI. L.J. 813, 827 [hereinafter Lavoie, *Am I My Brother's Keeper?*] ("[T]axpayers look to, and the efficient functioning of the tax system relies on, the advice of tax practitioners to guide them to the most appropriate interpretation of the law."); Margaret McKerchar, Kim Bloomquist & Sagit Leviner, *Improving the Quality of Services Offered by Tax Agents: Can Regulation Assist?*, 23 AUSTL. TAX F. 399, 402 (summarizing the increased use of pad tax preparers to file returns in the

the IRS's recent attempts at increasing preparer regulation, in fact do) include steps to ensure that the advice offered by paid tax preparers and advisors is as accurate as possible.

Despite increased use of paid preparers, the IRS has historically known surprisingly little about who these preparers are and what their level of expertise is, although the limited data that does exist suggests that paid preparers have a high error rate despite the fact that they supposedly have enough expertise in the tax laws that they can sell their tax-related services for a fee.[18] Until recently, there have been few minimum qualifications in place regarding who is eligible to be a paid preparer, and the minimal requirements that exist are poorly enforced.[19] Concerned about this trend, the IRS commissioned a report in 2009 regarding the return preparer industry (published as IRS Publication 4832), which led to the steps the IRS recently took to increase the regulatory oversight over all paid preparers.[20]

Bringing all paid preparers within the IRS's regulatory framework to ensure a baseline of competence is a good step towards improving tax compliance and towards reducing the tax gap. In adopting a mandatory regulatory regime, however, the government has missed an opportunity to realize additional compliance benefits that could be achieved by shifting towards a voluntary regulatory regime in which

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United States to the point that paid preparers are involved in both a majority of returns filed and taxes reported).

[18] Book, *Increase Preparer Responsibility*, *supra* note 17, at 78; Tolan, *supra* note 1, at 483-84; Danshera Cords, *Paid Tax Preparers, Used Car Dealers, Refund Anticipation Loans, and the Earned Income Tax Credit: The Need to Regulate Tax Return Preparers and Provide More Free Alternatives*, 59 CASE W. RES. L. REV. 351 (2009). Sagit Leviner summarizes the results of a GAO study that is illustrative of the level of the error rate:

> In an effort to collect more information on tax preparers and the quality of service they offer their clients, the GAO conducted a field study in 2007. In this study, GAO employees visited 19 chain-affiliated tax preparers. Using two hypothetical case scenarios drawn from everyday tax circumstances, the GAO employees represented themselves to preparers as if they were ordinary taxpayers shopping for tax preparation assistance. Strikingly, nearly all of the returns completed by preparers during the GAO site visits were incorrect to some extent. Some of the most serious deficiencies involved incidents where preparers failed to report side income (ten out of nineteen cases), did not itemize deductions at all or failed to claim available deductions (seven out of nine cases), did not ask where a child lived or ignored relevant information and claimed an ineligible child for EITC (five out of ten cases), and failed to take the most advantageous postsecondary education tax benefits (three out of nine cases). These deficiencies translated to unwarranted refunds of up to nearly $2,000 in five instances, while in two cases they cost the taxpayer over $1,500. Further, many of the issues identified in the GAO study put the preparer, taxpayer, or both at risk of IRS enforcement actions for violations such as negligence or willful or reckless disregard of tax rules.

Leviner, *Empirical Investigation*, *supra* note 17, at 1091-92; Morse, Karlinsky & Bankman, *supra* note 6, at 61-63 (tax preparers are often complicit in the tax fraud of their clients, either intentionally or recklessly).

[19] Book, *Increase Preparer Responsibility*, *supra* note 17, at 78-79.

[20] Tolan, *supra* note 1, at 484.

tax preparers could choose to seek certifications indicating whether they had a positive track record of compliance.

Under such a voluntary compliance certification regime with appropriately structured participation incentives aimed both at paid preparers and their clients, paid tax preparers are not simply mandated to achieve a minimal level of competence; they are instead provided with competitive advantages in the marketplace for achieving higher levels of compliance than preparers who have poor compliance track records. As a result, preparers are more likely to choose to pursue higher levels of compliance to obtain and maintain a certification. In addition, many taxpayers are more likely to seek out compliance-certified preparers because of the benefits associated with relying on advice and filing tax returns prepared by compliance-certified preparers. This piece seeks to lay the framework for how such a voluntary compliance certification program would work and to discuss the benefits of such a system that are currently not being realized through the IRS's current regulation of paid preparers.

Part II summarizes in brief the current regulatory landscape for paid preparers and illustrates that the current environment falls short in providing a mechanism to allow the government to better direct its enforcement resources and to incentivize a culture of compliance among tax preparers and their clients. Part III describes in general terms how a voluntary compliance certification system should be structured in order to achieve these benefits. Part IV describes in greater detail the compliance and related gains that can be achieved through a voluntary compliance certification system.

II. CURRENT PREPARER REGULATION IS INSUFFICIENT TO HELP THE GOVERNMENT IDENTIFY WHICH PREPARERS ARE MOST LIKELY TO BE COMPLIANT AND TO INCENTIVIZE A CULTURE OF COMPLIANCE

Paid preparers fall into three categories: (1) licensed professionals (attorneys and CPAs); (2) enrolled agents; and (3) registered tax preparers.[21] In addition, although they are usually not directly involved in individual tax advice or return preparation, tax promoters, who market investment vehicles broadly, are implicated in the tax system because they often promote the tax benefits of their products.[22] Each category has different levels of regulatory oversight and different error rates. Licensed professionals have the most stringent requirements (and the best track record of compliance) due to the requirements of state licensing boards, whereas registered tax preparers subject to the least amount of oversight and exhibit a much higher level of noncompliance (and, in fact, until 2011, this group was not subject to any licensing or educational requirements).[23]

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[21] Leviner, *Empirical Investigation*, *supra* note 17, at 1088. The focus on paid preparers when discussing preparer regulation is critical because, as Patrick Tolan notes, the statutory definition of tax preparer given in IRC § 7701 only covers preparers who do so for compensation (i.e., it does not include volunteers, such as those in the IRS' VITA program, or individuals who provide tax advice for friends or family members free of charge). Tolan, *supra* note 1, at 477.

[22] Doran, *supra* note 9, at 121.

[23] Leviner, *Empirical Investigation*, *supra* note 17, at 1088-89, 1092, 1119-29. Sagit Leviner provides a concise summary of the regulatory distinctions among these categories:

To better police return preparers,[24] the IRS in 2011 expanded the reach of Circular 230, the primary document regulating standards of practice before the IRS. As expanded, Circular 230 applies to all paid preparers and requires that all paid preparers be registered annually with a preparer tax identification number (PTIN); exhibit an acceptable level of character and fitness; successfully complete tests to ensure competence; and engage in continuing education.[25] The IRS's legal authority to institute these requirements to all paid preparers, however, is still in question.[26] The standards in Circular 230 are complex, but mirror requirements of IRC § 6694 (the provision of the tax code that provides penalties to tax preparers), which states that paid tax preparers are not permitted to advise a client to adopt a position without a reasonable belief that the position is more likely than not to be sustained in litigation if the position has a significant purpose to avoid or evade federal income tax or is a type of transaction that must be specifically reported to the IRS (even with adequate disclosure, this position still requires a "reasonable basis").[27]

In addition to dictating the required level of confidence tax preparers must have in rendering tax advice, Circular 230 has for several years set out time-consuming and costly requirements for tax preparers to render a "Covered Opinion" that can be

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> Comparing these three groups of preparers, licensed professionals prescribe to a heightened degree of scrutiny and training, as they are professionally regulated and registered by state licensing agencies. Enrolled Agents are preparers who are not professionally licensed, but earn IRS authorization to prepare returns and practice before it by passing an examination on tax matters or demonstrating past IRS employment experience. Finally, pursuant to the 2011 preparer regulation, all other paid tax preparers—previously unregulated—are now required to register and remain in compliance with the status of Registered Tax Return Preparer. To become a Registered Tax Return Preparer, a preparer must: (1) pass a one-time competency examination; (2) pass a suitability check; and (3) obtain a unique PTIN and pay the amount required in the PTIN User Fee Regulations.

Id. at 1088-89.

[24] *See* TIGTA REPORT, *supra* note 1 (discussing the pre-2011 difficulties the IRS had in monitoring paid preparers).

[25] Tolan, *supra* note 1, at 485-86, 503 (noting that certain preparers, such as CPAs, attorneys, and those they supervise, were exempt from some of these additional educational requirements, as were preparers who certified that they did not prepare returns for individuals). Note that there is ongoing litigation regarding whether these requirements can be imposed on all paid preparers. *See* Lipton, *supra* note 2. Although the government has initially lost its claim that it possesses the authority to impose these regulations, the issue is currently on appeal. *Id.* (discussing the IRS' loss in *Loving v. IRS*, 917 F. Supp. 2d 67 (D.D.C. 2013), and the status of the subsequent history of the litigation). For the purpose of making prescriptive policy arguments in favor of preparer regulation, however, the eventual outcome of the litigation is not particularly relevant because even if the IRS loses, Congress could still amend the tax code to increase regulation over tax preparers. *Id.*; Steve R. Johnson, *The D.C. Circuit Rejects the IRS's Regulation of Tax Return Preparers*, TAXPROF BLOG (Feb. 12, 2014), http://taxprof.typepad.com/taxprof_blog/2014/02/johnson-.html.

[26] Johnson, *supra* note 25.

[27] Lavoie, *Am I My Brother's Keeper?*, *supra* note 17, at 824 (discussing I.R.C. § 6694); Tolan, *supra* note 1, at 503. Promoters are merely prohibited from lying about their product's tax benefits. Doran, *supra* note 9, at 121 (discussing the promoter penalty of I.R.C. § 6700(a)).

used by their clients as a defense to numerous (but not all) penalties[28] that can be imposed on the taxpayer if he or she is audited and does not prevail on a particular position.[29] While tax preparers and advisors are permitted to render some tax advice without fulfilling all of the requirements of a Covered Opinion, they must explicitly state that their clients cannot rely on such advice as a defense to taxpayer penalties, significantly reducing the value of such advice.[30] Although the IRS Office of Professional Responsibility has proposed amending Circular 230 in 2013 to remove the requirements for Covered Opinions and to create a standard applicable to all written tax advice that is based on reasonableness,[31] the effects of such an amendment are difficult to predict until the amendment is finalized. As of the writing of this piece, the Covered Opinion rules remain in force.

These attempts to limit aggressive tax planning appear to have worked to some degree, but it remains to be seen whether these regulations will prove sufficient to improve compliance significantly going forward, as an improving economy leads to increased demand for aggressive tax planning.[32] Often times, whether a position passes muster under an existing regulation is a close call, creating the temptation for paid preparers to err on the side of encouraging a client to adopt overly aggressive positions.[33] In addition, while this increased preparer regulation could help to

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[28] Steven Z. Hodaszy, *Circular Argument: What is Wrong, and Right, with the Circular 230 "Covered Opinion" Regulations*, 2 COLUM. J. TAX L. 150, 177 ("[A] Non-Reliance Disclaimer prevents an opinion from being invoked as part of a reasonable cause-and-good-faith defense to the imposition of accuracy-related penalties under § 6662 of the Code (or § 6662A(a) . . . , in the case of disclosed reportable transactions) or fraud penalties under § 6663.").

[29] See *id.* for a good discussion of the Covered Opinion requirements.

[30] *Id.* at 160.

[31] *See* Benson S. Goldstein, *Amendments to Circular 230 to Remove "Covered Opinion" Rules*, AICPA (Jan. 1, 2013), http://www.aicpa.org/publications/taxadviser/2013/january/pages/dc-currents_jan2013.aspx; *see also* Florence Olsen, *Tax Practice: Proposed Revisions to IRS Circular 230 Set New Standards for 'Reasonable' Practices*, BNA DAILY TAX REPORT (Feb. 14, 2013), *available at* http://www.bna.com/proposed-revisions-irs-b17179872372/.

[32] Lavoie, *Am I My Brother's Keeper?*, supra note 17, at 852.

[33] *Id.* at 825. This temptation can be enhanced by tax preparers operating from an inappropriately adversarial perspective with the government, even prior to the onset of litigation:

> Moreover, when tax practitioners are involved in planning transactions or assisting taxpayers in developing their reporting positions for a completed transaction, it is questionable whether such work is truly adversarial, as that term has traditionally been interpreted. Our adversarial system of justice contemplates a competition among equals that is intended to efficiently and fairly yield the "truth." Thus, having a taxpayer make colorable arguments regarding his proper tax burden is justifiable once the issue has been joined with the Government (either administratively or in litigation), but making those identical claims on an initial tax return, when no adversary has yet entered the ring, impedes the arrival at a fair result.

Id. at 828; *see id.* at 828-30 (noting that some argue that such an adversarial relationship is appropriate (particularly for attorneys) because of client loyalty and zealous advocacy norms); *see also* Ventry, *supra* note 9, at 477 ("Prevailing standards based on adversarial norms encourage literalist interpretations of the law because such interpretations can provide

improve the overall quality of return preparation and tax compliance, it would not allow the IRS to better identify which paid preparers are more prone to compliance than others, which would be useful information, as the IRS allocates its limited enforcement resources.[34] This regulatory scheme also only incentivizes preparers to meet a baseline level of compliance. It neither provides an incentive for paid preparers to compete with each other with regard to how compliant they are, nor does it provide an incentive to taxpayers to select the most compliant paid preparers to assist them in preparing returns. Part III describes how a regulatory regime over paid preparers could be improved from the existing model to achieve these additional benefits.

III. STRUCTURING AN EFFECTIVE COMPLIANCE CERTIFICATION AND TARGETED ENFORCEMENT PROGRAM

Mandatory regulation of all paid preparers is a step in the right direction, but it neither goes far enough to allow the IRS to better ascertain who the most compliant preparers are nor provides enough incentives for preparers to compete with each other over who can achieve high rates of compliance. Shifting to a voluntary compliance certification system of preparer regulation would accomplish both of these goals. Currently, the different types of paid preparers are primarily differentiated from each other based on their education and training. While paid preparers with the most training and expertise do provide more accurate advice,[35] it does not automatically follow, due to the complex interactions between preparer and client that drive tax compliance decisions, that the existing classifications automatically sort which types of preparers are more focused on intentionally maintaining high levels of compliance (and these classifications also do not indicate which preparers within each classification are most likely to be the most compliant).[36] This Part describes how such a voluntary compliance certification system could be structured to achieve these benefits that are currently unrealized in the current regulatory environment.

A. Due Diligence and Educational Requirements

The first goal that a voluntary compliance certification program should have is that of encouraging paid tax preparers to be as thorough as possible in collecting and verifying information from their clients and to have up-to-date knowledge of the tax laws (particularly in areas that exhibit high levels of noncompliance) to help them accurately determine their tax liability. In order to obtain a compliance certification, preparers should be required to adhere to IRS guidelines that would require them to exhibit an increased level of vigilance when advising taxpayers in areas that have historically high levels of noncompliance.[37] This requirement could provide a much

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sufficient authority if challenged and litigated. Meanwhile, practice standards based on a more likely than not norm reinforce a purposive approach to statutory interpretation.").

[34] *See* Johnston, *supra* note 12 and accompanying text (discussion of the IRS' limited enforcement resources).

[35] *See* Leviner, *supra* note 17 and accompanying text.

[36] *See infra* note 77 and accompanying text.

[37] See Book, *Increase Preparer Responsibility*, supra note 17, at 82:

needed incentive for tax preparers and advisors not only to comply with the due diligence requirements that already exist but also to comply voluntarily with a higher level of due diligence that could systematically reduce areas that have historically exhibited high levels of noncompliance.[38] As part of this requirement, preparers would be required to adhere to heightened educational requirements similar to those that are currently being litigated in *Loving v. IRS* in order to ensure that they maintain a baseline level of competence.[39]

B. Primary Business Requirement

Related to the concept of increased educational requirements yielding better compliance outcomes, paid tax preparers who spend the bulk of their professional lives rendering tax advice are more likely to have the requisite expertise for more accurate advice and return preparation. Accordingly, to obtain a compliance certification, a preparer should be in the primary business of rendering tax advice

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> If research suggests high areas of noncompliance associated with specific types of issues, our tax system should more affirmatively impose upon preparers an obligation to ask questions that relate to ferreting out facts that will at a minimum (i) place the responsibility for taxpayer actions squarely on the taxpayer's shoulders and (ii) discourage preparers from becoming facilitators of noncompliance. . . . .
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> [W]ith the exception of the EITC [(Earned Income Tax Credit)] . . . , [t]he current tax compliance regime does not tie due diligence of the underlying issues, but rather to the preparer's underlying knowledge of individual circumstances that would trigger a duty of further inquiry under general negligence principles.

Id. at 83. Such an increased due diligence obligation should not create any undue conflict between tax preparers and clients, because the obligation only "emphasizes the preparers' obligation to inquire about relevant facts, and inform taxpayers about why those facts are relevant to complying with the laws, areas that should not legitimately heighten or create preparer tensions with clients." *Id.* at 88.

Increasing due diligence requirements could be particularly valuable if applied to advice given to and returns filed on behalf of small and medium-sized businesses ("SMBs"). SMBs are the largest contributors to the tax gap and have a rate of noncompliance that is significantly higher than other groups of taxpayers. Logue & Vettori, *supra* note 9, at 103, 107-09. SMB noncompliance occurs with a small number of SMB taxpayers understating their cash receipts significantly and with a large number of SMB taxpayers overstating their deductions by a smaller amount. *Id.* at 110. Because understatement of cash receipts and overstatement of deductions are an easy form of noncompliance to engage in even without preparer complicity (taxpayers simply do not provide all of the relevant information to preparers), increasing preparer due diligence requirements to make inquiries and seek verification of items could improve the compliance rate among SMB taxpayers.

[38] *See* Book, *Increase Preparer Responsibility*, *supra* note 17, at 86 ("[C]urrent research shows those preparers often ignore the existing due diligence rules.").

[39] *See supra* note 25 and accompanying text. Although attorneys and CPAs would arguably already satisfy this component with their continuing educational requirements required by their state licensing authorities, it might make sense to mandate education in particular areas of high noncompliance even for these groups in order to obtain a compliance certification. *But see* Tolan, *supra* note 1, at 515-17, 542-43 (summarizing arguments that heightened educational requirements are inefficient and ineffective, although Tolan advocates for increased training and certification).

and/or preparing returns.[40] Because preparers who provide tax services as an ancillary business generally have the profitability of their full-time business as their primary objective, these preparers should automatically raise a compliance red flag.[41] This lack of compliance can particularly impact the administration of the Earned Income Tax Credit (EITC) (which has a high level of noncompliance) because these part-time preparers often prepare returns for EITC recipients and redirect EITC funds into their primary businesses.[42] In addition, part-time preparers are likely unable to spend as much time staying abreast of current tax law developments as full-time preparers, raising the potential for inadvertent as well as intentional errors. Although it is not practical to ban part-time preparers completely, making them ineligible for a compliance certification (or perhaps requiring even higher levels of testing and/or educational requirements if they wish to obtain a compliance certification without having tax advice or return preparation as their primary business) could certainly help limit their use and would help the IRS target enforcement against this "low-hanging enforcement fruit."[43]

C. Pro Bono Requirement

The third component of a voluntary compliance certification system would require paid preparers seeking certification to complete a fixed number of returns for EITC-eligible taxpayers on a pro bono basis.[44] This requirement is perhaps a bit

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[40] Tolan, *supra* note 1, at 539 ("Perhaps the PTIN application process could be tweaked to require applicants working for businesses not primarily engaged in tax matters to identify the nature of their primary business. This factor, in isolation or in combination with problematic returns from that preparer, could be used to trigger heightened Service scrutiny.").

[41] *Id.*

[42] Cords, *supra* note 18, at 368. Compounding this problem is the fact that many EITC-eligible taxpayers are unaware that there are free tax return services that are available to them. *Id.* at 374 ("The IRS provides assistance to taxpayers who meet its income thresholds through its walk-in Taxpayer Assistance Centers (TACs) and the training and the partnerships it forms with community organizations through the Volunteer Income Tax Assistance Program ("VITA") and the Tax Counseling for the Elderly ("TCE") Program.").

[43] Tolan, *supra* note 1, at 539.

[44] Rather than requiring such pro bono service, preparers with compliance certifications could be given an option of providing the free service or of donating a fixed sum of money to an organization that focuses on assisting EITC taxpayers in completing their returns. *See* Quintin Johnstone, *Law and Policy Issues Concerning the Provision of Adequate Legal Services for the Poor*, 20 CORNELL J.L. & PUB. POL'Y 571, 609 (2011) (arguing for mandatory pro bono with a buyout option); Kendra Emi Nitta, *An Ethical Evaluation of Mandatory Pro Bono*, 29 LOY. L.A. L. REV. 908, 929 (1996) (noting that mandatory pro bono requirements with buyout options can be valuable in raising funds for pro bono legal service, although they are criticized as benefitting large firms, which can more easily afford the buy-out than a smaller firm); *see also* Rob Atkinson, *A Social-Democrat Critique of Pro Bono Publico Representation of the Poor: The Good as the Enemy of the Best*, 9 AM. U. J. GENDER SOC. POL'Y & L. 129, 168-70 (2001) (arguing that a mandatory buyout in the form of Good Samaritan Tax, is actually the more efficient way to ensure that legal services are provided to the poor, although he argues that such a tax should be taken from the public at large rather than just the bar because the public is receiving the benefit); Debra Burke, Reagan McLaurin & James W. Pearce, *Pro Bono Publico: Issues and Implications*, 26 LOY. U. CHI. L.J. 61, 82-83 (1994) (allowing large firms to buy out of a pro bono obligation is more efficient than

more controversial,[45] although, if enacted, it could help the government remedy a persistent problem that exists in the area of EITC compliance. The EITC, designed specifically to benefit low-income taxpayers, is subject to both intentional fraud and unintentional error due to its complexity.[46] By increasing the number of EITC returns performed by paid preparers who are more likely to avoid both the intentional and unintentional errors, the government can go a long way towards remedying this problem by guiding eligible taxpayers to preparers who will be best served to help them. Paid preparers wishing to obtain and maintain a compliance certification would have to market their free EITC services (or volunteer at Voluntary Income Tax Assistance (VITA) Centers), which will make it more likely that EITC-eligible taxpayers will be served by paid preparers possessing high levels of ability and integrity. EITC compliance could be enhanced even further through the voluntary compliance certification system if the government permitted only compliance-certified tax preparers to conduct eligibility prescreening for the EITC and made voluntary participation in the prescreening a prerequisite for lower preparer and taxpayer penalties and audit rates.[47]

D. IRS Monitoring

Of course, for a compliance certification program to work, the IRS needs to improve its system of identifying and monitoring preparers so that it can determine which ones are worthy of a certification.[48] The IRS' recent requirement that tax

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mandatory pro bono because it increases profitability to large firms as well as increases funding for legal services to the poor); Debra Burke, George W. Mechling & James W. Pearce, *Mandatory Pro Bono: Cui Bono?*, 25 STETSON L. REV. 983,1007-09 (1996) (indicating that a mandatory pro bono system with a buy out option can be structured either to incentivize attorneys to actually perform services or to incentivize attorneys to elect the buy out option, as attorneys will elect the buy out when the buy out rate is less than the attorney's billing rate); Judith L. Maute, *Changing Conceptions of Lawyers' Pro Bono Responsibilities: From Chance Noblesse Oblige to Stated Expectations*, 77 TUL. L. REV. 91, 157-58 (2002) (supporting a buy-out option).

[45] *See* Part IV.D.

[46] Cords, *supra* note 18, at 368-69. ("Because there are many reasons for EITC noncompliance—including errors relating to qualifying children, documentation, record keeping, and actual fraud—there is no single means to achieve EITC compliance. . . . Greater oversight and regulation, including more training of tax preparers, could help resolve some noncompliance."). Leslie Book has also written extensively on the causes of EITC noncompliance. *See, e.g.*, Leslie Book, *Preventing the Hybrid from Backfiring: Delivery of Benefits to the Working Poor Through the Tax System*, 2006 WIS. L. REV. 1103 (2006); Leslie Book, *The Poor and Tax Compliance: One Size Does Not Fit All*, 51 U. KAN. L. REV. 1145 (2003) [hereinafter Book, *The Poor and Tax Compliance*].

[47] *See* Book, *The Poor and Tax Compliance*, *supra* note 46, at 1146-49.

[48] Book, *Increase Preparer Responsibility*, *supra* note 17, at 88 ("both TIGTA and GAO have recently noted that the IRS is limited by the lack of information it captures about preparers, and the limited means of monitoring practitioner performance"). Even California and Oregon, which do contain preparer regulatory regimes, have historically not done a good job of tracking preparers for monitoring or enforcement purposes. *Id.* at 78. In a system in which preparers and their clients will receive different treatment from the government based on their compliance history, then institutionalizing the reputations of preparers with the

preparers obtain PTIN numbers, combined with mandatory preparer e-filing, is a significant step towards increasing the IRS' ability to monitor tax preparers.[49] For a robust compliance certification system to be in place, however, more monitoring would be required.[50] From the current regulatory foundation, the IRS could take steps to create a systematic database for each preparer that establishes each preparer's error rate, or at least establishes a reliable estimate of that rate.[51] In addition, the IRS could annually provide detailed information to tax preparers indicating how their returns compare in accuracy to national benchmarks, as well as require, as a part of the certification maintenance requirements, that preparers demonstrate a certain level of improvement in any areas in which a preparer is deemed to be falling below acceptable levels.[52]

E. Incentives for Participation

If compliance certification is to be on a voluntary basis, there must be incentives in place to encourage participation and to help the government further the goals of resource allocation, as well as better detection mechanisms to justify such certifications. Creating a combination of carrots and sticks aimed at tax preparers is

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government is an indispensable step in ensuring consistent treatment under this system. *See* David M. Schizer, *Enlisting the Tax Bar*, 59 TAX L. REV. 331, 345 (2006).

[49] Leviner, *Empirical Investigation*, *supra* note 17, at 1134 ("[The mandatory PTIN requirement] may serve a key function in effectively facilitating further administrative mechanisms in the coming years, including advancing preparer and taxpayer outreach and oversight."); Tolan, *supra* note 1, at 487, 539-42 (noting that, assuming the IRS develops a database to process the data, the PTIN registration process and mandatory e-filing should help determine who problem preparers are by allowing the IRS to spot trends exhibiting a pattern of noncompliance).

[50] This increased monitoring would potentially be the biggest roadblock to a compliance certification system being successful. While technological efficiencies could likely be achieved in constructing an electronic mechanism to conduct most of the monitoring, implementing this system would almost certainly have more than a de minimis up-front cost. As a result, implementation could run into the same obstacles that exist whenever the IRS seeks additional funding to carry out its mandate. *See* Johnson, *supra* note 25 and accompanying text.

[51] Book, *Increase Preparer Responsibility*, *supra* note 17, at 90-91:

> One possibility is that the IRS could create a preparer database that allows the IRS to capture compliance related information on each preparer, including, for example, the total number of clients and dollars a preparer has in the cash economy, and information on client return DIF scores that are outside the norm, math error activity on client returns, and examination results. Where a preparer is a member of a firm, that relationship presents the possibility of two different perspectives, one at the preparer level, and the other at the firm level, provided both the preparer and the firm can both be uniquely identified.

Id. at 90 n.70.

[52] *See id.* at 109-10; Tolan, *supra* note 1, at 482; *see also* Book, *Increase Preparer Responsibility*, *supra* note 17, at 115-16 (discussing how this type of monitoring could be done by imposing stricter reporting requirements on preparers with high error rates until their error rate improves, although not considering this concept in light of providing a compliance certification with tangible benefits for both preparers and their clients).

of course an important first step in creating appropriate incentives, but, in order to maximize the odds that taxpayers would seek out compliance-certified preparers, the certification system should provide benefits to taxpayers who use compliance-certified preparers. This latter aspect is important because incentivizing taxpayers to seek out certified compliant tax preparers has the additional effect of incentivizing tax preparers to compete for business by being more, rather than less, compliant.[53] These incentives could be structured in many ways,[54] but the most significant incentives that would actually influence both taxpayers and tax preparers are those that can potentially result in significant cost savings for taxpayers who use certified compliant preparers. These incentives fall into the following categories: (1) lowering of potential penalties for errors committed on returns by certified compliant preparers; (2) lowering of audit risk for returns prepared by certified compliant preparers; and (3) lowering of the cost of obtaining tax advice.

1. Lowering Penalties for Compliance-Certified Preparers and their Clients

With regard to the first category of incentives, both compliance-certified preparers and their clients could be subject to lower penalties should a violation of the tax laws be discovered on an audit. Commentators have considered the effects of

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[53] Some commentators have considered the possibility that tax preparers might try to be compliant to preserve a relationship with the government for the benefit of future and current clients. Lavoie, *Am I My Brother's Keeper?*, *supra* note 17, at 826, 831 (citing Michael Hatfield, *Legal Ethics and Federal Taxes, 1945-1965: Patriotism, Duties, and Advice*, 12 FLA. TAX REV. 1, 18 (2012)). This reputational motivation, however, may not be as strong as it otherwise could, particularly because preparers likely know that, in many instances, the government will never know how compliant they are. In addition, tax preparers have been moving steadily away from a culture of serving as gatekeepers for the tax system:

> While numerous factors and changes over the recent decades have undoubtedly contributed to the shift in the ethical reality of tax practice, four overarching areas of change can be easily identified as highly significant in altering the ethical perceptions of the tax bar: (1) evolving client norms for ethical behavior; (2) increasing competitive pressures on legal service providers; (3) changing judicial approaches to statutory interpretation; and (4) a lessening imperative favoring taxpaying in society as a whole.

Id. at 841-42. By coming up with a formal certification and monitoring system and by tying that into direct benefits to both preparers and taxpayers, the incentive to comply is much stronger, particularly because client business norms have shifted significantly away from valuing tax compliance as part of business ethics. *Id.* at 842-43. In addition, such an incentive helps encourage more (although, admittedly not all) preparers to comply with the PTIN registration requirements so that they are not "ghost preparers" and can be better monitored by the IRS. *See* Tolan, *supra* note 1, at 519.

[54] Leslie Book describes numerous incentives that could be used to incentivize compliance, such as: "favored refund time, differing access to the Debt Indicator program or access to IRS information generally, differing recordkeeping or due diligence requirements, or explicit discretion from Congress for the IRS to modify or waive certain requirements or penalties for preparers who meet certain low-error thresholds." Book, *Increase Preparer Responsibility*, *supra* note 17, at 113-14; *see also* Schizer, *supra* note 48, at 361-62 (suggesting that the government could keep a list of tax preparers with poor compliance track records that could be used to shame those preparers and could create an expedited review process for tax advisors who had a reputation for giving conservative opinions).

providing different penalties for tax preparers who demonstrate higher levels of compliance[55] but have not taken the idea far enough to provide an incentive for both preparers and taxpayers to work together towards improving compliance. Providing lower preparer penalties for certified compliant preparers certainly would be a valuable incentive for preparers to seek a certification. Limiting this differential penalty treatment to preparer penalties, however, does not necessarily help influence taxpayers to seek out the most compliant preparers to assist them in their tax planning and filing obligations. This limitation creates an inherent tension between taxpayers, who may wish for preparers to engage in more aggressive tax planning, and preparers, who would want to preserve their eligibility for the lower preparer penalty. This tension could cause tax preparers to avoid legitimate positions in grey areas of the law that would interfere with their relationships with their clients (particularly when the tax preparers are also attorneys with the requirements inherent in an attorney/client relationship).[56] This tension is better than taxpayers and preparers being aligned towards noncompliance, but it is still inferior to a system in which both taxpayers and preparers would have their interests aligned towards compliance.

Accordingly, lower penalties should be extended towards taxpayers who use those tax preparers as well. This extension of differential penalty treatment will provide a much stronger incentive for taxpayers to seek out certified compliant preparers by providing the taxpayers with a tangible benefit from using compliance-certified tax preparers. This incentive is important because, while compliance oriented taxpayers could be channeled towards compliance-certified preparers by simply publishing a list of compliant preparers,, reducing potential for penalties does more to incentivize compliance-indifferent taxpayers to seek out certified compliant preparers to receive better penalty treatment.[57]

2. Lowering the Audit Rate on Compliance-Certified Preparers and their Clients

As for the second category of incentives, the IRS could also provide incentives for both preparers to seek a compliance certification and for taxpayers to use compliance-certified preparers by committing to lowering the frequency with which the IRS audits returns prepared by certified compliant preparers.[58] This could take

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[55] *See, e.g.*, Book, *Increase Preparer Responsibility*, *supra* note 17, at 113; Raskolnikov, *supra* note 9, at 691-94 (proposing a dual option tax enforcement system in which the traditional system is complemented by a voluntary compliance regime that taxpayers could elect and that would involve taxpayers giving up certain rights in exchange for lower penalties—a system that more compliant taxpayers would likely elect).

[56] See *infra* note 78 and accompanying text for a discussion of the criticism of how misaligned incentives between attorneys and taxpayer clients can have a negative effect on the attorney/client relationship.

[57] See Book, *Increase Preparer Responsibility*, *supra* note 17, at 113.

[58] *Id.* at 39 n.97, 67; Lavoie, *Am I My Brother's Keeper?*, *supra* note 17, at 860 (discussing how this audit strategy could be used to combat aggressive tax shelter activity, and observing that "[a] taxpayer who knows that aggressive tax planners serve as audit lightning rods has an incentive to seek out practitioners who have a good reputation with the Government, and presumably are more evenhanded in their legal conclusions").

the form of either the IRS promising to lower the overall intentional audit rate[59] for returns prepared by certified compliant preparers or the IRS promising not to audit such a return unless it triggers a higher DIF score[60] than that which would normally trigger an audit. An alternative version of this approach would allow compliance-certified preparers and their clients to be eligible for a more responsive, graduated regulatory approach with the IRS whereby the government would determine its level of hostility to or cooperation with a taxpayer based on the taxpayer's willingness to cooperate.[61] Relaxing procedural requirements that limit malpractice claims for claims brought against non-certified tax preparers would also accomplish many of the same effects as providing penalty relief to compliance-certified preparers and their clients because tax preparers would not want to risk losing their malpractice protections by not obtaining a certification.[62]

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[59] The risk that a return would be randomly selected for audit should likely remain the same in order to keep the deterrent effect that the random audit risk creates.

[60] DIF scores, which stand for Discriminant Function System, are a computer scoring mechanism that rates returns in order to select returns for audit. *The Examination (Audit) Process, FS-2006-10*, IRS.GOV (Jan. 2006), http://www.irs.gov/uac/The-Examination-(Audit)-Process.

[61] Tolan, *supra* note 1, at 528. Australia provides a good model for how such a responsive regulatory regime would work by using detection and enforcement in combination with non-punitive measures to increase the overall compliance rate. Leviner, *New Era*, *supra* note 6, at 381. Under this approach, the government would start from a position of cooperation with the taxpayer and would provide increasingly favorable treatment if met with taxpayer cooperation but would become increasingly adversarial if met with taxpayer resistance. *Id.* at 417-28. Such an approach would be warranted for compliance certified preparers and their clients as there is a greater likelihood of honest cooperation from those predisposed to compliance. Thus, engaging in responsive regulation with those who have already demonstrated a higher propensity for compliance could cause any disputes to be resolved much more quickly and efficiently outside of the adversarial context. *See id.* at 426 (arguing that one of the purposes of such a system is to prevent enforcement resources from being marshaled when no violation occurred). Limiting responsive regulation to this subset of preparers and taxpayers mitigates against the concern that taxpayers predisposed to noncompliance might actually increase their noncompliant behavior under the assumption that, if they are discovered, they could hopefully engage in cooperation with the government to attempt to limit their liability. *See id.*

Note that in order to be worthwhile, the value of increased compliance would have to outweigh the potentially significant costs associated with such a program. Raskolnikov, *supra* note 9, at 707 (observing that a responsive regulation approach would potentially require two sets of auditors); *see also* Lawrence Zelenak, *Tax Enforcement for Gamers: High Penalties or Strict Disclosure Rules?*, 109 COLUM. L. REV. SIDEBAR 55, 62 (2009) (two sets of auditors would likely require either significant retraining or hiring, and both approaches would have high costs).

[62] *See* Jay A. Soled, *Tax Shelter Malpractice Cases and their Implications for Tax Compliance*, 58 AM. U. L. REV. 267, 315-30 (2008). Soled proposes the following reforms in the abusive tax shelter context: (1) tolling the statute of limitations and limiting the use of arbitration clauses in the tax shelter malpractice context; (2) prohibiting abusive tax shelter promoters from relying on a "mere error in judgment defense"; (3) increasing the amount of potential recovery in malpractice cases; (4) encouraging taxpayers to settle with the government by making penalties easier to recover; (5) prohibiting insurance carriers from covering claims related to abusive tax shelters; and (6) publishing the names of tax preparers who receive judgments. *Id.* at 322.

3. Lowering Costs and/or Increasing Value Associated with Tax Advice

With regard to the third category of incentive, one concern regarding a compliance certification program is that it would increase costs on tax preparers, which would either be passed on to clients or would potentially drive tax preparers out of the industry.[63] Combatting this concern is another reason why there must be an incentive structure in place for both tax preparers and taxpayers to want to participate in this certification program. The most straightforward savings mechanism would be simply to provide a refundable tax credit equivalent of the amount usually spent on filing a routine tax return to taxpayers who use compliance-certified preparers.[64]

Another possibility would be relaxing some of the Circular 230 requirements for compliance-certified preparers (a step that may already be underway with regard to all paid preparers).[65] One way to accomplish this would be to allow taxpayers to rely, for the purposes of penalty protection, on what Circular 230 terms a "reliance opinion."[66] Reliance opinions can currently be given to taxpayers without following the Covered Opinion regulations, but cannot currently be used for penalty protection.[67]

Another way to incentivize participation would be to allow Covered Opinions and/or Reliance Opinions to serve as penalty defense to the new accuracy-related penalty for transactions lacking economic substance, which currently is a strict liability penalty.[68] The compliance certification should make the tax preparer

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[63] Tolan, *supra* note 1, at 513-14. Increasing costs could also have the negative effect of causing fewer taxpayers to use paid preparers, which could increase the potential for errors in tax return preparation. *See, e.g.*, McKerchar, Bloomquist & Leviner, *supra* note 17, 405, 419 (noting that, in addition to fewer taxpayers using paid preparers, more preparers might go "underground" and continue preparing returns without being monitored by the government). In addition, compliance costs "are largely a deadweight loss when they are costs of investigating items of legal or factual uncertainty." Mark P. Gergen, *Third Party Opinions as a Tool for Enforcing Tax Law*, *available at* https://www.law.upenn.edu/institutes/taxlaw/pastseminars/200809papers/GergenMarkTaxOpinions.pdf.

[64] Costs of tax preparation are already deductible but, at least for individual taxpayers, these expenses are itemized deductions under I.R.C. §§ 212 and 62, which they cannot always take because of I.R.C. § 67's 2% floor on miscellaneous itemized deductions. I.R.S. Pub. 529 (Nov. 13, 2013).

[65] *See* Goldstein, *supra* note 31; *see also* Olsen, *supra* note 33.

[66] Hodaszy, *supra* note 28, at 154 n.8 (a reliance opinion is a written opinion in which the tax preparer has concluded that there is a greater than fifty percent chance that the taxpayer will prevail on a federal tax issue that the government has a reasonable basis to challenge and that could significantly impact the tax treatment of whatever transaction the opinion is addressing) (citing 31 C.F.R. § 10.35(b)(3), (4) (2010)).

[67] *Id.* at 177. Steven Hodaszy advocates limiting the scope of Circular 230 even further, so that it only covers tax shelter opinions. *Id.* at 190 ("The chief problem with the Covered Opinion Regulations is that they apply not only to tax shelter opinions, but also to advice concerning virtually all other tax matters.").

[68] *Id.* at 184-86 (discussing I.R.C. § 6662(b)(6)). Allowing Covered Opinions (or even Reliance Opinions) to serve as a defense to the § 6662(b)(6) penalty would better help practitioners to continue to serve as key players in improving tax compliance:

rendering the opinion more inherently trustworthy, which should allow their opinions to serve as insurance policies for the taxpayer without creating a significant noncompliance risk. This relaxing of Circular 230 requirements would make the advice much more valuable, justifying a higher premium. This value premium, however, would likely flow to the client, as tax preparers and advisors would be able to render useful tax advice in considerably less time than it takes to render a Covered Opinion, making these reliance opinions less costly than a Covered Opinion but just as valuable.[69]

These additional incentives are essential because without them, unscrupulous taxpayers would be tempted to avoid compliance-certified preparers in favor of preparers who would be more inclined to engage in noncompliant behavior to the benefit of the taxpayer (or in favor of self-preparation).[70] In addition, tax preparers and advisors have shown that they will not maintain high compliance standards just because of professional ethics and aspirational goals,[71] making an incentive structure all the more necessary.

IV. BENEFITS OF A COMPLIANCE CERTIFICATION AND TARGETED ENFORCEMENT PROGRAM

A compliance certification program would lower the tax gap if a sufficiently large number of preparers obtained certifications because more paid preparers would have higher competency levels, as would also be the case if current IRS efforts to strengthen regulation of paid preparers were permitted to be enforced in their entirety. In addition to improving the quality of preparers, however, a voluntary compliance certification program would achieve additional benefits. Such a program would create a market for compliance that would incentivize tax preparers to compete with each other over how compliant they are and would incentivize taxpayers to value compliance history in selecting a tax advisor. Thus, a compliance certification program would not only increase competency, but would help establish compliance as something of value which could help the tax bar transition to a more

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> To the extent that the § 6662(b)(6) penalty supplants other accuracy-related penalties with respect to tax shelters, the effectiveness of the Covered Opinion Regulations in creating a "gatekeeper" role for tax practitioners threatens to be severely undermined. If a covered opinion no longer provides insurance against the most probable accuracy-related penalty to be imposed on a tax shelter, clients will be likely no longer to view the receipt of such an opinion as a prerequisite to entering into an aggressive transaction. (This is particularly true in light of the high transaction costs that the regulations impose on such opinions). In turn, if a client no longer views a covered opinion as a necessity when investing in a tax shelter, then a practitioner's withholding of such an opinion will no longer function as a strong impediment to the client's participation in an abusive deal. Much of the Covered Opinion Regulations' deterrent effect on taxpayer behavior will thus be lost.

Id. at 186.

[69] *See id.* at 171, 177. This more efficient rendering of tax advice can make taxpayers more likely to seek out tax advice more often because they can be confident that they can ask a succinct question and get an equally succinct answer to a tax question (and rely on that answer) without incurring the cost of a Covered Opinion. *Id.* at 171.

[70] Book, *Increase Preparer Responsibility*, *supra* note 17, at 98.

[71] *See* Hodaszy, *supra* note 28, at 167, 179.

compliance focused culture. In addition, such a system would help the IRS focus its enforcement efforts on tax preparers and taxpayers who, because of a lack of certification, are more likely to exhibit noncompliant behavior. This Part discusses these potential benefits in greater detail.

A. Increased Accuracy and Higher Rates of Compliance

If sufficient numbers of preparers sought and obtained compliance certifications, overall accuracy in tax reporting would likely improve. The preliminary evidence for this actually exists on the state level, as California, Maryland, New York, and Oregon have imposed heightened educational and certification requirements on paid preparers for a long enough period of time that there is data attesting to the efficacy of such programs, so long as they are properly structured.[72] The best data comes from Oregon's program, which has the most stringent requirements and has existed for a sufficient period of time that inferences can be drawn from the data.[73] Although further research must be conducted to rule out other factors, initial data reveals that Oregon's program has led to an overall increase in tax compliance among Oregon taxpayers.[74] In addition, Oregon's example shows that holding preparers to higher regulatory standards without forcing them out of the marketplace is in fact possible.[75]

B. Norm Shifting

A compliance certification, if coupled with other incentive structures, potentially can yield significant dividends in changing tax preparer and taxpayer attitudes regarding the importance of tax compliance. Both preparers and taxpayers tend to fall into one of three categories: (1) the intentionally noncompliant; (2) those who are indifferent to compliance; and (3) the intentionally compliant.[76] Although

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[72] *See, e.g.*, I.R.S. Pub. 4832 (rev. Dec. 2009); Book, *Increase Preparer Responsibility*, *supra* note 17, at 46 (citing a GAO report indicating that federal returns prepared by Oregon paid preparers 72% higher odds of being accurate than comparable returns filed in the rest of the country, while federal returns prepared by California paid preparers had 22% lower odds of being accurate than comparable returns filed elsewhere); McKerchar, Bloomquist & Leviner, *supra* note 17, at 412-20; Tolan, *supra* note 1, at 474 n.3.

[73] McKerchar, Bloomquist & Leviner, *supra* note 17, at 411-12. Oregon's program has existed since 1973 (as opposed to 1997 for California) and requires significantly more training and education in order to be licensed than the California program. *Id.* at 411 (summarizing the requirements of both programs in detail).

[74] *Id.* at 418 ("In summary, the analysis for three performance measures found that individual taxpayers in Oregon who are clients of tax agents 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. However, the question that remains to be answered is whether these observed differences are due solely or even primarily to Oregon's program of tax agent education and licensing or whether they result from another factor or combination of factors unique to Oregon.").

[75] *Id.* at 419-20 (arguing that Oregon illustrates that such regulation might signal to taxpayers that paid preparers offer a higher quality product, which could encourage more taxpayers to use paid preparers with the confidence that they are receiving higher value).

[76] Book, *Increase Preparer Responsibility*, *supra* note 17, at 80 n.27 (citing Yuka Sakurai & Valerie Braithwaite, *Taxpayer's Perceptions of the Ideal Tax Adviser: Playing Safe or Saving Dollars?* (Ctr. for Tax Sys. Integrity, Working Paper No. 5, 2001), *available at*

noncompliant taxpayers often attempt to seek out preparers who are already predisposed towards noncompliance, it is possible that compliance-oriented tax preparers could have a positive influence on taxpayers predisposed towards noncompliance.[77] This positive influence would not necessarily be limited to the individual level, but would occur on a macro level as well.

A good compliance certification system would provide both direct and indirect incentives for tax preparers to have a good track record of reaching the correct result rather incentives to have a history of simply "winning" against an adversary (the government).[78] Establishing these incentives is important to counter the predictable fact that currently tax preparers often appear to mirror their clients' attitudes regarding aggressive tax positions unless their behavior is reigned in through deterrence incentives.[79] This change in focus by preparers could potentially lead to a

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http://ctsi.anu.edu.au/publications/WP/5.pdf. Book breaks these three broad categories into six sub-categories:

> 1. Refusing practitioners—these practitioners refuse to engage in a relationship with clients they suspect to be dishonest or overly aggressive;
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> 2. Signaling practitioners—these practitioners will signal their unwillingness to prepare returns for clients they expect to be dishonest by making detailed inquiries or requesting back-up documentation;
>
> 3. Facilitating practitioners—these preparers facilitate noncompliance by advising the taxpayer how to take improper return positions when they know or reasonably believe that the taxpayer is misstating facts;
>
> 4. Indifferent practitioners—these preparers are indifferent to the taxpayer's conduct and are willing to follow taxpayer preference and overlook noncompliance;
>
> 5. Incompetent or unsophisticated practitioners—given the due diligence requirements, these preparers should be able to recognize that the taxpayer is taking improper positions, but are unable to detect or suspect taxpayer misconduct because of lack of training, education sophistication, etc.; and
>
> 6. Reasonably unknowing practitioners—despite the client's misconduct, the practitioner does not and cannot reasonably know or suspect that the facts the taxpayer alleges are incorrect.

Id. at 80 n.28 (citing Leslie Book, *Study of the Role of Preparers in Relation to Taxpayer Compliance with Internal Revenue Laws*, *in* 2007 NAT'L TAXPAYER ADVOCATE ANNUAL REPORT TO CON. 71 (Taxpayer Advocate Series) [hereinafter Book, *Role of Preparers*]).

[77] *Id.* at 80 n.27 (citing Book, *Role of Preparers*, *supra* note 76, at 71); Hodaszy, *supra* note 28, at 180 ("[T]o deter abusive tax shelters effectively, a regulatory scheme must not only prohibit bad behavior by tax practitioners; it must actually enlist the aid of private practice tax attorneys in reigning in their clients."); Leviner, *New Age*, *supra* note 6, at 425; Schizer, *supra* note 48, at 333.

[78] Ventry, *supra* note 9, at 443.

[79] Michael L. Roberts & George F. Klersey, *Effects of Experience, Task Specific Information, and Risk on Tax Professionals' Judgments*, 7 (Aug. 5, 2011) *available at* http://papers.ssn.com/sol3/papers.cfm?abstract_id=1905127; McKerchar, Bloomquist & Leviner, *supra* note 17, at 404–07. In addition to reflecting clients' attitudes, tax preparers also exhibit confirmation bias in overly valuing evidence that supports positions favorable to their clients

positive shift in the underlying compliance norm, driving tax advice and causing both preparers and taxpayers to become more focused on getting it right rather than on getting away with it.[80] Furthermore, this change in focus could improve compliance by uniting the incentives of the government, tax preparers, and taxpayers, which would be more likely to bring about a norm shift than many existing proposals that require preparers to develop an adversarial relationship with their clients in order to police them.[81] These shifts in attitudes could be a significant

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while undervaluing evidence that would support a contrary position. Roberts & Klersey, *supra* at 7. Because of the complex nature of the tax advisor/client relationship, however, the multiple studies in this area have led to some inconsistent findings regarding whether the tax advisor or the client is the primary instigator of noncompliant activity. McKerchar, Bloomquist & Leviner, *supra* note 17, at 406 ("[T]he literature is not entirely clear as to which party is responsible for the adoption of an aggressive tax stance and the extent to which such a stance is affected by contextual conditions including penalty exposure, opportunity, personal circumstances, and attitudes.").

[80] *See* Ventry, *supra* note 9, at 477-78. Solutions that contribute to shifts in compliance norms have the potential of being a more efficient mechanism of having a longer lasting effect on increasing tax compliance than proposals that simply try to increase enforcement or try to work with existing norms without trying to change them. Elizabeth Branham, Note, *Closing the Tax Gap: Encouraging Voluntary Compliance Through Mass-Media Publication of High-Profile Tax Issues*, 60 HASTINGS L.J. 1507, 1525 (2009); Sunstein, *supra* note 9, at 909, 930 (describing how "norm entrepreneurs" can produce "norm bandwagons" around a new norm, which in turn can cause more and more people to begin adhering to the new norm until a "norm cascade" occurs, causing a permanent shift in the norm). *But see* Hope M. Babcock, *Assuming Personal Responsibility for Improving the Environment: Moving Toward a New Environmental Norm*, 33 HARV. ENVTL. L. REV. 117 (2009) (discussing some of the difficulties in changing norms generally, which can include: (1) combatting myths regarding the source of the problem; (2) preventing free riding on a collective benefit; and (3) drawing connections between norms and tangible actions).

This certification program with its incentives can be much more effective in drawing these potentially norm-changing connections between tax preparers and compliance norms than simply increasing preparer standards without an incentive structure because the incentives will encourage preparers to market their certifications more directly to clients, illustrating the benefits of compliance norms. *See* Tolan, *supra* note 1, at 526-27 ("[Compliance-oriented preparers] would also signal to their clients a compliance norm that could then, in turn, motivate the taxpayers to be more compliant."); Schizer, *supra* note 48, at 45 ("Lawyers will want conservative reputations, and clients will want to hire such lawyers, if the government treats opinions of conservative lawyers more favorably than opinions of aggressive ones."). In addition, the certification system itself can redefine which conduct is considered to be compliant by adopting a penalty structure in which taxpayers are potentially subject to higher penalties if they do not use compliance certified preparers (thus making the use of these preparers an aspect of what constitutes full compliance with the tax laws). Doran, *supra* note 9, at 145 (the structure of penalties serves a definitional function of describing what is considered to be compliant conduct).

[81] Commentators who have argued for a stronger gatekeeping function nevertheless have to harmonize this gatekeeping function with traditional notions about an attorney/client (or accountant/client) relationship. *See* Tolan, *supra* note 1, at 534-35 (proposing that preparers be required to police tax payers for noncompliance); Lavoie, *Am I My Brother's Keeper?*, *supra* note 17, at 828, 830 (discussing how some commentators are critical of proposals that weaken the attorney/client relationship in the context of tax advice, although still arguing for tax preparers to serve a gatekeeping function). Structuring incentives so that preparers and

step towards improving "tax morale," whereby taxpayers will begin to see tax compliance as a civic virtue.[82]

C. Targeted Tax Enforcement

In addition to improving tax morale, compliance certification combined with targeted tax enforcement better utilizes government resources and produces more just outcomes by focusing the most lengthy and adversarial enforcement efforts, as well as the most significant penalties, on taxpayers and preparers who are most likely to be noncompliant.[83] This benefit is better realized with a voluntary compliance system as opposed to mandatory regulation because it helps sort tax preparers into groups that are more and less likely to be compliant and then uses market pressure to remove those predisposed to intentional or negligent noncompliance from the marketplace.[84] For these efficiency gains to be realized, however, the factors that determine what should trigger an audit for clients of certified and non-certified preparers would need to be continuously adjusted.[85] While keeping the audit benefits afforded to certified-compliant preparers completely secret might lessen the desired incentivizing effects, some details would have to be kept confidential to lessen the temptation of preparers to try to obtain a certification only to manipulate it for its benefits.[86]

D. Enhanced EITC Compliance

The certification program would also increase EITC compliance and make claiming the EITC more viable for taxpayers. If completing a certain amount of

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taxpayers are unified in a desire to be more compliant can increase tax preparers' role as gatekeepers without actually requiring them to do so in a way that might weaken the relationship with the client.

[82] *See, e.g.*, Kornhauser, *Morale Approach*, *supra* note 9, at 599; Marjorie E. Kornhauser, *Tax Compliance and the Education of John (and Jane) Q. Tax Payer*, 121 TAX NOTES 737 (2008) (describing her efforts to increase "tax morale").

[83] Admittedly, it can be difficult to determine ex ante which tax preparers and tax payers are more likely to be compliant because of the complex array of factors that drive compliance decisions. *See* Doran, *supra* note 9*,* at 129-30 (arguing that it is difficult to separate taxpayers into different types because of the various factors that influence tax compliance decisions). This uncertainty can be problematic because, if more responsive regulation is applied across the board, noncompliant taxpayers might try to exploit it through innovation designed to lessen the likelihood of detection in a more relaxed enforcement environment. Ventry, *supra* note 9, at 459.

[84] *See* Raskolnikov, *supra* note 9, at 709 (discussing an elective compliance regime as a potential signaling mechanism for which taxpayers are predisposed towards compliance). The preparer monitoring that would be part of the compliance certification system would also serve as an additional verification of the compliance predisposition to ensure that such a predisposition has not changed with a particular preparer.

[85] *See* Logue & Vettori, *supra* note 9, at 121-24 (discussing how an audit strategy designed to use presumptions regarding whether a taxpayer is being compliant for the purpose of directing audit resources would need to be changed constantly and would likely not be able to be fully publicized to avoid taxpayers adjusting their behavior to appear more compliant based on these presumptions).

[86] *See id.* at 144.

EITC returns free of charge were a requirement for certification, tax preparers seeking the certification would be more likely to advertise their free EITC services to taxpayers, and such services would become more widely available. Taxpayers would receive the dual benefit of being better guided towards a free service and having a more highly trained preparer assist them in preparing their returns.[87] Enforcing the EITC preparation requirement for certification, along with the other requirements that are designed to ensure that only highly compliant preparers receive certification, would address the concerns that shifting more EITC work to paid preparers would not improve EITC compliance because of concerns over the paid preparers' motives and training.[88]

E. Shaming Benefits

If the government promulgated a list of compliance-certified preparers and took steps to increase public awareness of this list and of the benefits of using these types of preparers, tax advisors and preparers who were absent from the list might have an additional motivation to qualify for certification because of shaming effects.[89] Such programs have already been successful on the state level when applied to taxpayers directly.[90] For shaming benefits to be realized, however, the government would have to attract a sufficiently large population of preparers to the certification program, otherwise the shaming effect could backfire if preparers see that the vast majority of their peers are not seeking certification and are thus not necessarily furthering compliance norms.[91]

F. Reduction in Burdens Imposed by Circular 230

The ability of relaxed Circular 230 requirements to reduce costs and add value for compliant-certified preparers has been discussed *supra*.[92] In addition to these benefits, limiting the scope of Circular 230 to provide more flexibility for

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[87] *See* Cords, *supra* note 18, at 374 (noting that many taxpayers are unaware of the free services that already exist, and, because the current free services comprise volunteers and still commit errors on account of insufficient training).

[88] *Compare id.* at 389-90 (arguing for more resources to be devoted for free filing assistance because shifting work to paid preparers may not lead to increased EITC compliance), *with* Book, *The Poor and Tax Compliance*, *supra* note 47, at 1135 (arguing for imposing additional requirements on paid preparers to improve EITC compliance).

[89] *See* Jay A. Soled & Dennis J. Ventry, Jr., *A Little Shame Might Just Deter Tax Cheaters*, USA TODAY, Apr. 10, 2008, at 11A; *see also* Leviner, *New Era*, *supra* note 6, at 408; Schizer, *supra* note 48, at 361-62. Note that, as with the targeted tax enforcement benefits, the shaming benefits are enhanced by keeping the compliance certification program voluntary as opposed to mandatory.

[90] Soled & Ventry, *supra* note 89 ("Shaming has helped states collect hundreds of millions of dollars in unpaid tax bills as taxpayers have rushed to expunge their names from the lists.").

[91] Lavoie, *Flying Above the Law*, *supra* note 5, at 637; Kahan, *The Logic of Reciprocity*, *supra* note 5, at 85; Kahan, *Community Policing*, *supra* note 9, at 1519 (suggesting that, because most taxpayers base their compliance decisions on whether they observe their fellow citizens complying with the tax laws, the government could tap into this reciprocity norm and increase tax compliance through policies that promoted trust among taxpayers).

[92] *See supra* Part III.E.3.

compliance-certified preparers takes Circular 230 a step closer to addressing the legion of complaints that have been raised against it as being: (1) overly broad; (2) overly complex; (3) overly costly; (4) an impediment to attorney-client communication and to the rendering of tax advice in a piecemeal fashion as issues arise; (5) a restriction on the professional judgment of tax preparers and advisors; (6) the cause of the over-use of Non-Reliance Disclaimers to the point of making them ineffective; and (7) an opt-out system that creates many of the above-mentioned problems as opposed to being an opt-in system.[93] Relaxing these requirements could also encourage compliance-oriented tax preparers to take more pro-taxpayer positions in good faith in legitimate gray areas of the tax law because there would be fewer costs in doing so. These challenges, if filed more frequently, could serve as a signal to both the IRS and Congress regarding what gray areas exist and how they should be clarified to produce the proper interpretation in the future.

G. Benefits of Mandatory Pro Bono EITC Representation

In addition to improving the EITC compliance and providing more access to low income tax payers to experienced return preparers who can assist them in obtaining the credit, requiring mandatory pro-bono EITC representation as a condition of compliance can serve larger societal goals. For tax preparers who are attorneys, imposing this requirement would better bolster the inherent obligation of the legal profession to provide representation to the poor.[94] Despite this inherent obligation and despite the fact that some local private bar associations have mandated pro bono service,[95] the imposition of a universal mandatory pro bono requirement on the bar has met with resistance both on precedential and constitutional grounds.[96] These arguments, in brief, are: (1) the nonexistence of a right to counsel in civil cases; (2) the weakness of the historical argument for attorneys being officers of the court for the purpose of rendering pro bono service; (3) mandatory pro bono constitutes an

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[93] Hodaszy, *supra* note 28, at 169-79.

[94] Philip P. Houle, *Is Mandatory Uncompensated Pro Bono in Civil Cases Constitutional?*, 3 NEV. LAW. 20, 20 (1995). This obligation is based not only on fundamental values reflected in the oath of attorneys but also on the fact that attorneys occupy a monopoly position in the marketplace based on the privileges associated with their law licenses, thus enhancing the obligation to provide service to the poor. *See id.*; Burke, McLaurin & Pearce, *supra* note 44, at 67; Burke, Mechling & Pearce, *supra* note 44, at 987; Steven Lubet & Cathryn Stewart, *A "Public Assets" Theory of Lawyers' Pro Bono Obligations*, 145 U. PA. L. REV. 1245, 1248-49 (1997) (providing a good history of the relationship of the bar to pro bono services and advocating for a mandatory pro bono requirement under a theory that lawyers are deriving gains from a public asset and a mandatory pro bono requirement is simply a public recapture of some of those rents).

Nitza Milagros Escalera, *A Christian Lawyer's Mandate to Provide Pro Bono Publico Service*, 66 FORDHAM L. REV. 1393, 1398 (1998) (noting that, in addition to the arguments for mandatory pro bono that apply generally, lawyers who profess to adhere to a Christian ethic have a particular duty to provide pro bono legal service); Maute, *supra* note 44, at 91 (providing a good historical overview of the bar's attitudes towards pro bono service and noting the influence of the discussion of incorporating religious faith into legal practice).

[95] *See, e.g.*, Escalera, *supra* note 94, at 1393; Burke, McLaurin & Pearce, *supra* note 44, at 61.

[96] Houle, *supra* note 94, at 20.

impermissible taking of the attorney's property without just compensation; (4) state constitutional protections of property; (5) lack of judicial authority to order uncompensated service in civil cases; (6) lack of judicial authority to order mandatory pro bono service; (7) the lack of a true monopoly in the legal profession because of the possibility of self-representation; (8) the right to an occupation is a fundamental right under the 14th Amendment; (9) mandatory pro bono infringes on First Amendment rights by compelling attorneys to participate in cases to which they are morally opposed; (10) mandatory pro bono constitutes involuntary servitude (an argument that has not gained traction); (11) lack of reciprocity in that attorneys rendering pro bono service or not having their costs reduced; (12) mandating charity weakens the moral value of charity by removing its charitable character; (13) administrative difficulties that would likely result in an approved list of eligible recipients that would exclude religious groups and other organizations an attorney might choose to represent for free.[97] In addition to the arguments that focus on the negative effects on the attorney required to render mandatory pro bono service, arguments have been raised that such a requirement is economically inefficient because it potentially results in bad legal advice from attorneys who are not experts in the area in which they are representing clients pro bono[98] and because it overly steers legal services to the poor beyond the point at which the poor value them.[99]

By limiting the pro bono requirement specifically to the EITC area, such a program better utilizes practitioners' pro bono time because it enlists them in an area in which they have expertise as well as in an area that is a specifically identified area

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[97] *See, e.g.*, *id.*; Omar J. Arcia, *Objections, Administrative Difficulties and Alternatives to Mandatory Pro Bono Legal Services in Florida*, 22 FLA. ST. U. L. REV. 771 (1995) (arguing that, in addition to the other objections that have been raised, mandatory pro bono could significantly increase the administrative burdens on the state on account of its having to administer such a program); Atkinson, *supra* note 44, at 129; Burke, Mechling & Pearce, *supra* note 44, at 983; Escalera, *supra* note 94, at 1393; Burke, McLaurin & Pearce, *supra* note 44, at 61; Michelle S. Jacobs, *Pro Bono Work and Access to Justice for the Poor: Real Change or Imagined Change?*, 48 FLA. L. REV. 509 (1996) (rejecting many of the traditional legal challenges to mandatory pro bono but arguing that mandatory pro bono, while having some benefits, is insufficient to help the poor escape poverty on account of complex structural issues at the root of poverty); Lubet & Stewart, *supra* note 94, at 1245 (summarizing, but rejecting, many of the classic challenges to mandatory pro bono); Nitta, *supra* note 44, at 909. In addition, Jonathan Macey points out that, even when such a requirement can be permissibly imposed, attorneys are not treated equally because large firm attorneys have a much easier time fulfilling the requirement than small-firm attorneys or solo practitioners. Jonathan R. Macey, *Mandatory Pro Bono: Comfort for the Poor or Welfare of the Rich?*, 77 CORNELL L. REV. 1115, 1121 (1992) (arguing that large firms can use pro bono requirements as a training ground for young associates, while smaller firms are forced to absorb more of the cost of providing free legal services because they do not receive a similar benefit to their cost structure); Atkinson, *supra* note 44, at 148 (arguing the same); Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1, 5 (2004) (arguing the same).

[98] Arcia, *supra* note 97, at 786-87; Burke, McLaurin & Pearce, *supra* note 44, at 75; Nitta, *supra* note 44, at 925.

[99] Macey, *supra* note 97, at 1118 (arguing that mandatory pro bono cases steer attorneys into predominantly landlord/tenant and family law matters in which the costs associated with providing the legal services do not outweigh the benefits). *But see* Nitta, *supra* note 44, at 922 (noting that, in Nevada, statistics showed that there were legal needs of the poor that were not being met, even with attorneys providing pro bono service).

of need.[100] In addition, the pro bono requirements are simply a minimum for certification and could create a culture in which preparers with compliance certifications perform even more EITC (or other voluntary tax) work pro bono as they achieve a tangible benefit on taxpayers' lives by helping them secure these valuable credits.[101]

Furthermore, the pro-bono EITC requirement could be helpful in creating the norm shift towards more compliance described *supra* because it can help tie compliance-certified tax preparers to Judeo-Christian values that, for a majority of the United States population,[102] can potentially influence their perception of the importance of tax preparers and tax compliance generally.[103] Pro bono service is a fundamental obligation for the Christian attorney.[104] By tying pro bono service to the requirements for a compliance certification in the tax context, the government can better illustrate the moral and ethical dimensions of tax practice and tax compliance. As a result, the moral and ethical aspects of tax compliance could better resonate with Judeo-Christian religious organizations and cause them to realize that they have an obligation to be key players in the effort to shift the country towards being a more tax-compliant culture.[105]

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[100] Maute, *supra* note 44, at 155 (noting that, due to the diversity in the legal profession, pro bono requirements are better dictated on more local or regional issues); Arcia, *supra* note 97, at 783 (noting that one problem with mandatory pro bono is the mismatching of attorney expertise to pro bono legal matters); Cummings, *supra* note 97, at 112 n.674 (arguing the same); Nitta, *supra* note 44, at 933 (arguing the same); Burke, McLaurin & Pearce, *supra* note 44, at 74-75 (arguing the same).

[101] *See* Deborah A. Schmedemann, *Pro Bono Publico as a Conscience Good*, 35 WM. MITCHELL L. REV. 977, 984 (2009).

[102] I focus on the connections between public service and Judeo-Christian values because of how interconnected Judaism and Christianity are and because together they encompass approximately 81.8% of the United States population. *See United States (General)*, ASSOCIATION OF RELIGION DATA ARCHIVES, http://www.thearda.com/internationalData/countries/Country_234_1.asp (last visited Aug. 11, 2013). Certainly, the restriction of my focus is not meant to imply that other religious and moral traditions have not considered evaluated taxation as a moral issue. *See, e.g.*, ROBERT W. MCGEE, THE PHILOSOPHY OF TAXATION AND PUBLIC FINANCE 67-69 (2004) (discussing moral issues relating to taxation in Islam).

[103] *See generally*, Afield, *supra* note 16, at 53.

[104] Escalera, *supra* note 94, at 1398 (noting that, in addition to the arguments for mandatory pro bono that apply generally, lawyers who profess to adhere to a Christian ethic have a particular duty to provide pro bono legal service); *see also* Maute, *supra* note 44, at 98 (providing a good historical overview of the bar's attitudes towards pro bono service and noting the influence of the discussion of incorporating religious faith into legal practice).

[105] Afield, *supra* note 16, at 53 (arguing that tax compliance norms can be improved through partnerships between the government and Judeo-Christian religious organizations that are designed to promote tax compliance as a moral obligation); Stuart P. Green, *What is Wrong with Tax Evasion?*, 9 HOUS. BUS. & TAX L.J. 220, 222 (2009) (arguing that compliance gains can be achieved if a norm shift could occur that would move taxpayers' view of tax compliance as being morally ambiguous to being morally wrong); Susan Pace Hamill, *An Evaluation of Federal Tax Policy Based on Judeo-Christian Ethics*, 25 VA. TAX REV. 671, 671–674 (2006) (arguing that the only valid metric with which tax policy can be analyzed is the moral one and specifically discussing what a Judeo-Christian tax policy should resemble);

V. CONCLUSION

As the IRS has realized that paid preparers are playing an increasingly prevalent role in assisting taxpayers in complying with the tax laws and that such preparers nevertheless have high error rates, it has understandably taken steps to try to increase the quality of these preparers in the hopes of reducing the tax gap. Although mandatory regulation that ensures a baseline of competency for all paid preparers is an improvement over the prior system of minimal regulation, the IRS is giving up compliance gains that could be achieved by restructuring its preparer regulatory regime as one of voluntary compliance certifications. If tax preparers are offered the opportunity to obtain a compliance certification if they meet certain requirements and are then rewarded with lower penalties, reduced audit risk, and lower costs for both themselves and their clients, they (as well as their current and potential clients) will have a stronger incentive to improve compliance. Taxpayers' compliance incentives would also be better aligned with those of tax preparers, increasing the possibility of a norm shift towards a greater culture of tax compliance. In addition, the government could use the allure of these incentives to set the requirements for certification at a level that will be more likely to produce increased compliance in areas that have traditionally exhibited high error rates. At first blush it may seem counterintuitive that a voluntary regulatory regime would achieve more benefits than a mandatory one. Given the IRS's resource limitations that prevent effective enforcement of the tax laws, however, the most realistic approaches to improving tax compliance necessarily rely on providing market incentives for tax preparers and taxpayers to value compliance. To do more with less, the IRS must raise the tax bar to meet it as it strives for a more just and efficient tax system.

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see also Susan Pace Hamill, *A Moral Perspective on "Big Business'" Fair Share of America's Tax Burden*, 1 U. ST. THOMAS L.J. 857, 859 (2004); POPE BENEDICT XVI, *CARITAS IN VERITATE* [*Encyclical Letter on Integral Human Development in Charity and Truth*] ¶ 37 (2009) (noting that "*every economic decision has a moral consequence*" and very briefly discussing tax policy as a moral issue at ¶ 60); MARTIN TIMOTHY CROWE, THE MORAL OBLIGATION OF PAYING JUST TAXES: A DISSERTATION 42 (1944) (concluding that there is a moral obligation to pay just taxes); CATECHISM OF THE CATHOLIC CHURCH ¶ 2409 (2d ed. 1997) (listing tax evasion as one of the ways an individual can violate the Seventh Commandment's prohibition on theft); *id.* at ¶ 2240 (establishing that paying taxes is morally obligatory as part of a taxpayer's obligation to submit to lawful authority); MCGEE, supra note 102, at 45-53 (summarizing Jewish thought regarding the obligation to pay taxes); KENNETH H. RYESKY, A JEWISH ETHICAL PERSPECTIVE TO AMERICAN TAXATION 8 (2009); Michael A. Livingston, *The Preferential Option, Solidarity, and the Virtue of Paying Taxes: Reflections on the Catholic Vision of a Just Tax System* 7, 12 (Jan. 4, 2007) (unpublished paper) (on file with Rutgers-Camden School of Law), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=958806 (indicating that, while the Catholic hierarchy has supported progressive taxation generally, they have not done so with much use of moral language, possibly because the Catholic Church still needs to "develop a more sophisticated theory of private wealth and how wealth creation and distribution should be balanced consistently with Catholic teaching.").