A Market for Tax Compliance

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INTRODUCTION

In 2011, the IRS took regulatory steps to correct a longstanding problem: inconsistent quality from tax preparers who are permitted to prepare tax returns but who are not part of any licensed class of professionals that would impose quality standards. Although tax commentators generally praised such steps, the IRS’s authority to increase the standards on this class of tax preparers was immediately challenged, resulting in an initial loss for the government, which is currently on appeal.

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

Although the United States arguably has more of a culture of compliance than the rest of the world, the United States’ overall high compliance rate is deceptive because noncompliance does not exist evenly across all types of tax reporting, and willingness to comply tends to correlate with whether the government is receiving third-party information related to a taxpayer’s tax liability. Illustrating the extremes in compliance

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3 IR-2012-4 (Jan. 6, 2012) (“The tax gap is defined as the amount of tax liability faced by taxpayers that is not paid on time”).

4 Id.


6 See Leandra Lederman, Tax Compliance and the Reformed IRS, 51 U. Kan. L. Rev. 971, 974–75 (2003) (noting that reliance upon statistics establishing a high compliance rate despite a low audit rate to support the view of a compliant culture is flawed because this comparison does not consider the effect of information reporting); see also Leandra Lederman, The Interplay Between Norms and Enforcement in Tax Compliance, 64 Ohio St. L.J. 1453, 1460 (2003) [hereinafter Lederman, Norms and Enforcement]; Susan Clearly Morse, Stewart Karlinsky & Joseph Bankman, Cash Businesses and Tax Evasion, 20 Stan. L. & Pol’y Rev. 37, 39–40 [hereinafter Morse,
rate differentials, there is only a 1% noncompliance rate for wage income (which is almost entirely reported by third parties), but there is an approximately 50% noncompliance rate for cash income, which is not subject to third party reporting.7

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

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


Morse, Cash Businesses, supra note 6, at 39. Susan Morse, Stewart Karlinsky, and Joseph Bankman conclude from this data that “[t]he strong relationship between evasion and income source suggests that the primary causal factor that explains evasion is opportunity.” Id. at 40.

See, e.g., Update on Reducing the Federal Tax Gap and Improving Voluntary Compliance, U.S. DEP’T OF THE TREASURY, OFFICE OF TAX POLICY 2 (2009) [hereinafter Update on Tax Gap] (for a good overview of what the proposed solutions from government are); see also Rifkin, supra note Error! Bookmark not defined. (for a good overview of various proposals to reduce the tax gap).

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

10 Id. at 138 (“The questions of why taxpayers comply and how penalties should be structured to promote compliance remain unsettled and controversial . . .”).

11 Id. at 113.
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considerable limitations on resources available for tax enforcement. Because increasing resources for IRS enforcement of the tax laws is not politically viable, the government inevitably must look to proposals that can reduce the tax gap but that do not require more funding for the IRS. The most readily apparent solution, increasing potential penalties to compensate for the low risk of detection created by the limited enforcement budget, also is a practical non-starter on account that such an approach would require increasing penalties to such a high level that they would become draconian. In other words, the IRS has no choice but to do more with less.

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

12 David Cay Johnston, Change and the IRS, TAX NOTES TODAY, Dec. 2, 2008, available in LEXIS 2008 TNT 232-83 (quoting Charles Rossoetti, former Commissioner of the IRS, who stated “The tax system continues to grow in complexity . . . while the resource base of the IRS is not growing and in real terms is shrinking. Basically, demands and resources are going in the opposite direction. This is systematically undermining one of the most important foundations of the American economy.”).
14 Leviner, supra note Error! Bookmark not defined., at 401.
15 Id. at 402.
16 See W. Edward Afield, Dining With Tax Collectors: Reducing the Tax Gap Through Church-Government Partnerships, 7 RUTGERS BUS. L.J. 53 (2010) (for a summary of the various proposals that are designed to encourage more voluntary compliance). Soled, Information Returns, supra note 6, at 377. See also supra note 6 and surrounding text.
17 2008 Annual Report to Congress, 2 NAT’L TAXPAYER ADVOCATE 7 (Leslie Book, The Need to Increase Preparer Responsibility, Visibility and Competence) [hereinafter Book, Increase Preparer Responsibility]; Sagit Leviner, The Role of Tax Preparers Play in Taxpayer Compliance: An Empirical Investigation with Policy Implications, 60 BUFF. L. REV. 1079, 1090 (2012) (“With the growing number of taxpayers who turn to third party preparation assistance, tax preparers have become critical gatekeepers for the tax system and its administration”); Richard Lavoie, Am I My Brother’s Keeper? A Tax Law Perspective on the Challenge of Balancing Gatekeeping Obligations and Zealous Advocacy in the Legal Profession, 44 LOY. U. CHI. L.J. 813, 827 (“taxpayers look to, and the efficient functioning of the tax system relies on, the advice of tax practitioners to guide them to the most appropriate interpretation of the law”) [hereinafter Lavoie, Am I My Brother’s Keeper?]; Margaret McKercher, Kim Bloomquist & Sagit Leviner, Improving the Quality of Services Offered by Tax Agents: Can Regulation Assist?, 23 AUSTL. TAX F. 399, 402 (summarizing the increased use of paid tax preparers to file returns in the United States to the point that paid preparers are involved in both a majority of returns filed and taxes reported).
seen by the IRS’s recent attempts at increasing preparer regulation, in fact do) include steps to ensure that the advice offered by paid tax preparers and advisors is as accurate as possible.

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

Bringing all paid preparers within the IRS’s regulatory framework in order to ensure a baseline of competence is a good step towards improving tax compliance and towards reducing the tax gap. In adopting a mandatory regulatory regime, however, the government has missed an opportunity to realize additional compliance benefits that could be achieved by shifting towards a voluntary regulatory regime in which tax preparers could choose to seek certifications indicating whether they had a positive track record of compliance.

Under such a voluntary compliance certification regime with appropriately structured participation incentives aimed both at paid preparers and their clients, paid tax preparers are not simply mandated to

\textsuperscript{18} Book, Increase Preparer Responsibility, supra note 17, at 7–9; Tolan, supra note 1, at 483–84; Danshera Cords, Paid Preparers, Used Car Dealers, Refund Anticipation Loans, and the Earned Income Tax Credit: The Need to Regulate Tax Return Preparers and Provide More Free Alternatives, 59 CASE W. RES. L. REV. 351 (2009). Sagit Leviner summarizes the results of a GAO study that is illustrative of the level of the error rate:

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

Leviner, supra note 17, at 1091–92; Morse, Cash Businesses, supra note 6, at 61–63 (tax preparers are often complicit in the tax fraud of their clients, either intentionally or recklessly).

\textsuperscript{19} Book, Increase Preparer Responsibility, supra note 17, at 7–9.

\textsuperscript{20} Tolan, supra note 1, at 484.
achieve a minimal level of competence; they are instead provided with competitive advantages in the marketplace for achieving higher levels of compliance than preparers who have poor compliance track records. As a result, preparers are more likely to choose to pursue higher levels of compliance in order to obtain and maintain a certification. In addition, many taxpayers are more likely to seek out compliance certified preparers because of the benefits associated with relying on advice and filing tax returns prepared by compliance certified preparers. This piece seeks to lay the framework for how such a voluntary compliance certification program would work and to discuss the benefits of such a system that are currently not being realized through the IRS’s current regulation of paid preparers.

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

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

Paid preparers fall into three categories: (1) licensed professionals (attorneys and CPA’s); (2) Enrolled Agents; and (3) Registered Tax Preparers. In addition, although they are usually not directly involved in individual tax advice or return preparation, tax promoters, who market investment vehicles broadly, are implicated in the tax system as they often promote the tax benefits of their products. Each category has different levels of regulatory oversight and different error rates, with licensed professionals having the most stringent requirements (and the best track record of compliance), due to the requirements of state licensing boards, and with Registered Tax Preparers subject to the least amount of oversight and exhibiting a much higher level of noncompliance (and, in fact, until 2011, this group was not subject to any licensing or educational

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

22 Doran, supra note 9, at 121.
In order to better police return preparers, the IRS in 2011 expanded the reach of Circular 230, the primary document regulating standards of practice before the IRS, to all paid preparers and required that all paid preparers be registered annually with a preparer tax identification number (PTIN); exhibit an acceptable level of character and fitness; successfully complete tests to ensure competence; and engage in continuing education, although the issue of whether the IRS has the legal authority to institute these requirements to all paid preparers is still in question. The standards in Circular 230 are complex but mirror requirements of IRC § 6694 (the provision of the tax code that provides penalties to tax preparers), which states that paid tax preparers are not permitted to advise a client to adopt a position without a reasonable belief that the position is more likely than not to be sustained in litigation if the position has a significant purpose to avoid or evade federal income tax or is a type of transaction that must be specifically reported to the IRS (even with adequate disclosure, this position still requires a “reasonable basis”).

In addition to dictating what level of confidence tax preparers must have in rendering tax advice, Circular 230 has for several years set out time-consuming and costly requirements for tax preparers to render a “Covered Opinion” that can be used by their clients as a defense to numerous (but not

23 Leviner, supra note 17, at 1088–89, 1092, 1119–29. Sagit Leviner provides a concise summary of the regulatory distinctions among these categories:

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

Id. at 1088–89.

24 See TIGTA REPORT, supra note 1 (for a discussion of the pre-2011 difficulties the IRS had in monitoring paid preparers).

25 Tolan, supra note 1, at 485–86, 503 (noting that certain preparers, such as CPA’s, attorneys, and those they supervise, were exempt from some of these additional educational requirements, as were preparers who certified that they did not prepare returns for individuals). Note that there is ongoing litigation regarding whether these requirements can be imposed on all paid preparers. See Lipton, supra note 2. Although the government has initially lost its claim that it possesses the authority to impose these regulations, the issue is currently on appeal. Id. (discussing the IRS’ loss in Loving v. IRS, 917 F. Supp. 2d 67 (D.D.C. 2013) and the status of the subsequent history of the litigation). For the purpose of making policy prescriptive arguments in favor of preparer regulation, however, the eventual outcome of the litigation is not particularly relevant because, even if the IRS loses, Congress could still amend the tax code to increase regulation over tax preparers. Id. Although Congressional action might be politically more difficult to achieve, such action is still possible, and the current litigation does not appear to pose an insurmountable obstacle to preparer regulation. See also, Camp, supra note 2 (arguing that the district court erred in Loving and that the IRS does in fact have the authority to regulate all paid preparers).

26 Lavoie, Am I My Brother’s Keeper?, supra note 17, at 824 (discussing I.R.C. § 6694); ’Tolan, supra note 1, at 503. Promoters are merely prohibited from lying about their products tax benefits. Doran, supra note 9, at 121 (discussing the promoter penalty of I.R.C. § 6700(a)).
all) penalties\textsuperscript{27} that can be imposed on the taxpayer if he or she is audited and does not prevail on a particular position.\textsuperscript{28} While tax preparers and advisors are permitted to render some tax advice without fulfilling all of the requirements of a Covered Opinion, they must explicitly state that their clients cannot rely on such advice as a defense to taxpayer penalties, making the value of such advice significantly lower.\textsuperscript{29} Although the IRS Office of Professional Responsibility has proposed amending Circular 230 in 2013 to remove the requirements for Covered Opinions and to create a standard applicable to all written tax advice that is based on reasonableness,\textsuperscript{30} the effects of such an amendment are difficult to predict until it is finalized. As of the writing of this piece, the Covered Opinion rules remain in force.

These attempts to limit aggressive tax planning appear to have worked to some degree, but it remains to be seen whether these regulations will prove sufficient to improve compliance significantly going forward as an improving economy leads to increased demand for aggressive tax planning.\textsuperscript{31} Often times, whether a position passes muster under existing regulation is a close call, creating the temptation for paid preparers to err on the side of encouraging a client to adopt overly aggressive positions.\textsuperscript{32} In addition, while this increased preparer regulation could help to improve the overall quality of return preparation and tax compliance, it would not allow

\textsuperscript{27} Steven Z. Hodaszy, Circular Argument: What is Wrong, and Right, with the Circular 230 “Covered Opinion” Regulations, 2 COLUM. J. TAX L. 150, 177 (“[A] Non-Reliance Disclaimer prevents an opinion from being invoked as part of a reasonable cause-and-good-faith defense to the imposition of accuracy-related penalties under § 6662 of the Code (or § 6662(a) . . . , in the case of disclosed reportable transactions) or fraud penalties under § 6663 . . . ”).

\textsuperscript{28} See id., for a good discussion of the Covered Opinion requirements.

\textsuperscript{29} Id. at 160.


\textsuperscript{31} Lavoie, Am I My Brother’s Keeper?, supra note 17, at 852.

\textsuperscript{32} Lavoie, Am I My Brother’s Keeper?, supra note 17, at 825. This temptation can be enhanced by tax preparers operating from an inappropriately adversarial perspective with the government, even prior to the onset of litigation:

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

Id. at 828. See id. at 828–30 (noting that some argue that such an adversarial relationship is appropriate (particularly for attorneys) because of client loyalty and zealous advocacy norms). See also Ventry, Cooperative Tax, supra note 9, at 477 (“Prevailing standards based on adversarial norms encourage literalist interpretations of the law because such interpretations can provide sufficient authority if challenged and litigated. Meanwhile, practice standards based on a more likely than not norm reinforce a purposive approach to statutory interpretation.”).
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the IRS to better identify which paid preparers are more prone to compliance than others, which would be useful information as the IRS allocates its limited enforcement resources.\textsuperscript{33} This regulatory scheme also only incentivizes preparers to meet a baseline level of compliance. It does not, however, provide an incentive for paid preparers to compete with each other in regards to how compliant they are, nor does it provide an incentive to taxpayers to select the most compliant paid preparers to assist them in preparing returns. Part III describes how a regulatory regime over paid preparers could be improved from the existing model to achieve these additional benefits.

III. STRUCTURING AN EFFECTIVE COMPLIANCE CERTIFICATION AND TARGETED ENFORCEMENT PROGRAM

Mandatory regulation of all paid preparers is a step in the right direction, but it does not go far enough to allow the IRS to better ascertain who the most compliant preparers are nor does it provide enough incentives for preparers to compete with each other over who can achieve high rates of compliance. Shifting to a voluntary compliance certification system of preparer regulation would accomplish both of these goals. Currently, the different types of paid preparers are primarily differentiated from each other based on their education and training. While paid preparers with the most training and expertise do provide more accurate advice,\textsuperscript{34} it does not automatically follow, due to the complex interactions between preparer and client that drive tax compliance decisions, that the existing classifications automatically sort which types of preparers are more focused on intentionally maintaining high levels of compliance (and these classifications also do not indicate which preparers within each classification are most likely to be the most compliant).\textsuperscript{35} This Part describes how such a voluntary compliance certification system could be structured in order to achieve these benefits that are currently unrealized in the current regulatory environment.

A. Due Diligence and Educational Requirements

The first goal that a voluntary compliance certification program should have is that of encouraging paid tax preparers to be a thorough as possible in collecting and verifying information from their clients and to have up-to-date knowledge of the tax laws (particularly in areas that exhibit high levels

\textsuperscript{33} See Johnston, supra note 12 and surrounding text for a discussion of the IRS’ limited enforcement resources.

\textsuperscript{34} See Leviner, supra note 23 and surrounding text.

\textsuperscript{35} See infra note 77 and surrounding text.
of noncompliance) in order to help them accurately determine their tax liability. In order to obtain a compliance certification, preparers should be required to adhere to IRS guidelines that would require them to exhibit an increased level of vigilance when advising taxpayers in areas that have historically high levels of noncompliance. This requirement could provide a much needed incentive for tax preparers and advisors not only to comply with the due diligence requirements that already exist but to comply voluntarily with a higher level of due diligence that could systematically reduce areas that have historically exhibited high levels of noncompliance. As part of this requirement, preparers would be required to adhere to heightened educational requirements similar to those that are currently being litigated in Loving v. IRS in order to ensure that they maintained a baseline level of competence.

B. Primary business requirement

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

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36 See Book, Increase Preparer Responsibility, supra note 17, at 82:
If research suggests high areas of noncompliance associated with specific types of issues, our tax system should more affirmatively impose upon preparers an obligation to ask questions that relate to ferreting out facts that will at a minimum (i) place the responsibility for taxpayer actions squarely on the taxpayer’s shoulders and (ii) discourage preparers from becoming facilitators of noncompliance . . . . As Book states, “with the exception of the EITC [Earned Income Tax Credit] . . . . [t]he current tax compliance regime does not tie due diligence of the underlying issues, but rather to the preparer’s underlying knowledge of individual circumstances that would trigger a duty of further inquiry under general negligence principles.” Id. at 83. Such an increased due diligence obligation should not create any undue conflict between tax preparers and clients, because the obligation only “emphasizes the preparers’ obligation to inquire about relevant facts, and inform taxpayers about why those facts are relevant to complying with the laws, areas that should not legitimately heighten or create preparer tensions with clients.” Id. at 88.

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

37 See Book, Increase Preparer Responsibility, supra note 17, at 86 (“Current research shows that preparers often ignore the existing due diligence rules”).

38 See supra note 25 and surrounding text. Although attorneys and CPAs would arguably already satisfy this component with their continuing educational requirements required by their state licensing authorities, it might make sense to mandate education in particular areas of high noncompliance even for these groups in order to obtain a compliance certification. But see, Tolan, supra note 1, at 515–17, 542–43 (summarizing arguments that heightened educational requirements are inefficient and ineffective, although Tolan advocates for increased training and certification).
obtain a compliance certification, a preparer should be in the primary business of rendering tax advice and/or preparing returns.\textsuperscript{39} Because preparers who provide tax services as an ancillary business generally have the profitability of their full-time business as their primary objective, these preparers should automatically raise a compliance red flag.\textsuperscript{40} This lack of compliance can particularly impact the administration of the Earned Income Tax Credit (EITC) (which has a high level of noncompliance) because these part time preparers often prepare returns for EITC recipients and redirect EITC funds into their primary businesses.\textsuperscript{41} In addition, part-time preparers are likely unable to spend as much time staying abreast of current tax law developments as full-time preparers, raising the potential for inadvertent as well as intentional errors. Although it is not practical to ban part-time preparers completely, making them ineligible for a compliance certification (or perhaps requiring even higher levels of testing and/or educational requirements if they wish to obtain a compliance certification without having tax advice or return preparation as their primary business) could certainly help limit their use and would help the IRS target enforcement against this “low-hanging enforcement fruit.”\textsuperscript{42}

\textbf{C. Pro bono requirement}

The third component of a voluntary compliance certification system would require paid preparers seeking certification to complete a fixed number of returns for EITC-eligible taxpayers on a pro bono basis.\textsuperscript{43} This

\textsuperscript{39} Tolan, supra note 1, at 539 (“Perhaps the PTIN application process could be tweaked to require applicants working for businesses not primarily engaged in tax matters to identify the nature of their primary business. This factor, in isolation or in combination with problematic returns from that preparer, could be used to trigger heightened Service scrutiny”).

\textsuperscript{40} Id.

\textsuperscript{41} Cords, supra note 18, at 368. Compounding this problem is that the fact that many EITC-eligible taxpayers are unaware that there are free tax return services that are available to them. Id. at 374 (“The IRS provides assistance to taxpayers who meet its income thresholds through its walk-in Taxpayer Assistance Centers (TACs) and the training and the partnerships it forms with community organizations through the Volunteer Income Tax Assistance Program (“VITA”) and the Tax Counseling for the Elderly (“TCE”) Program”).

\textsuperscript{42} Tolan, supra note 1, at 539.

\textsuperscript{43} Rather than requiring such pro bono service, preparers with compliance certifications could be given an option of providing the free service or of donating a fixed sum of money to an organization that focuses on assisting EITC taxpayers in completing their returns. See Kendra Emi Nitta, An Ethical Evaluation of Mandatory Pro Bono, 29 LOY. L.A. L. REV. 908 (1996) (noting that mandatory pro bono requirements with buyout options can be valuable in raising funds for pro bono legal service, although they are criticized as benefiting large firms, which can more easily afford the buy-out than a smaller firm); Quintin Jonstone, Law and Policy Issues Concerning the Provision of Adequate Legal Services for the Poor, 20 CORNELL J. L. & PUB. POL’Y 571 (2011) (arguing for mandatory pro bono with a buyout option); see also, Rob Atkinson, A Social-Democratic Critique of Pro Bono Publico Representation of the Poor: The Good as the Enemy of the Best, 9 AM. U. J. GENDER SOC. POL’Y & L. 129 (2001) (arguing that a mandatory buyout in the form of Good Samaritan Tax, is actually the more efficient way to ensure that legal services are provided to the poor, although he argues that such a tax should be taken from the public at large rather than just the bar because the public is receiving the benefit); Debra Burke, Reagan McLaurin & James W. Pearce, Pro Bono Publico: Issues and Implications, 26 LOY. U. CHI. L.J. 61 (1994) (allowing large firms to buy out of a pro bono obligation is more efficient than mandatory pro bono because it increases profitability to large firms as well as increases funding for legal services to the poor); Debra
requirement is perhaps a bit more controversial, although, if enacted, it could help the government remedy a persistent problem that exists in the area of EITC compliance. The EITC, designed specifically to benefit low income taxpayers, is subject to both intentional fraud and unintentional error due to its complexity. By increasing the number of EITC returns performed by paid preparers who are more likely to avoid both the intentional and unintentional errors, the government can go a long way towards remediying this problem by guiding eligible taxpayers to preparers who will be best served to help them. Paid preparers wishing to obtain and maintain a compliance certification would have to market their free EITC services (or volunteer at Voluntary Income Tax Assistance (VITA) centers), which will make it more likely that EITC-eligible taxpayers will be served by paid preparers possessing high levels of ability and integrity. EITC compliance could be enhanced further through the voluntary compliance certification system if the government only permitted compliance certified tax preparers to conduct eligibility prescreening for the EITC and making such voluntary participation in such prescreening a factor that could also result in lower preparer and taxpayer penalties as well as audit rates if taxpayers and paid preparers participated.

D. IRS Monitoring

Of course, for a compliance certification program to work, the IRS needs to improve its system of identifying and monitoring preparers, so that it can determine which ones are worthy of a certification. The IRS’s

Burke, George W. Mechling & James W. Pearce, Mandatory Pro Bono: Cui Bono?, 25 STETSON L. REV. 983 (1996) (indicating that a mandatory pro bono system with a buy out option can be structured either to incentivize attorneys to actually perform services or to incentivize attorneys to elect the buy out option, as attorneys will elect the buy out when the buy out rate is less than the attorney’s billing rate); Judith L. Maute, Changing Conceptions of Lawyer’s Pro Bono Responsibilities; From Chance Noblesse Oblige to Stated Expectations, 77 TUL. L. REV. 91 (2002) (supporting a buy-out option).

44 See Part IV.D.

45 Cords, supra note 18, at 368–69. ("Because there are many reasons for EITC noncompliance—including errors relating to qualifying children, documentation, record keeping, and actual fraud—there is no single means to achieve EITC compliance. . . . Greater oversight and regulation, including more training of tax preparers, could help resolve some noncompliance . . ."). Leslie Book has also written extensively on the causes of EITC noncompliance. See, e.g., Leslie Book, Preventing the Hybrid from Backfiring: Delivery of Benefits to the Working Poor Through the Tax System, 2006 WIS. L. REV. 1103 (2006); Leslie Book, The Poor and Tax Compliance: One Size Does Not Fit All, 51 U. KAN. L. REV. 1145 (2002–2003) [hereinafter The Poor and Tax Compliance].

46 See The Poor and Tax Compliance, supra note 44, at 1146–49.

47 Book, Increase Preparer Responsibility, supra note 17, at 88 ("both TIGTA and GAO have recently noted that the IRS is limited by the lack of information it captures about preparers, and the limited means of monitoring practitioner performance"). Even California and Oregon, which do contain preparer regulatory regimes, have historically not done a good job of tracking preparers for monitoring or enforcement purposes. Id. at 78. In a system in which preparers and their clients will receive different treatment from the government based on their compliance history, then institutionalizing the reputations of preparers with the government is an indispensable step in ensuring consistent treatment under this system. See David M. Schizer, Enlisting the Tax Bar, 59 TAX L. REV. 331, 345 (2005–2006).
recent requirement that tax preparers obtain PTIN numbers, combined with mandatory preparer e-filing, takes a significant step towards increasing the IRS’ ability to monitor tax preparers. For a robust compliance certification system to be in place, however, more monitoring would be required. From the current regulatory foundation, the IRS could take steps to create a systematic database for each preparer that establishes what the error rate for each preparer is, or at least what a reliable estimate for that rate is. In addition, the IRS could annually provide detailed information to tax preparers indicating how their returns compare in accuracy to national benchmarks, and could require, as a part of the certification maintenance requirements, that preparers demonstrate a certain level of improvement in any areas in which a preparer is deemed to be falling below acceptable levels.

E. Incentives for participation

If compliance certification is to be on a voluntary basis, then there must be incentives in place to encourage participation and to help the government further the goals of resource allocation and better detection that help justify such a certification. Creating a combination of carrots and sticks aimed at tax preparers is of course an important first step in creating appropriate incentives, but, in order to maximize the odds that taxpayers would seek out compliance certified preparers, the certification system should provide benefits to taxpayers who use compliance certified preparers. This latter aspect is important because incentivizing taxpayers to seek out certified compliant tax preparers has the additional effect of incentivizing tax

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48 Leviner, supra note 23, at 1134 (”[The mandatory PTIN requirement] may serve a key function in effectively facilitating further administrative mechanisms in the coming years, including advancing preparer and taxpayer outreach and oversight”); Tolan, supra note 1, at 487, 539–42 (noting that, assuming the IRS develops a database to process the data, the PTIN registration process and mandatory e-filing should help determine who problem preparers are by allowing the IRS to spot trends exhibiting a pattern of noncompliance).

49 This increased monitoring would potentially be the biggest roadblock to a compliance certification system being successful. While technological efficiencies could likely be achieved in constructing an electronic mechanism to conduct most of the monitoring, implementing this system would almost certainly have more than a de minimis up-front cost. As a result, implementation could run into the same obstacles that exist whenever the IRS seeks additional funding to carry out its mandate. See supra note 12 and surrounding text.

50 Book, Increase Preparer Responsibility, supra note 17, at 90–91:
One possibility is that the IRS could create a preparer database that allows the IRS to capture compliance related information on each preparer, including, for example, the total number of clients and dollars a preparer has in the cash economy, and information on client return DIF scores that are outside the norm, math error activity on client returns, and examination results. Where a preparer is a member of a firm, that relationship presents the possibility of two different perspectives, one at the preparer level, and the other at the firm level, provided both the preparer and the firm can both be uniquely identified.

Id. at 90 n.70.

51 See id. at 109–10; Tolan, supra note 1, at 482. See also Book, Increase Preparer Responsibility, supra note 17, at 115–16 (discussing how this type of monitoring could be done by imposing stricter reporting requirements on preparers with high error rates until their error rate improves, although not considering this concept in light of providing a compliance certification with tangible benefits for both preparers and their clients).
preparers to compete for business by being more, rather than less, compliant. These incentives could be structured in many ways, but the most significant incentives that would actually influence both taxpayers and tax preparers are those that can potentially result in significant cost savings for taxpayers who use certified compliant preparers. These incentives fall into the following categories: (1) lowering of potential penalties for errors committed on returns by certified compliant preparers; (2) lowering of audit risk for returns prepared by certified compliant preparers; and (3) lowering of the cost of obtaining tax advice.

1. Lowering of penalties for compliance certified preparers and their clients

In regards to the first category of incentives, both compliance-certified preparers and their clients could be subject to lower penalties should a violation of the tax laws be discovered on an audit. Commentators have considered the effects of providing different penalties for tax preparers who demonstrate higher levels of compliance but have not taken the idea far enough to provide an incentive for both preparers and taxpayers to work together towards improving compliance. Providing lower preparer penalties for certified compliant preparers certainly would be a valuable incentive for

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52 Some commentators have considered the possibility that tax preparers might try to be compliant to preserve a relationship with the government for the benefit of future and current clients. Lavoie, supra note 17, at 826, 831 (citing Michael Hatfield, Legal Ethics and Federal Taxes, 1945-1965: Patriotism, Duties and Advice, 12 FLA. TAX REV. 1, 18 (2012)). This reputational motivation, however, may not be as strong as it otherwise could, particularly because preparers likely know that, in many instances, the government will never know how compliant they are. In addition, tax preparers have been moving steadily away from a culture of serving as gatekeepers for the tax system: While numerous factors and changes over the recent decades have undoubtedly contributed to the shift in the ethical reality of tax practice, four overarching areas of change can be easily identified as highly significant in altering the ethical perceptions of the tax bar: (1) evolving client norms for ethical behavior; (2) increasing competitive pressures on legal service providers; (3) changing judicial approaches to statutory interpretation; and (4) a lessening imperative favoring taxpaying in society as a whole.

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

53 Leslie Book describes numerous incentives that could be used to incentivize compliance, such as: “favored refund time, differing access to the Debt Indicator program or access to IRS information generally, differing recordkeeping or due diligence requirements, or explicit discretion from Congress for the IRS to modify or waive certain requirements or penalties for preparers who meet certain low-error thresholds.” Book, Increase Preparer Responsibility, supra note 17, at 67; see also, Schizer, supra note 46, at 43–46 (suggesting that the government could keep a list of tax preparers with poor compliance track records that could be used to shame those preparers and could create an expedited review process for tax advisors who had a reputation for giving conservative opinions).

54 See, e.g., Book, Increase Preparer Responsibility, supra note 17, at 67; Raskolnikov, supra note 9 (proposing a dual option tax enforcement system in which the traditional system is complemented by a voluntary compliance regime that taxpayers could elect and that would involve taxpayers giving up certain rights in exchange for lower penalties—a system that more compliant taxpayers would likely elect).
preparers to seek a certification. Limiting this differential penalty treatment to preparer penalties, however, does not necessarily help influence taxpayers to seek out the most compliant preparers to assist them in their tax planning and filing obligations. This limitation creates an inherent tension between taxpayers, who may wish for preparers to engage in more aggressive tax planning, and preparers, who would want to preserve their eligibility for the lower preparer penalty. This tension could cause tax preparers to avoid legitimate positions in grey areas of the law that would interfere with tax preparers’ relationships with their clients (particularly when the tax preparers are also attorneys with the requirements inherent in an attorney/client relationship). 55 This tension is better than taxpayers and preparers being aligned towards noncompliance, but it is still inferior to a system in which both taxpayers and preparers would have their interests aligned towards compliance. Accordingly, lower penalties should be extended towards taxpayers who use those tax preparers as well. This extension of differential penalty treatment will provide a much stronger incentive for taxpayers to seek out certified compliant preparers by providing the taxpayers with a tangible benefit from using compliance certified tax preparers. This incentive is important because, while taxpayers predisposed towards compliance could be channeled towards compliance certified preparers by simply publishing a list of compliant preparers for compliance oriented taxpayers to use if they wish, adding a benefit of lower potential penalties does more to incentivize taxpayers who are indifferent to compliance to seek out certified compliant taxpayers in order to receive better penalty treatment.56

2. Lowering the audit rate on compliance certified preparers and their clients

As for the second category of incentives, the IRS could also provide incentives for both preparers to seek a compliance certification and for taxpayers to use compliance certified preparers by committing to lowering the frequency with which the IRS audits returns prepared by certified compliant preparers.57 This could take the form of either the IRS promising to lower the overall intentional audit rate58 for returns prepared by certified

55 See note 78 and surrounding text for a discussion of the criticism of how misaligned incentives between attorneys and taxpayer clients can have a negative effect on the attorney/client relationship.

56 See Book, Increase Preparer Responsibility, supra note 17, at 67.

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

58 The risk that a return would be randomly selected for audit should likely remain the same in order to keep the deterrent effect that the random audit risk creates.
compliant taxpayers or the IRS promising not to audit such a return unless it triggers a higher DIF score than that which would normally trigger an audit. An alternative version of this approach would allow compliance certified preparers and their clients to be eligible for a more responsive, graduated regulatory approach with the IRS in which the government determines its level of hostility to or cooperation with a taxpayer based on the taxpayer’s willingness to cooperate.59 Relaxing procedural requirements that limit malpractice claims for claims brought against non-certified tax preparers would also accomplish many of the same effects as providing penalty relief to compliance certified preparers and their clients because tax preparers would not want to risk losing their malpractice protections by not obtaining a certification.60

3. Lowering costs and/or increasing value associated with tax advice

In regards to the third category of incentive, one concern regarding a compliance certification program is that it would increase costs on tax preparers which would either be passed on to clients or would potentially drive tax preparers out of the industry.61 Combatting this concern is another

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

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

60 See Jay A. Soled, Tax Shelter Malpractice Cases and their Implications for Tax Compliance, 58 AM. U. L. REV. 267, 315–30 (2008). Soled proposes the following reforms in the abusive tax shelter context:

1. tolling the statute of limitations and limiting the use of arbitration clauses in the tax shelter malpractice context;
2. prohibiting abusive tax shelter promoters from relying on a “mere error in judgment defense”;
3. increasing the amount of potential recovery in malpractice cases;
4. encouraging taxpayers to settle with the government by making penalties easier to recover;
5. prohibiting insurance carriers from covering claims related to abusive tax shelters; and
6. publishing the names of tax preparers who receive judgments.

Id. at 322

61 Tolan, supra note 1, at 513–4. Increasing costs could also have the negative effect of causing fewer taxpayers to use paid preparers, which could increase the potential for errors in tax return preparation. See, e.g., M. McKercher, K. Bloomquist & S. Leviner, Improving the Quality of Services Offered by Tax Agents: Can Regulation Assist?, 23 AUSTL. TAX F. 399, 405, 419 (noting that, in addition to fewer taxpayers using paid
reason why there must be an incentive structure in place for both tax preparers to want to participate in this certification program. The most straightforward savings mechanism would be simply to provide a refundable tax credit equivalent to the amount usually spent on filing a routine tax return to taxpayers who use compliance certified preparers.62

Another possibility would be relaxing some of the Circular 230 requirements for compliance-certified preparers (a step that may already be underway in regards to all paid preparers).63 One way to accomplish this would be to allow taxpayers to rely for the purposes of penalty protection on what Circular 230 terms a “reliance opinion,”64 which can currently be given to taxpayers without following the Covered Opinion regulations but which cannot currently be used for penalty protection.65 Another way would be to allow Covered Opinions and/or Reliance Opinions to serve as penalty defense to the new accuracy-related penalty for transactions lacking economic substance, which currently is a strict liability penalty.66 The compliance certification should make the tax preparer rendering the opinion more inherently trustworthy, which should allow their opinions to serve as insurance policies for the taxpayer without creating a significant noncompliance risk. This relaxing of Circular 230 requirements would make the advice much more valuable, justifying a higher premium. This value premium, however, would likely flow to the client as tax preparers

62 Costs of tax preparation are already deductible but, at least for individual taxpayers, these expenses are itemized deductions under I.R.C. §§ 212, and 62, that they cannot always take because of I.R.C. § 67’s 2% floor on miscellaneous itemized deductions. I.R.S. Publication 529 (Jan. 8, 2013).
63 See Goldstein, supra note 31; see also Olsen, supra note 31.
64 Hodaszy, supra note 28, at 154 n.8 (a reliance opinion is a written opinion in which the tax preparer has concluded that there is a greater than fifty percent chance that the taxpayer will prevail on a federal tax issue that the government has a reasonable basis to challenge and that could significantly impact the tax treatment of whatever transaction the opinion is addressing) (citing 31 C.F.R. § 10.35(b)(3), (4) (2010)).
65 Id. at 177. Steven Hodaszy advocates limiting the scope of Circular 230 even further, so that it only covers tax shelter opinions. Id. at 190 (“The chief problem with the Covered Opinion Regulations is that they apply not only to tax shelter opinions, but also to advice concerning virtually all other tax matters”).
66 Id. at 184–86 (discussing I.R.C. § 6662(b)(6)). Allowing Covered Opinions (or even Reliance Opinions) to serve as a defense to the § 6662(b)(6) penalty would better help practitioners to continue to serve as key players in improving tax compliance:

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

Hodaszy, supra note 28, at 186.
and advisors would be able to render useful tax advice in considerably less time than it takes to render a Covered Opinion, making these reliance opinions cost less than a Covered Opinion but making them just as valuable.\textsuperscript{67}

These additional incentives are essential, because, without them, unscrupulous taxpayers would be tempted to avoid compliance-certified preparers in favor of preparers who would be more inclined to engage in noncompliant behavior to the benefit of the taxpayer (or in favor of self-preparation).\textsuperscript{68} In addition, tax preparers and advisors have shown that they will not maintain high compliance standards just because of professional ethics and aspirational goals\textsuperscript{69}, making an incentive structure all the more necessary.

IV. \textbf{Benefits of a Compliance Certification and Targeted Enforcement Program}

A compliance certification program would lower the tax gap if a sufficiently large number of preparers obtained certifications because more paid preparers would have higher competency levels, as would be the case under if current IRS efforts to strengthen regulation of paid preparers were permitted to be enforced in their entirety. In addition to improving the quality of preparers, however, a voluntary compliance certification program would achieve additional benefits. Such a program would create a market for compliance that would incentivize tax preparers to compete with each other over how compliant they are and would incentivize taxpayers to value compliance history in selecting a tax advisor. Thus, a compliance certification program would not only increase competency, but would help establish compliance as something of value which could help the tax bar transition to a more compliance focused culture. In addition, such a system would help the IRS focus its enforcement efforts on tax preparers and taxpayers who, because of a lack of certification, are more likely to exhibit noncompliant behavior. This Part discusses these potential benefits in greater detail.

\textit{A. Increased accuracy and higher rates of compliance}

If sufficient numbers of preparers sought and obtained compliance

\textsuperscript{67} See Hodaszy, \textit{supra} note 28, at 171, 177. This more efficient rendering of tax advice can make taxpayers more likely to seek out tax advice more often because they can be confident that they can ask a succinct question and get an equally succinct answer to a tax question (and rely on that answer) without incurring the cost of a Covered Opinion. \textit{Id.} at 171.

\textsuperscript{68} Book, \textit{Increase Preparer Responsibility, supra} note 17, at 24.

\textsuperscript{69} See Hodaszy, \textit{supra} note 28, at 167, 179.
certifications, overall accuracy in tax reporting would likely improve. The preliminary evidence for this actually exists on the state level, as California, Maryland, New York, and Oregon have imposed heightened educational and certification requirements on paid preparers for a long enough period of time that there is data attesting to the efficacy of such programs if they are structured properly. The best data comes from looking at Oregon’s program, which has the most stringent requirements and has existed for a sufficiently long enough period of time that inferences can be drawn from the data. Although further research must be conducted to rule out other factors, initial data reveals that Oregon’s program has led to an overall increase in tax compliance among Oregon taxpayers. In addition, Oregon’s example shows that it is possible to hold preparers to higher regulatory standards without forcing preparers out of the marketplace.

B. Norm Shifting

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

See, e.g., I.R.S. Publication 4832 (Revised, Dec. 2009); Tolan, supra note 1, at 474 n.3; McKerchar, Bloomquist & Leviner, supra note 59, at 412–20; Book, Increase Preparer Responsibility, supra note 17, at 46 (citing a GAO report indicating that federal returns prepared by Oregon paid preparers 72% higher odds of being accurate than comparable returns filed in the rest of the country, while federal returns prepared by California paid preparers had 22% lower odds of being accurate than comparable returns filed elsewhere). McKerchar, Bloomquist & Leviner, supra note 59, at 411–12. Oregon’s program has existed since 1973 (as opposed to 1997 for California) and requires significantly more training and education in order to be licensed than the California program. Id. at 411 (summarizing the requirements of both programs in detail).

Id. at 418: In summary, the analysis for three performance measures found that individual taxpayers in Oregon who are clients of tax agents have a lower probability of experiencing math errors, are less likely to have underreported interest income in excess of $10 and have, overall, higher voluntary reporting rates. However, the question that remains to be answered is whether these observed differences are due solely or even primarily to Oregon’s program of tax agent education and licensing or whether they result from another factor or combination of factors unique to Oregon.

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


1. Refusing practitioners—these practitioners refuse to engage in a relationship with clients they suspect to be dishonest or overly aggressive;
2. Signaling practitioners—these practitioners will signal their unwillingness to prepare returns for clients they expect to be dishonest by making detailed inquiries or requesting back-up documentation;
3. Facilitating practitioners—these preparers facilitate noncompliance by advising the taxpayer how to take improper return positions when they know or reasonably believe that the taxpayer is misstating
to seek out preparers who are already predisposed towards noncompliance, it is possible that compliance-oriented tax preparers could have a positive influence on taxpayers predisposed towards noncompliance. This positive influence would not necessarily be limited to the individual level but would also occur on a macro level as well. A compliance certification system would provide both direct and indirect incentives for tax preparers to have a good track record of reaching the correct result rather than on having a history of simply “winning” against an adversary (the government). Establishing these incentives is important to counter the predictable fact that currently tax preparers often appear to mirror their clients’ attitudes regarding aggressive tax positions unless their behavior is reigned in through deterrence incentives. This change in focus by preparers could potentially lead to a positive shift in the underlying compliance norm driving tax advice and cause both preparers and taxpayers to become more focused on getting it right rather than on getting away with it.

4. Indifferent practitioners—these preparers are indifferent to the taxpayer’s conduct and are willing to follow taxpayer preference and overlook noncompliance;
5. Incompetent or unsophisticated practitioners—given the due diligence requirements, these preparers should be able to recognize that the taxpayer is taking improper positions, but are unable to detect or suspect taxpayer misconduct because of lack of training, education sophistication, etc.; and
6. Reasonably unknowing practitioners—despite the client’s misconduct, the practitioner does not and cannot reasonably know or suspect that the facts the taxpayer alleges are incorrect. Id. at 44 (citing Leslie Book, Study of the Role of Preparers in Relation to Taxpayer Compliance with Internal Revenue Laws, in 2007 NAT’L TAXPAYER ADVOCATE ANNUAL REPORT TO CON. VOL. 2, 17 (Taxpayer Advocate Series) [hereinafter Role of Preparers]).

5 Id. at 39, 45 (citing Role of Preparers, supra note 72, at 57–63); Role of Preparers (“the taxpayer and preparer arrive at the tax filing platform as one interconnected unit”); Hodaszy, supra note 28, at 118 (“to deter abusive tax shelters effectively, a regulatory scheme must not only prohibit bad behavior by tax practitioners; it must actually enlist the aid of private practice tax attorneys in reigning in their clients”); Leviner, supra note 6; Schizer, supra note 46.

6 Ventry, Cooperative Tax, supra note 9, at 443.
7 Michael L. Roberts & George F. Klersey, Effects of Experience, Task Specific Information, and Risk on Tax Professionals’ Judgments, 7 (Aug. 5, 2011) available at http://papers.ssn.com/sol3/papers.cfm?abstract_id=1905127&download=yes; McKerchar, Bloomquist & Leviner, supra note 59, at 404–407. In addition to reflecting clients’ attitudes, tax preparers also exhibit confirmation bias in overly valuing evidence that supports positions favorable to their clients while undervaluing evidence that would support a contrary position. Roberts & Klersey, supra at 7. Because of the complex nature of the tax advisor/client relationship, however, the multiple studies in this area have led to some inconsistent findings regarding whether the tax advisor or the client is the primary instigator of noncompliant activity. McKerchar, Bloomquist & Leviner, supra note 59, at 406 (“the literature is not entirely clear as to which party is responsible for the adoption of an aggressive tax stance and the extent to which such a stance is affected by contextual conditions including penalty exposure, opportunity, personal circumstances, and attitudes”).
8 See Ventry, Cooperative Tax, supra note 9, at 477–78. Solutions that contribute to shifts in compliance norms have the potential of being a more efficient mechanism of having a longer lasting effect on increasing tax compliance than proposals that simply try to increase enforcement or try to work with existing norms without trying to change them. Elizabeth Branhm, Note: Closing the Tax Gap: Encouraging Voluntary Compliance Through Mass-Media Publication of High-Profile Tax Issues, 60 HASTINGS L.J. 1507, 1525 (2009); Sunstein, supra note 9, at 909, 930 (describing how “norm entrepreneurs” can produce “norm bandwagons” around a new norm, which in turn can cause more and more people to begin adhering to the new norm until a “norm cascade” occurs, causing a permanent shift in the norm). But see, Hope M. Babcock, Assuming Personal Responsibility for Improving the Environment: Moving Toward a New Environmental Norm, 33 HARV. ENVTL. L. REV. 117 (2009) (discussing some of the difficulties in changing norms generally, which can include: (1) combatting myths regarding the source of the problem; (2) preventing free riding on a collective benefit; and (3) drawing connections between norms and tangible actions).
Furthermore, it could improve compliance by uniting the incentives of the government, tax preparers, and taxpayers, which would be more likely to bring about a norm shift than many existing proposals that require preparers to develop an adversarial relationship with their clients in order to police them. These shifts in attitudes could be a significant step towards improving “tax morale”, in which tax payers begin to see tax compliance as a civic virtue.

C. Targeted Tax Enforcement

In addition, compliance certification combined with targeted tax enforcement better utilizes government resources and produces more just outcomes by focusing the most lengthy and adversarial enforcement efforts as well as the most significant penalties on taxpayers and preparers who are most likely to be noncompliant. This benefit is better realized with a voluntary compliance system as opposed to mandatory regulation because it helps sort tax preparers into groups that are more and less likely to be compliant and then uses market pressure to remove those predisposed to intentional or negligent noncompliance from the marketplace. In order for

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This certification program with its incentives can be much more effective in drawing these potentially norm-changing connections between tax preparers and compliance norms than simply increasing preparer standards without an incentive structure because the incentives will encourage preparers to market their certifications more directly to clients, illustrating the benefits of compliance norms. See Tolan, supra note 1, at 526–27 (“[compliance oriented preparers] would also signal to their clients a compliance norm that could then, in turn, motivate the taxpayers to be more compliant.”); Schizer, supra note 46, at 45 (“Lawyers will want conservative reputations, and clients will want to hire such lawyers, if the government treats opinions of conservative lawyers more favorably than opinions of aggressive ones”). In addition, the certification system itself can redefine which conduct is considered to be compliant by adopting a penalty structure in which taxpayers are potentially subject to higher penalties if they do not use compliance certified preparers (thus making the use of these preparers an aspect of what constitutes full compliance with the tax laws). Doran, supra note 9 (the structure of penalties serves a definitional function of describing what is considered to be compliant conduct).

Commentators who have argued for a stronger gatekeeping function nevertheless have to harmonize this gatekeeping function with traditional notions about an attorney/client (or accountant/client) relationship. See supra note 1, at 534–35 (proposing that preparers be required to police tax payers for noncompliance); Lavoie, Am I My Brother’s Keeper?, supra note 5, at 828, 830 (discussing how some commentators are critical of proposals that weaken the attorney/client relationship in the context of tax advice, although still arguing for tax preparers to serve a gatekeeping function). Structuring incentives so that preparers and taxpayers are unified in a desire to be more compliant can increase tax preparers’ role as gatekeepers without actually requiring them to do so in a way that might weaken the relationship with the client.

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

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

See Raskolnikov, supra note 9 (discussing an elective compliance regime as a potential signaling mechanism for which taxpayers are predisposed towards compliance). The preparer monitoring that would be part of the compliance certification system would also serve as an additional verification of the compliance predisposition to ensure that such a predisposition has not changed with a particular preparer.
these efficiency gains to be realized, however, the factors that go into what should trigger an audit for clients of certified and non-certified preparers would need to be continuously adjusted. While keeping the audit benefits afforded to certified compliant preparers completely a secret might lessen the desired incentivizing effects, some details would have to be kept confidential to lessen the temptation of preparers to try to obtain a certification only to manipulate it for its benefits.

D. Enhanced EITC Compliance

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

E. Shaming Benefits

If the government promulgated a list of compliance certified preparers and took steps to increase public awareness of this list and of the benefits of using these types of preparers, tax advisors and preparers who were absent from the list might have an additional motivation to qualify for certification because of shaming effects. Such programs have already been successful

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83 See Logue & Vettori, supra note 9, at 61–64 (discussing how an audit strategy designed to use presumptions regarding whether a taxpayer is being compliant for the purpose of directing audit resources would need to be changed constantly and would likely not be able to be fully publicized to avoid taxpayers adjusting their behavior to appear more compliant based on these presumptions).

84 See id.

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

86 Compare id. at 389–90 (arguing for more resources to be devoted for free filing assistance because shifting work to paid preparers may not lead to increased EITC compliance), with Book, Preventing the Hybrid, supra note 44 (arguing for imposing additional requirements on paid preparers to improve EITC compliance).

87 See Jay A. Soled & Dennis J. Ventry, A Little Shame Might Just Deter Tax Cheaters, USA TODAY, Apr. 10, 2008, at 12A; see also Leviner, supra note 6, at 385; Schizer, supra note 46, at 45. Note that, as with the targeted tax enforcement benefits, the shaming benefits are enhanced by keeping the compliance certification program voluntary as opposed to mandatory.
on the state level when applied to taxpayers directly. For shaming benefits to be realized, however, the government would have to attract a sufficiently large population of preparers into the certification program, otherwise the shaming effect could backfire as preparers see that the vast majority of their peers are not seeking certification and are thus not necessarily furthering compliance norms.

F. Reduction in Burdens Imposed by Circular 230

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

G. Benefits of Mandatory Pro-Bono EITC Representation

In addition to improving the EITC compliance and providing more access to low income tax payers to experienced return preparers who can assist them in obtaining the credit, requiring mandatory pro-bono EITC representation as a condition of compliance can serve larger societal goals. For tax preparers who are attorneys, imposing this requirement would better bolster the inherent obligation of the legal profession to provide

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88 Soled & Ventry, supra note 85 (“Shaming has helped states collect hundreds of millions of dollars in unpaid tax bills as taxpayers have rushed to expunge their names from the lists”).
89 Lavoie, supra note 5, at 637; Kahan, Community Policing, supra note 9, at 1519 (suggesting that, because most taxpayers base their compliance decisions on whether they observe their fellow citizens complying with the tax laws, the government could tap into this reciprocity norm and increase tax compliance through policies that promoted trust among taxpayers).
90 See supra Part III.E.3.
91 Hodaszy, supra note 28, at 169–79.
representation to the poor.\textsuperscript{92} Despite this inherent obligation and despite the fact that some local private bar associations have mandated pro bono service,\textsuperscript{93} the imposition of a universal mandatory pro bono requirement on the bar has met with resistance both on historical precedential and constitutional grounds.\textsuperscript{94} These arguments, in brief, are: (1) the nonexistence of a right to counsel in civil cases; (2) the weakness of the historical argument for attorneys being officers of the court for the purpose of rendering pro bono service; (3) mandatory pro bono constitutes an impermissible taking of the attorney’s property without just compensation; (4) state constitutional protections of property; (5) lack of judicial authority to order uncompensated service in civil cases; (6) judicial authority to order funding to guarantee that attorneys are reasonably compensated for their service; (7) the lack of a true monopoly in the legal profession because of the possibility of self-representation; (8) the right to an occupation is a fundamental right under the 14th Amendment; (9) mandatory pro bono infringes on First Amendment rights by compelling attorneys to participate in cases to which they are morally opposed; (10) mandatory pro bono constitutes involuntary servitude (an argument that has not gained traction); (11) lack of reciprocity in that attorneys rendering pro bono service or not having their costs reduced; (12) mandating charity weakens the moral value of charity by removing its charitable character; (13) administrative difficulties that would likely result in an approved list of eligible recipients that would exclude religious groups and other organizations an attorney might choose to represent for free.\textsuperscript{95} In addition to the arguments that focus

\textsuperscript{92} Philip Houle, \textit{Is Mandatory Uncompensated Pro Bono in Civil Cases Unconstitutional?}, 3 NEV. L. 20, 20 (1995). This obligation is based not only on fundamental values reflected in the oath of attorneys but also on the fact that attorneys occupy a monopoly position in the marketplace based on the privileges associated with their law licenses, thus enhancing the obligation to provide service to the poor. See id.; Debra D. Burke, Reagan McLaurin & James W. Pearce, \textit{Pro Bono Publico: Issues and Implications}, 26 LOY. U. CHI. L.J. 61 (1994) [hereinafter Burke et al., \textit{Issues and Implications}]; Debra D. Burke, George W. Mechling & James W. Pearce, \textit{Mandatory Pro Bono: Cal Bono?}, 25 STETSON L. REV. 983 (1996) [hereinafter Burke et al., \textit{Mandatory Pro Bono}]; Steven Lubet & Cathryn Stewart, \textit{A “Public Assets” Theory of Lawyers’ Pro Bono Obligations}, 145 U. PA. L. REV. 1245 (1996) (providing a good history of the relationship of the bar to pro bono services and advocating for a mandatory pro bono requirement under a theory that lawyers are deriving gains from a public asset and a mandatory pro bono requirement is simply a public recapture of some of those rents).

Nitza Milagros Escalera, \textit{A Christian Lawyer’s Mandate to Provide Pro Bono Publico Service}, 66 FORDHAM L. REV. 1393 (1998) (noting that, in addition to the arguments for mandatory pro bono that apply generally, lawyers who profess to adhere to a Christian ethic have a particular duty to provide pro bono legal service); Maute, supra note 43, at 91 (providing a good historical overview of the bar’s attitudes towards pro bono service and noting the influence of the discussion of incorporating religious faith into legal practice).

\textsuperscript{93} See, e.g., Escalera, supra note 90, at 1393; Burke et al., \textit{Issues and Implications}, supra note 90, at 61.

\textsuperscript{94} Houle, supra note 90, at 20.

\textsuperscript{95} See, e.g., id. at 21; Omar J. Arcia, \textit{Objections, Administrative Difficulties and Alternatives to Mandatory Pro Bono Legal Services in Florida}, 22 FLA. ST. U. L. REV. 771 (1995) (arguing that, in addition to the other objections that have been raised, mandatory pro bono could significantly increase the administrative burdens on the state on account of its having to administer such a program); Atkinson, supra note 43, at 129; Burke et al., \textit{Mandatory Pro Bono}, supra note 90, at 983; Escalera, supra note 90, at 1393; Burke et al., \textit{Issues and Implications}, supra note 90, at 61; Michelle S. Jacobs, \textit{Pro Bono Work and Access to Justice for the Poor: Real Change or Imagined Change}, 48 FLA. L. REV. 509 (1996) (rejecting many of the traditional legal challenges to mandatory pro bono but arguing that mandatory pro bono, while having some benefits, is insufficient to help the
on the negative effects on the attorney required to render mandatory pro bono service, arguments have been raised that such a requirement is economically inefficient because it potentially results in bad legal advice from attorneys who are not experts in the area in which they are representing clients pro bono and because it overly steers legal services to the poor beyond the point at which the poor value them.

By limiting the pro bono requirement specifically to the EITC area, such a program better utilizes practitioners’ pro bono time because it enlists them in an area in which they have expertise as well as in an area that is a specifically identified area of need. In addition, the pro bono requirements are simply a minimum for certification and could create a culture in which preparers with compliance certifications performed even more EITC (or other voluntary tax) work pro bono as they achieved having a tangible benefit on taxpayers’ lives by helping them secure these valuable credits.

Furthermore, the pro-bono EITC requirement could be helpful in creating the norm shift towards more compliance described supra because it can help tie compliance-certified tax preparers to Judeo-Christian values that, for a majority of the U.S. population, can potentially influence their perception of the importance of tax preparers and tax compliance generally. In discussing pro bono service requirements, Nitza Escalera

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97 Note 16, at 53.

98 Macey, supra note 93, at 115 (arguing that mandatory pro bono cases steers attorneys into predominantly landlord/tenant and family law matters in which the costs associated with providing the legal services do not outweigh the benefits); but see Nitta, supra note 43, at 909 (noting that, in Nevada, statistics showed that there were legal needs of the poor that were not being met, even with attorneys providing pro bono service).

99 Mauze, supra note 43, at 91 (noting that, due to the diversity in the legal profession, pro bono requirements are better dictated on more local or regional issues); Arcia, supra note 93, at 771 (noting that one problem with mandatory pro bono is the mismatching of attorney expertise to pro bono legal matters); Cummings, supra note 93, at 1 (arguing the same); Nitta, supra note 43, at 909 (arguing the same); Burke et al., Issues and Implications, supra note 43, at 61 (arguing the same).

90 See Deborah A. Schmedemann, Pro Bono Publico As A Conscience Good, 35 WM. MITCHELL L. REV. 977 (2009).
has noted that such a requirement is a fundamental one for the Christian attorney.\footnote{Escalera, supra note 90, at 1393 (noting that, in addition to the arguments for mandatory pro bono that apply generally, lawyers who profess to adhere to a Christian ethic have a particular duty to provide pro bono legal service); see also Maute, supra note 43, at 91 (providing a good historical overview of the bar’s attitudes towards pro bono service and noting the influence of the discussion of incorporating religious faith into legal practice).}

By tying pro bono service into the requirements for a compliance certification in the tax context, the government can better illustrate the moral and ethical dimensions of tax practice and tax compliance. As a result, the moral and ethical aspects of tax compliance could better resonate with Judeo-Christian religious organizations and cause them to realize that they have an obligation to be key players in the effort to shift the country towards being a more tax-compliant culture.\footnote{Afield, supra note 16, at 53 (arguing that tax compliance norms can be improved through partnerships between the government and Judeo-Christian religious organizations that are designed to promote tax compliance as a moral obligation); Stuart P. Green, \textit{What is Wrong with Tax Evasion?}, 9 \textit{HOUS. BUS. & TAX L.J.} 221 (2009) (arguing that compliance gains can be achieved if a norm shift could occur that would move taxpayers’ view of tax compliance as being morally ambiguous to being morally wrong); Susan Pace Hamill, \textit{An Evaluation of Federal Tax Policy Based on Judeo-Christian Ethics}, 25 \textit{VA. TAX REV.} 671, 671–764 (2006) (hereinafter Hamill, \textit{Federal Tax Policy Based on Judeo-Christian Ethics}) (arguing that the only valid metric with which tax policy can be analyzed is the moral one and specifically discussing what a Judeo-Christian tax policy should resemble). See also Susan Pace Hamill, \textit{A Moral Perspective on “Big Business” Fair Share of America’s Tax Burden}, 1 \textit{U. ST. THOMAS L.J.} 857 (2004) [hereinafter Hamill, \textit{A Moral Perspective}]; Michael A. Livingston, \textit{The Preferential Option, Solidarity, and the Virtue of Paying Taxes: Reflections on the Catholic Vision of a Just Tax System}, 7, 12 \textit{[Jan. 4, 2007]} (unpublished paper) (on file with Rutgers-Camden School of Law), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=958806 (indicating that, while the Catholic hierarchy has supported progressive taxation generally, they have not done so with much use of moral language, possibly because the Catholic Church still needs to “develop a more sophisticated theory of private wealth and how wealth creation and distribution should be balanced consistently with Catholic teaching . . .”); Pope Benedict XVI, \textit{Caritas in Veritate} (Encyclical Letter on Integral Human Development in Charity and Truth) ¶ 37 (2009) (noting that “every economic decision has a moral consequence” and very briefly discussing tax policy as a moral issue at ¶ 60); Martin Timothy Crowe, \textit{The Moral Obligation of Paying Just Taxes: A Dissertation} 42 (1944) (concluding that there is a moral obligation to pay just taxes); \textit{Catechism of the Catholic Church} ¶ 2409 (2d ed. 1997) (listing tax evasion as one of the ways an individual can violate the Seventh Commandment’s prohibition on theft); id. ¶ 2240 (establishing that paying taxes is morally obligatory as part of a taxpayer’s obligation to submit to lawful authority); McGee, supra note 98, at 45–53 (summarizing Jewish thought regarding the obligation to pay taxes); see also Kenneth H. Ryesky, \textit{A Jewish Ethical Perspective to American Taxation}, 10 \textit{RUTGERS J. L. & RELIGION} 8 (2009).}

\textbf{CONCLUSION}

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