

2023

The Guardians of the New Internal Revenue Code

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Recommended Citation

Michael, Douglas C. (2023) "The Guardians of the New Internal Revenue Code," *Florida Tax Review*. Vol. 25, Article 4.

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FLORIDA TAX REVIEW

Volume 25

2022

Number 2

THE GUARDIANS OF THE NEW INTERNAL REVENUE CODE

by

Douglas C. Michael*

ABSTRACT

The proliferation of electronic filing (e-filing) of income tax returns creates new problems and opportunities for the regulation of the tax return preparation industry. Now that e-filing is universal, the rules of the law are, for many taxpayers, the code of the tax software, not in the Internal Revenue Code. The natural consequences of universal e-filing are unremitting complexity in a tax code which is also used to deliver social benefits in the form of tax credits. This, combined with the political pariah status of the Internal Revenue Service (IRS), makes it imperative that the IRS work with the tax return preparers to ensure that their products are safe and accurate. More importantly, the existence of such an industry creates great opportunities for the IRS to leverage its relationship with this private sector group to improve the tax return filing experience for many taxpayers. The existing voluntary relationship between the IRS and the industry is likely no longer viable, but this article provides the blueprint for government-supervised self-regulation which can solve the problems with the new code.

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[T]he United States tax administration runs on rules, both those embodied in the law and those coded into computers. It is the latter that can have a tremendous impact on the structure of tax laws. . . . Tax administration is no longer so much about individual employees administering the law to other individuals; it is much more about individual employees monitoring machines.¹

I. INTRODUCTION

Electronic filing (or e-filing) of federal income tax returns is a permanent fixture of life for taxpayers in the United States. However, it is not just the e-filing which is remarkable, but also the number of taxpayers who have decided to take the law and the e-filing software into their own hands. The following table shows the number of individual tax

1. Bryan T. Camp, *Theory and Practice in Tax Administration*, 29 VA. TAX REV. 227, 269 (2009).

Table 1

Tax year	No. of returns	% e-filed	% e-filed by tax professionals	% e-filed by individuals
2021	145,372,000	94.4	53.4	46.6
2020	169,098,000	90.1	55.8	44.2
2019	169,684,000	90.0	52.7	47.3
2018	155,660,000	88.8	58.3	41.7
2017	153,383,000	88.1	59.1	40.8
2016	152,235,000	86.9	59.6	40.4
2015	152,544,000	86.4	59.7	40.3

returns filed each year, with the breakdown in the percentage of returns e-filed by taxpayers using a tax professional and by taxpayers alone.²

We can see that most of the increase in e-filing is coming from taxpayers making their own efforts without the assistance of a tax professional. The Covid-19 pandemic dramatically accelerated this trend in tax year 2019 (filing season January-November 2020), so that tax year 2020 shows a small reversal. Regardless of who prepares the return or how it is filed, nearly all individual federal income tax returns are completed with the assistance of return preparation software (RPS).³ As all Americans become users of ubiquitous technology, we

2. Tax year 2021 data is through May 20, 2022. Internal Revenue Service, *Filing Season Statistics for Week Ending May 20, 2022*, I.R.S. (Oct. 22, 2021), www.irs.gov/newsroom/filing-season-statistics-for-week-ending-may-20-2022 [<https://perma.cc/6LLH-MHP6>]. Tax year 2019 and 2020 filings include returns filed to obtain Economic Impact Payments by those who would not usually file income tax returns. *Id.*; Internal Revenue Service, *Filing Season Statistics for Week Ending December 11, 2020*, I.R.S. (Dec. 11, 2020), <https://www.irs.gov/newsroom/filing-season-statistics-for-week-ending-december-11-2020#footnote1> [<https://perma.cc/TQN7-2P4M>].

3. Even those recalcitrant paper-filers use RPS. For the tax years for which complete data are available, the percentage of returns filed by individuals not using RPS (whether filed electronically or on paper) is 4% for tax year 2018, down from 7% in tax year 2015. National Taxpayer Advocate, *2020 Annual Report to Congress*, TAXPAYER ADVOC. SERV. (2020), www.TaxpayerAdvocate.irs.gov/AnnualReport2020 [<https://perma.cc/6T49-ESG8>].

can expect RPS use to become universal.⁴ “If tax compliance were an industry, it would be one of the largest in the United States.”⁵

Thus, there exists, especially for individual taxpayers, a new Internal Revenue Code. It is not the legal code written by Congress, but the computer code written by private RPS companies.⁶ The IRS observed as early as 2009 that “[t]he tax software industry has fundamentally changed the means of compliance with our civic tax obligations.”⁷

To be sure, this new Internal Revenue Code yields dramatic advantages for both individuals and the IRS. The combination of computer preparation and electronic filing benefits individuals by eliminating the need for paper filing, reducing processing time and increasing accuracy, all while maintaining the security and confidentiality of the information. The new code benefits the government by dramatically reducing return processing costs,⁸ and the lower error rate further reduces investigation and follow-up costs.⁹ E-filing also “lays the groundwork for further improvements in tax administration because it captures

4. Professor Austin Goolsbee’s study of RPS usage indicated that it is more correlated to comfort and familiarity with computers than to the complexity of the taxpayer’s return. See Austin Goolsbee, *The Turbo Tax Revolution: Can Technology Save Complexity?*, in *THE CRISIS IN TAX ADMINISTRATION* 124–38 (Henry J. Aaron and Joel Slemrod eds., 2004).

5. National Taxpayer Advocate, *2012 Annual Report to Congress*, TAXPAYER ADVOC. SERV. (2012), <https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/Volume-1.pdf> [<https://perma.cc/J49R-A9AJ>].

6. Prof. Lawsky takes the analogy one step further, suggesting that tax law provisions could (or should) be written in formal logic structures, paving the way for eventual use of artificial intelligence, that is, in “machines that can actually reason about the law.” Sarah B. Lawsky, *Formalizing the Code*, 70 *TAX L. REV.* 377, 396 (2017).

7. IRS PUB. NO. 4832, RETURN PREPARER REVIEW 38 (2009) [hereinafter *Return Preparer Review*].

8. The IRS “spends about \$4.78 to process a paper return compared to \$0.18 for an electronically filed return.” National Taxpayer Advocate, *2020 Annual Report to Congress*, TAXPAYER ADVOC. SERV.(2021), www.TaxpayerAdvocate.irs.gov/AnnualReport2020 [<https://perma.cc/CUT9-ZP8A>].

9. Internal Revenue Service Oversight Board (IRSOB), *Electronic Filing 2011 Annual Report to Congress*, I.R.S.O.B 7-8 (Dec. 2011), www.treasury.gov/IRSOb/reports/Documents/IRSOb_2011%20eFiling%20Report.pdf [<https://perma.cc/A4ZY-7A6B>] [hereinafter *IRSOb 2011 Efile Report*]; Government Accountability Office, *Tax Administration: Many Taxpayers Rely on Tax Software and IRS Needs to Assess Associated Risks* at 6 (Feb. 2009)

100 percent of the information on returns in a digital fashion,” rather than the small fraction of that information coded from paper returns.¹⁰

Despite these clear advantages, the new Internal Revenue Code has two unintended consequences deserving further discussion and study. First, there will now be unremitting and unstoppable growth in the complexity of the Code. Second, there is substantial discretion and uncertain reliability in the new Internal Revenue Code, as the IRS has delegated development and maintenance to private industry. Part II examines the impact of computers on tax complexity, how the new Internal Revenue Code is destined to remain complex, and the implications for tax policy. Part III describes the development of e-filing and the return-preparation industry. Part IV discusses how the federal government can, with private industry partnership, properly control and oversee the new Internal Revenue Code, to perhaps limit these unintended consequences of electronic filing and to ensure that the benefits of e-filing continue to outweigh the costs.

II. COMPLEXITY IS HERE TO STAY

The complexity of the federal income tax system is an enduring topic of scholarly debate.¹¹ On the one hand, complexity has its costs, which are clear, measurable and reducible. Estimates of compliance costs vary and are difficult to prepare,¹² but they range in the hundreds of billions of dollars.¹³ On the other hand, complexity alone is not an evil, and making

(GAO-09-297), www.gao.gov/products/GAO-09-297 [<https://perma.cc/QV26-W458>] [hereinafter *GAO Tax Software Study*].

10. IRSOB, *Electronic Filing 2011 Annual Report to Congress*, *supra* note 9, at 8.

11. For good representative bibliographies, each building on the prior, see Deborah Paul, *The Sources of Tax Complexity: How Much Simplicity Can Fundamental Tax Reform Achieve?*, 76 N.C. L. REV. 151, 153 n.3 (1997); Edward J. McCaffery, *The Holy Grail of Tax Simplification*, 1990 WIS. L. REV. 1267, 1267–68 n.1-2; Paul R. McDaniel, *Federal Income Tax Simplification: The Political Process*, 34 TAX L. REV. 27, 28 n.1 (1978–79).

12. *JCT 2015 Complexity Report*, *supra* note 27, at 14 (“[T]here is no clear consensus among economists as to how a reliable estimate of average value of taxpayer time should be made.”); National Taxpayer Advocate, *supra* note 5, at 4 n. 4 (summarizing cost-of-compliance studies and methodologies).

13. For representative estimates of annual costs, see National Taxpayer Advocate, *supra* note 5, at 6 (\$193 billion); Jason J. Fichtner and Jacob M.

taxes simpler is not necessarily a laudable goal standing alone. Simplicity may be a byproduct of meaningful tax reforms which produce efficiency or equity. Or, more fundamentally, “on fuller reflection, it appears that simplification is a hopeless cause—that it lacks a constituency; is fatally at odds with other, more important, goals of tax policy; is impossible in a complex society; or is simply unimportant.”¹⁴

Complexity takes on a new dimension with the new computer-based Internal Revenue Code. First, I consider the traditional aspects of complexity which are particularly relevant in discussing the new Code. Second, I discuss the new aspects of complexity which result from the new rules residing in computer code instead of laws.

A. *The Old Complexity*

Everyone who has studied the issue recognizes that, while there are places where clear gains could result from simplification, overall tax complexity is here to stay.¹⁵ In the Revenue Restructuring Act of 1998,¹⁶ Congress required that annual reports be made to it by the IRS Commissioner on the “sources of complexity in the administration of the Federal tax laws.”¹⁷ Despite this command, “the IRS has issued only two such reports and none since 2002.”¹⁸ The number of IRC sections,

Feldman, *The Hidden Cost of Federal Tax Policy*, SSRN 3 (2015), <https://dx.doi.org/10.2139/ssrn.2267971> [<https://perma.cc/PU23-2YCR>] (\$67 to \$378 billion), Tax Complexity, Compliance, and Administration: The Merits of Simplification in Tax Reform, Senate Committee on Finance, 114th Cong., 1st Sess. at 2 (Mar. 10, 2015), available at <https://www.finance.senate.gov/imo/media/doc/98400.pdf> [<https://perma.cc/7SU8-AQ89>] (Stmt. Of Sen. Orrin Hatch) (\$168 billion) [hereinafter *Tax Complexity Hearings*].

14. McCaffery, *supra* note 11, at 2 (footnotes omitted).

15. Lawrence Zelenak, *Complex Tax Legislation in the TurboTax Era*, 1 COL. J. TAX L. 91, 92 (2010) (“With few returns now prepared by hand, however, the computational complexity constraint on the income tax rules applicable to large numbers of taxpayers has virtually disappeared.”); Samuel A. Donaldson, *The Easy Case Against Tax Simplification*, 22 VA. TAX REV. 645, 650 n.23 (2003) (inevitability of tax complexity).

16. Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685 (1998), [hereinafter RRA98].

17. *Id.*; I.R.C. § 4022(a), 112 Stat. at 785.

18. National Taxpayer Advocate, *2014 Annual Report to Congress*, TAXPAYER ADVOC. SERV.102, www.taxpayeradvocate.irs.gov/2014annualreport

subsections, and cross-references has doubled since 1991.¹⁹ Three major presidentially-appointed study groups have made comprehensive recommendations on tax simplification, but none have evoked legislative response.²⁰ There are three aspects of complexity especially relevant to the development and ascendance of the new Internal Revenue Code—the computer code of RPS.

First, the Code is subject to constant amendment.²¹ This process is explained in part by the demand of well-financed constituencies for legislation.²² In addition, such law writing is done without careful consultation with technical writers.²³ This ensures that there will be a steady supply of errors in and modifications to the law, and that they will rarely (if ever) be drafted or passed in a manner which is optimal from a technical implementation standpoint. Neither Congress nor the IRS will or will be able to do this job; therefore, it will fall to the RPS industry.

Second, the Code is used as the vehicle for many tax expenditures, but importantly for large social programs, such as the Earned Income Tax Credit (EITC) and the Child Tax Credit (CTC). Both have

[<https://perma.cc/F99L-9P7A>] [hereinafter *NTA 2014 Report*]. See also Zelenak, *supra* note 15, at 116–18 (noting that the Commissioner has not filed a complexity report since 2000, and “there is no indication in the public record that anyone in Congress has complained”).

19. *Id.*, at 104.

20. *IRSOB, Electronic Filing 2011 Annual Report to Congress*, *supra* note 9, at 42 n.20.

21. Jonathan Barry Forman and Roberta F. Mann, *Making the Internal Revenue Service Work*, 17 *FLA. TAX REV.* 725, 772 (2015) (“Much of the complexity in tax administration comes from Congress constantly tinkering with, and adding to, the Internal Revenue Code.”).

22. See generally, Richard L. Doernberg and Fred S. McChesney, *On the Accelerating Rate and Decreasing Durability of Tax Reform*, 71 *MINN. L. REV.* 913 (1987); Donaldson, *supra* note 15, at 669–72.

23. Congress recommended that technical writers from the IRS be consulted when tax legislation is drafted, see RRA 98, *supra* note 16, § 4021, 112 Stat. at 785, but that recommendation has never been implemented. If it were, “legislation . . . crafted with smooth tax administration in mind, and . . . informed by discussions with the front-line employees who may have to explain it to taxpayers, . . . [would] likely . . . be simpler, less burdensome, more taxpayer-focused, and easier to administer.” *NTA 2014 Report*, *supra* note 18, at 110.

evolved in greater complexity and coverage since originally introduced.²⁴ They were a key part of the most recent economic assistance provisions of the American Rescue Plan Act.²⁵ Thus, the consistently complex Code will be used to deliver benefits to a population generally unable to understand those benefits without assistance of RPS or a preparer who uses RPS.²⁶

Finally, the federal income tax is levied upon complicated economic entities and situations. As others have observed, the tax code is complicated because life is complicated.²⁷ So long as the tax is levied

24. A recent report by the Treasury Inspector General for Tax Administration chronicled this increasing complexity:

The requirements to claim the EITC and the [CTC] have continued to increase in complexity over time. For example, when the EITC was created in 1975, the amount an individual was entitled to receive was based solely on the individual's earnings. Today, the EITC has four earnings limitations dependent on the taxpayer's filing status and the number of qualifying children. Since the credit's enactment, it has been modified to increase amounts and to differentiate between family size and structure. . . . Although the rules for claiming [the EITC and the CTC] are similar, they are not the same. The complexity of the rules causes taxpayers to erroneously claim the credits . . . [and] increases compliance burden for taxpayers and administrative costs for the IRS.

Treasury Inspector General for Tax Administration, *Addressing Complex and Inconsistent Earned Income Tax Credit and Additional Child Tax Credit Rules May Reduce Unintentional Errors and Increase Participation* at 6 (Report No. 2021-40-070) (Sept. 23, 2021), www.treasury.gov/tigta/auditreports/2021reports/202140070fr.pdf [<https://perma.cc/W9ZE-GKXG>].

25. See American Rescue Plan Act of 2021, Pub. L. No. 117-2; 135 Stat. 4 at 144 (codified at I.R.C. §24(i)) (CTC) and § 9621(a), 135 Stat. at 152 (codified at I.R.C. § 32(n)) (EIC).

26. One researcher notes there are “compelling reasons” to keep EITC and CTC administration within the IRS, but with some reforms as to how they are administered. MICHELLE LYON DRUMBL, *TAX CREDITS FOR THE WORKING POOR: A CALL FOR REFORM* 205, 217–19 (2019).

27. Donaldson, *supra* note 15, at 660, n.61 (“It is often said that the Code is complex because American society and its economy are complex.”); Joint Committee on Taxation, *Complexity in the Federal Tax System* 6

on income, it will continue to be complicated. And because the income tax remains the primary method of financing the federal government,²⁸ it is thus almost guaranteed, absent some political and economic sea change, that the increasingly complex income tax will continue to have a major impact on most Americans' lives.

B. The New Complexity

But there are three other reasons for the enduring complexity of the tax system which have more to do with the existence of paid preparers and RPS. These reasons also have different implications for tax policy than do the traditional concerns about complexity.

First, RPS has reduced the overall costs of complexity at the margin. Taxpayers no longer need to figure out how the tax law applies to their situations nor make the increasingly detailed calculations required for items of income, deduction or credit.²⁹ Complexity simply isn't an issue for them.³⁰ There is no political or policy value in tax simplification anymore.³¹ No taxpayers (and few practitioners) need to

(JCX-49-15) (Mar. 6, 2015), www.jct.gov/publications.html [<https://perma.cc/N2SL-8UN5>] [hereinafter *JCT 2015 Complexity Report*] (“[C]omplexity in tax rules may sometimes be necessary to effectively tax a complex economy.”). A related component of this complexity is the tax base itself. Donaldson, *supra* note 15, at 665 (“An income tax is inevitably complex because there is no simple definition of ‘income’ and no simple way to measure it.”); Joshua D. Rosenberg, *A Helpful and Efficient IRS: Some Simple and Powerful Suggestions*, 88 KY. L.J. 33, 53 (1999–2000) (“To begin with, the very concept of ‘income’ is vague and complex.”).

28. The Congressional Budget Office estimates indicate that the income tax revenues will constitute about one-half of federal budget receipts over the next ten years. Congressional Budget Office, *An Update to the Budget and Economic Outlook: 2021 to 2031*, CONG. BUDGET OFF. (July 2021), <https://www.cbo.gov/system/files/2021-07/57218-Outlook.pdf> [<https://perma.cc/8YZ8-9FGL>].

29. See Zelenak, *supra* note 15, at 98–116 (citing the Alternative Minimum Tax and phase-outs of credits and deductions as complex provisions made irrelevant by having tax software handle the calculations).

30. See *id.* at 98–99; Rosenberg, *supra* note 27, at 41 (software solves complexity problems).

31. “[T]echnology perversely encourages Congress to make exceedingly complicated law, pacified by the notion that software, rather than people,

know or care about the forms and instructions prepared by the IRS,³² and many may remain ignorant of the laws themselves. It is safe to say that tax forms (and instructions) may fade into irrelevance as most taxpayers turn to RPS regardless of how they file their returns.³³ The new Internal Revenue Code has virtually no limits to its complexity. In a 2003 article, Prof. Samuel Donaldson observed that tax complexity is different from other legal complexity (such as bankruptcy or torts) because hundreds of millions of Americans encounter the tax laws, and because the tax laws require taxpayers to police themselves.³⁴ This encounter is a softer experience now than over a decade ago. Both taxpayers and the government have come to rely on RPS as a critical piece of the machinery ensuring compliance with the tax laws.

Second, and somewhat conversely, complexity remains a major issue for many low-income taxpayers. Low-income individuals do not have returns which they consider to be “simple.” Because the tax system is used to deliver benefits through major tax expenditures,³⁵

will have to apply it.” Joshua D. Blank & Leigh Osofsky, *Automated Legal Guidance*, 106 CORNELL L. REV. 179, 243 (2020).

32. Most tax software offers an “interview” mode (in addition to a “forms” mode), where taxpayers can simply answer questions about their finances and their lives. They are presently simply a vehicle for transmitting the taxpayer’s information to the IRS by the RPS. “Whoever does the taxes may well just answer whatever questions pop-up on a computer screen, while the software gives a running account of tax liability and ultimately prints out the information in a format acceptable to the IRS.” Rosenberg, *supra* note 27, at 41. “[F]or most people, the 1040 (Individual Income Tax Return) is a summary of answers to questions posed by software or a paid preparer that doesn’t command the same amount of direct attention from taxpayers.” Richard Rubin, *There’s a New 1040 Tax Form. Will Millions of E-Filers Even Notice?* WALL ST. J. (June 29, 2018), https://www.wsj.com/articles/irs-changes-1040-tax-form-even-as-taxpayers-switch-to-digital-filing-1530264600?mod=searchresults_pos19&page=22 [<https://perma.cc/ZQE3-NWM7>].

33. See *supra* note 3 and accompanying text; Rubin, *supra* note 32 (quoting Robert Kerr of the National Association of Enrolled Agents: “The 1040 is this sort of iconic, symbolic thing, but no one actually fills out a 1040 anymore, so there’s a lot of energy being consumed by a new 1040 without the more fundamental question of: So what?”).

34. Donaldson, *supra* note 15, at 735–36.

35. See generally Jacob Goldin, *Tax Benefit Complexity and Take-up: Lessons from the Earned Income Tax Credit*, 72 TAX L. REV. 59 (2018); Michelle Lyon Drumbl, *Those Who Know, Those Who Don’t, and Those Who Know*

low-income taxpayers are driven by the resulting complexity to paid preparers and computers.³⁶ This can create an additional problem for low-income taxpayers, because this drive is one to technology to which they may not have access and to paid preparers whom they cannot afford.³⁷ Furthermore, the IRS is auditing EITC taxpayers at relatively higher rates, because of the higher rate of errors in those returns.³⁸

Better: Balancing Complexity, Sophistication, and Accuracy on Tax Returns, 11 PITT. TAX REV. 113, 119–39 (2013).

36. “[F]orcing low income taxpayers to obtain their social benefits through the tax system causes a high percentage of these individuals to use paid tax preparers at a high cost to them because of the real or perceived complexity of the tax system.” 2015 Tax Complexity Hearings, *supra* note 29, at 56 (testimony of T. Keith Fogg, Professor of Law and Director of the Federal Tax Clinic at Villanova University School of Law); Jonathan P. Schneller, *The Earned Income Tax Credit and the Administration of Tax Expenditures*, 90 N. CAR. L. REV. 719, 735 (2012) (“[A] majority of low-income workers are driven by the EITC’s complexity to turn for help, often at considerable expense, to private tax preparers with perverse incentives.”).

37. The Taxpayer Advocate reported results of surveys by that office concluding that

approximately 41 million U.S. taxpayers have no broadband access at all in their homes. Taxpayers with internet service connections slower than broadband will likely experience delays when attempting to access large files or complex web pages—including irs.gov which has over 135,000 web pages. Vulnerable populations, including low-income taxpayers, elderly taxpayers, and taxpayers with disabilities, are especially impacted by this issue. . . . In addition, almost 14 million U.S. taxpayers have no internet access at all at home, most significantly an issue in the vulnerable populations. . . . [V]ulnerable populations also feel less skilled conducting internet research.

National Taxpayer Advocate, *2017 Annual Report to Congress* 39–40 (Nat’l Taxpayer Advoc. 2017 Ann. Rep. to Cong., 2017), www.taxpayeradvocate.irs.gov/reports/2017-annual-report-to-congress/full-report/ [<https://perma.cc/4CNV-HC5B>]. Although these survey results are somewhat dated, they indicate that reaching full reliance on technology for tax compliance will result in larger costs for the last groups able to do so.

38. The rates are relatively higher because all audit rates are falling but those for EITC taxpayers are falling more slowly. *The 2019 Filing Season*

Third, the IRS remains in poor relations with Congress and critically underfunded.³⁹ Professor Leandra Lederman puts it succinctly in her recent review of IRS relations with legislators.

It may not be surprising that a Congress that has vilified the IRS in public hearings has also cut its budget. . . . Ultimately, a core problem is that the IRS is an easy target for politicians. . . . Experience has shown that if Congress finds IRS enforcement or service inadequate, it need not conclude that the IRS needs more resources—such as more personnel or better technology—to carry out that function. Instead, Congress can discipline the IRS for perceived failures in service or enforcement by decreasing its funding. The reduction in resources may also pose challenges for management, increasing the likelihood of mistakes. In other words, Congress can set a struggling IRS up for further failures.⁴⁰

And struggle it does; between fiscal years 2010 and 2018, the IRS faced an eight percent reduction in expenditures (20 percent when adjusted for inflation) and a more than 22 percent reduction in personnel.⁴¹ The

and the 21st-Century IRS, Hearings Before the Senate Committee on Finance, 116th Cong., 1st Sess. 52–53 (S. Hrg. 116–420) (Apr. 10, 2019), www.finance.senate.gov/imo/media/doc/43753.pdf [<https://perma.cc/MS35-NB5K>] (testimony of Internal Revenue Service Commissioner Charles Rettig) (“Estimates from the IRS National Research Program indicate that the EITC is over-claimed on approximately 50 percent of the returns claiming an EITC. . . . There is no emphasis on lower-income taxpayers because of their income. The IRS’s focus on EITC overpayments is based on available information about the risk of EITC overclaims as reflected in the share of taxpayers. . . .”). See also Kim M. Blomquist, *Regional Bias in IRS Audit Selection*, 162 Tax Notes Fed. 987 (March 4, 2019) (unintended consequence of this change is a concentration of audits in the southeastern U.S.).

39. See generally, Forman and Mann, *supra* note 21, at 763–72.

40. Leandra Lederman, *IRS Reform: Politics As Usual?*, 7 COLUM. J. TAX L. 36, 76–78 (2016).

41. IRS PUB. NO. 55B, 2018 IRS DATA BOOK 68 (2019), <https://www.irs.gov/pub/irs-prior/p55b—2019.pdf> [<https://perma.cc/Q35N-JU3Q>] (nominal costs and personnel numbers); Forman and Mann, *supra* note 21, at 764

agency also has no specific funding to implement its duties under the Affordable Care Act or many other recent changes.⁴² “Whatever the motivation for the recent budget cuts was, the IRS has a big job to do and less and less money to do it with.”⁴³ As this becomes a steady-state condition for the IRS, the consequences continue to mount.

It is irresponsible for an agency that touches all aspects of people’s lives to be underfunded, understaffed, and

(decrease in real dollars); see also Congressional Budget Office, *Trends in the Internal Revenue Service’s Funding and Enforcement* 1–2 (July 2020), <https://www.cbo.gov/system/files/2020-07/56422-CBO-IRS-enforcement.pdf> [<https://perma.cc/8HQT-PUAC>].

42. According to the 2020 report of the IRS Advisory Council (IRSAC):

Due to the accumulated expertise of its large workforce, massive systems and huge data depository, the IRS has been mandated additional duties outside its traditional mission and responsibilities, such as administration of significant portions of the Affordable Care Act (ACA), the Foreign Account Tax Compliance Act (FATCA), the Achieving a Better Life Experience (ABLE) Act, and the Health Coverage Tax Credit. In 2020, the IRS was further called upon to administer, in concert with other agencies, coronavirus-related economic relief for small businesses and to deliver over 160 million Economic Impact Payments to American citizens in a matter of weeks. This was a commendable and selfless effort from a devoted workforce that was itself in the throes of navigating the novel and complex logistical hurdles facing employers as they developed and transitioned to new operational models for the safety of their personnel. Often these legislative mandates, whether directly related to the IRS’s mission or not, come with insufficient or no corresponding funding. For example, the IRS spent nearly \$2.7 billion implementing the ACA from FY 2010 to FY 2018, yet Congress appropriated the IRS \$0.5 billion for implementation, resulting in the IRS absorbing the remaining \$2.2 billion cost internally.

IRS PUB. NO. 5316, IRSAC ANNUAL REPORT 19 (2020), <https://www.irs.gov/pub/irs-prior/p5316—2020.pdf> [<https://perma.cc/FY9U-8J8A>].

43. Forman and Mann, *supra* note 21, at 772.

at the mercy of shutdowns. As we document in these pages, the IRS is wrestling with its workload. With the best of intentions—namely, trying to do its job—it is making strategic decisions that ultimately burden taxpayers, increase its own rework, and create distance and distrust between taxpayers and the tax agency, thereby undermining voluntary compliance. And it is experiencing a “cycle of frustration” as it tries to soldier on with its important work in the midst of shutdowns and funding stops and starts.⁴⁴

The staffing issues are critical; even with appropriations for 2020, the IRS was unable to fill 5,000 postings for jobs. Attrition creates skills and demographic gaps which make it more difficult for the IRS to fulfill its missions.⁴⁵

The funding picture has improved recently. The IRS did receive funding from Congress to help with Covid-19-related challenges, including implementation of Economic Impact (“Stimulus”) Payments in 2020–21.⁴⁶ In the Inflation Reduction Act (IRA),⁴⁷ the IRS was provided substantial funding over ten years for modernization and staff.

44. National Taxpayer Advocate, *2018 Annual Report to Congress*, TAXPAYER ADVOC. SERV. (2018), www.TaxpayerAdvocate.irs.gov/2018AnnualReport [<https://perma.cc/L6UU-FG75>].

45. National Taxpayer Advocate, *2020 Annual Report to Congress*, TAXPAYER ADVOC. SERV. 13–14 (2020), www.TaxpayerAdvocate.irs.gov/AnnualReport2020 [<https://perma.cc/KN2S-MNDY>].

46. Testimony of Charles P. Rettig, Commissioner Internal Revenue Service before the Senate Finance Committee on the IRS Budget, June 8, 2021, <https://www.irs.gov/newsroom/written-testimony-of-charles-p-rettig-commissioner-internal-revenue-service-before-the-senate-finance-committee-on-the-irs-budget> [<https://perma.cc/M8M9-9SE5>].

47. An act to provide for reconciliation pursuant to title II of S. Con. Res. 14, Pub. L. No. 117-169 § 10301(1)(A), available at www.govinfo.gov/content/pkg/BILLS-117hr5376enr/pdf/BILLS-117hr5376enr.pdf [<https://perma.cc/529H-VM5U>], colloquially known as the Inflation Reduction Act, *see, e.g.*, remarks by the President upon signing of the law, available at www.whitehouse.gov/briefing-room/speeches-remarks/2022/08/16/remarks-by-president-biden-at-signing-of-h-r-5376-the-inflation-reduction-act-of-2022/ [<https://perma.cc/KP2H-BVE5>]. The law provides for the following appropriations for the IRS over ten years (figures rounded): taxpayer services \$3.2 billion, enforcement

The new funding from the IRA will provide a much-needed boost to operations. However, the IRS Commissioner noted, in response to 2021 funding increases, that such funds cannot immediately counteract years of neglect.

[I]t will take time to overcome the challenges of the past decade, and the agency will continue to struggle to replace employees lost through attrition and expand our workforce, support implementation of our multi-year Integrated Modernization Business Plan as designed, and continue enhancing meaningful service and compliance efforts that will earn the trust and respect of every American and improve our working relationships with taxpayers and others in the tax community.⁴⁸

These aspects of the “new” complexity work together to ensure RPS is here to stay. Because of RPS, all motivation for tax simplification has been obliterated. The new Code also relies upon “assisted” taxpayer self-certification in several Code sections through RPS. And the IRS’s persistent pariah status⁴⁹ ensures that the private sector

\$45.6 billion, operations \$25.3 billion, business systems modernization \$4.8 billion.

48. Rettig testimony, *supra* note 46.

49. Even the new funding in the Inflation Reduction Act, *see supra* note 47, drew immediate criticism from opponents, who charged that the IRS would hire 87,000 new audit agents. *See, e.g.,* Laura Davison and David Ingold, *The \$80 Billion IRS Infusion Means More Audits—in 2026 or 2027*, Bloomberg Business Week (Aug. 22, 2022), available at [https://www.bloomberg.com/news/articles/2022-08-22/the-irs-getting-87-000-agents-won-t-mean-more-audits-now?leadSource=uverify wall](https://www.bloomberg.com/news/articles/2022-08-22/the-irs-getting-87-000-agents-won-t-mean-more-audits-now?leadSource=uverify%20wall); David Lawder, *The new IRS employees: An ‘army’ or harmless programmers?*, Reuters News Service (Aug. 19, 2022), available at <https://www.reuters.com/world/us/republicans-call-it-an-army-irs-hires-will-replace-retirees-do-it-says-treasury-2022-08-19/> [<https://perma.cc/96WG-KXPS>]. The 87,000 figure apparently comes from a Treasury Department forecast for a different proposed bill providing about \$80 billion for new personnel, as opposed to the IRA’s \$45.6 billion. *See* Dept. of the Treasury, *The American Families Plan Tax Compliance Agenda 16* (May 2021), available at home.treasury.gov/system/files/136/The-American-Families-Plan-Tax-Compliance-Agenda.pdf.

assistance, in this form, will continue to be central to tax policy and administration for the foreseeable future.

III. THE DEVELOPMENT OF THE TAX RETURN PREPARATION SOFTWARE INDUSTRY

In order to understand the current government-industry relationship, the full history is critically relevant. This section discusses the development of computer technology, the subsequent agreement between the IRS and the industry to help meet the government's e-file goals, and a forecast of where new developments are likely to lead.

A. Development of E-File Technology

Tax preparation software was first developed in the mid-1980s. It was employed company-wide at Jackson Hewitt, then a small Virginia firm, in 1982.⁵⁰ Paid preparers took to the programs quickly; about a quarter of their returns were computer-prepared by 1987,⁵¹ and nearly all of them by 2005.⁵² Coordination with IRS efforts proceeded at about the same time, with the first electronic filing pilot operated in 1986, and the first large-scale operation the following year; "large-scale" was then seven cities and 78,000 returns.⁵³ E-file was available nationwide beginning in 1990.⁵⁴

The public-private structure of the e-file program was dictated in part by this history. Because private development of computer RPS predated the IRS's development of electronic submission, by the time the IRS was ready to embrace electronic filing, there was already a private industry in place with expertise which could be leveraged. "Today's third party involvement in electronic filing is shaped by the fact that the

50. Zelenak, *supra* note 15, at 94, and Rodney P. Mock and Nancy E. Shurtz, *The Turbo Tax Defense*, 15 FLA. TAX REV. 443, 456 (2014), both citing Daniel P. Grunberg, *Case Study: Information Technology at Jackson Hewitt Tax Service*, 15 J. CONSUMER MKTG. 282, 283 (1998).

51. Zelenak, *supra* note 15, at 94.

52. Mock and Shurtz, *supra* note 50, at 456.

53. Internal Revenue Service, *IRS E-File: A History*, IRS <https://www.irs.gov/pub/irs-news/fs-11-10.pdf> [<https://perma.cc/A6JW-NJT6>] (June, 2011) [hereinafter *IRS E-File: A History*].

54. *Id.*

demand for e-filing originated in the preparer community and prompted the development of partnerships between the IRS and preparers.”⁵⁵

The government did make late but brief forays into RPS development. In 1992, the IRS developed the “Telefile” program, which enabled taxpayers to file simple individual returns directly with the IRS via touch-tone telephone;⁵⁶ the program was phased out in 2005.⁵⁷ In August 1995, the IRS contracted with the Department of Commerce’s National Technical Information Service to develop Cyberfile, a more ambitious program to allow individual taxpayers to prepare and submit tax returns to the IRS using their personal computers. However, the project was not well managed and was scrapped nine months later.⁵⁸

The public-private partnership for e-filing began as a collaboration between the IRS and H&R Block, a private return preparer, in 1985,⁵⁹ with the first e-filings in 1986. The partnership was driven in part by necessity. “At the outset of the collaboration process, there were some technical and business capabilities the IRS lacked. . . . [T]he IRS did not and does not have a user-friendly web interface for taxpayers who would like to file directly to the IRS.”⁶⁰ In the Revenue Restructuring Act of 1998 (RRA),⁶¹ Congress imposed substantial oversight on the process, establishing the Electronic Tax Administration Advisory Committee (ETAAC) and requiring annual reports from the IRS on

55. Internal Revenue Service, *Advancing E-file Study: Phase I Report* 13, [<https://perma.cc/4ATU-QN57>] IRS (2008), www.irs.gov/pub/irs-utl/irs_advancing_e-file_study_phase_1_report_v1.3.pdf [hereinafter *Advancing E-file Study*].

56. IRS E-File: A History, *supra* note 53.

57. Internal Revenue Service Oversight Board, *Electronic Filing 2012 Annual Report to Congress* 9 (Dec. 2012), www.treasury.gov/IRSOB/reports/Documents/IRSOB_E-File%20Report%202012.pdf [<https://perma.cc/V5Y2-CHBD>].

58. See General Accounting Office (now Government Accountability Office), *Tax Systems Modernization: Cyberfile Project was Poorly Planned and Managed* at 1–4 (1996) (Rept. No. 96-140).

59. Stephen Holden and Patricia Fletcher, *The Virtual Value Chain and E-Government Partnership: Nonmonetary Agreements in The IRS E-file Program*, Handbook of Public Information Systems (G. David Garson ed. 375 2nd ed. 2005).

60. *Id.* at 377. Telefile is, of course, the small exception; see *id.* and text accompanying notes 56–57 *supra*.

61. See *supra* note 16.

e-filing progress.⁶² However, Congress was less than clear about public or private leadership. The RRA conference report relating to Section 2001 of the bill⁶³ is equivocal. “The intent of the conferees with respect to this provision is for the IRS and Treasury to press for robust private sector competition. . . . [T]he conferees also intend that the IRS should continue to offer and improve its Telefile program *and make available a comparable program on the internet.*”⁶⁴

The partnership continued to advance in the late 1990s, as each party recognized that the combination met goals which could not be met separately. The IRS created the mechanism to submit tax returns electronically, and the private sector developed the mechanism and market to provide returns to be submitted electronically.⁶⁵ Both parties were able to leverage advantages from the other to achieve their goals: the public goal of universal e-filing, and the private goal of developing a robust RPS industry.

As radical as some of the product and program changes were, neither the IRS nor the partners “started from scratch” on a number of the most visible changes like electronic signatures and payments. The partners were extremely willing to work for mutually agreed-upon goals, in some instances blurring the boundaries between the sectors for the benefit of the IRS e-file program.⁶⁶

A major push toward reliance on the private sector came in 2001 with President George W. Bush’s President’s Management Agenda (PMA). The PMA adopted a five-part program involving “expanded

62. *Id.* at 378; RRA98, *supra* note 16, I.R.C. § 2001, 112 Stat. 685, 783 (1998).

63. This section establishes the 80% efile goal and an “electronic commerce advisory group” to the Secretary of the Treasury and states the “policy of Congress” that the IRS “should cooperate with and encourage the private sector by encouraging competition to increase electronic filing of . . . returns.” RRA98, *supra* note 16, §2001(a)(3), 112 Stat. 685, 783 (1998).

64. H.R. Conf. Rep. 105-599 at 235, 105th Cong., 2nd Sess. (1998) (emphasis added).

65. *See* Advancing E-File Study, *supra* note 55, at 13.

66. Holden and Fletcher, *supra* note 59, at 382–83.

e-government” as one of the priorities for all government departments and agencies.⁶⁷ This effort emphasized use of the internet as part of government modernization, continuing the refrain begun with President Clinton’s National Performance Review (NPR). According to an NPR director, “Perhaps the NPR’s most concrete accomplishment was reforming the Internal Revenue Service.”⁶⁸ The intervening RRA solidified e-filing as a national goal.⁶⁹ In 2001, the PMA took the legislative mandate to heart. “In accordance with the . . . directive, the IRS began working in partnership with the tax software industry to develop a solution. Two principles guided its development: no one should be forced to pay extra to file his or her return and the IRS should not get into the software business.”⁷⁰ Implementing the PMA, Treasury Secretary Paul O’Neill

stated that it was not his intent “for the IRS to get into the software business, but rather to open a constructive dialogue with those who already have established expertise in the field. In the end, this effort should come up with a better way to save time and money for both taxpayers and the Government.” Since software companies had already proven their knowledge in the area of electronic tax services, working with private

67. See generally Free File: About the Free File Alliance, www.irs.gov/uac/about-the-free-file-alliance [https://perma.cc/6SE4-W5ZH].

68. Charles S. Clark, *Reinventing Government—Two Decades Later*, GOV’T EXEC. (Apr. 26, 2013), <http://www.govexec.com/management/2013/04/what-reinvention-wrought/62836/> [https://perma.cc/CR4Z-HSC8] (quoting Robert Stone, “the project’s director and ‘energizer in chief’”).

69. See RRA98 *supra* note 16 (goal to have 80 percent of returns e-filed by 2007). This is true even though “[t]he goals set by Congress in RRA98 were seen by the participants as too high to achieve, although, at the time, no one was willing to say so in public on the record. The reality is that there is no precedent in technology diffusion, other than Internet adoption itself, which supports such a steep adoption curve.” Holden and Fletcher, *supra* note 66, at 383.

70. *2006 Tax Return Filing Season and The IRS Budget for Fiscal Year 2007: Hearing before the Subcomm. On Oversight, House Ways and Means Comm.*, 109th Cong., 2d Sess. 9 (2006) (testimony of IRS Commissioner Mark Everson), www.gpo.gov/fdsys/pkg/CHRG-109hrg30443/pdf/CHRG-109hrg30443.pdf [https://perma.cc/FX88-94CM] [hereinafter *Everson Testimony*].

industry has several advantages. It encourages competition, gives taxpayers more choices, and reduces costs to the American public.⁷¹

This policy ultimately received Congressional endorsement.⁷² In this fashion, the government exited the RPS business, leaving the development to private industry.

Collaboration permitted the IRS to change its ways, and to quickly add features to e-filing which were required by RRA but would have been impossible by the government acting alone. “Before the creation of [e-filing partnerships], IRS and the tax industry had what both would call an indifferent to stormy series of interactions.”⁷³ But the partnership with diverse motivations worked well. The private sector saw a way to expand its reach with its products, and the IRS saw a way to get paperless filing products to the markets (taxpayers and return preparers) much more quickly. “The two sets of partners, therefore, shared one overriding common interest—they both wanted to increase the volume of electronic filing, albeit for different reasons.”⁷⁴

B. The Free File Alliance

The main group upon which the IRS began to and continues to rely to implement this partnership is the Free File Alliance (FFA).⁷⁵ The FFA

71. Michelle Chu and Melissa Kovalic, *An Analysis of the Free File Program*, in SPECIAL STUDIES IN FEDERAL TAX STATISTICS 115 (2006), <https://www.irs.gov/pub/irs-soi/06rpppchu.pdf> [<https://perma.cc/95TH-P7DV>] (citations omitted).

72. See Committee on Appropriations, U.S. House of Representatives, *Treasury, Postal Service, and General Government Appropriations Bill, 2003* at 38 (H.R. Rep. No 107-575, July 15, 2002), <https://www.congress.gov/107/crpt/hrpt575/CRPT-107hrpt575.pdf> [<https://perma.cc/RUX4-ZRJN>] (“The Committee strongly believes in the industry-IRS partnership concept and directs the IRS to continue strengthening its ties with the private sector and computer software community as it moves forward in this endeavor.”).

73. Holden and Fletcher, *supra* note 59, at 379.

74. *Id.* at 381.

75. “In accordance with this . . . directive [implementing the PMA], the IRS worked in partnership with the tax software industry to develop a solution. The result was the formation of the Free File Alliance, LLC.” IRS,

is a consortium of nine private software companies,⁷⁶ originally structured as a limited liability company, and reorganized as a corporation with public charity status in 2012.⁷⁷ The official partnership began on October 30, 2002, and now extends through 2022.⁷⁸

The intent of the IRS-FFA arrangement is to increase free e-filing and encourage competition in the private sector RPS industry.⁷⁹ The arrangement faced early criticism from consumer groups concerned about the impact of limited availability to low-income taxpayers and the promotion of refund anticipation loans.⁸⁰ Both of these issues have been addressed in later iterations of the agreements, which

Free File: About the Free File Alliance, www.irs.gov/uac/about-the-free-file-alliance [<https://perma.cc/L2JD-QR4B>].

76. The nine FFA members are listed at www.freefilealliance.org/free-file-alliance-members/ [<https://perma.cc/H89V-2MJH>]. Intuit announced it was leaving the FFA effective October 2021. *See infra* note 160 and accompanying text.

77. *See* “Preamble” in the Seventh Memorandum of Understanding on Service Standards and Disputes (2015), www.irs.gov/pub/irs-utl/2015-seventh-free-file-mou.pdf [<https://perma.cc/W9P6-ASA7>] [hereinafter *Seventh MOU*]. The entity is now referred to as “Free File, Inc.” or FFI. *Id.* The public charity status was recently changed; *see infra* note 163 and accompanying text.

78. For a summary through 2008, *see Advancing E-File Study, supra* note 55, at 17. The governing document is actually an interlaced combination of five “agreements” and eight “memoranda of understanding” (the latter with two amendments). *See* www.irs.gov/uac/about-the-free-file-alliance [<https://perma.cc/YX9B-MFV9>] for a compilation of all the documents. The intention is for the IRS and the FFA to annually conclude an MOU which addresses the year-to-year issues, with the underlying shorter Agreement to run for several years. *See* 2009–2014 Free On-Line Electronic Tax Filing Agreement Amendment §§ I-II, www.irs.gov/pub/irs-utl/2009-2014-free-file-online-electronic-filing-agreement-amendment.pdf [<https://perma.cc/2B6K-XXHM>]. The “agreement” has not been substantively amended since 2009, but the MOU is renegotiated and rewritten at each stage.

79. *See* Internal Revenue Service, *Electronic Tax Preparation and Filing: Intent to Enter Agreement, Opportunity for Comment, Opportunity to Submit Proposals for Additional Consortia*, 67 FED. REG. 51,261, 51,261 (2002).

80. *See* Comment of Consumer Federation of America, National Consumer Law Center, Consumers Union, and U.S. Public Interest Research Group Regarding IRS Proposed Pact with Commercial Preparers, September 4, 2002, <http://web.archive.org/web/20060515014244/http://www.consumerlaw>

now require the free-file services to be available to taxpayers with the lowest incomes,⁸¹ and prohibit any discussion or advertising of refund anticipation loans.⁸² Later criticism of the involvement of private industry came from the Treasury Inspector General for Tax Administration, who testified about the FFA that “their primary goal is to keep the Federal Government from entering the tax preparation business,”⁸³ and from the National Taxpayer Advocate, who characterized the FFA program as “a Wild, Wild West of differing eligibility requirements, differing capabilities, differing availability of and fees for add-on products, and many sites that are difficult to use.”⁸⁴ Other scholars and researchers have been similarly skeptical of FFA’s motives and performance.⁸⁵

.org/initiatives/refund_anticipation/content/irs_content.html [https://perma.cc/6LQJ-9V62].

81. Seventh MOU, *supra* note 77, I.R.C. §§ 1.5 and 4.1,3(i).

82. *Fourth Memorandum Of Understanding On Service Standards And Disputes Between the Internal Revenue Service and Free File Alliance, LLC* § 4.30(c) (2009), www.irs.gov/pub/irs-utl/2009-fourth-ff-mou.pdf [https://perma.cc/VS4J-9DYG]. The IRS removed the “debt indicator” from e-file data prior to the 2011 filing season, which effectively shut down the refund anticipation loan business. *See* IRS Removes Debt Indicator for 2011 Tax Filing Season IR-2010-89 (Aug. 5, 2010), *available at* <https://www.irs.gov/pub/irs-news/ir-10-089.pdf>; Mark P. Cussen, *Why the IRS Blocked Refund Anticipation Loans*, INVESTOPEDIA, <http://web.archive.org/web/20140414163057/www.investopedia.com/articles/personal-finance/040814/why-irs-blocked-refund-anticipation-loans.asp> [https://perma.cc/5B39-3TX8]. (“Most banks ceased to offer RALs as a result of this change, and they disappeared altogether after 2012. . . . The demise of the refund anticipation loan marks a major turning point in the tax preparation industry. . . . Many preparers who previously relied on the income that these loans generated for them have been forced out of business, while others have had to cope with reduced revenues.”).

83. J. Russell George, Treasury Inspector General for Tax Administration, Testimony Before the Subcommittee on Oversight of the House Committee on Ways and Means 4 (Apr. 6, 2006), www.treasury.gov/tigta/congress/congress_04062006.pdf [https://perma.cc/9ZXX-MRZU].

84. Nina Olson, *Tax Return Preparation Options for Taxpayers 19* (2006) in IRS, *Advancing E-file Study: Phase I Report*, *supra* note 55, at 18.

85. For a summary focused more on one RPS company but providing good background, see Justin Elliott and Paul Kiel, *Inside TurboTax’s 20-Year Fight to Stop Americans from Filing Their Taxes for Free*, PRO PUBLICA (Oct. 17,

Despite the fact that one of the objectives of the FFA was to increase competition,⁸⁶ the Alliance members had a bad experience with runaway competition in the 2005 filing season, which resulted in free filing being offered to virtually all taxpayers, with a substantial increase in customers. This experience prompted the members to insist on abolition of this competitive pressure if the arrangement were to survive. With the Alliance unraveling, the IRS agreed that the free-file program should be limited in its availability.⁸⁷

The thought that the FFA might restrain competition came up in other circumstances as well. In 2002, when the arrangement was first proposed, the Council for Electronic Revenue Communication Advancement, Inc. (CERCA), predecessor to the FFA,⁸⁸ sought a Department of Justice business review letter,⁸⁹ and the Department concluded that the FFA, if operated as proposed, was “not likely to produce anti-competitive effects.”⁹⁰ Several years later, private plaintiffs challenged the FFA arrangement under the antitrust laws and the Independent Offices Appropriations Act (IOAA).⁹¹ The Court of Appeals affirmed

2019), www.propublica.org/article/inside-turbotax-20-year-fight-to-stop-americans-from-filing-their-taxes-for-free [<https://perma.cc/79GY-PPA4>].

86. See *supra* text accompanying note 71.

87. See *Everson Testimony*, *supra* note 70, at 9–10 (“As we prepared for negotiations to extend the Free File agreement in 2005, the IRS took the position that Free File should be available to as many taxpayers as possible. The Alliance’s position was that Free File should only be available to low and moderate income taxpayers. As is the case in most negotiations, we compromised and agreed that Free File would be offered to 70 percent of taxpayers, or anyone with an [adjusted gross income] of \$50,000 or less in 2005.”).

88. According to CERCA’s website, it was formed in 1994 “at the direct request of the Internal Revenue Service.” <https://cerca.org/about/> [<https://perma.cc/5KXT-NPP8>]. In addition, “CERCA played a central role in the creation of the [Free File] Alliance.” Testimony of Bernard McKay, CERCA Chairman, before the IRS Oversight Board 2 (February 1, 2005), *available at* https://www.treasury.gov/IRSOB/meetings/Documents/2005statement_cerca.pdf [<https://perma.cc/X37V-ZUPS>].

89. See Antitrust Division Business Review Procedure, 28 C.F.R. § 50.6.

90. Council for Electronic Revenue Enhancement, Inc., 2002 WL 35598904 (Oct. 7, 2002).

91. *Byers v. Intuit, Inc.*, 600 F.3d 286 (3d Cir. 2010). The plaintiffs alleged violation of § 1 of the Sherman Act, 15 U.S.C. § 1, and the IOAA, 31 U.S.C. § 9701.

the dismissal of both claims. It held, on the IOAA claim, that the FFA was sufficiently “private” not to be covered by the Act.⁹² And on the antitrust claim, the court held that the FFA was sufficiently “public” in its relationship to the IRS to be within the “implied immunity” doctrine under the antitrust laws.⁹³ Because of this ruling, the court did not reach the plaintiffs’ substantive antitrust allegation, namely, that the limits on service adopted by the FFA and IRS in the face of substantial competition⁹⁴ were “an illegal horizontal agreement amongst FFA members to restrict output.”⁹⁵

How popular is the free file program? Although up to 70 percent of taxpayers are eligible, only a small fraction takes advantage of the service.⁹⁶

The reasons offered for the very limited success of the free file program are fairly straightforward. It is limited in its publicity (primarily on the IRS’s main web page, www.irs.gov). Each FFA member can

92. See Byers, 600 F.3d at 292 (“We cannot accept Byers’ argument since she erroneously conflates the statutory duty delegated to the IRS—i.e., **collecting** and **processing** tax returns—with the services provided by the FFA members—i.e., **preparing** and **filing** the returns.”) (emphases in original).

93. See *id.* at 294–95 (holding that a defendant is entitled to implied immunity if its otherwise anticompetitive conduct is directed by a government agency; the defendant itself need not be public or quasi-public).

94. See *supra* text accompanying note 87.

95. Byers, *supra*, 600 F.3d at 290.

96. TREASURY INSPECTOR GENERAL FOR TAX ADMINISTRATION (TIGTA) FILING SEASON REPORTS, e.g., www.treasury.gov/tigta/auditreports/2022reports/202240035fr.pdf [https://perma.cc/7VDZ-B28T]. The tax year 2019 numbers exclude 7.8 million returns filed in 2020 to claim only the Economic Impact (“Stimulus”) Payments (EIP). A tool to allow EIP applications was developed jointly by the IRS and the Free File Alliance. See TIGTA, RESULTS OF THE 2020 FILING SEASON AND EFFECTS OF COVID-19 ON TAX PROCESSING OPERATIONS 9 (MAR. 22, 2021) available at www.treasury.gov/tigta/auditreports/2021reports/202146023fr.pdf [https://perma.cc/LG2X-RESB], and *IRS Free File Marks Record Increase*. IR-2020-230 (October 6, 2020), available at www.irs.gov/newsroom/irs-free-file-marks-record-increase-available-through-oct-15 [https://perma.cc/7YSD-L4PP]. The tax year 2020 numbers are through March 5, 2021, and the percentage change number for that year is compared to March 6, 2020. TIGTA, INTERIM RESULTS OF THE 2021 FILING SEASON 5 (May 6, 2021) available at www.treasury.gov/tigta/auditreports/2021reports/202140038fr.pdf [https://perma.cc/8ZPM-C947].

Table 2

	Tax year					
	2021	2020	2019	2018	2017	2016
% of all e-file returns prepared using Free-File	2.3	3.2	2.7	2.1	2.0	2.0
% change in number of Free-File returns from prior year	-30.3	0.2	66.4	5.6	4.7	-2.4

set its own limits on eligibility, so that the offered services vary substantially. And because FFA members can refuse, on the free-file site, to provide any added value, such as to prepare any state tax returns or provide the taxpayer with a printed copy of the prepared return,⁹⁷ many taxpayers who originally consider the Free File program eventually will choose to pay for the full service they need.⁹⁸ In addition, the IRS spends very little money promoting the Free File program, and the FFA does no advertising, passing that responsibility on to the IRS.⁹⁹

97. The printing of returns was addressed in the very first MOU and has always stated equivocally that, although FFA members must allow free printing, it “must be provided for the same period of time (e.g. 3 days, 3 weeks or 3 months) that such services are provided for free to commercial customers.”) *See, e.g.*, Seventh MOU, *supra* note 77, § 4.16.1.

98. *See* Laura Sanders, *Why ‘Free file’ for Taxes Isn’t So Popular*, WALL ST. J. (Jan 30, 2015), available at <https://www.wsj.com/articles/why-free-file-for-taxes-isnt-so-popular-1422633546> [<https://perma.cc/QPT7-S4SH>]; *see supra* text accompanying note 84; *Advancing E-File Study*, *see also supra* note 55, at 124–25.

99. The Eighth MOU provides that “[t]he IRS will make consistent, good-faith efforts to promote the Free File Program in appropriate media activities.” Eighth Memorandum of Understanding on Service Standards and Disputes § 4.35 (Oct. 31, 2018), available at <https://www.irs.gov/pub/irs-utl/Eight%20Free%20File%20MOU.pdf> [<https://perma.cc/MC2Z-ZTVF>]. The agency has been limited in its ability and willingness to do so, however. *See, e.g.*, Treasury Inspector General for Tax Administration, *Complexity and Insufficient Oversight of the Free File Program Result in Low Taxpayer Participation* at 9, available at <https://www.treasury.gov/tigta/auditreports/2020reports/202040009fr.pdf> [<https://perma.cc/8TCQ-PZYK>] (the IRS “has not paid for advertising . . . since Fiscal Year 2014.”).

Also telling is the IRS's own research into the behavior of Free-File participants. Although most taxpayers gave good marks to the Free-File experience, most "migrated" to a different e-file platform the following year. The main reason offered for this switch was that taxpayers went directly to the website of the RPS company, "possibly because they 'thought they were continuing to use Free File by going back to [last year's] provider.'"¹⁰⁰

Most recently, controversy has centered on an attempt to adopt legislation to incorporate the voluntary program into law, and on the opposition to that legislation based in part on perceived unfairness on the part of the Free File members. The Taxpayer First Act of 2019 included a provision to require the IRS to continue to operate the Free File program in the manner of the series of memoranda and agreements between the IRS and the FFA.¹⁰¹ After controversy surfaced about the FFA members' apparently making it more difficult for taxpayers to locate and use the free products,¹⁰² the provision "legislating" the IRS-FFA arrangement was removed from the version of the bill ultimately enacted.¹⁰³

100. *Advancing E-File Study*, *supra* note 55, at 134 (quoting from the IRS 2008 Free File Migration Study) (bracketed material in source).

101. See H.R. 5444, The Taxpayer First Act, § 202, Congressional Record p. H3412 (Daily Edition, April 18, 2018).

102. See Dennis J. Ventry, Jr., *The Fix Was In: Mitre's "Independent" Review of Free File*, 166 TAX NOTES FEDERAL 875, 875-77 (2020). IRSAC 2018 Report; Elliott and Kiel, *supra* note 85 ("Even as TurboTax's business thrived, 2019 has been a rocky year for Intuit's long-running war against government encroachment. In April, the company was close to finally succeeding in its long-held goal to make Free File permanent. A bill called the Taxpayer First Act was sailing toward almost unanimous approval in Congress. But after ProPublica published a series of stories about the program, including a story showing that military families and students were particularly affected by Intuit's business tactics, the bill stalled. Congress ultimately removed the provision that would have enshrined Free File in law.").

103. Compare §§ 1101-1103 of H.R. 1957, the version originally passed by the House of Representatives, at Congressional Record H3153 (daily edition Apr. 9, 2019), with §§ 1101-1102 of H.R. 3151, the bill ultimately passed by both chambers, at Congressional Record H4353 (daily edition June 10, 2019), and enacted, *see* Pub. L. No. 116-25, 133 Stat. 981, 985-86 (July 1, 2019).

In addition, the controversy over access to free file products resulted in a review by the Treasury Inspector General for Tax Administration,¹⁰⁴ and a separate study contracted by the IRS with MITRE Corp. to review the entire Free File program.¹⁰⁵ Both studies made recommendations for improvements to the Free File program, none yet implemented.

The continuing utility of the FFA program may be limited. The “carrot” of access through the IRS website¹⁰⁶ is far less valuable than it was at the program’s inception, given the prevalence of RPS companies and web-search tools which quickly provide taxpayers with their e-filing options. Although recent increases in e-file participation have come mostly from taxpayers who self-prepare their returns, the yield from this population can be expected to diminish over time as the number of paper-filers shrinks. The Free-File program was not particularly successful in reaching this population in any event, and the FFA has little incentive to expand the eligibility for this program.¹⁰⁷

C. The Developing Relationship Between Government and Private Industry

Beyond the voluntary arrangement with the FFA, the IRS has some authority over tax return preparers as well as those who file forms with the agency. Some of this regulation has been limited by court challenges to the IRS’s authority in these areas, and some areas are still developing.

104. Treasury Inspector General For Tax Administration, *Complexity and Insufficient Oversight of the Free File Program Result in Low Taxpayer Participation* (Feb. 3, 2020), <https://www.treasury.gov/tigta/auditreports/2020reports/202040009fr.pdf> [<https://perma.cc/MUM2-54K7>] [hereinafter *TIGA 2020 Report*].

105. MITRE Corp., *Independent Assessment of the Free File Program* (Oct. 3, 2019), https://www.irs.gov/pub/newsroom/01_free-file-program-assessment-100319.pdf [<https://perma.cc/C9XP-DZLM>]. Although the document is labelled “Not for Public Release,” its appearance at www.irs.gov belies that prohibition; See Ventry, *supra* note 102, at 878 n.43 (details of release of the report and exhibits).

106. See Holden and Fletcher, *supra* note 59, at 379 (“What the IRS brought to the partnership was a tremendous market opportunity for the tax preparation and filing community [through] the IRS website. . . .”).

107. Advancing E-File Study, *supra* note 55, at 135.

1. Existing Regulation

Tax return preparers are subject to federal regulation. They assist taxpayers in fulfilling the requirement to file returns or information as required by the IRS.¹⁰⁸ The IRS is authorized to require certain information to be filed electronically, and to govern the format of electronically-filed information.¹⁰⁹ There is substantial regulation and testing of the security and technical performance of RPS; it must safeguard taxpayer information and transmit information in a format acceptable to IRS data-processing equipment.¹¹⁰ The most recent efforts in this area include an ambitious “Security Summit” composed of IRS officials, tax return preparation firms, software developers and others, to deal with the continuing problems of identity theft. The Summit was first convened in 2015,¹¹¹ and its work continues, fortified by cooperation with industry members and state revenue departments.¹¹²

There is much less regulation of the substantive performance of RPS. The IRS does run RPS programs through several test scenarios each year, which test basic computations and presentation of the forms and schedules.¹¹³ These test scenarios include filled-in forms and

108. See I.R.C. § 6011(a).

109. See I.R.C. § 6011(e); Rev. Proc. 2007–40, 2007–1 C.B. 1488 (June 25, 2007), www.irs.gov/irb/2007-26_IRB/ar13.html [<https://perma.cc/52UC-RY7L>].

110. See Rev. Proc. 2007–40, *supra* note 107, at §§ 4 and 7, and the requirements in IRS Publication 1345, *Handbook for Authorized IRS e-file Providers of Individual Tax Returns*, available at www.irs.gov/pub/irs-pdf/p1345.pdf [<https://perma.cc/B94G-7E6E>]; IRS PUB. NO. 1436, TEST PACKAGE FOR ELECTRONIC FILERS OF INDIVIDUAL INCOME TAX RETURNS FOR TAX YEAR 2016 (2016) www.irs.gov/pub/irs-pdf/p1436.pdf [<https://perma.cc/S4BG-7ZTG>] [hereinafter *Publication 1436*].

111. See *2016 Security Summit: Protecting Taxpayers from Identity Theft Tax Refund Fraud* 19 (June 2016), available at www.irs.gov/pub/newsroom/6_2016_security_summit_report.pdf [<https://perma.cc/F894-WPJ7>].

112. See Identity Theft Tax Refund Fraud Information Sharing and Analysis Center, 2020 Annual Report, <https://www.irs.gov/pub/irs-utl/2020-information-sharing-and-analysis-center-isac-annual-report.pdf> [<https://perma.cc/UXL2-66AQ>].

113. See *Publication 1436*, *supra* note 110. For tax year 2020, the IRS published 24 scenarios for individual income tax RPS, which included the

information; they do not test the ability of the RPS to extract information from the taxpayer or the taxpayer's forms (other than a W-2) or to interview the taxpayer regarding the completeness or propriety of items of income, adjustment, deduction, or credit claimed. The RPS industry self-reports substantial compliance efforts, but most compliance measures are based on security and service measures discussed above, not on accuracy. The IRS does not directly monitor any of these claims, contending that any audit of the accuracy of RPS would be prohibitively expensive, and it therefore relies on the industry to do its own testing.¹¹⁴ Reviewing this situation, the Government Accountability Office concluded in 2009:

While significant problems have not occurred to date, without performing a risk assessment—the first step in risk management and mitigation—IRS does not know the potential magnitude or nature of problems or their likelihood of occurring. As a result, IRS does not have an informed basis for making resource allocation decisions, taking steps to mitigate any significant risks, or avoiding costly risk mitigation in areas where the risks are low.¹¹⁵

The FFA software is similarly tested, but these tests “do not assess the accuracy of applying the tax law. [IRS] [m]anagement stated testing of commercial tax preparation software to determine its

following items: wages, interest, state/local income tax refunds, dividends, capital gains, sole proprietorship profit/loss and self-employment tax, social security and retirement income, farm income, income for residents of Puerto Rico, penalty on early withdrawal of savings, itemized deductions, noncash charitable contributions, earned income credit, child/dependent care credit, education credits, premium tax credit, split refund, extension, installment agreement requirements, expatriation, fiduciary notices, social security income, partnership distributions, household employment taxes and nonresident returns. See www.irs.gov/tax-professionals/e-file-providers-partners/modernized-e-file-mef-assurance-testing-system-ats-updates [<https://perma.cc/3JSL-XQ8E>].

114. See GAO Software Study, *supra* note 9, at 16.

115. *Id.* at 19.

accuracy in applying the tax law would be a monumental challenge for the IRS.”¹¹⁶

In general, the IRS has concluded that “[t]here is . . . no direct evaluation of software packages for accuracy or usability.”¹¹⁷ Reasons given by the IRS include:

- The IRS cannot contractually require that commercial preparers place their programs under IRS control, because it would require that the companies reveal functional specifications and design details to the agency.
- The IRS would be performing the industry’s quality review.
- The IRS could be held liable for RPS errors if it had “certified” the product.¹¹⁸

The IRS plans to continue to study the idea of regulation of the RPS industry. The 2009 Return Preparer Review¹¹⁹ proposed a task force of industry representatives, state governments and other stakeholders to “continue to assess the risks of a high level dependence on consumer and commercial tax preparation software.”¹²⁰ There has been no such task force constituted to date.

2. Attempts at Extending Regulation

The IRS engaged in a comprehensive study of the return preparer industry in 2009.¹²¹ Based on this investigation, it adopted broad-based

116. Treasury Inspector General for Tax Administration, “Additional Action is Needed to Expand the Use and Improve the Administration of the Free File Program” 3–4 (June 28, 2007), <http://web.archive.org/web/20171220060558/https://www.treasury.gov/tigta/auditreports/2007reports/200740105fr.pdf> [<https://perma.cc/2PJX-BBBE>] [hereinafter *TIGTA 2007 Report*].

117. Return Preparer Review, *supra* note 7, at 10.

118. TIGTA 2007 Report, *supra* note 116, at 37.

119. See *supra* note 7. This report is discussed in more detail in the following section.

120. *Id.* at 39.

121. Return Preparer Review, *supra* note 117.

regulations in 2011, requiring return preparers to register with the IRS, pass a competency examination and receive a mandatory minimum of continuing education.¹²² These regulations were ultimately invalidated in *Loving v. IRS*,¹²³ which held that they were beyond the IRS's statutory authority.¹²⁴ Indeed, a later case¹²⁵ has gone further, indicating that the IRS only has the authority to regulate written tax advice and those professionals who represent taxpayers in adversarial proceedings.¹²⁶ The IRS does, however, retain the authority to require registration of return preparers and to charge appropriate fees for doing so.¹²⁷

The IRS is thus left with little authority to regulate the return preparation process prior to any adversary proceedings. In addition, the IRS has limited its scope of regulation of the software used by those preparers, requiring only technical compatibility and the safeguarding of personal information.¹²⁸

IV. THE GOVERNMENT'S ROLE IN THE NEW CODE

The IRS is at a crossroads with respect to return preparation software. It faces increasing complexity of the job it is required to do and decreasing resources with which to do it. Although the IRS is committed to partnering with the RPS industry, to date the partnership is limited in its extent and success. The IRS needs a new model for its role in the new Internal Revenue Code. In this section, I discuss the

122. See *Regulations Governing Practice Before the Internal Revenue Service*, 76 FED. REG. 32,286, (2011), codified in 31 C.F.R. Pt. 10; "Plain English" summary, *id.* at 32,287.

123. *Loving v. I.R.S.*, 742 F.3d 1013 (D.C. Cir. 2014).

124. "In our judgment, the traditional tools of statutory interpretation—including the statute's text, history, structure, and context—foreclose and render unreasonable the IRS's interpretation of [31 U.S.C.] Section 330." *Id.* at 1021–22.

125. *Ridgley v. Lew*, 55 F.Supp.3d 89 (D.D.C. 2014).

126. *Id.* at 97–98; see Jamie P. Hopkins, *Loving v. IRS: The IRS' Achilles' Heel for Regulated Tax Advice?*, 34 VA. TAX REV. 191, 219–21 (2014); Jay A. Soled and Kathleen DeLaney Thomas, *Regulating Tax Return Preparation*, 58 B.C. L. REV. 151, 162–63 (2017).

127. See Frank G. Colella, *D.C. Circuit Affirms IRS Authority to Require Practitioner Tax ID Numbers & Impose a User Fee: Montrois v. United States*, 20 Hous. Bus. & Tax L.J. 56 (2020).

128. Soled and Thomas, *supra* note 126, at 165–66.

ways to improve the existing public-private partnership. There must be a reliable private entity with credible threats of public intervention if needed.

A. Creation of a Co-Regulatory System

It is clear that the IRS/RPS partnership needs to be continued and improved. A “strategic partnership” has long been desired and lauded by most students of tax administration.¹²⁹ The IRS cannot supplant the RPS industry, as it likely has neither the technical ability¹³⁰ nor the political support¹³¹ to do so.

Although the IRS needs to continue to ensure that RPS is compatible with its own computing infrastructure and that the programs adequately protect taxpayer privacy, much more is required. For RPS to be a meaningful long-term part of a public-private solution, there must be a way to assure users that the RPS is substantively correct in preparation of their returns. For the IRS to do so, with its limited expertise and resources, it should invest in a form of supervised regulation or certification either by the RPS industry of itself or by some other third party.

There exists a large body of research and theory on such programs from which we can draw the outlines of a successful program. “[T]he weight of scholarly opinion suggests that . . . ‘co-regulatory’ solutions, which combine a self-regulatory mechanism with some form of state intervention, ‘are more resilient and effective than self-regulation in isolation.’”¹³² Such co-regulatory solutions have been the subjects of many studies.¹³³

129. See generally W. Edward Afield, *A Market for Tax Compliance*, 62 CLEVELAND ST. L. REV. 315 (2014), Holden & Fletcher, *supra* note 59, at 380–84, Internal Revenue Service Oversight Board, *Electronic Filing 2013 Annual Report to Congress* 19–20 (Feb. 2014), <https://www.treasury.gov/IRSOB/reports/Documents/IRSOB-E-File%202013.pdf> [<https://perma.cc/4PAR-NJLD>], Advancing E-file Study, *supra* note 55, at 12–14.

130. See *supra* text accompanying notes 56–58.

131. See *supra* note 40 and accompanying text.

132. Ira Rubenstein, *Privacy and Regulatory Innovation: Moving Beyond Voluntary Codes*, 6 I/S: J. LAW & POL’Y 355, 368 (2011) (quoting Neil Gunningham & Joseph Rees, *Industry Self-Regulation: An Institutional Perspective*, 19 LAW & POL’Y 363, 366 (1997)).

133. See, e.g., IAN AYERS AND JOHN BRAITHWAITE, *RESPONSIVE REGULATION* (1992); John T. Scholz, *Cooperation, Deterrence, and the Ecology of*

Such a co-regulatory system may also be necessary to guide the development of RPS. To the extent that the programs make decisions about unclear laws and apply them to taxpayer situations, they engage in the kind of activity which the IRS itself undertakes.¹³⁴ The RPS can, in such a fashion, become the law as the rules and their applications might be both written and applied in an environment free of human intervention.¹³⁵ In this area, current studies indicate that there is an important role for government supervision in this fashion, to work with the private-sector providers to ensure transparency, efficacy and reasoned decision-making.¹³⁶

Regulatory Enforcement, 18 LAW & SOC'Y REV. 179 (1984); EUGENE BARDACH AND ROBERT A. KAGAN, GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS (1982). Surveys of earlier literature are provided in Douglas Michael, *Self-Regulation for Safety and Security: Final Minutes or Finest Hour?*, 36 SETON HALL L. REV. 1075, 1082–85 (2006); Douglas Michael, *Cooperative Implementation of Federal Regulation*, 13 YALE J. ON REG. 535, 539–50 (1996); Douglas Michael, *Federal Agency Use of Audited Self-Regulation as a Regulatory Technique*, 47 ADMIN. L. REV. 171, 181–91 (1995) [hereinafter *Audited Self-Regulation*]; See also Cary Coglianese and David Lazer, *Management-Based Regulation: Prescribing Private Management to Achieve Public Goals*, 37 LAW & SOC. REV. 691, 700–06 (2003); Margot M. Priest, *The Privatization of Regulation*, 29 OTTAWA L. REV. 233, 268–74 (1997–98); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 8–21 (1997).

134. The IRS uses what Joshua Blank and Leigh Osofsky term “simplicity” to apply technical or unclear tax rules and note that this can be extended to return preparation. See Joshua Blank and Leigh Osofsky, *Simplicity: Plain Language and the Tax Law*, 66 EMORY L.J. 189, 260 (2017).

135. See Blank and Osofsky, *supra* note 31, at 242 (“The [tax] rules could be as complex as artificial intelligence can process, which may be extraordinarily complex—certainly far more complex than the current tax system, which assumes some amount of application by human beings.”).

136. The Administrative Conference of the United States has made recommendations regarding government oversight of artificial intelligence. See Administrative Conference of the United States, Statement No. 20, Agency Use of Artificial Intelligence (Dec. 16, 2020) <https://www.acus.gov/recommendation/agency-use-artificial-intelligence> [<https://perma.cc/75JS-N3H5>]. For the studies upon which the statement is based, see David Engstrom *et al*, Government by Algorithm: Artificial Intelligence in Federal Administrative Agencies (Feb. 19, 2020), <https://www.acus.gov/report/government-algorithm-artificial-intelligence-federal-administrative-agencies> [<https://perma.cc/Z9LS-UNY6>] and Cary Coglianese, A Framework for Governmental Use of Machine

We can evaluate the possible utility of such an arrangement by looking at the two main players: the industry regulator and the self-regulatory organization. In each area, as discussed below, there is potential to design an effective co-regulatory system.

1. Creating an Effective Industry Regulator

The obvious candidate regulator for RPS is the IRS. As shown above, the two have a long history of cooperation.¹³⁷ Although there are occasional concerns with deceptive¹³⁸ or anti-competitive¹³⁹ conduct, the main concerns for RPS are accuracy and reliability. These are areas uniquely within the IRS's expertise.

In order for the IRS to convincingly oversee the RPS industry, it must have authority over the industry, and there must be "sound science," or standards upon which everyone can agree.¹⁴⁰ Effective oversight requires established standards of accuracy and clear rules about how those standards will be enforced.¹⁴¹ Standards could be developed

Learning (Dec. 8, 2020) <https://www.acus.gov/report/framework-governmental-use-machine-learning> [<https://perma.cc/PJ2M-3N2R>]. For follow-on research on both studies, see respectively, David Engstrom and Daniel Ho, *Algorithmic Accountability in the Administrative State*, 37 YALE J. ON REG. 800 (2020) and Cary Coglianese and David Lehr, *Transparency and Algorithmic Governance*, 71 ADMIN. L. REV. 1 (2019).

137. See *supra* Part III(A).

138. See *supra* note 102 and accompanying text, explaining the concern about RPS companies "hiding" their free products from standard web-search software. This concern was addressed in the 2020 addendum to the IRS-industry agreement. See Addendum to Eighth Memorandum of Understanding on Service Standards and Disputes Between the IRS and Free File, Inc. ¶ I (Dec. 26, 2019), available at <https://www.irs.gov/pub/irs-utl/FFI%20Signed%20MOU%20Addendum%2012-26-19.pdf> [<https://perma.cc/5U8J-VKY5>].

139. See text accompanying notes 83–95.

140. Afield, *supra* note 129, at 326–27 (preparer regulation), Electronic Tax Administration Advisory Committee, *Annual Report to Congress 22–23* (June 2009), IRS Publication 3415, available at www.irs.gov/pub/irs-prior/p3415—2009.pdf [<https://perma.cc/8GC6-KQLD>] [hereinafter *ETAAC 2009 Report*].

141. *IRSOB 2011 Efile Report*, *supra* note 9, at 31; Electronic Tax Administration Advisory Committee, *Annual Report to Congress 13* (June 2011),

by the IRS, the RPS industry or a third-party self-regulatory organization.¹⁴² Using an “audit” in this fashion, to provide assurance of effectiveness, is becoming more accepted throughout public management.¹⁴³ Effective standards will be necessary to make online filing acceptable; users—both the individuals and the government—must have confidence in the competence of the service providers.

It is likely that such standards exist or can be developed. Third-party verification is already contemplated in the IRS-FFA agreement¹⁴⁴ and appears to already be in use with respect to the organization and functionality of the FFA member web pages.¹⁴⁵ Some RPS industry

<https://www.irs.gov/pub/irs-prior/p3415—2011.pdf> [<https://perma.cc/6LJ5-GKX5>] (recommending IRS/industry cooperation in developing software “best practices”); *Tax Complexity Hearings*, *supra* note 13, at 51 (Testimony of Prof. T.Keith Fogg, Director, Villanova University School of Law Federal Tax Clinic) (best use of scarce resources is cooperation with return preparers and software manufacturers to ensure correctness of returns before filing).

142. A public forum for software developers suggested a non-government self-regulatory organization for software development; see *Return Preparer Review*, *supra* note 7, at 29. The IRS agreed to form a task force to study the need for regulation of the accuracy, security and privacy of RPS; *id.* at 38–39.

143. See generally MICHAEL POWER, *THE AUDIT SOCIETY: RITUALS OF VERIFICATION* 52–54 (1997).

144. The original 2002 Agreement, in clause III.B.6, permitted self-certification by members of “competence and capability.” The MOU has long provided that members will guarantee mathematical computations and “table look-up” accuracy; see First MOU § 4.11. Beginning with the third MOU, this § 4.11 had a second subsection, § 4.11.2, providing that each member “may be required to obtain third party certification that its tax software program accurately prepares the taxpayer’s return.” Such third-party verification has never been required. Subsection 4.11.2 was removed in the Eighth MOU. All documents are available at <https://www.irs.gov/e-file-providers/about-the-free-file-alliance> [<https://perma.cc/V3TV-S3EM>].

145. Section 4.29.1 of the Eighth MOU provides in part that “FFI and IRS conduct reviews of Members’ Free File Landing Pages for compliance with the requirements and obligations contained in this MOU. The review process is under the control of the Executive Director and IRS leadership.” This does not contemplate third-party verification; but the FFA does contract with an (unnamed) “independent auditor,” see *MITRE Report*, *supra* note 105, at 56, and the first amendment to the Eighth MOU provides, in clause V, that “FFI shall provide to the IRS a copy of their *independent auditor’s* aggregate

members, participating in an IRS panel on return preparer regulation in 2009,

supported increased IRS involvement in tax return preparation software oversight. But these panelists recommended against day-to-day involvement by the IRS, suggesting, instead, that the increased oversight be IRS approved standards and certification requirements carried out through a formal self-regulatory organization operating outside the government.¹⁴⁶

The Electronic Tax Administration Advisory Committee (ETAAC)¹⁴⁷ also recommended in 2009 that the IRS work with the industry and states to develop RPS accuracy standards, but that

any such standards should avoid excessive rigidity [and] empower software developers to determine how best to meet their obligations. . . . [A]ny oversight model should focus on high-level requirements. . . . Compliance with [the] standards could be ensured through an oversight model relying on independent third party review.¹⁴⁸

Two years later the ETAAC provided more details on accuracy standards, indicating that any standards development group needs to take into account the facts that RPS is subject to external factors, inputs and stakeholders, and in fact needs to carefully consider what

findings from the initial website review of the Member Landing Pages at least 2 days prior to Free File's 'go live' date, and the aggregate findings from the mid-year website review of the Member Free File Landing Pages," see <https://www.irs.gov/pub/irs-utl/Eight%20Free%20File%20MOU.pdf> [<https://perma.cc/77VZ-BBY>] (emphasis added).

146. Return Preparer Review, *supra* note 7, at 29. The IRS recommended further study of the suggestion; *id.* at 39.

147. This committee, known as ETAAC, was established by Congress in the RRA98; see *supra* note 62 and accompanying text.

148. IRS PUB. NO. 3415, ELECTRONIC TAX ADMINISTRATION ADVISORY COMMITTEE, ANNUAL REPORT TO CONGRESS 23(JUNE 2009), www.irs.gov/pub/irs-prior/p3415-2009.pdf [<https://perma.cc/EHC2-8AUQ>] [hereinafter *ETAAC 2009 Report*].

“accuracy” means.¹⁴⁹ The IRS Oversight Board endorsed these recommendations in its 2011 Report on Electronic Filing, noting that these standards should “provide a reference point for ‘best practices.’”¹⁵⁰

The IRS is now well-positioned to be more assertive in its relationship with the RPS industry. The industry is no longer nascent, as it was in 1985 when the IRS first established a partnership.¹⁵¹ The government can, on the one hand, be more demanding of the industry, and, on the other hand, recognize that a mature RPS infrastructure greatly assists the agency in its job of administration of the tax laws.

2. Creating an Effective Self-Regulatory Organization

The self-regulatory organization which exists in this government partnership must have the expertise and motivation to solve the regulatory problem.¹⁵² The above discussion indicates that there is likely “sound science” to support third-party verification of RPS compatibility, privacy protection and substantive accuracy. Thus, we know that achievement of these goals is within the competence of the regulated entities.

Can the RPS industry be motivated to develop a self-regulatory organization?¹⁵³ The industry created and continues to invest in the FFA, an industry group born of the desire to promote and advance e-filing, and with only the modest motivation of (1) access to the official IRS website and (2) IRS forbearance from developing its own RPS product.¹⁵⁴ Those motivations are proving now to be

149. IRS Pub. No. 3415, Electronic Tax Administration Advisory Committee, *Annual Report to Congress* 17–18 (June 2011), <https://www.irs.gov/pub/irs-prior/p3415—2011.pdf> [<https://perma.cc/3JCS-UZX9>].

150. I.R.S. Oversight Board, *Electronic Filing 2011 Annual Report to Congress* 31 (December 2011), www.treasury.gov/IRSOB/reports/Documents/IRSOB_2011%20eFiling%20Report.pdf [<https://perma.cc/ZKJ5-SY3Z>].

151. See *supra* notes 59–64 and accompanying text.

152. See Audited Self-Regulation, *supra* note 133, at 192–93.

153. If not in existence, we can postulate what such an organization should look like. “[S]uccessful self-regulatory organizations can be established contemporaneously with the regulation; in almost half the programs [studied], this was the case.” Audited Self-Regulation, *supra* note 133, at 241–42.

154. The first agreement, in 2002, committed the IRS to create and manage the website which would be the access point for the members’ free products, and provided that the agreement could be terminated if the IRS

outdated.¹⁵⁵ Access to the IRS website must now be mandated by updates to the FFA-IRS agreement to keep the members from bypassing the site altogether.¹⁵⁶ Even with this mandate to make free filing obvious to all taxpayers, it is clear from usage data that very few taxpayers take advantage of the free-file products as offered on the IRS's website, but instead find the online RPS providers through other routes or use add-on services once they find the free (but low-functioning) products offered on the IRS's website.¹⁵⁷ We can expect that future years will continue to bring decreased yields of taxpayers whose only contact with an RPS provider was the official IRS website. The IRS now has the freedom to develop its own "Free File" product,¹⁵⁸ although it is unclear if this will have any dramatic impact on a private industry already with over 92% market penetration.¹⁵⁹

offered its own free services. See Free Online Electronic Tax Filing Agreement, Oct. 30, 2002, sections V.A and VII.D, *available at* <https://www.irs.gov/pub/irs-utl/2002-free-online-electronic-tax-filing-agreement.pdf> [<https://perma.cc/5XA8-W78B>].

155. The MITRE Report lists as one of its findings, that the objectives reflected in the MOUs have been achieved, and that the IRS and the FFA have not revisited their program objectives. See MITRE Report, *supra* note 105, at xvi.

156. See [First] Addendum to Eighth MOU, Clause I, <https://www.irs.gov/pub/irs-utl/FFI%20Signed%20MOU%20Addendum%2012-26-19.pdf> [<https://perma.cc/CGG7-LEES>].

157. See *supra* notes 96–98 and accompanying text.

158. See [First] Addendum to Eighth MOU, Clause II, <https://www.irs.gov/pub/irs-utl/FFI%20Signed%20MOU%20Addendum%2012-26-19.pdf> [<https://perma.cc/M4YL-UX28>].

159. See *supra* note 2 and accompanying table (92% e-file rate for tax year 2020 to date). An Intuit, Inc. blog downplays this potential IRS competition. "With approximately 90% of taxpayers e-filing today, the language is no longer relevant and is not a prerequisite for Intuit's continued participation in the Free File program. Critics of the program came to believe that this language was the only thing stopping the IRS from offering tax preparation software and assistance, and that companies participated in Free File only in exchange for this promise. That is wrong, and we support removing the language that fostered this confusion. We are confident in our exceptional product, and we participate in the Free File program to help give eligible taxpayers another option to file their taxes for free." <https://www.intuit.com/blog/news-social/strengthening-the-free-file-program/> [<https://perma.cc/VK7K-VJ2X>]; see also Justin Elliot and Paul Kiel, *IRS Reforms Free File Program, Drops*

Furthermore, the departure of the leading RPS providers, Intuit¹⁶⁰ and H&R Block,¹⁶¹ from the FFA will no doubt limit its utility as a self-regulator.¹⁶² The FFA also changed its status from a public charity to an educational or advocacy group¹⁶³ which can, among other things, lobby and take political positions.¹⁶⁴ Overall, the reputation of the FFA as a model for protecting free-file rights may be tarnishing.¹⁶⁵

Perhaps CERCA is a better model. Its membership is broad, it was originally formed pursuant to IRS directives, and its motivation

Agreement Not to Compete With TurboTax, PRO PUBLICA (Dec. 31, 2019), <https://www.propublica.org/article/irs-reforms-free-file-program-drops-agreement-not-to-compete-with-turbotax> [<https://perma.cc/CH3K-GG5N>]. The former National Taxpayer Advocate Nina Olson remains optimistic that the IRS could possibly provide its own product. See William Hoffman, *IRS Free File Tax Return Preparation Remains Out of Reach*, 166 TAX NOTES FED. 641, 642–43 (2020).

160. Michael Cohn, *Intuit withdraws TurboTax from Free File Alliance*, ACCOUNTING TODAY (July 19, 2021), www.accountingtoday.com/news/intuit-withdraws-turbotax-from-free-file-alliance [<https://perma.cc/RGT7-3DRN>]; Isabelle Sarraf, *Turbotax Maker Intuit Opts Out of IRS Free File Program*, BLOOMBERG DAILY TAX REP. (July 16, 2021), <https://news.bloomberglaw.com/daily-tax-report/turbotax-maker-intuit-opts-out-of-irs-free-file-program> [<https://perma.cc/W67S-MUBW>].

161. Allyson Versprille and Faris Bseiso, *IRS's Free File Partners Moving Forward without H&R Block*, BLOOMBERG DAILY TAX REP. (June 18, 2020), www.bloombergtax.com/daily-tax-report/irss-free-file-partners-moving-forward-without-h-r-block [<https://perma.cc/JV83-YK7P>].

162. See Sarraf, *supra* note 160 (“‘I think it doesn’t bode well for Free File in the long run,’ said Jeff Trinca, . . . legislative counsel for the National Association of Enrolled Agents.”).

163. See Addendum to the Eighth Memorandum of Understanding on Service Standards and Disputes, Clause XII (Dec. 26, 2019), <https://www.irs.gov/pub/irs-utl/FFI%20Signed%20MOU%20Addendum%2012-26-19.pdf> [<https://perma.cc/MCP8-6CP9>] (noting change in FFI from IRC § 501(c)(3) to § 501(c)(4) status).

164. See Treas. Reg. §§ 1.503(c)(4)-1(a)(2), 1.503(c)(3)-1(c)(3).

165. See Binyamin Applebaum, *Good Riddance, Turbo Tax. Americans Need a Real “Free File” Program*, N.Y. TIMES (July 19, 2021), www.nytimes.com/2021/07/19/opinion/intuit-turbotax-free-filing.html [<https://perma.cc/3KQ C-LSJ2>].

is not so distinctly entrepreneurial.¹⁶⁶ Its members include 38 firms involved in tax preparation, financial data collection and reporting, and other areas.¹⁶⁷ Contrast the now nine members of the Free-File Alliance, all of them RPS companies.¹⁶⁸

Not only must the organization's membership be comprehensive, but its operations must be transparent and meet basic standards of due process.¹⁶⁹ For example, the current IRS-FFI MOU¹⁷⁰ provides for standards of service and operation of the free-file site. Disputes are resolved through a "formal resolution process."¹⁷¹ The sole sanction for violation of these rules is removal from access to the IRS free-file site, which is determined by either the agency or the FFI Executive Director.¹⁷² Compliance is monitored by the FFA members, the IRS and an independent auditor hired by the FFA. In 2019, reviews by two different agencies concluded that the IRS does not engage in sufficient oversight of the FFA operation.¹⁷³ The MITRE Report reviewing the IRS-FFA program¹⁷⁴ suggests that a "public-private partnership" such as this one has three measures of success: democratic accountability, procedural legitimacy and substantive outcomes.¹⁷⁵ The Report is candid about the assessment of the future of the program; if it continues to

166. See *supra* note 88.

167. See Cerca, *Cerca Member Organization*, CERCA (2022), <https://cerca.org/members/> [<https://perma.cc/WB3C-EBZT>].

168. See Free File, *Free File Alliance Members*, FREEFILE (2022), <https://freefilealliance.org/free-file-alliance-members/> [<https://perma.cc/W9G5-29NF>].

169. See Rubenstein, *supra* note 132, at 381; Freeman, *supra* note 133, at 30–31.

170. Eighth MOU (Oct. 31. 2018), <https://www.irs.gov/pub/irs-utl/Eight%20Free%20File%20MOU.pdf> [<https://perma.cc/4TSP-MPJR>].

171. See *generally*, MITRE Report, *supra* note 105, at 56.

172. See *id.* Article 6, Breach and Removal From the IRS Free File Website. The decision may be appealed to the IRS, *see id.* § 7.1 and from there to the Civilian Board of Contract Appeals, *see id.* § 7.2. See *generally* 41 U.S.C. 7105(b), (e)(1)(B), (f), and (g) (establishment and organization of the Civilian Board of Contract Appeals).

173. TIGTA 2020 Report, *supra* note 104, at 12–13; Internal Revenue Service Advisory Council, *Public Report* 14–18 (Nov. 2018), <https://www.irs.gov/pub/irs-prior/p5316—2018.pdf> [<https://perma.cc/BV4P-AM92>].

174. MITRE Report, *supra* note 105.

175. *Id.* at 59.

be based on a voluntary agreement, the ability to impose further restrictions on FFA members is likely very limited.¹⁷⁶

It is likely, therefore, that a successful self-regulatory organization for the new Internal Revenue Code will need several important features in order to be successful. First, it must be comprehensive in its membership (akin to CERCA). Second, its procedures must be efficient and fair; perhaps the FFA procedures, according to its own internal operating agreement and the MOU, can provide some guidance.¹⁷⁷ Third, it must have substantive objective standards. This is where the current agreement has run out of steam; a new arrangement focusing on accuracy and access to the program for those of limited means can be established by a mutual agreement in which the IRS has other incentives to bring to the table to replace the outdated access to the IRS website.

The Inflation Reduction Act passed in August, 2022,¹⁷⁸ provides a financial boost to this cooperative effort. The act provides \$15 million for a report in nine months on:

(I) the cost (including options for differential coverage based on taxpayer adjusted gross income and return complexity) of developing and running a free direct efile tax return system, including costs to build and administer each release, with a focus on multi-lingual and mobile-friendly features and safeguards for taxpayer data; (II) taxpayer opinions, expectations, and level of trust, based on surveys, for such a free direct efile system; and (III) the opinions of an independent third-party on the overall feasibility, approach, schedule, cost, organizational design, and Internal Revenue Service capacity to deliver such a direct efile tax return.¹⁷⁹

176. *Id.* at 61–62.

177. Fair procedures subject to federal agency oversight may satisfy most anti-competitive concerns surrounding this agreement among industry competitors. *See supra* notes 88–95 and accompanying text, and *Audited Self-Regulation, supra* note 133, at 199 (“[P]rocess protections . . . are . . . relevant to antitrust analysis in two respects: they may permit a court to imply an exemption from the antitrust laws, and they may help define the boundaries between permissible conduct and illegal conspiracies.”).

178. *See supra* note 47.

179. *Id.* § 10301(1)(B).

If properly constituted and combined with IRS oversight, a new self-regulatory organization could easily solve the “free file” problem as well. The program founders now because there is no incentive for RPS companies to offer the services. But if all companies were members, as a matter of competitive necessity (to obtain e-file access) or by law, then requiring a consistent free-file product available from all of them would be an easy step to take. The IRS could undertake advertising to promote the products, or it could simply require the RPS companies to offer a certain amount or type of product free each filing season. The extent of a free-file program, and who pays for it, are policy matters to be sorted out, but the system of supervised self-regulation can easily deliver whatever outcome is directed by that policy decision.

B. Credible Residual Regulation

Government-supervised self-regulation requires, ultimately, that the government have independent authority over both the self-regulatory organization and the regulated entities.¹⁸⁰ Here, that translates into authority over the FFA- or CERCLA-like organization, and the RPS companies themselves. In order for this type of system to be effective, “government must have the final say.”¹⁸¹ The IRS has or might have three credible sources of such authority.

First, the agency has the clear authority to mandate electronic filing by preparers,¹⁸² and nearly all of them take advantage of RPS. It would not be a far step for the IRS to require RPS certification in respects other than compatibility. For example, it could have the ability to set standards (indirectly) for third-party security or accuracy verification. But this authority alone will not likely support direct regulation of the RPS-taxpayer relationship, such as requiring free filing. Although

180. See Priest, *supra* note 133, at 282 (“[T]he government does retain an ultimate responsibility that can be exercised in the case of a loss of faith in the [self-]regulatory process.”); Freeman, *supra* note 133, at 87 (“[T]he agency continues to be the ultimate decisionmaker and arbiter of the larger public interest.”); Audited Self-Regulation, *supra* note 133, at 246 (“Ultimate responsibility to ensure the public interest rests, of course, in the plenary authority of the agency and ultimately the Congress.”).

181. Soled and Thomas, *supra* note 126, at 203.

182. See *supra* text accompanying notes 109–112.

the RPS companies are return preparers,¹⁸³ given the limitations on this authority from *Loving* and *Ridgley*,¹⁸⁴ there is no room for the IRS to exercise any authority over the companies based on this status.

Second, should a legislative fix for *Loving* be forthcoming, it would hardly be a political or legislative stretch to include direct regulation of RPS.¹⁸⁵ However, this would not eliminate the need for cooperative regulation, because the RPS companies have established expertise and experience which the government simply cannot duplicate. Professors Soled and Thomas recognized this in their first analysis of regulation of RPS companies, concluding that cooperation with industry is a necessary component of tax administration.¹⁸⁶

Finally, the IRS can offer sanctions relief for RPS which meets IRS or industry certified standards. This might, for example, include relief from or reduced accuracy or negligence penalties.¹⁸⁷ This relief should be carefully limited, of course.¹⁸⁸ This conjures up the so-called “TurboTax defense” to IRS-imposed accuracy or negligence penalties.¹⁸⁹ Although the Tax Court has generally been hostile to this

183. Rev. Rul. 85-187, 1985-2 C.B. 338, Rev. Rul. 85-189, 1985-2 C.B. 341.

184. See *supra* notes 122–126 and accompanying text.

185. RPS companies are likely already within the definition of “tax return preparer,” see *supra* text accompanying note 183. See proposed legislation, Soled and Thomas, *supra* note 126, at 193.

186. See Soled and Thomas, *supra* note 126, at 202–03.

187. I.R.C. § 6662(b)(1) and (2) provide for a penalty in case of understatement of tax due to negligence or the relative amount of the understatement compared to the tax due. IRC section 6664(c)(1) provides for relief from the penalty “if it is shown that there was a reasonable cause for such portion and that the taxpayer acted in good faith with respect to such portion.” See *Mock & Shurtz*, *supra* note 50, at 480 (“[T]he presumption should be in favor of a good-faith exception when the taxpayer diligently uses tax software (perhaps of certain authorized brands by the [IRS])”); *Afield*, *supra* note 129, at 328–30 (also suggesting lower audit rates for favored returns).

188. Such limited relief from sanctions would be consistent with the developing contours of any “Turbo-Tax” defense, requiring that the proof extend to the workings of the RPS itself. If taxpayer inputs or calculations are involved, the role of the software becomes inconsequential in the eyes of most courts.

189. The “TurboTax” defense is, in essence, a taxpayer’s allegation that reliance upon his or her RPS should mitigate or eliminate understatement

defense,¹⁹⁰ language exists in the opinions suggesting that it might be permissible if the taxpayer could show that the error was clearly a result of the software program itself and not any information from or calculations by the taxpayer.¹⁹¹

The IRS could condition its approval [of an RPS product] upon satisfying itself that the program as developed and as used will have sufficient prompts, encouragements and warnings about complying that it will be effective to increase honesty among those who use it.¹⁹²

For example, suppose such relief were granted for third-party reported income (wages, interest, dividends, unemployment, capital transactions) correctly shown on the return. This would be the policy equivalent of the government sending a pre-populated return to the taxpayer,¹⁹³ as is done

penalties under I.R.C. § 6662(b) by satisfying the “good faith” exception under I.R.C. § 6664(c).

190. The initial reaction of the Tax Court was hostile. In *Bunney v. Commissioner*, 114 T.C. 259, 267 (2000), the court noted famously and quotably that “Tax preparation software is only as good as the information one inputs into it.” The subsequent reaction by the Tax Court has not much changed. See generally, Drumbl, *supra* note 35, at 150–51; Bryan Camp, *Lessons from the Tax Court: The Turbo-Tax Defense*, TAXPROF BLOG (Mar. 19, 2018), http://taxprof.typepad.com/taxprof_blog/2018/03/lesson-from-the-tax-court-the-turbo-tax-defense.html [<https://perma.cc/5GYX-V6N2>].

191. Mock & Shurtz, *supra* note 50, at 476–505; Camp, *supra* note 190.

192. Rosenberg, *supra* note 27, at 57; see *supra* note 187, referring to IRS-authorized brands of software.

193. The idea of “return-free filing” has a storied history in tax policy analysis. See William G. Gale and Janet Holtzblatt, *On the Possibility of a No-Return Tax System*, 50 NAT’L. TAX J. 475 (1977); Bouree Lam, *The Fight Over Making Taxes Less Awful*, THE ATLANTIC (Apr. 18, 2016), www.theatlantic.com/business/archive/2016/04/tax-simplification-act/478788/ [<https://perma.cc/62ZC-5WY2>] (chronicling efforts from 1985 to 2016); Liz Day, *How the Maker of TurboTax Fought Free, Simple Tax Filing*, PRO PUBLICA (Mar. 26, 2013), <https://www.propublica.org/article/how-the-maker-of-turbotax-fought-free-simple-tax-filing> [<https://perma.cc/CGD7-TWP4>] (reviewing history and recent legislative proposals). For a recent proposal, see Jonathan Barry Forman and Roberta F. Mann, *Making the Internal Revenue Service Work*, 17 FLA. TAX REV. 725, 805–06 (2015).

in some states now,¹⁹⁴ but without the government actually sending or preparing the return. This option would be much less objectionable because it still involves the private RPS companies.¹⁹⁵ The IRS also has, as one option, “payment of appropriate incentives” for electronic filing,¹⁹⁶ which could be a promising incentive for either RPS companies or taxpayers, but that of course requires it to have funds for that purpose.

V. CONCLUSION

The new Internal Revenue Code—the return preparation software, not the law—brings new opportunities to extend the learning about government-supervised self-regulation. The new Code brings new demands upon the government and taxpayers. The existing cooperative relationship is at its functional end, having achieved its objectives. Following principles of supervised self-regulation will mean providing for an effective regulator applying sound science working with a self-regulatory organization which is comprehensive, fair and motivated to comply. In this way, the government and the industry can each revisit their goals and means of ensuring compliance to ensure that the new code is fair, efficient and accurate, and serves the best interests of taxpayers.

194. See, e.g., State of California Franchise Tax Board, *CalFile*, FTB (2022), www.ftb.ca.gov/file/ways-to-file/online/calfile/index.asp [<https://perma.cc/F2B2-5YW3>].

195. The IRS-FFA MOU contemplates that they will work together to develop pre-populated forms. See Eighth Memorandum of Understanding on Service Standards and Disputes, § 4.36.2 (Oct. 31, 2018), <https://www.irs.gov/pub/irs-utl/Eight%20Free%20File%20MOU.pdf> [<https://perma.cc/7WLE-SCL9>].

196. I.R.C. § 6011(f)(2).