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Failing to Prepare: The Importance of Regulating Tax Return Preparers Followingthe Passage of the Tax Cuts and Jobs Act

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FAILING TO PREPARE: THE IMPORTANCE OF REGULATING TAX RETURN PREPARERS FOLLOWING THE PASSAGE OF THE TAX CUTS AND JOBS ACT

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I. INTRODUCTION

Albert Einstein's name has become synonymous with genius, and even he once posited, "[t]he hardest thing in the world to understand is the income tax."[1] The complexity and confusion caused by the Internal Revenue Code ("IRC") are contributing factors to why more than half of taxpayers use a paid tax preparer to file each year.[2] Most Americans simply want to ensure

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1. *Tax Quotes*, IRS, https://www.irs.gov/newsroom/tax-quotes (last updated Aug. 21, 2018).

2. *See Written Testimony of John A. Koskinen Commissioner Internal Revenue Service Before the S. Fin. Comm. on Regulation of Tax Return Preparers*, 113th Cong. 1 (2014) [hereinafter *Koskinen Testimony*] (testifying to the Senate Finance Committee, former IRS Commissioner, John A. Koskinen explained that fifty-six percent of

that everything on their tax return is correct.[3] For this reason, it is highly concerning that taxpayers may not be able to trust the tax preparer they are paying to do their taxes.

Over the past two decades, the Internal Revenue Service ("IRS") has tried to increase oversight of tax return preparers; however, various lawsuits have prevented the agency from doing so.[4] Numerous investigations have demonstrated that non-credentialed return preparers ("NCRPs") consistently prepare returns incorrectly, thereby resulting in widespread underreporting of income.[5] This Note will examine the impact of tax preparer misconduct through the lens of certain refundable and non-refundable credits.[6] This Note focuses on that particular population because taxpayers claiming those credits are more likely to use paid tax preparers, specifically NCRPs, than their counterparts, who are not claiming those credits,[7] and because incorrectly claiming these credits can significantly impact the financial wellbeing and future eligibility of these taxpayers who trust someone to make sure they are in compliance.[8] This Note should not be seen as a

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taxpayers used paid preparers, and ninety percent of Americans seek some form of assistance on their taxes).

3. *See 2014 Taxpayer Attitude Survey*, IRS OVERSIGHT BOARD 1, 8 (Dec. 2014), https://www.treasury.gov/IRSOB/reports/Documents/IRSOB%20Taxpayer%20Attitude%20Survey%202014.pdf (explaining that, contrary to conventional wisdom, taxpayers are more motivated to pay their taxes because of personal integrity than because of fear or third-party pressure).

4. *See* Loving v. IRS, 742 F.3d 1013, 1014-15 (D.C. Cir. 2014) (ruling that the IRS does not have the authority to regulate an estimated 600,000 to 700,000 return preparers, allowing them to continue working without training or credentials); *see also* Steele v. United States, 260 F. Supp. 3d 52, 67-68 (D.D.C. 2017) (ruling that the IRS does have the authority to require PTINs, but the IRS cannot charge a fee for acquiring or maintaining a PTIN and must refund the previously paid fees).

5. *See* PURPLE BOOK: COMPILATION OF LEGISLATIVE RECOMMENDATIONS TO STRENGTHEN TAXPAYER RIGHTS AND IMPROVE TAX ADMINISTRATION, NAT'L TAXPAYER ADVOC. 14-15 (Dec. 31 2017) [hereinafter PURPLE BOOK], https://taxpayeradvocate.irs.gov/Media/Default/Documents/2017-ARC/ARC17_PurpleBook.pdf (citing studies performed by the Government Accountability Office ("GAO"), Treasurer Inspector General for Tax Administration ("TIGTA"), New York State Department of Taxation and Finance, and the IRS which found extremely high instances of negligence and fraud amongst paid tax preparers).

6. *See infra* Part II (looking specifically at the Earned Income Tax Credit ("EITC"), refundable and nonrefundable child tax credit, and the refundable and nonrefundable education credits).

7. *See* Rosemary Marcuss et al., *Compliance Estimates for the Earned Income Tax Credit Claimed on 2006-2008 Returns*, IRS 24 (Aug. 2014), https://www.irs.gov/pub/irs-soi/EITCComplianceStudyTY2006-2008.pdf (contrasting the types of preparers used by claimants and non-claimants and highlighting that forty-four percent of non-claimants use a CPA, while only ten percent of claimants do).

8. *See* 26 U.S.C. § 32(k) (2018) (stating that taxpayers making "fraudulent or reckless claims" can be disallowed from claiming the credit for two or ten years

criticism of the aforementioned credits, but, rather, as an invitation to discuss the lack of training and oversight of NCRPs and the impact of untrained and unregulated NCRPs on taxpayers and the federal government's bottom line.[9]

With the passage of the Tax Cuts and Jobs Act ("Act"), it is important that preparers get the training and oversight needed to help these taxpayers understand the changes in the law.[10] While the expansion of the refundable and non-refundable portions of the Child Tax Credit ("CTC") included in the Act is intended to help families reduce their tax burden, expanding those portions could incentivize preparer misconduct, thereby distorting the purpose of the changes by hurting taxpayers who are misled by NCRPs.[11]

Part II of this Note will examine the impact of underreporting on revenue collection as well as the subsequent consequences for taxpayers, and, further, Part II will analyze how some unqualified preparers exacerbate that problem. Part III will discuss the strategies employed by the IRS to reduce non-compliance through stricter regulation on tax preparers. Part IV will assess a variety of proposed legislative fixes and suggest ways to improve these fixes.

II. MONEY LEFT ON THE TABLE AND HOW IT HURTS THE AMERICAN TAXPAYER

A. Non-Credentialed Paid Preparers Are Adding to the Tax Gap

The United States ("U.S.") government is dependent on the voluntary compliance of taxpayers for over ninety percent of the revenue it collects.[12]

depending on the circumstances).

9. *See Policy Basics: The Child Tax Credit*, CTR. ON BUDGET & POL'Y PRIORITY, https://www.cbpp.org/research/federal-tax/policy-basics-the-child-tax-credit (last updated Apr. 18, 2018) (explaining the positive impact that the CTC and ACTC have had on reducing poverty and providing opportunities for children); *see also Policy Basics: The Earned Income Tax Credit*, CTR. ON BUDGET & POL'Y PRIORITY, https://www.cbpp.org/research/federal-tax/policy-basics-the-earned-income-tax-credit (last updated Apr. 19, 2018) (showing how the EITC encourages and rewards work and reduces poverty).

10. *See* Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 (2017) (starting in tax year 2018, this law will make significant changes for all types of filers and will require preparer awareness).

11. *See* 26 U.S.C. § 24(h) (increasing the upper income threshold to $400,000 for joint returns and $200,000 for others, doubling the maximum credit to $2000 per child, and increasing the refundable portion of the credit to $1,400 per child).

12. *See* FISCAL YEAR 2016 HISTORICAL TABLES BUDGET OF THE U.S. GOVERNMENT, OFF. MGMT. & BUDGET 38 (Feb. 2, 2015), https://www.gpo.gov/fdsys/pkg/BUDGET-2016-TAB/pdf/BUDGET-2016-TAB.pdf (estimating that for Fiscal Year 2017, approximately 91.6 percent of revenue will come from individual income taxes (47.1 percent), payroll taxes (31.2 percent), and corporate income taxes (13.3 percent)).

While most taxpayers are able to accurately file their taxes, there is a significant difference between the amount of money owed and the amount that is collected.[13] The measure of this noncompliance is called the "gross tax gap," and between 2008 and 2010, it amounted to an average of $458 billion per year.[14] The "gross tax gap" not only represents money left on the table, so-to-speak, it suggests that taxpayers who are not properly filing are shifting their responsibility onto those who are.

The "gross tax gap" results from taxpayers underreporting, failing to file, and underpaying, with underreporting comprising approximately 71.7% of the gap.[15] The largest share of underreporting from income tax return filers comes from taxpayers filing business income reported on Schedules C, E, and F,[16] but this Note focuses on the second largest cause of underreporting: credits.[17]

By increasing the refundable portion of the CTC, Congress created a space in which preparers could make errors affecting the gap and taxpayers.[18] Said increase in the potential refund raises the following question: are the same underreporting problems facing the Earned Income Tax Credit ("EITC") shared by the CTC?[19]

Errors in claiming the EITC accounts for approximately two-thirds of the individual income tax underreporting gap attributable to credits, and between 2003 and 2013, EITC errors added $151 billion to the gap.[20] In 2014, the

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13. *See* TAX GAP ESTIMATES FOR TAX YEARS 2008–2010, IRS 1 (Apr. 2016) [hereinafter *Tax Gap Estimates*], https://www.irs.gov/pub/newsroom/tax%20gap%20estimates%20for%202008%20through%202010.pdf (explaining that over eighty-three percent of taxpayers are compliant and overviewing the extent of the "tax gap" through the lens of a study looking at tax years 2008-2010).

14. *See id.* (noting that the IRS estimates it will ultimately be able to collect $52 billion through administrative and enforcement activities making the "net tax gap" $406 billion).

15. *See id.* at 2 (estimating that underreporting represents $387 billion of the tax gap, with non-filing and underpayment representing $32 billion and $39 billion respectively).

16. *See id.* at 19 (estimating that these taxpayers account for forty-seven percent of the $319 billion-dollar gross tax gap for individual income tax).

17. *See id.* (approximating that fifteen percent of the individual income tax underreporting tax gap comes from credits including the EITC (ten percent), refundable and nonrefundable child tax credit (three percent), and the refundable and nonrefundable education credits (two percent)).

18. *See* 26 U.S.C. § 24(h) (2018) (increasing the refundable portion of the CTC could cause greater underreporting if it trends parallel to the way the EITC is treated).

19. *See Koskinen Testimony*, *supra* note 2, at 5 (testifying that underreporting for claimants of the EITC can be partially attributed to the fact that approximately sixty percent of EITC returns are prepared by paid preparers).

20. *See* Kyle Pomerleau, *The Earned Income Tax Credit Still Faces High Error Rate*, TAX FOUND. (Jan. 12, 2015), https://taxfoundation.org/earned-income-tax-credit-still-faces-high-error-rate/ (showing that the error rate of EITC returns hovered between

IRS published a study on the filing habits of EITC claimants, identifying that the claimants are far more likely to use paid preparers than non-claimants and are also more likely to use unenrolled preparers or a preparer from a national tax return preparation firm than non-claimants.[21] While some of the underreporting for EITC claimants can be attributed to self-prepared returns, as well as the complexity of the EITC requirements, it is undeniable that the failures of certain paid preparers contribute significantly to the problem.[22]

If the expansion of eligibility and the refundable nature of the CTC operate like the EITC, increasing the refundable portion of the CTC will increase the percentage of the tax gap attributable to underreporting credits irrespective of errors potentially due to fraud or misunderstanding of the rules.

B. Impact on Taxpayers

The high rate of paid preparer error surrounding credits does not simply affect the tax gap, it can lead to immediate and long-term issues for the most vulnerable taxpayers. When a taxpayer incorrectly claims all or part of the EITC, CTC, or American Opportunity Tax Credit ("AOTC"), the taxpayer must pay back any amount in error *with interest* and may be subject to a twenty percent accuracy-related penalty or a seventy-five percent fraud penalty.[23] In addition, if the IRS determines that error occurred from "reckless or intentional disregard of rules and regulations" or fraud, the taxpayer may be banned from claiming certain credits for two or ten years, respectively.[24] If the IRS determines that the error was not the result of either, the taxpayer may yet carry the burden of filing an additional form to claim the credit in subsequent years.[25] Because the Act broadens the

twenty-three and twenty-eight percent); *see also Tax Gap Estimates*, *supra* note 13 (approximating that the EITC is two thirds of the individual income tax underreporting gap). *But see* Robert Greenstein et al., *Reducing Overpayments in the Earned Income Tax Credit*, CTR. ON BUDGET & POL'Y PRIORITY, https://www.cbpp.org/research/federal-tax/reducing-overpayments-in-the-earned-income-tax-credit#_ftnref5 (last updated Feb. 20, 2018) (asserting that methodological problems may be inflating the rate of error for EITC claimants).

21. *See* Marcuss et al., *supra* note 7, at 24.

22. *See id.* (showing that twenty-nine percent of EITC claimants self-prepare); *see also* Greenstein et al., *supra* note 20 (highlighting the complexity of the EITC as a main proponent of misfiling).

23. *See Consequences of Not Meeting Your Due Diligence Requirements*, IRS, https://www.eitc.irs.gov/tax-preparer-toolkit/preparer-due-diligence/consequences-of-failing-to-meet-your-due-diligence (last updated Sept. 28, 2017) (outlining the consequences of incorrectly claiming certain credits).

24. 26 U.S.C. § 32(k) (2018).

25. *See* FORM 8862, INFORMATION TO CLAIM EARNED INCOME CREDIT, IRS, https://www.irs.gov/pub/irs-pdf/f8862.pdf (last revised Oct. 2017) (requiring that the taxpayer prove that they are in fact eligible for the credit they are claiming).

eligibility and increases the credit amount for the CTC, a larger number of people could be affected if their preparers are not accurately assisting in preparing their tax returns.

III. THE IRS'S EFFORTS TO FIX THE PREPARER PROBLEM

Just before the turn of the millennium, the IRS began issuing Preparer Tax Identification Numbers ("PTINs") so that tax preparers would not have to use their Social Security Numbers when preparing a return.[26] A decade later, recognizing the growing importance of oversight for third-party preparers, IRS Commissioner Douglas Shulman created the Return Preparer Review, with mandatory PTINs as the cornerstone.[27] The resulting regulation required that all paid preparers obtain a PTIN and renew it each year, pay associated fees, pass a competency exam, and take fifteen continuing education credits each year to stay abreast of changes; however, a group of preparers sued the IRS, claiming that it did not have the statutory authority to do so.[28]

The IRS claimed to have the authority to regulate preparers through 31 U.S.C. section 330, which allows the Secretary of the Treasury to "regulate the practice of representatives of persons before the Department of the Treasury," but the U.S. Court of Appeals for the District of Columbia, in *Loving v. IRS*,[29] disagreed.[30] The court determined that the IRS lacked statutory authority to regulate tax preparers because preparers are not "representatives" and do not "practice" before the department.[31] Ultimately, the court disallowed all of the mandated testing and continuing education requirements, leaving only the PTIN requirement and the associated fees.[32]

26. *See* Press Release, IRS, IRS to Issue Alternative Identification Numbers for Tax Preparers (Aug. 24, 1999), https://www.irs.gov/pub/irs-news/ir-99-72.pdf (providing return preparers with an option to protect their Social Security Numbers from potential abuse by their clients).

27. *Return Preparer Review*, IRS, 1-3 (Dec. 2009), https://www.irs.gov/pub/irs-pdf/p4832.pdf (outlining the commissioners plans to try to hold all preparers to the same professional standards).

28. *See* Loving v. IRS, 742 F.3d 1013, 1014-15 (D.C. Cir. 2014) (finding that the IRS only had the authority to require mandatory PTINs and charge for them but could not impose any other requirements); *see also* Regulations Governing Practice Before the Internal Revenue Service, 76 Fed. Reg. 32,286, 32,287 (June 3, 2011) (to be codified at 31 C.F.R. pt. 10).

29. 742 F.3d at 1015.

30. *See* 31 U.S.C. § 330 (2018); *see also Loving*, 742 F.3d at 1015.

31. *See Loving*, 742 F.3d at 1021-22 (stating that the IRS failed both *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council* steps because Congress had not spoken explicitly on the issue and the actions of the IRS were arbitrary and capricious).

32. *See generally id.*

In its conclusion, the court recognized that this regulation may be "wise as a policy matter," but it is one that would need a legislative solution.[33] Additionally, preparers have since won a class action suit claiming that the IRS has no authority to charge preparers for PTINs because preparers receive no special benefit from the agency.[34]

Given the aforementioned decisions, the regulatory scheme has been rendered toothless, as there are still no tests to ensure that preparers are competent to do the job.[35] The level of oversight granted to the IRS could be hugely impactful on increasing tax compliance, as evidenced by experimental programs on the state level.[36] Before the IRS proposed the PTIN program, the State of Oregon already regulated paid return preparers under a similar regulatory scheme to the IRS's attempted fix in 2011, and the state reduced its tax gap by $390 million.[37] The State of California, which maintains less stringent requirements for tax preparers, saw a decrease in compliance with their program, demonstrating that a regulatory system without teeth is not cost effective.[38]

Although it may make sense to emulate Oregon's regime on the national level, the courts have been clear that the IRS does not have the authority to do so. As such, Congress must resolve the problem. A legislative solution is now more important than ever, not only because of the CTC's potential effect on the tax gap and taxpayers, but because preparers need to be educated on what is changing between Tax Years 2017 and 2018 due to the Act.

IV. LEGISLATIVE SOLUTIONS TO THE PREPARER PROBLEM

There have been legislative efforts in both the House and Senate to expand the IRS's authority to establish competency standards for preparers in the wake of a growing tax gap, but nothing has been put into law.[39] In addition

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33. *Id.* at 1022.

34. *See* Steele v. United States, 260 F. Supp. 3d 52, 67-68 (D.D.C. 2017) (leading to an ongoing appeal and a court order estopping the IRS from continuing to charge for PTINs in the interim).

35. *See id.* (requiring that preparers need only possess a PTIN to prepare a return).

36. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-781, TAX PREPARERS: OREGON'S REGULATORY REGIME MAY LEAD TO IMPROVED FEDERAL TAX RETURN ACCURACY AND PROVIDES A POSSIBLE MODEL FOR NATIONAL REGULATION (2008) (showing that greater standards for NCRPs increased overall compliance).

37. *See id.* (attributing that the increase in compliance to the testing and education requirements of tax preparers).

38. *See id.* (recognizing that Oregon had more stringent requirements and testing for return preparers than California, with only fifty-four percent passing the state's basic examination).

39. *See* Tax Return Preparer Competency Act of 2015, H.R. 4141, 114th Cong. § 2

to these actions, the National Taxpayer Advocate ("NTA"), an independent officer inside the IRS working on systemic issues affecting taxpayers, has made the authorization of the IRS to establish minimum competency standards one of her annual recommendations.[40]

The American Institute of CPAs ("AICPA") has expressed concern about the expansion the IRS's authority to regulate tax preparers in the way that these bills have proposed.[41] One of the AICPA's main concerns is that CPAs, and other credentialed preparers, will have the additional burden of getting PTINs and will have to go through trainings and testing despite being "highly-regulated and licensed at the state level."[42] Another concern expressed by the AICPA is market confusion.[43] This concern is not a deal breaker for the AICPA, but rather, the organization is asking that the IRS have some sort of mitigating regulation that would require preparers with this new level of certification to have a disclaimer that they are in fact different from the already existing types of certified preparers.[44]

The NTA responded to the AICPA's concerns in her report, asserting that

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(2015) (adding language to 31 U.S.C. § 330 that would allow the IRS to create minimum standards for preparers); Taxpayer Rights Act of 2015, H.R. 4128, 114th Cong. § 202 (2015) (mimicking language in the Tax Return Preparer Competency Act); *see also Description of the Chairman's Mark of a Bill to Prevent Identity Theft and Tax Refund Fraud Before the S. Comm. on Fin.*, 114th Cong. 16-21 (2015) (outlining a plan requiring third-party examination and continuing education for providers).

40. *See* PURPLE BOOK, *supra* note 5, at 14-16 (outlining the necessity for this change and suggesting how it could be done).

41. *See* Letter from Troy K. Lewis, Chairman, AICPA Tax Exec. Comm., to the Honorable Orrin G. Hatch, Chairman, Senate Comm. on Fin., and the Honorable Ron Wyden, Ranking Member, Sen. Comm. on Fin. 6 (Sept. 15, 2015) [hereinafter AICPA Letter to Senate], https://www.aicpa.org/Advocacy/Tax/DownloadableDocuments/2015-09-15-Prevent-ID-Theft-and-Tax-Refund-Fraud-Comment-Letter-FINAL.pdf (asking that Congress limit the PTIN requirement to preparers "*not* supervised by an attorney, [CPA], or 'enrolled preparer'" and that the IRS take steps to limit market confusion that may occur if any of these laws are passed); *see also* Letter from Troy K. Lewis, Chairman, AICPA Tax Exec. Comm., to the Honorable Kevin Brady, Chairman, Comm. on Ways & Means, and the Honorable Sander Levin, Ranking Member, Comm. on Ways & Means 2 (Dec. 4, 2015) [hereinafter AICPA Letter to House], https://www.aicpa.org/content/dam/aicpa/advocacy/tax/downloadabledocuments/2015-12-4-aicpa-comments-on-hr-4141-final.pdf (expressing concerns with H.R. 4141 because it may require CPAs and otherwise credentialed preparers to have the additional burden of certifying with the IRS).

42. *See* AICPA Letter to House, *supra* note 41, at 2.

43. *See id.* (arguing that consumers would have difficulty understanding the differences between otherwise credentialed preparers and this new class of "certified" preparers and this would hurt CPAs' business and cause harm to taxpayers).

44. *See* AICPA Letter to Senate, *supra* note 41, at 6 (highlighting that the IRS recognized the potential for market confusions "when they required the currently unenrolled community be made subject to the guidance in Notice 2011-45, 2011-25 IRB 886 with regard to advertising restrictions").

the AICPA's argument about market confusion is unconvincing, and, regardless, the IRS "can and should" take the necessary steps to assure that people are not confused about the varying levels of credentials.[45] The NTA also ensured that the requirement of passing any tests or trainings would lie solely on non-credentialed preparers.[46]

The AICPA also suggested that there is room in the proposed bills for changes that could lead to more effective oversight, including granting the IRS the authority to rescind a PTIN from a preparer that has been proven to be preparing fraudulent tax returns.[47] Another suggestion is that the IRS could do more to exchange information about preparers with state governments in order to "improve tax administration" in a way that could reduce overall government expenditures.[48]

It does not seem that the AICPA, Congress, and the NTA have irreconcilable views, especially considering all parties recognize the damage done by underreporting. It seems that this decision will be one that depends on political expediency.[49] The Act may be the political catalyst necessary for this legislation to pass as Republicans are looking to ensure that it is implemented smoothly.[50] Just as the Act may create a potential for an increase in the tax gap, it has created an opportunity for bipartisan reform of a problem that is plaguing tax administration.[51]

V. CONCLUSION

The Act has increased the need of tax preparer regulation and has provided a politically feasible path to its possibility. Given the authority to do so, the IRS could make significant headway in shrinking the tax gap and increasing revenue by hundreds of billions of dollars. While its impact on overall revenue may be the strongest political talking point, it is important to recognize the impact a lack of regulation will have on individual taxpayers

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45. PURPLE BOOK, *supra* note 5, at 16.

46. *Id.*

47. *See* AICPA Letter to House, *supra* note 41, at 2 (stating that the IRS does not already have this authority).

48. *Id.* at 3.

49. *See* PURPLE BOOK, *supra* note 5, at 16 (stating that the support for the legislation is bipartisan).

50. *See* Erica Werner & Jeff Stein, *In Shift, GOP Eyes More Funding for IRS to Implement New Tax Law*, WASH. POST (Jan. 10, 2018), https://www.washingtonpost.com/news/wonk/wp/2018/01/10/report-irs-to-face-massive-strain-under-gop-tax-law/?utm_term=.6a6bc4a38269 (expressing support from Republicans to increase funding to the IRS).

51. *See id.* (adding that the Republicans may head the advice of the NTA because of the Act's passage).

and their trust in the tax system.

Imagine you are a single parent of two children who is counting on a tax refund to pay the bills or feed your family. You should not be worried that the IRS is going to ask for that refund back, plus interest, in a few years because you trusted in a stranger who claimed to have prepared your taxes correctly.[52] If CPAs, attorneys, enrolled preparers, and Volunteer Income Tax Assistance ("VITA") volunteers are required to demonstrate knowledge of the tax code and update their training on a regular basis, it is preposterous that virtually all you need to do to advertise as a professional tax preparer is to fill out some paperwork.[53]

The IRS needs to have a greater role in the oversight of tax preparers and should work with Congress, preparers, and taxpayers to create a regulatory scheme that will help close the tax gap and decrease negative impact on taxpayers.

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52. *See* 26 U.S.C. § 24(h) (2018) (estimating that claiming even on child incorrectly for the CTC could result in a taxpayer owing 2,000 dollars to the IRS).

53. *See PTIN Application Checklist: What You Need To Get Started*, IRS, https://www.irs.gov/tax-professionals/ptin-application-checklist-what-you-need-to-get-started (last updated Mar. 19, 2018) (listing the following requirements to receive a PTIN).

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