

3-1-2015

Unregulated Tax Return Preparers: Not Loving the Penalties

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Unregulated Tax Return Preparers: Not *Loving* the Penalties

SARAH OYER*

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* © 2015 Sarah Oyer. J.D. Candidate, University of San Diego School of Law 2015; B.A., Political science, Flagler College 2012. I am grateful to the *San Diego Law Review* editorial staff for their hard work. I want to especially thank my family for their unwavering and much appreciated support.

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I. INTRODUCTION

The year is 1884. The Civil War is over; many farms have been destroyed and many horses have been killed. Congress has permitted citizens to make claims against the government for the value of horses and property lost during the war, and citizens hire agents to represent their claims before the Treasury Department.¹ Wanting to take advantage of this opportunity, many individuals begin presenting themselves as agents. Unfortunately, most of them had never appeared before the Treasury Department, and citizens with valid reimbursement claims are swindled out of their money.² This was not an uncommon scenario. As a result of this abuse, Congress passes the Dead Horse Act of 1884, granting the Secretary of the Treasury the authority to regulate the admission of agents representing clients before the Treasury Department.³

One hundred and thirty years later, the Internal Revenue Service (IRS) claims that the Dead Horse Act of 1884 provides it with the authority to regulate tax return preparers for much of the same reason the statute was originally passed.⁴ The IRS is concerned that, like the unqualified agents

1. See C. John Muller IV, *Circular 230: New Rules Governing Practice Before the IRS*, 1 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 284, 292 (2011).

2. See *id.* (“The provision was subject to much abuse.”).

3. The Act provides that “[f]or horses and other property lost in the military service . . . the Secretary of the Treasury may prescribe rules and regulations governing the recognition of agents, attorneys, or other persons representing claimants before his Department.” Act of July 7, 1884, ch. 334, 23 Stat. 236, 258 (current version at 31 U.S.C. § 330 (2012)). The Act further requires that “such persons, agents and attorneys, before being recognized as representatives of claimants” must demonstrate “they are of good character and in good repute, possessed of the necessary qualifications to enable them to render such claimants valuable service.” *Id.* at 258–59.

4. The language of the Dead Horse Act of 1884 was amended in 1982, but the legislative history indicates Congress did not intend to change the meaning of the 1884 Act at the time. H.R. Rep. No. 97-651, at 19–20 (1982), *reprinted in* 1982 U.S.C.A.N. 1895, 1913–14. The term “representative of persons” was substituted for “agents, attorneys, or other persons representing claimants,” but it is clear this change was merely stylistic instead of substantive. See *id.*; Lawrence B. Gibbs, *Loving v. IRS: Treasury’s*

of 1884, unregulated tax return preparers are causing serious problems such as taxpayer noncompliance and the increasing tax gap.⁵ In 2011, the IRS began implementing regulations in an attempt to combat these problems.⁶ However, in recent opinions, the D.C. District Court and D.C. Circuit Court of Appeals have ruled that the Dead Horse Act of 1884 does not grant the IRS the power to regulate tax return preparers.⁷ Accordingly, the courts permanently enjoined the IRS from implementing the regulations.⁸

In order to combat the problem of taxpayer noncompliance and to decrease the tax gap, the IRS has decided it is time to regulate tax return preparers.⁹ Regulations may be the answer to these problems, but the specific regulations the IRS wants to implement may overpenalize tax return preparers.¹⁰ This Comment argues that tax return preparers should be regulated but Congress needs to enact legislation that would limit the penalties and align them with those already in place for tax return preparer misconduct. Part II outlines the background surrounding the regulations and the reasons the IRS decided to implement the regulations 130 years after it was supposedly granted the authority to do so. Part III summarizes the specific regulations and the arguments against them, and discusses the problem of overpenalization. Part IV reviews the recent legal battle regarding these regulations and analyzes why the courts in *Loving v. IRS* made the right decision. Part V advocates for Congress to enact legislation authorizing regulations of tax return preparers while limiting the penalties that may be imposed.

Authority To Regulate Tax Return Preparers, 141 TAX NOTES 331, 332 (2013); Steve R. Johnson, *Loving and Legitimacy: IRS Regulation of Tax Preparation*, 59 VILL. L. REV. 515, 520 (2014).

5. See Nina E. Olson, *More Than a 'Mere' Preparer: Loving and Return Preparation*, 139 TAX NOTES 767, 769–70 (2013).

6. See I.R.S. Notice 2011-6, 2011-3 I.R.B. 317–318 (providing guidance regarding the implementation of the regulations).

7. *Loving v. IRS*, 917 F. Supp. 2d 67, 76–77 (D.D.C. 2013), *aff'd*, 742 F.3d 1013, 1022 (D.C. Cir. 2014) (holding that the language of the 1884 statute does not apply to tax return preparers because they do not “practice” before the Treasury Department and therefore, the IRS lacks the authority to impose regulations).

8. *Loving*, 917 F. Supp. 2d at 81.

9. See *infra* Part II.B.

10. See *infra* Part III.C.

II. BACKGROUND

Prior to 2011, tax return preparers were not held to any legal standards.¹¹ There was no test they had to take to demonstrate they understood the current tax laws or knew the ethical standards expected of them.¹² There was no registration process to determine how many people claimed to be tax return preparers.¹³ Anyone could set up a tax return preparer business with little to no knowledge of how to file a tax return, and any person who was not licensed to practice before the IRS could prepare taxes for a fee without being subject to regulations.¹⁴

A. Who Is Considered an Unregulated Tax Return Preparer

An unregulated tax return preparer is someone who charges a fee for preparing taxes but is not an attorney, certified public accountant, or enrolled agent.¹⁵ Attorneys and certified public accountants are licensed by their state, and enrolled agents are certified to practice before the IRS.¹⁶ These tax professionals are all regulated by Circular 230.¹⁷ However, it

11. See INTERNAL REVENUE SERV., PUB. NO. 4832, RETURN PREPARER REVIEW 1 (2009) [hereinafter I.R.S. PUB. NO. 4832], <http://www.irs.gov/pub/irs-utl/54419109.pdf> [<http://perma.cc/8UFR-LBEM>].

12. Although tax return preparers were largely unregulated, they were still accountable for their misconduct. It was not the wild west of taxes; if tax return preparers were guilty of misconduct, they were subjected to penalties under the Internal Revenue Code. See I.R.C. §§ 6694, 6695, 7206, 7207, 7404 (2012). Tax return preparers did have boundaries prior to 2011, even though they were not necessarily considered “regulated.” See I.R.S. PUB. NO. 4832, *supra* note 11, at 1; see also *infra* Part II.C (summarizing the penalties tax return preparers faced prior to 2011).

13. See I.R.S. PUB. NO. 4832, *supra* note 11, at 7.

14. In today’s society, it has become increasingly more convenient for anyone to claim they are a tax return preparer. For as little as \$119.95, anyone with a computer can purchase tax preparation software and make such a claim. See Olson, *supra* note 5, at 769. “There are no longer any barriers to entry to becoming a tax return preparer.” *Id.* Although, in theory, tax return preparers could set up shop without having ever prepared a tax return before, it is unlikely they will stay in business for long; the free market economy would likely prevent unqualified tax return preparers from becoming successful because their reputations would suffer. See David Brunori, *Government Power, Cronyism, and the IRS Running Amok*, 134 TAX NOTES 1599, 1600 (2012).

15. Attorneys, certified public accountants, and enrolled agents are collectively known as “practitioners,” and are subject to federal regulations because they are granted the authority to “practice” before the Department of the Treasury. See 31 U.S.C § 330(a) (2012); 31 C.F.R. §§ 10.2, 10.3 (2013).

16. I.R.S. PUB. NO. 4832, *supra* note 11, at 8.

17. See 31 C.F.R. § 10.0 (2013) (containing “rules governing the recognition of attorneys, certified public accountants, enrolled agents”); see *infra* Part III.A.1.

is unregulated tax return preparers, and not the tax professionals, who have become the main concern of the IRS's contested regulations.¹⁸

It is unknown exactly how many people claim to be tax return preparers.¹⁹ Therefore, it is impossible to determine how many of them obtained the requisite education, knowledge, training, or skill before charging their clients a fee for preparing taxes.²⁰ In the 2011 tax year, of the 142 million individual tax returns filed, approximately 79 million taxpayers paid someone to prepare their taxes and over 42 million of those returns were prepared by an unregulated tax return preparer.²¹ The IRS estimated the number of unregulated tax return preparers was about 600,000 to 700,000 that year²² and, as a result, concluded tax return preparers must be regulated to ensure they do not harm the taxpayers who employ them or interfere with the IRS's ability to efficiently carry out its duties.²³

B. Why the IRS Decided To Regulate Tax Return Preparers

Taxpayers hire professionals to prepare their taxes because the tax code is very complex.²⁴ When taxpayers pay someone to prepare their taxes, it is implied that the tax return preparer has an understanding of tax law and its complexities.²⁵ However, recent studies show that this might not be the

18. See I.R.S. PUB. NO. 4832, *supra* note 11, at 1; see Olson, *supra* note 5, at 769–70.

19. See I.R.S. PUB. NO. 4832, *supra* note 11, at 1.

20. See *id.*

21. 1 TAXPAYER ADVOCATE SERV., INTERNAL REVENUE SERV., NAT'L TAXPAYER ADVOCATE 2013 ANNUAL REPORT TO CONGRESS 61 (2013), <http://www.irs.gov/pub/irs-pdf/p2104.pdf> [<http://perma.cc/9L7T-Z5WT>].

22. Regulations Governing Practice Before the Internal Revenue Service, 76 Fed. Reg. 32,286, 32,299 (proposed June 3, 2011) (to be codified at 31 C.F.R. pt. 10).

23. See Olson, *supra* note 5, at 767–68 (“[S]ignificant concerns have been raised about incompetent and unscrupulous preparers and their negative impact on taxpayers and tax compliance. If a preparer makes inflated claims that the IRS later rejects, or fails to claim benefits to which the taxpayer is entitled, the taxpayer suffers. If a preparer makes inflated claims that the IRS does not detect, federal revenue collection suffers.”).

24. *Id.* at 769.

25. There have been approximately 4680 changes to the tax code since 2001. 1 TAXPAYER ADVOCATE SERV., INTERNAL REVENUE SERV., NAT'L TAXPAYER ADVOCATE 2012 ANNUAL REPORT TO CONGRESS 6 (2013), <http://www.taxpayeradvocate.irs.gov/2012-Annual-Report/downloads/Volume-1.pdf> [<http://perma.cc/KZ4R-9F6F>]. Interestingly, this averages out to be more than one change per day. *Id.* This figure, however, does not include changes made after December 28, 2012, and is an understatement because multiple changes to a section are often grouped together and counted as a single entry. *Id.* at 6 n.10.

case.²⁶ In its 2009 report recommending implementation of tax return preparer regulations, the IRS cited two government studies and the increasing tax gap as evidence that the regulations could help encourage taxpayer compliance.²⁷

I. Government Accountability Office Study

In 2006, the Government Accountability Office (GAO) conducted a study of the services offered by paid tax return preparers and found that preparers working for commercial chain preparation companies, such as H&R Block, made serious errors.²⁸ The study targeted nineteen offices of commercial tax return preparation firms in major metropolitan areas.²⁹ Although its ultimate recommendation was simply that the IRS needed to conduct more research to determine how accurately paid tax preparers were following the tax code, the study's findings were enough to raise serious concerns.³⁰ For example, only two out of the nineteen tax return preparer offices studied calculated the correct tax liability and refund amounts.³¹ In fact, all nineteen of the offices prepared some tax returns that contained a mistake,³² which is especially concerning because tax return preparers are a "critical quality-control checkpoint for the tax system."³³ Even though the study was not conclusive, it revealed the need to regulate the tax preparation industry.³⁴

26. See I.R.S. PUB. NO. 4832, *supra* note 11, at 13–14.

27. See *id.* In both studies, auditors posed as taxpayers and sought assistance from tax return preparers in filing their taxes. See TREASURY INSPECTOR GEN. FOR TAX ADMIN., NO. 2008-40-171, MOST TAX RETURNS PREPARED BY A LIMITED SAMPLE OF UNENROLLED PREPARERS CONTAINED SIGNIFICANT ERRORS 2 (2008), <http://www.treasury.gov/tigta/audit/reports/2008reports/200840171fr.pdf> [<http://perma.cc/Y85M-4VKQ>]; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-563T, PAID TAX RETURN PREPARERS: IN A LIMITED STUDY, CHAIN PREPARERS MADE SERIOUS ERRORS 3 (2006), <http://www.gao.gov/assets/120/113330.pdf> [<http://perma.cc/AH3X-25EF>].

28. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 27, at Introduction.

29. *Id.* at 3. The auditors who posed as taxpayers did not visit any certified public accountants or attorneys. *Id.* Even though the study was not directed at unregulated tax return preparers, it can be inferred that most of the tax return preparers were largely unregulated.

30. See I.R.S. PUB. NO. 4832, *supra* note 11, at 13.

31. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 27, at 23.

32. *Id.* at 31. According to the IRS, if the tax returns prepared in the course of this study were real and the IRS detected the mistakes, the preparers would likely have faced civil sanctions. See *id.* at 26. For example, several tax return preparers encouraged the auditors not to report side income that would have resulted in an understatement of tax liability; this conduct could have resulted in fines of up to \$1000 for willful or reckless disregard for tax laws. See I.R.C. § 6694(a)–(b) (2012); U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 27, at 26.

33. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 27, at 29.

34. See *id.*

2. Treasury Inspector General for Tax Administration Study

The IRS also relied on the 2008 Treasury Inspector General for Tax Administration's (TIGTA) study to support its implementation of the regulations.³⁵ The study specifically targeted unregulated tax return preparers instead of just commercial chain preparers.³⁶ Much like the GAO study, TIGTA's study found significant errors among tax return preparers visited by the auditors.³⁷ Auditors visited twelve commercial chains and sixteen small, independently owned tax preparation offices.³⁸ The study found that of the twenty-eight returns that were prepared, only eleven were correct.³⁹ The most troubling finding was that 35% of the returns contained mistakes the IRS would have considered substantial enough to warrant sanctions,⁴⁰ indicating the IRS's regulations were justifiable. Ultimately, the study recommended the IRS develop regulations that require all paid preparers to have a single identification number so the IRS can track their activities and better understand their effect on taxpayer noncompliance.⁴¹

3. Tax Gap

Furthermore, the IRS is concerned that taxpayer noncompliance is contributing to the increasing tax gap.⁴² The tax gap is simply the

35. See I.R.S. PUB. NO. 4832, *supra* note 11, at 6; TREASURY INSPECTOR GEN. FOR TAX ADMIN., *supra* note 27, at 26.

36. TREASURY INSPECTOR GEN. FOR TAX ADMIN., *supra* note 27, at 16.

37. See *id.* at 5.

38. *Id.* at 2. Each of the tax return preparers visited used commercial tax preparation software to assist in filling out the tax return, and some relied on this software to make eligibility determinations based on the information that the taxpayer provided to the preparer. I.R.S. PUB. NO. 4832, *supra* note 11, at 15.

39. TREASURY INSPECTOR GEN. FOR TAX ADMIN., *supra* note 27, at 5. The scenarios the auditors presented to the tax return preparers were not considered to be difficult tax situations. *Id.* In fact, the situations were "specific, straightforward, and not dependent on interpretation"; they were designed to mirror real life scenarios. See *id.* at 3.

40. See *id.* at 5, 9. Similar to the GAO study, the IRS concluded that if these returns had been real, it would have found that the mistakes constituted a "willful or reckless" disregard for tax laws under the Internal Revenue Code and would have imposed sanctions. See I.R.C. § 6694 (2012); I.R.S. PUB. NO. 4832, *supra* note 11, at 16, 17; *supra* note 32. For example, in some cases the tax return preparers increased deductions without permission from the taxpayer even after the taxpayer questioned whether they were entitled to the deduction. I.R.S. PUB. NO. 4832, *supra* note 11, at 16.

41. TREASURY INSPECTOR GEN. FOR TAX ADMIN., *supra* note 27, at 18.

42. See Olson, *supra* note 5, at 771.

difference between taxes that are legally owed and taxes that are paid on time.⁴³ The IRS believes the main cause of the tax gap is taxpayers misreporting their income and therefore paying fewer taxes.⁴⁴ The fact that a majority of taxpayers rely on a tax return preparer to file their income tax indicates preparers are helping taxpayers misrepresent their income.⁴⁵ Tax return preparers also contribute to the tax gap by misinterpreting complex tax laws, failing to exercise due diligence, and directing taxpayers to misrepresent their income.⁴⁶ The concern over the increasing tax gap is just one of the reasons the IRS feels compelled to impose regulations on tax return preparers.⁴⁷

43. TREASURY INSPECTOR GEN. FOR TAX ADMIN., No. 2013-IE-R008, THE INTERNAL REVENUE SERVICE NEEDS TO IMPROVE THE COMPREHENSIVENESS, ACCURACY, RELIABILITY, AND TIMELINESS OF TAX GAP ESTIMATES 1 (2013), <http://www.treasury.gov/tigta/iereports/2013reports/2013IER008fr.pdf> [<http://perma.cc/6EM5-VSU8>]. The tax gap was most recently reported in 2012 for the 2006 tax year. *Id.* at 4. The IRS reported the tax gap was \$385 billion between the taxes owed and taxes not collected. *Id.* at 5. The difference between taxes owed and taxes not voluntarily collected—before the IRS enforcement activity—was \$450 billion. *U.S. IRS ‘Tax Gap’ Could Be More Accurate — TIGTA Report*, REUTERS (Sept. 16, 2013, 10:42 AM), <http://www.reuters.com/article/2013/09/16/usa-tax-gap-idUSL2N0HB0IN20130916> [<http://perma.cc/SZ46-5EDD>].

44. See JAMES M. BICKLEY, CONG. RESEARCH SERV., R42739, TAX GAP, TAX COMPLIANCE, AND PROPOSED LEGISLATION IN THE 112TH CONGRESS 2 (2012), <http://fas.org/sgp/crs/misc/R42739.pdf> [<http://perma.cc/8WWM-G7TR>].

45. Both the GAO and the TIGTA studies reported that tax return preparers understated the auditor’s income, which resulted in a decreased tax liability that would have resulted in penalties. See *supra* notes 32, 40 and accompanying text.

46. See Leslie Book, *Study of the Role of Preparers in Relation to Taxpayer Compliance with Internal Revenue Laws*, in 2 NAT’L TAXPAYER ADVOCATE 2007 ANNUAL REPORT TO CONGRESS 44, 69–70 (2008), http://www.irs.gov/pub/tas/arc_2007_vol_2.pdf [<http://perma.cc/2RAR-WDHD>] (discussing the importance of understanding the source of errors found on tax returns and how a better understanding of the role unregulated tax return preparers play in the tax gap is vital).

47. See BICKLEY, *supra* note 44, at 8. Although the studies relied on by the IRS and the growing tax gap weigh in favor of implementing regulations on tax return preparers, it is important to note that there is not enough information known about unregulated tax return preparers to reach a conclusion about the role they play in taxpayer noncompliance. See Book, *supra* note 46, at 47. Even the studies themselves concede this issue. See TREASURY INSPECTOR GEN. FOR TAX ADMIN., *supra* note 27, at 12 (“Although paid preparers file the majority of income tax returns, the IRS has limited information on them and insufficient means by which to track or monitor them.” (footnote omitted)); U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 27, at 30 (“We recommend that the Commissioner of the Internal Revenue conduct necessary research to determine the extent to which paid preparers live up to their responsibility to file accurate and complete tax returns . . .”). Additionally, others have advocated for more research in order to determine the best course of action for regulating tax return preparers. See Book, *supra* note 46, at 74 (discussing the inconclusive nature of research concerning how paid preparers affect tax compliance); see also Patrick E. Tolan, Jr., *It’s About Time: Registration and Regulation Will Boost Competence and Accountability of Paid Tax*

C. Oversight of Tax Return Preparers Prior to 2011

Although unregulated tax return preparers were not subject to federal regulations prior to 2011, they were subject to existing civil penalties under the Internal Revenue Code and in some cases to criminal sanctions.⁴⁸ These penalties are the IRS's "key tool" against noncompliant tax return preparers and can be imposed for a variety of tax law violations.⁴⁹

The Internal Revenue Code imposes civil sanctions for tax return preparers who misrepresent a taxpayer's information.⁵⁰ For example, Internal Revenue Code § 6694(a) penalizes a tax return preparer that understates a taxpayer's liability where the tax return preparer knew, or reasonably should have known, the understatement was the result of an "unreasonable position."⁵¹ For each violation, the tax return preparer can face fines of up to \$1000 or 50% of the tax return preparer's income derived from the return, whichever is greater.⁵² Under § 6694(b), if tax return preparers make a "willful attempt in any manner to understate the liability for tax on the return" or recklessly disregard any of the rules or regulations, they face a \$5000 fine.⁵³ Additionally, under § 6695, the tax return preparer can be penalized for failing to provide the taxpayer a copy of his or her return, failing to sign the return and provide an identifying number, failing to retain a copy of the return, or failing to be diligent in determining eligibility for earned income credit.⁵⁴ The penalty is \$50 per failure to comply, but the maximum penalty imposed cannot exceed \$25,000 with respect to each violation.⁵⁵

Preparers, 31 VA. TAX REV. 471, 522–23 (2012) (discussing how previous studies on tax return preparers and their effect on tax payer compliance lack reliable data).

48. See *Loving v. IRS*, 917 F. Supp. 2d 67, 77 (D.D.C. 2013), *aff'd*, 742 F.3d 1013 (D.C. Cir. 2014) (discussing the broader statutory context and the already enacted penalty scheme under the Internal Revenue Code); I.R.S. PUB. NO. 4832, *supra* note 11, at 17–18; U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 27, at 10–11.

49. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 27, at 9.

50. See I.R.C. §§ 6694, 6695, 6701, 6713 (2012).

51. An "unreasonable position" means that the understatement of a taxpayer's liability was due to a position "that had no realistic possibility of being sustained." U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 27, at 10.

52. I.R.C. § 6694(a)(1)(B).

53. *Id.* § 6694(b).

54. I.R.C. § 6695.

55. *Id.* These are just a few examples of civil penalties that tax return preparers are subject to. Others include civil penalties for aiding and abetting an understatement of tax liability, which can result in fines up to \$1000, and improper disclosure or use of return

Criminal sanctions can also be imposed for improper conduct.⁵⁶ For example, a tax return preparer that willfully prepares a false or fraudulent return may be held liable, and violations can result in up to \$100,000 in fines and three years imprisonment.⁵⁷ Additionally, tax return preparers can be punished for knowingly or recklessly disclosing tax return information, and violations can result in fines up to \$10,000 and one year imprisonment.⁵⁸ Civil and criminal sanctions can be imposed for the same violation.⁵⁹

The Internal Revenue Code also provides the authority to enjoin tax return preparers.⁶⁰ Consequently, the IRS can bring a civil action in district court “to enjoin any person who is a tax return preparer from further engaging in [certain] conduct.”⁶¹ If the court finds tax return preparers have engaged in any conduct that would subject them to civil penalties or criminal sanctions, the court can enjoin them from engaging in such conduct.⁶² The court may also enjoin tax return preparers from preparing any tax returns if the preparers’ conduct is particularly egregious or if the preparers have been punished previously for the same misconduct.⁶³

III. THE REGULATIONS AND THEIR PROBLEMS

A. *The Regulations*

The IRS has tried to implement various regulations designed to curtail the negative effects of unregulated tax return preparers in response to the

information, which can result in fines up to \$250 for each disclosure. I.R.C. §§ 6701, 6713 (2012).

56. See I.R.C. §§ 7206, 7207, 7216 (2012).

57. I.R.C. § 7206.

58. I.R.C. § 7207.

59. I.R.S. PUB. NO. 4832, *supra* note 11, at 18; U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 27, at 10–11.

60. I.R.C. § 7407 (2012).

61. *Id.* § 7407(a).

62. See I.R.C. § 7407(b)(2); *United States v. Cruz*, 611 F.3d 880, 887 (11th Cir. 2010) (denying the IRS’s request to permanently enjoin the tax return preparer because less stringent penalties would have sufficed instead, after the tax return preparer brought evidence showing he no longer engaged in misconduct).

63. I.R.C. § 7407(b)(2). This is the most severe penalty tax return preparers can face under the Internal Revenue Code’s penalty scheme. The permanent injunction that can be assessed is referred to as the “death penalty” in the profession of tax return preparers. See Ariel Alvarez, *The Constitutionality of the Inevitable Regulations of All Tax Return Preparers*, 14 J. ACCT., ETHICS & PUB. POL’Y 735, 746 (2013). The severity of the penalty corresponds to the extent and nature of the wrongdoing. *Id.*

growing concerns about their accuracy and accountability.⁶⁴ The goals of the regulations are twofold—increase taxpayer compliance and ensure high ethical standards for tax return preparers.⁶⁵ These regulations include implementation of the ethical standards found in Circular 230, mandatory registration, continuing education, and competency testing.⁶⁶

1. Circular 230

Under the regulations, all tax return preparers will be held to the ethical standards found in Circular 230.⁶⁷ Circular 230 outlines a standard of conduct that originally only applied to certain tax professionals who were certified to represent their clients in administrative hearings.⁶⁸ However, in 2007, Circular 230 was expanded to include all attorneys, certified public accountants, and enrolled agents who provided any written tax advice to their clients.⁶⁹ In 2011, the IRS amended Circular 230's definition of *practitioner* to include “registered tax return preparer.”⁷⁰ This new definition includes the category of tax return preparers previously

64. “After consideration of the input provided through the public comment process, the IRS believes that taxpayers, tax administration and the tax professional industry and related service providers will be better served through the implementation of a number of changes in how the industry participants are overseen.” I.R.S. PUB. NO. 4832, *supra* note 11, at 2.

65. See Tolan, *supra* note 47, at 484 (discussing the “twin goals” behind the implementation of the regulations).

66. See I.R.S. PUB. NO. 4832, *supra* note 11, at 33–35, 37.

67. 31 C.F.R. §§ 10.3, 10.36 (2013), *reprinted in* INTERNAL REVENUE SERV., TREASURY DEP’T CIRCULAR NO. 230: REGULATIONS GOVERNING PRACTICE BEFORE THE INTERNAL REVENUE SERVICE (2011); see I.R.S. PUB. NO. 4832, *supra* note 11, at 37.

68. See Alvarez, *supra* note 63, at 747.

69. In 2007, Circular 230's definition of *practice* was expanded to include “rendering written advice with respect to any entity, transaction, plan or arrangement, or other plan or arrangement having a potential for tax avoidance or evasion.” Bryan T. Camp, ‘Loving’ Return Preparer Regulation, 140 TAX NOTES 457, 461 (2013). Because the purpose of hiring a tax attorney, certified public accountant, or enrolled agent is to obtain tax advice, this broader definition of *practitioner* means that Circular 230 now regulates nearly every action taken by these tax professionals. *Id.* at 461–62.

70. See 31 C.F.R. §§ 10.2, 10.3 (2011); Muller, *supra* note 1, at 301. The definition of *registered tax return preparer* will include “any individual who is compensated for preparing, or assisting in the preparation of, all or substantially all of a tax return or claim of refund of tax,” but a registered preparer's practice is “limited to preparing tax returns . . . and other documents for submission to the Internal Revenue Service.” Muller, *supra* note 1, at 301 (quoting Regulations Governing Practice Before the Internal Revenue Service, 75 Fed. Reg. 51,713, 51,727 (proposed Aug. 23, 2010) (to be codified at 31 C.F.R. pt. 10)).

excluded in the definition because the IRS now requires every paid tax return preparer to register.⁷¹ The proposed changes to Circular 230 attempt to create a registration process for tax return preparers that would require preparers to obtain a preparer tax identification number (PTIN), pass an eligibility examination, and participate in continuing education courses.⁷²

2. Registration

The new regulations require every paid tax return preparer to register with the IRS and obtain a PTIN.⁷³ In order to obtain a PTIN and register, tax return preparers will be charged a “reasonable nonrefundable fee” and required to provide this number when they sign tax returns.⁷⁴ Prior to the regulations, tax return preparers were required to sign each return and provide an identification number, such as a social security number or a PTIN.⁷⁵ The IRS claims that mandatory registration through PTINs will help collect more data on the accuracy of paid tax return preparers.⁷⁶

3. Continuing Education

The regulations also require tax return preparers to participate in fifteen hours of continuing education each year.⁷⁷ The fifteen hours must be composed of three hours of federal tax law, two hours of tax ethics, and ten hours of other specialized federal tax law topics.⁷⁸ The IRS believes

71. See I.R.S. Notice 2011-6, *supra* note 6; Muller, *supra* note 1, at 301.

72. See Alvarez, *supra* note 63, at 749 (discussing the changes made to Circular 230 in order to regulate tax return preparers).

73. I.R.S. Notice 2011-6, *supra* note 6 (“[A]ll individuals who are compensated for preparing, or assisting in the preparation of, all or substantially all of a tax return or claim for refund of tax must have a PTIN.”).

74. I.R.S. PUB. NO. 4832, *supra* note 11, at 33.

75. See I.R.C. § 6109(a)(1) (2012) (“Any person required under the authority of this title to make a return, statement or other document shall include in such return, statement, or other document such identifying number as may be prescribed for securing proper identification of such person.”); Prop. Treas. Reg. § 1.609-2, 75 Fed. Reg. 60,309, 60,315 (Sept. 30, 2010).

76. See I.R.S. PUB. NO. 4832, *supra* note 11, at 33. Registration would help to combat the problem of not having enough information because a registration system would allow the IRS to collect data and make determinations of what regulations should and should not be implemented. See *supra* note 47.

77. 31 C.F.R. § 10.6 (2011). Those who provide continuing education services must be an accredited educational institution and must be recognized by the IRS as a “professional organization, society, or business whose programs include offering continuing professional education opportunities in subject matters within section 10.6(f) of Circular 230.” See I.R.S. Notice 2011-61, 2011-31 I.R.B. 91.

78. See I.R.S. PUB. NO. 4832, *supra* note 11, at 36.

all tax return preparers have an obligation to keep abreast of tax laws and this requirement will ensure better compliance with consistently changing laws.⁷⁹ This requirement, however, does not include attorneys, certified public accountants, or enrolled agents because they are already required to complete continuing education to maintain their professional licenses.⁸⁰

4. Eligibility Examination

Additionally, the new regulations require tax return preparers to pass an eligibility exam.⁸¹ To prevent an interruption of business and ease the transition, the IRS allows tax return preparers three years to complete the competency testing requirement.⁸² There are two levels of testing that tax return preparers can choose from: (1) wage and nonbusiness tax returns, and (2) wage and small business tax returns.⁸³ Tax return preparers must pass the competency test before they can register with the IRS and obtain a PTIN.⁸⁴ Again, attorneys, certified public accountants, and enrolled

79. *Id.* at 35–36; *see also* Olson, *supra* note 5, at 771–72 (“Tax law has evolved so that competently advising a taxpayer and accurately preparing even the simplest return require an extraordinary exercise of judgment and knowledge by the return preparer. The code provisions applying to family status are as complex as those relating to depreciation of business property or passive activity losses.”).

80. *See* I.R.S. PUB. NO. 4832, *supra* note 11, at 36. *But see* Kelly Phillips Erb, *Attorney Who Bested IRS in Tax Preparer Regulation Case Speaks Out*, FORBES (Jan. 22, 2013, 10:56 AM), <http://www.forbes.com/sites/kellyphillipserb/2013/01/22/attorney-who-bested-irs-in-tax-preparer-regulation-case-speaks-out/> [<https://perma.cc/3UUX-7WVL?type=pdf>] (describing how attorneys are exempt from eligibility and continuing education requirements and are considered competent tax return preparers based on their status as an attorney and irrespective of their familiarity with tax law).

81. *See* T.D. 9527, 2011-27 I.R.B. 2–3 (June 3, 2011); I.R.S. Notice 2011-48, 2011-26 I.R.B. 927.

82. T.D. 9527, *supra* note 81, at 2–3. The IRS invited the public to comment on the implementation of the competency testing requirement. I.R.S. Notice 2011-48, *supra* note 81, at 927. Commentators requested that the IRS delay the implementation of the testing requirement until the regulations were already in place. T.D. 9527, *supra* note 81, at 5.

83. *See* I.R.S. PUB. NO. 4832, *supra* note 11, at 53 app. I (showing competency examination content for each examination category).

84. *Id.* at 35. Additionally, when a tax return preparer applies to take the competency exam, the IRS will perform a suitability check, which may “include criminal background checks and tax compliance checks.” *Id.* at n.82. A tax compliance check will be limited to a “review of the tax return preparer’s filing and payment compliance history.” *Id.*

agents do not have to satisfy this requirement because they already passed competency tests to obtain their professional licenses.⁸⁵

B. *The Opposition*

Not everyone agrees with the IRS's implementation of the regulations on tax return preparers.⁸⁶ In fact, some independent tax return preparers and commercial chain preparer firms oppose the regulations.⁸⁷ The opposition has valid objections concerning the form and substance of the requirements, including their cost and training measures.⁸⁸ Some tax return preparers are concerned that the expense of implementing the regulations will be too burdensome.⁸⁹ There is also concern that the training measures are duplicative because many tax return preparers already undergo rigorous training.⁹⁰

1. *The Regulations Are Expensive*

Tax return preparers affected by the regulations will be faced with many new fees.⁹¹ For example, the cost of registering with the IRS will be

85. See T.D. 9527, *supra* note 81, at 5 (“Other categories of . . . practitioners are generally subject to state requirements that result in the individual possessing a minimum level of experience, knowledge, judgment, and maturity.”); *supra* text accompanying note 80.

86. See Alvarez, *supra* note 63, at 750.

87. See Tolan, *supra* note 47, at 513.

88. See Alvarez, *supra* note 63, at 750–51. Of course, some of the concerns that have been raised are typical complaints that arise any time a systematic change is imposed upon a large group of people. See *id.* Opposition is bound to happen when the government decides to require an entire profession to pay a fee in order to continue practicing their profession legally. See Tolan, *supra* note 47, at 513.

89. See Katherine Pickering, Written Testimony of Katherine Pickering, Executive Director of the Tax Institute at H&R Block and Vice President of Government Relations, Before the House Committee on Ways and Means Subcommittee on Oversight: Hearing on IRS Return Preparer Initiative 3 (July 28, 2011) (unpublished manuscript), <http://waysandmeans.house.gov/uploadedfiles/pickeringhrblock.pdf> [<https://perma.cc/9EA5-7SZF?type=pdf>].

90. *Id.*

91. See Tolan, *supra* note 47, at 513–14. The cost of the regulations is a major concern and small independent tax return preparation firms are not the only ones that are worried. H&R Block has voiced its concerns and estimates it will cost over \$23 million annually to implement the regulations—costs that will inevitably be passed down to the taxpayer. See Pickering, *supra* note 89, at 3–4. The National Association of Tax Professionals (NATP), a group that represents 20,500 regulated and unregulated preparers, is also concerned with the costs imposed by the new regulations. See PAUL CINQUEMANI, NAT'L ASS'N OF TAX PROF'LS, RETURN PREPARER REVIEW INITIATIVE—A RETROSPECTIVE 2, 7–8 (2011), <http://www.natptax.com/TaxKnowledgeCenter/taxprepareregistration/Documents/Discussion%20Paper%20b4%20House%20Subcommittee%20on%20Oversight%20July%2028.pdf> [<https://perma.cc/X9N2-G57G?type=pdf>]. The NATP suggests the costs of the

\$64.25 per year.⁹² However, in order to register, a tax return preparer must be fingerprinted and pass a background check, the combined cost of which is approximately \$90.⁹³ In addition, tax return preparers are now required to pass a competency test and participate in fifteen hours of continuing education every year.⁹⁴ Although there is no set fee for the competency test or the continuing education hours, similar tests for enrolled agents cost about \$97 and classes cost anywhere from \$5 to \$25 per credit hour.⁹⁵ In total, a tax return preparer could end up paying more than \$500 per year in fees. For small, independent tax preparers that prepare only a handful of tax returns each tax season, this amount could prove too burdensome for them to remain in business.⁹⁶

2. *The Requirements Are Duplicative*

There is also concern that the regulations are duplicative because training programs that ensure tax return preparer competency already exist.⁹⁷ For example, national commercial tax preparation chains have education programs and competency testing programs for their employees.⁹⁸ H&R Block requires its tax return preparers to take eighty-four hours of classroom instruction in addition to homework, quizzes, a midterm, and a final exam.⁹⁹ It also requires its employees to participate in twenty-four hours of continuing education each year.¹⁰⁰ H&R Block's education and competency requirements far exceed the IRS's requirements; however, its employees must still participate in the IRS's competency tests and abide

regulations will be most devastating in remote or rural locations, where there are only one or very few tax return preparers in business during the tax season. *Id.* at 8.

92. *Id.* at 7.

93. *Id.*; see also Alvarez, *supra* note 63, at 751 (“[I]t would be a shocking waste of time and resources if the effect of the new requirements were to create *less* compliance by taxpayers who are forced to file their tax returns without assistance.”).

94. I.R.S. PUB. NO. 4832, *supra* note 11, at 34–35, 36.

95. Cinquemani, *supra* note 91, at 8.

96. See *infra* Part IV.A.

97. See Tolan, *supra* note 47, at 514–15.

98. *Id.* at 515. This objection carries a lot of weight because the number of tax return preparers who work for large commercial chain preparers is substantial, and all commercial chain preparers require at least some sort of training. See Alvarez, *supra* note 63, at 751.

99. Pickering, *supra* note 89 (manuscript at 2).

100. See *id.* But see Tolan, *supra* note 47, at 515 (suggesting the regulations will cause H&R Block to cut down on its own training to avoid duplicative costs).

by its education requirements.¹⁰¹ This renders the competency testing and education requirement unnecessary for H&R Block's 97,000 tax return preparers.¹⁰²

C. The Problem of Overpenalization

Tax return preparers may be subject to overpenalization if the regulations are implemented because there are safeguards already in place to ensure tax return preparer accountability.¹⁰³ The penalties tax return preparers face under the Dead Horse Act of 1884, if they are subject to such regulations, significantly overlap with the specific penalty scheme found in the Internal Revenue Code.¹⁰⁴ Additionally, the penalties prescribed under the new Circular 230 are harsher than already existing penalties.¹⁰⁵

One area of overlap within the penalty schemes can be found in § 7407 of the Internal Revenue Code and section 330(b) of the Dead Horse Act of 1884.¹⁰⁶ Section 7407 provides the authority to enjoin tax return preparers from engaging in illegal conduct or from preparing taxes at all.¹⁰⁷ Section 330(b) grants the IRS authority to disbar any tax return preparer who is "incompetent" or "disreputable" or who "violates regulations."¹⁰⁸ However, § 330(b) does not require the same level of judicial oversight that the Internal Revenue Code provides.¹⁰⁹ Thus, it

101. Pickering, *supra* note 89 (manuscript at 3). H&R Block initially supported the Paid Tax Return Preparer Initiative, assuming that H&R Block's "training and testing program would be accepted by the IRS, and that [it's] certified tax preparers would be waived from the IRS Competency exam." *Id.* Further, there has previously been "bipartisan support for H&R Block's competency testing to be certified for IRS purposes." *Id.*

102. *See id.* But see Alvarez, *supra* note 63, at 751 (explaining that "[w]hether the large business chain preparers adequately train their own employees or not has no bearing on the need to monitor all of the other preparers who do not undergo such professional preparation").

103. *See* Loving v. IRS, 917 F. Supp. 2d 67, 77 (D.D.C. 2013), *aff'd*, 742 F.3d 1013 (D.C. Cir. 2014).

104. *Compare* 31 U.S.C. § 330(b) (2012) (outlining the general penalty scheme found within the Dead Horse Act of 1884), *and* Regulations Governing Practice Before the Internal Revenue Service, 76 Fed. Reg. 32,286, 32,292 (proposed June 3, 2011) (to be codified at 31 C.F.R. pt. 10) (outlining the penalties imposed under Circular 230), *with* I.R.C. §§ 6694, 6695, 6713, 7216, 7407 (2012) (outlining the specific statutory scheme found within the Internal Revenue Code).

105. *See* Regulations Governing Practice Before the Internal Revenue Service, 76 Fed. Reg. at 32,286.

106. *Loving*, 917 F. Supp. 2d at 76 (highlighting the intersection between the Internal Revenue Code's penalty scheme and the discipline standards under 31 U.S.C. § 330(b)).

107. I.R.C. § 7407.

108. 31 U.S.C. § 330(b).

109. *Compare* I.R.C. § 7407 ("A civil action in the name of the United States to enjoin any person who is a tax return preparer . . ."), *with* 31 U.S.C. § 330(b) ("After

will be easier to disbar tax return preparers than it will be to enjoin them from engaging in certain misconduct because the IRS will not have to deal with the formality of bringing the case to a district court. Disbarment is a more serious penalty than enjoinder because it threatens to prevent tax return preparers from practicing their chosen profession.¹¹⁰ Therefore, the IRS should not be able to impose the penalty of disbarment without more stringent judicial oversight.

Additionally, under Circular 230, tax return preparers will be subject to harsher penalties than under the Internal Revenue Code.¹¹¹ For example, Circular 230 penalizes tax return preparers for understating liability even if it is ultimately eliminated in a different portion of the return.¹¹² However, under Internal Revenue Code § 6694(d), if another portion of the return eliminates the understatement, the tax return preparer does not receive a penalty.¹¹³ Similarly, Circular 230 provides no reasonable cause defense for an understatement of liability, whereas § 6694(a)(3) states, “if it is shown that there is reasonable cause for the understatement,” then the penalties will not be imposed.¹¹⁴ There is potential for overpenalization if tax return preparers are subject to Circular 230’s penalties because they leave less wiggle room for mistakes.¹¹⁵ The Internal Revenue Code accounts for these mistakes and provides relief for a tax return preparer’s unintentional errors. However, if Circular 230’s penalties apply to tax

notice and opportunity for a proceeding, the Secretary may suspend or disbar from practice before the Department . . .”).

110. *Disbarment* is defined as “The expulsion of a lawyer from the bar or from the practice of law, usu. because of some disciplinary violation; the official act by which an attorney is deprived of the privilege of practicing law.” BLACK’S LAW DICTIONARY 561 (10th ed. 2014). *Enjoin* is defined as “[t]o legally prohibit or restrain by injunction.” *Id.* at 647.

111. See Muller, *supra* note 1, at 304.

112. Compare Regulations Governing Practice Before the Internal Revenue Service, 76 Fed. Reg. 32,286, 32,292 (proposed June 3, 2011) (to be codified at 31 C.F.R. pt. 10) (explaining that elimination of a tax understatement by a secondary position on the tax return will still result in penalties), with I.R.C. § 6694(d) (2012) (stating that “at any time there is a final administrative determination or a final decision that there was no understatement of liability,” any assessment of penalties “shall be abated”).

113. I.R.C. § 6694(d).

114. Compare Regulations Governing Practice Before the Internal Revenue Service, 76 Fed. Reg. at 32,307 (lacking a reasonable-cause defense to penalties), with I.R.C. § 6694(a)(3) (2012) (“No penalty shall be imposed . . . if it is shown that there is reasonable cause for the understatement and the tax return preparer acted in good faith.”).

115. See Regulations Governing Practice Before the Internal Revenue Service, 76 Fed. Reg. at 32,307.

return preparers, then overpenalization could occur for simple mistakes made on tax returns that tax return preparers otherwise would not be held accountable for.¹¹⁶

IV. *LOVING v. IRS*

Not surprisingly, just a few months after the IRS began implementing the new regulations, Sabina Loving, Elmer Kilian, and John Gambino—three independent tax return preparers—sued the IRS,¹¹⁷ challenging its statutory authority to impose such regulations.¹¹⁸

A. *The Plaintiffs*

Sabina Loving, the named plaintiff, owns a small tax preparation office in an impoverished neighborhood on the South Side of Chicago.¹¹⁹ The cost of implementing the IRS's regulations would likely force Loving to raise her prices.¹²⁰ Her low-income clients would be unable to afford her services, and as a result, she would likely go out of business.¹²¹

Elmer Kilian lives in a small town in Wisconsin.¹²² Every tax season for the past thirty years he hung a sign outside his house advertising his tax preparation services.¹²³ Kilian prepared around eighty to one hundred tax returns every year.¹²⁴ The cost of the regulations would have

116. See I.R.C. § 6694(a)(3), (d).

117. Complaint for Declaratory and Injunctive Relief at 2, *Loving v. IRS*, 917 F. Supp. 2d 67 (D.D.C. 2013) (No. 1:12-cv-00385), 2012 WL 5356606 [hereinafter Complaint].

118. *Id.*

119. Kelly Phillips Erb, *Tax Preparers Speak Out Against New Regs, File Suit Against IRS*, FORBES (Mar. 13, 2012, 2:34 PM), <http://www.forbes.com/sites/kellyphillipserb/2012/03/13/tax-preparers-speak-out-against-new-regs-file-suit-against-irs/> [https://perma.cc/W4BU-KD5Y?type=pdf]. After the D.C. Circuit Court of Appeals affirmed the district court's ruling, Sabina Loving stated, “[M]y customers—not the IRS—should be the ones who get to choose who prepare their taxes. I have a right to earn an honest living without getting permission from the IRS.” Matthew Barakat, *IRS Loses Appeal on New Rules for Tax Preparers*, YAHOO (Feb. 11, 2014, 3:57 PM), <http://news.yahoo.com/irs-loses-appeal-rules-tax-preparers-174447027.html> [https://perma.cc/42JA-8QXV?type=image].

120. *Challenging the IRS's Authority To License Tax Return Preparers*, INST. FOR JUST., <http://www.ij.org/irs-tax-preparers-backgrounder-2> [http://perma.cc/A75W-N5QA] (last visited Mar. 27, 2015).

121. See *id.*

122. *Id.* Kilian is a retired Korean War veteran and often prepares free tax returns for charity. See Erb, *supra* note 119.

123. See *Challenging the IRS's Authority To License Tax Return Preparers*, *supra* note 120.

124. See Erb, *supra* note 119.

outweighed his profit margin and he would no longer be able to provide his services.¹²⁵

John Gambino is a Certified Financial Planner who primarily assists his clients with wealth management services.¹²⁶ As a convenience, he often prepared their taxes.¹²⁷ Gambino prepared about fifty tax returns a season for compensation.¹²⁸ However, under the new requirements, it would no longer be profitable for him to offer this service.¹²⁹

B. The Legal Battle

The facts of the case are simple and straightforward. The plaintiffs were previously unregulated tax return preparers who believed the IRS lacked the statutory authority to enact and enforce the new regulations. The plaintiffs brought suit against the IRS,¹³⁰ seeking injunctive and

125. See *Challenging the IRS's Authority To License Tax Return Preparers*, *supra* note 120.

126. See Erb, *supra* note 119.

127. See *id.* Although the IRS does exempt certified public accountants, attorneys, and enrolled agents from the regulations, it does not exempt Certified Financial Planners (CFPs). See generally Letter from Kevin R. Keller, Chief Exec. Officer, Certified Fin. Bd. of Standards, Inc., to Internal Revenue Serv. (July 7, 2011), http://www.cfp.net/docs/public-policy/irs_notice_2011-48_letter8B185F4D644A.pdf?sfvrsn=2 [<http://perma.cc/VPQ2-N32P>]. However, CFPs professional standards are similar to those necessary to become a CPA. *Id.* For example, in order to gain certification, CFPs must complete coursework and a rigorous examination in financial planning, which covers federal income tax laws and related tax subjects. *Id.* The CFP Board believes these requirements should be enough to exempt CFPs from the regulations. *Id.*

128. See Erb, *supra* note 119.

129. See *Challenging the IRS's Authority To License Tax Return Preparers*, *supra* note 120. The plaintiffs were represented by the Institute of Justice, a libertarian public interest law firm. *Id.* The lead attorney, Dan Alban, has voiced his opposition to the IRS's implementation of the regulations since 2010. See Dan Alban, *The IRS and the Latest Licensing Outrage*, DAILY CALLER (Oct. 8, 2010, 11:20 AM), <http://dailycaller.com/2010/10/08/the-irs-and-the-latest-licensing-outrage/> [<http://perma.cc/JW8Q-JSTG>]. He testified at a congressional hearing on the matter that the regulations would disproportionately hurt small tax return preparation businesses and independent preparers. *Id.* Alban believes higher regulatory costs and a corresponding decrease in competition will likely increase the cost of tax preparation services overall. *Id.*; see also Erb, *supra* note 119 (discussing how Alban was the only one expressing opposition at the 2010 congressional hearing).

130. Administrative Procedure Act, 5 U.S.C. § 706(2)(C) (2012). The Administrative Procedure Act applies to all administrative agencies and procedures, and governs any administrative unit with substantial independent authority, such as the IRS, in the exercise of specific functions. 73 C.J.S. *Public Administrative Law and Procedure* § 8 (Supp. 2013).

declaratory relief to prevent the IRS from implementing these new regulations.¹³¹

Both the plaintiffs and the IRS claimed the statutory language of 31 U.S.C. § 330 pointed in their favor.¹³² As a result, both parties moved for summary judgment.¹³³ Generally, summary judgment requires the moving party to show “that there is no genuine dispute as to any material fact” and that the moving party is therefore “entitled to judgment as a matter of law.”¹³⁴ However, in cases where the court is reviewing a final agency action, summary judgment serves to decide, as a matter of law, whether the administrative record supports the agency action.¹³⁵ Here, the court had to apply this standard of review to determine whether the IRS had the authority to enact and enforce the regulations.¹³⁶

There was no dispute by either party that the Administrative Procedure Act was the controlling law in deciding this issue.¹³⁷ A challenge to an administrative agency’s rulemaking requires the reviewing court to “set aside agency action” that is “in excess of [the agency’s] statutory jurisdiction, authority, or limitations.”¹³⁸ In order to determine if the agency action was outside the scope of the IRS’s statutory authority, the court had to decide whether the regulations were “consistent with the Congressional purposes underlying the authorizing statute.”¹³⁹ The court employed the two-step approach of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* to analyze the scope of authority under the 1884 Dead Horse

131. Complaint, *supra* note 117, at 21. Additionally, plaintiffs sought attorneys’ fees and any other legal or equitable relief. *Id.*

132. Plaintiffs’ Motion for Summary Judgment at 27–31, *Loving v. IRS*, 917 F. Supp. 2d 67 (D.D.C. 2013) (No. 1:12-cv-00385-JEB), 2012 WL 8133439; Defendants’ Reply Memorandum in Support of Motion for Summary Judgment at 7–11, *Loving v. IRS*, 917 F. Supp. 2d 67 (D.D.C. 2013) (No. 1:12-cv-00385-JEB), 2012 WL 8133440.

133. *Loving v. IRS*, 917 F. Supp. 2d 67, 72 (D.D.C. 2013).

134. FED. R. CIV. P. 56(a).

135. See, e.g., *Nw. Motorcycle Ass’n v. U.S. Dep’t of Agric.*, 18 F.3d 1468, 1472 (9th Cir. 1994) (“[T]his case involves review of a final agency determination under the Administrative Procedure Act, 5 U.S.C. § 706; therefore, resolution of this matter does not require fact finding on behalf of this court. Rather, the court’s review is limited to the administrative record . . .”).

136. *Loving*, 917 F. Supp. 2d at 72.

137. See Plaintiffs’ Motion for Summary Judgment, *supra* note 132, at 14; Defendants’ Memorandum in Support of Motion for Summary Judgment and in Opposition to Plaintiffs’ Motion for Summary Judgment at 11, *Loving v. IRS*, 917 F. Supp. 2d 67 (D.D.C. 2013) (No. 1:12-cv-00385-JEB), 2012 WL 8133441.

138. Administrative Procedure Act, 5 U.S.C. § 706(2)(C) (2012).

139. *Bensman v. Nat’l Park Serv.*, 806 F. Supp. 2d 31, 40 (D.D.C. 2011) (finding the language of the Freedom of Information Act unambiguously required the Service to make a determination within twenty working days).

Act.¹⁴⁰ The first step was to examine whether “Congress has directly spoken to the precise question at issue.”¹⁴¹ Where the intent of Congress is clear and unambiguous, there is no reason to go any further.¹⁴² However, if Congress has not directly addressed the issue, then the court must move on to the second step of *Chevron* and decide whether the agency’s action was “based on a permissible construction of the statute.”¹⁴³ The plaintiffs argued that the statute was unambiguous in that it did not grant the IRS the authority to regulate tax return preparers.¹⁴⁴ The IRS argued that the language of the statute was ambiguous because the terms *practice* and *representative* were not defined by the Dead Horse Act and could be interpreted broadly.¹⁴⁵

The court focused on whether the IRS had the statutory authority to regulate previously unregulated tax return preparers.¹⁴⁶ This issue turned on statutory interpretation, specifically on whether the statute unambiguously provided the IRS with the authority to regulate under step one of *Chevron*.¹⁴⁷

1. What Does It Mean To “Practice?”

The court’s analysis began by examining “the language of the statute itself” to determine the plain meaning of the term *practice* and whether tax return preparers “practice” before the IRS when they file a tax

140. *Id.* (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 840–41 (1984)). In *Chevron*, the petitioners filed for review of the Clean Air Act promulgated by the EPA. *Chevron*, 467 U.S. at 841. The issue was whether the EPA’s action was based on a reasonable construction of a certain statutory term. *Id.* at 840. The court formulated a two-part test to determine if deference should be granted to the agency’s interpretation of the statutory term. *Id.* at 842–43.

141. *Id.* at 842.

142. Richard M. Lipton, ‘Tough Loving’: District Court Invalidates IRS Regulation of Return Preparers, 118 J. TAX’N 200, 202 (2013).

143. *Chevron*, 467 U.S. at 843.

144. Plaintiffs’ Motion for Summary Judgment, *supra* note 132, at 16.

145. Defendants’ Reply Memorandum in Support of Motion for Summary Judgment, *supra* note 132, at 15–16.

146. See *Loving v. IRS*, 917 F. Supp. 2d 67, 74 (D.D.C. 2013).

147. *Chevron*, 467 U.S. at 842–43 (“If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”); *Loving*, 917 F. Supp. 2d at 74.

return.¹⁴⁸ The court determined this issue fell under the first step of the *Chevron* inquiry and whether Congressional intent was clear and unambiguous.¹⁴⁹ If the term *practice* was deemed unambiguous, the IRS would lose at *Chevron* step one and the plaintiffs would prevail.¹⁵⁰

The IRS argued that the statute did not define what it means to practice before the Treasury Department¹⁵¹ and this made the meaning of the statute and Congress's intent ambiguous because the term *practice* has a broad meaning.¹⁵² The IRS argued the inquiry must move beyond step one of *Chevron* because the statute "does not 'unambiguously foreclose' the Secretary's regulation of paid tax return preparers."¹⁵³ Furthermore, the IRS contended that tax return preparers had been allowed "limited practice" before the IRS because they were allowed to represent their clients if the IRS later audited their clients' tax returns.¹⁵⁴ Therefore, because Congress had not specifically addressed the issue of whether or not tax return preparers practice before the IRS and yet preparers were permitted "limited practice" prior to the new regulations, the statute was ambiguous and the inquiry should move to the second step of the *Chevron* analysis.¹⁵⁵

On the other hand, the plaintiffs argued *practice* does not apply to tax return preparers because they do not represent their clients "in adversarial

148. See 31 U.S.C. § 330(a) (2012) (stating in relevant part that the "Secretary of the Treasury may regulate the practice of representatives of persons before the Department of the Treasury"); *Loving*, 917 F. Supp. 2d at 73.

149. See *Loving*, 917 F. Supp. 2d at 74 ("The battle here will be fought and won on *Chevron* step one.").

150. See *Lipton*, *supra* note 142, at 202.

151. Defendants' Memorandum in Support of Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment, *supra* note 137, at 15 ("The challenged regulations pass step 1 because Congress did not unambiguously define the term 'practice' before the Department of the Treasury or otherwise expressly determine whether the preparation of tax return constitutes 'practice.'").

152. *Id.* The dictionary's definition of *practice* is "to exercise or pursue an employment or profession (as medicine or law) actively." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1780 (1993).

153. Defendants' Memorandum in Support of Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment, *supra* note 137, at 15 ("*Chevron* step 1 ends the analysis only 'if the statute unambiguously forecloses the agency's interpretation.'" (quoting *Friends of Blackwater v. Salazar*, 691 F.3d 428, 432 (D.C. Cir. 2012))).

154. Rev. Proc. 81-38, 1981-35 I.R.B. 12 ("[A]n individual preparer of tax returns may exercise, without enrollment, the privilege of limited practice as a taxpayer's representative before the Internal Revenue Service."); 31 C.F.R. § 10.7(c)(2) (2013) ("[A]n individual who is not a practitioner may represent a taxpayer before the Internal Revenue Services."); Defendants' Memorandum in Support of Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment, *supra* note 137, at 24.

155. See Defendants' Memorandum in Support of Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment, *supra* note 137, at 15-16.

proceedings before the Treasury.”¹⁵⁶ Instead, they merely prepare and file tax returns for compensation.¹⁵⁷ The plaintiffs claimed, “‘practice’ connotes the conduct of trained professionals, such as attorneys.”¹⁵⁸ This argument is reinforced by the context of the statute, such as the list of requirements “representatives” must possess in order to practice, including “good character” and “good reputation.”¹⁵⁹ Furthermore, the statute also requires that “representatives demonstrate competency to advise and assist persons in presenting their cases.”¹⁶⁰ The term *case* signifies that the representative will present “an adversarial proceeding of some kind.”¹⁶¹ Based on its plain meaning and textual clues found within other provisions of the statute, the plaintiffs convincingly argued the term *practice* was not meant to include tax return preparers.

The court was persuaded by the plaintiffs’ argument and found the statute “unambiguously foreclosed” the IRS from regulating previously unregulated tax return preparers.¹⁶² The court concluded the IRS “hurrie[d] through *Chevron* step one” and labeled this approach “simplistic.”¹⁶³

156. Plaintiffs’ Motion for Summary Judgment, *supra* note 132, at 18.

157. *See id.*

158. *Id.* *Black’s Law Dictionary* defines *practice of law* as “[t]he professional work of a lawyer, encompassing a broad range of services such as conducting cases in court, preparing papers necessary to bring about various transactions from conveying land to effecting corporate mergers, preparing legal opinions on various points of law, drafting wills and other estate-planning documents, and advising clients on legal questions.” BLACK’S LAW DICTIONARY 1362 (10th ed. 2014).

159. 31 U.S.C. § 330(a)(2) (2012). These requirements are very similar to the requirements attorneys must possess to be admitted to the bar and ultimately to practice law. The American Bar Association recommends that the standard character of a lawyer is to show conduct that “justifies the trust of clients, adversaries, courts, and others with respect to the professional duties owed to them.” NAT’L CONFERENCE OF BAR EXAM’RS & AM. BAR ASS’N SECTION OF LEGAL EDUC. & ADMISSION TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS viii (Erica Moeser & Claire Huisman eds., 2014), http://www.ncbex.org/assets/media_files/Comp-Guide/CompGuide.pdf [<https://perma.cc/RT8B-DWGV?type=pdf>].

160. 31 U.S.C. § 330(a)(2)(D); Plaintiffs’ Motion for Summary Judgment, *supra* note 132, at 21.

161. Plaintiffs’ Motion for Summary Judgment, *supra* note 132, at 21. *Black’s Law Dictionary* defines *case* as “[a] civil or criminal proceeding, action suit, or controversy at law or in equity.” BLACK’S LAW DICTIONARY 258 (10th ed. 2014).

162. The court has no difficulty siding with the plaintiffs in this case because the IRS’s argument was somewhat strained. *See* Lipton, *supra* note 142, at 205. The IRS should have recognized that the term *practice* has a well-established meaning. *Id.*

163. *Loving v. IRS*, 917 F. Supp. 2d 67, 74 (D.D.C. 2013), *aff’d*, 742 F.3d 1013 (D.C. Cir. 2014).

Furthermore, the court found “[f]iling a tax return would never, in normal usage, be described as ‘presenting a case.’”¹⁶⁴ The court held the plain meaning of the statute was unambiguous, which meant there was no reason to go beyond the first step of the *Chevron* analysis because it was clear from the textual clues that Congress did not intend to include tax return preparers among those who practice before the IRS.¹⁶⁵

2. Broader Statutory Context

The court also referenced the broader statutory context to determine whether Congress intended to unambiguously preclude regulation of tax return preparers.¹⁶⁶ In determining whether Congress has addressed the specific issue, as required by *Chevron*’s first step, the reviewing court “should not confine itself to examining the particular statutory provision in isolation.”¹⁶⁷ Instead, the court must to look at the broader statutory scheme because the meaning of certain terms might “only become evident when placed in context.”¹⁶⁸ The court in this case needed to determine whether or not the broader statutory context supported the notion that the IRS was acting outside the scope of its statutory authority when it enacted new regulations.¹⁶⁹

The plaintiffs argued that the overall statutory scheme indicated Congress’s intent was not to grant the IRS plenary authority to regulate tax return

164. 31 U.S.C. § 330(a)(2)(D) (2012); *Loving*, 917 F. Supp. 2d at 74 (“At the time of filing, the taxpayer has no dispute with the IRS; there is no ‘case’ to present. This definition makes sense only in connection with those who assist taxpayers in the examination and appeals stages of the process.”).

165. *Loving*, 917 F. Supp. 2d at 74.

166. See *Loving*, 917 F. Supp. 2d at 75. When interpreting statutes, the inquiry “must cease if the statutory language is unambiguous and ‘the statutory scheme is coherent and consistent.’” *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240 (1989)) (holding that the plain meaning of the legislation should be conclusive). The ambiguity of the statutory language can be determined by reference to “the broader context of the statute as a whole.” *Robinson*, 519 U.S. at 341 (citing *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 477 (1992)) (holding that the statutory language is ambiguous as to whether it excludes former employees).

167. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) (holding that the Congress had directly spoken on the specific issue and precluded the FDA from regulating tobacco products).

168. *Id.* A fundamental canon of statutory interpretation is that “the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.” *Davis v. Mich. Dep’t of Treasury*, 489 U.S. 803, 809 (1989); see also *Brown v. Gardner*, 513 U.S. 115, 118 (1994) (“Ambiguity is a creature not of definitional possibilities but of statutory context.”).

169. See *Loving*, 917 F. Supp. 2d at 73–74.

preparers.¹⁷⁰ Since 1884, Congress has passed several statutes offering specific and limited grants of authority when it believed it was necessary to empower the IRS to regulate tax return preparers.¹⁷¹ For example, Congress passed several statutes contained in the Internal Revenue Code that govern the penalties tax return preparers could face for various acts of misconduct.¹⁷² If Congress believed the IRS had plenary authority to regulate tax return preparers, it likely would not have enacted these specific statutes. Additionally, the plaintiffs argued that if section 330(b) applies to tax return preparers, then § 7407 of the Internal Revenue Code would be rendered surplusage.¹⁷³ The broader penalty scheme found in section 330(b) would allow the IRS to circumvent the judicial protections found within § 7407.¹⁷⁴ If Congress believed the IRS already had the power to disbar tax return preparers, the plaintiffs questioned why Congress would feel the need to enact a specific statute granting the IRS limited authority to permanently enjoin tax return preparers.¹⁷⁵

The IRS argued the 2009 Tax Return Preparer Review exposed the need for “greater regulatory oversight despite the numerous statutory provisions.”¹⁷⁶ The IRS pointed out that the purpose of the penalties outlined in the Internal Revenue Code was completely different from those found in

170. See Plaintiffs’ Motion for Summary Judgment, *supra* note 132, at 35.

171. *Id.* Congress’s most recent grant of specific authority to the IRS to regulate tax return preparers was in November 2009 when it mandated the use of e-filing by all tax return preparers who file more than ten returns. I.R.C. § 6011(e)(3) (2012).

172. See, e.g., I.R.C. §§ 6694, 6695, 6713, 7216 (2012).

173. See Plaintiffs’ Motion for Summary Judgment, *supra* note 132, at 35. Additionally, plaintiffs also argued the IRS’s own interpretation of the statute undercuts its interpretation of 31 U.S.C. § 330. *Id.* at 36. Interestingly, the IRS has had the authority to regulate for 130 years, but it just now realized it has the statutory authority to implement these regulations without making any legislative changes. See, e.g., *Ry. Labor Exec. Ass’n v. Nat’l Mediation Bd.*, 29 F.3d 655, 669 (D.C. Cir. 1994) (finding it significant that only in the last five years of the statute’s sixty-five year history did the agency claim the statute’s language affords it the authority to regulate).

174. Section 7407 was passed as part of the Tax Reform Act of 1976 and allows the Treasury Department to file a civil action to “enjoin any person who is a tax return preparer from further . . . acting as a tax return preparer.” I.R.C. § 7407 (2012); Tax Reform Act of 1976, § 1203, Pub. L. No. 94-455, 90 Stat. 1522, 1693 (1976); see Plaintiffs’ Motion for Summary Judgment, *supra* note 132, at 38.

175. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (“[T]he meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand.”).

176. Defendants’ Memorandum in Support of Motion for Summary Judgment and in Opposition to Plaintiffs’ Motion for Summary Judgment, *supra* note 137, at 30–31; I.R.S. PUB. NO. 4832, *supra* note 11, at 8.

Circular 230.¹⁷⁷ Circular 230 is meant to “ensure practitioners are ethically and competently fit to practice” before the IRS.¹⁷⁸ On the other hand, the penalties found in the Internal Revenue Code are meant to “prevent future harm and to encourage voluntary compliance.”¹⁷⁹ The Internal Revenue Code penalties are applied retroactively, whereas Circular 230 is meant to prevent noncompliance from the start.

Again, the court found the plaintiffs’ argument more persuasive.¹⁸⁰ The court held that the IRS’s interpretation of the statute did not make sense in the broader statutory scheme.¹⁸¹ If section 330(b) applied to tax return preparers, then “the IRS would have the discretion—with few restraints—to impose an array of penalties.”¹⁸² The court determined the general penalty scheme of section 330(b) should not be interpreted to allow the IRS to punish tax return preparers because the provisions found in the Internal Revenue Code already “set[] forth a comprehensive scheme targeting specific problems with specific solutions.”¹⁸³ If the general penalty scheme applies to tax return preparers, there is potential for

177. Defendants’ Memorandum in Support of Motion for Summary Judgment and in Opposition to Plaintiffs’ Motion for Summary Judgment, *supra* note 137, at 31. Additionally, the IRS argued that the overall statutory scheme does not preclude the IRS from regulating under 31 U.S.C. § 330. *Id.* at 26–27; *see, e.g., Touche Ross & Co. v. SEC*, 609 F.2d 570, 579 (2d Cir. 1979) (finding that the SEC possesses the statutory authority to regulate, despite several provisions that create remedies for violations of securities laws).

178. Defendants’ Memorandum in Support of Motion for Summary Judgment and in Opposition to Plaintiffs’ Motion for Summary Judgment, *supra* note 137, at 31. The IRS also points out that none of that statutes found within the penalty scheme of the Internal Revenue Code require tax return preparers to prove they are competent. *Id.* at 30–31.

179. *Id.* at 31. The IRS further contended that the existence of enforcement proceedings under I.R.C. § 7407 demonstrates the need for competency standards. *Id.* at 32 (citing *United States v. Cruz*, 611 F.3d 880, 883, 887 (11th Cir. 2010)) (holding that repeated violations of the Internal Revenue Code warranted injunctions under § 7407).

180. *Loving v. IRS*, 917 F. Supp. 2d 67, 77 (D.D.C. 2013), *aff’d*, 742 F.3d 1013 (D.C. Cir. 2014); *see Lipton*, *supra* note 142, at 202.

181. *Loving*, 917 F. Supp. 2d at 77. The court followed the general-specific canon, which states that where there are two interrelated statutes, the specific statute governs the general statute. *HCSC-Laundry v. United States*, 450 U.S. 1, 6 (1981) (“[I]t is a basic principle of statutory construction that a specific statute . . . controls over a general provision . . . particularly when the two are interrelated and closely positioned . . .”). In this case, there were already specific statutes in place; therefore, the general statute was unnecessary.

182. *Loving*, 917 F. Supp. 2d at 77; *see supra* Part III.C. This demonstrates the potential for overpenalization. The court is concerned that the lack of judicial oversight may lead to problems for tax return preparers that they would not have to worry about under the Internal Revenue Code.

183. *Loving*, 917 F. Supp. 2d at 77.

overpenalization because the IRS may sidestep the stringent judicial review requirements.¹⁸⁴

3. *The Outcome*

The district court ultimately granted the plaintiffs' motion for summary judgment and request for declaratory and injunctive relief.¹⁸⁵ The court found the IRS acted outside of its statutory authority when it implemented the new regulations and permanently enjoined the IRS from enforcing the regulations.¹⁸⁶

Not surprisingly, the IRS appealed the decision.¹⁸⁷ Pending appeal, the IRS moved to stay the permanent injunction, which would allow it to move forward with the new regulations and require tax return preparers to register for the upcoming tax year.¹⁸⁸ However, both the D.C. District

184. See Lipton, *supra* note 142, at 204 (“If the preparation of tax returns were covered under section 330, however, the IRS could avoid the limitation imposed by Section 7407 and simply use its inherent authority to disbar or suspend the practitioner.”).

185. *Loving*, 917 F. Supp. 2d at 80–81.

186. *Id.* at 77. The plaintiffs passed the four-factor test for a permanent injunction: (1) they suffered an irreparable injury because they will likely have to close their businesses; (2) the remedies available are inadequate to recover from that injury; (3) the balance of hardships between the plaintiffs and the IRS tips strongly in favor of the plaintiffs; and (4) the public interest would be served by a permanent injunction. See *Loving*, 917 F. Supp. 2d at 80–81 (citing *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 393–94 (2006)).

187. In its appellate brief, the IRS argued the district court erred because it refused to go beyond *Chevron* step one. See Brief for the Appellants at 35–36, *Loving v. IRS*, 917 F. Supp. 2d 67 (D.D.C. 2013) (No. 13-5061). The IRS argued that this case turns on *Chevron* step two and that its interpretation of *practice* allows it to “rationally implement the goals” of tax return preparer regulations. *Id.* at 53. In plaintiffs’ response appellate brief, they argued the district court made the right decision and that Congress has clearly denied the IRS the authority to regulate by establishing its own set of rules. See Brief of Plaintiffs-Appellees at 36–37, 43, *Loving v. IRS*, 917 F. Supp. 2d 67 (D.D.C. 2013) (No. 13-5061). On September 24, 2013, the D.C. Circuit Court of Appeals heard oral arguments, and commentators noted the judges seemed skeptical of the IRS’s arguments and appeared unconvinced the IRS had the authority to regulate tax return preparers. See Kelly Phillips Erb, *IRS Beats a Dead Horse, Argues for Regulations at Appeals Court*, FORBES (Sept. 25, 2013, 2:21 PM), <http://www.forbes.com/sites/kellyphillipserb/2013/09/25/irs-beats-a-dead-horse-argues-for-regulations-at-appeals-court/> [https://perma.cc/MW9P-E9ML?type=pdf]; Lauren French, *IRS Claim To Regulate Tax Preparers Has Rough Day in Court*, POLITICO (Sept. 25, 2013, 5:18 AM), <http://www.politico.com/story/2013/09/irs-tax-preparers-dc-appellate-court-97291.html> [http://perma.cc/5TTN-LF46].

188. *Loving v. IRS*, 920 F. Supp. 2d 108, 112 (D.D.C. 2013) (denying the IRS’s motion to suspend injunction pending appeal).

Court and the D.C. Circuit Court of Appeals denied the motion, holding the IRS had not satisfied the strict requirements for a stay pending appeal.¹⁸⁹

On February 11, 2014, the D.C. Circuit Court of Appeals issued an opinion affirming the District Court's decision.¹⁹⁰ The Court of Appeals held the statute's plain text and context "foreclose[d] and render[ed] unreasonable the IRS's interpretation of Section 330."¹⁹¹

C. *Why the District Court and the Court of Appeals Got it Right*

The D.C. District Court and the D.C. Circuit Court of Appeals were correct in finding the IRS did not have the statutory authority to impose regulations on tax return preparers. The current dominant approach to cases challenging an agency's discretion and authority is to scrupulously examine the agency's action under *Chevron* step one to determine whether the statute is unambiguous as to the action.¹⁹² For example, in a recent Supreme Court case, the court recommended "taking seriously, and applying rigorously, in all cases, statutory limits on an agencies' authority."¹⁹³ This is consistent with the notion that the *Chevron* analysis "has become largely a device for maintaining congressional primacy in contested matters of statutory meaning."¹⁹⁴ Thus, in cases where the *Chevron* doctrine applies, the reviewing court should reject the agency's interpretation of a statute

189. *Id.* at 110 ("To assess the propriety of a stay pending appeal, the Court looks to four factors: '(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay.'" (quoting *Cuomo v. Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir 1985))).

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

191. *Id.* at 1021–22.

192. *See Johnson, supra* note 4, at 21.

193. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1864, 1874 (2013) (holding that courts must apply the *Chevron* framework to an agency's interpretation of a statutory ambiguity that concerns the scope of its authority).

194. Jack M. Beerman, *The Turn Toward Congress in Administrative Law*, 89 B.U. L. REV. 727, 743 (2009). Professor Beerman argues that the Court has moved away from the "deference to agency statutory interpretations toward a more traditional Court-centered approach with the focus on congressional intent." *Id.* at 747. This means that the scope of *Chevron*'s first step—to determine if Congress has directly spoken to the issue—has expanded to allow courts to use "traditional tools of statutory construction" to determine Congress's intent." *Id.* (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987)). This expansive view of step one allows courts to decide cases "even with little or no indication that Congress focused on the particular issue" and means that "in more situations, courts will overrule agency interpretations as inconsistent with what the court finds to be clear congressional intent." *Id.* at 747–49.

under *Chevron* step one when “the agency has gone against Congress’s intent or at least its more general preferences.”¹⁹⁵

Here, the court correctly followed the current dominant approach to *Chevron* and conducted the step one inquiry in an exacting fashion, relying on other portions of the statute as well as other statutes to reach the conclusion that *practice* was unambiguous in the context. “Congress has established a clear line” and the IRS cannot go beyond that line, the court reasoned.¹⁹⁶ Both courts relied on the traditional tools of statutory interpretation, such as the plain meaning of the text and the broader statutory context, to determine that Congress did not intend to give the IRS the authority to regulate tax return preparers when it enacted 31 U.S.C. § 330.¹⁹⁷

As for overpenalization, the D.C. District Court and the D.C. Circuit Court of Appeals expressed apprehension about the IRS’s general penalty scheme under § 330(b).¹⁹⁸ The district court worried that the IRS could impose harsh penalties with little restraint,¹⁹⁹ and the court of appeals was troubled by the fact that the IRS would have free rein to impose penalties for a broad array of misconduct.²⁰⁰ This indicates the courts recognized the potential for the IRS to abuse the general penalty scheme and hand out harsher penalties than it otherwise could under the Internal Revenue Code’s more specific penalty scheme.²⁰¹ The courts’ recognition of this

195. *Id.* at 750.

196. *City of Arlington*, 133 S. Ct. at 1874.

197. Judges are not experts in the field of tax return preparers and therefore should not make their decisions on their own personal policy preferences. In fact, “Congress has delegated policymaking responsibilities” to the IRS because it is the agency “charged with the administration of the statute in light of everyday realities.” *Chevron v. Natural Res. Def. Council*, 467 U.S. 837, 865–66 (1984); *see Loving v. IRS*, 742 F.3d 1013, 1022 (D.C. Cir. 2014); *Loving v. IRS*, 917 F. Supp. 2d 67, 74 (D.D.C. 2013), *aff’d*, 742 F.3d 1013 (D.C. Cir. 2014).

198. *See Loving*, 742 F.3d at 1020–22; *Loving*, 917 F. Supp. 2d at 79–80.

199. *Loving*, 917 F. Supp. 2d at 76 (“Yet if § 330 covers tax return preparers, the IRS would have the discretion—with few restraints—to impose an array of penalties.”).

200. *Loving*, 742 F.3d at 1020 (“The IRS, by virtue of its heretofore undiscovered carte blanche grant of authority from Section 330, would already have had free rein to impose an array of penalties on any tax return preparer who ‘is incompetent,’ ‘is disreputable,’ [and] ‘violates regulations prescribed under’ Section 330 . . .”).

201. Congress should take caution and beware that under the IRS’s proposed interpretation of § 330, the agency could “sidestep every protection § 7407 affords—judicial review, the demanding standards for the extraordinary remedy of an injunction, and the elevated hurdle for enjoining preparation of tax returns.” *Loving*, 917 F. Supp. 2d at 78.

issue should put Congress on notice that a more limited penalty scheme, one that aligns with the already well-established penalty scheme, is necessary when implementing new legislation.

Additionally, the courts correctly rejected the policy arguments because *Chevron* step one does not turn on policy.²⁰² If the statute unambiguously precludes the IRS from regulating tax return preparers, then it is irrelevant whether it should have the authority to do so—that is a question for Congress to decide. However, the holdings of these cases augur in favor of congressional action.²⁰³ Although the courts found Congress did not intend to give the IRS the authority to regulate tax return preparers based on a 130-year-old statute, this does not mean Congress does not intend to give the IRS the authority to do so now.²⁰⁴ Because the IRS currently lacks the authority to act, the courts’ rulings should act as an invitation for congressional action, alerting Congress to the fact that there are problems with unregulated tax return preparers and something needs to be done to solve these problems.²⁰⁵

V. THE FUTURE OF TAX RETURN PREPARER REGULATION

The eventual regulation of all tax return preparers is inevitable.²⁰⁶ Considering the recent D.C. Circuit Court of Appeals’ decision, Congress

202. *See id.* at 79.

203. Erb, *supra* note 80 (“Of course, since the legal basis for the ruling indicated that the power to regulate preparers had to come from Congress and not the IRS . . .”).

204. Congress will likely give the policy arguments great weight in the fight for regulations because its job is to weigh these factors in deciding whether or not to regulate tax return preparers. In the legislative arena, policy is paramount. *See* Katherine M. Hetherington, *Regulation of Paid Tax-Return Preparers: A Forgone Conclusion Regardless of the Result in the Loving Case*, SUFFOLK U. L. REV. ONLINE 117–18 (Dec. 4, 2013), <http://suffolklawreview.org/wp-content/uploads/2013/12/Hetherington-Essay.pdf> [http://perma.cc/P44U-QDTD].

205. In fact, the Court of Appeals went so far as to say, “It might be that allowing the IRS to regulate tax return preparers more stringently would be wise as a policy matter.” *Loving*, 742 F.3d at 1022. However, the court ultimately left that decision up to Congress. *Id.*

206. The plaintiffs may regret the day they challenged the IRS’s authority to regulate tax return preparers because it is widely believed that their regulation is inevitable. The legislature is aware of the issue and was patiently waiting for the court of appeals to make its decision. Now that the court has ruled on the issue, it is only a matter of time before Congress takes action. *See, e.g., Simplifying the Tax System for Families and Businesses: Senate Finance Committee Staff Tax Reform Options for Discussion*, U.S. SENATE COMMITTEE ON FIN. 3 (Mar. 21, 2013), <http://www.finance.senate.gov/imo/media/doc/032113%20Tax%20Administration%20Options%20Paper%20for%20Member%20Meeting%20.pdf> [http://perma.cc/9ES6-P452] (“If the IRS does not prevail in its appeal of the *Loving* case, it will lose an important tool to increase tax compliance and protect taxpayers from unethical tax return preparers.”); *see also* Alvarez, *supra* note 63, at 757 (“Whether the DDC’s *Loving* decision is upheld or overturned, it is inevitable that the group of tax

will probably act quickly to grant the IRS the authority to regulate.²⁰⁷ However, Congress will need to be aware of the potential for harsh penalties when it enacts new legislation.²⁰⁸ The legislation should specifically address the issue of overpenalization for tax return preparers and limit the IRS's authority to penalize by aligning the penalty schemes found in the Internal Revenue Code and the Dead Horse Act of 1884.

A. Previously Proposed Legislation

Since 2005, nine bills have been introduced to amend the 1884 Dead Horse Act to allow the IRS to regulate tax return preparers; all have died either upon introduction or in committee.²⁰⁹ This not only strengthens the argument that the IRS did not have authority to implement the new regulations but also demonstrates Congress was not necessarily eager to grant the authority necessary to regulate tax return preparers.²¹⁰

return preparers targeted by the IRS will eventually be regulated.”); Hetherington, *supra* note 204, at 123 (“[P]erhaps a judicial defeat is exactly what the legislature is waiting for to give the IRS express statutory authority for its RTRP program.”); Lipton, *supra* note 142, at 205 (“[A]ny future rules concerning tax return preparers emanating from Congress could make the Service’s Regulations appear to be mild.”).

207. See Ashlea Ebeling, *Appellate Court Delivers Blow to IRS and Taxpayers Nixing Tax Return Preparer Regs*, FORBES (Feb. 11, 2014, 2:51 PM), <http://www.forbes.com/sites/ashleaebeling/2014/02/11/appellate-court-delivers-blow-to-irs-and-taxpayers-nixing-tax-return-preparer-regs/> [<https://perma.cc/Z5NW-5RQS?type=pdf>].

208. See *supra* text accompanying notes 200–201.

209. See Taxpayer Protection and Preparer Fraud Prevention Act of 2013, H.R. 1570, 113th Cong. § 2 (2013); Taxpayer Bill of Rights Act of 2012, H.R. 6050, 112th Cong. § 202 (2012); Taxpayer Bill of Rights Act of 2012, S. 3355, 112th Cong. § 202 (2012); Taxpayer Bill of Rights Act of 2010, H.R. 5047, 111th Cong. § 202 (2010); Taxpayer Bill of Rights Act of 2010, S. 3215, 111th Cong. § 202 (2010); Taxpayer Bill of Rights Act of 2008, H.R. 5716, 110th Cong. § 4 (2008); Taxpayer Protection and Assistance Act of 2007, S. 1219, 110th Cong. § 4 (2007); Telephone Excise Tax Repeal and Taxpayer Protection and Assistance Act of 2006, S. 1321, 109th Cong. § 203 (2006); Taxpayer Protection and Assistance Act of 2005, S. 832, 109th Cong. § 4 (2005).

210. See *Loving v. IRS*, 742 F.3d 1013, 1020 (D.C. Cir. 2014) (“[W]e find at least some significance in the fact that multiple Congresses have acted as if Section 330 did not extend so broadly as to cover tax return preparers.”); see also Plaintiffs’ Motion for Summary Judgment, *supra* note 132, at 42 (“That Congress has not done so despite numerous recent bills indicates that it has not reached any consensus to grant such authority; the IRS thus has no congressional authorization to regulate in this manner.”). But see *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 185 (1994) (explaining that the views or understandings of later Congresses are not dispositive and can sometimes be a hazardous basis for interpreting the meaning of an earlier enacted statute).

Although the previously proposed legislation aimed for the same goal as the Dead Horse Act—to regulate tax return preparers—the bills varied according to how they planned to achieve this goal. The earlier bills appeared more detailed and offered a well organized outline of the regulations and steps the IRS can take in regulating tax return preparers.²¹¹ On the other hand, the bills proposed after the new regulations were introduced and implemented were far less detailed and left more room for the IRS to implement the new regulations as it saw fit.²¹²

The regulations introduced in 2009 embodied the basic concept of the previously proposed legislation²¹³: to amend the Internal Revenue Code to authorize the IRS to take steps that would provide taxpayers additional protection and assistance.²¹⁴

B. Proposed Legislation

In light of the recent D.C. Circuit Court of Appeals' decision, Congress will clearly need to enact new legislation in order for the IRS to regulate tax return preparers.²¹⁵ This proposed legislation should focus on two main goals: (1) granting the IRS the authority to regulate, and (2) limiting the penalties that tax return preparers may face.

In order to accomplish the proposed legislation's dual goals, three main provisions are proposed. The first and perhaps most important provision would grant the IRS the authority to regulate tax return preparers.²¹⁶ The

211. *See, e.g.*, S. 832 § 4. The earlier bills also seem to address the important issue of overlap found within the penalty subsections of § 330(b) and the Internal Revenue Code. *See, e.g.*, S. 1219 § 4 (limiting the monetary penalty that can be imposed for noncompliance with the regulations); S. 832 § 4(d)(2) (describing how the funds collected from penalties will be used).

212. *Compare* S. 832 § 4 (outlining a more complex version of the bill, particularly the examination process and continuing education requirements), *with* H.R. 6050 § 202 (describing a more simple version of the bill, generally outlining the promulgation of regulations).

213. *See* S. 832 § 4; I.R.S. PUB. NO. 4832, *supra* note 11, at 32.

214. The summary of each proposed bill states a very similar purpose—a bill to amend the Internal Revenue Code to provide taxpayer protection and assistance. *See, e.g.*, H.R. 6050 § 202; H.R. 5047 § 202; S. 1219 § 4; S. 1321 § 203; S. 832 § 4.

215. *See supra* note 206.

216. *See* S. 832 § 4(a) (granting the IRS authorization to regulate). Senator Max Baucus of Montana introduced the Taxpayer Protection and Assistance Act of 2005 in response to Congress's plan to reduce taxpayer access to assistance and services. Press Release, U.S. Senate Comm. on Fin., Baucus Works To Increase Taxpayers Assistance (Apr. 19, 2005), <http://www.finance.senate.gov/newsroom/ranking/release/?id=6b884146-1ae5-4eb6-ac5f-fd92e7bb77b3> [<http://perma.cc/N8TA-2LB3>]. Baucus stated the proposed legislation would “make it easier to give millions of taxpayers more assistance and will promote ethical and competent service by tax preparers.” *Id.*

second provision would detail the requirements the IRS may implement.²¹⁷ Lastly, the third provision would limit the penalties that can be enforced under § 330(b) and align them with the Internal Revenue Code penalty scheme.²¹⁸

1. Authorization

The main goal of the new legislation is to grant the IRS the necessary authority to regulate tax return preparers.²¹⁹ The previously proposed legislation tried to add some version of the phrase “compensated preparers of Federal tax returns” to § 330(a)(1) after the term “representatives.”²²⁰ The amended statute would read: “regulate the practice of representatives including tax return preparers of Federal tax returns.”²²¹ This reading of the statute, however, is contrary to the holding of *Loving* because in that case, the court found tax return preparers do not “practice” before the IRS.²²²

In order to remain consistent with *Loving* and accomplish the goal of regulating tax return preparers, the grant of authority must be found in a provision separate from § 330(a)(1).²²³ The new legislation should be modeled after the Taxpayer Protection and Preparer Fraud Prevention Act of 2013 because it specifically addressed the problem of implementing the

217. See, e.g., S. 832 § 4(b) (stating the requirements that the new regulations will necessitate).

218. See *id.* § 4(d) (discussing allowable penalties if the regulations are not followed).

219. See Alvarez, *supra* note 63, at 757.

220. Instead of trying to add a new provision granting the authority to regulate, versions of the bill before the *Loving* decision proposed to add this phrase to the statute. See, e.g., Taxpayer Bill of Rights Act of 2012, H.R. 6050, 112th Cong. § 202(a) (2012); Taxpayer Bill of Rights Act of 2010, H.R. 5047, 111th Cong. § 202(a) (2010); Taxpayer Protection and Assistance Act of 2007, S. 1219, 110th Cong. § 4(a) (2007); Telephone Excise Tax Repeal and Taxpayer Protection and Assistance Act of 2006, S. 1321, 109th Cong. § 203(a) (2006); S. 832 § 4(a).

221. This simple change could solve a larger problem and may be the easiest way for Congress to authorize the IRS to regulate instead of enacting a completely new piece of legislation. It has become increasingly difficult to enact new legislation, and there is a possibility that, with Congress’s heavy workload, the need for tax preparer regulation might be overlooked. See Alvarez, *supra* note 63, at 758.

222. *Loving v. IRS*, 742 F.3d 1013, 1018 (D.C. Cir. 2014).

223. See, e.g., Taxpayer Protection and Preparer Fraud Prevention Act of 2013, H.R. 1570, 113th Cong. § 2 (2013).

new regulations.²²⁴ Instead of amending § 330(a)(1) to grant the IRS the authorization to regulate tax return preparers, the bill introduced a completely new provision to § 330.²²⁵ The new provision granted the IRS the authority to “regulate tax return preparers who do not practice as representatives” before the IRS.²²⁶ By following this approach, Congress would avoid any confusion about whether tax return preparers are practicing representatives. Therefore, the newly proposed legislation should grant the authority to regulate tax return preparers in a provision separate from the one granting authority to regulate representatives who “practice” before the IRS.

2. Requirements

Next, the new legislation must carefully outline the requirements the IRS can impose on tax return preparers. This will help police the IRS so it may not over-regulate and will serve to limit the regulations that it can implement.²²⁷ Congress should specify the regulations the IRS can promulgate under its newly granted authority.²²⁸ The earlier versions of the previously proposed legislation do a good job detailing the requirements of regulated tax return preparers.²²⁹ The newly proposed legislation should follow this method of implementing the requirements.

224. *Id.* The Taxpayer Protection and Preparer Fraud Prevention Act of 2013 was introduced by Congressman Cedric Richmond of Louisiana in response to the D.C. District Court’s holding in *Loving*. Press Release, Congressman Cedric Richmond, Rep. Richmond Introduces Legislation To Combat Tax Preparer Fraud (Apr. 15, 2013), <http://richmond.house.gov/press-release/rep-richmond-introduces-legislation-combat-tax-preparer-fraud> [<http://perma.cc/N672-FK4H>]. Richmond stated the purpose of the bill was to “provide the IRS with tools to ensure consumers are choosing from only the most competent pool of preparers when it is time to file their return.” *Id.*

225. H.R. 1570 § 2.

226. *Id.* By inserting the phrase, “or tax return preparer” after “representative” in § 330(b), this version of the bill goes even further and clarifies that tax return preparers and representatives are two distinct groups. *Id.*

227. Congressional oversight of the IRS is important to ensure that the IRS is doing its job by implementing the Internal Revenue Code. See Archie Parnell, *Congressional Interference in Agency Enforcement: The IRS Experience*, 89 YALE L.J. 1360, 1365–66 (1980). Congress has the responsibility to inquire into the activities and make suggestions to the IRS. *Id.* at 1368. The IRS must be accountable to Congress, but at the same time the IRS has the constitutional duty to faithfully execute the tax laws, and there is sometimes tension between these two duties. *Id.* This conflict was seen in the *Loving* case, where the IRS believed it was carrying out its duties under the tax code. See *Loving*, 742 F.3d at 1014–15.

228. See, e.g., Taxpayer Bill of Rights Act of 2010, H.R. 5047, 111th Cong. § 202(b) (2010); Taxpayer Protection and Assistance Act of 2007, S. 1219, 110th Cong. § 4(b) (2007).

229. For example, the Taxpayer Protection and Assistance Act of 2007 contained a very detailed requirements provision. See S. 1219 § 4(b). The examination requirement

The first requirement should detail the eligibility examinations. Similar to the regulations proposed in 2009, tax return preparers should be required to pass an eligibility examination that demonstrates their knowledge of the applicable federal tax laws.²³⁰ The new legislation should allow the IRS to develop and administer eligibility examinations that are designed to test the preparers' knowledge of how to prepare a federal tax return for both individuals and businesses.²³¹ The examination should also test for knowledge of the ethical standards determined by the IRS.²³² This will help ensure that tax return preparers understand the complexities of the tax code and the ethical standards expected of them.²³³

The next requirement should outline the continuing education provision for tax return preparers. The details of this requirement should be left up to the IRS and should generally state that continuing education is required.²³⁴ The early versions of the previously proposed legislation defer to the IRS for the specifics of the continuing education requirements and require only that tax return preparers "show evidence of completion of such continuing

stated, "In promulgating the regulations . . . the Secretary shall develop (or approve) and administer an eligibility examination designed to test" both the technical knowledge and the knowledge of ethical standards. *Id.* § 4(b)(2)(A). Specifically, the technical knowledge portion of the examination tested whether tax return preparers knew how to "prepare Federal tax returns, including individual and business income tax returns" and "properly claim the earned income tax credit under section 32 of the Internal Revenue Code of 1986 with respect to such individual returns." *Id.* § 4(b)(2)(A)(i). Similarly, the ethical knowledge portion tested whether tax return preparers knew the "ethical standards for the preparation of such returns as determined appropriate by the Secretary." *Id.* § 4(b)(2)(A)(ii). The continuing education requirement stated that, "As part of the renewal of eligibility, such regulations shall require that each preparer show evidence of completion of such continuing education requirements as specified by the Secretary." *Id.* § 4(b)(3)(B).

230. See I.R.S. PUB. NO. 4832, *supra* note 11, at 31.

231. See, e.g., H.R. 5047 § 202(c)(1)(B) ("One such examination shall be designed to test technical knowledge and competency to prepare individual returns, and the other examination shall be designed to test technical knowledge and competency to prepare business income tax returns.").

232. See S. 1219 § 4(b)(2)(A)(ii).

233. See I.R.S. PUB. NO. 4832, *supra* note 13, at 31.

234. In the previously proposed legislation, the IRS was given great deference in this area and only the very basics are outlined, specifically trying avoiding details, as the IRS is in a better position than Congress to determine what will work as far as continuing education requirements are concerned. See, e.g., H.R. 5047 §§ 202(c)(1)(B), 202(c)(3)(B); S. 1219 § 4(b)(3).

education or testing requirements.”²³⁵ Ideally, the IRS should control the specifics of the continuing education requirements because it is difficult to say what will and will not work. By allowing the IRS the discretion to determine the necessary requirements for continuing education, it will be easier for the IRS to change its procedures if they prove ineffective instead of going through the daunting administrative process once again.

However, some states and employers already require that tax return preparers pass eligibility examinations and participate in continuing education courses similar to those that will be required by the IRS.²³⁶ In cases where the states’ or employers’ examinations and continuing education requirements are analogous, they should be used in place of the federally mandated regulations. The 2007 and 2010 versions of the previously proposed legislation contain a “grandfather” provision, which allows the IRS to accept the eligibility examinations of states or other organizations in lieu of its examination, but only if they are deemed “comparable.”²³⁷

235. See, e.g., H.R. 5047 § 202(c)(1)(B); S. 1219 § 4(b); Telephone Excise Tax Repeal and Taxpayer Protection and Assistance Act of 2006, S. 1321, 109th Cong. § 203 (2006); Taxpayer Protection and Assistance Act of 2005, S. 832, 109th Cong. § 4 (2005).

236. For example, tax return preparers in New York are required to register annually, obtain an identification number, and pay a \$100 fee. N.Y. STATE DEP’T OF TAXATION & FIN., PUB. NO. 58, INFORMATION FOR INCOME TAX RETURN PREPARERS FOR TAX YEAR 2012, at 5, 7 (2013), <http://www.tax.ny.gov/pdf/publications/income/pub58.pdf> [<https://perma.cc/4LA3-XKYU?type=pdf>]. In California, tax return preparers are required to complete at least sixty hours of tax education, purchase a \$5000 tax preparer bond, obtain a PTIN from the IRS, and submit an application before they can become a registered preparer. *California Tax Education Council (CTEC) Registered Tax Preparers*, CAL. FRANCHISE TAX BD., https://www.ftb.ca.gov/professionals/registered_tax_preparers.shtml [<https://perma.cc/CZ29-QSQR>] (last visited Mar. 27, 2015). In order to keep their registration, tax return preparers must complete at least twenty hours of continuing education classes annually, renew their PTIN, and submit a renewal application. *Id.* At the time this Comment was written, Oregon was the only state to require an examination. OR. BD. OF TAX PRACTITIONERS, GENERAL INFORMATION BOOKLET FOR TAX CONSULTANT AND TAX PREPARER APPLICANTS 3 (2013), http://www.oregon.gov/OBTP/docs/Form/gen_info.pdf [<http://perma.cc/DPP3-EAU6>]. Before tax return preparers can take the eligibility examination they must complete eighty hours of basic tax courses and score at least a seventy-five percent on the examination to obtain their license. *Id.*; see I.R.S. PUB. NO. 4832, *supra* note 11, at 33–36; Alvarez, *supra* note 63, at 759–60. H&R Block is an example of an employer that requires eligibility examinations and continuing education courses. Pickering, *supra* note 89, at 46.

237. See, e.g., H.R. 5047 § 202(c)(1)(B) (“The Secretary is authorized to accept an individual as meeting the eligibility examination requirement of this section if, in lieu of the eligibility examination under this section, the individual passed a State licensing or State registration program eligibility examination that the Secretary determines is comparable to either of the eligibility examinations described in subparagraph (B) if such exam is administered within 5 years after the date of issuance of the regulations under this section.”); S. 1219 § 4(b)(2)(B) (“The Secretary is authorized to accept an individual as meeting the eligibility examination requirement of this section if, in lieu of the eligibility examination under this section, the individual passed—a State licensing or State registration program eligibility examination that is comparable to the eligibility examination established by

The new legislation needs to extend this grandfather provision to include continuing education requirements. By allowing the IRS to accept an equivalent form of these requirements, Congress could avoid the problem of redundancy.²³⁸ A grandfather provision could also reduce costs for tax return preparers.²³⁹ If tax return preparers are already required to pass a test and participate in a continuing education course, then it is unnecessary to make them take the same test twice or require further continuing education.

3. Penalties

In order to achieve the second goal of the proposed legislation—restricting the penalty scheme—the new bill needs to contain a provision limiting the penalties that can be imposed on tax return preparers for failing to comply with the regulations. As the penalty scheme under § 330(b)(1) now reads, the IRS may “impose a monetary penalty” or “suspend or disbar from practice” anyone who fails to comply with the regulations.²⁴⁰ Therefore, in accordance with the holding in *Loving*, tax return preparers are not subject to these penalties because they do not “practice” before the IRS.²⁴¹ There should, however, be some sort of penalty for failing to comply with the regulations.

The 2013 version of the previously proposed legislation amended § 330(b) to include the term “tax return preparer” after “representative,” so that the newly regulated tax return preparers would be subject to the

the Secretary, or an eligibility examination administered by an existing organization for tax return preparers that is comparable to the eligibility examination established by the Secretary if such test was administered prior to the issuance or regulations under this section.”).

238. The opposition believes the requirements are redundant; adding a grandfather provision might put them at ease. A grandfather provision would allow those already required to take a test and participate in continued education to bypass this requirement, while at the same time requiring those who do not have to participate in such tests and continuing education programs to demonstrate competency. *See Tolan, supra* note 47, at 514; *supra* Part III.B.

239. The problems of redundancy and cost go hand in hand. If redundancy is minimized, then costs are reduced because less people would have to complete the testing and education requirements. *Tolan, supra* note 47, at 513–14.

240. 31 U.S.C. § 330(b)(1) (2012).

241. *See Loving v. IRS*, 742 F.3d 1013, 1018, 1020 (D.C. Cir. 2014); *Loving v. IRS*, 917 F. Supp. 2d 67, 74, 77 (D.D.C. 2013), *aff’d*, 742 F.3d 1013 (D.C. Cir. 2014).

same penalties as those who “practice” before the IRS.²⁴² This includes disbarment and other monetary sanctions on top of the penalties tax return preparers already face under the Internal Revenue Code.²⁴³ This is the problem that the proposed legislation seeks to avoid.

The best approach to dealing with overpenalization is to add a new provision following the requirements provision. This provision should be modeled after the 2007 version of the bill, which granted the IRS the authority to impose a \$1000 penalty for each federal tax return prepared by a preparer who is not in compliance with the above-mentioned requirements.²⁴⁴ This is appropriate because it limits the penalty the IRS can impose on tax return preparers who are not in compliance with the regulations. Another advantage to creating a new penalty provision specifically for tax return preparers is that it would not subject preparers to suspension or disbarment.²⁴⁵ The Internal Revenue Code already has a section that specifically addresses the issue of enjoining tax return preparers.²⁴⁶

To solve this issue, the legislation should add a provision to Internal Revenue Code § 7407(b)(1) that would allow tax return preparers to be enjoined for failing to comply with the regulations under 31 U.S.C. § 330.²⁴⁷ This solution is ideal because it provides tax return preparers with the protection of judicial review if they are enjoined from preparing taxes.²⁴⁸ Under § 330(b), the Secretary may suspend or disbar from practice a tax return preparer who is incompetent, disreputable, or who violates regulations only after “notice and opportunity for a proceeding,” which does not necessarily mean a formal judicial hearing.²⁴⁹ However, under § 7407, there is a guarantee that “[a]ny action under this section

242. Under the Taxpayer Protection and Preparer Fraud Prevention Act of 2013, § 330(b) would read, “After notice and opportunity for a proceeding, the Secretary may suspend or disbar from practice before the Department, or censure, a representative or tax return preparer The Secretary may impose a monetary penalty on any representative or tax return preparer” See Taxpayer Protection and Preparer Fraud Prevention Act of 2013, H.R. 1570, 113th Cong. § 2(b)(1) (2013).

243. 31 U.S.C. § 330(b); I.R.C. §§ 6694, 6695, 7206, 7216, 7407 (2012).

244. Taxpayer Protection and Assistance Act of 2007, S. 1219, 110th Cong. § 4(b)(4) (2007) (“In promulgating the regulations . . . the Secretary shall impose a penalty of \$1000 for each Federal tax return, document, or other submission prepared by a preparer . . . who is not in compliance with the requirements . . .”).

245. 31 U.S.C. § 330(b)(1).

246. I.R.C. § 7407.

247. *Id.* The new provision would be found under § 7407(b)(1)(E) and would read something like, “engaged in conduct consider to be disreputable or in violation of the regulations prescribed in 31 U.S.C. § 330.”

248. See *supra* text accompanying notes 106–110.

249. 31 U.S.C. § 330(b)(1); *Loving v. IRS*, 917 F. Supp. 2d 67, 77 (D.D.C. 2013), *aff’d*, 742 F.3d 1013 (D.C. Cir. 2014).

shall be brought in [a] District Court of the United States.”²⁵⁰ Therefore, by adding a provision that permits enjoinder of tax return preparers who do not comply with the regulations under the Internal Revenue Code, the IRS can prevent ineligible tax return preparers from preparing taxes, and the tax return preparers would have the protection of judicial review.

*C. Advantages and Disadvantages of Future Tax Return
Preparer Regulation*

Although this proposed legislation may achieve the goal of granting the IRS the authority to regulate tax return preparers and limiting the penalties they may face, one disadvantage may be the legislation’s complexity.²⁵¹ The proposed legislation may look too much like an all-encompassing instruction manual on how the IRS should regulate tax return preparers.²⁵² This approach may be too detailed and complex to be an effective piece of legislation by placing too many restrictions on the IRS’s duty to regulate.²⁵³ For example, the requirements provision may proscribe an overly detailed set of rules for eligibility examinations and continuing education. The IRS could find these requirements are a completely ineffective way of ensuring tax return preparers are competent and that a different method works much better.²⁵⁴ Instead, it should be Congress’s

250. I.R.C. § 7407.

251. The rules in isolation may seem to be a simple, reasonable request; however, when collectively taken as a whole they could impose a huge burden on the IRS. See *Over-Regulated America*, ECONOMIST (Feb. 18, 2012), <http://www.economist.com/node/21547789> [<http://perma.cc/27HL-JPY4>] (“America is meant to be the home of *laissez-faire*. . . . Americans are supposed to be free to choose, for better or for worse.”).

252. See *id.* America has become increasingly more dependent on the federal government, and this has resulted in more complex federal regulations in areas that were not traditionally regulated. There are currently 4062 new regulations at various stages of implementation before Congress. Niall Ferguson, *The Regulated States of America*, WALL ST. J. (June 18, 2013, 6:43 PM), <http://online.wsj.com/news/articles/SB10001424127887324021104578551291160259734> [<http://perma.cc/WQ5V-4JJ6>].

253. See Johnson, *supra* note 4, at 14 (“Some have decried the challenged regulations as another step in the over-regulation of America.”); *Over-Regulated America*, *supra* note 251.

254. This is different from leaving the specifics of the requirements up to the IRS. This would mean leaving the requirements themselves up to the IRS to decide and only outlining the goal of the requirements to ensure tax return preparers are competent. See *supra* Part V.B.2.

job to outline the broad goals of the legislation and it should be the IRS's job to structure the regulations the way it sees fit.²⁵⁵

On the other hand, a more detailed proposed legislation allows Congress to place greater limits on the IRS's regulation of tax return preparers. It also allows for a clearer idea of Congress's intent.²⁵⁶ Congress has an interest in ensuring that federal agencies, such as the IRS, are run in an efficient manner.²⁵⁷ By proposing more complex and detailed legislation, Congress can ensure the IRS will not overpenalize tax return preparers. For example, without detailed legislation limiting the IRS's ability to enjoin or disbar tax return preparers, the IRS would likely always choose the less stringent form of disbarment practices under § 330(b) instead of the judicially protected procedures under the Internal Revenue Code.²⁵⁸ The proposed legislation needs to be complex enough to ensure this cannot happen, and it can do this by introducing a happy medium between the two extremes: allowing the IRS to maintain the ability to disbar tax return preparers for failure to comply with the regulations while at the same time offering the necessary judicial oversight to help protect tax return preparers from overpenalization.

VI. CONCLUSION

In 2015, over 130 years after the passage of the Dead Horse Act of 1884, Congress is facing the same problems it had at the end of the Civil War. However, instead of citizens trying to collect for the loss of their property, taxpayers are trying to collect their refunds, and the IRS is trying to collect their taxes. Studies have shown that unregulated tax return preparers are adding to the problem of taxpayer noncompliance and the increasing tax gap. It is apparent that Congress needs to take action if tax return preparers are to be regulated. However, in regulating tax return preparers, Congress must recognize the potential for overpenalizing those who fail to comply with these regulations. The proposed legislation aims to remedy this problem by granting the IRS the authority to regulate and aligning the penalty schemes.

255. See *Over-Regulated America*, *supra* note 251.

256. This was a big deal in the *Loving* case; if Congress had made their intentions more clear, the case would likely not have been brought. Detailed legislation could help prevent this issue in the future. See *Loving v. IRS*, 742 F.3d 1013, 1020 (D.C. Cir. 2014); *Loving v. IRS*, 917 F. Supp. 2d 67, 77 (D.D.C. 2013), *aff'd*, 742 F.3d 1013 (D.C. Cir. 2014).

257. See Lee Hamilton, *True Congressional Oversight*, CENTER ON CONGRESS IND. U. (May 16, 2000), <http://congress.indiana.edu/true-congressional-oversight> [<http://perma.cc/P68Q-JN72>].

258. See *Loving*, 742 F.3d at 1020.