

B. The Current Limited Oversight of Return Preparers Makes Taxpayers Vulnerable to Unscrupulous or Incompetent Preparers

Since 2002, the National Taxpayer Advocate has advocated for the regulation of return preparers. Her proposals included:

- A program to register, test, and certify preparers;
- Increased penalties, and improvements to due diligence requirements; and
- A comprehensive IRS advertising campaign on how to choose a competent preparer and to educate taxpayers about the requirement for paid preparers to
 - sign the tax return and
 - provide a copy to the taxpayer;¹

In January 2010, the IRS published a study of federal tax return preparers which in most important aspects reflected the proposals made by the National Taxpayer Advocate.² In response, the IRS issued regulations requiring that all preparers register with the IRS by obtaining a preparer tax identification number (PTIN). The IRS also required certain preparers meet testing and continuing education requirements.³ Implementation began with the 2011 filing season, when the IRS required paid return preparers to obtain PTINs.⁴ The continuing education requirement began during the 2012 calendar year. The IRS launched the registered tax return preparer competency test in November 2011 with a deadline to take the test by December 31, 2013.⁵

However, in January 2013, a U.S. district court judge in *Loving v. Internal Revenue Service* disagreed with the IRS's view that it has the authority to implement these requirements on its own, and invalidated the testing and continuing education requirements.⁶ The Justice Department has appealed the District Court's decision.⁷

The National Taxpayer Advocate believes that the district court's decision in *Loving* is based in part on an outdated understanding of return preparation and filing. The return preparation industry has changed substantially over the last few decades as a result of the

1 See National Taxpayer Advocate 2009 Annual Report to Congress 41-69; National Taxpayer Advocate 2008 Annual Report to Congress 503-512; National Taxpayer Advocate 2006 Annual Report to Congress 197-221; National Taxpayer Advocate 2005 Annual Report to Congress 223-237; National Taxpayer Advocate 2004 Annual Report to Congress 67-88; National Taxpayer Advocate 2003 Annual Report to Congress 270-301; National Taxpayer Advocate 2002 Annual Report to Congress 216-230; *Fraud in Income Tax Return Preparation: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways and Means*, 109th Cong. (2005) (statement of Nina E. Olson, National Taxpayer Advocate).

2 IRS Publication 4832, *Return Preparer Review* (Dec. 2009).

3 Treas. Reg. § 1.6109-2(d); 31 C.F.R. § 10.2 et seq.

4 See IRS News Release, *IRS Begins Notifying Tax Return Preparers on PTIN Renewals*, IR-2010-106 (Oct. 25, 2010).

5 IRS News Release, *IRS Moves to Next Phase of Return Preparer Initiative; New Competency Test to Begin* (Nov. 22, 2011).

6 *Loving v. IRS*, 111 A.F.T.R.2d (RIA) 589 No.(D.D.C. Jan. 18, 2013). The government filed a motion to suspend the injunction pending appeal. The U.S. District Court for the District of Columbia denied the motion but then modified the terms of the injunction. See *Loving*, 111 A.F.T.R.2d (RIA) 702 (D.D.C. Feb. 1, 2013). On February 25, 2013, the government filed a motion for a stay pending appeal. On March 27, 2013, the U.S. District Court for the District of Columbia denied the motion for stay.

7 See Government Files Brief in D.C. Circuit Court in Return Preparer Oversight Case, *Tax Notes Today*, 2013 TNT 62-20 (Apr. 3, 2013); *Loving v. IRS*, No. 1:12-cv-00385 (D.D.C. 2013) (USCA Case No. 13-5061).

ready availability of return preparation software, refundable credits, and refund-based loans. These changes underscore the significance of tax return preparers in our self-assessment system and the role of the tax return in making claims against the government.⁸ In fact, the National Taxpayer Advocate believes that the problems associated with refund claims in today's tax system are directly analogous to the problem Congress sought to address in the original 1884 grant of regulatory authority to Treasury.⁹

The National Taxpayer Advocate's main focus continues to be the retention of minimum standards for return preparation. If the Court of Appeals reverses the district court's ruling in *Loving*, the IRS would reinstate the rules requiring certain preparers to take a competency exam and complete continuing education credits. If the district court ruling stands, the National Taxpayer Advocate will urge members of Congress to support remedial legislation to authorize the IRS to reissue its rules to protect taxpayers. The reinstatement or reissuance of the IRS preparer oversight rules would promote tax compliance by imposing minimum competency standards. In addition, questionable preparers would have less opportunity and incentive to engage in misconduct or fraud, as discussed in the previous area of focus, with registration, testing, and continuing education requirements coupled with an extensive public awareness campaign.

In the meantime, until either the courts or Congress reinstate the IRS's authority to require preparers to demonstrate minimum competence to prepare tax returns, the National Taxpayer Advocate is concerned that taxpayers remain vulnerable to incompetent or unscrupulous preparers. Accordingly, the Taxpayer Advocate Service is working to ensure that taxpayers are vigilant when they hire an individual or firm to prepare their returns. Specifically, TAS suggests that taxpayers proactively protect themselves by taking the following steps:¹⁰

- Ask the preparer directly about his or her qualifications and experience level in preparing tax returns. The taxpayer should feel confident that the preparer possesses sufficient knowledge of relevant tax law – not merely completion of return preparation software training.
- Make sure the preparer signs the return and fills in his or her PTIN where indicated on the tax return.

8 An amicus brief filed on behalf of five former IRS commissioners (Mortimer Caplin, Sheldon Cohen, Lawrence Gibbs, Fred Goldberg, and Charles Rossotti) argues that the filing of a tax return constitutes presenting a case due to the increasingly wide variety of government assistance programs administered through the federal income tax system. Brief of Former Commissioners of Internal Revenue as amici curiae, supporting defendants-appellants, *Loving v. IRS*, No. 13-5061 (D.C. Cir. 2013). In addition, the amicus brief of the National Consumer Law Center and the National Community Tax Coalition in *Loving* contains many examples of the virtual absence of professionalism and competency in this component of the unregulated tax return preparation world. Brief of National Consumer Law Center and National Community Tax Coalition, as amici curiae, supporting defendants-appellants, *Loving v. IRS*, No. 13-5061 (D.C. Cir. 2013).

9 Nina E. Olson, *More Than a 'Mere' Preparer, Loving and Return Preparation*, 2013 TNT 92-13, Tax Notes Tax Analysts Today (May 13, 2013).

10 The Taxpayer Advocate Service has developed and distributed an informational poster on this subject to all Taxpayer Assistance Centers, TAS Local Taxpayer Advocate offices, and Low Income Taxpayer Clinics. See IRS Pub. 5074, *Protect Your Tax Refund*. See also <http://www.taxpayeradvocate.irs.gov/Tax-Professionals/Tax-Preparer-Regulation> (last visited Mar. 21, 2013).

- Obtain from the preparer a copy of the signed and filed return and keep the copy in the event there is a problem with the return.

In addition, consistent with the National Taxpayer Advocate's longstanding position that the IRS should mount a comprehensive taxpayer awareness campaign, we believe it is more important than ever that the IRS increase its outreach and education about choosing a preparer, with particular emphasis on the populations at most risk, such as low income taxpayers and the elderly. In the meantime, TAS will continue in FY 2014 to advocate for minimum competency standards in return preparation and work to ensure that taxpayers are better equipped to protect themselves against incompetent and unscrupulous preparers.

How taxpayers can protect themselves from return preparer misconduct

BEFORE

You choose a preparer

Ask the preparer about his or her qualifications and experience, not just a software preparation system.



AFTER

A preparer finishes your taxes

Make sure you get a copy of your tax return with the return preparer's signature and PTIN or Social Security number.

